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NORTH CAROLINA REPORTS
VOL. 223

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1943

FALL TERM, 1943

REPORTED BY

JOSEPH B. CHESHIRE

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1944

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1943--FALL TERM, 1943.

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WILLIAM A. DEVIN,
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J. WALLACE WINBORNE,
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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

Hubert E. Olive	Lexington.
Clarence E. Blackstock	Asheville.
Justus C. Rudisill	Newton.

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.
Norman A. Boren	Twelfth	Greensboro.
Edward H. Gibson	Thirteenth	Laurinburg.
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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, SPRING TERM, 1943

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1943—Judge Bone.

Beaufort—Jan. 11* (2); Feb. 15† (2); Mar. 15* (A); April 5†; May 3† (2); June 21.

Camden—Mar. 8.

Chowan—Mar. 29; April 26†.

Currituck—Mar. 1.

Dare—May 24.

Gates—Mar. 22.

Hyde—May 17

Pasquotank—Jan. 4†; Feb. 8†; Feb. 15* (A); Mar. 15†; May 3† (A) (2); May 31*; June 7† (2).

Perquimans—Jan. 11† (A); April 12.

Tyrrell—Feb. 1†; April 19.

SECOND JUDICIAL DISTRICT

Spring Term, 1943—Judge Parker.

Edgecombe—Jan. 18; Mar. 1; Mar. 29† (2); May 31 (2).

Martin—Mar. 15 (2); April 12† (A) (2); June 14.

Nash—Jan. 25; Feb. 15† (2); Mar. 8; April 19† (2); May 24.

Washington—Jan. 4 (2); April 12†.

Wilson—Feb. 1*; Feb. 8†; May 10*; May 17†; June 21†.

THIRD JUDICIAL DISTRICT

Spring Term, 1943—Judge Williams.

Bertie—Feb. 8 May 3 (2).

Halifax—Jan. 25 (2); Mar. 15† (2); April 26; May 31; June 7†.

Hertford—Feb. 22; April 12† (2).

Northampton—Mar. 29 (2).

Vance—Jan. 4*; Mar. 1*; Mar. 8†; June 14*; June 21†.

Warren—Jan. 11*; Jan. 18†; May 17*; May 24†.

FOURTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Frizzelle.

Chatham—Jan. 11; Mar. 1†; Mar. 15†; May 10.

Harnett—Jan. 4*; Feb. 1† (2); Mar. 15* (A); Mar. 29† (A) (2); May 3†; May 17*; June 7† (2).

Johnston—Jan. 4† (A) (2); Feb. 8 (A); Feb. 15† (2); Mar. 1 (A); Mar. 8; April 12 (A); April 19† (2); June 21*.

Lee—Jan. 25† (A) (2); Mar. 22 (2).

Wayne—Jan. 18; Jan. 25†; Feb. 1† (A); Mar. 1† (A) (2); April 5; April 12†; April 19† (A); May 24; May 31†; June 7† (A).

FIFTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Stevens.

Carteret—Mar. 8; June 7 (2).

Craven—Jan. 4*; Jan. 25† (3); April 5‡; May 10†; May 31*.

Greene—Feb. 22 (2) June 21.

Jones—Mar. 29.

Pamlico—April 26 (2).

Pitt—Jan. 11†; Jan. 18; Feb. 15†; Mar. 15† (2); April 12 (2); May 3† (A); May 17† (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Harris.

Duplin—Jan. 4† (2); Jan. 25*; Mar. 8† (2); April 12; April 19†.

Lenoir—Jan. 18*; Feb. 15† (2); April 5; May 10† (2); June 7† (2); June 21*.

Onslow—Mar. 1; May 24* (2).

Sampson—Feb. 1 (2); Mar. 22† (2); April 26; May 3†; June 7† (A) (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Burney.

Franklin—Jan. 11†; Feb. 1*; Mar. 15†; April 5*; April 19†.

Wake—Jan. 4*; Jan. 11† (A); Jan. 18† (2); Feb. 8† (3); Mar. 1* (2); Mar. 15† (A); Mar. 22†; April 5* (A); April 12†; April 19† (A); April 26†; May 3*; May 10† (3); May 31* (2); June 14† (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Nimocks.

Brunswick—Jan. 18; April 5†; May 17.

Columbus—Jan. 25*; Feb. 1* (A); Feb. 15† (2); May 3*; June 14* (2).

New Hanover—Jan. 11*; Feb. 1† (2); Mar. 8†; Mar. 15*; April 12† (2); May 10*; May 24† (2); June 7*.

Pender—Jan. 4; Mar. 22†; April 26.

NINTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Carr.

Bladen—Jan. 4; Mar. 15*; April 26†.

Cumberland—Jan. 11*; Feb. 8† (2); Mar. 1* (A); Mar. 8*; Mar. 22† (2); April 26* (A); May 3† (2); May 31*.

Hoke—Jan. 18; April 19.

Robeson—Jan. 11† (A) (2); Jan 25* (2); Feb. 22† (2); Mar. 15* (A); April 5* (2); April 19† (A); May 3* (A) (2); May 17† (2); June 7†; June 14*.

TENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Thompson.

Alamance—Jan. 25† (A); Feb. 22*; Mar. 29†; May 10* (A); May 24† (2).

Durham—Jan. 4*; Jan. 11† (2); Jan. 25† (A); Feb. 15*; Feb. 22† (A); Mar. 1† (2); Mar. 15† (A); Mar. 22*; Mar. 29* (A); April 5† (A) (3); April 26† (2); May 17*; May 24† (A) (3); June 21*.

Granville—Feb. 1 (2); April 5 (2).

Orange—Mar. 15; May 10†; June 7; June 14†.

Person—Jan. 25; Feb. 1† (A); April 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Gwyn.

Ashe—April 12*; May 24† (2).
Alleghany—April 26.
Forsyth—Jan. 4; Jan. 11 (A); Jan. 11† (3); Feb. 1; Feb. 8† (3); Feb. 8 (A); Mar. 1; Mar. 8† (3); Mar. 8 (A); Mar. 29 (2); April 12† (A); April 19†; April 26† (A); May 3 (2); May 24† (A) (2); June 7; June 14† (2); June 14 (A).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Bobbitt.

Davidson—Jan. 25*; Feb. 15† (2); April 5† (A) (2); May 3*; May 24†; May 31† (A); June 21*.
Guilford—Dec. 28*; Jan. 4* (A); Jan. 4†; Jan. 11†; Jan. 18*; Feb. 1† (2); Feb. 1* (A); Feb. 15† (A) (2); Mar. 1* (2); Mar. 15† (2); Mar. 22* (A); Mar. 29† (2); April 12† (2); April 19* (A); April 26*; May 10† (2); May 17* (A); May 24* (A); May 31† (2); June 14*.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Armstrong.

Anson—Jan. 11*; Mar. 1†; April 12 (2); June 7†.
Moore—Jan. 18*; Feb. 8†; Mar. 22† (A) (2); May 17*; May 24†.
Richmond—Jan. 4*; Feb. 1† (A); Mar. 15†; April 5*; May 24† (A); June 14†.
Scotland—Mar. 8; April 26†.
Stanly—Feb. 1†; Feb. 8† (A); Mar. 29; May 10†.
Union—Jan. 25*; Feb. 15† (2); Mar. 22†; May 3†.

FOURTEENTTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Warlick.

Gaston—Jan. 11*; Jan. 18† (2); Mar. 8* (A); Mar. 15† (2); April 19*; May 17† (A) (2); May 31*.
Mecklenburg—Jan. 4*; Jan. 4† (A) (2); Jan. 18* (A) (2); Jan. 18† (A) (2); Feb. 1† (3); Feb. 1† (A) (4); Feb. 22*; Mar. 1† (2); Mar. 1† (A) (2); Mar. 15* (A) (2); Mar. 15† (A) (2); Mar. 29† (2); Mar. 29† (A) (2); April 12* (A); April 12†; April 19† (A); April 26† (2); April 26† (A) (2); May 10*; May 10† (A) (2); May 17† (2); May 24† (A) (2); June 7*; June 7† (A) (2); June 14†; June 21* (2).

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Rousseau.

Alexander—Feb. 1 (A) (2).
Cabarrus—Jan. 4 (2); Feb. 22†; Mar. 1† (A); April 19 (2); June 7† (2).
Iredell—Jan. 25 (2); Mar. 8†; May 17 (2).
Montgomery—Jan. 18*; April 5† (2).
Randolph—Jan. 25† (A) (2); Mar. 15† (2); Mar. 29*; June 21*.
Rowan—Feb. 8 (2); Mar. 1†; Mar. 8† (A); May 3 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Pless.

Burke—Feb. 15; Mar. 8† (2); May 31 (3).
Caldwell—Jan. 4† (A) (2); Feb. 22 (2); May 3 (A); May 17† (2).
Catawba—Jan. 11† (2); Feb. 1 (2); April 5† (2); May 3† (2).
Cleveland—Jan. 4; Mar. 22 (2); May 17† (A) (2).
Lincoln—Jan. 18 (A); Jan. 25†.
Watauga—April 19 (2); June 7† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Nettles.

Avery—April 5* (A); April 12†.
Davie—Mar. 15; May 24†.
Mitchell—Mar. 29 (2).
Wilkes—Jan. 11† (3); Mar. 1 (2); Mar. 15 (A); April 26† (2); May 31† (2).
Yadkin—Feb. 1 (3).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Alley.

Henderson—Jan. 4† (2); Mar. 1 (2); April 26† (2); May 24† (2).
McDowell—Dec. 28*; Feb. 8† (2); June 7 (2).
Polk—Jan. 25 (2).
Rutherford—Feb. 22†; April 12† (2); May 10 (2); June 21† (2).
Transylvania—Mar. 29 (2).
Yancey—Jan. 18†; Mar. 15 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1943—Judge Clements.

Buncombe—Jan. 4† (2); Jan. 11 (A) (2); Jan. 18*; Jan. 25; Feb. 1† (2); Feb. 15 (A) (2); Feb. 15*; Mar. 1† (2); Mar. 15*; Mar. 15 (A) (2); Mar. 29† (2); April 12*; April 12 (A) (2); April 26; May 3† (2); May 17*; May 17 (A) (2); May 31† (2); June 14*; June 14 (A) (2).
Madison—Feb. 22; Mar. 22; April 19; May 24; June 21.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1943—Judge Sink.

Cherokee—Jan. 18† (2); Mar. 29 (2); June 14† (2).
Clay—April 26.
Graham—Jan. 4† (A) (2); Mar. 15 (2); May 31† (2).
Haywood—Jan. 4† (2); Feb. 1 (2); May 3† (2).
Jackson—Feb. 15 (2); May 17† (2); June 7* (A).
Macon—April 12 (2).
Swain—Jan. 11† (A) (2); Mar. 1 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Spring Term, 1943—Judge Phillips.

Caswell—Mar. 15*; Mar. 22†.
Rockingham—Jan. 18* (2); Mar. 1†; Mar. 8*; April 12†; May 3† (2); May 17* (2); June 7† (2).
Stokes—Jan. 4* (A); Mar. 29*; April 5†; June 21*.
Surry—Jan. 4*; Jan. 11†; Feb. 8*; Feb. 15† (2); April 19*; April 26†; May 31†.

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

SUPERIOR COURTS, FALL TERM, 1943

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, 1943—Judge Thompson.

Beaufort—Sept. 20* (A); Sept. 27†; Oct. 11†; Nov. 8* (A); Dec. 6†.
Camden—**Aug. 30.**
Chowan—Sept. 13; Nov. 29.
Currituck—July 19†; Sept. 6.
Dare—Oct. 25.
Gates—Nov. 22.
Hyde—Aug. 16† (2); Oct. 18.
Pasquotank—Sept. 20†; Oct. 11† (A) (2); Nov. 8†; Nov. 15*.
Perquimans—Nov. 1.
Tyrrell—Oct. 4.

SECOND JUDICIAL DISTRICT

Fall Term, 1943—Judge Bone.

Edgecombe—Sept. 13; Oct. 18; Nov. 15† (2).
Martin—Sept. 20 (2); Nov. 22† (A) (2); Dec. 13.
Nash—Aug. 30; Sept. 20† (A) (2); Oct. 11†; Nov. 29*; Dec. 6†.
Washington—July 12; Oct. 25†.
Wilson—Sept. 6; Oct. 4†; Nov. 1† (2); Nov. 6 (A).

THIRD JUDICIAL DISTRICT

Fall Term, 1943—Judge Parker.

Bertie—Aug. 30 (2); Nov. 15 (2).
Halifax—Aug. 16 (2); Oct. 4† (A) (2); Oct. 25* (A); Nov. 29 (2).
Hertford—Aug. 2; Oct. 18 (2).
Northampton—Aug. 2 (A); Nov. 1 (2).
Vance—Oct. 4*; Oct. 11†.
Warren—Sept. 20*; Sept. 27†.

FOURTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Williams.

Chatham—Aug. 2† (2); Oct. 25.
Harnett—Sept. 6* (A); Sept. 20†; Oct. 4† (A) (2); Nov. 15* (2).
Johnston—Aug. 16*; Sept. 27† (2); Oct. 18 (A); Nov. 8†; Nov. 15† (A); Dec. 13 (2).
Lee—July 19; Sept. 13†; Sept. 20† (A); Nov. 1.
Wayne—Aug. 23; Aug. 30† (2); Oct. 11† (2); Nov. 29 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Frizzelle.

Carteret—Oct. 18; Dec. 6†.
Craven—Sept. 6*; Oct. 4† (2); Nov 22† (2).
Greene—Dec. 6 (A); Dec. 13 (2).
Jones—Aug. 16†; Sept. 20; Dec. 6 (A).
Pamlico—Nov. 8 (2).
Pitt—Aug. 23†; Aug. 30; Sept. 13† Sept. 27†; Oct. 25†; Nov. 1; Nov. 22† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Stevens.

Duplin—July 26*; Aug. 30† (2); Oct. 4*; Dec. 6† (2).
Lenoir—Aug. 23; Sept. 27†; Oct. 18; Nov. 8† (2); Dec. 13 (A).
Onslow—July 19‡; Oct. 11; Nov. 22† (2).
Sampson—Aug. 9 (2); Sept. 13† (2); Oct. 25; Nov. 1†.

SEVENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Harris.

Franklin—Sept. 13†; Oct. 11*; Nov. 8† (2).
Wake—July 12*; Sept. 6*; Sept. 13* (A); Sept. 20† (2); Oct. 4*; Oct. 18† (3); Nov. 8* (A); Nov. 15† (A); Nov. 22† (2); Dec. 6* (2); Dec. 20†.

EIGHTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Burney.

Brunswick—Sept. 13; Sept. 20†.
Columbus—Sept. 6*; Oct. 4† (2); Nov. 22*; Nov. 29† (2).
New Hanover—July 26*; Aug. 23†; Aug. 30*; Oct. 18† (2); Nov. 8*; Nov. 15; Dec. 6† (A); Dec. 13†.
Pender—July 19†; Sept. 27; Nov. 1†.

NINTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Nimocks.

Bladen—Aug. 9†; Sept. 20*.
Cumberland—Aug. 30*; Sept. 27† (2); Oct. 11* (A); Oct. 25† (2); Nov. 22* (2).
Hoke—Aug. 2†; Aug. 23; Nov. 15.
Robeson—July 12† (2); Aug. 16*; Aug. 30† (A); Sept. 6* (2); Sept. 27* (A); Oct. 11† (2); Oct. 25*; (A) Nov. 8*; Nov. 15† (A); Dec. 6† (2); Dec. 20*.

TENTH JUDICIAL DICTRICT

Fall Term, 1943—Judge Carr.

Alamance—Aug. 2†; Aug. 16*; Sept. 6† (2); Nov. 15† (A) (2); Nov. 29*.
Durham—July 19*; Aug. 2† (A) (2); Sept. 6* (A) (2); Sept. 20† (2); Oct. 4† (A); Oct. 11*; Oct. 18† (A) (2); Nov. 1† (2); Dec. 6*.
Granville—July 26; Oct. 25†; Nov. 15 (2).
Orange—Aug. 23; Aug. 30†; Oct. 4†; Dec. 13.
Person—Aug. 9; Oct 18.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Phillips.

Ashe—July 26† (2); Oct. 25*.
Alleghany—Oct. 4.
Forsyth—July 12 (2); Sept. 6 (2); Sept. 20† (2); Oct. 4† (A); Oct. 11 (2); Oct. 25† (A); Nov. 1†; Nov. 8 (2); Nov. 22† (2); Dec. 6 (2).

#TWELFTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Gwyn

Davidson—Aug. 23*; Sept. 13† (2); Oct. 4† (2); Nov. 22 (2).
Guilford—July 12* (2); Aug. 2*; Aug. 9† (2); Aug. 30† (2); Sept. 13*; Sept 20†; Sept. 20* (2); Sept. 27† (3); Oct. 18* (2); Nov. 1† (2); Nov. 1* (3); Nov. 22† (2); Dec. 6† (2); Dec. 6* (3).

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Bobbitt.

Anson—Sept. 13†; Sept. 27*; Nov. 15†.
Moore—Aug. 16*; Sept. 20†; Sept. 27† (A).
Richmond—July 19†; July 26*; Sept. 6†; Oct. 4*; Nov. 8†.
Scotland—Aug. 9; Nov. 1†; Nov. 29 (2).
Stanly—July 12; Sept. 6† (A) (2); Oct. 11†; Nov. 22.
Union—Aug. 23 (2); Oct. 18 (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Armstrong.

Gaston—July 26*; Aug. 2† (2); Sept. 13* (A); Sept. 20† (2); Oct. 25*; Nov. 1† (A); Nov. 29* (A); Dec. 6† (2).
Mecklenburg—July 12* (2); Aug. 2* (A) (2); Aug. 16* (2); Aug. 30*; Sept. 6† (2); Sept. 6† (A) (2); Sept. 20† (A) (2); Sept. 20* (A) (2); Oct. 4† (A) (2); Oct. 4*; Oct. 11† (2); Oct. 18† (A) (2); Nov. 1† (A) (2); Nov. 1† (2); Nov. 15† (A) (2); Nov. 15* Nov. 22† (2); Nov. 29† (A) (2); Dec. 6* (A) (2); Dec. 13† (A); Dec. 20†.

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Warlick.

Alexander—Aug. 30 (A) (2).
Cabarrus—Aug. 23*; Aug. 30†; Oct. 18 (2); Nov. 15† (A); Dec. 6† (A).
Iredell—Aug. 2 (2); Nov. 8 (2).
Montgomery—July 12; Sept. 27† Oct. 4; Nov. 1†.
Randolph—July 19† (2); Sept. 6*; Oct. 25† (A) (2); Dec. 6 (2).
Rowan—Sept. 13 (2); Oct. 11†; Oct. 18† (A); Nov. 22 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Rousseau.

Burke—Aug. 9 (2); Sept. 27† (3); Dec. 13 (2).
Caldwell—Aug. 23 (2); Oct. 4† (A) (2); Nov. 29 (2).
Catawba—July 5 (2); Sept. 6† (2); Nov. 15*; Nov. 22†; Dec. 6† (A).
Cleveland—July 26 (2); Sept. 13† (A) (2); Nov. 1 (2).
Lincoln—July 19; Oct. 18; Oct. 25†.
Watauga—Sept. 20.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Pless.

Avery—July 5 (2); Oct. 18 (2).
Davie—Aug. 30; Dec. 6†.
Mitchell—July 26† (2); Sept. 20 (2).
Wilkes—Aug. 9 (2); Oct. 4† (2); Dec. 13 (2).
Yadkin—Aug. 23*; Nov. 22† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Nettles.

Henderson—Oct. 11 (2); Nov. 22† (2).
McDowell—July 12† (2); Sept. 6 (2).
Polk—Aug. 23 (2).
Rutherford—Sept. 27† (2); Nov. 8 (2).
Transylvania—July 26 (2); Dec. 6 (2).
Yancey—Aug. 9 (2); Oct. 25† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1943—Judge Alley.

Buncombe—July 12† (2); July 19 (A) (2); July 26*; Aug. 2; Aug. 9† (2); Aug. 23 (A) (2); Aug. 23*; Sept. 6† (2); Sept. 20 (A) (2); Sept. 20*; Oct. 4† (2); Oct. 18 (A) (2); Oct. 18*; Nov. 1; Nov. 8† (2); Nov. 22 (A) (2); Nov. 22*; Dec. 6† (2); Dec. 20 (A) (2); Dec. 20*.
Madison—Aug. 30; Sept. 27; Oct. 25; Nov. 29; Dec. 27.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1943—Judge Clements.

Cherokee—Aug. 9 (2); Nov. 8 (2).
Clay—Oct. 4.
Graham—Sept. 6 (2).
Haywood—July 12 (2); Sept. 20† (2); Nov. 22 (2).
Jackson—Oct. 11 (2).
Macon—Aug. 23 (2); Dec. 6 (2).
Swain—July 26 (2); Oct. 25 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1943—Judge Sink.

Caswell—July 5; Nov. 15*; Nov. 22†.
Rockingham—Aug. 9* (2); Sept. 6† (2); Oct. 25†; Nov. 1* (2); Nov. 29† (2); Dec. 13*.
Stokes—Aug. 23; Oct. 11*; Oct. 18†.
Surry—July 12† (2); Sept. 20*; Sept. 27† (2); Dec. 20*.

*For criminal cases.
†For civil cases.
‡For jail and civil cases.
(A) Special or Emergency Judge to be assigned.
#Special or regular Judge, act not specific in case of conflict.

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. MADELYN D. 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. JAMES B. SWAILS, 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.
MADELYN D. 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. J. Y. JORDAN, Clerk, Asheville.

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, 1943

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 5, 1943:

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Given over my hand and the seal of the Board of Law Examiners, this the 5th day of August, 1943.

(SEAL.)

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

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ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1943

WACHOVIA BANK & TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF FANNIE E. CORRIHER, v. MRS. ELLA MILLER, MRS. HESTER A. SUTTLEMYRE, MRS. MILDRED WASHBURN, MRS. LAURA SHUFORD, EVERETTE CORRIHER, MRS. EUGENIA EDWARDS McKENZIE, B. O. EDWARDS AS ADMINISTRATOR OF THE ESTATE OF JOHN REID EDWARDS, AND B. O. EDWARDS, INDIVIDUALLY.

(Filed 7 April, 1943.)

1. Wills § 32—

The intent of the testator, as expressed in the will, "taking it by its corners," is the "Polar star" guiding the Court in arriving at the proper construction of the language used. In ascertaining such intent two presumptions generally prevail: (1) against intestacy; and (2) in favor of the first taker.

2. Wills § 31—

The intention of the testator need not be declared in express terms in the will, but it is sufficient if the intention can be clearly inferred from particular provisions of the will, and from its general scope and import.

3. Wills §§ 33c, 33d: Estates § 9a—

Cross remainders are implied in a will where there is a gift for life or in tail to two or more persons as tenants in common, followed by a gift over of all property at once. Cross executory limitations apply to personal property like cross remainders to realty and both prevent a chasm or hiatus in the limitation.

4. Same—

Where real and personal property is left by will in trust for two grandchildren until they reach the age of 35 years, when the principal is to be

given them, with the provision that should they not live and not have bodily heirs the property shall go to other named persons, upon the death of one of the grandchildren, without issue and before reaching 35 years of age, his part of the trust goes to the surviving grandchild under the terms of the will. The limitation over does not become operative as to his one-half of the trust, for it was the intention of the testatrix that the trust should go as a whole to the class as indicated, unless both should die without bodily heirs.

APPEAL by defendants, Mrs. Eugenia Edwards McKenzie and B. O. Edwards, individually, and B. O. Edwards as administrator of the estate of John Reid Edwards, from *Pless, J.*, at October Term, 1942, of ROWAN. Error.

Petition by plaintiff trustee for advice and instruction.

There was born to Mrs. Fannie E. Corriher, late of Rowan County, two children, a daughter, Zelia Corriher, who married defendant B. O. Edwards, and a son, Everette Corriher. Zelia Corriher Edwards predeceased Mrs. Corriher, leaving surviving two children, John Reid Edwards and Eugenia Edwards.

Mrs. Corriher died leaving a last will and testament in which she made certain individual bequests and devises, which included the home place to her son and her Asheville real property to her grandchildren. The remaining pertinent part of the will is as follows:

"The balance of my estate stocks bonds or real estate where ever located I place in the hands of the Wachovia Bank & Trust Co. or the Commerce Bank Trust Co. of Asheville. Of this fund I bequeath to my two grand children John Reid & Eugenia 60 per cent of the above stocks and to Everette Corriher (40) forty per cent. Eugenia Edwards to receive the interest or div. on her part of stock when she arrives at the age of 25 if she proves herself capable of handling it. John Reid's portion of the estate to be kept by the above Trust Co. and the interest to be paid to him by The Trust Co. when he is 25 years old. And the principal to be paid to Eugenia & John Reid when they are 35 years old if they prove themselves capable of handling it.

"To my son Everette when my executor shall be satisfied that he has given up the use of intoxicating drinks after two—2—years, I will that the interest be turned over to him, and the principal be held by the Trust Co. as long as he lives and then to be given to John Reid and Eugenia Edwards, unless Everett marries and has bodily heirs. Then the estate is to be held by the Trust Co. for them, unless he has shown that he has given up the use of strong drink after 5 years.

"I will that should Eugenia & John Read Edwards not live and not have bodily heirs that their part of the estate shall be divided between Everette and my sisters who are living at that time. Everett to receive

half and to be held by the Trust Co. and my sisters the other half and their part to be divided equally among themselves."

A codicil named plaintiff Trust Company as trustee.

John Reid Edwards died intestate on or about 8 November, 1941, without surviving wife or issue and being less than 35 years of age at the time of his death. Thereupon a controversy arose as to whether the limitation over contained in the will became effective at his death and if not as to who became seized and possessed of his interest in the trust estate. The plaintiff trustee instituted this action to obtain instructions as to the disposition it should make of said estate.

When the cause came on to be heard the court below concluded that the limitation over became operative as to one-half of the trust estate devised for the use of the grandchildren upon the death of John Reid Edwards, and that, therefore, said one-half should be divided into equal shares and distributed 50% to Everette Corriher and 50% to the surviving sisters of the testatrix, to wit: Ella Miller, Hester A. Suttlemyre, Laura Shuford and Mildred Washburn. Defendant Eugenia Edwards McKenzie, B. O. Edwards, individually and as administrator of the estate of John Reid Edwards, excepted and appealed.

Linn & Linn for Wachovia Bank & Trust Co., as Trustee under the Will of Fannie E. Corriher, plaintiff, appellee.

Walter H. Woodson, Jr., and Walter H. Woodson for defendants, Mrs. Ella Miller, Mrs. Hester A. Suttlemyre, Mrs. Mildred Washburn and Mrs. Laura Shuford, appellees.

Williams & Cocke for defendants, appellants.

BARNHILL, J. While Everette Corriher did not appeal, he, in his answer, takes the position that at the death of John Reid Edwards his interest in the estate vested in the son and in the granddaughter and that if he, Everette, took no part thereof then it vested in the granddaughter Eugenia.

The granddaughter, Eugenia Edwards McKenzie, and B. O. Edwards, individually and as administrator, assert that John Reid's interest in the trust estate vested in Eugenia, and if not, then in Eugenia and the son Everette. The four surviving sisters, collateral kin, contend that as to one-half of the devise to the grandchildren the executory bequest or ulterior limitation over became effective as to one-half of the gift in trust to the grandchildren upon the death of John Reid and that, therefore, they jointly take one-half and Everette takes the remainder.

These conflicting contentions raise this question: Was it the intent of the testatrix that the executory limitation over of the gift to the grandchildren John Reid and Eugenia should take effect and become operative

only in the event both died without bodily heirs, so that the gift would go over as a whole?

The intent of the testatrix, as expressed in the will, "taking it by its four corners," is the "Polar star" guiding the Court in arriving at the proper construction of the language used in the will. *Patterson v. McCormick,* 181 N. C., 311, 107 S. E., 12; *Smith v. Creech,* 186 N. C., 187, 119 S. E., 3; *Wells v. Williams,* 187 N. C., 134, 121 S. E., 17; *Edmondson v. Leigh,* 189 N. C., 196, 126 S. E., 497; *McCullen v. Daughtry,* 190 N. C., 215, 129 S. E., 611; *Westfeldt v. Reynolds,* 191 N. C., 802, 133 S. E., 168; *Walker v. Trollinger,* 192 N. C., 744, 135 S. E., 871.

The intention of the testatrix need not be declared in express terms in the will, but it is sufficient if the intention can be clearly inferred from particular provisions of the will, and from its general scope and import. The courts will seize upon the slightest indications of that intention which can be found in the will to determine the real objects and subjects of the testatrix's bounty. 28 R. C. L., 218. And it is generally held that, in seeking to discover this intention, two presumptions prevail—(1) against intestacy, *Case v. Biberstein,* 207 N. C., 514, 177 S. E., 802, and cases cited; 28 R. C. L., 227; 69 C. J., 91, sec. 1147; and (2) in favor of the first taker, *Dunn v. Hines,* 164 N. C., 113; *Citizens Bank v. Murray,* 175 N. C., 62, 94 S. E., 665; *Smith v. Creech, supra;* 69 C. J., 103.

The will under consideration was, in some respects, ineptly drawn and leaves room for doubt as to the real intention of the testatrix. The natural result is the controversy which has now arisen.

While it is lacking in exactness of expression and attention to details that might be expected in a paper writing disposing of an estate of the size here involved, it does contain *indicia* which we think point with reasonable certainty to the intent of the testatrix, and to the ultimate purpose she was seeking to accomplish.

It discloses an understanding of the difference between a gift that is several or in common and one that is joint. After making certain specific bequests she gave to her grandchildren the furniture which belonged to their mother with directions for division. She also devised to them her Asheville real estate "to be divided." She likewise bequeathed to them a china dinner set—a gift that could not be divided without destroying the value of the gift itself. Then when she came to the residue of her estate she recognized her two lines of lineal descendants and divided it accordingly—into two shares, 60% to one line, the grandchildren, and 40% to the other line, her son.

The gift to the grandchildren is "to my grand children John Reid & Eugenia 60 per cent . . . The principal to be paid to Eugenia & John Reid when they are 35 years old . . . Should Eugenia & John Reid not

live and not have bodily heirs then their part of the estate shall be divided between Everette and my sisters."

Although she had made provision for the separation of income during the existence of the trust and had made devises to be divided there is no provision for a division or for the separation of interest in the principal estate given the grandchildren. It is to *them* to be received by *them* when *they* become 35 years of age and to go over in the event *they* shall die without bodily heirs. In that event *their* part is to be divided between her son and collateral heirs.

It is apparent then that the testatrix intended the gift in trust to the grandchildren as representatives of one line of descent, to go over at one time as a whole in the event both should die, neither having bodily heirs. The limitation over cannot take effect unless both die without bodily heirs.

This is a logical conclusion reasonably justified by the language used. Naturally her primary concern was to provide for her lineal descendants. This she did. It is equally natural that she should make sure that the gift to neither line should fail so long as there remained anyone in that line capable of taking.

This conclusion is in accord with the decisions of this Court. *Coffield v. Roberts,* 35 N. C., 277; *Picot v. Armistead,* 37 N. C., 226; *Kirkman v. Smith,* 174 N. C., 603, 94 S. E., 423; *Leggett v. Simpson,* 176 N. C., 3, 96 S. E., 638; *Pratt v. Mills,* 186 N. C., 396, 119 S. E., 766; *Lamm v. Mayo,* 217 N. C., 261, 7 S. E. (2d), 501. See also *Henry v. Henderson,* 60 So., 33; *Kramer v. Sangamon Loan & Trust Co.,* 293 Ill., 553, 127 N. E., 877.

In the *Leggett case, supra,* which is almost identical, the devise was to Elizabeth Bateman and Charlotte Baxter, nieces, for life, and then "to the lawful children of my nieces (naming them) all the lands I have loaned in a former item to my nieces (naming them) to have and to hold to them in fee simple forever, at the death of my aforesaid nieces." The will further provided that "in the event that my said nieces (naming them) should die without leaving any lawful children then it is my wish and desire that the land devised in a former item to them shall go to the children of my sister Martha Perry and Sally Leggett, and to have and to hold to them in fee simple forever." Elizabeth Bateman died without children and the ulterior devisees claimed her interest. The Court said: "Elizabeth Bateman having died without children the land went to Charlotte Baxter and after her death to her children and they and their grantees are the sole owners thereof. The devise over to the children of his sisters, Martha Perry and Sally Leggett, was contingent on the death of his nieces Elizabeth Bateman and Charlotte Baxter 'without leaving any lawful children living,' which contingency did not happen and the plaintiffs therefore take nothing."

In the *Lamm case, supra,* the devise was to the testator's two grandchildren (naming them) their lifetime and after their death then to their lawful children, if any, and if none, then to be equally divided between all her children. One grandchild died without children or lineal descendants and the children of the testator made claim to her share. The Court held that the limitation over could not become effective before the death of both and that the purchasers from the surviving claimant who had children acquired a good title.

In the *Kirkman case, supra,* the devise of a remainder was to "Guy Kirkman and Marvin Kirkman and their heirs and if they should die without bodily heirs then the land to go over to the Flow heirs." Marvin Kirkman died intestate without issue. Guy Kirkman had two children. The Court held that the contingency upon which the executory devise, by way of a shifting use, was to become effective had not happened.

On the contrary, the interpretation insisted upon by appellees would produce results wholly inconsistent with her primary intent to provide for those who had first claim on her bounty—her lineal descendants. If that view is adopted her granddaughter would take no part of her brother's share in the trust estate. Instead, it would go in part to collateral heirs.

Likewise, it would, in all probability, create two groups of ultimate takers. The gift over is "to my sisters who are living at that time." Four sisters of the testatrix survived John Reid. Should Eugenia die without bodily heir there may then be only one or perhaps no sister to take under the limitation over. Hence, different persons would take or some of the same devisees would take different portions under identically the same executory devise.

It cannot be assumed from any expression in the will that the testatrix intended either result. That she did not so intend is evidenced by her gift to Everette which goes to the grandchildren in the event he does not marry and have bodily heirs.

What then is to become of John Reid's share in the trust estate? As to it, since he died without bodily heir, did testatrix die intestate?

To adopt the intestacy theory would defeat the trust. The trustee is to hold the trust property until both arrive at the age of 35. That event has not yet occurred. It would likewise annul the limitation over for, under the law of intestacy, the estate would descend to the father of John Reid. Then, too, it would deprive the lineal descendants of any part thereof and vest it instead in a stranger in blood. Such conclusion is violative of the whole tenor of the will. An assumption of interstitial intestacy is equally untenable.

On the other hand, the will does permit the conclusion that testatrix intended cross remainders or reciprocal rights of succession as between the grandchildren.

Cross remainders are implied in a will where there is a gift for life or in tail to two or more persons as tenants in common followed by a gift over of all the property at once. 2 Simes, Law of Future Estates, 258, sec. 435; 23 R. C. L., 555, sec. 102. 1 Jarman on Wills, 660.

"Under a devise to several persons in tail, being tenants in common, with a limitation over for want or in default of such issue, cross-remainders are to be implied among the devisees in tail." 1 Jarman on Wills, 668.

"In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainderman until all the devisees shall have died without issue, the effect of not implying cross remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of all." 1 Jarman on Wills, 669.

"In the case of a devise to A. and B. and a gift over after the death of both of them to C., cross-remainders are implied, for otherwise, upon the death of A. before B., the interest which A. had would be terminated by his death and would remain undisposed of by the will until B.'s death, since C., the remainderman, cannot take anything until after the death of both A. and B. There is a presumption that the testator intended to dispose of his whole estate by his will, and a construction which will result in even partial intestacy will not be adopted if a different construction is permissible. Therefore the law implies cross-remainders in the case supposed, and the survivor of the two succeeds to the deceased cotenant's interest until the expiration of the term. In *Doe v. Webb,* 1 Taunt, 234, whether or not there were cross-remainders was held to be a question of the testator's intention, whether or not he intended the whole estate to go over together to the ultimate taker as a whole." *Whittaker v. Porter,* 151 N. E., 905.

The rule is quoted in *Lombard v. Witbeck,* 173 Ill., 396, 51 N. E., 61, as follows:

"You must ascertain whether the testator intended the whole estate to go over together. If you once found that to be intended, you were not to let a fraction of it descend to the heir at law in the meantime. You were to assume that what was to go over together, being the entire estate, was to remain subject to the prior limitations until the period when it was to go over arrived."

The rule as to real estate applies to personal property.

"Cross executory limitations in the case of personal estate, like cross remainders of real estate, are only implied to fill up a hiatus in the limitations, which seems from the context to have been unintentional . . . Such gap occurs . . . where, there being such a gift over, the preceding

limitations do not provide for every event except that contemplated by the gift over, but leave some gap which would occasion an intestacy as to part of the estate." 1 Jarman on Wills, 672.

"Perhaps the requisite for the implication of cross remainders most often emphasized in judicial opinions on the matter is that testator has expressed an intention that the property shall all go over at one time." 2 Simes, Law of Future Estates, 262.

That the testatrix intended the gift to the grandchildren as a group representing one line of descent, the whole to go to the survivor in the event one should die without bodily heir, seems to be reasonably certain. This conclusion is in harmony with the whole tenor of the will. It dovetails with the general intent to provide for her two lines of descent and to make provision for those who had first claim on her bounty and is consistent with the rule that favors the first taker. It is likewise consonant with the decisions in this and other jurisdictions. *Kirkman v. Smith, supra; Leggett v. Simpson, supra; Pratt v. Mills, supra; Lamm v. Mayo, supra; Hadcox v. Cody,* 213 N. Y., 570, 108 N. E., 84; *Kramer v. Sangamon Loan & Trust Co., supra; Henry v. Henderson, supra; Addicks v. Addicks,* 266 Ill., 349, 107 N. E., 580.

We are advertent to the decisions in *Coffield v. Roberts, supra,* and in *Picot v. Armistead, supra,* where it was held that the doctrine of cross remainders could not be applied. If those cases are not factually distinguishable they are not, in this respect, in harmony with later decisions of this Court.

There was error in the judgment below. A decree must be entered adjudging that the defendant Eugenia Edwards McKenzie is the owner of the trust estate bequeathed to her and her brother John Reid Edwards subject to the contingent limitation over contained in the will.

Error.

MARYLAND CASUALTY COMPANY, A CORPORATION, V. MRS. BEULAH LAWING, INDIVIDUALLY; MRS. BEULAH LAWING, GUARDIAN OF KARL LANDER LAWING, AGNES LANDER LAWING, JOHN MEANS LAWING AND DAN PHILMON LAWING; AND KARL LANDER LAWING, AGNES LANDER LAWING, JOHN MEANS LAWING AND DAN PHILMON LAWING.

(Filed 7 April, 1943.)

1. Guardian and Ward §§ 23, 24—

As a general rule, the surety on a guardian's bond is a creditor of his principal from the date of its execution, although no default occurs until long afterwards.

2. Guardian and Ward § 25: Executors and Administrators §§ 31, 33b—

The Superior Courts have original, concurrent jurisdiction with the probate courts in actions against executors, administrators, collectors and guardians, to order an account to be taken and to adjudge application and distribution of funds ascertained, or to grant other relief, as the nature of the case may require. C. S., 135.

3. Guardian and Ward § 25—

Where a guardian uses the guardianship funds to improve and keep up property in which she is interested along with the wards, contributing nothing from her own funds but taking her share of the rents, and violates her obligations as guardian in other respects, the surety on the guardian bond can maintain an action in the Superior Court to terminate the guardianship, to enforce the liability of the guardian in exoneration of the surety, and to surcharge and correct the guardian's accounts.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1943, of LINCOLN.

Civil action for determination of liability of defendant, guardian, to her wards, for correction and proper statement of her accounts, and for judgment against her, and enforced for any amount that may be found due so as to exonerate plaintiff from any liability as surety upon her bond as guardian, heard upon demurrer to complaint.

The complaint of plaintiff in substantial pertinent part alleges:

"2-3. That on 10 February, 1937, defendant, Mrs. Beulah Lawing, was appointed by the clerk of Superior Court of Lincoln County, North Carolina, guardian of her four minor children, the defendants Karl Lander Lawing, Agnes Lander Lawing, John Means Lawing and Dan Philmon Lawing, who are sixteen, fourteen, thirteen, and nine years of age, respectively, and as such guardian gave a bond in the penal sum of Twenty Five Thousand Dollars, on which, upon her application and an agreement on her part to indemnify and save it harmless from all loss and expense, plaintiff became surety.

"4. That there came into the hands of said guardian the property of such wards consisting principally of their interest in the estate of their deceased father, K. L. Lawing, who died intestate on or about 17 August, 1934, leaving surviving him the said Mrs. Beulah Lawing, as his widow, and his children, the four minor defendants, and of whose estate the widow qualified as administratrix and filed her final account as such administratrix on or about 14 August, 1939; that her accounts, including said final account, as filed in office of clerk of Superior Court of Lincoln County, are referred to and made a part of complaint.

"5. That the estate of said K. L. Lawing, deceased, consisted of personal property and a considerable amount of real estate located in Lincoln County, North Carolina, and considerable in the State of Florida; that as plaintiff is informed and believes the said real estate in the State of North Carolina descended to the children of said K. L. Lawing subject

to the dower interest of his said widow, Mrs. Beulah Lawing, and as to the real estate in Florida, the widow had an option to claim dower, and that, in the absence of such claim, she inherited a child's part, to wit, one-fifth undivided interest therein, and that plaintiff is informed and believes that said widow failed to claim dower and, consequently, owned one-fifth interest in said Florida real estate.

"6. That defendant guardian failed to file an inventory and annual accounts as such guardian until September, 1941, when she filed a purported account, copy of which is attached as an exhibit.

"7. That on or about 3 September, 1941, defendant guardian filed a petition, in an *ex parte* proceeding before clerk of Superior Court of Lincoln County for authority to borrow money and to mortgage certain real estate belonging to her wards, in which proceeding said minors had no representation except through the petitioner, their guardian—the petition and judgment rendered thereon are referred to and made a part of the complaint.

"8. That plaintiff is informed and believes that defendant guardian has failed to properly account for the funds and property which have come into her hands, as such guardian, and that her account, copy of which is attached as Exhibit A, is incorrect and improper in the following particulars:

"(a) That the said Mrs. Beulah Lawing also had herself appointed guardian of said minor children in the State of Florida, and has filed a purported account in that estate, copy of which is hereto attached marked Exhibit B. The plaintiff is informed and believes that at least one disbursement, amounting to $308.05, has been charged against the minors, both in the North Carolina account and in the Florida account; that numerous charges pertaining to the Florida property and representing disbursements in Florida have been improperly charged in the North Carolina account when they should have been charged in the Florida account, and in many instances it is impossible to ascertain from the two accounts whether or not such charges have been duplicated.

"(b) That said account does not take into consideration all of the funds which should have been received by the said guardian from herself as administratrix of the estate of K. L. Lawing, and in particular in that the said Mrs. Beulah Lawing, in her final account as administratrix, charges the cost of repairs to the home in Florida owned and occupied by the said Mrs. Beulah Lawing and her children jointly against said children and charges no part thereof against herself, and that this affects the final amount of which she acknowledges receipt as guardian.

"(c) In said account of said guardian the guardian charges her wards with numerous items of expense for repairs to properties jointly owned by the guardian and her wards, both in Florida and in North Carolina,

charging no part of said expenses to herself individually, while at the same time she gives herself credit for one-third of the rents of all the North Carolina property, except one building erected by her from guardianship funds.

"(d) That said guardian's account shows numerous items of insurance paid upon properties jointly owned by the guardian and her wards, all of which items are charged to the wards and no part of which is charged to the guardian individually.

"(e) That said account of the guardian charges large amounts to the wards for board furnished by the said guardian who is the mother of said wards, and the plaintiff alleges that said Mrs. Beulah Lawing has funds of her own from which said wards can be supported, and the question should be determined whether she has an obligation to furnish reasonable support to her said children, and if it should be held that she is entitled to charge the said wards for board, the plaintiff is informed and believes that there should be a determination of a proper charge in this action in which said wards are made parties, and that only so much as is found to be proper be charged against them.

"(f) That said report of the guardian treats the funds of all four wards as being jointly owned and contains no separate account as to each one, whereas it appears from the said report that some disbursements therein were made for the benefit of one or more, but less than all, of said wards, and that the said account does not constitute a proper accounting as to the balances due each of said wards individually.

"(g) That the plaintiff is informed and believes that numerous items in said account which have been charged to the wards should have been paid by the guardian individually and should not be charged against said wards. That there should be a determination of the propriety of charging to the wards such items as furniture, drug bills, magazines and newspapers, and other items, as to which the account does not clearly show whether they were bought for the benefit of the children or for the benefit of Mrs. Lawing, or for both.

"(h) That the said guardian's account shows that the guardian has used funds derived from the North Carolina properties of the wards, and belonging to the wards, to pay a loss in the operation of orange groves in Florida, owned jointly by the guardian and her wards, and that no part of said loss is charged to the guardian individually."

"9. That, for the protection of the said wards and the plaintiff as surety, there should be a re-statement of the account; the guardian should be required to account in this action for all funds which she received, or should have received, as such guardian up to the present time and her accounts should be corrected and judgment rendered against her in favor of the wards for any amount found to be due from said guardian to the wards.

"10. The plaintiff is further informed and believes that the validity and binding effect upon the wards of the judgment in the *ex parte* proceeding hereinbefore referred to in reference to mortgaging the property of the wards for money used to erect a building thereon should be determined in this action, and if there is any liability of the guardian upon her bond in respect thereto, or in respect to the erection of said building, or use of the funds of the wards in regard thereto, the same should be determined in this action and the guardian required to account and make good any loss sustained by the wards, thereby to the end that this plaintiff be exonerated from liability therefor upon its bond.

"11. That, in view of the fact that this action involves an accounting as between the guardian and her wards, and that her personal interests conflict with her duties as guardian in respect to numerous matters hereinbefore alleged, it is necessary that a guardian *ad litem* be appointed for the minor defendants to represent them in this action.

"12. That if the minor defendants have any causes of action against said guardian and this plaintiff as surety in reference to said guardianship up to the time of filing this action, whether indicated by the foregoing allegations or not, said defendants, through their guardian *ad litem* should be required to set the same up in this action, to the end that all liability upon said bond be determined and adjudicated in this action."

Defendant, Mrs. Beulah Lawing, individually and as guardian, demurs to the complaint upon these grounds:

"1. That this court has no jurisdiction of the subject of this action: (a) For that it appears from the complaint that this plaintiff is seeking in this suit to have an accounting of the estates belonging to said wards, and to surcharge and falsify the guardian's annual inventory and report, whereas an appropriate plaintiff, with power to bring such an action, could only maintain such an action in the probate court, presided over by the clerk of the Superior Court of Lincoln County, whose jurisdiction is exclusive.

"(b) For that it appears from the complaint that the accounting sought involves the transactions of Mrs. Beulah Lawing, as guardian for said wards, in the State of Florida, under her appointment as guardian by the Probate Court of said State, to which Court alone she is bound to report; which court has the full and exclusive jurisdiction over her accounts and reports, made with respect to the transactions relating to the properties belonging to the wards in said State.

"2. That the plaintiff above named has not legal capacity to bring and maintain this action, as appears from the complaint, it having failed to show that it has any right, title, or interest in the several estates of the wards, or that it is entitled to any equitable relief incident to said property.

"3. That the complaint does not state facts sufficient to constitute a cause of action against this defendant, either in her individual right or her representative capacity."

Upon hearing in Superior Court, judgment was entered at January Term, 1943, sustaining the demurrer and dismissing the action. Plaintiff excepted thereto, and appeals to Supreme Court, and assigns error.

Robinson & Jones and W. C. Ginter for plaintiff, appellant.
A. L. Quickel for defendants, appellees.

WINBORNE, J. Admitting the allegations of the complaint to be true, as we must do in considering the sufficiency thereof when challenged by demurrer, appellants present this question: "Where a guardian uses guardianship funds to improve and keep up property in which she is individually interested along with the wards, contributing nothing from her own funds, but taking her share of the rents, and violates her obligations as guardian in other respects, can the surety on the guardian's bond maintain an action in the Superior Court at term time prior to termination of the guardianship to enforce the liability of the guardian in exoneration of the surety, and to surcharge and correct the guardian's accounts either at common law or under C. S., 135?" We are of opinion, and hold, that the surety may maintain such an action and that the provisions of C. S., 135, are in themselves sufficiently broad to give Superior Court original concurrent jurisdiction of the action.

1. As a general rule the surety on a guardian's bond is a creditor of his principal from the date of its execution, although no default occurs until long afterward. 25 Am. Jur., 127, Guardian and Ward, section 203. In the case of *Ames v. Darrah,* 76 Miss., 187, 23 So., 768, 71 Am. St. Rep., 522, the Supreme Court of Mississippi held that a surety can maintain a bill in equity to set aside a voluntary conveyance made by the guardian to his wife after the date of the bond but before occurrence of a default. Also compare *Stenhouse v. Davis,* 82 N. C., 432. But if the rule were otherwise, the defense that plaintiff is not a real party in interest is new matter, and may only be made by affirmative allegations. *Morrow v. Cline,* 211 N. C., 254, 190 S. E., 207; *Nall v. McConnell,* 211 N. C., 258, 190 S. E., 210; *Leach v. Page,* 211 N. C., 622, 191 S. E., 349.

Moreover, when a guardian fails to "faithfully execute the trust reposed in him as such," upon which his bond is conditioned, C. S., 2162, the surety thereon is subjected to liability, and as a party in interest is entitled to have the wrong remedied.

2. While the surety might have proceeded before the clerk, the statute, C. S., 135, provides that "in addition to the remedy by special proceed-

ings, actions against executors, administrators, collectors and guardians may be brought originally to the Superior Court at term time; and that it shall be competent for the court in which said actions are pending to order an account to be taken by such persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require."

Construing this statute, which originated as section 6, chapter 241, Act of 1876-77, there are numerous decisions relating to administration of estates in which it is held that the Superior Court is therein given concurrent jurisdiction with the probate courts, that is, clerks of Superior Court in actions of class mentioned in the statute. See *Haywood v. Haywood,* 79 N. C., 42; *Bratton v. Davidson,* 79 N. C., 423; *Simpson v. Jones,* 82 N. C., 323; *Pegram v. Armstrong,* 82 N. C., 326; *Stenhouse v. Davis,* 82 N. C., 432; *Rountree v. Britt,* 94 N. C., 104; *Godwin v. Watford,* 107 N. C., 168, 11 S. E., 1051; *Royster v. Wright,* 118 N. C., 152, 24 S. E., 746; *Fisher v. Trust Co.,* 138 N. C., 90, 50 S. E., 592; *Shober v. Wheeler,* 144 N. C., 403, 57 S. E., 152; *Oldham v. Rieger,* 145 N. C., 254, 58 S. E., 1091; *Clark v. Homes,* 189 N. C., 703, 128 S. E., 20; *S. v. McCanless,* 193 N. C., 200, 136 S. E., 371; *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720; *In re Hege,* 205 N. C., 625, 172 S. E., 345; *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24; *Leach v. Page,* 211 N. C., 622, 191 S. E., 349; *Gurganus v. McLawhorn,* 212 N. C., 397, 193 S. E., 844. And this statute as it was originally enacted, and now is, applies to guardians as well as to executors and administrators.

That the statute is not confined to actions pertaining to final settlement in the administration of estates of deceased persons is shown in the case of *Haywood v. Haywood, supra; Leach v. Page, supra; Gurganus v. McLawhorn, supra.* And no sufficient reason appears for contrary holding in the present case which relates to a guardianship. In this connection defendants point to the case of *Moses v. Moses,* 204 N. C., 657, 169 S. E., 273. This case is distinguishable from that in hand. While there the question as to the applicableness of C. S., 135, was debated in briefs filed, apparently the Court was of opinion that the primary purpose of the action was the removal of the guardian, and that the matters of accounting were predicated upon such removal, and decided the case without any reference to the provisions of C. S., 135.

The judgment below is

Reversed.

MELVINA WINGLER AND MINDA C. LONG v. A. R. MILLER AND M. C. WINGLER, ADMINISTRATORS OF N. WINGLER, DECEASED; A. R. MILLER, INDIVIDUALLY, AND T. J. PEARSON AND HARRY PEARSON, SURETIES UPON ADMINISTRATORS' BOND.

(Filed 7 April, 1943.)

1. Trial § 37: Appeal and Error § 39f—

Where a stipulation is entered into by counsel for plaintiffs and defendants that only one issue may be submitted to the jury and the parties waive the submitting of any other issue, on appeal the Court's consideration is limited to those exceptions and assignments of error bearing on the single issue submitted by consent.

2. Trial § 22f: Appeal and Error § 40e—

On motion for judgment of nonsuit the evidence is taken in the light most favorable to plaintiffs, who are entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

3. Executors and Administrators § 21—

In an action by distributees of decedent against his administrators and surviving partner for recovery of money found on decedent's person in his last illness and claimed by his partner, where the evidence tended to show that decedent for many years had carried large sums of money on his person and over six thousand dollars was found on his person at the hospital just before his death, that he had three bank accounts, including the partnership account, motion for judgment of nonsuit was properly denied.

4. Evidence § 28—

In a suit by distributees to recover from administrators and surviving partner money found on the person of intestate and claimed by his partner, the following evidence was not prejudicial to defendants: (1) Of the surgeon who found the money on deceased's person when he entered the hospital, that it was done up in different packages and some of it looked like it had been carried for a long time, especially as this witness was allowed to give similar testimony without objection; (2) of a sister, one of plaintiffs, that decedent carried packages everywhere he went. "They were all around. I never saw what was in them. I don't read and write"; (3) of the other plaintiff, that decedent carried large sums of money on his person for 27 or 28 years and that she saw $4,000 in his possession not long before his death, that he carried the money in pocketbooks and packages; (4) of one plaintiff, a sister, and a justice of the peace, that plaintiffs and decedent owned a boundary of timber which was sold for $2,600 cash, which the justice of the peace saw paid to decedent, and the sister (witness) received $600 for her share—this does not violate the provisions of C. S., 1795.

5. Evidence § 32—

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, is clearly inadmissible under C. S., 1795.

WINGLER *v.* MILLER.

APPEAL by defendants from *Johnson, Special Judge,* at October Term, 1942, of WILKES.

Civil action to recover the sum of $3,197.78 with interest from 15 January, 1940, from A. R. Miller, individually, A. R. Miller and M. C. Wingler, administrators of the estate of N. Wingler, and Harry Pearson and T. J. Pearson, sureties on the aforesaid administrators' bond.

N. Wingler died intestate in Wilkes County, N. C., on 31 December, 1939, leaving as his sole heirs at law and distributees, two sisters, the plaintiffs in this action, Melvina Wingler and Minda C. Long.

On 29 December, 1939, N. Wingler was admitted as a patient to the Wilkes Hospital, in North Wilkesboro, N. C. At the time of his admission he was in a semi-conscious condition. He had on his person various sums of money, in many small packages and in at least three pocketbooks. The money was counted by the chief surgeon of the hospital and amounted to $6,395.57. Thereafter it was turned over to the president of the Bank of North Wilkesboro, who deposited the same to the credit of N. Wingler on 30 December, 1939, in the aforesaid bank.

N. Wingler and A. R. Miller had been partners in a small mercantile business for sixteen years or more. Wingler & Miller had a savings account in the Bank of North Wilkesboro at the time of the death of N. Wingler in the amount of $1,318.08. N. Wingler had a personal savings account in the same bank at the time of his death in the amount of $1,308.71, he also carried a checking account in the Northwestern Bank of North Wilkesboro. The record does not disclose the amount on deposit in this checking account at the time of his death, neither does it disclose whether the account was carried in his name or in the name of the partnership.

A. R. Miller contends that no settlement was ever made between himself and N. Wingler and that the money found on the person of N. Wingler when he entered the hospital belonged to the partnership of Wingler & Miller, and that he is entitled to one-half of said sum, to wit, $3,197.78, being the amount in controversy in this action.

On 15 January, 1940, the aforesaid sum of $6,395.57 was equally divided between A. R. Miller and the estate of N. Wingler. The defendant A. R. Miller alleges and contends said division was made with the approval and consent of the plaintiffs, and alleges they are now estopped to maintain this action for the recovery thereof.

Plaintiffs allege and contend that by reason of fraudulent representations made by A. R. Miller to M. C. Wingler, his co-administrator, the aforesaid sum of $6,395.57 was divided as set forth above, without their knowledge or consent. Plaintiffs offered evidence tending to show that N. Wingler had carried money on his person in packages similar to those found on him at the time he entered the hospital, 29 December, 1939,

for a great many years. Two witnesses for the plaintiffs testified that Mr. Wingler had boarded with them for nearly 16 years prior to his death, and when he came to board with them he carried "certain bags, packages or bulks of something on his person" and continued to do so through the years. They further testified the packages were on his person when he left for the hospital.

Prior to the submission of the case to the jury, counsel stipulated as follows:

"It is stipulated between counsel representing the plaintiffs and counsel representing defendants that the Court may submit the case to the jury on one issue involving the ownership of the fund found on the person of N. Wingler and deposited in the Bank of North Wilkesboro to the account of N. Wingler on or about December 29th, 1939.

"It is further stipulated that if the issue is answered in favor of the plaintiffs, that is to say, if the jury find that N. Wingler was the owner individually of said fund, that such finding shall support a judgment against both defendants as Administrators and against A. R. Miller individually and against both the bondsmen for the amount of $3,197.78, with interest from January 15th, 1940, and the cost.

"It is also stipulated that if the issue is answered in favor of the defendants, finding that the fund did not belong to N. Wingler individually, or that the fund belonged to the partnership of Wingler & Miller, that judgment shall be entered in favor of the defendants.

"It is stipulated that the parties waive the submitting of any other issue or issues arising on the pleadings.

"It is further stipulated that all exceptions taken to the ruling of the presiding Judge by either counsel for the plaintiffs or counsel for the defendants are preserved and the right of either the plaintiffs or the defendants to appeal to the Supreme Court are in no way affected or waived by these stipulations. The one issue submitted by consent, as follows:

"1. Was the fund found on the person of N. Wingler at the Wilkes Hospital the individual property of N. Wingler, as alleged in plaintiffs' complaint?"

The issue was answered in favor of plaintiffs, and from judgment entered thereon the defendants appeal, assigning error.

J. Allie Hayes and Ira T. Johnston for plaintiffs.

Trivette & Holshouser and John R. Jones for defendants.

DENNY, J. The stipulations entered into by counsel for plaintiffs and defendants limit our consideration to those exceptions and assignments of error bearing on the single issue submitted to the jury by consent,

to wit, "Was the fund found on the person of N. Wingler at the Wilkes Hospital the individual property of N. Wingler, as alleged in plaintiffs' complaint?" The question of fraud on the part of A. R. Miller, the alleged mutual settlement between Miller and the estate of N. Wingler, the liability of the bondsmen, the counterclaim of A. R. Miller, etc., discussed in appellants' brief, are eliminated from our consideration by the stipulations of counsel, in the following language: "That the parties waive the submitting of any other issue or issues arising on the pleadings."

Assignments of error numbers 15 and 33 are to the refusal of his Honor to sustain defendants' motions for judgment of nonsuit lodged at the close of plaintiffs' evidence and renewed at the close of all the evidence.

There is but little evidence, one way or the other, as to the ownership of the money found on the person of N. Wingler at the time he entered the hospital. The record, however, does disclose that N. Wingler worked for a lumber company for some time and operated a store for about sixteen years prior to his death; that from 24 October, 1924, until his last illness he boarded with Mr. and Mrs. Jim Wingler, who were not related to him. Mr. and Mrs. Wingler testified that when he came to board with them he carried certain bags, or packages, on his person and continued to do so through the years. They further testified the packages were on his person when he left for the hospital. This and other evidence tends to establish the fact that N. Wingler did carry a substantial sum of money on his person for many years prior to his death. The record further discloses that for many years he had maintained three bank accounts, a checking account in the Northwestern Bank of North Wilkesboro, a savings account in the name of Wingler & Miller and a savings account in his own name in the Bank of North Wilkesboro.

When the evidence in this case is taken in the light most favorable to the plaintiffs, it is sufficient to be submitted to the jury, since the plaintiffs are entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. C. S., 567; *Edwards v. Junior Order,* 220 N. C., 41, 16 S. E. (2d), 466; *Coltrain v. R. R.,* 216 N. C., 263, 4 S. E. (2d), 852; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601; *Cromwell v. Logan,* 196 N. C., 588, 146 S. E., 233; *Brown v. R. R.,* 195 N. C., 699, 143 S. E., 536; *Robinson v. Ivey,* 193 N. C., 805, 138 S. E., 173.

The third exception is to the evidence of Dr. Hubbard, the chief surgeon of Wilkes Hospital, who found the money on the person of N. Wingler, took it out of the various packages and pocketbooks, counted it and turned it over to the president of the Bank of North Wilkesboro. In response to the following question: "What about the way it was done up in different packages, would that indicate it had been carried a

long period of time?" Dr. Hubbard answered: "Some of it looked like it had been carried a long time." The appellants contend this answer was prejudicial and that the witness expressed an opinion upon a point which was a question for the jury. We do not think this evidence prejudicial, especially in view of the fact that the witness was permitted, without objection, to testify about this money as follows: "It was in different pockets, in different packages, and in different pocketbooks. He had, I expect, at least three pocketbooks on him. They were full. It was wrapped up in different dimensions; some of it was old, dry, the edges of it worn out from use. It was practically all bills. The bills were of large denomination, several hundred-dollar bills, I remember. If I remember, they were old style, I wouldn't say most of them, but a lot of them were." This exception cannot be sustained.

Exception number 7 challenges the admissibility of the following evidence of Melvina Wingler on the ground that it is too indefinite and uncertain: "2. Please state whether or not at any time prior to his death during the years you have seen him, if you saw any pocketbooks or packages on or about his person." "A. I saw packages all around. He carried them everywhere he went. I never saw what was in those packages. I don't read and write." In view of the admission of other evidence that for many years N. Wingler did carry numerous packages of money on his person, we do not think this evidence prejudicial to the defendants. If the testimony had been prejudicial, it was negatived by the further statement of the witness that "I never saw what was in those packages."

Exception number 24 is to the admission of the testimony of one of the plaintiffs, Mrs. Minda C. Long, who testified that her brother had carried money, on his person, in small packages for many years. The first time she saw him carrying money this way was 27 or 28 years ago. She further testified that she saw in his possession not long before his death nearly $4,000.00. That he had carried his money in pocketbooks, a cloth purse, and wrapped in paper pokes. While this exception is carried forward in appellants' brief, no reason or argument is stated or authority cited in support thereof, as required by Rule 28 of the Rules of Practice in the Supreme Court, 221 N. C., 563. Therefore, this exception is taken as abandoned. *Bank v. Snow,* 221 N. C., 14, 18 S. E. (2d), 711; *S. v. Gibson, ibid.,* 252; *Brown v. Ward, ibid.,* 344.

Assignments of error numbers 9, 10, 12 and 29 are based on numerous exceptions to the testimony of Mrs. Long, relative to the sale of certain timber, and to the testimony of the justice of the peace before whom the timber deed was acknowledged. The substance of Mrs. Long's testimony was as follows: N. Wingler, Mrs. Melvina Wingler, a sister now dead, and she, owned a boundary of timber. The timber was sold for $2,600.00,

and the witness received $600 for her interest in the timber. The justice of the peace testified that he took the probate of a timber deed when N. Wingler sold some timber. That he saw the money paid over to him and it was $2,600.00; twenty-six packages of $100.00 each.

The evidence of Mrs. Long, relative to the sale of timber, was recited before the jury three times in the course of her testimony, and stricken out each time, and the jury instructed to disregard her testimony as to the sale of timber. The appellants contend that the evidence was inadmissible and by permitting it to be repeated three times, the prejudicial effects thereof could not be cured by instructing the jury to disregard it. These assignments of error cannot be sustained, since this testimony does not disclose a personal transaction or communication between the deceased and the witness about which the witness could not testify by reason of the provision of C. S., 1795. This Court said, in *S. v. Osborne,* 67 N. C., 259: "The plaintiff, it is true, was not competent to prove any transaction between himself and his deceased guardian; but he was competent to prove any other transaction of his guardian. The transaction, in this case, was a sale of property of the plaintiff by his guardian to a third person." Substantive facts of which a witness had knowledge independently of any statement by the deceased, or any transaction with the deceased, are competent and do not come within the inhibitions of C. S., 1795. *Jones v. Waldroup,* 217 N. C., 178, 7 S. E. (2d), 366; *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863; *Ins. Co. v. Jones,* 191 N. C., 176, 131 S. E., 587; *In re Will of Saunders,* 177 N. C., 156, 98 S. E., 378; *Sutton v. Wells,* 175 N. C., 1, 94 S. E., 688. There is nothing in the testimony of this witness that tends to show she gained her information about the sale of her interest in this boundary of timber exclusively through any conversation or transaction with her deceased brother. The substance of the testimony is that she and other members of her family owned a boundary of timber. It was sold to a third party for $2,600.00, and she received $600.00 for her interest. Hence, the defendants have no cause for complaint in connection with the admission of this evidence and the subsequent exclusion thereof.

Assignments of error numbers 18, 19 and 20 are to the refusal of his Honor to permit A. R. Miller to testify concerning his relationship to the copartnership and to relate certain conversations he had with the deceased about the assets of the partnership. The evidence is clearly inadmissible. A. R. Miller is (a) a party to the action, (b) he is interested in the event of the action, and (c) N. Wingler is dead and because his lips are sealed in death Miller is incompetent to testify in his own behalf to any transaction or communication between himself and the intestate. C. S., 1795; *Turlington v. Neighbors,* 222 N. C., 694, 24 S. E. (2d), 648; *Wilder v. Medlin,* 215 N. C., 542, 2 S. E. (2d), 549; *Fenner*

v. Tucker, 213 N. C., 419, 196 S. E., 357; *Walston v. Coppersmith,* 197 N. C., 407, 149 S. E., 381; *Abernathy v. Skidmore,* 190 N. C., 66, 128 S. E., 475.

The remaining exceptions are without merit, or refer to evidence on other issues which were eliminated by the stipulations of counsel.

The case was one for the jury and we find no error that would justify disturbing the verdict.

No error.

LUCY H. FARABOW, INDIVIDUALLY, AND LUCY H. FARABOW, ADMINISTRATRIX OF K. B. FARABOW, v. ELY J. PERRY.

(Filed 7 April, 1943.)

1. Adverse Possession § 4f—

Possession of a widow, to whom no dower has been assigned, is not adverse to the heirs at law of her husband.

2. Estates § 9a: Adverse Possession § 17—

If the life tenant purchases the property at a sale to satisfy an encumbrance, he cannot hold such property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner. Dower is a life estate.

3. Adverse Possession § 9a: Limitation of Actions § 2b—

While a deed will give color of title so as to permit a plea of the statute of limitations by the grantee, even though the grantor is chargeable with fraud, if the grantee accepts the deed in good faith without knowledge of the fraud, actual fraud is neither sanctioned nor cured by the statute of limitations.

4. Adverse Possession §§ 4f, 9a: Limitation of Actions § 2b—

A widow, in possession of lands of which her husband died seized and possessed and in which she is entitled to dower which was never set apart to her, cannot perfect title to the premises in herself by claiming adverse possession under color of title for seven years, where it appears she mortgaged the premises, intentionally defaulted, and purchased the property at her own mortgage sale in order to obtain a deed on which to rely as color of title.

APPEAL by plaintiff from *Thompson, J.,* at November Term, 1942, of LENOIR.

The facts essential to a determination of this cause appear in the following parts of the judgment entered below:

"1. That the said Fred Hardy died intestate in Lenoir County on October 23, 1923, seized and in possession of that certain lot of land situated in the City of Kinston, Lenoir County, North Carolina, and

described in deed by J. A. McDaniel and wife, to Fred Hardy, dated December 7, 1914, and recorded in the office of the Register of Deeds of Lenoir County in Book 46, at page 465. That the said Fred Hardy left surviving him as his sole heirs at law and next of kin a half-brother, James Worthington, and a sister, Sarah Hardy Mason, and his widow, Lucy Hardy. That after the death of the said Fred Hardy, his widow, Lucy Hardy, continued in possession of the said premises, living in the house located thereon without having her dower allotted.

"2. That on April 26, 1929, the said Lucy Hardy, widow, executed and delivered unto A. I. Gross and A. L. Pearson a mortgage deed, upon the said lot of land, to secure certain indebtedness as set forth in said mortgage deed, the same appearing of record in the office of the Register of Deeds of Lenoir County, in Book 106, page 174. That there was a purported foreclosure sale under the power of sale contained in said mortgage deed by said mortgagees on January 3, 1930, at which purported sale the said mortgagor in possession, Lucy Hardy, became the last and highest bidder for said lands, and on January 14, 1930, the mortgagees executed and delivered a purported mortgagees' deed covering and purporting to convey unto her the lot of land in question. Said mortgagees' deed was filed for record in the office of the Register of Deeds of Lenoir County on January 15, 1930, and appears of record in Book 105, page 457. The mortgagees on August 18, 1931, acknowledged the satisfaction of the mortgage on the margin of the record over their signatures.

"3. That on February 1, 1937, the said Lucy Hardy executed and delivered to George B. Greene, Trustee, for K. B. Farabow, a purported Deed of Trust upon the lot of land in question securing a purported indebtedness of $485.00, the same being filed for record on February 2, 1937, and recorded in the office of the Register of Deeds of Lenoir County, in Book 153, page 277.

"4. That the said Lucy Hardy who had continued in uninterrupted possession of the said premises since the death of her husband, Fred Hardy, without her dower having been allotted, died intestate on December 22, 1939, leaving as her heirs at law certain brothers and sisters or issue of such. That one of her brothers, Richard Coley, on January 9, 1940, qualified as administrator of her estate and took possession of the premises in question, by renting the same and collecting the rents, and collected rents until on or about February 2, 1942, when the said administrator, through his attorney, attempted to foreclose the aforesaid deed of trust from Lucy Hardy to George B. Greene, Trustee, and, at said purported foreclosure sale, one, William Whitehead, became the last and highest bidder, and after ten days had elapsed, the said purported purchaser refused to take title under said purported sale. That on the

16th day of February, 1942, the administrator of Lucy Hardy's estate, filed his final account as administrator without taking any further action with respect to the premises in question.

"5. That on February 13, 1942, James Worthington and wife executed and delivered to the defendant, Ely J. Perry, their deed conveying unto him a one-half undivided interest in the premises in question. Said deed being filed for record on February 14, 1942, and recorded in the office of the Register of Deeds of Lenoir County in Book 197, at page 163; and on February 14, 1942, the said Sarah Hardy Mason and husband executed and delivered unto the defendant, Ely J. Perry, their deed conveying unto him a one-half undivided interest in the premises in question, which said deed was filed for record on February 14, 1942, and recorded in the office of the Register of Deeds of Lenoir County in Book 197, page 163. That the said Ely J. Perry, Grantee, in said deeds, took possession of the premises on February 14, 1942, from the administrator of Lucy Hardy, deceased, who had collected rents up to that date, and thereafter the said Ely J. Perry exercised full possession and control of the premises and collected rents, and is now in possession and collects said rents.

"6. That George B. Greene, Trustee in the aforesaid deed of trust from Lucy Hardy to K. B. Farabow, on March 28, 1942, purported to foreclose the premises under said power of sale and at said sale held at the Courthouse door, Lucy H. Farabow, the plaintiff, being the widow and administratrix of K. B. Farabow, deceased, became the last and highest bidder for said lot of land. That prior to said sale, the defendant, Ely J. Perry, delivered to the Trustee and caused to be read a written notice of his claim of ownership of the premises. That George B. Greene, Trustee, on April 15, 1942, executed and delivered unto the said Lucy H. Farabow a Trustee's deed for the premises. Pursuant to the purported sale the Trustee's deed was filed for record in the office of the Register of Deeds of Lenoir County on August 27, 1942.

"7. That after the death of the said Fred Hardy on October 23, 1923, and until the time of her own death on December 22, 1939, the said Lucy Hardy, widow, made no application to have dower assigned to her in the premises nor were any steps taken by anyone else to have such dower allotted and assigned, and no dower was assigned. That at the time of the death of the said Fred Hardy he and the said Lucy Hardy, his wife, resided in the residence on said lot of land, and after his death the said Lucy Hardy continued to reside in the said residence and was in possession of the said lot of land continuously and until her own death and her possession during all of said period was peaceable and undisturbed by any of the heirs at law of the said Fred Hardy, deceased, or anyone claiming under them, and no one except the said Lucy Hardy was in possession or exercised any control of same.

"Upon the foregoing facts and the agreed statement of facts, the Court is of the opinion, and now holds, that the defendant, Ely J. Perry, is the lawful owner and is entitled to the possession of the premises referred to, and, thereupon it is Ordered, Adjudged and Decreed by the Court as follows:

"1. That the defendant, Ely J. Perry, pursuant to the two deeds referred to herein in the findings of fact above set forth, is seized in fee simple and is entitled to the possession as owner of that certain lot of land situated in the City of Kinston, Lenoir County, North Carolina, and bounded as follows: . . .

"2. That the plaintiff, Lucy H. Farabow, owns and holds no interest whatever in said lands by virtue of the Trustee's Deed from George B. Greene to her, hereinbefore referred to in the findings of fact in this judgment, and the plaintiff has no interest therein or right of possession thereto.

"3. That the plaintiff neither individually, nor as administratrix, is entitled to recover any sum whatever of the defendant as rents.

"4. That the defendant is not entitled to recover of the plaintiff, administratrix, any sum whatever as rents paid to said administratrix by the administrator of Lucy Hardy, deceased, prior to the execution of the deeds to the defendant from the heirs at law of Fred Hardy, deceased.

"5. That the Trustees' deed from George B. Greene, Trustee, to Mrs. Lucy H. Farabow, dated April 16, 1942, and appearing of record in the office of the Register of Deeds of Lenoir County in Book ....., page ....., being the same above referred to, is hereby declared void and of no effect and the same is vacated and set aside and ordered canceled of record, and, to that end, it is hereby ordered that a copy of this judgment be certified to the office of the Register of Deeds of Lenoir County. . . ."

Plaintiff appeals from the foregoing judgment and assigns error.

Matt H. Allen and Geo. B. Greene for plaintiff.
R. A. Whitaker and J. A. Jones for defendant.

DENNY, J. Lucy Hardy, widow of Fred Hardy, remained in possession of the lands of which her husband died seized and possessed, and in which lands she was entitled to dower, but which dower was never set apart to her. While she was in possession, as the widow of Fred Hardy, she executed a mortgage deed on the premises, defaulted in the payment thereof, and at the foreclosure sale became the purchaser of the property. Does the deed from her mortgagees to her constitute color of title?

In our opinion a widow, while in possession of the lands of which her husband died seized and possessed, and in which lands she is entitled to

dower, but which dower was never set apart to her, cannot perfect title to the premises in herself by claiming adverse possession under color of title for seven years, where it appears she mortgaged the premises, intentionally defaulted, and purchased the property at her own mortgagees' sale in order that she might obtain a deed on which she could rely as color of title. 2 C. J. S., sec. 170, p. 744; *Bell v. Bell,* 159 La., 460, 105 So., 509.

In this case the widow, not having had dower assigned to her, had nothing to convey at the time she mortgaged the premises, and the mortgagors had nothing to foreclose at the time of the purported foreclosure sale. The mortgagees apparently were the agents of the mortgagor and entered into the arrangement for a foreclosure sale for the sole purpose of defrauding the heirs of the widow's deceased husband out of their inheritance. She mortgaged the premises for $389.75, on April 26, 1929, and paid the mortgagees $400.00 for the property at the foreclosure sale on January 2, 1930. If she had the money to purchase the property for $400.00 at the foreclosure sale, she could have paid off the indebtedness secured by her mortgage without foreclosure, and it was her duty to have done so.

"The courts have consistently held that a deed will give color of title so as to permit a plea of the Statute of Limitations by the grantee, even though the grantor is chargeable with fraud, if the grantee accepts the deed in good faith without knowledge of the fraud. While the matter of fraud is thus considered immaterial by some courts, actual fraud is neither sanctioned nor cured by the Statute of Limitations." 1 Am. Jur., sec. 198, p. 903. A party who acts in bad faith is not protected or benefited by the statute of limitations. *Baker v. Schofield,* 243 U. S., 114, 61 Law Ed., 626.

Even though it should be conceded that the mortgagees' deed under consideration constituted color of title, we do not think the title to the land in controversy was perfected in Lucy Hardy, widow of Fred Hardy. There is nothing in this record to indicate that she entered into possession under this deed adversely to the rightful heirs; but, on the contrary, it is admitted that she was in possession of the lands involved herein after the death of her husband, on 23 October, 1923, until her own death, on 22 December, 1939, and that during said period she was in the peaceable possession of said land, undisturbed by the heirs or anyone claiming under them.

In *Nixon v. Williams,* 95 N. C., 103, in discussing the possession of the widow, the Court, speaking through *Merrimon, J.,* said: "The widow entitled to dower remained upon the land after the death of her husband, and continued to do so several years, but no dower was ever assigned to her. Her possession was not adverse to the wife of the plaintiff, in her

lifetime; indeed, she was in possession under her, and the defendant's presence did not have the effect to prevent the seizin of the plaintiff's wife, or his rights as the husband." The foregoing case was cited in *Atwell v. Shook,* 133 N. C., 387, 45 S. E., 777, and the principle as deduced therefrom stated thusly: "The possession of a widow, to whom no dower has been assigned, is not adverse to the heirs at law of her deceased husband." *Page v. Branch,* 97 N. C., 97; *Everett v. Newton,* 118 N. C., 919, 23 S. E., 961. "In 21 C. J., 942, sec. 74, it is stated: 'If the life tenant purchases . . . the property at a sale to satisfy an encumbrance, he cannot hold such . . . property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner . . . If the life tenant pays more than his proportionate share, he simply becomes a creditor of the estate for that amount.' Again, on the same page, it is stated: 'Neither a life tenant, nor one claiming under him, who allows property to be sold for taxes, or the satisfaction of an encumbrance, . . . can acquire a title adverse to the remainderman or reversioner by purchasing at the sale.' Dower is a life estate. *Holt v. Lynch,* 201 N. C., 404, 160 S. E., 469; *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196." *Creech v. Wilder,* 212 N. C., 162, 193 S. E., 281. Therefore, if the possession is not adverse, her occupancy for more than twenty years would not have perfected title in her. Likewise, a deed, which ordinarily would be color of title, does not draw to the claimant the protection of the statute of limitations where the requisites of adverse possession are not present. 1 Am. Jur., sec. 196, p. 901. *Barbee v. Bumpass,* 191 N. C., 521, 137 S. E., 275; *Clendenin v. Clendenin,* 181 N. C., 465, 107 S. E., 458.

A deed procured by a widow, under the circumstances disclosed in this record, where there is no evidence that the character of her possession was in any manner changed thereby, and no evidence of express notice having been given to the rightful heirs of any intention to claim adversely to them, is insufficient to convert the possession of the widow, which is not adverse to the rightful heirs, into possession adverse to them. 2 C. J., sec. 210, p. 124.

The judgment of the court below is

Affirmed.

R. H. LEACH v. J. M. QUINN AND WIFE, JESSIE B. QUINN, J. O. MILLER AND WIFE, LIZZIE MILLER, J. M. QUINN AND J. O. MILLER, PARTNERS TRADING AS QUINN & MILLER, A PARTNERSHIP, QUINN & MILLER COMPANY, INCORPORATED, W. M. BUNN, AND FARMERS SUPPLY COMPANY OF KINSTON, A CORPORATION; AND J. R. MILLER AND J. O. MILLER, JR., ADMINISTRATORS OF THE ESTATE OF J. O. MILLER, DECEASED.

(Filed 7 April, 1943.)

1. Reference § 3—

A plea in bar is so peremptory as to prevent the plaintiff from further prosecuting his cause with effect and, if established by proof, to destroy the action altogether.

2. Same—

It is well settled in this jurisdiction that a plea in bar will repel a motion for a compulsory reference, and no order of reference should be entered until the issue of fact raised by the plea is first determined.

3. Reference §§ 2b, 8—

Where defendant objects and excepts to an order of compulsory reference, he has the option of appealing at once or of awaiting final judgment to present his exception to the order duly preserved.

APPEAL by defendants from *Thompson, J.*, at November Term, 1942, of LENOIR.

The plaintiff alleges that he was the owner of one-fourth of the capital stock of the Farmers Supply Company of Kinston, Incorporated, and one-fourth interest in the Hudson-Essex Motor Company, a partnership, and that the other three-fourths of the capital stock in said corporation and the other three-fourths interest in said partnership were owned in equal portions by the defendants J. M. Quinn, J. O. Miller and W. M. Bunn, and that he instituted this action to recover of the defendants Quinn and Miller one-fourth interest in the assets owned originally by the said supply company and said motor company prior to the filing of voluntary petitions in bankruptcy by said companies, and transferred to said Quinn and Miller under a parol agreement between plaintiff Leach and defendants Quinn and Miller, and acquiesced in by defendant Bunn.

The plaintiff alleges that the defendants Quinn and Miller entered into a parol agreement with him and defendant Bunn that the assets of the Farmers Supply Company and of the Hudson-Essex Motor Company, transferred and delivered to defendants Quinn and Miller, would be held in trust by them for the purpose of liquidating the amount borrowed by said supply company and motor company to make composition settlement in bankruptcy of the indebtedness of said companies, and that any remaining assets which were not exhausted in paying the amount

borrowed to make composition would be held in trust for the use and benefit of the plaintiff and of the defendants Quinn and Miller, and of defendant Bunn, in accord with their respective stocks and interests in said companies.

The plaintiff further alleges that in pursuance of such agreement he transferred his one-fourth capital stock in the Farmers Supply Company and one-fourth interest in the Hudson-Essex Motor Company to defendants Quinn and Miller, and that the assets of said companies were thereby delivered to defendants Quinn and Miller, and were by them sold, and that compositions with the creditors of the supply company and of the motor company were effected; that the plaintiff Leach and defendant Bunn transferred their respective stocks and interests in said companies, and joined in the transfer of the assets of the supply company and motor company to Quinn and Miller for the purpose of effecting such compositions all under the parol agreement that the transferees, Quinn and Miller, would hold any surplus after such compositions had been made to be distributed so that the plaintiff would receive his proportionate part thereof; and further that defendants Quinn and Miller have refused to account to the plaintiff for his proportionate part of the funds and property which came into their hands under said parol agreement and remained there after the compositions had been effected.

The defendants, except W. M. Bunn, filed answer wherein they denied the material allegations of the complaint, and pleaded in bar of the plaintiff's alleged cause of action the execution and delivery of deeds to Quinn and Miller for certain real estate by the plaintiff and by the Farmers Supply Company and the Hudson-Essex Motor Company, acquiesced in by plaintiff; and further pleaded in bar of the plaintiff's alleged cause of action the acquiescence of the plaintiff in the bankruptcy proceedings of the Farmers Supply Company and of the Hudson-Essex Motor Company; and still in bar of plaintiff's right to recover the defendants pleaded the voluntary petition in bankruptcy filed by the plaintiff, and that any cause of action existing by virtue of such parol trust as is alleged in the complaint accrued to the creditors of the plaintiff and should be administered under the jurisdiction of the bankrupt court; and also in bar of plaintiff's right to recover the defendants pleaded the three years statute of limitations; and the defendants further pleaded in bar of the plaintiff's alleged cause of action the acquiescence of the plaintiff in the transfer of the assets of the Farmers Supply Company and of the Hudson-Essex Motor Company to one C. A. Penick, without divulging any claim which the plaintiff may have had thereto by virtue of a parol contract or otherwise; and, finally, the defendants in bar of plaintiff's alleged cause of action, averred that such parol agreement as is set forth in the complaint would be in violation of the provisions of

the bankruptcy law of the United States, and, therefore, illegal and void, and would preclude the plaintiff's right to maintain an action based thereon.

Reply and amended complaint were filed, as well as a rejoinder which did not materially affect the original allegations of the complaint and answer, except the amended complaint alleged that the defendants Quinn and Miller induced the plaintiff to transfer to them his stock in the Farmers Supply Company and interest in the Hudson-Essex Motor Company "for the purpose of gaining possession of and title to the property of this plaintiff, W. M. Bunn, the Farmers Supply Company of Kinston, a corporation, and the Hudson-Essex Motor Company, a partnership, wrongfully."

The cause came on for hearing at the November Term, 1942, of the Superior Court of Lenoir County, when and where, upon motion of the plaintiff and over objection and exception of the defendants, the court ordered a compulsory reference, without first having disposed of the several pleas in bar of the plaintiff's alleged cause of action. From this order the defendants appealed, assigning error.

J. Faison Thomson, F. E. Wallace, and Sutton & Greene for plaintiff, appellee.

J. A. Jones for defendants, appellants.

SCHENCK, J. Having objected and excepted to the order of compulsory reference entered below, the defendants had the option to appeal at once or to wait final judgment to do so, to present the exception to the order duly preserved. *Lumber Co. v. Pemberton,* 188 N. C., 532, 125 S. E., 119. They have elected to pursue the former course. Hence, we now have presented in this Court the sole question as to whether there was error in making an order of compulsory reference without first determining the pleas in bar made in the answer to the allegations contained in the complaint. We are constrained to hold that the question posed must be answered in the affirmative.

"It is well settled in this jurisdiction that a plea in bar will repel a motion for a compulsory reference, and no order of reference should be entered until the issue of fact raised by the plea is first determined, . . ." *Grimes v. Beaufort County,* 218 N. C., 164, 10 S. E. (2d), 640.

" '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." *Lithographic Co. v. Mills,* 222 N. C., 516, 23 S. E. (2d), 913. The pleas in bar contained in the defendants' answer fall clearly within the definition here set forth.

We do not concur in the position urged by the appellee, that this case falls within a possible exception to the general rule that a plea in bar should be first determined before an order of compulsory reference is made because a reference may divulge facts necessary for the proper decisions of the issues raised by the plea in bar. No facts necessary for the determination of the pleas in bar could be involved in the examination of the long account for which alone the order of reference was made. C. S., 573 (1).

Reversed.

W. M. BUNN v. J. M. QUINN AND WIFE, JESSIE B. QUINN, J. O. MILLER AND WIFE, LIZZIE MILLER, J. M. QUINN AND J. O. MILLER, PARTNERS TRADING AS QUINN & MILLER, A PARTNERSHIP, QUINN & MILLER COMPANY, INC., R. H. LEACH, AND FARMERS SUPPLY OF KINSTON, A CORPORATION; AND J. R. MILLER AND J. O. MILLER, JR., ADMINISTRATORS OF THE ESTATE OF J. O. MILLER, DECEASED.

(Filed 7 April, 1943.)

APPEAL by defendants from *Thompson, J.,* at November Term, 1942, of LENOIR.

J. Faison Thomson, F. E. Wallace, and Sutton & Greene for plaintiff, appellee.

J. A. Jones for defendants, appellants.

SCHENCK, J. This case is practically identical with the case of *Leach v. Quinn, ante,* 27, except that the positions of the plaintiff Bunn and of the defendant Leach in this case are interchanged with that of the plaintiff Leach and defendant Bunn in the former case. What is said in the disposition of the former case is applicable to this case.

The order of compulsory reference entered below is

Reversed.

STATE v. CLYDE GRASS.

(Filed 7 April, 1943.)

1. Criminal Law § 33—

The competency of an alleged confession is a preliminary question for the trial court.

2. Same—

Confessions are to be taken as *prima facie* voluntary, and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary.

3. Same—

In a prosecution for murder, where defendant confessed shortly after the homicide to officers, one of whom was the coroner, such confession is not inadmissible because defendant was not advised of his rights under C. S., 4561, the provisions of which are applicable only to preliminary judicial examinations.

4. Same—

When a confession is admitted in evidence and thereafter defendant testifies that he was drunk when the confession was made to officers, which the officers deny, a verdict of guilty will not be disturbed, no request having been made to strike or withdraw the confession from the consideration of the jury.

5. Homicide §§ 27a, 27c—

In a prosecution for murder a charge to the jury in these words, "and if you find that in shooting and killing the deceased he (accused) did so with premeditation and deliberation, that would constitute murder in the first degree," is not reversible error, when it appears from the charge in its entirety that the court properly instructed the jury in respect to the burden of proof and repeated the instruction several times.

APPEAL by defendant from *Pless, J.*, at October Term, 1942, of CABARRUS.

Criminal prosecutions tried upon indictments charging the defendant, in one bill, with the murder of W. A. Godwin, and in another, with the murder of Annie Lee Stafford, consolidated and tried together, as both homicides arose out of a single occurrence from shots fired in close succession.

The record discloses that the defendant and his wife owned a house in the mill village of Kannapolis, Cabarrus County, the title being vested in them as tenants by the entirety; that the defendant objected to his wife's relatives living with them and had ordered them to leave; that on the night of 1 October, 1942, the defendant came home and asked his wife if her father, W. A. Godwin, was there; that on being informed he was, the defendant went into the room where his father-in-law and his

wife's sister, Annie Lee Stafford, were and opened fire, killing both of them.

There is evidence that the *feme* deceased was shot first, and that a struggle ensued between the defendant and his father-in-law before the latter was shot.

Later that night, the defendant told the officers, one of whom was the coroner of the county, "I went down there to kill them and that is what I done and there is one thing I regret about it, that I didn't kill my wife."

On the trial, the defendant contended that he shot his father-in-law in self-defense, and that his sister-in-law was accidentally hit. He stated that he did not remember confessing the crime and that the confession, if any, was made while he was drunk.

Verdicts: In No. 2326, wherein the defendant is charged with the murder of Annie Lee Stafford, "Guilty of murder in the second degree."

In No. 2326-A, wherein the defendant is charged with the murder of W. A. Godwin, "Guilty of murder in the first degree."

Judgments: In No. 2326, imprisonment in the State's Prison for a period of 30 years not to run concurrently with any other sentence and not to postpone or affect the sentence of death in the other case consolidated herewith.

In No. 2326-A, death by asphyxiation.

Defendant appeals, assigning errors.

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

A. A. Tarlton and J. F. Sossomon for defendant.

STACY, C. J. We have here for determination, (1) the competency or admissibility in evidence of certain alleged confessions, and (2) the correctness of the charge.

The testimony of the officers, relative to statements made by the defendant shortly after the homicides, is challenged on two grounds, first, because the defendant was not cautioned or advised of his rights as required by C. S., 4561, and, second, for that the statements were made by the defendant while he was drunk.

First, in respect of the failure to inform the defendant that he was at liberty to refuse to answer any questions, and that such refusal could not thereafter be used to his prejudice, it is enough to say the provisions of C. S., 4561, are applicable only to preliminary judicial examinations. *S. v. Grier,* 203 N. C., 586, 166 S. E., 595. Here, the questioning of the defendant was not in a judicial proceeding, as was the case in *S. v. Matthews,* 66 N. C., 106, cited and relied upon by the defendant. *Cf. McNabb v. U. S.,* October Term, 1942, decided March 1, 1943.

Second, as to the alleged drunkenness of the defendant when the confessions were elicited, the challenge does not seem to have been made on this ground. It is true, the defendant later testified that he was drunk when questioned by the officers, which the officers denied, but there was no request to strike out the confessions or to withdraw them from the consideration of the jury, as was done in the case of *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643.

The competency of an alleged confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, and the court's ruling thereon is not reviewable on appeal, unless accompanied by some imputed error of law or legal inference. *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821.

It is to be noted the confessions are not assailed for involuntariness. "Unless challenged, the voluntariness of a confession will be taken for granted." *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657. A free and voluntary confession by one guilty of a crime affords testimony of the highest credibility and usually of a character which may be easily verified. On the other hand, open and frank responses by innocent persons arrested under misapprehension are generally powerful aids in securing their prompt discharge from custody. "Confessions are to be taken as *prima facie* voluntary, and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary"—*Dillard, J.,* in *S. v. Sanders,* 84 N. C., 729.

The exceptions in respect of the rulings on evidence are not sustained.

We now turn to the defendant's principal exception, or the one upon which he chiefly relies. In charging the jury, the court used this expression: ". . . and if you find that in shooting and killing the deceased Godwin he did so with premeditation and deliberation, that would constitute murder in the first degree." The vice in this instruction, so the defendant contends, is that it incorrectly states the intensity of proof required to show the elements of premeditation and deliberation in a capital case. If the instruction stood alone, there might be substance to the exception. However, it appears from a reading of the charge in its entirety, that the court properly instructed the jury in respect of the burden of proof, and repeated the instruction several times. The State was required to prove the case in all of its elements "beyond a reasonable doubt," the degree of proof required in a criminal prosecution. *S. v. Schoolfield,* 184 N. C., 721, 114 S. E., 466. The *quantum* of proof was correctly stated in a number of instances. "An exception of this sort must be considered in connection with the entire charge and is not to be determined by detaching clauses from their appropriate setting"—*Adams, J.,* in *S. v. Ellis,* 203 N. C., 836, 167 S. E., 67. The charge is to be

construed contextually. *S. v. Lee,* 192 N. C., 225, 134 S. E., 458. So interpreted, the present charge appears to be free from successful challenge. *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360.

The remaining exceptions are equally resolvable in favor of upholding the trial, a course we are enjoined to pursue in balancing the scales between the State and the individual.

The jury rejected the defendant's plea of self-defense, which was mildly supported by the defendant, and strongly contradicted by the State's case. After arming himself with a gun, the defendant says, "I went over there to run him off," meaning that he went with a gun to run his father-in-law away from his home. This was in the middle of the night, about 2:00 a.m. The deceased was in bed at the time. Defendant says: "I woke him up and told him to get up and get his clothes on, he was getting out of there. When I called him he kinder raised up off his pillow on his elbows. . . . He scooped the covers all at once and came after me. . . . He was reaching for the gun barrel when I shot him. . . . Mrs. Stafford was shot some time during the wrestle, a few seconds after her daddy got hold of the gun."

The defendant admitted on cross-examination that he had been indicted 12 or 15 times, and that he had served three road sentences, one for whiskey, one for assaulting his wife, and the last for manufacturing whiskey. "I haven't missed a day for the last six months drinking." However, it was not contended that the defendant was drunk at the time of the shooting. He says he took several drinks after the shooting and was drunk when he made the statements to the officers, albeit the officers failed to detect any drunken condition. The case presented was largely one of fact determinable alone by the trial court and the jury.

No reversible error has been made to appear, hence the verdicts and judgments will be allowed to stand.

No error.

IN RE WILL OF B. F. COOPER, DECEASED.

(Filed 7 April, 1943.)

Wills § 22: Appeal and Error § 38—

Upon filing a caveat to a will the burden of showing reversible error is upon caveators, and verdict and judgment will not be set aside for harmless error or for mere error and no more. To accomplish this result, it must appear not only that there is error, but also that it is material and prejudicial, amounting to a denial of some substantial right.

APPEAL by caveators from *Burney, J.,* at August Term, 1942, of DUPLIN. No error.

IN RE WILL OF COOPER.

This was a proceeding to probate the will of B. F. Cooper, deceased. Caveat was filed by the children of the decedent by a former marriage, alleging that the paper writing propounded was not the last will and testament of the decedent, for that its execution was procured by undue influence, and that at the time of its execution B. F. Cooper did not have sufficient mental capacity to make a will.

In the Superior Court, upon issues submitted, the jury returned the following verdict:

"1. Was the paper writing propounded, dated the 21st day of October, 1927, executed by B. F. Cooper according to the formalities of the law required to make a valid last will and testament? Answer: Yes.

"2. At the time of signing and executing said paper writing, did the said B. F. Cooper have sufficient mental capacity to make and execute a valid last will and testament? Answer: Yes.

"3. Was the execution of said paper writing propounded in this cause procured by undue influence, as alleged? Answer: No.

"4. Is the said paper writing referred to in issue No. 1, propounded in this cause, and every part thereof, the last will and testament of B. F. Cooper, deceased? Answer: Yes."

From judgment on the verdict declaring the paper writing propounded to be the last will and testament of B. F. Cooper, deceased, the caveators appealed.

Beasley & Stevens and R. D. Johnson for propounders.
Sutton & Greene and J. A. Jones for caveators.

DEVIN, J. B. F. Cooper was thrice married. As fruit of the first marriage six children were born. The second marriage ended in a divorce, without children. In 1916, when he was 59 years of age, he married his third wife, Macy Cooper, who was then 15 years old. Of the last marriage three children were born, two of them now under the age of 21 years.

In 1927 he executed what purported to be his last will and testament, wherein he devised the bulk of his estate, consisting of real and personal property, to his wife Macy and her three children. In the will he explained his reasons for the apparent discrimination between his older and younger children.

In August, 1941, B. F. Cooper died. The paper writing purporting to be his will was offered for probate by the corporate executor therein named, and the six children of his first marriage filed a caveat attacking the validity of the will on the ground of mental incapacity and undue influence. On the trial the verdict was against the caveators, and the will was established in solemn form.

The counsel for caveators, in the zealous effort to protect the interests of their clients, noted numerous exceptions to the rulings of the court below in the admission of testimony and to the instructions to the jury, and have brought forward in their appeal thirty-nine assignments of error, but upon an examination of these we are unable to find any of sufficient moment to warrant a new trial. The case seems to have been fairly tried. Fifty-nine witnesses were examined. From a consideration of the testimony thus adduced, and under a charge free from error, the triers of the facts concluded that at the time of the execution of the will in 1927 B. F. Cooper had sufficient mental capacity, as defined by the court, to dispose of his property by will, and that its execution was not procured by undue influence. The evidence was fully sufficient to support these findings.

The burden of showing error was upon appellants. In order to warrant a new trial it must be made to appear that the rulings of the trial court have injuriously affected the appellants' cause in some material respect, and that the jury was probably misled thereby. As was said in *Wilson v. Lumber Co.*, 186 N. C., 56, 118 S. E., 797, "Verdicts and judgments are not to be set aside for harmless error or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right." *Collins v. Lamb*, 215 N. C., 719, 2 S. E. (2d), 863; *R. R. v. Thrower*, 217 N. C., 77 (82), 6 S. E. (2d), 899; *S. v. Wray*, 217 N. C., 167, 7 S. E. (2d), 468; *Caldwell v. R. R.*, 218 N. C., 63 (71), 10 S. E. (2d), 680.

Without undertaking to discuss *seriatim* appellants' numerous assignments of error, an examination of each of these, in connection with the entire record, leaves us with the impression that the verdict and judgment should not be disturbed.

No error.

FINNIE DAVIS v. RUBY LEE HOWARD DAVIS.

(Filed 7 April, 1943.)

1. Deeds § 2a: Insane Persons § 11—

The law presumes every person sane in the absence of evidence to the contrary. Likewise, after a person is found to be mentally incompetent there is a presumption that the mental incapacity continues.

2. Same—

Where a plaintiff sues to cancel his deed and alleges and offers evidence of mental incapacity to make the deed, it is necessary in order to maintain the action to allege and prove a restoration of his mental capacity.

3. Same—

Mental capacity required for the valid execution of a deed is the ability to understand the nature of the act in which the party is engaged and its scope and effect, or its nature and consequence; not that he should be able to act wisely or discreetly, nor to drive a hard bargain, but that he should be in such possession of his faculties as to know at least what he is doing.

4. Deeds § 2c—

A grantor in a deed, except in cases of fraud, mistake, or undue influence, will not be permitted to contradict the terms of his written deed.

5. Deeds § 2a: Estoppel § 1—

If the plaintiff is mentally competent to assert his rights and protect his interest at the present time, and there has been no change in his mental capacity since he executed the deed in question, he is estopped from challenging the validity thereof.

APPEAL by defendant from *Burney, J.*, at September Term, 1942, of LENOIR.

Civil action to cancel certain deeds.

1. The plaintiff and defendant were married in September, 1935, and thereafter lived together as husband and wife until some time in September, 1939.

2. Prior to his aforesaid marriage, the plaintiff was the owner in fee simple, subject to the life estate of his father, George W. Davis, of a 23.25 acres tract of land, situate in Lenoir County, N. C.

3. On 19 October, 1938, the plaintiff and his wife, the defendant, executed a deed conveying the aforesaid premises to Paul LaRoque. Paul LaRoque, by deed bearing the same date, conveyed the premises to Finnie Davis and Ruby Lee Howard Davis, his wife, as tenants by the entirety. Both deeds were duly recorded in the office of the Register of Deeds of Lenoir County, N. C., on 22 October, 1938.

4. Plaintiff brings this action to set aside and cancel the aforesaid deeds. He alleges that the defendant obtained execution of said deeds by undue influence and that he, the plaintiff, did not possess sufficient mental capacity to make and execute a deed on 19 October, 1938.

5. The pertinent issues submitted to the jury, and the answers thereto, are as follows:

"Did the defendant obtain the execution of the deed from Finnie Davis and Ruby Lee Davis to Paul LaRoque and from Paul LaRoque to Finnie Davis and Ruby Lee Davis, dated October 19, 1938, by undue influence, as alleged in the complaint? Answer: No.

"Did Finnie Davis possess sufficient mental capacity to make and execute the deed from Finnie Davis and Ruby Lee Howard Davis to Paul LaRoque, dated October 19, 1938? Answer: No."

Whereupon judgment was entered setting aside and declaring null and void the deeds referred to herein. Defendant appeals, assigning error.

R. A. Whitaker for plaintiff.
J. A. Jones for defendant.

DENNY, J. The verdict of the jury in this case eliminates a consideration of fraud or undue influence. Plaintiff's case rests on the allegation and evidence offered in support thereof to the effect that at the time of the execution of said deeds, plaintiff did not possess sufficient mental capacity to make and execute the same or to know and understand the nature and extent of his acts. In the case of *Lamb v. Perry,* 169 N. C., 436, 88 S. E., 179, this Court said: "The mental capacity required for the valid execution of a deed is the ability to understand the nature of the act in which the party is engaged and its scope and effect, or its nature and consequences—not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. . . . A want of adequate mental capacity of itself vitiates the deed, while mere mental weakness or infirmity will not do so, if sufficient intelligence remains to understand the nature, scope, and effect of the act being performed."

The law presumes that every person is sane in the absence of evidence to the contrary. Likewise, after a person has once been found to be mentally incompetent there is a presumption that the mental incapacity continues.

When the grantor in a deed brings an action to set aside and cancel his deed and alleges and offers evidence tending to prove that at the time of the execution of the deed he did not have sufficient mental capacity to make a deed or to know and understand the nature and extent of his acts, it is necessary in order to maintain the action in his own behalf to allege and prove a restoration of his mental capacity; otherwise, he is presumed to be incompetent to bring the action. It will be noted that in the case of *Lamb v. Perry, supra,* the action was brought by a next friend.

A grantor in a deed, except in cases of fraud, mistake or undue influence, will not be permitted to contradict the terms of his written deed. *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028.

If the plaintiff is mentally competent to assert his rights and protect his interest at the present time, and there has been no change in his mental capacity since he executed the deed in question, he is estopped from challenging the validity thereof. *Gaylord v. Gaylord, supra.*

The judgment of the court below is

Reversed.

STATE v. JAMES UTLEY.

(Filed 14 April, 1943.)

1. Constitutional Law § 28—

The constitutional right of the accused in a criminal prosecution, to be informed of the accusation against him and to confront his accusers and witnesses with other testimony, carries with it, not only the right to face one's "accusers and witnesses with other testimony," but also the opportunity fairly to present one's defense.

2. Criminal Law § 44—

A motion for continuance, in a criminal prosecution, is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review on appeal, except in a case of manifest abuse.

3. Constitutional Law § 28: Criminal Law § 44—

In a prosecution for murder, where accused moved for a continuance on account of the absence of material witnesses, stating what the witnesses' testimony would be, and the solicitor admitted that the witnesses would testify as stated and the court denied the motion for continuance, specifically and in detail instructing the jury to consider that the witnesses had so testified and to give this evidence consideration just as if the witnesses had been present in court and testified for defendant, there is no denial of defendant's constitutional right.

4. Criminal Law § 48c—

Where the court sustains an objection to a question asked a defense witness, in a criminal case, and the record fails to show what the witness would have answered, no error is shown and the ruling must be sustained.

5. Homicide § 27b—

In a prosecution for murder, where the killing is not denied and where defendant pleaded self-defense and took the stand and testified that he was attacked by deceased, the court's charge as follows was not erroneous—"to create manslaughter the defendant, and not the State, has the burden of showing there was no malice; and if he would be entirely absolved, he must go further and establish that the killing was not unlawful, that is, that it was done in self-defense."

6. Homicide § 1—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

7. Homicide §§ 6a, 6b, 16—

The intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. And upon proof or admission of an intentional killing, the burden is on the defendant to show to the satisfaction of the jury facts and

circumstances sufficient to reduce the homicide to manslaughter or to excuse it.

8. Criminal Law § 53a: Trial § 29a—

A charge is to be construed contextually and not by detaching clauses from their appropriate setting.

9. Criminal Law § 65—

Where, in a prosecution for murder, the indictment, evidence and verdict correctly described the person killed as "Cora Lee Utley," which is the correct name, while the judgment in the case reads "one Carrie Lee Utley," this discrepancy comes within the rule of *idem sonans* and is not a fatal variance.

APPEAL by defendant from *Pless, J.*, at October Term, 1942, of MONTGOMERY.

Criminal prosecution upon two indictments, charging defendant in No. 731 with murder of Cora Lee Utley and in No. 732 with murder of J. T. Collins, consolidated by consent for purpose of trial and tried together. (See *S. v. Grass, ante,* 31.)

Upon the trial below the State offered evidence tending to show that on morning of 24 July, at time homicide in question occurred, "a picking crew," composed of Cora Lee Utley, age 24 years, wife of defendant, J. T. Collins, age 21 years, brother of Cora Lee Utley, Willa Meta Pugh, age 18 years, Elco Covington, who married niece of Cora Lee Utley, and perhaps others, under C. A. Campbell as foreman, were picking peaches at the Montgomery Orchard; that the defendant, armed with a butcher knife, the blade of which was 12 to 14 inches long, came into the orchard and approached "the crowd"; that J. T. Collins asked defendant if he wanted a job, to which defendant replied, "No, I believe not," "No," or "No, there isn't enough of them for me," as variously stated by witnesses, and that defendant immediately assaulted J. T. Collins, and then Cora Lee Utley, inflicting wounds from which they died.

Elco Covington, as witness for the State, described the occurrence in this manner: "I saw James Utley come down one of the peach rows toward where the crowd was picking. Cora Lee was picking and J. T. and the other girl was picking another row above them. J. T. moved up to the other side and asked James Utley if he wanted a job. Utley said, 'No, I believe not.' Then J. T. moved to another tree. James, the defendant, walked from the tree he was at and did like that and walked by J. T. like he was going to back up, and when he did he grabbed J. T. in the back of his belt and stabbed J. T. in the side with a butcher knife . . . in the right side, and if J. T. was doing anything or saying anything, I did not hear it. . . . J. T. went across the orchard. I saw him catch the pick-up. He was bleeding in the side. I did not see him any more. James pulled around the tree and went to his wife, Cora Lee.

Cora Lee ran to Mr. Campbell, and he ran after her. She tripped and fell, and when she did, I seen James stab her through her arm with a butcher knife. He ran 12 or 15 feet after Cora Lee. . . . I next saw her standing up and James had walked off and she said he had killed her and fell back on the peach tree. . . . I heard him (defendant) ask Mr. Alex Campbell if she was dead and he told him Yes. He said if she wasn't he was going to finish her. Mr. Alex caught him on the shoulder and told him not to do that, he had done enough. Cora Lee did not strike at the prisoner at the time he stabbed her, and had no weapon in her hand, and I did not see any weapon in J. T. Collins' hand. Cora Lee died under the peach tree in about twelve minutes after she was stabbed. . . . James made no effort to render any assistance after he stabbed her. . . . I was about 18 feet away when James caught J. T. and about 12 feet when he caught Cora Lee. . . . I did not see J. T. pull a knife from his pocket and did not see James get cut on the thumb."

Willa Meta Pugh, also witness for State, gives this version: "I was in the orchard and saw James when he walked in the field. He stood in the row opposite the tree where we were picking, and J. T. asked him if he wanted a job, and James said No. When J. T. turned his back James grabbed him and stabbed him one time. He pulled the knife out of Collins and ran over to where his wife was; then he chased her around the tree and she fell, or he knocked her down, and then he stabbed her five or six times while she was on the ground. She did not say anything. . . . James did not say anything after he stabbed his wife; he left and went down behind the pick-up. He came back after she fell and wanted to know whether she was dead or not. He asked Mr. Campbell . . . said if she wasn't he was going to finish her. Cora Lee was not quite dead . . . she died a few minutes later. J. T. Collins left after he was stabbed. . . . Collins did not attempt to do anything to James, and I did not see Collins have any weapon. When James stabbed his wife . . . she had no weapon and I heard him say nothing prior to time he stabbed her. . . . I was standing between J. T. and Cora Lee and saw James when he struck at J. T. J. T. had nothing in his hand; I could have seen it if he had had one."

C. A. Campbell, also witness for State, gave this narrative of the occurrence: "I saw James walking in the field . . . James said 'You are picking peaches?' I said 'Yes.' He said, 'They are right pretty.' I said 'Yes.' He said 'What kind are they?' I said, 'Elbertas.' I was very close to him at the time. Someone asked him if he did not want a job. He said, 'No, there isn't enough of them for me.' Cora Lee came running around me and James ran against me running. I said, 'Here, don't do that, don't do that.' She ran in front of me and stumbled and fell face foremost. She rolled over right quick and he ran and dropped

down on her with his knee on her and stabbed her one time through the right arm, and then . . . I saw him stab her five times. J. T. ran around there and grabbed up a peach basket with about a gallon of peaches and hit James with it, and James jumped up and said, 'I will finish you.' They ran out 18 feet away and J. T. grabbed a peach limb off a dead peach tree and struck at James. At this time my son-in-law came by on a pick-up and J. T. caught the back end and went off. James ran the pick-up down the field 35 or 40 yards and then he turned around and came walking back to where I was standing. 'Cap, I am sorry I done it, but I had to do it,' he said, 'those damn Collins' have been running over me for the last ten years.' I said, 'James, you have done the wrong thing.' He said, 'Do you know where I can get the law?' I said, 'They will be here in a few minutes.' He said, 'I will walk on down and wait for them.' He said, 'If she ain't dead, I will finish her.' I said, 'James, you have done plenty.' . . . I didn't see what occurred between J. T. and James before he got to his wife. I had my back to them, and I did not hear anything at all except what James said to me. . . . James was arrested about 500 yards from where the killing took place. So far as I know, he made no effort to get away."

Sheriff Bruton, who arrested defendant, described the wounds on the body of Cora Lee Utley as "one at the shoulder, three cuts in the right arm, one right above the hip, two stabs in the back a little to the right of the backbone that were to the hollow . . . seven . . . altogether," and those on the body of J. T. Collins, as "one cut across the stomach about 6 inches long that went to the hollow"; and "a stab wound on the right side of the stomach; it went to the heart. They appeared to have been made with a knife."

On the other hand, defendant, after testifying that he married Cora Lee Collins in 1934, that he had been assaulted and threatened by J. T. Collins on several occasions; and that on the night before the homicide he upbraided his wife for her conduct with a man, whom he saw that night but did not know, related this story of happenings on the night before and at the time of the homicide: "I shaved and went back to my wife's father's house. They were all sitting on the porch. When I sat down on the porch, J. T. got up and went through the house and asked what was that I put in the water bucket. I told him I hadn't been in the house. J. T. had a double-barrel gun and I told him I had not been in the house. I was pleading for my life, and his sister told him that I had not been in the house and was pleading for my life. His sister took it away from him and later on that night they went to bed. I stayed on the porch until about 3 o'clock. J. T. took the gun in the room with him and slept with it across his bed. I was frightened and did not sleep. The next morning my wife asked me to come to the

peach farm where she was so that we might talk this thing over, and the next morning I went to the peach orchard where they were. I admit being afraid of J. T. I went there with the intention of apologizing to J. T. and to get my wife so that we could live together. I didn't go there with the intention to kill or hurt anybody. I had never had that in mind. . . . When I got to the farm J. T. asked me if I wanted a job. I told him there was not enough to pick. I said: 'J. T., I come to apologize to you about drawing a gun on me.' He said, 'Tonight you won't only get it drawn on you, you will get shot.' I was afraid of him, to tell you the truth about it. I grabbed him with this hand (indicating). He ran his right hand in his pocket and made a swipe at my neck with a knife. I grabbed his hand and he split my finger. . . . When he cut me on the finger, I cut him. When I looked around, my wife was coming at me with a peach bag drawing back like that (indicating). I do not know whether she meant to hit me or not. At that time I guess I was a little madder than I should have been. I don't know how many times I cut her—and then I went on down the road and sat down. I went . . . and got a cloth and wrapped my thumb up." Then on cross-examination, defendant continued: "I have been cooking . . . in Greensboro . . . I came back with the intention to take my wife. Me and my wife had a big argument the night before and I slept across the bed. She left the house about 8 o'clock and I left . . . about 10 o'clock. She didn't strike me with anything, but when I turned around, she was in arm's reach with a peach bag drawed back. . . . I got the knife on the porch at Robert Collins' (father of Cora Lee, at whose home he had spent the night), . . . I was not drinking. I am right-handed and the only wound J. T. inflicted on me was a nip on my left thumb. When I grabbed J. T. in the breast he ran his hand in his right-hand pocket and had a switch-blade knife and made a sweep at me. I took this hand and blocked the knife. J. T. weighed about 160 pounds . . . I weigh 190 pounds. I am about 6 feet 2 inches tall and J. T. was about 5 feet 10 inches."

Sheriff Bruton, recalled as witness for defendant, stated: "At the time I took the defendant in custody he had a cut on his hand. I brought him to Troy and got Dr. Harris to fix it up," and defendant testified that "Dr. Harris put four stitches in it."

When the case was called for trial it appeared that defendant had issued subpœnas to Hoke County for two men, and to Scotland County for another, by whom he proposed to show his good character, and a subpœna to Scotland County for Ben Leach, "who would be offered for the purpose of showing threats made for this defendant's life by J. T. Collins, one of the deceased, and also to corroborate the defendant's testimony that defendant on one occasion came to Ben Leach's home

stating that he wanted to spend some time and get away from J. T. Collins, who was threatening to kill him." Whereupon, the solicitor stated that he would admit the witnesses, if present, would testify that the defendant's character was good, and that Ben Leach, if present, would testify in corroboration with the defendant's statement, "without admitting the truth of any statement made by any other witness." Thereupon, it appearing that subpœnas were issued for the witnesses referred to a week before the date of trial, and that the defendant had been in custody since 24 July, the court declined to grant a continuance. Exception No. 1 by defendant. And before the close of defendant's case, the court specifically and in detail instructed the jury in accordance with the agreement of the solicitor—that the jury should consider that the witnesses had so testified, and that the jury should consider same as evidence for defendant just as if the witnesses had been present and testified in court. This constitutes defendant's Exception No. 4.

Verdict: "That the defendant is guilty of murder in the first degree in both counts."

Judgment: In case in which defendant was "indicted, tried and convicted . . . of the murder in the first degree of one Carrie Lee Utley": Death by asphyxiation.

In case in which defendant was "indicted, tried and convicted . . . of the murder in the first degree of one J. T. Collins": Death by asphyxiation.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Bradley Welfare and Malcolm McQueen for defendant, appellant.

WINBORNE, J. Careful consideration of the several exceptive assignments, upon which defendant relies on this appeal, fails to show cause for disturbing the judgments in the trial below.

The first assignment relating to the refusal of the court to grant motion for continuance on account of absence of material witnesses, and the fourth relating to the court stating to the jury the agreement that the jury should consider as evidence what the absent witnesses would testify, if present at the trial, may be considered together. Defendant contends that although generally the matter of a continuance is addressed to the sound discretion of the court, the refusal of continuance in this case denied to him his constitutional right in a criminal prosecution to be informed of the accusation against him and to confront his accusers and witnesses with other testimony. North Carolina Constitution, Article I, section 11. He relies upon *S. v. Whitfield*, 206 N. C., 696, 175

S. E., 93, 293 U. S., 556, 55 S. C., 658, 79 L. Ed., 658, where denial of petition for writ of *certiorari* is recorded, of which notation appears in 207 N. C., 878. In that case it is stated that "the rule undoubtedly is, that the right of confrontation carries with it not only the right to face one's 'accusers and witnesses with other testimony' (sec. 11, Bill of Rights), but also the opportunity fairly to present one's defense"; . . . that "a right observed according to form, but at variance with substance, is a right denied," citing cases, among others, *Powell v. Alabama,* 287 U. S., 45; and "that a reasonable time for the preparation of a defendant's case should be allowed counsel appointed by the court to defend him commends itself, not only as a rule of reason, but also as a rule of law, and is so established by the decisions." But, continuing, the Court there said: "On the other hand, it is equally well established in this jurisdiction that a motion for a continuance is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review on appeal, except in a case of manifest abuse," citing *S. v. Lea,* 203 N. C., 13, 164 S. E., 736; *S. v. Banks,* 204 N. C., 233, 167 S. E., 851, and other cases.

Applying these principles to the case in hand, we cannot say, as a matter of law, that, in denying the motion for continuance, the court took from defendant his constitutional right of confrontation. To the contrary, it appears that the court, through the agreement of the solicitor, went far in giving defendant the benefit of what the absent witnesses would have testified if present. In absence of a clear showing of error, the exception must be overruled. See *S. v. Whitfield, supra,* and cases cited.

Exception is taken to the ruling of the court in sustaining objection by State to this question asked the witness Ross: "Did you ever hear J. T. Collins threaten the life of the defendant?" If this question were proper, the record fails to show what the witness would have answered. Hence, the ruling of the court must be sustained, as no error is shown. *S. v. Thomas,* 220 N. C., 34, 16 S. E. (2d), 399, and numerous other cases.

Other assignments relate to the charge.

The court, in defining murder in the first degree, murder in the second degree, and manslaughter, instructed the jury that "it is the law of this State, . . . that where one admits or it is proven that he has killed another with a deadly weapon, then that raises a presumption of murder in the second degree, that is, it raises a presumption that one has killed unlawfully and that it was done with malice, and from there on, to create murder in the first degree, the State must establish premeditation and deliberation. To create manslaughter, the defendant, not the State, has the burden of showing that there was no malice, in which event it is

reduced to manslaughter; and if he would be entirely absolved, he must go further and establish that the killing was not unlawful, that is, that it was done in self-defense."

Defendant challenges the correctness of the last sentence of this instruction, that is, the sentence beginning with the words "To create manslaughter," contending that under the law defendant has no such burden, and citing as authority the case of *S. v. Howell,* 218 N. C., 280, 10 S. E. (2d), 815. The *Howell case, supra,* is distinguishable from case in hand in factual situation. There the defendant, upon being arraigned, entered a plea of not guilty, and did not testify in his own behalf or offer any other witness. The law as discussed there must be read in the light of the facts in that case. "The law discussed in any opinion is set within the framework of the facts of that particular case." *Barnhill, J.,* in *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10. In the present case, while he pleaded not guilty, defendant testified in his own behalf and stated that when J. T. Collins "cut me on the finger, I cut him," and that "when I looked around my wife was coming at me with a peach bag, drawing back like that. . . . At that time I guess I was a little madder than I should have been. I don't know how many times I cut her." Moreover, it is not contended that J. T. Collins and the wife of defendant did not die as result of the wounds intentionally inflicted by defendant with a butcher knife; nor is there any contention that the deaths were accidental. On the contrary, defendant pleads self-defense.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. These definitions of murder in the first degree, murder in the second degree and manslaughter are too firmly imbedded in the law to require citation of authority. Moreover, the law is well established in this State that the intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. And when this implication is raised by an admission or proof of the fact of an intentional killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it. *S. v. Capps,* 134 N. C., 622, 46 S. E., 730; *S. v. Quick,* 150 N. C., 820, 64 S. E., 168; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *S. v. Debnam,* 222 N. C., 266, 22 S. E. (2d), 562.

In the *Keaton case, supra,* the rule is stated in this manner: "If a defendant who has intentionally killed another with a deadly weapon would rebut the presumption arising from such showing or admission, he must establish to the satisfaction of the jury the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or which will excuse it altogether on the ground of self-defense, unavoidable accident or misadventure."

Therefore, when in the light of these principles, applied to the facts in the present case, that portion of the charge to which the exception relates, is read in connection with that which immediately precedes, there is no error. "An exception of this sort must be considered in connection with the entire charge and is not to be determined by detaching clauses from their appropriate setting," *Adams, J.,* in *S. v. Ellis,* 203 N. C., 836, 167 S. E., 67. "The charge is to be construed contextually," *Stacy, C. J.,* in *S. v. Grass, ante,* 31, citing *S. v. Lee,* 192 N. C., 225, 134 S. E., 458.

Applying this principle to the present case it is true that, in that portion of the charge immediately preceding that to which the exception is directed, the word "intentionally" does not appear before the word "killed" in the clause "that where one admits or it is proven that he has killed another with a deadly weapon," upon which the presumption of murder in the second degree arises. But, as the correctness of the portion to which exception is taken is predicated upon that which precedes, that which precedes must be a correct charge. Nevertheless, as it is not here contended that the deaths of the deceased persons were accidental, and as defendant admits the cutting and resultant deaths, and pleads self-defense, that the cutting was intentional is apparent, and, hence, there is no error, *S. v. Debnam, supra,* for which a new trial can be ordered.

There are other exceptions to excerpts from the charge, which standing alone may be subject to challenge, but, as in the foregoing, when severally read in connection with the portion of the charge immediately preceding, or immediately following, each, as the case may be, that is, construed contextually, they are free from error. To treat them *seriatim* would be mere repetition.

It is proper to point out, however, that, while no objection is taken, and no exception is directed thereto, a discrepancy appears upon the face of the record. In case Number 731 defendant is charged with the murder of one Cora Lee Utley, and the judgment in that case reads, "James Utley, you have been indicted, tried and convicted by a jury of your county of the murder in the first degree of one Carrie Lee Utley, etc." Nevertheless, the evidence in the record shows that the real name of the murdered woman, wife of defendant, is Cora Lee Utley as named in the

indictment. Furthermore, the record shows that the court, in its charge to the jury, referring to the indictment and to the evidence, gives her name as Cora Lee Utley. And the verdict of the jury is "that the defendant is guilty of murder in the first degree in both counts"—one of the counts being the charge of the murder of one Cora Lee Utley. Manifestly, there is no uncertainty in the identity of the person. Therefore, the name as used in the judgment comes within the rule of *idem sonans* and is not a fatal variance. For cases in which, upon identity being established, the principle has been applied in this State, see *S. v. Upton*, 12 N. C., 513, "Anne" and "Anny"; *S. v. Patterson*, 24 N. C., 346, "Deadema" and "Diadema"; *S. v. Houser*, 44 N. C., 410, "William Michaels" and "William H. Michal"; *S. v. Johnson*, 67 N. C., 55, "Susan," "Susanna" and "Susie"; *S. v. Lane*, 80 N. C., 407, "J. B. Runkins" and "J. B. Rankin," and "Dulks & Helker" and "Helker & Duts"; *S. v. Covington*, 94 N. C., 913, "Hawood" and "Haywood"; *S. v. Hare*, 95 N. C., 682, "Willis Fain" and "Willie Fanes"; *S. v. Collins*, 115 N. C., 716, 20 S. E., 452, "Major Vass" and "Major Vase"; *S. v. Hester*, 122 N. C., 1047, 29 S. E., 380, "Thomas R. Robertson" and "Thomas Robertson"; *S. v. Drakeford*, 162 N. C., 667, 78 S. E., 308, "Lila Hatcher" and "Liza Hatcher"; *S. v. Chambers*, 180 N. C., 705, 104 S. E., 670, misspelling of Tolbert; *S. v. Donnell*, 202 N. C., 782, 164 S. E., 352, "R. B. Andrews" and "R. B. Andrew"; *S. v. Whitley*, 208 N. C., 661, 182 S. E., 338, "Cannon Mills Company" and "Cannon Mills"; *S. v. Dingle*, 209 N. C., 293, 183 S. E., 376, "Gernie Williams" and "Germie Williams"; *S. v. Reynolds*, 212 N. C., 37, 192 S. E., 871, "Oakes Clement" and "Okes Clement"; *S. v. Vincent*, 222 N. C., 543, 23 S. E. (2d), 832, "Vincent" and "Vinson."

The setting under which the homicides were committed, as revealed by the evidence, lends little, if any, support to defendant's plea of self-defense. Yet the court fairly presented the question, and gave to defendant full benefit of the principle. The jury, however, were not satisfied, and rejected the plea. Moreover, there is strong evidence to support the verdicts of murder in the first degree. No reversible error appears on this record. Hence, in the judgments below we find

No error.

GENERAL AMERICAN LIFE INSURANCE COMPANY v. YETTIE STADIEM ET AL.

(Filed 14 April, 1943.)

1. Bills and Notes § 10d: Banks and Banking § 8a—

The payee of an unaccepted, uncertified check has no right of action against the bank upon which the check is drawn, for he is in no position to allege a breach of legal duty and no action at law can be maintained except there is shown to have been a failure in the performance of some legal duty. C. S., 3171.

2. Bills and Notes § 10a: Banks and Banking § 8a—

The drawer of a check on a bank may maintain an action against the bank for breach of contract to honor his check.

3. Pleadings §§ 13½, 15—

Demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. C. S., 511 (6).

4. Banks and Banking § 8a: Bills and Notes § 27: Negligence § 19a—

Where complaint, in an action for damages, alleges that a bank negligently refused to pay a check, given on it by a policyholder to an insurance company in payment of a policy premium, and induced the company by careless misrepresentations to decline to pay the policy, in consequence of which the company suffered damages in litigation over the policy, a demurrer was properly sustained, as the proximate cause of the company's loss was not the negligence of the bank but the independent act of the company in refusing to pay the insurance.

5. Negligence § 5—

Proximate cause requires a continuous and unbroken sequence of events, and where the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the second wrong as the proximate cause, and not to the first, or more remote cause.

APPEAL by plaintiff from *Grady, Emergency Judge,* at May Term, 1942, of LENOIR.

Civil action in tort to recover damages for alleged wrongful refusal to honor check, and in contract to recover the amount of the check.

The complaint, in substance, alleges:

1. That on 3 September, 1933, the plaintiff issued to David P. Cauley a certificate of insurance under a group policy taken out by the Federal Postal Employees Association in the face value of $3,000, and payable to Ruth Sutton Cauley, wife of the insured, as beneficiary.

2. That in August, 1939, the insured mailed to the Federal Employees Postal Association, collecting agent for the plaintiff, a check for $21.38, drawn on the First-Citizens Bank and Trust Company (Kinston, N. C.),

in payment of the semiannual premium due on his certificate of insurance 1 August, 1939.

3. That on 1 September, 1939, the insured deposited with the defendant, First-Citizens Bank & Trust Company, the sum of $21.38 "for the specific and sole purpose of covering the $21.38 premium check . . . and David P. Cauley instructed the agents and employees of the defendant bank that said funds were to be held solely for such purpose, thereby creating a special deposit."

4. That theretofore, on 13 July, 1939, the said David P. Cauley had drawn a check on the Branch Bank & Trust Company (Kinston, N. C.) for $5.25, payable to the order of H. Stadiem; that this check was written in pencil, signed "D. P. Cauley," and was delivered to the manager of the business known as "H. Stadiem" and agent of the defendant, Mrs. Yettie Stadiem, with the understanding and agreement "that said check would not be presented to the bank upon which it was drawn or any other bank for payment."

5. That on 4 September, 1939, the manager of the business conducted by Mr. Yettie Stadiem altered, changed and forged the $5.25 check above mentioned by changing the name of the drawee bank from "Branch Banking & Trust Company" to First-Citizens Bank and Trust Company, and presented said check, so altered and forged, to the teller of the defendant bank, who wrongfully and unlawfully cashed said check and debited it against the special deposit of $21.38 standing in the name of David P. Cauley.

6. That the premium check for $21.38 was duly deposited by plaintiff's agent in the Colorado National Bank of Denver, Colorado, for collection, and in due course reached the First-Citizens Bank & Trust Company, Kinston, N. C., on or about 12 September, 1939; that said defendant bank wrongfully and negligently failed to pay said check, marked it "insufficient funds," and transmitted it back to plaintiff's agent.

7. That the insured, David P. Cauley, died on 15 September, 1939, and the beneficiary in said certificate demanded of plaintiff that it pay the face value thereof.

8. That relying upon the representations of the defendant bank that said premium check was worthless, the plaintiff declined to pay the insurance; that suit was brought on said certificate and after two trials in the Superior Court of Lenoir County and two appeals to the Supreme Court of North Carolina (see *Cauley v. Ins. Co.*, 219 N. C., 398, 14 S. E. [2d], 39; 220 N. C., 304, 16 S. E. [2d], 221), the beneficiary recovered the amount of the policy.

9. That plaintiff is entitled to recover as damages its costs in defending said action, amounting to $2,596.48, and "the defendant Bank is also

indebted to the plaintiff in the sum of $21.38, the face amount of said check, the payment of which was wrongfully and unlawfully refused by the said Bank."

Wherefore, plaintiff prays recovery of damages and the amount of the check.

A demurrer was interposed by the defendants, and each of them, on the grounds that the complaint does not state facts sufficient to constitute a cause of action; that the damages alleged are too remote, and that no proximate cause exists between the negligence alleged and the loss sustained.

From judgment sustaining the demurrer and dismissing the action, the plaintiff appeals, assigning error.

Smith, Wharton & Jordan for plaintiff, appellant.
F. E. Wallace for defendant Bank, appellee.
John G. Dawson for defendants Stadiem, appellees.

STACY, C. J. The question for decision is whether the complaint states facts sufficient to constitute a cause of action, either in contract or in tort. C. S., 511, subsec. 6. The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *Leonard v. Maxwell, Comr.*, 216 N. C., 89, 3 S. E. (2d), 316; *Harris v. R. R.*, 220 N. C., 698, 18 S. E. (2d), 204 Hence, we must look to the allegations of the complaint to ascertain the questions presented.

I. THE ACTION IN CONTRACT.

The plaintiff seeks to recover in contract on the allegation that "the defendant Bank is indebted to the plaintiff in the sum of $21.38, the face amount of said check." This is a mere conclusion of the pleader, and it is not supported by the facts alleged. In the absence of an acceptance or agreement to pay Cauley's check, the Bank assumed no liability to the plaintiff or its agent, the payee named therein. *Perry v. Bank,* 131 N. C., 117, 42 S. E., 551; *Bank v. Bank,* 118 N. C., 783, 24 S. E., 524, 32 L. R. A., 712, 54 Am. St. Rep., 753. "The transaction of giving the check does not . . . substitute the checkholder for the drawer. The latter may maintain an action for the breach of the contract to honor his check, and if the holder has a similar right, the result is, that two persons may maintain separate actions upon the same instrument at the same time to recover against the same defendant as a principal debtor. . . . The bank's agreement with the depositor involves or implies no agreement with the holder of the check. . . . Being liable to

the drawer to account with him for failure to honor his check, the bank cannot, on either legal or equitable considerations, be held at the same time liable to the holder of the check"—*Spear, J.*, in *Cincinnati, Etc., R. Co. v. Bank*, 54 Ohio St., 60, 31 L. R. A., 653, 56 Am. St. Rep., 700, quoted with approval in *Perry v. Bank, supra.*

In *First National Bank v. Whitman*, 94 U. S., 343, cited by *Walker, J.*, in *Trust Co. v. Bank*, 166 N. C., 112, 81 S. E., 1074, as authoritative, it is said: "We think it clear, both upon principle and authority, that the payee of a check, unaccepted, cannot maintain an action upon it against the bank on which it is drawn." *Dawson v. Bank*, 196 N. C., 134, 144 S. E., 833.

Indeed, it is provided by C. S., 3171, that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. *Brantley v. Collie*, 205 N. C., 229, 171 S. E., 88.

Such is the law as it obtains with us in respect of checks, albeit we have in a number of cases held that "where a contract between two parties is made for the benefit of a third, the latter may sue thereon and recover although not strictly a privy to the contract." *Rector v. Lyda*, 180 N. C., 577, 105 S. E., 170; *Gorrell v. Water Supply Co.*, 124 N. C., 328, 32 S. E., 720. These latter cases are grounded on principles of equity, not presently applicable to the plaintiff's suit. The arguments, *pro* and *con*, on the subject are fully set out in *Cincinnati, Etc., R. Co. v. Bank, supra*, and the reasoning of the majority view quoted with approval in *Perry v. Bank, supra.*

It is suggested, however, that the basis of the minority view was followed in *Cauley v. Ins. Co.*, 219 N. C., 398, 14 S. E. (2d), 221, where it was said that if the "final cash returns" were still rightfully available to plaintiff's agent, the judgment of nonsuit would seem to be at variance with the rights of the beneficiary named in the policy. The expression, "final cash returns," was a quotation from the receipt issued by plaintiff's agent, and the thought prevailed that if the insured had in reality given a valid check for his premium in accordance with their previous custom, the policy ought not to be forfeited without an opportunity to make good the "final cash returns." Indeed, the premium check was collectible, if not collected, in that suit.

Hence, according to the law as it obtains in this jurisdiction, the facts stated are not sufficient to constitute a cause of action against the defendant Bank for the amount of the check.

II. THE ACTION IN TORT.

It follows from what is said above that the demurrer to the complaint on the cause of action sounding in tort was likewise properly sustained.

If a bank be not liable to the holder of a check "until and unless it accepts or certifies the check," the payee has no right of action against the bank on an unaccepted or uncertified check, for he is in no position to allege a breach of legal duty, and no action at law can be maintained except there is shown to have been a failure in the performance of some legal duty. *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 358; *Hood, Comr. of Banks, v. Bayless,* 207 N. C., 82, 175 S. E., 823.

Moreover, the proximate cause of plaintiff's loss was not the negligent dishonor of the premium check, but the subsequent independent act of the plaintiff in refusing to pay the insurance. *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808. True, there is allegation that plaintiff was induced to decline payment of the policy by the careless misrepresentations of the Bank, nevertheless the plaintiff's refusal to pay was the result of its own voluntary election, "acting with an independent mind." *Bearden v. Bank of Italy,* 57 Cal. App., 377, 207 Pac., 270.

The definition of proximate cause requires a continuous and unbroken sequence of events, and where the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the second wrong as the proximate cause, and not to the first or more remote cause. Cooley on Torts, sec. 50; *Butner v. Spease, supra.*

The rule is, that if the original act be wrongful, and would naturally prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not in themselves wrongful, the injury is to be referred to the wrongful cause, passing by those which are innocent. *Scott v. Shepherd,* 2 Bl., 892 (*Squib Case*). But if the chain of causation be broken by the intervention of some efficient, independent cause, such intervening cause is to be regarded as the proximate cause of the injury, and in an action against the original wrongdoer the law will not undertake further to pursue the question or resulting damage. *McGhee v. R. R.,* 147 N. C., 142, 60 S. E., 912, 24 L. R. A. (N. S.), 119. *"In jure non remota causa sed proxima spectatur.* It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon's Maxims, I; *Newell v. Darnell,* 209 N. C., 254, 183 S. E., 374. To avail the original wrongdoer as a defense, however, the intervening cause must be both independent and responsible of itself. *Harton v. Tel. Co.,* 146 N. C., 429, 59 S. E., 1022; *Watters v. City of Waterloo,* 126 Iowa, 199, 101 N. W., 871.

In searching for the proximate cause of an event, the question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Do the facts constitute a continuous

succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? *Milwaukee and St. P. Ry. Co. v. Kellogg,* 94 U. S., 469, 24 L. Ed., 256. Many causes and effects may intervene between the original wrong and the final consequence, and if they might reasonably have been foreseen, the last result, as well as the first and every immediate consequence, is to be considered in law as the proximate cause of the original wrong. But when a new cause intervenes, which is not itself a consequence of the first wrongful cause, nor under the control of the original wrongdoer, nor foreseeable by him in the exercise of reasonable prevision, and except for which the final injurious consequence would not have happened, then such injurious consequence must be deemed too remote to constitute the basis of a cause of action against the original wrongdoer. *McGhee v. R. R., supra; Ramsbottom v. R. R.*, 138 N. C., 38, 50 S. E., 448.

Here, the causal connection between the Bank's negligence and the plaintiff's ultimate loss was broken by an independent and responsible cause. The damages claimed are in no legal sense the proximate cause of the negligence alleged. "There was an interruption and the intervention of an entirely separate cause, which cause was an independent human agency, acting with an independent mind." *Hartford v. All Day and All Night Bank,* 170 Cal., 538, 150 Pac., 356, L. R. A. 1916-A, 1220. The damages alleged are too remote. *Bowers v. R. R.*, 144 N. C., 684, 57 S. E., 453, 12 L. R. A. (N. S.), 446; 62 C. J., 1115.

It results, therefore, that the demurrer was properly sustained on both causes of action.

Affirmed.

STATE v. HARRY DAVIS.

(Filed 14 April, 1943.)

1. Criminal Law § 23—

The plea of former jeopardy, to be good, must be grounded on the "same offense," both in law and in fact.

2. Same—

A conviction under a Federal Act is no bar to a prosecution for violating a State statute, though the two indictments are founded on identically the same state of facts.

3. Same—

Where the same act violates two State statutes, a prosecution for the one is not a bar to a subsequent prosecution for the other.

4. Criminal Law §§ 21, 27—

A plea of former jeopardy is a plea in bar to the prosecution and not a plea to the indictment. It poses an inquiry, not into the conduct of the defendant, but as to what action the court has taken on a former occasion.

5. Criminal Law § 27—

A defendant is deemed to have abandoned his plea of former jeopardy by not tendering and requesting the court to submit to the jury the issue arising thereon.

6. Same—

The form of issue usually submitted on a plea of former jeopardy is: "Has the defendant been formerly convicted (or acquitted) of the offense wherewith he now stands charged?"

7. Criminal Law § 23—

A plea of former jeopardy, based upon a conviction, or plea of guilty, on a warrant charging operating a gambling house, is not good upon an indictment, charging (1) maintaining a public nuisance, (2) carrying on a lottery, (3) sale of lottery tickets, and (4) operation of gambling devices, even where the several offenses arise out of the same transaction.

APPEAL by defendant from *Grady, Emergency Judge,* at November Term, 1942, of WAKE.

Criminal prosecution tried upon indictment charging the defendant, and another, in four counts, (1) with maintaining a public nuisance, (2) with setting on foot and carrying on a lottery, (3) with the sale of lottery tickets, and (4) with the operation of gambling devices at 115 W. Martin Street, Raleigh, in Wake County, on or about 15 May, 1942, contrary to the statutes in such cases made and provided and against the peace and dignity of the State.

The defendant, Harry Davis, moved for dismissal of the prosecution on the ground of a former conviction in the city court of Raleigh, it appearing that he was there tried upon a warrant charging him with operating a gambling house at 115 W. Martin Street in the city of Raleigh on or about 1 June, 1942, in violation of the ordinances of the city of Raleigh, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

To this warrant the defendant pleaded guilty, and a fine of $50.00 was imposed 12 June, 1942.

The motion to dismiss was overruled; whereupon the defendant pleaded guilty, preserving his right to appeal from the ruling on his motion to dismiss on the ground of former conviction.

Judgment of imprisonment and probation was entered on the defendant's plea of guilty.

Defendant appeals, assigning error in the ruling on his plea of former jeopardy.

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

John W. Hinsdale for defendant.

STACY, C. J. The appeal poses the question whether the defendant is entitled to further consideration on his plea of former jeopardy. The record suggests a negative answer.

In the first place, the evidence offered is not sufficient to sustain the plea. The warrant in the city court was not as broad as the four-count indictment, nor did it purport to cover the same time. *S. v. Dills*, 210 N. C., 178, 185 S. E., 677. It is true, the indictment antedates the warrant, and if the two were identical and for a continuing offense, the plea would probably be good. *S. v. Johnson*, 212 N. C., 566, 194 S. E., 319. But such is not the case. The instant indictment involves much more than the previous warrant, albeit the several offenses may have arisen out of the same transaction.

In *S. v. Harrison*, 184 N. C., 762, 114 S. E., 830, it was held that a conviction under the Volstead Act was no bar to a prosecution for violating a State statute, though the two indictments were founded on identically the same state of facts. There, the violations were of different laws. Here, the charge includes, not only the same, but also other laws. The plea of former jeopardy, to be good, must be grounded on the "same offense," both in law and in fact. *S. v. Hankins*, 136 N. C., 621, 48 S. E., 593; *S. v. Taylor*, 133 N. C., 755, 46 S. E., 5; *S. v. Nash*, 86 N. C., 650.

Likewise, in *S. v. Malpass*, 189 N. C., 349, 127 S. E., 248, and again in *S. v. Midgett*, 214 N. C., 107, 198 S. E., 613, it was held that where the same act violated two State statutes, a prosecution for the one was not a bar to a subsequent prosecution for the other. The pertinent authorities are fully reviewed in the *Malpass* and *Midgett cases, supra*.

Secondly, the defendant is deemed to have abandoned his plea of former jeopardy by not tendering and requesting the court to submit to the jury the issue arising thereon. *S. v. King*, 195 N. C., 621, 143 S. E., 140.

Moreover, the plea of former jeopardy is a plea in bar to the prosecution, and not a plea to the indictment. It poses an inquiry, not into the conduct of the defendant, but as to what action the court has taken on a former occasion. *S. v. Ellsworth*, 131 N. C., 773, 42 S. E., 699. Unless it can be determined as a matter of law on the record, an issue is raised for submission to the jury. The form of the issue usually submitted in such cases is: "Has the defendant been formerly convicted (or acquitted) of the offense wherewith he now stands charged?" It will be observed that this is a collateral civil issue, to be determined before

entering upon the prosecution. If answered in the affirmative, and allowed to stand, it bars the prosecution. If answered in the negative, the defendant may preserve his exception, if so advised. *S. v. Pollard,* 83 N. C., 597. When the plea is not sustained, the prosecution then begins unaffected by the interlocutory inquiry in respect of the former action of the court. *S. v. Ellsworth, supra.*

The practice of trying the pleas of former jeopardy and not guilty separately finds support among all the authorities, *S. v. Winchester,* 113 N. C., 641, 18 S. E., 657; *S. v. Respass,* 85 N. C., 534, although in a number of cases they have been tried together without prejudicial effect. *S. v. Dills,* 210 N. C., 178, 185 S. E., 677; *S. v. Taylor,* 133 N. C., 755, 46 S. E., 5; *S. v. Winchester, supra; S. v. Smith,* 170 N. C., 742, 87 S. E., 98.

In the instant case, the evidence was not sufficient to sustain the plea, hence the trial court was correct in deciding it as a matter of law.

Affirmed.

STATE v. ELLIS DAVIS.

(Filed 14 April, 1943.)

Criminal Law § 41i—

On the trial of a criminal action, an instruction to the effect that the jury should scrutinize the testimony of near relations of defendant, in the light of their interest in the verdict, was proper; but it was error to omit the qualifying instruction to the effect that, if after such scrutiny they believe such testimony, it should be given the same weight and credence as the testimony of any other witness.

APPEAL by defendant from *Dixon, Special Judge,* at October Term, 1942, of FRANKLIN.

The defendant was convicted of a felonious assault upon one Wheless with a deadly weapon, a pistol, with intent to kill, thereby inflicting serious injury not resulting in death, and from judgment of imprisonment predicated upon the verdict, appealed, assigning errors.

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

Yarborough & Yarborough for defendant, appellant.

SCHENCK, J. The State offered the testimony of Melvin Wheless to the effect that while he was standing near an automobile outside the filling station of the defendant, with his back toward the defendant, he

was shot twice by the defendant and was seriously wounded. The State also offered other evidence corroborative of the testimony of Wheless. While, on the other hand, the defendant and his wife testified that Melvin Wheless was inside the filling station of the defendant, and was advancing on the defendant with a knife, using profane and threatening language, and the defendant shot him in self-defense. The defendant likewise offered further corroborative evidence.

The court in its charge to the jury used the following language, which is assigned as error by the defendant: "The law regards with suspicion the testimony of near relations, other interested parties and those testifying in their own behalf. . . . The evidence of near relations, interested parties and those testifying in their own behalf must be taken with some degree of allowance." This instruction, which must have been understood by the jury as having reference to the testimony of the defendant's wife as a near relation or interested party, was given without any qualifying words to the effect that if upon scrutiny of such testimony, the jury believed it, then the jury should give it the same weight as the testimony of any other witness.

The instruction to the effect that the jury should scrutinize the testimony of near relations of the defendant in the light of their interest in the verdict was proper but it was error to omit the qualifying instruction to the effect that if after such scrutiny they believed such testimony it should be given the same weight and credence as the testimony of any other witness. This is in accord with a long line of our decisions, beginning with *S. v. Ellington,* 29 N. C., 61, and continuing through *S. v. Holland,* 216 N. C., 610, 6 S. E. (2d), 217.

In *S. v. Lee,* 121 N. C., 544, 28 S. E., 552, it is written: "We will again state the rule: The law regards with suspicion the testimony of near relations, interested parties, and those testifying in their own behalf. It is the province of the jury to consider and decide the weight due to such testimony, and, as a general rule in deciding on the credit of witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stands to the party; that such evidence must be taken with some degree of allowance and should not be given the weight of the evidence of disinterested witnesses, but the rule does not reject or necessarily impeach it; and if, from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness. The omission in his Honor's charge, tested by this rule, was liable to mislead the jury into the impression or belief that the evidence of the wife is to be to some extent discredited, although the jury may think she is honest and has

told the truth. *S. v. Nash,* 30 N. C., 35; *S. v. Boon,* 82 N. C., 637; *S. v. Holloway,* 117 N. C., 730; *S. v. Collins,* 118 N. C., 1203. We must therefore order a New trial."

The first syllabus of *S. v. Collins,* 118 N. C., 1203, 24 S. E., 118, properly interprets the opinion and is a clear statement of the rule as it has existed with us from the early decisions of this Court. It reads: "On the trial of a criminal action against a husband, in which he and his wife were witnesses on his behalf, it was error to instruct the jury that, because of such relationship and the witnesses' interest in the result of the action, the jury should carefully scrutinize the testimony and receive it with grains of allowance, without adding that, if the jury believed the testimony of the witnesses, they were entitled to full credit, notwithstanding their relationship and interest."

We do not concur in the argument advanced by the Attorney-General that certain qualifying words used in the charge as to the testimony of the defendant himself, likewise referred to the testimony of the defendant's wife. The words used were: "But the rule does not reject or necessarily impeach such evidence and in this connection the court particularly charges you that where a defendant in the trial of a criminal prosecution testifies in his own behalf, if you believe he has sworn the truth, and find him worthy of belief, you should give as full credit to his testimony as any other witness, notwithstanding his interest in the outcome of your verdict." The omission of any reference to the testimony of the defendant's witness (his wife) from the qualifying words applied to the testimony of the defendant himself may have been unintentional, an oversight, or even a *lapsus linguæ,* nevertheless the omission is clearly apparent from the record, and we cannot read into the charge words which do not there appear. We are bound by the record.

For the error assigned, there must be a

New trial.

MOSES ROGERS v. J. P. TIMBERLAKE, JR., W. F. POWERS, TRUSTEE, AND SMITH-DOUGLAS CO., INC.

(Filed 14 April, 1943.)

1. Betterments § 1—

One, who in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. C. S., 699.

2. Betterments §§ 3, 4—

Where defendant acquired the legal title to certain lands (originally belonging to plaintiff) at a foreclosure sale and subject to an agreement to hold the land in trust for the plaintiff and to reconvey to plaintiff upon the payment of a sum certain on or before a given date, he (defendant) is not entitled to the value of improvements placed upon the land by him while holding same upon such trust.

APPEAL by defendants from *Bone, J.*, at January Term, 1943, of FRANKLIN. No error.

This was an action to enforce the provisions of a judgment rendered in a previous suit between the same parties, wherein it was adjudged that defendant Timberlake held title to certain land in trust for the plaintiff, to be conveyed to plaintiff upon the payment of $1,500.

Plaintiff pleaded this judgment, alleged tender and readiness to pay the $1,500, and demanded conveyance in accord with the terms of the judgment. Defendants admitted the provisions and effect of the judgment alleged, and expressed willingness to convey the land upon payment of the amount fixed by the judgment. However, there was disagreement as to the manner of payment and cancellation of a deed of trust on the land which had been given by defendant Timberlake to his codefendants, subsequent to his acquisition of the title in trust. It is admitted that the money has been paid into court by the plaintiff, and that deed has been executed by the defendant and deposited with plaintiff's counsel.

The defendant Timberlake also claimed the value of improvements which he alleged he had placed on the land. The court sustained objection to testimony as to the value of such improvements, and declined to submit an issue thereon.

Upon the issues submitted there was verdict for plaintiff, and it was thereupon adjudged that the deed executed by defendant be accepted, and that out of the money paid into court the deed of trust should be satisfied and canceled, and taxes paid, so that plaintiff should receive a fee simple unencumbered title to the land.

Defendants appealed.

Yarborough & Yarborough for plaintiff.
G. M. Beam for defendants.

DEVIN, J. It was not controverted that the plaintiff was entitled to the conveyance of the land upon the payment of the amount fixed by the former judgment. The question as to the satisfaction and cancellation of the deed of trust, put upon the land by defendant Timberlake subsequent to his acquisition of the title in trust for the plaintiff, about which the parties disagreed, was properly settled by the provision in

the judgment below that out of the money already paid into court by the plaintiff the deed of trust and the lien of unpaid taxes should be discharged. Thus, an appropriate end has been put to the cross-firing between the parties as to this part of the controversy.

The defendants, however, assign error in the refusal of the court below to admit testimony and submit an issue as to the value of the improvements alleged to have been put upon the land by defendant subsequent to his acquisition of the title and before the adjudication that he held it subject to a parol trust in favor of the plaintiff. The principle that one who in good faith enters into the possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to permanent improvements placed on the land by him, has long been recognized, both by statute (C. S., 699), and by the decisions of this Court. *Barrett v. Williams,* 220 N. C., 32, 16 S. E. (2d), 398, and cases cited. But this principle is applicable only to one who holds the land in good faith under a colorable title believed by him to be good. It must appear that he entertained a *bona fide* belief in the validity of his title, and that he had reasonable grounds for such belief. *Pritchard v. Williams,* 176 N. C., 108, 96 S. E., 733; 27 Am. Jur., 269. Here it had been judicially determined, in the former suit between the plaintiff and defendant Timberlake, that in 1937 Timberlake acquired the legal title to the land (which had originally belonged to the plaintiff) at a foreclosure sale under and subject to an agreement to hold the land in trust for the plaintiff to reconvey the land to him upon the payment of $1,500 on or before 2 October, 1942. While Timberlake, in the former suit, denied making such an agreement, it was therein determined that he had done so at the time he acquired the title to the land. That fact having been established, it must necessarily follow that he entered into occupancy of the land with knowledge, at that time, that his title was subject to the trust subsequently established—a trust based upon his own agreement. Hence, improvements made by him were put on the land with knowledge that he was obligated to reconvey the land to the plaintiff upon the payment of the amount fixed by the terms of the agreement he had made. *Southerland v. Merritt,* 120 N. C., 318, 26 S. E., 814; *Hallyburton v. Slagle,* 132 N. C., 957, 44 S. E., 659. The other exceptions noted by defendants and brought forward in their assignments of error cannot be sustained.

In the trial we find

No error.

MRS. ANNIE P. HOWELL v. C. S. HOWELL.

(Filed 14 April, 1943.)

Divorce §§ 12, 13—

In an action for alimony without divorce, C. S., 1667, as in an action for divorce *a mensa et thoro* by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegations is fatal and demurrer properly sustained.

APPEAL by defendant from *Thompson, J.*, at November Term, 1942, of WAKE.

This is an action instituted under section 1667, Consolidated Statutes of North Carolina, for alimony without divorce.

The complaint in this action was filed 16 October, 1929, and alleges that over a period of ten years the defendant, from time to time, had been guilty of misconduct with other women, but in each instance until the last one, she expressly pleads that she forgave the defendant of his wrongs.

It is alleged that on 21 March, 1929, the plaintiff intercepted a letter from a woman named in the complaint which confirmed the allegation that defendant had been carrying on a flirtation with said woman and paying her affectionate attention. However, adultery is not alleged.

The allegations relied on by the plaintiff are substantially as follows: That the defendant has constantly and continuously abused the plaintiff, has made mean and contemptible accusations against her, that he goes for long periods of time without speaking to plaintiff except the most necessary words; that he is neglectful and purposely snubs the plaintiff; that he accuses her of being shallow-brained and crazy; that he is a railroad man and spends only a portion of his time in the city, and while away from home he keeps his automobile under lock and key, thereby preventing plaintiff from driving same, and in many ways has endangered the health and comfort of the plaintiff; that the indignities offered to her person by his unjust accusations, his sarcastic remarks, his total lack of affection, his neglect and abuse, have offered such indignities to her person as to render her condition intolerable and her life burdensome.

Defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. Demurrer overruled, defendant appeals, assigning error.

R. L. McMillan for plaintiff.
Douglass & Douglass for defendant.

DENNY, J. In an action for alimony without divorce, as in an action for divorce *a mensa et thoro* by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation upon her part. *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1; *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222; *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 719; *Martin v. Martin,* 130 N. C., 27, 40 S. E., 822; *O'Connor v. O'Connor,* 109 N. C., 139, 13 S. E., 887; *Jackson v. Jackson,* 105 N. C., 433, 11 S. E., 173; *White v. White,* 84 N. C., 340.

While the complaint does not set forth with particularity the language and conduct of the defendant upon which the plaintiff relies, as constituting such indignities to her person as to render her condition intolerable and her life burdensome, as required by numerous decisions of this Court, she further fails to allege that the acts of cruelty and misconduct on the part of her husband were without adequate provocation on her part. The omission of such allegation is fatal to her cause of action.

The demurrer should have been sustained.

Reversed.

R. J. SHELTON v. TUTTLE MOTOR COMPANY.

(Filed 28 April, 1943.)

Contracts §§ 11d, 12—

Where plaintiff "traded" defendant an old automobile in October, 1941, taking in part a due bill for $175 as a credit on a new car when he should want it, defendant advising plaintiff that after 1 January, 1942, he probably would not be able to deliver a new car, whereupon the parties agreed that defendant should not be liable for any delay or failure to make delivery for any cause, such agreement is a valid contract and plaintiff cannot recover the face of the due bill, since Rationing Order No. 2-A, "freezing" the sale of new cars, and the matter remains *in statu quo* until sale and delivery of a new automobile can be consummated.

DEVIN, J., dissenting.

SCHENCK, J., concurs in dissent of DEVIN, J.

SEAWELL, J., dissenting.

APPEAL by defendants from *Gwyn, J.,* at October Term, 1942, of STOKES.

Civil action to recover $175.00, advanced credit on purchase of new automobile.

The court of first instance (justice of the peace) rendered judgment for the plaintiff. On appeal to the Superior Court, a jury trial was waived, the facts were agreed upon, and the matter was thereupon submitted to the court for determination of the rights of the parties.

In summary, the operative facts follow:

1. The plaintiff traded the defendant an old automobile and took as part payment due bill for $175.00 good for credit on purchase of a new car. It was not contemplated that the new automobile should be delivered prior to 1 January, 1942.

2. The defendant had a gross profit of $200.00 in the sale of such new automobile.

3. The defendant advised the plaintiff that after January he probably would not be able to get automobiles to deliver to him until after the duration. Following this conversation, the parties entered into a contract with these principal provisions:

"This is to certify that I have this day traded Tuttle Motor Company one 1937 Chevrolet Tudor Sedan . . ., leaving a balance of $175.00 on deposit on a new car to be delivered when I want it. Except it is agreed that you will not be held liable for any delay or failure through any cause whatsoever in making delivery. The car will be delivered at the price upon delivery date.

"I agree to pay the balance on the car and accept delivery . . . at dealer's place of business within forty-eight hours after I have been notified that it is ready. In case I fail to take delivery of car when notified, my deposit may be retained as liquidated damages. . . .

"This 25th day of October, 1941.

R. J. SHELTON, Purchaser.

"RALPH D. TUTTLE,
Dealer's Signature."

4. Thereafter, new automobiles were "frozen" by virtue of "Rationing Order No. 2-A—New Passenger Automobile Regulations," as amended, which further provides that "If performance of any agreement of sale or purchase of a new automobile is forbidden . . . any person who has made any payment on account of the purchase of such new automobile shall upon demand be entitled to the return of the amount of any deposit or any other consideration paid," etc.

These orders were issued pursuant to Act of Congress known as the Priorities and Allocations Act (Pub. L. 89, 77th Congress, 1st Session, C. 157), later enlarged by the Second War Powers Act (Pub. L. 507, 77th Congress, 2nd Session, C. 199).

5. Prior to the order of "freezing," the defendant approached the plaintiff relative to delivering him an automobile as per their agree-

ment, and the defendant was at that time advised by the plaintiff that he was not ready for an automobile. The defendant was then ready, able and willing to make delivery.

6. The plaintiff made application to the Rationing Board for permit to obtain a new car, which application was denied. Had plaintiff obtained such permit, the defendant could have made delivery.

7. The defendant sold the old automobile which he received from the plaintiff, valuing it upon sale for the purpose of financing at $350.00.

The plaintiff grounds his action on the provisions of "Rationing Order No. 2-A—New Passenger Automobile Regulations," as above set out. Recovery is resisted on the terms appearing in the memorandum of agreement signed 25 October, 1941, and further that no authority exists for declaring rights and remedies in the rationing orders.

The court being of opinion that plaintiff was entitled to recover the face amount of the due bill (voluntarily reduced to $150.00) upon which the present action is based, entered judgment accordingly, from which the defendant appeals, assigning error.

Woltz & Barber and Petree & Petree for plaintiff, appellee.

A. J. Ellington and Folger & Folger for defendants, appellants.

STACY, C. J. The parties have contracted against the very contingency which has arisen here. Indeed, their agreement was made with a view to its probable happening.

On 25 October, 1941, the plaintiff "traded" the defendant an old automobile, "leaving a balance of $175.00 on deposit on a new car to be delivered when I want it." It was not then contemplated that the new automobile should be delivered prior to 1 January, 1942. However, after closing the transaction, "the defendant advised the plaintiff that after January he probably would not be able to get automobiles to deliver to him until after the duration." In the light of this conversation, the parties drew up and signed the memorandum of agreement set out in the record. In this the plaintiff agrees that the defendant "will not be held liable for any delay or failure through any cause whatsoever in making delivery. The car will be delivered at the price upon delivery date." And further, "In case I fail (for 48 hours) to take delivery of car when notified, my deposit may be retained as liquidated damages," etc.

In other words, anticipating that the purchase of new automobiles might thereafter be "frozen," the parties entered into an agreement, setting out that in such event the plaintiff's memo of credit with the defendant should likewise be "frozen." That is, the parties undertook in advance to say how the matter would be handled if the freezing of

new automobiles should occur. *Atlantic Steel Co. v. Campbell Coal Co.*, 262 Fed., 555. This is a lawful contract, and neither the Acts of Congress nor the Executive Orders relied upon by the plaintiff purport to declare it unlawful or inoperative. These Federal pronouncements were intended for other facts. They are not controlling on this record. The plaintiff was at liberty to cancel the credit memorandum, if he wanted to, or to do with it as he pleased. He enjoyed then, and still enjoys, freedom of contract in respect of such credit.

Prior to the time when "the freezing of new automobiles" went into effect, the defendant approached the plaintiff relative to making delivery of a new car as per their agreement—the defendant then being ready, able and willing to make delivery—but the plaintiff said he "was not ready for an automobile."

The plaintiff, therefore, finds himself face to face with two insurmountable provisions in his contract:

First, he has agreed that the defendant shall not be liable for any delay or failure through any cause whatsoever in making delivery of the new car. This defeats the present action.

Second, he has agreed that in case he fails to accept delivery within 48 hours after notice, his deposit may be retained as liquidated damages. While notice was given to the plaintiff prior to the "freezing" order, thereby possibly making available the terms of this provision, still the defendant has not sought to take advantage of it, because of the original understanding that delivery of the new automobile was not contemplated prior to January 1, 1942.

Notwithstanding these permissible defenses, the defendant has signified his willingness to make delivery, if and when the plaintiff wants a new car and is permitted to purchase one. The plaintiff made application for permit to obtain a new car, after rationing went into effect, but his application was denied.

Plaintiff sues to recover $175.00, "due on contract." On the hearing in the Superior Court he voluntarily reduced his claim to $150.00. Even the plaintiff will not say what his credit memorandum is worth in cash, for he realizes the defendant had a profit in excess of the memorandum in the sale of a new automobile, and he also remembers the stipulation against liability in case of "freezing." He did not think so much of his credit memorandum when he signed the agreement releasing the defendant from liability in case of "delay or failure" to make delivery of the new car.

The disposition of the old car by the defendant is not germane to the case. Title passed and the plaintiff has no further interest in this car. Viewed in the light most favorable to the plaintiff, the contract must at least be construed as an agreement to allow the plaintiff's credit with

the defendant to remain *in statu quo* until the purchase and sale of a new automobile can be consummated. Plaintiff would ignore this agreement. But it is signed by him; it is valid, and he is bound by its terms.

The trial court predicated its judgment on the supposed abrogation of the "due bill" given at the time of the trade, and "upon which the present action is based," according to a recital in the judgment. The case is controlled by the memorandum of agreement afterwards signed by the parties and in which the defendant is relieved of liability for any delay or failure through any cause whatsoever in making delivery of a new car. The defendant is entitled to prevail on the record as presented. Judgment accordingly.

Reversed.

DEVIN, J., dissenting: I am unable to agree with the result reached in this case. I do not think the defendant should be permitted to retain the plaintiff's money without consideration indefinitely, when by the rationing orders and regulations of the Federal Government, made pursuant to authority of the Acts of Congress in aid of the war effort of our country, the plaintiff has been prevented from buying and equally the defendant from selling the automobile about which the original contract was made. It seems to me the ends of justice would be met by adhering to the rule established in such cases by the Federal Regulations, and restoring the parties to their original position, without loss to either party.

SCHENCK, J., concurs in this opinion.

SEAWELL, J., dissenting: I find nothing in the stipulations and in the written contract between the parties to justify the Court in assuming that they had contracted with reference to any "freezing" order by the Government prohibiting the sale of automobiles. The defendants did not make that argument here, either in brief or in oral argument. They depended solely on the theory that the effect of the presidential orders was to temporarily suspend the contract while the restriction lasts, to be revived after it has been removed, citing cases relative to that theory. They did challenge the power of the Government to require, by executive orders, the return of the advance payment of the purchase price.

The authorities are overwhelmingly against the position of the defendants on the first proposition. Not only does the presidential order prohibit the transaction, but a violation of the regulation is a criminal offense, punishable under Title III of the Second War Powers Act by fines up to $10,000 and imprisonment for one year, or both. Violations of such regulations are also punishable under section 37 of the Criminal

Code, 18 U. S. C. A. Sec. 88; Act of 1917, Sec. 4, 50 U. S. C. A. Sec. 34, as conspiracies to commit an offense against the Government. Also the restriction is intended to preserve for military use materials of war which are now far more critical than they were when the original order was promulgated, and the restriction must, therefore, be assumed to be for the duration of the war, or at least for an indefinite extent, and the contract thereby discharged. *Metropolitan Water Bd. v. Dick, Kerr & Co., Ltd.* (1917), 2 K. B. 1; (1918) A. C. 119, 115 L. T. N. S., 448; *The Clararesk* (1920), 264 Fed., 276; *Schmidt v. Wilson & Kanham*, 47 Ont. L. Rep., 194; *Allanwilde Transportation Corporation v. Vacuum Oil Co.*, 248 U. S., 377, 63 L. Ed., 312; *Standard Chemicals and Metals Corp. v. Waugh Chemical Corp.*, 185 N. Y. Sup., 207; *Jersey Ice Cream Co. v. Banner Cone Co.*, 204 Ala., 532, 86 So., 382; *Atlantic Steel v. R. O. Campbell Coal Co.*, 262 Fed., 555; Effect of War on Contracts, Webber (1940), p. 378; see Scrutton L. J. (1917), 2 K. B., 35, 36.

Since we are not dealing with a commercial transaction upon a suit begun after the restriction has been removed, and where it appears that the basis of the contract has survived and the performance may be still feasible, it is the duty of the Court to determine the matter now upon the facts as they now appear, taking into consideration events that have taken place since the transaction was forbidden and fulfillment became impossible. *Comptoir Commercial Anversois v. Power, Son & Co.* (1920), 1 K. B. (Eng.), 868, 36 Times L. R., 101; *Embricos v. Reid*, 3 K. B. (Eng.), 45, 111 L. T. N. S., 291.

Under the American rule, where the contract has thus become impossible of fulfillment, the advance consideration must be returned on demand, or an action may be maintained to recover it as an unjust enrichment as in *assumpsit*. Williston on Contracts, sections 1769, 1792; Restatement, Contracts, section 468 (1); Restatement, Restitution, sec. 66 (3). "One who has paid for goods he never gets is entitled to recover the payment, even though the reason why performance was not made by the seller is excusable impossibility." Williston, sec. 1794. "The Act of God may properly lift from his shoulders the burden of performance, but it has not yet extended so as to enable him to keep the other man's property for nothing." *Board of Education v. Townsend*, 63 Ohio St., 514, 59 N. E., 223; Restatement, Restitution, S. 25, comment b.

There is no sound reason why we should either ignore or evade the positive requirements of the Government order that the money be returned. This order, the plaintiff contends, entitles him to his money. The defendants deny the power of the Government to abrogate their contract or effectuate such an order. The purport and effect of the two orders taken together is to discharge the contract and require restitution. In my judgment they apply to the terms of this contract. Except for

this denial of Federal wartime power over civilian contracts relating to the use of vitally necessary materials of war, the controversy would be too trivial to justify extended notice.

It is the duty of the Court, of course, to declare the law under all circumstances and with cool detachment. Even if the people of the United States by some congenital ineptness in their legal institutions, or irreconcilable conflict in their fundamental laws, are deprived of the ability to act in national unity in a time of national peril, or as states, to agree upon things necessary to a successful prosecution of war, doubtless it would be our duty to say so. It is also our duty as a State Court to uphold those fundamental rights which the people have not surrendered to the care of Congress, either under the Federal or State Constitution. But it is not our duty to reassert rights which have been constitutionally subordinated to the Federal administration of the national defense, and in the face of powers which have been categorically delegated for that purpose. The incidence of wartime regulation is not upon the independence of the courts, but upon the conduct of persons. These come into the forum with civil rights abridged, contracts annulled, and causes of action profoundly affected by the emergency of war and the acts of the Federal Government necessary to its prosecution. In *Home Building & Loan Association v. Blaisdell*, 290 U. S., 398, 426, *Mr. Justice Hughes* said:

"The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties." *Horowitz v. U. S.*, 267 U. S., 458, 69 L. Ed., 736; *Norman v. B. & O. R. R. Co.*, 294 U. S., 240, 307, 308, 79 L. Ed., 885.

Speaking within the limits of the constitutional grant of power and to a subject which has proper relevancy to the conduct of war, the voice of Congress is *suprema lex*. It is only when some fundamental and inalienable right of the citizen, protected by our Constitutions, either Federal or State, and not surrendered to the care of Congress, becomes threatened that we come face to face with the necessity of "safeguarding essential liberties" to the full extent of our judicial power. There is no point in denying to the National or Federal Government, acting within its wartime powers, authority to take action relevant to the national defense when it affects only property rights which we ourselves have a hundred times, even in peace, declared to be, *sub modo*, relative and subordinate

to the general welfare; or in reaching that result by adopting a doctrine at variance with what the Government, in the exercise of a legitimate power, desires to do.

When the Constitution was adopted and our dual form of government was created, the difficulty of carrying on war by ordinary democratic processes, especially when these were parceled to the several states, was not unappreciated nor undebated. Implicit in the grant of power which we gave to the Federal Government for the national defense is that the power should be adequate to the purpose; and this implies and justifies its summary and administrational exercise in a manner which may suspend, in order that they may be eventually preserved, some of the rights which the states are commendably jealous in preserving in time of peace.

Whether with regard to strictly military operations or to civilian conduct when properly subject to wartime regulation, the principle is the same. The power given to the Government and the mode of its exercise must be adequate to the immediacy of situations which arise, both here and at more distant fronts, with a minimum of notice and a maximum of urgency. That power, we are convinced, cannot be successfully exercised when confined to mere negations, however heavy the barrage. And in some instances, at least, the power to restore must be a corollary to the power to destroy. The action of the Federal Government in arresting this contract cannot be considered an impersonal *force majeure,* unpurposively creating a situation which it is powerless to amend. There is a nexus of circumstance, including the reports of committees, debates in Congress, the background and wording of the Acts themselves, the orders which speak for themselves, that shows a full appreciation of the subjects we have been discussing, and the purpose not to leave the rights of parties who suffer infraction of their contracts left as dangling ends of discord and litigation.

Regulations and orders like these, intended to prevent loss through displacements caused by necessary Government action, or to restore economic balances, whether small or great, in the manner sought to be done in this instance, have a reasonable relation to the objectives of the War Powers Acts, and may be regarded as within their authority. Until held otherwise by competent Federal authority, full faith and credit should be given them in this Court.

In my opinion, the judgment of the court below should be affirmed.

FRANK R. HORTON, JR., v. WILSON & COMPANY, A CORPORATION.

(Filed 28 April, 1943.)

1. Master and Servant § 63: Statutes § 5a—

In dealing with a Federal law it is incumbent upon the State courts to apply the rules of construction obtaining in the Federal jurisdiction.

2. Master and Servant § 65—

Under the Federal Fair Labor Standards Act, to enable an employee to recover, it is not necessary that all of plaintiff's efforts be directed to the interstate commerce side of defendant's business. It is sufficient if they directly aid in that enterprise.

3. Same—

An employee is "engaged in commerce," under the Federal Fair Labor Standards Act, if his services—not too remotely, but substantially and directly—aid in such commerce. If the business is such as to occupy the channels of interstate commerce, any employee, who is a necessary part of carrying on that business, is within its terms.

4. Same—

In an action by plaintiff to recover from defendant wages and damages, under the Federal Fair Labor Standards Act of 1938, where the evidence showed that defendant is engaged in the distribution and sale of food products over a large portion of the United States, that its Raleigh branch received these products mostly for outside the State, stored them locally, sold and distributed same only within the State, that plaintiff was "Cashier" and later "Office Manager" of the Raleigh branch, among his duties were handling and accounting for the cash, remitting profits to home office, making up pay rolls and vouchers therefor, receiving and checking invoices for all products shipped in and making claims for shortages, maintain profit and loss account, transmitting same to home office and receiving instructions therefrom, the services of plaintiff have a reasonable and substantial connection with the commerce of defendant as defined in the Act and bring plaintiff within its terms.

APPEAL by defendant from *Nimocks, J.*, at September Term, 1942, of WAKE.

The plaintiff sued under the Federal Fair Labor Standards Act of 1938—ch. 676; 52 Stat., 1060; 29 U. S. C. A., S. 201-219—for recovery of overtime wages for a period beginning 24 October, 1939, and ending 23 March, 1940, amounting, as he contends, to $353.15, and the like sum as liquidated damages, totaling $706.30, and costs. The controversy here is over the question whether the services performed by plaintiff bring him within the Act as engaged in interstate commerce. By consent of parties, the case was heard by *Nimocks, J.*, at September Term, 1942, of Wake Superior Court, without a jury, upon the following agreed facts:

"1. The plaintiff is a citizen and resident of Wake County, North Carolina.

"2. This defendant is a corporation duly organized, chartered, existing and doing business under the laws of the State of New Jersey, and is duly domesticated and licensed to do business under the laws of the State of North Carolina.

"3. This defendant, during the period beginning on or about October 24, 1938, and continuing up to the time of the commencement of this action, and including all of the times mentioned in the complaint filed herein, was doing business in the State of North Carolina.

"4. The defendant, at its Raleigh, N. C., branch, during the period of time involved herein, was engaged in the business of selling mostly at wholesale, meat and meat foods wholly within the State of North Carolina, but did not purchase or slaughter livestock in North Carolina. The defendant purchased meat and meat products in various other states and said products were transported, by means of common carriers and other usual transportation agencies, from such other states to defendant's Raleigh, North Carolina, branch for sale. Meats and meat products were received daily or almost daily and were placed in the defendant's coolers and warehouse at Raleigh. These meats and meat products during the period stated were thereafter sold on orders and distributed to retailers and other concerns within the State of North Carolina. The defendant, at its Raleigh, N. C., branch, did not sell any food products outside of the State of North Carolina, or to anyone who resided or did business outside of the State of North Carolina. During the period stated some of the meat and meat foods were sold by the defendant's Raleigh branch without being processed and without any change and some without being unpacked.

"5. In carrying on its business, this defendant, during the period above mentioned, sold food products to the trade in the area surrounding Raleigh, North Carolina. Such food products were shipped mainly from points in states other than North Carolina to said Raleigh, North Carolina, branch of the defendant.

"6. The moneys received from the sale of said food products by the defendant, Raleigh, North Carolina, branch, were deposited to its credit with the Wachovia Bank & Trust Company, Raleigh, North Carolina. This defendant maintained continuously during said period in said Wachovia Bank & Trust Company a deposit in the sum of $5,000. Each working day during said period the defendant drew a check on Wachovia Bank & Trust Company for the entire credit balance of the defendant in such bank over and above the said $5,000, said check being made payable to Wachovia Bank & Trust Company; and in return for said check Wachovia Bank & Trust Company issued a Cashier's Check for a similar amount payable to the defendant. The defendant each day mailed such Cashier's Check to the Chase National Bank of the City of

New York, State of New York, to be deposited to the credit of the defendant's account. No banking was done at Raleigh, except as herein stated. All disbursements for salaries and operating expenses of the defendant's business handled at its Raleigh, North Carolina, branch were made by the Raleigh cashier by voucher drafts drawn on a Chicago, Illinois, bank, except as to some small items paid from petty cash.

"7. In the operation of its Raleigh branch, the defendant carries on its books an account designated as 'Personal Account,' which is a current account. When shipments of food products are received by the Raleigh branch, the defendant is credited on said account for the invoice amounts of said shipments. Debits are entered on this personal account for all remittances by the Raleigh branch to New York for deposit there to the credit of the defendant, for pay roll disbursements, for general expenses, etc. When a loss is shown from operations for any month, such loss is also debited to this account.

"8. In the operation of its Raleigh branch the defendant also carries on its books a 'Profit and Loss' account. On one side of this account there is shown a record of gross profits from sales of food products. On the other side there is shown a record of expenses, such as salaries, wages, telephone and telegraph charges, trucks, tires, gasoline, and other expenses. This account shows for each month whether there has been a profit or a loss from operations at the Raleigh branch. When there is a profit or a loss, it is transferred to the 'Personal Account' at the end of each fiscal period.

Paragraph omitted.

"9. The plaintiff was employed by the defendant at its Raleigh, North Carolina, branch from November 14, 1938, to March 23, 1940, as 'Cashier' at a weekly wage or salary of $24.00. During the last several months of said employment the plaintiff's title with the defendant was changed to 'Office Manager' of the Raleigh, North Carolina, branch of defendant.

"10. As Cashier and later as Office Manager of the Raleigh, North Carolina, branch of the defendant, the plaintiff had charge of handling cash from sales wholly within the State of North Carolina by the defendant of food products at its Raleigh, North Carolina, branch, made deposits of the defendant's funds derived from such sales with Wachovia Bank & Trust Company at Raleigh, North Carolina, drew checks on said bank almost every day for the defendant for the entire credit balance of the defendant's Raleigh branch over and above $5,000, received from said bank in exchange therefor a Cashier's check for a similar amount payable to defendant, and mailed said Cashier's check to the Chase National Bank of the City of New York, State of New York, for deposit there to the defendant's account, kept the records of hours worked by office

employees and handled the pay roll of the Raleigh branch of defendant and, along with the Manager of the Raleigh branch, signed voucher drafts issued by defendant for salaries and other expenses, received from the Manager of the Raleigh branch of defendant invoices for food products shipped from other states to defendant's Raleigh, North Carolina, branch and checked said invoices against the receiving records to ascertain shortages in shipments, etc., made out claims against defendant's sources of supply, principally from states other than North Carolina, for any shortages and overcharges, and prepared and submitted profit and loss statements of the Raleigh branch of defendant and transmitted them to Chicago, Ill., office of defendant. From time to time during the period stated the plaintiff received direct from the Branch House Accounting Department of the defendant at Chicago, Illinois, bulletins containing instructions concerning his duties as an employee of the defendant.

"11. In addition to social security tax deductions, there was deducted from the plaintiff's wage or salary each week the sum of 20c for premium in Wilson Employees Mutual Benefit Fund and premium for life insurance, which sums were forwarded each month, along with similar deductions from the wages of other employees, to 'Wilson Employees Mutual Benefit Fund of Chicago, Illinois,' and appropriate accounts. The plaintiff computed the deductions and mailed the checks to said fund each month, along with a required report. The plaintiff was also required to keep a record of the hours work for employees, including himself, who numbered approximately eighteen.

"12. Paragraph omitted.

"13. The plaintiff has made demand upon the defendant for the payment of compensation for overtime, that is, for the number of hours worked each week from November 14, 1938, to October 24, 1939, in excess of 44, and for the number of hours in excess of 42 per week during the period beginning October 24, 1939, and ending March 23, 1940, but the defendant never has paid anything to the plaintiff over $24.00 per week and contends that the plaintiff during the period in question was not engaged in commerce or the production of goods for commerce which would entitle him to any additional compensation under the Fair Labor Standards Act of 1938."

Upon these facts, judgment was rendered in favor of the plaintiff for the amount of his demand, and defendant appealed.

Bailey, Lassiter & Wyatt and Douglass & Douglass for plaintiff, appellee.

Richard C. Winkler and Smith, Leach & Anderson for defendant, appellant.

SEAWELL, J. The Fair Labor Standards Act of 1938—Act of 25 June, 1938, chapter 676; 52 Stat. 1060; 29 U. S. C. A., secs. 201-219—with some exceptions not pertinent to this case, provides a schedule of minimum wages and maximum hours for every employee "who is engaged in commerce or in the production of goods for commerce." Secs. 6 (a) and 7 (a). Section 3 (b) defines commerce as used in the Act as follows: "'commerce' means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof."

It has been said that the Congress has not exhausted its full power under the Commerce Clause in this legislation. It may well include categories not now within the confines of the Act. But it has greatly broadened the conception of interstate commerce, and extended its reach or comprehension of the instrumentalities employed, particularly on the human side, as a means of removing burdensome inequalities and as a measure of social justice to those employed, including in the Act a vast number of persons not theretofore considered in this connection, but whose exclusion would defeat the purpose of the Act. Sec. 2 (a). In doing so it has stricken down court opinion reflecting a narrower view of the powers of Congress under the Commerce Clause. *Hammer v. Dagenhart,* 247 U. S., 251, 62 L. Ed., 1101; *U. S. v. Darby,* 312 U. S., 100, 85 L. Ed., 609; and has hurdled judicial abstractions thought to be defeative of its purpose. *U. S. v. Darby, supra; Kirschbaum Co. v. Walling,* 316 U. S., 517, 86 L. Ed., 1638; *Walling v. Jacksonville Paper Co.,* 87 (U. S.) L. Ed., 393.

We have freely entertained cases arising under the Wage and Hour Law, although it imposes a liability with respect to damages not of a character heretofore cognizable in our courts. *Hart v. Gregory,* 220 N. C., 180, 16 S. E. (2d), 837; *Crompton v. Baker,* 220 N. C., 52, 16 S. E. (2d), 471; *Overnight Motor Transp. Co. v. Missel,* 316 U. S., 572, 582, 86 L. Ed., 1682, 1691. But we are dealing with a Federal Law, and it is incumbent upon us to apply the rules of construction obtaining in the Federal jurisdiction, regardless of the cliches of interpretation we might otherwise employ.

We are not dealing here with the clause of the Act relating to the production of goods for commerce, nor with the distinctions peculiar to cases where the employee attempts to qualify for the protection of the statute as one who is so engaged. *Hart v. Gregory, supra.* The clause under which plaintiff claims protection is simpler and broader—"engaged in commerce"—which we think, if it means anything at all, signifies that the employee is so engaged if his services—not too remotely, but substantially and directly—aid in such commerce as above defined. With reference to that clause, it is said in *Walling v. Jacksonville Paper Co.,*

supra: "It is clear that the purpose of the Act was to extend Federal control in this field throughout the farthest reaches of the channels of interstate commerce." In that connection the opinion quotes from the statement made by Senator Borah, speaking for the Senate Conferees on the Conference Report: ". . . if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill." 83 Cong. Rec., 75th Cong., 3rd Sess., Pt. 8, p. 9170.

If the plaintiff did so aid the defendant in any phase of its business in which it was itself engaged in interstate commerce, both of them come within the purview of the Act.

In the case at bar, the defendant is not aided by *Walling v. Jacksonville Paper Co., supra,* or the absence in the present case of the conditions thought necessary in the *Walling case, supra,* for the plaintiff's recovery. The plaintiffs in the two cases are not like situated. There, the suit was by one engaged in the local delivery of the goods to customers, and it was necessary to maintain the theory of continuity of the movement in commerce, despite a temporary interruption in defendant's warehouse, in order to connect the employment with the commerce. Here, it may be conceded without detriment to plaintiff's case—or necessary exoneration of the defendant—that the products moving in interstate commerce came to rest in defendant's Raleigh warehouse without further obligation to the "channels of commerce" theory in its local distribution, if, nevertheless, plaintiff's services in any substantial and direct way aided in the interstate commerce in which defendant was actually engaged.

In the case at bar, the plaintiff contends, and we think with reason, that his services, or at least a substantial part of them, were connected with the flow of goods in commerce before they came to rest, if they did so, in the defendant's local warehouse, or in connection with that result. But, that the defendant received its own products by shipment to itself or its agency in this State may have an important bearing upon the functions of its Raleigh branch, the extent and manner in which the commerce at the instance of defendant was projected into this State, the participation therein by its local agency, and the connection of the plaintiff with such commerce.

In one phase of its business, the defendant was unquestionably engaged in interstate commerce: In gathering its materials of trade, slaughtering livestock, and purchasing meat products outside of the State and shipping them to its warehouse in this State for local or intrastate distribution.

Down to the time the products came to rest in the Raleigh warehouse, defendant dealt with them and transported them in interstate commerce, and the agreed facts indicate that its agency here was maintained primarily to aid and facilitate both such transportation and final distribu-

tion within the State. These products, we think, did not come to rest here without a substantial contribution by the Raleigh agency to that result.

The plaintiff, of course, would not necessarily be engaged in interstate commerce because of his connection with the business of the employer, if his own activities were confined solely to assistance in intrastate distribution. The question before us is whether the duties performed by the plaintiff could be considered altogether within the pale of defendant's local distribution business within the State, or whether they were essential to or in aid of its interstate commerce. *Foster v. National Biscuit Co.*, 31 F. Supp., 244; *Walling v. Jacksonville Paper Co., supra; Kirschbaum Co. v. Walling, supra.*

Doubtless some of the duties performed by one in plaintiff's position, or similar position, might fit into the concept of a purely independent, local concern, in no wise engaged in interstate commerce; but they would be just as appropriate or necessary to the conduct and management of an interstate concern with a set-up dealing altogether in interstate commerce. The acts of the employee, although abstractly similar, take on a different significance according to the activity which they aid. Others of these duties seem more directly concerned with defendant's interstate commerce.

The Raleigh branch was not autonomous. The evidence discloses it to be, in effect, an agency of the defendant, integrated with the Chicago office as an interstate set-up, and acting under the control and management of the home office as an efficacious if not necessary instrumentality in keeping its products flowing in interstate commerce from the various shipping points outside the State to its own warehouses in this State. The existence of the branch office at this, the receiving end of the line, was as necessary to the defendant's way of doing business as were the facilities by which the products were collected and put into the flow of commerce.

Amongst the duties performed by the plaintiff were handling cash from sales of products from the Raleigh branch; making deposit of cash in the Wachovia Bank & Trust Co. at Raleigh; drawing checks on such deposits for all sums in excess of $5,000.00, and making daily remittances to the home office; keeping records of hours worked by office employees at the Raleigh branch; handling the pay roll of the employees of the Raleigh branch; signing voucher drafts issued by defendant for salaries of employees and payment of other expenses; receiving invoices from the Manager of the Raleigh branch for food products shipped from other states, and checking invoices against receiving records to determine shortages in shipments; making out claims against defendant's source of supply from other states for shortages and overcharges; maintaining the

profit and loss account of the Raleigh branch of the corporation; preparing and submitting to the Chicago office statements of profit and loss of the Raleigh branch; receiving from the Chicago office, bulletins containing instructions as to his duty as an employee; deducting and transmitting to Chicago social security tax and a weekly sum for premiums in the Wilson Employees Mutual Benefit Fund, with the required report; keeping records of the hours of work of the approximately eighteen employees of the defendant's corporation at its Raleigh branch.

Some of these duties may not be of great significance. It may be difficult upon analysis to classify all of them one way or another, but some of them we think essential to the maintenance of defendant's business, taken as a whole, including its interstate commerce. The plaintiff kept the records of the office generally, without any distinction as to items which might pertain to purely localized business; handled the pay roll of all employees, regardless of whether they were engaged in receiving and storing the incoming products or otherwise; signed vouchers for wages and expenses, the latter presumably including costs of transportation; kept track of the goods moving in commerce to see whether they arrived, and made out claims against the source of supply in other states for shortages and overcharges; dealt directly with the home office in daily transmission of the funds and reports of profit and loss. These duties did not begin with the distribution of the product after it had come to rest in the North Carolina warehouse; they were not all confined to localized activities or to local distribution, or necessary to that branch of the business. They were activated by the necessities of defendant to keep informed as to the interstate movements of its products from points of shipment outside the State, and facilitated their control and reception here. Without some of the services enumerated, whether performed by the plaintiff or some other person, it would seem that the defendant's business of shipping its products to the Raleigh branch would have been impaired, disorganized, or greatly impeded.

It is not necessary that all of plaintiff's efforts be directed to the interstate commerce side of defendant's business. It is sufficient if they directly tended to aid in that enterprise. It is not a question of percentage; the *de minimis* doctrine does not apply in cases of this kind. *Ward v. Central Sand & Gravel Co.*, 33 F. Supp., 40; *Hart v. Gregory*, 218 N. C., 184, 10 S. E. (2d), 644.

There has been no attempt to formulate any general rule applicable to cases of this kind. It is a matter of the application of sound judgment, upon the facts of the particular case and within the limitations of the Act, in fairly appraising the relation of the employee and of his services with respect to the interstate commerce of his employer, where that exists. We think the services of the plaintiff have a reasonable and sub-

stantial connection with such commerce of the defendant—were intended to be and, in fact, were efficacious in its promotion and conduct—and bring him within the protection of the Act. The judgment of the court below is

Affirmed.

STATE v. MARK HARVEY BOYD AND MOFFITT DOTSON WILBORN.

(Filed 28 April, 1943.)

1. Criminal Law § 52b—

Upon a motion for nonsuit under C. S., 4643, if there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case should be submitted to the jury. But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment, the motion should be allowed.

2. Same—

Where a complete defense is established by the State's case, on a criminal indictment, the defendant should be allowed to avail himself of a motion for nonsuit under C. S., 4643.

3. Burglary and Unlawful Breaking §§ 1e, 7—

Upon indictment under C. S., 4236, the burden is upon the State to show: (1) that the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse.

4. Burglary and Unlawful Breaking § 9—

In the trial of an indictment for the possession of implements of housebreaking, where the State's evidence fails to show that any of the implements were for the express purpose of housebreaking and fails to show that any of them were implements enumerated in the statute, C. S., 4236, except perhaps a "bit," and shows that all of the tools or implements, except pistols, were in common use in lawful and ordinary occupations, without any circumstances inferring that the implements were for burglarious purposes, there is no evidence to support a verdict of guilty and motion of nonsuit should have been granted.

APPEAL by defendants from *Dixon, Special Judge,* at October Term, 1942, of FRANKLIN.

Criminal prosecution charging defendants with having in their joint possession, without lawful excuse, certain implements of burglary. C. S., 4236.

The implements, in possession of which defendants are charged to have been found in Franklin County, enumerated in the bill of indict-

ments are: "3 pistols with cartridges for same, bolt clippers, wrecking bar, two big screwdrivers, 2 pairs of gloves and flashlights, blackjack, brace and bit, and pliers or nippers and other implements of dangerous and offensive nature fitted and designed for use in burglary or other housebreaking or for use in burglary with explosives."

Upon the trial in Superior Court evidence offered by the State through the witnesses, State Highway Patrolman M. H. Bynum and one S. T. Denton, tends to show these facts: "Around" twelve o'clock on the night of 16 April, 1942, Patrolman Bynum, acting in his official capacity, and accompanied by Denton, seeing two cars, a Pontiac and a '41 Plymouth, "parked just beyond the monument on Main Street in Louisburg," "came on back down the street and pulled into a service station to wait for them to come by. They came by pretty soon." The patrolman "checked the Pontiac" as it went out Nash Street, and found that it was occupied, and being driven by "a fellow Lassiter." Then the patrolman "went to check the '41 Plymouth." It "had come on down in front of the Big Apple Cafe," and the patrolman "touched the siren and they pulled up along there at the Big Apple." Defendant Wilborn was driving the car, and defendant Boyd was on the right front seat of it. No one else was in the car. This was not over ten minutes after the cars were seen near the monument. When the patrolman came up to the car he asked Wilborn if he objected to his car being searched, to which Wilborn "said he did not," and got out of the car. Whereupon, the patrolman, upon looking in the back of the car, found about a quart of whiskey on the floor back of Wilborn, and, picking up his overcoat, found a pistol in it. The patrolman then arrested Wilborn. At that time the sheriff, having heard the siren, had "walked out there." Then the patrolman had Boyd to get out of the car, and, finding in "the glove compartment" "a flashlight and another pistol and a blackjack" he "put them both under arrest," walked with them to, and put them in jail. Denton, following closely, drove the car to the jail. Up to that time the officer had found only the whiskey, flashlight, two pistols and blackjack, as above stated. But after defendants were locked up, the officers gave "the car a thorough check." The back seat cushion was out. In the car they found these articles, in addition to those above enumerated: "a bolt cutter . . . under the mat . . . on the floor, under boot in the trunk," "a large screwdriver in the trunk"; "wrecking bar . . . in the boot"; "brace and bit"; "one pistol . . . kind of rusty . . . in the boot . . . behind the tire . . . it was loaded"; "a pair of pliers and screwdriver in the boot"; a "straw hat," and a "slicker hat"; two pairs of gloves, one in the glove compartment and the other on the floor in the back; another flashlight "in the seat"; and a "fan belt in the trunk." (Each of these articles was introduced in evidence as exhibits.)

The patrolman testified that when he stopped the defendants, Wilborn said, in the presence and within the hearing of Boyd, that "they had that stuff in there for their protection"; that "they had been stopped with some liquor and had some liquor taken from them"; that "they carried the gun for his own protection"; that, on being asked what they were doing down there, "Wilborn said he had started to Rocky Mount to get a load of liquor"; that, in reply to question of patrolman as to "why he didn't go down 301, it was so much nearer," Wilborn "said he wanted to see a man in Henderson, so he came there"; and that, on being asked who the man was in the other car, Wilborn "said he didn't know him—just happened to run up together and they were both lost," but that "when some officers from Virginia came down and questioned them about it" "they later told me who he was."

And on cross-examination, in pertinent part, the patrolman continued: "Mr. Boyd said he did not know anything about any of it, said he was just riding . . . They didn't make any effort to get away or make any objection to me searching the car or make any motion that I would construe as an attempt to get away . . . The bolt clippers are what is known as a bolt clipper or cutter, is used for cutting bolts, are part of a mechanic's tools—you can use them to cut most anything—they are used around a garage . . . The brace and bit is a common tool of the carpenter, I would say so . . . The screwdriver you see in every garage and in homes, that is a very common tool . . . I believe the wrecking bar is an ordinary wrecking bar—nothing unusual about it . . . a lot of mechanics have them and use them . . . This little screwdriver is an ordinary screwdriver . . . You can buy them anywhere, and the same thing about the pliers—they are used around garages and filling stations, and carpenters and electricians use them—everyone should have flashlights. I do not recall that the glove compartment was difficult to open. I mashed the button and . . . it came open very easy . . . Mr. Wilborn told me that he had the pistol for protection—that he had some liquor taken off of him . . . Mr. Boyd said that he was just riding with him as a passenger. Mr. Wilborn said he was a mechanic. That was what he said that he had followed the trade of a mechanic for a long number of years and these were his tools . . . I didn't find among these tools any sawed-off shotguns, or any extra ammunition for the pistols, or any nitroglycerin or any ammonia, any butcher knife, any chisels, drill punches, soap, wire or rope, eye-droppers, dynamite caps or fuses, sledge-hammers, breast drill, drill bits. No, sir, I didn't find any of the articles you have called over." And on re-direct examination the Patrolman said: "I did not find any machine guns . . . 75 MM cannons . . . any shotguns."

The testimony of S. T. Denton, as contained in the record, is, in the main, in corroboration of the patrolman in identifying the articles found in the car.

When the State rested its case, defendants and each of them moved for judgment as of nonsuit. C. S., 4643. The motion was denied and defendants excepted.

Verdict: Guilty as charged in the bill of indictment.

Judgment: As to defendant Moffitt Dotson Wilborn: Confinement in State's Prison at Raleigh for a period of not less than 10 nor more than 12 years. As to defendant Mark Harvey Boyd: Confinement in State's Prison at Raleigh for a period of not less than 7 nor more than 10 years.

Though indicted in the same bill and tried together, defendants separately appeal to the Supreme Court and bring up separate records, identical in all respects except as to judgment, and separately assign error.

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

Yarborough & Yarborough for defendants Boyd and Wilborn, appellants.

WINBORNE, J. Defendants, in the main, stress for error, and properly so, the refusal of the court to grant their motions under C. S., 4643, for judgment of nonsuit.

In considering motion for judgment of nonsuit under C. S., 4643, the general rule as stated in *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730, and in numerous other decisions of this Court, is that "if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment against defendant, the motion for judgment of nonsuit will be allowed. *S. v. Johnson, supra,* and cases cited. See *S. v. Stephenson,* 218 N. C., 258, 10 S. E. (2d), 819; and also *S. v. Vinson,* 63 N. C., 335; *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. Madden,* 212 N. C., 56, 192 S. E., 859; *S. v. Shelnutt,* 217 N. C., 274, 7 S. E. (2d), 561; *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47; *S. v. Goodman,* 220 N. C., 250, 17 S. E. (2d), 8; *S. v. Penry,* 220 N. C., 248, 17 S. E. (2d), 4.

Also, on a motion for judgment as of nonsuit, under C. S., 4643, the rule is, as stated in *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769, "that where a complete defense is established by the State's case, a defendant should be allowed to avail himself of such defense." See also *S. v. Hed-*

den, 187 N. C., 803, 123 S. E., 65; *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91; *S. v. Todd, supra.*

In the *Todd case, supra,* applying this principle to an alleged confession of defendant, offered in evidence by the State, *Devin, J.,* said: "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," citing cases.

Defendants are indicted under that portion of the statute, C. S., 4236, which prescribes that "if any person . . . shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking . . . such person shall be guilty of a felony and punished by fine or imprisonment in the State's Prison, or both in the discretion of the court."

This statute, significant to note, is patterned after the English statute known as the Larceny Act, 1861, 24 and 25 Vict., chapter 96, sec. 58, which is more condensed in expression than a prior English statute, 5 Geo. 4, chapter 83, sec. 4, as quoted in Chitty on Criminal Law (1832), Vol. III, p. 1116, and in pertinent part prescribes that: "Everyone . . . who is found by night having in his possession without lawful excuse (the proof of which excuse lies on such person) any pick-lock, key, crow, jack, bit, or other implement of housebreaking shall be guilty of a misdemeanor." And in this connection it is noted that in the case of *S. v. Dozier,* 73 N. C., 117, at June Term, 1875, a case in which the Court then said that breaking and entering a storehouse, with intent to steal the goods and chattels therein, is not a criminal offense at common law or by statute in this State, *Bynum, J.,* directed attention to the above English statute. Thereafter, a statute was incorporated in the Code of North Carolina, adopted in 1883, sec. 997, which in pertinent part reads: "If any person . . . shall be found by night having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking . . . shall be guilty of an infamous crime," etc. Thus it appears that the statute so adopted in this State is in almost the same words as the English statute except that the clause "the proof of which excuse lies on such person," contained in the English statute, was deleted. It is manifest and significant, therefrom, that the General Assembly did not intend that this clause should apply in this State. And the statute, unchanged in wording, was brought forward in the Revisal of 1905, as section 3334, which was amended in 1907 by striking out the words "by night." Public Laws 1907, chapter 822, sec. 1. As so amended it is now the statute under which defendants are indicted. C. S., 4236. In the light of the foregoing it is clear that in this State, under this statute, the gravamen of the offense is the possession of burglar's tools without

lawful excuse, *S. v. Vick,* 213 N. C., 235, 195 S. E., 779, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse.

In this connection it is noted that the English courts, treating of cases relating to this phase of the statute, seem to hold that although an implement be used in the ordinary affairs of life for lawful purposes, it is to be considered an implement of burglary within the meaning of the Act (1) if it be capable of being used for the purpose of housebreaking, and (2) if, at the time and placed alleged, the person charged had it in possession for that purpose. And, further, although under the English rule when a person is charged with possession of an implement of housebreaking, the burden of proving lawful excuse is on the person so charged, that burden is discharged by the accused if he prove that the alleged implement of housebreaking, capable of being used for that purpose, is a tool used by him in his trade or calling. See 9 Halsbury's Laws of England, Part XIII, on Criminal Law and Procedure, section 1353; and The English and Empire Digest Supplement 1940, Vol. 14, page 108, Nos. 10727, 10729 (a); and Vol. 15, page 960, Part XXXIV, section 13.

Also, in the case of *S. v. Ferrone,* 97 Conn., 258, 116 A., 336, it appears that in the State of Connecticut there is a statute in almost exact wording of the pertinent section of the English Larceny Act, including the clause as to proof of excuse being upon the accused, which is hereinabove quoted. In that case the Supreme Court of Errors of Connecticut, speaking of, and approving the charge of the trial court, as a clear and accurate construction of the statute, has this to say: " 'An instrument of housebreaking,' said the Court, 'may be such from its essential nature, that is, it may be one which is made and designed for the express purpose of housebreaking.' Or, it 'may be one which is such temporarily and for a particular purpose, and whether such or not would depend upon two considerations: "First, is it one that is reasonably adapted for use in housebreaking; and, second, was it at the time intended or actually used for that purpose?" ' "

In the light of the similarity in wording of the English and Connecticut statutes to that in this State, C. S., 4236, the construction so made and applied by the English and Connecticut courts, as above indicated, is convincing and appropriate in considering the case in hand.

Therefore, applying these principles to the facts in the present case, we are of opinion that the State has failed to offer evidence sufficient to support a verdict of guilty. The evidence fails to show that any of the articles found in the automobile was an implement made and designed for the express purpose of housebreaking. It fails to show that any of

them were implements enumerated particularly in the statute, except perhaps the "bit." It fails to show that any of the implements were reasonably adapted for use in housebreaking, or that they were the kind of implements used by burglars. On the contrary, the evidence for the State tends to show that each of the articles, including the "bit," so found, except the pistols, and blackjack, is a tool or instrument in common use in lawful occupations, and in the ordinary affairs of life. Moreover, the evidence fails to show facts and circumstances from which it may be inferred that at the time and place in question defendants possessed the implements, singly or in combination, as burglar's tools or for the purpose of housebreaking.

The phrase "without lawful excuse" must be construed in the spirit of the statute. And, even though the possession of the pistols and blackjack be unlawful, and even though the defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of intoxicating liquor, in accordance with statement of defendant Wilborn, such possession is not within the meaning of the statute in question.

This case is distinguishable from *S. v. Vick, supra,* where defendant was charged with having in possession certain implements of burglary. Though it is there stated that "the particular section of the statute under which defendant was being tried does not require the proof of any 'intent' or 'unlawful use,' " it must be borne in mind that there "the defendant made no contention that the tools found in the possession of Denton and the other occupants of the car were not implements of housebreaking." Therefore, the rule there stated must be read in the light of the facts in that case. "The law discussed in any opinion is set within the framework of the facts of that particular case," *Barnhill, J.,* in *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10. See also *S. v. Utley, ante,* 39.

For the reasons stated, the judgment of Superior Court against each defendant is

Reversed.

C. M. BYERS v. SARA SHERMAN BYERS.

(Filed 28 April, 1943.)

1. Actions § 4: Equity § 1d—

No civil rights can inure to one out of his own violation of the criminal law.

2. Same—

The courts are open for the determination of rights and the redress of grievances, but not for the rewarding of wrongs—one *in flagrante delicto* is not permitted to recover.

3. Appeal and Error § 49b: Trial § 29b—

Expressions in an opinion are to be interpreted in connection with the factual situation under review.

4. Pleadings § 3a—

A plaintiff is not held bound to anticipate and negative in advance all grounds of defense to the action he brings, and petitions for divorce do not constitute an exception to the general rule.

5. Divorce § 2a—

Notwithstanding the broad language of the separation statute, a husband may not ground an action for divorce on his own criminal conduct towards his wife. A full review of recent divorce and separation statutes and decisions thereon.

6. Same—

An action for divorce may not be maintained on the ground that the husband and wife have lived separate and apart for two years, when it is shown and pleaded in bar that such separation was the result of plaintiff's wrongful abandonment of his wife and their children, and his offering of such indignities to defendant's person as to render her condition intolerable and life burdensome.

7. Pleadings § 15—

A plea in bar is not to be overthrown by demurrer, if good in any respect or to any extent.

8. Divorce §§ 11, 13—

An order for support, either *pendente lite* or under C. S., 1667, without more, will not perforce defeat an action for divorce under ch. 100, Public Laws 1937. Such an order is not final and may be modified or set aside on a showing of changed conditions. C. S., 1666.

9. Pleadings § 21—

A discretionary ruling on a motion to amend pleadings is not reviewable on appeal. C. S., 547.

APPEAL by plaintiff from *Johnson, Special Judge,* at January Special Term, 1943, of MECKLENBURG.

Civil action for absolute divorce on the ground of two years separation.

The complaint, filed 7 March, 1942, alleges:

1. That plaintiff and defendant were married in March, 1936, and lived together as husband and wife until February, 1940, when they separated.

2. That plaintiff and defendant have lived separate and apart continuously for the past two years, and the plaintiff has resided in this State for a period of one year.

Wherefore, plaintiff prays that the bonds of matrimony be dissolved as provided by ch. 100, Public Laws 1937.

Defendant filed answer 10 April, 1942, admitted the marriage and alleged that plaintiff and defendant lived together as husband and wife

from March, 1936, until the plaintiff wrongfully abandoned her in September, 1940. She also admitted the plaintiff's residence in the State for a period of one year, but denied that they had lived separate and apart within the meaning of the divorce laws.

In a further defense and cross action the defendant asked for alimony without divorce or subsistence and counsel fees under C. S., 1667, as amended.

The plaintiff filed motion to strike the further answer and cross action under authority of *Silver v. Silver,* 220 N. C., 191, 16 S. E. (2d), 834, and *Shore v. Shore,* 220 N. C., 802, 18 S. E. (2d), 353, which was allowed. Whereupon, the defendant instituted an independent action for subsistence and counsel fees, alleging wrongful abandonment, etc., on the part of defendant, and upon denial of liability and issues joined, the jury found that the defendant therein, plaintiff herein, had failed to provide his wife and their two children with necessary subsistence and that he had offered "such indignities to the person of the plaintiff (the wife) as to render her condition intolerable and life burdensome, without any fault of the plaintiff, as alleged in the complaint."

In the meantime a trial of the present action resulted in verdict and judgment for defendant, from which the plaintiff appealed, and a new trial was awarded for error in the charge. 222 N. C., 298.

Over objection of plaintiff, the defendant then applied to the court for leave to amend her answer and to set up in bar of the plaintiff's action the record in the case by the defendant for alimony without divorce.

The motion being allowed, the plaintiff interposed a demurrer to the plea in bar, which was overruled. From the two rulings, the plaintiff appeals, assigning errors.

Thaddeus A. Adams for plaintiff, appellant.

Carswell & Ervin and Robinson & Jones for defendant, appellee.

STACY, C. J. The broad question for decision is whether an action for divorce may be maintained on the ground that "the husband and wife have lived separate and apart for two years" (ch. 100, Public Laws 1937), when it is shown and pleaded in bar that such separation was the result of the plaintiff's wrongful abandonment of the defendant and their two children, and his offering such indignities to the person of the defendant as to render her condition intolerable and life burdensome. Specifically, the question posed is whether the amended answer states a good plea in bar, admitting for the purpose the truth of the facts alleged. 17 Am. Jur., 267; 27 C. J. S., 625.

The history of the "separation" statute was given in part on the former appeal, reported in 222 N. C., 298, to which reference may be had

to avoid repetition. See, also, *Brown v. Brown,* 213 N. C., 347, 196 S. E., 333.

Briefly, it may be recalled that the first separation statute in this State was a ten-year statute, enacted in 1907, ch. 89, Laws 1907.

In *Cooke v. Cooke,* 164 N. C., 272, 80 S. E., 178, it was held by a sharply divided Court, that the plaintiff in an action for divorce under the conditions named in the statute, as amended by ch. 165, Public Laws 1913, was entitled to a decree in his or her favor without reference to whether the plaintiff or the defendant was in fault in bringing about the separation, and that the time covered by a decree *a mensa et thoro* rendered in an action brought by the wife should not be excluded in computing the period of separation.

Thereafter, the *Cooke case, supra,* was rendered apocryphal by the recodification of the laws in 1919—Consolidated Statutes—when the provisions of the separation statute were brought forward as subsection 4 of the general divorce section, C. S., 1659, which provides that "marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, *on application of the party injured,* in the following cases," naming them. (Italics added.) This was so declared in the cases of *Sanderson v. Sanderson,* 178 N. C., 339, 100 S. E., 590, and *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352.

The law remained in this condition, in respect of the "party injured," until the enactment of ch. 72, Public Laws 1931, in which it was provided: "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," etc. (reduced to two years by ch. 163, Public Laws 1933). And further: "That this act shall be in addition to other acts and not construed as repealing other laws on the subject of divorces."

In two cases arising under the 1931 Act, as amended in 1933, it was held that the applicant for divorce need not be "the injured party." *Long v. Long,* 206 N. C., 706, 175 S. E., 85; *Campbell v. Campbell,* 207 N. C., 859, 176 S. E., 250. In neither of these cases, however, was there a plea in bar based on the wrong of the applicant. The principle really applied was that stated by *Avery, J.,* in *Steel v. Steel,* 104 N. C., 631, 10 S. E., 707: "The plaintiff is not held bound to anticipate and negative in advance all ground of defense to the action he brings, and petitions for divorce do not constitute an exception to the general rule."

Then came the case of *Parker v. Parker,* 210 N. C., 264, 186 S. E., 346, decided 15 June, 1936, in which it was held that "while the applicant need not be the injured party, the statute does not authorize a divorce where the husband has separated himself from his wife, or the

wife has separated herself from her husband, without cause and without agreement, express or implied."

Following this decision, the General Assembly of 1937 again amended the law so as to read: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on 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." And further: "That this act shall be in addition to other acts and not construed as repealing other laws on the subject of divorce." Ch. 100, Public Laws 1937. The section will appear in the General Statutes of 1943 as G. S. 50-6.

The plaintiff brings his action under the 1937 law. We have held in at least three cases that, notwithstanding the broad language of the separation statute, a husband may not ground an action for divorce on his own criminal conduct toward his wife. *Reynolds v. Reynolds,* 208 N. C., 428, 181 S. E., 338; *Brown v. Brown,* 213 N. C., 347, 196 S. E., 333; *Hyder v. Hyder,* 215 N. C., 239, 1 S. E. (2d), 540. No civil rights can inure to one out of his own violation of the criminal law. *Lloyd v. R. R.,* 151 N. C., 536, 66 S. E., 604. It may be noted that in the *Hyder case, supra,* the defendant alleged a willful or criminal abandonment on the part of the plaintiff, whereas the issue which the jury answered in the affirmative was: "Did the plaintiff wrongfully abandon the defendant, as alleged in the answer?" The judgment denying the plaintiff a divorce on this issue was upheld on appeal.

We have also held that when the misconduct of the complaining party in an action for divorce *a mensa et thoro* is calculated to and does reasonably induce the conduct of the defendant, relied upon in the action, he or she, as the case may be, will not be permitted to take advantage of his or her own wrong, and the decree of divorcement will be denied. *Page v. Page,* 161 N. C., 170, 76 S. E., 619. It is to be observed, however, that this was said in a case arising under the section which gives a right of action only to the "party injured." C. S., 1660. And it has been said that the "party injured" means the party "wronged by the action of the other," *Lee v. Lee, supra,* or "that the party to the marriage contract, *who is in the wrong,* cannot obtain a divorce." *Sanderson v. Sanderson, supra.* It may also be pointed out that expressions appearing in an opinion are to be interpreted in connection with the factual situation under review. *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10. For example, the expression used on the former appeal in this case "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," should be viewed in the light of its setting, and construed accordingly. It was not intended as a delimitation of the statute. Likewise, the statement in *Hyder v. Hyder,*

supra, that "a husband is not compelled to live with his wife if he provides her adequate support," should be understood as having been used in connection with what constitutes a willful abandonment under C. S., 4447. So, also, the quotation in *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549, that "separation as applied to the legal status of husband and wife means . . . a cessation of cohabitation of husband and wife, by mutual agreement," should be noted as having been employed in reference to the theory advanced by the plaintiff in the case that the parties had mutually agreed to separate. "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered"—*Marshall, C. J.,* in *U. S. v. Burr,* 4 Cranch., 469.

The cases holding that in an action for divorce *a vinculo matrimonii,* a plea in bar will not be sustained where the misconduct of the plaintiff falls short of such as would also constitute cause for absolute divorce are not in point. 17 Am. Jur., 269; 27 C. J. S., 625; Anno. 39 L. R. A. (N. S.), 1135. The defendant's plea is not technically one of recrimination, though it may be *in genere,* of kindred nature, or of like kind. *Pharr v. Pharr, post,* 115. Here, the very act of living separate and apart for two years, upon which the plaintiff bases his cause of action, was of his own wrongdoing. In other words, the plaintiff seeks to profit by his own tort. One *in flagrante delicto* is not permitted to recover in the courts. The courts are open for the determination of rights and the redress of grievances, but not for the rewarding of wrongs. To "do justly" and to "render to each one his due," *suum cuique tribuere,* are the first commands of the law.

It is an accepted principle in the law of domestic relations that an applicant will not be granted a divorce because of a condition—which within itself may be a statutory cause for divorce—when it affirmatively appears that such condition was brought about by the applicant's own wrong. *Pierce v. Pierce,* 120 Wash., 411, 208 Pac., 49. The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains. The maxim is, *"in pari delicto potior est conditio defendentis."* 10 R. C. L., 353. No one is permitted to profit by his own fraud, or to take advantage of his own wrong, or to found a claim on his own iniquity, or to acquire any rights by his own crime. 1 R. C. L., 317. "No court will lend its aid to a party who founds his claim for redress upon an illegal act"—*Swayne, J.,* in The "Florida," 101 U. S., 43.

It is true, the statute under review provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, "if and when the husband and wife have lived separate and apart for two years," etc. However, it is not to be supposed the General Assembly intended to authorize one spouse willfully or wrongfully to abandon the other for

a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong. *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5; *Sanderson v. Sanderson, supra; Whittington v. Whittington,* 19 N. C., 64. Nor is it to be ascribed as the legislative intent that one spouse may drive the other from their home for a period of two years, without any cause or excuse, and then obtain a divorce solely upon the ground of such separation created by the complainant's own dereliction. *McGarry v. McGarry,* 181 Wash., 689, 44 Pac. (2d), 816. Out of unilateral wrongs arise rights in favor of the wronged, but not in favor of the wrongdoer. One who plants a domestic thornbush or thistle need not expect to gather grapes or figs from it.

So much for the factual averments of the plea in bar as contained in the complaint filed in the maintenance suit and here set up in defense, which are deemed to be true for purposes of the demurrer.

When we come to the defendant's position in respect of estoppel by record or *res judicata,* however, quite a different question is presented. *Medlin v. Medlin,* 175 N. C., 529, 95 S. E., 857; *Brown v. Brown,* 205 N. C., 64, 169 S. E., 818; *Price v. Edwards,* 178 N. C., 493, 101 S. E., 33; 30 Am. Jur., 925. While the plaintiff there, defendant here, alleged an unlawful abandonment on the part of the plaintiff herein, this issue was not determined in the maintenance suit. The jury found in that action that the defendant there, plaintiff here, had failed to provide his wife and their two children with necessary subsistence according to his means and condition in life, and that he had offered such indignities to the person of the wife as to render her condition intolerable and life burdensome, without any fault on her part, as alleged in the complaint. But no issue was submitted to the jury in respect of the character of the separation. Its determination was not essential to the purposes of that suit. Indeed, in *Skittletharpe v. Skittletharpe,* 130 N. C., 72, 40 S. E., 851, it was said that in an action under C. S., 1667, the "defendant's reasons and excuses for separating from his wife . . . were irrelevant and might have been stricken out upon motion." See *Byerly v. Byerly,* 194 N. C., 532, 140 S. E., 158.

What effect this circumstance of placing the character of the separation in issue in that suit, without immediate disposition, may have upon the future course of the litigation cannot now be determined. See *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7; 30 Am. Jur., 927; *Case Mfg. Co. v. Moore,* 144 N. C., 527, 57 S. E., 213, 10 L. R. A. (N. S.), 734, 119 M. St. Rep., 983. At present we are concerned only with the plaintiff's demurrer. The record in the maintenance suit would be conclusive as evidence, so far as it goes. *Southerland v. R. R.,* 148 N. C., 442, 62 S. E., 517; *Medlin v. Medlin, supra.* If good in any respect or to any

extent, the plea is not to be overthrown by demurrer. *Pharr v. Pharr, supra; Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874. An order for support, either *pendente lite* or under C. S., 1667, without more, would not perforce defeat an action for divorce under ch. 100, Public Laws 1937. *Lockhart v. Lockhart, post,* 123; *Briggs v. Briggs,* 215 N. C., 78, 1 S. E. (2d), 118; *Holloway v. Holloway,* 214 N. C., 662, 200 S. E., 436; *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278; *Howell v. Howell,* 206 N. C., 672, 174 S. E., 921; *S. c., ante,* 62; *Ellett v. Ellett,* 157 N. C., 161, 72 S. E., 861. Such an order is not final, and may be modified or set aside on a showing of changed conditions. C. S., 1666; *White v. White,* 179 N. C., 592, 103 S. E., 216; C. S., 1667; *Hooper v. Hooper,* 164 N. C., 1, 80 S. E., 64.

The demurrer was properly overruled, and the discretionary ruling on defendant's motion to amend her pleading is not reviewable on appeal. C. S., 547. The result is an affirmance of the judgment.

Affirmed.

C. A. PYE, SR., v. ATLANTIC COMPANY, A CORPORATION.

(Filed 28 April, 1943.)

Master and Servant § 65—

In an action by plaintiff to recover from defendant wages and damages, under the Federal Fair Labor Standards Act of 1938, where plaintiff's evidence, in the most favorable light to him, showed that he was in the management of a recognized department of defendant's establishment, that he customarily and regularly directed the work of others employed therein, whom he hired and fired and exercised substantial discretionary powers, without sufficient evidence that his manual and clerical duties exceeded 20 per cent of his work week hours, such services bring plaintiff within the exemptive provisions of sec. 13, as the term "employed in a *bona fide* executive capacity" is defined by administrative regulation, and he is not entitled to recover.

APPEAL by plaintiff from *Blackstock, Special Judge,* at 19 October, 1942, Extra Civil Term, of MECKLENBURG. Affirmed.

The defendant is a corporation engaged in the manufacture, sale and distribution of beer and ale, with resident home office in Atlanta, Ga., and maintaining a branch office in Charlotte, N. C., from which it ships its products to its branches in North Carolina, South Carolina and Georgia, in barrels and crates by truck. It also does some local business by delivery immediately from the platform of the Charlotte building.

The plaintiff was for three years prior to 6 March, 1942, employed by defendant in the distribution of its products. He now brings action

under the Fair Labor Standards Act of 1938, 52 Stat., 1060, sec. 7 (a), 29 U. S. C. A., secs. 201-219—referred to as the Wages and Hours Law—to recover overtime wages for work done for the defendant beyond the schedule of maximum hours fixed in the Act, and for a like amount of liquidated damages for failure and refusal to pay overtime wages.

The defendant contends that during all this period the plaintiff was under the exemption provided in section 13 (a) (1) as a *"bona fide* executive," and not covered by the Act.

We summarize the evidence pertinent to these contentions:

The plaintiff testified that the bottling, loading and shipping was all carried on in one large room, in one corner of which was the bottling machinery and in the back a storage space filled up with beer or ale, or advertising matter, or anything to be shipped out of the place. At first plaintiff had a shelf on one side of the room on which he made and kept his records; but later a little enclosure was made for his comfort and convenience in the same room. The brewing department was separated from it by a partition. The bottling was carried on in the room in which plaintiff stayed.

The plaintiff supervised the loading and unloading of beer and ale, directing the quantity and kind to be put on each truck, inspected bottles and crates to see if broken bottles had been removed by employees, and that crates were in shape to carry the bottles, and that these were properly labeled and assorted as to color. During the loading he, for the most part, operated the conveyer controls. The actual loading was done sometimes by defendant's employees and sometimes by employees of the truck company which, under contract, hauled away the products. It was plaintiff's duty to keep a record of the beer and ale shipped away and empty crates and bottles returned, and make a form report thereof to the manager.

The defendant had a considerable local "platform" trade from the plant, and on occasions during the day plaintiff, rather than interrupt employees from their routine tasks, carried out crates and delivered them to customers. On occasions, the plaintiff had swept and mopped the floors—"all of us would put in there and take the 'squeejee' and broom" and start mopping up.

The plaintiff handled and distributed the advertising matter for the company and kept a record of materials, such as glue and caustic, received and used. He estimated that about 25% or 30% of his time was spent in manual labor and the rest in clerical duties. Including his 12-hour shifts on weekdays and a 3-hour shift on Sundays, he testified that he worked 75 hours per week.

Plaintiff further testified that there was no special supervision over the shipping department except from the Manager's office "except my

looking after the routine work they gave me to do"; that he had the checking and handling of all the merchandise that came to or went out of the plant; that he had under his supervision one Negro part of the time, and part of the time as many as two. There were at times as many as three or four—at one time twelve working on eight-hour shifts. Plaintiff gave instructions in the shipping department. They worked under him. There would be an average of eight or nine men working under plaintiff, but not all at one time. Plaintiff worked a crew and a half, and another man a crew and a half. "When I did not have laborers enough in the shipping department to do the work that was piled up on me, if I could pick up an extra man for four or five hours or half a day, I would do so and cut the time off of a later date on some man that I did not need on that day, since I was instructed not to allow my pay roll to go beyond a certain number of days a week. I hired men in my department, and as to firing men in my department, I have fired them." Plaintiff testified that he issued vouchers for the men temporarily hired by him during the three-year period.

Plaintiff made a list for the bottling department of what was needed to fill his orders, made from orders on his file. He testified that he was in charge of the shipping department, whether it consisted of "one or two men, whatever there were."

Plaintiff, according to general instructions, used his judgment whether in certain cases of urgent calls or in case of shortage of products, which orders should be filled in preference to others, and the quantity to be shipped to certain customers. He had instructions to fill telephone or telegraph orders first, and to fill long haul-orders ahead of short-haul orders, which he did.

In connection with hiring and firing men, plaintiff testified as follows:

"When I first came to this job there were some Negroes working there in connection with the shipping. After a year or so, one or two of them were fired. The manager fired one, I think, and I think I fired one. I have consulted with the manager in connection with hiring or firing employees. If a man had been there a year or so, I had some hesitancy in letting him go without mentioning it to the manager and I always consulted him when necessary about letting what we considered an "old" man go, who had been working there a long time, and as a rule he would tell me what he thought best. I have talked with the manager about hiring men to work in the shipping department and he would say, 'Well, that's up to you. You can use your own judgment about his work and see how it is, and if he is all right, it's all right with me.' The manager himself would hire and fire Negroes in connection with the shipping."

Plaintiff was corroborated as to the character of his services by A. H. Leonard, a former employee of the defendant.

Upon this evidence, the court below took the view that the plaintiff was an executive within the meaning of that term in the exempting provisions of section 13, as defined by the Administrator; and upon motion of the defendant on the conclusion of all the evidence, rendered judgment as of nonsuit, from which the plaintiff appealed.

Frank W. Orr and Frank H. Kennedy for plaintiff, appellant.
Stewart & Moore for defendant, appellee.

SEAWELL, J. Sections 6 (a) and 7 (a) of the Fair Standards of Labor Act provide a schedule of minimum wages and maximum hours for those employed in interstate commerce. There is no question that plaintiff was so employed or that his evidence as to overtime work was sufficient to go to the jury. But defendant insists that under plaintiff's own evidence, he should be regarded as employed in a "*bona fide* executive capacity" within the exemptive features of section 13, and therefore not entitled to overtime wages.

Section 13 authorizes the Administrator to define and delimit the terms used in the exemption clause, and acting under that authority, he issued regulations (October, 1940) defining the term "employee employed in a *bona fide* executive capacity" as follows:

"The term 'employee employed in a *bona fide* executive capacity' in section 13 (a) (1) of the Act shall mean any employee

"(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

"(B) who customarily and regularly directs the work of other employees therein, and

"(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

"(D) who customarily and regularly exercises discretionary powers, and

"(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

"(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty per cent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

Our attention is called to the fact that paragraph (E) of this definition has been held invalid by some Federal District Courts whose decisions are cited in the brief; but the paragraph is inapplicable here since the plaintiff received more wages per week than the minimum—$30—fixed in the definition.

Upon careful examination we have come to the conclusion that the plaintiff's evidence, taken in the light most favorable to him, sufficiently shows that he was in the management of a recognized department of the defendant's establishment, that he customarily and regularly directed the work of others employed therein, that he had and exercised the authority to hire and fire other employees in that department, and in the performance of these duties and others customarily and regularly exercised substantial discretionary powers.

The proportion of time spent by plaintiff in what he designates as manual and clerical duties are conclusions of the witness. We have no means of determining what time was spent in nonexempt employment, because the duty of supervision and management of his department—and the performance of that duty—appear to have been unbroken, except where, as a matter of convenience, plaintiff assisted in some work which was regularly in the routine of other employees. The clerical work alone, according to the evidence, was not sufficient to take him out of the definition of the Administrator as a percentage of performance of nonexempt services.

Perhaps we might have some concepts of a more expansive nature as to what an "executive" is or ought to be—of degree and importance, since we have come to associate that term with "big business" and worthwhile compensation. If the Administrator, official definer and delimiter of the term, had similar views, he failed to capture them within the web of his thesis. He has taken the more practical view that the definition and classification must be put on a functional basis, related to the business in which the employee is engaged, and the service he performs, which would make the importance of his position relative to the business in which he is employed.

Valid definitions within the delegated power speak with authority, and become the dictionary of the law.

We are led to the conclusion that the nature of plaintiff's services, as disclosed in his evidence, brings him within the exemptive provisions of S. 13, as its terms are officially defined by administrative regulation, and that he is not entitled to recover.

The judgment of nonsuit is

Affirmed.

WESTINGHOUSE ELECTRIC SUPPLY COMPANY v. MELVIN F. BURGESS.

(Filed 28 April, 1943.)

1. Principal and Surety §§ 8, 9—

Where a surety for the performance of a construction contract completes the contract upon default by the principal and one, who has furnished materials to both principal and surety for completion of the work, executes and delivers to the surety a full and complete release and discharge of all claims against both surety and principal, excepting, as to principal only, certain definite items, this release constitutes a compromise between surety and materialman, which does not affect the liability of the principal for the excluded items.

2. Principal and Surety §§ 7, 8: Contracts § 8—

Great liberality is allowed in construing releases. The intent is to be sought from the whole and every part of the instrument; and where general words are used, if it appears by other clauses of the instrument, or other documents, definitely referred to, that it was the intent of the parties to limit the discharge to particular claims only, courts, in construing it, will so limit it.

APPEAL by plaintiff from *Blackstock, Special Judge,* at First November Extra Term, 1942, of MECKLENBURG. Reversed.

Civil action to recover contract price of materials furnished to defendant.

In 1940-1941, defendant entered into four several contracts with electric membership corporations for the construction of four R. E. A. projects in Davidson, Haywood and Madison counties. He executed, in connection with each project, a faithful performance or compliance bond guaranteeing the payment of all just claims for labor and material. The United States Casualty Company was surety upon each bond. Thereafter, defendant entered upon the fulfillment of said construction contracts and in connection therewith purchased electric materials and supplies from plaintiff for use on said projects. In the early part of May, 1941, the defendant became unable to continue with and complete the same. The surety, under its contract, took charge, assumed control over and completed the work on each of said projects in accord with said contracts. At the time the surety company assumed control the defendant assigned to it all retained percentages and the balance due on the contracts and authorized the company to receive payment of any and all amounts still due by the several contracting parties. The surety company continued to purchase supplies and electric materials from the plaintiff and after the completion of the projects made settlement with the plaintiff.

At the time the surety company made settlement with the plaintiff the plaintiff executed and delivered to it a release agreement as follows:

"For and in consideration of the sum of Forty-Two Thousand Nine Hundred Ninety Three and 40/100 Dollars ($42,993.40), in hand paid to the undersigned, the receipt whereof being hereby acknowledged, the undersigned, Westinghouse Electric Supply Company, does for itself, its successors and assigns release, acquit, exonerate and forever discharge Melvin F. Burgess, an individual of Boone, North Carolina, and the United States Casualty Company, their and each of their heirs, executors, administrators, successors and assigns of and from any and all liability, claims, debts, demands, actions and causes of action of whatsoever kind or character which the undersigned may have against the said Melvin F. Burgess and against said United States Casualty Company by reason of labor, material or supplies of any kind or character performed, furnished or supplied by subcontract or otherwise, in connection with the performance of certain contracts entered into between said Melvin F. Burgess and (the several electric membership corporations here listed) and including particularly any and all liability, claims, debts, demands, actions and causes of action of whatsoever kind or character which the undersigned now has or may hereafter have against said United States Casualty Company on account of, under, or by virtue of certain bonds in the penalties of (the several amounts of the several compliance bonds here listed), executed by said United States Casualty Company as surety and by said Melvin F. Burgess as principal, in accordance with the statutes of the State of North Carolina, and guaranteeing the faithful performance of said contracts.

"And in consideration of the premises, the undersigned does hereby sell, assign, transfer and set over unto said United States Casualty Company, its successors and assigns (all claims for retained percentages and the like against the several electric membership corporations due the defendant).

"In accepting this Release and Assignment it is understood by the United States Casualty Company that the undersigned, Westinghouse Electric Supply Company, retains any and all rights which it may have against Melvin F. Burgess, individually, for items which the United States Casualty Company disclaimed any and all liability under its respective bonds, which for the purpose hereof may be valued at Five Thousand Eight Hundred Seven and 87/100 ($5,807.87) Dollars, and which items are and can be properly identified United States Casualty Company's Analysis of Westinghouse Electric Supply Company's claim involving the contracts and bonds set forth in Frank C. Wachter's (Engineer) reports, dated January 15, 1942, addressed to the United States Casualty Company."

At the time of this settlement materials valued at $5,807.87 were excluded. This balance represented the price of materials which had been furnished by plaintiff to defendant, liability for which was disclaimed by the surety company for the reason that it contended that such materials had not been used on either of said projects.

The plaintiff then instituted this action to recover therefor from the defendant to whom the material had been furnished.

When the cause came on for trial in the court below the parties waived trial by jury and agreed that the court should hear the evidence, find the facts and render judgment thereon. After hearing the evidence the court found the facts of which the foregoing is a summary. It thereupon concluded:

"That the plaintiff, in the first paragraph of Exhibit C (contract of release), released the defendant and the United States Casualty Company from all liability 'by reason of labor, material or supplies of any kind or character performed, furnished, or supplied by subcontract, or otherwise, in connection with the performance' of the contracts enumerated in said exhibit 'C,' and the court having found as a fact that all supplies and materials furnished by plaintiff to defendant and constituting the 'items' referred to in the third paragraph of items 'C' were used 'in connection with the performance of said contracts' designated in the first paragraph of exhibit 'C.' Therefore, the said release constitutes settlement in full to the plaintiff"; and entered judgment that the plaintiff recover nothing and that the action be dismissed. Plaintiff excepted and appealed.

Carswell & Ervin for plaintiff, appellant.

Wade E. Brown and Trivette & Holshouser for defendant, appellee.

BARNHILL, J. There are no exceptions to the facts found by the court below and there is no real controversy in respect thereto. The plaintiff only challenges the correctness of the legal conclusion drawn therefrom.

While the court below found that all of the materials which were delivered to the projects by the plaintiff were actually incorporated in the projects this fact was denied by the surety. Upon that ground it disclaimed any liability therefor. The result of this dispute was the release agreement which controls the merits of this controversy.

Hence, the question posed for decision is this: Did the plaintiff, under a proper interpretation of the release agreement, reserve and retain its right of action against the defendant for the balance due on the purchase price of the materials furnished and used in the projects by defendant for which the surety did not pay? That is, does the last paragraph of the release agreement constitute an exception to the general release contained in the first paragraph thereof?

A clause of a contract irreconcilable with a preceding clause and repugnant to the general purpose of the contract will be set aside. *Davis v. Frazier,* 150 N. C., 447, 64 S. E., 200.

But the ascertainment of the real intent of the parties as expressed in the instrument is the dominant object. The intent as embodied in the entire instrument must prevail, and each and every part must be given effect if it can be done by fair and reasonable intendment before one clause may be construed as repugnant to or irreconcilable with another. *Davis v. Frazier, supra; Bowden v. Lynch,* 173 N. C., 203, 91 S. E., 957; *Finger v. Goode,* 169 N. C., 72, 85 S. E., 137; *Lefler v. Lane,* 167 N. C., 267, 83 S. E., 463; *Gilbert v. Shingle Co.,* 167 N. C., 286, 83 S. E., 337.

In seeking the intent it is presumed that every part of the contract expresses an "intelligible intent, *i.e.,* means something." *Wooten v. Hobbs,* 170 N. C., 211, 86 S. E., 811; *Bowden v. Lynch, supra;* and in ferreting out this intent the instrument as a whole must be considered. 53 C. J., 59. The intention of the parties is to be collected from the entire instrument and not from detached portions. It is necessary to consider all of its parts, each in its proper relation to the other, in order to determine the meaning of any particular part as well as of the whole. 13 C. J., 525, sec. 486; 13 C. J., 535, sec. 497.

"Great liberality is allowed in construing releases. The intent is to be sought from the whole and every part of the instrument; and where general words are used, if it appears by other clauses of the instrument, or other documents, definitely referred to, that it was the intent of the parties to limit the discharge to particular claims only, courts, in construing it, will so limit it. . . . In determining the effect of an instrument containing words that taken by themselves would operate as a general release, all the provisions of the instrument must be read together; and if on such reading an intent to limit the scope of the release appears, it will be restricted to conform to such intent." 23 R. C. L., 389, sec. 26.

Considering the release agreement between the parties in the light of these well recognized rules of construction we are constrained to hold that the last paragraph was clearly intended as an exception to or a limitation upon the general terms of release contained in the first paragraph.

The material provisions of the agreement may be divided into three parts:

(1) A complete release and discharge of all claims against the principal and surety for labor or material furnished in connection with the performance of the construction contracts by the principal and surety.

(2) An assignment to the surety of all claims or rights of the plaintiff against the electric membership corporations accruing to the plaintiff as subcontractor or materialman.

(3) A reservation of all rights against the defendant, principal contractor, "for items which the United States Casualty Company disclaim any and all liability under its respective bonds," valued at $5,807.87, particularly identified in the report of the engineer, dated 15 January, 1942, and addressed to the surety.

The third provision is not mere surplusage. It was inserted in the contract for a purpose and it was intended to have some meaning and effect. To ascertain that meaning we must look to the disclosed circumstances surrounding the execution of the contract.

The surety was making payment of all claims against it for material furnished to it in completing the contract after the defendant, the principal, found it impossible to proceed. It was likewise making settlement of its liability as surety for claims against the principal for material furnished to him before it took over the work. Acting on the report of its engineer it disclaimed liability for certain specified items charged against the principal. This brought about a disagreement which had to be settled either by suit or by compromise agreement. The parties chose to compromise.

The terms of the compromise sufficiently appear. The surety received a full, complete and unqualified release and discharge. The principal was released and discharged as to all claims against him except for the items designated on the report of the engineer, valued at $5,807.87.

The items thus excepted are definite and certain and are now admitted. For them no one has made payment. The contract price thereof is still due the plaintiff. The parties to the release clearly intended that the release should be no bar to the right of plaintiff to attempt to compel payment thereof by the defendant. Thus the third provision was inserted as a limitation upon the release in general terms as set forth in the first paragraph.

This construction gives force and effect to each provision of the contract and accords with an intelligent intent in conformity with the evident purpose of the parties, and it renders unnecessary the elimination of any part of the contract as being irreconcilable with or repugnant to any other part thereof.

But the defendant contends that the surety disclaimed liability for these items for that the material was not used in the performance of the contract; that it is now found as a fact that the material was so used; and that, therefore, these items of charge therefor were not excepted. That is, he contends that if the third paragraph constitutes an exception, it only excepts items for material which was not used on the projects.

This contention cannot be sustained. The surety, it is true, bottomed its disclaimer of liability on the grounds that the material covered by these items was not used on the projects. That disclaimer brought about the

dispute. The language used in the release, however, contains no such limitation. The items excepted are specifically designated and identified by reference to the engineer's report.

On the facts found by the court below plaintiff is entitled to judgment. Hence the judgment entered must be

Reversed.

STATE OF NORTH CAROLINA EX REL. J. J. PAGE, ADMINISTRATOR OF THE ESTATE OF JOYCE CORINNE GODWIN, A MINOR, DECEASED, V. WILLIAM H. SAWYER, FORMER CLERK OF THE SUPERIOR COURT OF WAKE COUNTY, AND NATIONAL SURETY CORPORATION OF NEW YORK.

(Filed 28 April, 1943.)

1. Clerks Superior Court § 18: Infants § 16: Principal and Surety § 20—

In this jurisdiction the liability of the clerk of the Superior Court for the safety of funds of infants, placed in his hands by virtue of his office, is that of an insurer.

2. Public Officers §§ 7c, 8: Principal and Surety § 20: Clerks Superior Court § 18—

A public officer is not as a rule relieved from liability for the loss of public moneys in his charge where the loss is due to fire, burglary, theft, or embezzlement by subordinates, however careful and prudent he may have been. Under this rule liability would attach "where thieves break through and steal," and equally so where the clerk is the victim of a forgery.

3. Judges § 2a: Judgments § 22h—

An order of the judge as to a matter within his jurisdiction, even though erroneous in law, is binding on the clerk, and he is bound to obey or render himself liable to attachment for contempt. But this principle does not apply where the judge's order is void for lack of jurisdiction over the subject matter, or the parties, or the *res*.

4. Infants § 17—

In order to authorize the transfer of the funds of an infant domiciled in this State to a guardian in another state, the petition and proceeding prescribed by C. S., 2195, are jurisdictional; and an order, by the judge of the Superior Court or clerk, for its transfer otherwise is void.

5. Fraud § 1—

Where one of two innocent persons must suffer loss by the fraud of a third person, he who first reposes the confidence must bear the loss.

APPEAL by defendants from *Burney, J.*, at February Term, 1943, of WAKE. Affirmed.

This was a motion for judgment under C. S., 356, against William H. Sawyer, former clerk of the Superior Court of Wake County, and the

surety on his official bond, for the recovery of a fund of $766.98 in the hands of said clerk which belonged to the relator's intestate, Joyce Corinne Godwin, and which the said clerk has declined to pay on demand.

The respondents contended that this fund had been paid out by William H. Sawyer while clerk under an order of the resident judge of the Superior Court.

The case was heard on agreed facts which may be briefly summarized as follows: In 1937 a fund now amounting to $766.98 was placed in the hands of respondent Sawyer, then clerk of the Superior Court, as such clerk, belonging to Joyce Corinne Godwin, a minor and mental incompetent without guardian. Joyce Corinne Godwin was domiciled and resident in Wake County, and so continued until her death in 1942. On 6 February, 1941, a person calling himself D. O. Jackson, and claiming to have been appointed guardian of Joyce Corinne Godwin by the judge of probate of Wayne County, Georgia, presented a petition verified by himself, alleging the child was a resident of Wayne County, Georgia, and praying that this fund be turned over to him as such guardian. The so-called Jackson exhibited what purported to be copies of his appointment as guardian by the Ordinary of Wayne County, Georgia, and of his oath and bond, with United States Fidelity & Guaranty Company as surety, authenticated by what appeared to be the impression seal of the Court of Ordinary of Wayne County, Georgia. Respondent Sawyer filed the petition and supporting papers as a special proceeding, and, since the fund in question was in his hands, he referred the petition to the resident judge of the Superior Court. Thereupon, the judge signed an order directing Sawyer as clerk of the Superior Court to pay over to D. O. Jackson the amount of the fund belonging to Joyce Corinne Godwin, less commissions and costs, and the respondent Sawyer paid over to the person calling himself D. O. Jackson $766.98 representing the entire estate belonging to said minor. All this occurred on the same day. It was admitted that the papers filed by Jackson were forgeries, and that subsequently at July Term, 1941, Harold J. Rundt, *alias* D. O. Jackson, was convicted and sentenced to State's Prison on the charge of obtaining this money by false pretense. No part of the fund was recovered.

Upon these facts the court below was of opinion that plaintiff relator was entitled to recover of the respondents the amount of the fund, and so adjudged.

Respondents appealed.

Bunn & Arendell for relator, appellee.

Smith, Leach & Anderson for respondents, appellants.

DEVIN, J. The respondents challenge the correctness of the judgment below on the facts agreed, and contend that no liability should attach to the clerk of the Superior Court, or to the surety on his bond, on account of payment to an improper person of funds in the hands of the clerk belonging to an infant when the payment has been directed by an order of the judge of the Superior Court.

On first thought, this contention on the part of the respondents would seem to be based on a reasonable construction of the law governing the clerk's relation to the court, but, upon a closer examination of the duties and obligations of the clerk with respect to the funds of infants placed in his hands by virtue of his office, a different principle is found, which we think controlling on the admitted facts appearing in the case at bar.

For the determination of the rights of the parties on the facts presented we find no precedent in the decisions of this Court, and none elsewhere has been called to our attention. However, it is firmly established in this jurisdiction that the liability of the clerk of the Superior Court for the safety of funds of infants placed in his hands by virtue of his office is that of an insurer. *Thacker v. Deposit Co.*, 216 N. C., 135, 4 S. E. (2d), 324; *Pasquotank County v. Surety Co.*, 201 N. C., 325, 160 S. E., 176; *Williams v. Hooks*, 199 N. C., 489, 154 S. E., 828; *Indemnity Co. v. Corporation Commission*, 197 N. C., 562, 150 S. E., 16; *Gilmore v. Walker*, 195 N. C., 460, 142 S. E., 579; *Marshall v. Kemp*, 190 N. C., 491, 130 S. E., 193; *Smith v. Patton*, 131 N. C., 396, 42 S. E., 849; *Presson v. Boone*, 108 N. C., 78, 12 S. E., 897; *Havens v. Lathene*, 75 N. C., 505; *Commissioners v. Clarke*, 73 N. C., 255; 46 C. J., 1039; 43 Am. Jur., 113.

The obligation of a clerk with respect to the funds of infants in his custody is analogous to that of a debtor who is bound to pay in any event upon demand. *Havens v. Lathene, supra.* Indeed, it was suggested by *Rodman, J.*, in *Commissioners v. Clarke, supra*, that, in this fiduciary relationship, he is an insurer against loss by any means whatsoever, including losses arising from the act of God or the public enemy. In 43 Am. Jur., 118, it is said: "A public officer is not as a rule relieved from liability for the loss of public moneys in his charge where the loss is due to fire, burglary, theft, or embezzlement by subordinates, however careful and prudent he may have been." While this rule has been relaxed by statute in respect to the investment of funds by the clerk (Public Laws 1931, ch. 281), as regards his responsibility for the safety of funds in his hands and his obligation to pay on lawful demand, the strict rule of liability as an insurer has been consistently adhered to. See Guide Book Series #18 of the Institute of Government. Clearly, under this rule, liability would attach "where thieves break through and steal," and equally so where the clerk is the victim of a forgery.

But respondents' position is that in this case the clerk was protected by the order of the resident judge, which he was bound to obey. It is true an order of the judge as to a matter within his jurisdiction, even though erroneous in law, is nevertheless binding on the clerk, and he is bound to obey or render himself liable to attachment for contempt. *State ex rel. Tolls v. Tolls,* 160 Oregon, 317, 85 P. (2d), 366, 119 A. L. R., 1370. But that principle should not be applied to the detriment of the estate of an infant in his custody where the judge's order is void for lack of jurisdiction over the subject matter or the parties, or the *res.* In order to authorize the transfer of the funds of an infant domiciled in this State to a guardian in another state, the petition and proceeding prescribed by C. S., 2195, are jurisdictional. Forged papers presented by a spurious person, fictitiously posing as a guardian appointed by a court without jurisdiction, did not authorize a valid disbursement of the infant's funds, and an order based solely on such papers was void. The whole proceeding was a nullity. A void order, though signed by a judge, gave the clerk no protection from liability to the infant for paying out money as the property of such infant to an improper person.

It follows, therefore, that the infant, then a resident of Wake County, was in no sense represented in the proceeding based on the forged papers and was not bound thereby, and that the improper payment of money to the so-called Jackson, under the circumstances of this case, may not be held to constitute a valid disbursement of the funds of Joyce Corinne Godwin.

While an ingenious fraud by means of forged papers was practiced upon the clerk—a fraud which imposed upon him and the judge alike—we do not think the comparatively small estate of this minor should be made to suffer the loss. It is a well recognized principle that where one of two innocent persons must suffer loss by the fraud of a third person he who first reposed the confidence must bear the loss. *Berry v. Payne,* 219 N. C., 171 (178), 13 S. E. (2d), 217; *Bank v. Clark,* 198 N. C., 169 (173), 151 S. E., 102; *Bank v. Liles,* 197 N. C., 413 (418), 149 S. E., 377; *R. R. v. Kitchin,* 91 N. C., 39 (44); *Vass v. Riddick,* 89 N. C., 6. We think this was one of the casualties insured against by the surety on the clerk's bond. Neither the former clerk nor the surety is entitled to credit for this disbursement, and the judgment entitling the plaintiff relator now to recover the amount of the fund for the estate of Joyce Corinne Godwin must be

Affirmed.

CITY OF CHARLOTTE v. E. M. COLE, MARY S. ARMSTRONG AND HUSBAND, HARRY A. ARMSTRONG, SAMUEL B. SEEGERS, T/a SEEGERS' BARBER & BEAUTY SHOP, AND BEN JAFFA, T/a SOUTHERN FIVE AND TEN CENT STORES.

(Filed 28 April, 1943.)

1. Torts § 4: Pleadings § 15: Negligence § 16—

In an action by a city, for contribution as joint tort-feasors, against defendants, property owners in such city, alleging that a judgment was taken against the city, for injuries sustained by a pedestrian stumbling on a protruding iron stake on the property of defendants and very near, but not on, the city sidewalk, a demurrer to the complaint should have been sustained, as it discloses no actionable negligence against the city to which the conduct of defendants could have contributed.

2. Torts § 6—

Where a judgment has been obtained, arising out of a joint tort, and only one of the joint tort-feasors was a party and judgment against him alone, to enable such judgment debtor to recover, under C. S., 618, against the other joint tort-feasor, he must allege and prove, in an action *de novo*, the negligence of his alleged joint tort-feasor, the defendant, and his duty of contribution.

APPEAL by defendant Ben Jaffa, T/a Southern Five and Ten Cent Stores, from *Olive, Special Judge,* at 1 March, 1943, Extra Term of MECKLENBURG.

In a former personal injury action against the city of Charlotte, Mrs. Maudie Elwood Fisher obtained a judgment for $852.85, which the city paid. In the present suit it seeks to recover of the defendants the amount of the judgment, or a proportionate contribution thereto, on the ground that they were joint tort-feasors in producing the injury which resulted in the recovery. Chapter 68, Public Laws of 1929; sec. 618, Michie's Code, 1939. Consideration of the demurrer filed by the appealing defendant, Jaffa, makes it necessary to reproduce the complaint in full:

"The plaintiff complaining of the defendants, says and alleges:

"1. That the plaintiff, the City of Charlotte, is a municipal corporation organized and existing under and by virtue of the laws of the State of North Carolina.

"2. The defendants are citizens and residents of Mecklenburg County and State of North Carolina.

"3. On December 20, 1941, and for some time prior thereto, there existed in the easterly section of the City of Charlotte a street known as Central Avenue, which said street ran in an easterly and westerly direction.

"4. That the plaintiff, prior to December 20, 1941, had constructed a paved sidewalk along the southerly side of said Central Avenue; that

the southerly edge of said paved sidewalk, as constructed by the plaintiff, followed the southerly edge of Central Avenue and was immediately adjacent to the northerly property line of private property in the 1500 Block of said Central Avenue between the intersection of Central Avenue with Pecan Avenue on the west and Thomas Avenue on the east.

"5. That the private property owners owning the property at Nos. 1502 and 1504 Central Avenue had erected, or caused to be erected, buildings on said property; that the front of said buildings did not extend to the northerly edge of the property line where the said property line adjoined the southerly edge of the paved sidewalk which had been constructed by the plaintiff, but instead said buildings were erected two or three feet south of the northerly edge of the property line, and the said two or three foot space between the front of the building and the northerly property line was paved, or caused to be paved by the owners of the property so as to make and constitute an additional paved walkway in front of said buildings, but title to same remained in the private property owners.

"6. The easterly line of the property known as No. 1502 Central Avenue and the westerly line of the property known as 1504 Central Avenue, was the same between the two properties, and was marked at the northerly point by an iron stake which constituted the boundary division stake.

"7. That this boundary division iron stake between Lots Nos. 1502 and 1504 Central Avenue was located only a fraction of an inch south of the southerly edge of the paved sidewalk which had been constructed and was maintained by this plaintiff, and the southerly edge of Central Avenue; that said boundary division iron stake was located in the two or three foot space which had been paved by the private property owners of lots known as 1502 and 1504 Central Avenue; that said boundary division iron stake, during the month of December, 1941, and for some time prior thereto, protruded some three-eighths of an inch above the surface of the surrounding pavement, which had been laid by the private property owners, and there was a flange around the top edge of said stake.

"8. That on or about December 20, 1941, Mrs. Maudie Elwood Fisher stumbled and fell over the aforementioned boundary division iron stake, and on or about February 9, 1942, instituted an action in the Superior Court of Mecklenburg County against the plaintiff herein to recover damages for personal injuries which she alleged that she sustained as a result of stumbling and falling over said boundary division iron stake.

"9. That the action instituted by Mrs. Maudie Elwood Fisher against this plaintiff was tried in the Superior Court of Mecklenburg County, and although this plaintiff denied liability in said action and defended same, nevertheless, Mrs. Maudie Elwood Fisher recovered judgment

against this plaintiff in the amount of $750.00, and the Court costs in the amount of $102.85, making a total of $852.85, as will appear in the records of the office of the Superior Court of Mecklenburg County in the action entitled, 'Mrs. Maudie Elwood Fisher, plaintiff, *v.* City of Charlotte, Defendants,' to which records reference is hereby made.

"10. That said boundary division iron stake was, on December 20, 1941, at the time Mrs. Maudie Elwood Fisher stumbled and fell over same, jointly owned, maintained and/or controlled by the defendants.

"11. That the condition of the aforementioned boundary division iron stake on the property owned and/or controlled by the defendants, at the time and place in question, constituted joint and concurrent negligence on the part of the defendants, in that they placed, or allowed to be placed, or allowed to remain in a protruding position, the said division boundary iron stake on said property when they knew, or, by the exercise of due care, should have known, that it was in such a position as to be dangerous to the general public, and when they knew, or by the exercise of due care, should have known, that the public used said private two or three foot space as a part of the walkway, and when they knew, or, by the exercise of due care should have known, that such boundary division iron stake was in such close proximity to the public sidewalk maintained by this plaintiff as to constitute a hazard for members of the public lawfully using the sidewalk maintained by this plaintiff.

"11. (*Sic.*) That the failure of the defendants to maintain said protruding boundary division iron stake in a reasonably safe condition under the circumstances hereinbefore set out, constituted joint and concurrent negligence on their part, and was the proximate and primary cause of the injuries sustained by Mrs. Maudie Elwood Fisher, and the liability of this plaintiff for the injuries sustained by the said Mrs. Maudie Elwood Fisher was and is secondary, and, therefore, the plaintiff is entitled to recover of the defendants the amount that it has had to pay on account of the judgment obtained by Mrs. Maudie Elwood Fisher against this plaintiff.

"12. If the defendants be not adjudged primarily liable for the injuries sustained by Mrs. Fisher, then the defendants are jointly and concurrently liable with the plaintiff herein by reason of the negligence of the defendants as heretofore set out, and the plaintiff is entitled to have the liability of the defendants determined and enforced in this action under and by virtue of the terms and provisions of section 618 of the Consolidated Statutes of North Carolina."

Upon this plaintiff demanded recovery of the total amount of the judgment, or, failing this, for proportionate contribution.

The defendant Jaffa demurred to the complaint as not constituting a cause of action which the city might prosecute against the defendants

for that (a) it appears from the complaint that the obstruction or "protruding stake" which allegedly caused the injury was not on or in the city sidewalk, constructed or maintained by the city, or which they were legally liable to maintain by dedication or otherwise, but in a private walkway; and for that (b) it appears on the face of the complaint that any liability to Mrs. Fisher for the alleged injury was solely that of the owners of the property over which the public was required to walk in order to enter the premises owned by defendants, and plaintiff cannot, therefore, recover against defendants as joint tort-feasors.

The demurrer was overruled, and defendant Jaffa appealed.

Tillett & Campbell for plaintiff, appellee.

Guthrie, Pierce & Blakeney and E. A. Hilker for defendant, appellant.

SEAWELL, J. In order that plaintiff might recover any amount of the defendant under the cited law, since such defendant was not a party to the original action, it must sufficiently appear that the plaintiff and the defendant were joint tort-feasors in producing the injury, and that judgment has been obtained against the complaining party therefor.

In a proper case the defendant may be compelled to contribute to the payment of a judgment theretofore obtained against the joint tort-feasor; but as to such defendant, the trial is *de novo*. His negligence and his duty of contribution must be established in the pending action; and except as above stated, he is not barred by any of the proceedings by which negligence was established against the defendant in the prior suit, who thereafter becomes plaintiff in an action for contribution.

Plaintiff cannot rely solely upon the issue of negligence found against it in the former trial, any more than it could rely upon the evidence there addressed to that issue as determining the negligent character of the acts or omissions when the time has come for the present defendant to have his own day in court and make his defense. When, therefore, the injury has resulted from negligence, it is just as necessary as it was in the original action, and as it is in any independent action, that the negligent acts or omissions be specifically stated in order that the court may see whether there has been a breach of duty. *Gillis v. Transit Corp.*, 193 N. C., 346, 137 S. E., 153; *Whitehead v. Tel. Co.*, 190 N. C., 197, 129 S. E., 602; McIntosh, Civil Procedure, pp. 358, 398.

Examining carefully the facts upon which negligence is predicated, we are of opinion that the complaint fails to disclose any actionable negligence against the city, and therefore none to which the conduct of defendant, if negligent at all, could have contributed.

From what we have said, it follows as corollary that the defendant in the present action is not called upon to divine upon what theory liability

was fixed on the plaintiff in the former action, which terminated in the Superior Court without appeal. If that liability does not appear from judicial examination of the complaint in the present action, the plaintiff must fail. We gather from the complaint that the obstruction causing the injury—a boundary line marker, described as a "stake" protruding three-eighths of an inch from the surface of the concrete—was not in or on the sidewalk constructed and maintained by the city, but was in a three-foot wide concrete walkway constructed and maintained by the defendants between the store building and the sidewalk. There is no allegation that this approach to defendants' premises had been dedicated to the public use, accepted by the city as a public street, or that its use was of a character to charge the city with its maintenance. Its designation as a walkway does not have that significance. *Briscoe v. Power Co.*, 148 N. C., 396, 62 S. E., 600. In fact, the contrary is a fair inference from the manner in which the negligence is charged. If the defendant was negligent in maintaining a marker three-eighths of an inch from the surface in his private walkway, that would be, as far as the allegations of the complaint go, his sole negligence.

We are advertent to the allegation contained in the latter part of the eleventh paragraph of the complaint "that such division iron stake was in such close proximity to the public sidewalk maintained by this plaintiff as to constitute a hazard for members of the public lawfully using the sidewalk maintained by this plaintiff." But, considering the nature of the obstacle from which Mrs. Fisher is said to have received her injury—a marker three-eighths of an inch above the concrete near the edge of the sidewalk—our previous course of decision in comparable cases does not incline us to adopt the legal inference of negligence from this alone. *Walker v. Wilson*, 222 N. C., 66, 21 S. E. (2d), 817; *Houston v. Monroe*, 213 N. C., 788, 197 S. E., 571.

The demurrer should have been sustained. The judgment overruling it is

Reversed.

MRS. P. P. SHEPARD v. F. B. LEONARD AND WIFE, MRS. RUTH A. LEONARD.

(Filed 28 April, 1943.)

1. Courts § 1a—

The instant a court perceives that it is exercising, or about to exercise, a forbidden or ungranted power, it ought to stay its action, for such action will be a nullity.

2. Same: Appeal and Error §§ 1, 30b—

If the Superior Court acts without jurisdiction, on appeal the Supreme Court acquires no jurisdiction and will, *ex mero motu*, dismiss the case.

3. Judges § 2b—

Where a special judge is commissioned to hold a designated term of Superior Court in a particular county, he has no jurisdiction to enter an order in a cause pending in an adjoining county within the same judicial district.

4. Same: Constitutional Law §§ 4, 6a—

Under Art. IV, sec. 11, of the N. C. Constitution the power and authority of special and emergency judges is defined and limited by the words "in the courts which they are appointed to hold"; and the General Assembly is without power to grant such judges jurisdiction in excess of this definite limitation. It does not authorize the Legislature to confer "in chambers" or "vacation" jurisdiction on special judges, assigned to hold a designated term of court.

5. Judges §§ 2a, 2b—

Civil actions, pending on the civil issue docket of the Superior Courts, are always subject to motion in the cause, and these motions may be made in some instances in term or out of term. When made in term the presiding judge, whether regular or special, has jurisdiction, sec. 5, ch. 51, Public Laws 1941.

6. Judges § 2b—

Once having acquired jurisdiction at term a special or emergency judge, by consent, may hear the matter out of term *nunc pro tunc.*

7. Judges § 2a—

A regular judge of the Superior Court, except by consent or unless authorized by statute, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending.

APPEAL by defendants from *Olive, Special Judge,* in Chambers, 18 January, 1943. From WAKE. Reversed.

This action was instituted in Franklin County by issuance of summons. No complaint has been filed. Thereafter plaintiff made application to Olive, Special Judge, who was then holding the second regular week of the January Civil Term of Wake County, for an order permitting the plaintiff to inspect and copy a certain sealed promissory note then in the possession of the defendants and alleged to be the property of plaintiff. It is asserted in the application that the suit is instituted for the purpose of recovering possession of said note.

Upon the filing of said application and without notice to the defendants said judge signed an order directing and requiring the defendants to permit the plaintiff to inspect and copy said note and any and all memoranda or schedule of payments referred to in the application. Thereupon, the defendants filed exceptions and noted appeal in the office of the clerk of the Superior Court of Franklin County, and served written notice thereof as required by statute.

John F. Matthews and W. L. Lumpkin for plaintiff, appellee.

Malone & Malone and Yarborough & Yarborough for defendants, appellants.

BARNHILL, J. The defendants insist that the order signed by Olive, Special Judge, is void for that it was entered without notice to them. C. S., 1823. We do not reach this question for discussion or decision for we are met at the threshold of this case by the more serious question of jurisdiction. "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action; and, if it does not, such action is, in law, a nullity." *Burroughs v. McNeill,* 22 N. C., 297; *Reid v. Reid,* 199 N. C., 740, 155 S. E., 719; *Washington County v. Land Co.,* 222 N. C., 637, 24 S. E. (2d), 338.

Our jurisdiction is derivative. If the Superior Court judge who signed the order was without jurisdiction we have none and it has been the consistent policy of this Court, in the absence of motion, to dismiss *ex mero motu* so soon as a defect in jurisdiction is made to appear.

The commission issued to Olive, Special Judge, under which he was acting at the time he signed the order was "to hold the said Court of the County of Wake: second week regular civil term, January 18th, in the Seventh Judicial District." It was issued under an agreement of exchange, Nimocks, J., the judge regularly holding courts of the Seventh Judicial District at the time, being commissioned to hold a term during the same week in Robeson County in lieu of Olive, Special Judge, who theretofore had been assigned and commissioned to hold the same.

What jurisdiction, if any, in matters pending on the summons docket of Franklin County, a county within the same judicial district, vested in Olive, Special Judge, as the judge presiding in Wake County, under and by virtue of said commission? The answer is none.

The constitutional provision for the appointment of special judges is set out in Art. IV, sec. 11, of the Constitution 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."

Pursuant to said constitutional provision the General Assembly, in the exercise of the power thus conferred, enacted ch. 51, Public Laws 1941, by amending previous statutes on the subject. Section 5 thereof is 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."

While under the constitutional provision the power and authority of special judges is or may be that of regular judges of the Superior Court, these judicial powers are to be exercised by special judges only "in the courts which they are so appointed to hold." The authority vested in the General Assembly to provide for the appointment of special judges and to define their jurisdiction is subject to this definite limitation and the General Assembly is without power to grant jurisdiction to special judges in excess thereof. *Greene v. Stadiem,* 197 N. C., 472, 150 S. E., 18; *Reid v. Reid, supra; Ipock v. Bank,* 206 N. C., 791, 175 S. E., 127.

Speaking to the subject in *Ipock v. Bank, supra, Brogden, J.,* says: "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.' "

Civil actions pending on the civil issue docket of a county are always subject to motion in the cause. These motions may be made before the judge at term. In many instances they may be made out of term. When made at term the judge presiding, whether regular or special, has jurisdiction. To this extent sec. 5, ch. 51, Public Laws 1941, has full constitutional sanction.

However, the Constitution, Art. IV, sec. 11, does not confer or authorize the Legislature to confer any "in chambers" or "vacation" jurisdiction upon special judges, assigned to hold a designated term of court.

It may be said that a regular judge holding the courts of the district has general jurisdiction of all "in chambers" matters arising in the district. Why then is not this jurisdiction conferred on a special judge by the statue within the limitations of the Constitution?

The general "vacation" or "in chambers" jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and it is never dependent upon and does not arise out of the fact that he is at the time presiding over a designated term of court or in a particular county. As to him, it is limited, ordinarily, to the district to which he is assigned by statute. It may not be exercised even within the district of his residence except when specially authorized by statute. *Ward v. Agrillo,* 194 N. C., 321, 139 S. E., 451; *Howard v. Coach Co.,* 211 N. C., 329, 190 S. E., 478.

Under the statute, ch. 51, Public Laws 1941, enacted pursuant to Art. IV, sec. 11, of the Constitution, a special judge, during the term of the court he has been assigned to hold, has full and complete jurisdiction over all actions and proceedings on the dockets of that court and may act in respect thereto with the same authority and to the same extent as a regular judge holding the court under statutory assignment. This includes the right to hear and decide any and all motions made in causes pending on the dockets and to grant any and all proper orders in respect thereto. Once having acquired jurisdiction at term he, by consent, may hear the matter out of term *nunc pro tunc*. *Edmundson v. Edmundson*, 222 N. C., 181.

On the other hand, he has no "vacation" jurisdiction and no jurisdiction in any cause pending in any other county either within or without the same judicial district. Any attempt by the Legislature to confer such jurisdiction goes beyond the limitations "in the courts which they are so appointed to hold" and is without constitutional sanction.

Motions in causes pending on the dockets of a county can be heard "at term" only in that county. No judge has any "at term" jurisdiction thereof except within the county. They, at times, are heard during a term of court in another county. Nonetheless they are heard by virtue of the "vacation" jurisdiction of the judge.

This cause was pending on the summons docket of Franklin County. It was not at issue or subject to motion "in the court" in Wake County, over which Olive, Special Judge, was presiding. The motion made and heard therein outside the county in which the cause was pending and the order entered thereon was "in chambers" and not "at term." Hence, the order is void and of no effect.

Even as to regular judges "it is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending." *Bisanar v. Suttlemyre*, 193 N. C., 711, 138 S. E., 1; *S. v. Humphrey*, 186 N. C., 533, 120 S. E., 85; *Scott Drug Co. v. Patterson*, 198 N. C., 548, 152 S. E., 632; *Bank v. Hagaman*, 208 N. C., 191, 179 S. E., 759; *S. v. Whitley*, 208 N. C., 661, 182 S. E., 338.

The Governor, under the conditions and subject to the limitations set out in the quoted portion of the Constitution, may commission a special judge to hold the courts of a district. What jurisdiction attaches under this type of commission is not brought in issue on this appeal. That question is not discussed or decided.

The order entered in the court below must be vacated.

Reversed.

WILLIAM E. PHARR v. CAROLYN PHARR.

(Filed 28 April, 1943.)

1. Divorce § 2a—

The party in the wrong, in the face of a plea in bar based on such wrong, cannot obtain a divorce under ch. 100, Public Laws 1937. C. S., 1659 (a).

2. Divorce § 5—

Recrimination is recognized in this jurisdiction, and under that doctrine the defendant, in an action for a divorce, may set up as a defense in bar that plaintiff was guilty of misconduct which in itself would be a ground for divorce.

3. Same—

In an action for divorce, where defendant by answer and further defense pleads in bar plaintiff's unlawful and wrongful abandonment and non-support of defendant, his wife, and also recrimination, either plea, if sustained, is sufficient to prevent plaintiff from obtaining a divorce.

4. Pleadings § 22—

A motion to amend pleading is discretionary with the trial court and is not reviewable on appeal. C. S., 547.

5. Pleadings § 13½—

Where a general demurrer is filed to a pleading as a whole, if any count therein is good and states a cause of action, the demurrer should be overruled.

APPEAL by plaintiff from *Blackstock, Special Judge,* at November Term, 1942, of MECKLENBURG.

Plaintiff instituted this action for divorce *a vinculo matrimonii* on 5 August, 1940, on the ground of two years separation, alleging that plaintiff and defendant were married in 1917 and by mutual agreement separated themselves from each other and executed a deed of separation on 26 May, 1940, and that they have lived separate and apart since the execution of said agreement.

The defendant filed an answer, admitted the execution of the agreement, but alleged that the execution thereof "Was brought about by reason of the fact that the plaintiff had abandoned the defendant, and she was required to sue him for adequate support, and the result was a written agreement whereby the plaintiff in this action agreed to support the defendant during her natural life, or until she remarried." And by way of further answer and defense, the defendant alleged that the separation of the plaintiff and defendant was not occasioned by any fault on the part of the defendant, but as a result of the wrongful conduct of the plaintiff. Thereupon, the plaintiff moved to strike that portion of the answer quoted above and all of the further answer and defense. At

the hearing on the motion, the defendant requested permission of the court to file an amended answer. Motion to strike was denied and defendant was granted permission to file an amended answer.

The amended answer as a further answer and defense, and by way of recrimination and in bar of plaintiff's right to recover a divorce in this action, alleges: That the plaintiff willfully and wantonly abandoned the defendant in 1936, and that she was compelled to institute an action in the Buncombe County General Court against the plaintiff for abandonment and nonsupport. That by reason of her ill health, her want and need for hospitalization, she was induced to execute the separation agreement which provided for the payment of $75.00 per month for her support, which she alleges was wholly inadequate. It is further alleged that before and since the plaintiff and defendant separated the plaintiff committed adultery.

For a cross action and by way of counterclaim, the defendant alleges she is entitled to counsel fees and an order requiring the plaintiff to pay to the defendant each month for her support an amount in keeping with his means and condition in life.

From the order denying plaintiff's motion to strike and allowing the defendant to file an amended answer, the plaintiff appeals, assigning error.

Jordan & Horner for plaintiff.
James H. Dodgen and Joe W. Ervin for defendant.

DENNY, J. Plaintiff demurred *ore tenus* in this Court, to the further answer and defense and to the cross action.

The defendant in her amended further answer and defense pleads in bar of plaintiff's right to a divorce, his unlawful and wrongful abandonment and nonsupport of the defendant, and recrimination.

Under the decisions of this Court either plea in bar, if sustained, is sufficient to prevent the plaintiff from obtaining a divorce. In the case of *Byers v. Byers, ante,* 85, *Stacy, C. J.,* reviews our decisions and statutes, dealing with separation as a ground for divorce, and says: "It is true, the statute under review provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, 'if and when the husband and wife have lived separate and apart for two years,' etc. However, it is not to be supposed the General Assembly intended to authorize one spouse willfully or wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong." The foregoing is in accord with the decision of this Court in the cases of *Reynolds v. Reynolds,* 208 N. C., 428, 181 S. E., 338; *Brown v. Brown,*

213 N. C., 347, 196 S. E., 333; and *Hyder v. Hyder,* 215 N. C., 239, 1 S. E. (2d), 540.

The doctrine of recrimination is recognized in this jurisdiction. *Horne v. Horne,* 72 N. C., 533; *House v. House,* 131 N. C., 141, 42 S. E., 546. In the latter case, this Court said: "The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for a divorce." This view is supported by the authorities generally. See 27 C. J. S., p. 623, sec. 67; and 17 Am. Jur., 268, where it is stated: "It is well settled in this country under the doctrine of recrimination that the defendant to an action for divorce may set up as a defense in bar that the plaintiff was guilty of misconduct which in itself would be a ground for divorce."

We said in *Byers v. Byers, supra* (filed this day), that the party in the wrong in the face of a plea in bar based on such wrong cannot obtain a divorce under the provisions of chapter 100, Public Laws 1937, N. C. Code of 1939, sec. 1659 (a), (Michie).

We likewise hold that our divorce statutes do not authorize the granting of a divorce to one spouse where the other pleads and establishes recrimination.

The exceptions entered by the plaintiff to the refusal of his Honor to strike portions of the original answer are without merit and the discretionary ruling on defendant's motion to amend her pleading is not reviewable on appeal. C. S., 547. It will be noted that the motion to strike was limited to the original answer and not directed to the amended further answer and cross action. In this connection attention is called to *Silver v. Silver,* 220 N. C., 191, 16 S. E. (2d), 834, and *Shore v. Shore,* 220 N. C., 802, 18 S. E. (2d), 353. We find no error in the rulings of the court below.

The demurrer *ore tenus* interposed in this Court cannot be sustained. In *Griffin v. Baker,* 192 N. C., 297, 134 S. E., 651, the law is stated as follows: "The rule is well established that where a general demurrer is filed to a petition as a whole, if any count of the pleading is good and states a cause of action, a demurrer should be overruled, and the same rule governs as to demurrers to defenses. 21 R. C. L., sec. 77." The demurrer is overruled, and the judgment of the court below is

Affirmed.

CARRIE M. ALLEN, ADMINISTRATRIX OF L. E. ALLEN, v. DR. PEPPER BOTTLING COMPANY, INC., OF WASHINGTON, NORTH CAROLINA.

(Filed 28 April, 1943.)

1. Automobiles § 14—

Parking on a paved highway at night, without flares or other warning, is negligence. Ch. 407, Public Laws 1937, secs. 97 and 123. C. S., 2621 (283), 2621 (308).

2. Automobiles § 9a—

Curves on the road and darkness are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." Sec. 105, ch. 407, Public Laws 1937, C. S., 2621 (290). He must operate his automobile at night so as to be able to stop within the radius of his lights.

3. Automobiles §§ 18c, 18g—

In an action to recover damages from an automobile collision, where defendant's truck was parked at night on the right side of a 22-foot paved highway, in the middle of a four-tenths of a mile straight-away, with left wheels two feet on the concrete and without parking lights on rear but there were reflectors, and plaintiff's intestate, after applying his brakes and leaving skid marks on the pavement for 100 to 190 feet, ran on the right shoulder striking the truck on the right rear with such force that he and a passenger were killed, the contributory negligence of plaintiff's intestate was such that judgment of nonsuit sustained.

APPEAL by plaintiff from *Stevens, J.*, at September Term, 1942, of PITT. Affirmed.

Civil action to recover damages for wrongful death resulting from automobile-truck collision.

On the night of 24 December, 1940, defendant had two trucks traveling on the highway from Plymouth to Washington. They were 1½ ton trucks about 94 inches wide and 18 feet long loaded with crates of "Dr. Pepper" and ginger ale. There was evidence that the rear truck had been in a collision on Albemarle Sound bridge. The two trucks stopped, apparently for repair, partly on and partly off the hard surface, at a point between Plymouth and Washington near Acre Station. They stopped with the left wheels about two feet on the pavement. The front parking lights were burning. The evidence tends to show that the rear lights were not on but there were reflectors. No flares were set. There appeared to be a cable or chain between the two trucks which were about 25 or 30 feet apart.

When the trucks had been standing for about 15 to 30 minutes, at about 7 p.m., it being dark, plaintiff's intestate approached from the rear on a Ford V-8 going towards Washington. He ran into the rear truck and was killed. One passenger was also killed and another injured.

There are two slight curves in the road, the straight-away being about four-tenths of a mile and the truck stopped about midway between the curves. The right of way had been cleared so that the curve formed no obstruction to view during the daytime. As the deceased rounded the curve on the Plymouth side he met another car. After he had entered the straight-away he cut slightly to the left and then back and applied his brakes which left skid marks on the pavement from 100 to 190 feet long. As he approached the rear truck he "dodged" to the right and ran on the shoulder of the road so that the left front of his car struck the rear right of the truck. The car was considerably damaged. As he approached the truck there was another car coming from towards Washington two or three hundred yards away.

The weather was fair, visibility was good, the trucks were tall and painted red and could have been seen easily by one keeping a careful lookout. So the witnesses for plaintiff testified.

At the conclusion of the evidence for the plaintiff, the court, on motion of the defendant, entered judgment of nonsuit and plaintiff appealed.

W. L. Whitley and Blount & Taft for plaintiff, appellant.
J. B. James for defendant, appellee.

BARNHILL, J. On this record evidence of negligence on the part of defendant must be conceded. Ch. 407, Public Laws 1937, sections 97 and 123. The nonsuit must be sustained, if at all, upon the contributory negligence of plaintiff's intestate.

As the deceased approached from the rear, rounding the curve, the beam of his lights was thrown to the left of the highway so that his vision along the pavement was restricted. He was going 50 miles per hour. He met another car on the curve and slowed to about 45 miles per hour. As he entered the straight-away he was still 200 to 300 yards from the parked truck. Apparently he did not see it at that time. When, however, he was within 50 to 75 yards he applied his brakes, locking the wheels so that they left skid marks on the pavement for a distance of 150 feet or more—"50 steps." Even then he was unable to stop his car before striking the truck with considerable force.

Curves on the road and darkness are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." Sec. 103, ch. 407, Public Laws 1937. He must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights. *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Smith v. Sink*, 211 N. C., 725, 192 S. E., 108; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Beck v. Hooks*, 218 N. C., 105, 10 S. E.

(2d), 608; *Sibbitt v. Transit Co.*, 220 N. C., 702, 18 S. E. (2d), 203; *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; *Pike v. Seymour*, 222 N. C., 42.

On all the evidence, considered in the light most favorable to the plaintiff, the road was straight for 200 to 300 yards. By the exercise of ordinary care deceased could have seen the parked truck. If he did not see, it was due to his own failure to keep a proper lookout. If he did see but was unable to stop, this must be attributed, in part at least, to his speed. In either event, his negligence was such as to bar recovery.

Reference has been made to the oncoming car. The testimony is that it was 200 or 300 yards down the road approaching at a moderate rate of speed. No one testified that it had bright lights or that its lights interfered with the vision of deceased. Granted that it was approaching. Still the fact remains that the pavement was 22 feet wide and only 2 feet thereof was occupied by the truck. This left ample space for two cars to pass in safety. Indeed, it is a matter of common knowledge that many of our improved roads are only 16 feet wide. Furthermore, none of this excuses his conduct in operating his vehicle at such a speed that he was unable to control it within the distance the record discloses was available to him.

It is true the passenger at one time, in his testimony, said they were within 50 or 75 feet of the truck when he saw it. He stated several times that it was 50 or 75 yards. It is evident that he said "feet" when he meant "yards," for he stated that the brakes were applied when they were 50 or 75 yards away and that the skid marks were 100 feet or more in length. Surely deceased did not apply his brakes in such manner before he saw any obstruction in the road. Even so, a failure to see before he was within 50 or 75 feet does not tend to exculpate him. *Pike v. Seymour, supra.*

The judgment of nonsuit was in accord with former decisions of this Court. It must be

Affirmed.

STATE v. HARRY GRAY.

(Filed 28 April, 1943.)

1. Intoxicating Liquors § 2—

The Alcoholic Beverage Control Acts have not modified C. S., 3411 (b), in such a manner as to permit the purchase or sale of intoxicating liquors in Mecklenburg County, which has not authorized the establishment of A.B.C. stores.

2. Criminal Law § 52b—

Upon motion to nonsuit in a criminal case, the evidence must be considered in the light most favorable to the State, which is entitled to all reasonable inferences therefrom.

3. Intoxicating Liquor §§ 6a, 9d—

The acceptance by accused of liquor from one indebted to him, in part payment of the debt, constitutes, in Mecklenburg County, an unlawful purchase sufficient to support a verdict of guilty.

APPEAL by defendant from *Warlick, J.*, at January Term, 1943, of MECKLENBURG.

Criminal prosecution upon a warrant in which the defendant is charged with a violation of the liquor laws of North Carolina.

The defendant was tried on the warrant in the recorder's court in the city of Charlotte, convicted, and from the judgment entered thereon, appealed to the Superior Court.

The evidence disclosed that the officers searched the premises of the defendant on 19 December, 1942, and found four pints of liquor in his bedroom, two pints in the kitchen, and sixteen empty bottles.

A witness for the State testified that the defendant testified in his own behalf at the trial in the recorder's court, and said: "He had a fellow that owed him some money and brought him the liquor for part payment on the debt, for the money he owed him."

Verdict: Guilty of having purchased liquor in Mecklenburg County. From judgment on the verdict, the defendant appeals and assigns error.

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

Henry L. Strickland for defendant.

DENNY, J. The only exceptions brought forward in the defendant's brief relate to the overruling of the motion for nonsuit and the instruction to the jury to the effect that the defendant would be guilty of the purchase of intoxicating liquors if the jury should find that he accepted the whiskey from some individual in Mecklenburg County as a payment on a debt.

The defendant was convicted of a violation of section 1, chapter 1, of Public Laws of 1923, section 3411 (b) of N. C. Code of 1939 (Michie), which provides in part that: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor, except as authorized in this article . . ." This Act remains in full force in Mecklenburg County, except as modified by the Alcoholic Beverage Control Acts. *S. v. Davis*, 214 N. C., 787, 1 S. E.

(2d), 104; *S. v. Carpenter,* 215 N. C., 635, 3 S. E. (2d), 34. The law has not been modified in such manner as to permit the purchase or sale of intoxicating liquors in Mecklenburg County, a county which has not authorized the establishment of A.B.C. stores. Therefore, the question presented on this appeal is whether or not the evidence as to the purchase of intoxicating liquors in Mecklenburg County was sufficient to carry the case to the jury.

The defendant contends there is no evidence that the liquor was delivered to him in Mecklenburg County, nor that it was purchased in Mecklenburg County; but, on the contrary, the evidence was to the effect that the liquor was purchased at a legal liquor store. This latter contention, the defendant contends, is sustained by the evidence offered by the State in introducing the tax-paid liquor which was seized in his home.

We think it immaterial where the liquor was purchased by the person who delivered it to the defendant. That question is not the issue here. The question is: Did the person deliver the liquor to the defendant in Mecklenburg County in part payment of a debt? If so, the charge to the jury was correct and the overruling of defendant's motion for judgment as of nonsuit was proper.

Upon a motion to nonsuit, the evidence must be considered in the light most favorable to the State and it is entitled to all the reasonable inferences to be drawn therefrom. *S. v. Johnson,* 220 N. C., 773, 18 S. E. (2d), 358; *S. v. Mann,* 219 N. C., 212, 13 S. E. (2d), 247; *S. v. Landin,* 209 N. C., 20, 182 S. E., 689; *S. v. Casey,* 201 N. C., 185, 159 S. E., 337; *S. v. Carr,* 196 N. C., 129, 144 S. E., 698.

It will be noted that in a civil action, where the statute of limitations is pleaded, when goods are received upon an agreement in reduction of a debt, that is a payment sufficient to take the case out of the limitation law. 34 Am. Jur., p. 269, sec. 345; *Young v. Alford,* 113 N. C., 130, 18 S. E., 84; *White v. Beaman,* 96 N. C., 122, 1 S. E., 789. In the instant case the testimony of the defendant in his own behalf in the recorder's court was introduced in the trial below, to the effect that a party "owed him some money and brought him the liquor in part payment on the debt, for the money he owed him." The acceptance by the defendant of the liquor from one indebted to him in part payment of the debt constituted a purchase of the liquor. The evidence set forth in this record, allowing the State the benefit of the reasonable inferences to be drawn therefrom, is sufficient to support the verdict of the jury, finding the defendant guilty of having purchased liquor in Mecklenburg County.

In the trial below, we find

No error.

WILSON S. LOCKHART v. KATHERINE LOCKHART.

(Filed 28 April, 1943.)

1. Pleadings § 28—

A judgment on the pleadings, in favor of the defendant on an affirmative defense, can be approved only when the allegations of fact in plaintiff's pleadings and relevant inferences of fact deducible therefrom, construed liberally in his favor, fail in all material respects to make out a case.

2. Divorce § 5—

In an action for divorce on the grounds of two years separation, Public Laws 1937, ch. 100, C. S., 1659 (a), where complaint alleges sufficient facts and defendant in her answer sets up a divorce *a mensa* with alimony granted her on the grounds of abandonment, to which plaintiff replied without admission of wrongful or unlawful conduct on his part, a judgment for defendant on the pleadings is erroneous, as there are issues of fact raised to be tried by a jury.

APPEAL by plaintiff from *Thompson, J.*, at March Term, 1943, of WAKE. Reversed.

This was an action for divorce on the ground of two years' separation, under ch. 100, Public Laws 1937. Sufficient facts are alleged in the complaint to entitle plaintiff to the relief prayed.

The defendant filed answer setting up a judgment in a previous suit between the parties, rendered in 1940, wherein the defendant was granted a divorce *a mensa* with alimony on the ground of abandonment. This judgment was pleaded as a bar to plaintiff's present action.

To this affirmative defense the plaintiff replied that his present cause of action was based upon two years' separation for a period beginning subsequent to the judgment of 1940. Plaintiff also alleged that he had complied with the terms of the judgment as to the support of the defendant.

Upon defendant's motion, judgment was rendered on the pleadings, dismissing the plaintiff's action. Plaintiff appealed.

F. J. Carnage and Thos. W. Ruffin for plaintiff.

Frank P. Spruill, Jr., for defendant.

DEVIN, J. The case comes to us upon appeal from a judgment on the pleadings in favor of the defendant. The ruling of the court below was bottomed upon the view that as a matter of law plaintiff could not maintain his action, and that there was no issuable fact to be tried by a jury. C. S., 556.

A judgment on the pleadings, in favor of the defendant on an affirmative defense, can be approved only when the allegations of facts contained

in the plaintiff's pleadings and relevant inferences of fact deducible therefrom, construed liberally in his favor, fail in all material respects to make out a case. *Adams v. Cleve,* 218 N. C., 302, 10 S. E. (2d), 911; *Pridgen v. Pridgen,* 190 N. C., 102, 129 S. E., 419.

An examination of the plaintiff's complaint and reply in this case leads us to the conclusion that defendant's motion for judgment on the pleadings was improvidently allowed. While the defendant sets up in her answer a plea which, if established, would constitute a bar to the plaintiff's action, the only admission by the plaintiff in his reply is that the previous judgment of divorce *a mensa* was by consent, and that his present action is based upon a separation which began subsequent thereto, and which has continued for two years next preceding the institution of this action, in January, 1943. There is no admission that his cause of action is based upon his own wrongful and unlawful conduct. *Brown v. Brown,* 213 N. C., 347, 196 S. E., 333, and *Byers v. Byers, ante,* 85. The pleadings raise issues of fact to be tried by jury.

The judgment rendered on the pleadings must be

Reversed.

MRS. ETHEL GREGORY v. TRAVELERS INSURANCE COMPANY.

(Filed 5 May, 1943.)

1. Trial § 22b: Appeal and Error § 40c—

In considering a motion for nonsuit after all the evidence of both sides has been heard, the defendant's evidence unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff.

2. Insurance § 32c—

Where, under the terms of the insurance contract sued on, insurance on life of insured ceased when his employment by the Johnston Manufacturing Company terminated, with proviso that if, at such termination, insured was wholly disabled and prevented by disease from engaging in employment for wage or profit, the insurance would remain in force, and the evidence of plaintiff, beneficiary in the policy, tended to show that insured was regularly engaged for wages in the same occupation, with reasonable continuity, for a considerable period of time, after the termination of the service in which he was insured and to within a few days of his death, defendant's motion for nonsuit at close of all the evidence was properly allowed.

SEAWELL, J., concurring in result.

APPEAL by plaintiff from *Warlick, J.,* at February Term, 1943, of MECKLENBURG. Affirmed.

This was an action by the beneficiary in a life insurance certificate issued by defendant 3 February, 1941, on the life of Thomas J. Gregory, now deceased. The certificate was issued under a group insurance policy covering the employees of Johnston Manufacturing Company. According to the terms of the certificate it was agreed that the insurance should terminate when the insured's employment with the employer should terminate. However, it was provided "that in a case, where at the time of the termination of employment the employee shall be insured and shall be wholly disabled and prevented by bodily injury or disease from engaging in any occupation or employment for wage or profit the insurance will remain in force as to such employee during the continuance of such disability."

Plaintiff's evidence tended to show that the insured became ill with ulcerated colitis in the spring of 1941; that 12 June, 1941, he left the employment of Johnston Manufacturing Company because of his inability to work, due to disease, and that he died 26 August, 1941; that prior to his leaving Johnston Manufacturing Company's employ he complained of pains in his stomach and had sick and fainting spells, and was unable to work regularly. It also appeared from plaintiff's evidence that "after he quit the Johnston Mills he worked for a short time at Hoskins Mill." "After he quit the Johnston Mills Company, he worked at Hoskins. He also worked at the Louise Mill for a few days." Another witness testified that up to the time he died he was employed at the Hoskins Cotton Mills, and worked there five or six weeks; that he was "pale, weakly-looking," and underweight. "I was doing the same kind of work in the same department or division that he was in. He ran his job very well I imagine, but I wasn't where he was; I was at the other end. I have helped him in his job."

The defendant offered evidence, supported by pay roll sheets, tending to show that the insured went to work in the Louise Mill 24 June, and worked regularly eight hours per day up to 15 July, and on 17 July began work at the Hoskins Mill and worked regularly there (forty hours per week) until 20 August, when he quit. All the places where insured was employed were textile mills, and his work was that of "doffer."

At the close of all the evidence defendant's motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

W. Vance Howard and Joe W. Ervin for plaintiff, appellant.

Tillett & Campbell for defendant, appellee.

DEVIN, J. Under the terms of the insurance contract sued on the insurance on the life of Thomas J. Gregory ceased when his employment

by the Johnston Manufacturing Company, the employer named in the group policy, terminated. However, it was provided in the certificate of insurance that if at the time of the termination of his employment, while insured, he was "wholly disabled and prevented by bodily injury or disease from engaging in any occupation or employment for wage or profit," the insurance would remain in force.

The question presented by the appeal is whether the evidence offered by the plaintiff is sufficient to bring her case within the proviso contained in the certificate of insurance. It is admitted that the insured left the employment of the Johnston Company while the insurance was still in force, 12 June, 1941. Was he at that time "wholly disabled" and prevented by disease "from engaging in any occupation or employment for wage or profit?" From an examination of the testimony appearing in the record we are constrained to concur in the ruling below that the evidence was insufficient to support the plaintiff's case as to this essential element. While there is evidence tending to show that the insured was afflicted with a disease which finally proved fatal, and that at the time he left the employment of the Johnston Company he was unable to work by reason of disease, it does appear affirmatively from the plaintiff's evidence that as a matter of fact he did work five or six weeks with reasonable continuity at two other mills, after he left the employment of Johnston Manufacturing Company, performing the substantial duties of the same occupation. *Thigpen v. Ins. Co.*, 204 N. C., 551, 168 S. E., 845. Thus, the plaintiff has failed to show that he was prevented by disease from engaging in employment for wage or profit. His regular employment in two other cotton mills as a doffer for five or six weeks may not be regarded merely as an occasional or casual employment. It indicated something more than the intermittent and futile attempts to work on the part of a sick man who is "wholly disabled." *Medlin v. Ins. Co.*, 220 N. C., 334, 17 S. E. (2d), 463; *Jenkins v. Ins. Co.*, 222 N. C., 83; *Ford v. Ins. Co.*, 222 N. C., 154. There was no evidence that he had to work at a reduced wage, or at a different occupation, or for shorter hours, or was ever discharged for inability to perform the duties of his job. *Bulluck v. Ins. Co.*, 200 N. C., 642, 158 S. E., 185; *Edwards v. Junior Order*, 220 N. C., 41, 16 S. E. (2d), 466; *Blankenship v. Assurance Society*, 210 N. C., 471, 187 S. E., 590; 98 A. L. R., 478.

While the defendant offered evidence supported by pay roll records tending to show that after his employment by the Johnston Company terminated the insured worked approximately forty hours per week for eight weeks, defendant's evidence could not be considered on the motion for nonsuit, except in so far as it tended to clarify or explain the evidence of the plaintiff. *S. v. Fulcher*, 184 N. C., 663, 113 S. E., 769. The

rule for the consideration of defendant's evidence on a motion for nonsuit was stated by *Stacy, C. J.*, in *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598, as follows: "In considering the last motion (for nonsuit), the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff." This statement of the rule was quoted with approval in *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421; *Funeral Home v. Ins. Co.,* 216 N. C., 562, 5 S. E. (2d), 820; *Jeffries v. Powell,* 221 N. C., 415, 20 S. E. (2d), 561; *Tarrant v. Bottling Co.,* 221 N. C., 390, 20 S. E. (2d), 565. See also *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137. In *Sellars v. Bank,* 214 N. C., 300, 199 S. E., 266, it was said that the defendant's evidence which did not tend to contradict or impeach the evidence of the plaintiff, but "only served to amplify and explain the same," could be considered on the motion to nonsuit. The use of the word amplify in this case may not be understood as indicating a tendency to expand the rule laid down in the *Harrison case, supra,* or to open the door to the consideration, on this motion, of defendant's evidence except only such as serves to explain or make clear that offered by the plaintiff.

However, without considering the defendant's evidence, we think plaintiff's evidence sufficiently tends to show that the deceased was regularly engaged in the same occupation, with reasonable continuity, for a considerable period of time, after he left the service in which he was insured. Thus, after the termination of his employment by the Johnston Company he was unprotected by the saving clause in the certificate of insurance, and the casualty of his death under these circumstances was not within the coverage of the insurance. Unfortunately for the beneficiary, this prevented recovery on the insurance certificate, but we must hold the parties bound by the express terms of the contract into which they have entered.

The judgment of the Superior Court is

Affirmed.

SEAWELL, J., concurring in result: I concur in the result reached in this case, because I think it is unavoidable on consideration of plaintiff's evidence. But I do not agree with the view expressed in the main opinion that the court may draw inferences from the defendant's evidence unfavorable to the plaintiff upon a demurrer to the evidence and motion to nonsuit, and thereby deny the plaintiff his right of trial by jury. I do not believe it is consistent with our institutions relating to trial that the defendant may be permitted to swear himself out of court without the intervention of a jury, while the plaintiff to obtain relief must necessarily submit his evidence to that tribunal.

In so far as I am able to discover, the group of cases cited in the main opinion in support of that doctrine comprises the whole list of decisions favorable to that view, and ignores scores of cases to the contrary.

In my judgment, the dissident view is based on a misconception of the office of a demurrer to the evidence and the purpose and effect of C. S., 567, permitting defendant as a matter of right to introduce his evidence after demurring to that of plaintiff. The statute is procedural and does not affect the principles of demurrer to the evidence as it existed at common law. The office of demurrer to the evidence is to present to the court the evidence in its legal aspects only to ascertain whether it has, according to legal standards, any probative value in establishing the plaintiff's claim. The ultimate purpose of such an examination is simple. The office of the court ends when the legal character of the offered proof is ascertained—whether it is evidence or no evidence to support the case—and from then on it is a matter for the jury. The ultimate reception of such evidence by the jury, which alone can pass upon its weight, credibility and significance, is a part of the process. At no point in it have we any power—except that which results from the unreviewability of our decisions—to pass upon the weight or credibility of the evidence or to accept it as true, or to balance it against the evidence of the plaintiff in aid of the motion to nonsuit. Compare *S. v. Fulcher,* 184 N. C., 663, with *Means v. R. R.,* 126 N. C., 424, 429, construing the statute.

That the weight of authority is against such a proceeding cannot be doubted upon a careful study of the decisions of this Court. *Springs v. Schenck,* 99 N. C., 551, 555; *Newby v. Realty Co.,* 182 N. C., 34, 41; *S. v. Ammons,* 204 N. C., 753, 757; *Tuttle v. Bell,* 203 N. C., 154, 156. The list of decisions so holding might be almost indefinitely lengthened. While these cases are expressly to the point, it is equally true that all those cases using the familiar formula that upon a demurrer to the evidence and motion to nonsuit, the evidence must be taken in the most favorable light to the plaintiff, and plaintiff is entitled to every reasonable inference therefrom, have back of them a recognition of the true function of the demurrer, as well as an appreciation of our constitutional inhibition against passing upon the weight and credibility of the evidence and thereby depriving the plaintiff of his right to trial by jury. See collection of cases in annotation under C. S., 567, Michie's Code of 1939.

As I have said, outside of the group of cases cited in the main opinion, it is universally held that the statute did not change any of the principles of demurrer to the evidence as they existed at common law. The effect of such a demurrer in jurisdictions like ours, where courts are not permitted to pass upon the weight of evidence, is thus stated in 64 C. J.,

p. 384: "Only that portion of the evidence which tends to prove the case of the demurree can be considered, and evidence which tends to break down the case of demurree cannot be considered." Otherwise, it would be a speaking demurrer.

I assume that no one would suggest that any member of this Court is concerned whether the plaintiff or the defendant wins in any particular case, or class of cases. We are all concerned with the integrity of the processes which have been established to reach justice in all cases. While abstract views upon the merits of the jury system have been entertained by groups of people at all times, few would be bold enough to dispute that institutionally, at least, and for purpose of practical observance, the debate was closed with the adoption of Article I, section 19, of the Constitution, which requires that it be kept inviolate. Whether the line has been overstepped in the case at bar is a matter of individual opinion, and I accord to my colleagues as much sincerity in their position as I expect for my own.

For several hundred years English speaking peoples have been unwilling to trust judges as triers of the facts, and have emphasized that feeling in the only way they could—by writing it in the fundamental law. They still try to maintain that principle. It is not that our courts are not now filled with men of integrity and ability—perhaps it is because they are not yet convinced that society has not received as much damage from the mistakes of judges as it has from the ignorance of juries. Whether I personally share that feeling or not, I prefer that when these barriers are broken down, it should be by an orderly amendment to the Constitution and not through erosion by the Court.

The statute, C. S., 591, empowers the trial judge, in his discretion, to set aside the verdict for insufficiency of evidence. This is the only relief consonant with the constitutional limitations on judicial power.

STATE v. ZEB BURRAGE.

(Filed 5 May, 1943.)

1. Homicide § 1—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

2. Homicide §§ 6a, 6b, 16—

It is the intentional killing of a human being with a deadly weapon which raises the presumption of malice, and, nothing else appearing, constitutes murder in the second degree. And when this presumption is raised by admission or proof, the burden is on defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it.

3. Homicide § 27d—

On trial under an indictment for murder, where defendant contends and offers evidence tending to show that he did not intend to kill deceased but that she was shot in a struggle over a pistol in his hand, a failure to instruct the jury that the presumption of murder in the second degree only arises upon an admission, or proof of the fact, of an intentional killing with a deadly weapon is prejudicial error.

APPEAL by defendant from *Warlick, J.*, at November Term, 1942, of STANLY.

Criminal prosecution upon an indictment charging defendant with the murder of Ola Lowder.

Upon the trial in Superior Court, the State offered evidence tending to show, briefly stated, these facts:

Between 9:30 and 10:00 o'clock on night of 16 June, 1942, Ola Lowder was shot with a pistol and killed in front of her residence located about a mile from the center of the town of Albemarle, Stanly County, North Carolina, on the right of the road leading towards Concord. The house is situated something like twenty-five feet from the sidewalk. A driveway leads from the highway on the right side of the house, to and under a shed. Defendant, who roomed about three-fourths of a mile away, had been going with Miss Lowder for about two years. On night of homicide, defendant and Miss Lowder were seen together on her front porch around 9:15 o'clock, where they were "having differences." At that time the cars of defendant and Miss Lowder were parked in the driveway. Soon thereafter Miss Lowder backed her car out so that defendant could back his out, which he did and left. A couple of minutes later she got in her car and went to the home of her niece, Sybil Lowder, and, in 15, 20, or 30 minutes, accompanied by Sybil Lowder, she returned to her home. In the meantime defendant had gone to his room, and returned to the residence of Miss Ola Lowder, and left, and returned again and parked his car in the driveway. Upon her return Miss Ola Lowder parked her car on the shoulder of the road in front of her residence. Defendant, who was then sitting on the front porch, got up and went to, and sat in his car with his feet on the running board. Miss Sybil got out of car on side next to the house and walked by defendant to the porch, exchanging greeting with him as she passed. Miss Ola got out of car on side away from the house and walked around the back

of the car, and on into the yard toward defendant. Whereupon, he took about two steps toward her, and when they were 3, 4 or 5 feet apart, not close enough for her to reach him, he started shooting. She threw up her hand about time of second shot and holloed at him and started stepping or staggering backward, and fell on the shoulder of the highway within two feet of the driveway. After the first shot there was a pause, and others, 3 or 4, as many as three in all, were fired in quick succession. One shot entered her chest, and apparently went through her body and came out in the back. Other wounds were in her arm and in her side. Her right arm was broken. She died almost instantly. Neither Miss Sybil nor a person across the street heard defendant or Miss Lowder say anything before the shooting started. After the shooting defendant turned around, walked back to his car, got in, backed out of the driveway, and drove to his rooming house, went to his room and shot himself, the bullet entering the throat and coming out over eye. To a later inquiry as to "what happened," he replied, "I shot Miss Ola Lowder a while ago. I think I killed her. I meant to at least. If I didn't, tell her I still love her."

The State further offered evidence tending to show that defendant stated that he didn't carry the pistol with him the first time he went to see Miss Lowder that night; that he kept it at home in the bottom of his suitcase; and that he went back home and got it. And there was evidence that there were two suitcases in his room and that "one was open and the stuff in one corner turned back."

On the other hand, defendant offered evidence tending to show that he was in love with Miss Ola Lowder; that he had been to Virginia and came home in the late afternoon of 16 June and went to her home; that she did not know he was coming, and was away from home; that when she came in, differences arose, as detailed by him, and she told him that she couldn't see him that night, that he would have to go, and, quoting her, "if you don't I have got a friend I am going to get and bring him and have him send you home"; that he left, but upon reaching his room, he "got to studying," and thought he would go and "see if she was mad" —and if he left he "wouldn't see her any more"—that he "thought the world of her"; that, in consequence, he drove back to her house, parked his car in the driveway and went up on the porch; that when she and her niece drove up he went back to his car, and, on seeing someone get out of the car, "one on one side and one on the other," he couldn't tell whether it was a man or woman; that he then opened the car door, reached over the seat and picked up the gun "where it had been laying in the back on the floor"; that after Miss Sybil passed by, Miss Ola walked right up to him, and in kind of low voice said, "What you doing with that gun in your hand?" and before she gave him time to answer

she grabbed the gun with both hands, brought it right up at her breast, and the gun went off; that "she whirled around sideways . . . and still held on to the gun, three shots were fired"; that "she did not let go the gun until the last shot was fired"; and that he "doesn't know who fired the shots" nor "who pulled the trigger"; and, that, using his words, "after the shots were fired she turned and left me, went toward her car, kindly staggered, but I knew she was killed the way she acted . . . I was sorry she was shot and I turned and went back to my car and decided to shoot myself after she had been shot."

Verdict: Guilty of murder in the first degree and recommend mercy.

Judgment: Death by asphyxiation.

Defendant appeals to Supreme Court and assigns error.

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

Brown & Mauney and Hartsell & Hartsell for defendant, appellant.

WINBORNE, J. Of the exceptions upon which defendant challenges the trial in Superior Court, it is sufficient to consider these two, which entitle defendant to a new trial.

In the course of the charge, after defining murder in the first degree, murder in the second degree, and manslaughter, the court instructed the jury:

"Now, for instance, as we started on the controversy the burden was on the State on the whole of the trial at that time to satisfy you Gentlemen first, among other things, before any burden, so to speak, left the State and rests or was cast as a laboring oar to the defendant, to satisfy you first that this defendant, or prisoner as he is called in a capital case, took the life of Miss Ola Lowder with a deadly weapon. (Now as an illustration, if during the progress of the trial you become satisfied beyond a reasonable doubt that Zeb Burrage, the prisoner, did take Miss Ola Lowder's life with a deadly weapon, this pistol which I stated to you as a matter of law is a deadly weapon, then under that showing made by the State he was then looked upon by the State as guilty of murder in the second degree, nothing else appearing, then so far as that charge was concerned there thereafter was no burden on the State on the question of murder in the second degree, so he must—for when that showing is made by the State beyond a reasonable doubt or is admitted by the prisoner charged with the crime then he must—the law presuming malice from the use of a deadly weapon—then there is cast upon him the burden of going forward and excluding the presumption that the State lodges against him under that showing made or of rebutting that presumption.)"

Exception is directed to so much thereof as is in parentheses.

And, again, the court continued:

"(Now that presumption arises of his guilt of murder in the second degree if he admits in the trial or if it is proven beyond a reasonable doubt that this life was taken with this pistol, so then the laboring oar is cast to the prisoner to show you such evidence or such fact as would remove the alleged crime of murder and to bring it down to manslaughter or which would abrogate and destroy it altogether and to so justify you in returning a verdict of not guilty.)"

To this instruction defendant excepts.

The vice common to these instructions is the failure to instruct that it is the intentional killing of a human being with a deadly weapon which raises the presumption of malice.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. These definitions of murder in the first degree, murder in the second degree and manslaughter are too firmly imbedded in the law to require citation of authority. Moreover, the law is well established in this State that the intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. And when this implication is raised by an admission or proof of the fact of an intentional killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it. *S. v. Capps,* 134 N. C., 622, 46 S. E., 730; *S. v. Quick,* 150 N. C., 820, 64 S. E., 168; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *S. v. Debnam,* 222 N. C., 266, 22 S. E. (2d), 562; *S. v. Utley, ante,* 39.

In the *Keaton case, supra,* the rule is stated in this manner: "If a defendant who has intentionally killed another with a deadly weapon would rebut the presumption arising from such showing or admission, he must establish to the satisfaction of the jury the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or which will excuse it altogether on the ground of self-defense, unavoidable accident or misadventure."

In the *Debnam case, supra,* the Court, speaking through *Seawell, J.,* said: "Where the defense is based on the theory of accidental shooting, and 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."

Applying these principles to the case in hand, defendant does not admit an intentional killing of Ola Lowder. He denies that he intended to kill her and contends that she was shot in a struggle over a pistol he had in his hand. In the light of this contention, failure to instruct the jury that the presumption only arises upon an admission, or the proof of the fact of an intentional killing with a deadly weapon is prejudicial error.

Moreover, the second portion to which exception is taken places burden upon defendant "to show such evidence or such fact as would remove the alleged crime of murder." The alleged crime is murder in the first degree. The jury may fairly have understood that the burden was on defendant to show that he was not guilty of murder in the first degree. This is not his burden.

It is not deemed necessary to consider other exceptions.

For errors pointed out, let there be a

New trial.

ANNIE GLENN RATTLEY, ADMINISTRATRIX OF SYLVESTER RATTLEY, DECEASED, v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, AND T. LACY WILLIAMS, ADMINISTRATOR OF JOHN VAUGHAN, DECEASED.

(Filed 5 May, 1943.)

1. Negligence § 5—

By proximate cause is not meant necessarily the last act of cause, or nearest act to the injury, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause.

2. Negligence § 7—

Intervening negligence to have the effect of "insulating" the original negligence, where it is found to exist, must totally supersede that negligence in causal effect.

3. Negligence § 6—

When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.

4. Negligence § 7—

It is error for the court to instruct the jury that, in order to break the sequence of proximate causation or, in other words, to supersede the original negligence as proximate cause, the intervening negligence must be palpable or gross.

5. Same—

The real test is that of foreseeability of the intervening act as a reasonable consequence of the original negligence. If the intervening act or conduct is found to be reasonably foreseeable as a consequence of the original negligence, it will not serve the purpose of insulation.

STACY, C. J., concurring.

WINBORNE, J., joins in concurring opinion.

APPEAL by defendants from *Nimocks, J.*, at November Term, 1942, of FRANKLIN. New trial.

Yarborough & Yarborough for plaintiff, appellee.

Malone & Malone and Murray Allen for defendants, appellants.

SEAWELL, J. This case was here before upon the appeal of plaintiff from a judgment of nonsuit, and will be found reported as *Henderson v. Powell* and *Rattley v. Powell,* 221 N. C., 239. (For summary of facts, see that case.) The defendants had prevailed in their motion for nonsuit upon the evidence upon the theory either that the trial disclosed no evidence to go to the jury upon the issue of defendants' negligence, or that such negligence was insulated by the intervening negligent conduct of McCrimmon, the driver of the car in which Rattley, the intestate, was a guest when killed. The decision of this Court was adverse to the defendants upon both points, and the case was sent back for a new trial, without restriction of the issues to any phase of the case. The factual situation disclosed by the evidence on the second trial does not differ materially from the case as it then stood; and the views expressed by the Court in that decision with respect to the negligence of the defendants and the suggested insulation thereof by the conduct of McCrimmon become the law of the case.

Adverting to the instructions to the jury challenged upon this appeal, we have to say that mere intervention, alone, of an independent negligent act will not relieve the author of an original negligence from the consequences of his negligent conduct as an efficient cause in producing the injury.

"By proximate cause is not meant necessarily the last act of cause, or nearest act to the injury, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause." 38 Am. Jur., p. 703, sec. 55.

The court below was not in error in instructing the jury that intervening negligence to have the effect of "insulating" the original negligence, where it is found to exist, must totally supersede that negligence in causal effect. The principle as laid down in Sherman and Redfield on

Negligence (1941, Vol. 1, p. 101, sec. 38) and Restatement of the Law, Torts, sec. 439, is not different from that expressed in numerous well considered opinions of our own Court and in controlling opinion throughout the country. *Campbell v. R. R.*, 201 N. C., 102, 109, 159 S. E., 327. In *White v. Realty Co.*, 182 N. C., 536, 538, 109 S. E., 564, the principle is clearly expressed:

"But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover; 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, he is liable.'" *Wood v. Public-Service Corp.*, 174 N. C., 697, 94 S. E., 459.

But the trial judge did fall into a causal error in instructing the jury that in order to break the sequence of proximate causation or, in other words, to supersede the original negligence as proximate cause, the intervening negligence must be palpable or gross.

This expression was derived from *Herman v. R. R.*, 197 N. C., 718, 150 S. E., 361, and was applied in *Hinnant v. R. R.*, 202 N. C., 489, 493, 163 S. E., 555, but met with definite disapproval in *Quinn v. R. R.*, 213 N. C., 48, 50, 195 S. E., 85.

The test is not to be found merely in the degree of negligence of the intervening agency, but in its character—whether it is of such an extraordinary nature as to be unforeseeable. Restatement of the Law, Torts, sec. 447; *Butner v. Spease*, 217 N. C., 82, 86, 6 S. E. (2d), 808. A person is bound to foresee only those consequences that naturally and probably flow from his negligence; but caution must be observed in the application of this principle also, since the failure to foresee the exact nature of the occurrence caused by his negligence will not excuse him if it could be reasonably foreseen that injury to some person might occur through an event of that character. *Dunn v. Bomberger*, 213 N. C., 172, 177, 195 S. E., 364; *Lancaster v. Greyhound Corporation*, 219 N. C., 679, 688, 14 S. E. (2d), 820.

The real test then is that of foreseeability of the intervening act as a reasonable consequence of the original negligence. If upon the application of these principles, the intervening act or conduct is found to be reasonably foreseeable as a consequence of the original negligence, it will not serve the purpose of insulation. See quotation from *White v. Realty Co., supra; Wood v. Public-Service Corp., supra.*

The test applied in the instruction is not wholly consistent with these rules, and may have diverted the jury from their application. For the

error contained therein, the defendants are entitled to a new trial, and it is so ordered.

We deem it unnecessary to consider other exceptions.

New trial.

STACY, C. J., concurring: When an automobile is hit by or collides with a train at a grade crossing, the law makes a distinction between the causal negligence of the driver of the automobile which will bar a recovery in an action brought against the railroad by the driver and the negligence on his part which will bar a recovery in an action brought against the railroad by a guest in the automobile who exercises no control over the driver. *Baker v. R. R.*, 205 N. C., 329, 171 S. E., 342.

In the first case, contributory negligence on the part of the driver of the automobile will suffice to bar a recovery in an action brought by him. *McCrimmon v. Powell*, 221 N. C., 216, 19 S. E. (2d), 880; *Godwin v. R. R.*, 220 N. C., 281, 17 S. E. (2d), 137; *Miller v. R. R.*, 220 N. C., 562, 18 S. E. (2d), 232.

In the second, the negligence on the part of the driver which will defeat a recovery in an action brought against the railroad by a guest in the automobile who exercises no control over the driver, must do more than contribute to the injury; it must be the real efficient cause, or the sole proximate cause of the guest's injury. *Quinn v. R. R.*, 213 N. C., 48, 195 S. E., 85; *Harvell v. Wilmington*, 214 N. C., 608, 200 S. E., 367; *Campbell v. R. R.*, 201 N. C., 102, 159 S. E., 327; *Dickey v. R. R.*, 196 N. C., 726, 147 S. E., 15; *Earwood v. R. R.*, 192 N. C., 27, 133 S. E., 180; *Bagwell v. R. R.*, 167 N. C., 611, 83 S. E., 814.

It is true, in *Herman v. R. R.*, 197 N. C., 718, 150 S. E., 361, it was said "the negligence of the driver of the automobile is so palpable and gross, as shown by plaintiff's own witnesses, as to render his negligence the sole proximate cause of the injury." The Court was there speaking to a nonsuit and of the palpable and gross negligence of the driver appearing on the record which rendered his negligence "the sole proximate cause of the injury." This was not to say, however, that the negligence of the driver must be "palpable and gross." It is enough in such case to defeat a recovery, if the negligence of the driver be the sole proximate cause of the guest's injury. *Montgomery v. Blades*, 222 N. C., 463; *Chinnis v. R. R.*, 219 N. C., 528, 14 S. E. (2d), 500; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Smith v. Sink*, 211 N. C., 725, 192 S. E., 108.

An instruction similar to the one here complained of was held for error in *Quinn v. R. R., supra*. A like holding would seem to be in order here.

WINBORNE, J., joins in this opinion.

BURRIS SELLERS AND WIFE, J. B. SELLERS, v. B. P. HARRELSON AND WIFE, E. R. HARRELSON, ALMA HARRELSON HARDIE, MILDRED T. BURROUGHS AND HUSBAND, REECE BURROUGHS, AND C. L. PRICE.

(Filed 5 May, 1943.)

Fraud § 11: Trusts § 15: Trial § 22f—

In an action by plaintiffs to have a tax deed to the *feme* defendant Harrelson set aside as fraudulent or to have grantee therein declared a trustee for plaintiffs, where the evidence tended to show that the Harrelsons were plaintiffs' rental agents to handle the property and pay taxes and as such allowed the property to be sold for taxes and *feme* defendant Harrelson bought same at tax sale and sold parts thereof to the other defendants, one of them paying a consideration and the others none, judgment of nonsuit was proper as to the purchaser who paid a consideration, and improper as to all other defendants.

APPEAL by plaintiffs from *Carr, J.*, at October Term, 1942, of COLUMBUS.

This action was brought by the plaintiffs for the purpose of having a tax deed made to the defendant, E. R. Harrelson, set aside as fraudulent or void, or that E. R. Harrelson, defendant and grantee therein, be declared trustee for the use and benefit of the plaintiffs.

The case is here upon a successful motion by the defendants to nonsuit the plaintiffs, and discussion here will be confined to the propriety of the judgment as of nonsuit.

Facts pertinent to that issue may be summarized as follows: The *feme* plaintiff, J. B. Sellers, obtained the land in question by deed from her father-in-law and went into possession immediately, remaining in possession for some time thereafter. Later, in 1925, Burris Sellers removed to South Carolina, leaving his wife, J. B. Sellers, in the home of defendants. There is evidence tending to show that the premises were turned over to the care and custody of B. P. Harrelson as agent of the plaintiffs, upon an oral agreement that he would rent the same, keep the taxes paid, and account to them for a portion of the profits, if any. There is also evidence tending to show that plaintiffs did receive rents on several occasions, and that defendant B. P. Harrelson called on plaintiffs for money to pay expenses in a bad year, and that plaintiffs paid a small amount for that purpose.

The plaintiffs offered in evidence a deed of the sheriff of Columbus County to the defendant E. R. Harrelson, and an affidavit supporting the deed, for the purpose of attack. The plaintiff J. B. Sellers testified that she was living in the home of E. R. Harrelson when the tax deed was made, and that the defendants knew at all times where she and her husband were. She further testified that B. P. Harrelson took her and

her children to her husband in South Carolina, and that at all times thereafter the whereabouts of her and her husband was known to defendants; that B. P. Harrelson promised and agreed to pay the taxes in her name and to look after the property until the plaintiffs were ready to return, when he would turn the premises back to them; and during the period of her absence, they got small amounts of money from Harrelson for rent. There was intervisitation between the parties during her absence in South Carolina.

She returned to North Carolina in 1938, and found that the premises had been rented. At the end of the year, however, the tenant moved out and the plaintiffs went into the possession of the premises, without objection by the defendants and without any knowledge that there was a tax deed in existence.

Both the plaintiffs denied signing any deed to anyone for the land, and denied having gone before any notary public to acknowledge the same.

The plaintiff J. B. Sellers testified that she did not know that the land had been sold; that while with B. P. Harrelson, she worked and paid her own way, and paid him for taking her to South Carolina. There is evidence tending to show that plaintiffs first discovered the existence of the tax deed some time in the summer of 1939.

The evidence further tends to show that during the period, except when occupied by the plaintiffs, the lands were under the management of B. P. Harrelson, husband of E. R. Harrelson, and rented and controlled by him with the knowledge of all parties.

The plaintiffs remained upon the land until 1941, when "there was a lawsuit about getting off the land."

There was testimony as to the value of the land at the time of the tax deed, placing it at $2,500 to $3,000.

The affidavit supporting the sheriff's deed, made by the defendant E. R. Harrelson, states: "That no person has been in the actual possession or occupancy of the above described tract of land upon whom notice of such purchase could be served; that Mrs. J. B. Sellers, in whose name the land was assessed and taxed, cannot upon diligent inquiry be found in Columbus County or the State of North Carolina," etc. There is evidence tending to show that the defendant E. R. Harrelson knew of the presence of the plaintiff J. B. Sellers in North Carolina at the times stated in her evidence, and inferences that might be drawn by the jury that she knew of the relational agency that existed between B. P. Harrelson and the plaintiffs with respect to the land.

The defendant offered a judgment of the Superior Court at February Term, 1941, in favor of B. P. Harrelson and against Burris Sellers, the male plaintiff, ejecting him from the premises and further providing:

"It was further agreed by and between the parties that this judgment shall be without prejudice to any action hereinafter brought by the defendants against the plaintiffs."

The defendants further introduced a deed purporting to have been signed and acknowledged before a notary public in South Carolina, and purporting to convey the premises to B. P. Harrelson. See foregoing statement. The plaintiff Burris Sellers admitted that the signature looked like his, but denied signing it. The plaintiff J. B. Sellers denied it altogether. The deed was unregistered, and plaintiffs objected to its introduction. The evidence disclosed that it had been obtained for introduction in the evidence upon *capias ad testificandum* from Mrs. S. T. Williams of Gaston County, whose connection with the matter does not appear in the evidence.

The evidence discloses that certain parts of the land were conveyed on 20 December, 1930, by the defendants E. R. Harrelson and husband, B. P. Harrelson, to their daughter and codefendant, Mildred T. Burroughs, and on the same day a part of the land was conveyed to Alma Harrelson Hardie; and on 22 September, 1928, ten acres thereof were conveyed to C. L. Price. These deeds are merely referred to in the record by book and page of registry, and no copies thereof have been sent up to this Court.

As to the deeds to the daughters, Mildred T. Burroughs and Alma Harrelson Hardie, the evidence seems to indicate that no consideration passed at the time the deeds were received. The evidence does not disclose that Price had any knowledge of the transactions connected with the acquisition of the defendants' title, or that conveyance to him was without consideration.

This action was commenced by summons, which was introduced in the evidence, served upon the defendants 28 March, 1941.

Powell & Lewis and Tucker & Proctor for plaintiffs, appellants.

E. M. Toon and L. R. Varser for defendants, appellees.

SEAWELL, J. Upon the state of the record as presented to us, we are unable to say that there are not inferences which may be drawn from the evidence favorable to plaintiffs' claim, or that the action is barred by the statute pleaded, and the judgment of nonsuit with respect to all the defendants, save C. L. Price, is reversed. The plaintiffs, however, have produced no evidence entitling them to proceed further against the defendant Price, and the judgment of nonsuit as to him is sustained.

The judgment of the court below will be modified in accordance with this opinion.

Modified and affirmed.

DAVID WARD v. V. E. SMITH ET AL.

(Filed 5 May, 1943.)

1. Adverse Possession § 2—

In actions involving title to real property, where the State is not a party, other than in trials of protested entries laid for the purpose of obtaining grants, the title is conclusively presumed to be out of the State, and neither party is required to show such fact, though either may do so. C. S., 426.

2. Adverse Possession §§ 13b, 13c

In actions between individual litigants, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title. C. S., 428 and 430.

3. Appeal and Error § 40e: Trial § 22f—

A motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and support a recovery. The question thus presented is a question of law and is always to be decided by the court. C. S., 567.

4. Trial § 23—

Equivocations, discrepancies, and contradictions in plaintiff's evidence affect its credibility only and do not justify withdrawing the evidence from the jury.

APPEAL by defendants from *Carr, J.*, at December Term, 1942, of COLUMBUS.

Civil action for trespass.

The plaintiff alleges that he is the owner and in possession of a 30-acre tract of land in Columbus County, described by metes and bounds in the complaint; that the defendant has trespassed thereon, after being forbidden, and that plaintiff is entitled to injunctive relief and damages for the trespass already committed.

Upon denial of liability and issues joined, the jury returned a verdict in favor of the plaintiff.

From judgment thereon, the defendants appeal, assigning as error the refusal of the court to dismiss the action as in case of nonsuit.

Varser, McIntyre & Henry for plaintiff, appellee.

A. B. Brady and H. L. Lyon for defendants, appellants.

STACY, C. J. The plaintiff claims title to the *locus in quo* by adverse possession for twenty years. It is in evidence that he first entered upon the land in August, 1920; that he occupied it thereafter continuously, under known and visible lines and boundaries, making such use of it

and taking such profits each year as it was susceptible and capable of yielding at the time. There is no pretense that the plaintiff had any paper title to the land. The trespass of which the plaintiff complains occurred on 11 December, 1941, when the defendants entered upon the land and plowed up about three acres of strawberries. This action was instituted immediately thereafter.

The defendants, on the other hand, acquired a deed for the property in May, 1941, and they show title running back to 26 November, 1920. The defendants also offered evidence tending to show possession and use of the property by their predecessors in title. The cross-examination of the plaintiff indicated some equivocation as to the character of his possession and his claim of ownership. However, the conflict in the evidence has been resolved by the jury in favor of the plaintiff. It was sufficient to carry the case to the jury.

Indeed, the case is strikingly like that of *Locklear v. Savage,* 159 N. C., 236, 74 S. E., 347. It was tried under the law as there laid down, and the result must be upheld on authority of that case. It is stipulated in the record that the court correctly charged the jury on all phases of the case in compliance with C. S., 564, and that the issues submitted were not objected to by the defendants.

It is the holding with us, and the statute, C. S., 426, so provides, that in actions involving title to real property, where the State is not a party, other than in trials of protested entries laid for the purpose of obtaining grants, the title is conclusively presumed to be out of the State, and neither party is required to show such fact, though either may do so. *Dill Corp. v. Downs,* 195 N. C., 189, 141 S. E., 570.

In actions between individual litigants, as here, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. C. S., 428 and 430; *Power Co. v. Taylor,* 191 N. C., 329, 131 S. E., 646; *S. c.,* 194 N. C., 231, 139 S. E., 381.

The motion to nonsuit tests the sufficiency of the evidence, when considered in its most favorable light for the plaintiff, to carry the case to the jury and to support a recovery. The question thus presented by demurrer, whether interposed at the close of plaintiff's evidence, or "upon consideration of all the evidence," C. S., 567, is to be decided by the court as a matter of law. Whether the evidence is such as to carry the case to the jury is always for the court to determine. A demurrer raises only questions of law. *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137.

We are not inadvertent to the equivocation in the plaintiff's testimony as elicited on cross-examination. This, however, affected his credibility

only, and did not justify withdrawing his evidence from the jury. Such was the holding in *Christman v. Hilliard,* 167 N. C., 4, 82 S. E., 949; *Shell v. Roseman,* 155 N. C., 90, 71 S. E., 86; *Gunn v. Taxi Co.,* 212 N. C., 540, 193 S. E., 747. Discrepancies and contradictions, even in plaintiff's evidence, are matters for the jury, and not for the court. *Dozier v. Wood,* 208 N. C., 414, 181 S. E., 336; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601.

There was no error in overruling the motions to nonsuit. Hence, the validity of the trial must be upheld.

No error.

EMMA S. FISH v. JANE ALICE FISH HANSON AND LUCY MOORE, INDIVIDUALLY AND AS EXECUTRICES OF THE WILL OF GEORGE FISH, DECEASED, AND DOROTHY LIGON.

(Filed 5 May, 1943.)

1. Executors and Administrators § 24—

Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes, or controversies, when approved by the court, are valid and binding. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord.

2. Trial § 54: Appeal and Error § 37e—

Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. C. S., 569.

3. Executors and Administrators § 24—

Where testator died in May, 1933, leaving specific legacies to his daughters and debts totaling substantially the value of the estate, with residuum to be held in trust and income paid to his widow for life, then to go to the daughters, and all parties agreed to delay the settlement of the estate, collect the income, sell assets as advisable, and use income and proceeds of sales to pay debts and specific legacies, the daughters agreeing not to demand their legacies before the estate was worked out satisfactorily, a family agreement results and the widow is not entitled to receive from the residuum the income used in part to settle the debts.

APPEAL by plaintiff from *Hamilton, Special Judge,* at September Extra Term, 1942, of MECKLENBURG. Affirmed.

Civil action by legatee of life interest in residuary estate to recover income from estate received by executrices.

George Fish, late of Mecklenburg County, died testate 12 May, 1933. Plaintiff, his widow, and defendants Jane Alice Fish Hanson and Lucy Moore, his daughters, were named as executrices. He made certain specific bequests, including $10,000 each to Lucy Moore and Jane Alice Fish Hanson. The residue of his estate, after the payment of debts and the costs of administration, he devised to plaintiff for life or until her remarriage, with remainder to his two daughters and Dorothy Ligon, his stepdaughter.

When he died his estate was valued at $45,000 and he owed approximately $20,000. So that upon an immediate settlement of the estate the debts, expenses of administration and individual legacies would consume the estate, leaving a residuary bequest only nominal in value.

The interested parties held a meeting, discussed the situation, considered the inadvisability of a sale of the assets of the estate at the then prevailing low prices due to the existing economic depression, and agreed that the executrices should delay settlement of the estate, collect the income, sell assets from time to time as might be advisable, and use the income and proceeds of sales to pay the debts and specific legacies. To accomplish the purpose of the agreement the daughters agreed not to demand payment of their legacies before the estate was worked out on a satisfactory basis. All agreed that income from the estate property might be used to pay debts and specific legacies. This was done in order to try to salvage the property and to create a residue of substantial value.

The executrices administered the estate in accord with the agreement. They collected income up to 1 January, 1940, in the sum of $13,956.43 net. This sum, plus sales of assets, was sufficient to pay all debts and specific legacies and approximately $500 to plaintiff and still leave an estate, consisting principally of income-producing real estate, valued at approximately $19,000 (tax value). Since 1 January, 1940, net income of $4,456.05 has been received and paid to plaintiff.

Plaintiff instituted this suit to recover the income collected by the executrices, alleging that her contract constituted nothing more than an agreement to advance the income for the benefit of the estate and that she is entitled now to reimbursement for the funds so advanced.

When the cause came on for hearing in the court below the parties waived trial by jury and agreed that the court should hear the evidence, find the facts and enter judgment thereon. The court, after hearing the evidence, found the facts substantially as herein set forth and entered judgment dismissing the action. Plaintiff excepted and appealed.

Whitlock & Dockery for plaintiff, appellant.

Frank W. Orr and Frank H. Kennedy for Mrs. Lucy Moore, executrix, appellee.

BARNHILL, J. Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes or controversies, when approved by the court, are valid and binding. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord. *Spencer v. McCleneghan,* 202 N. C., 662, 163 S. E., 753; *In re Estate of Wright,* 204 N. C., 465, 168 S. E., 664; *Reynolds v. Reynolds,* 208 N. C., 578, 182 S. E., 341; *Bohannon v. Trotman,* 214 N. C., 706, 200 S. E., 852; Schouler, Wills, Executors and Administrators (6d), sec. 3103.

The plaintiff testified "when Mr. Fish died his estate was involved, the value of the assets was down, and it was agreed between the parties interested that, since it was not to the best interest of the estate to immediately close the same, as time passed, and income of the estate and sums realized from the liquidation of assets permitted, to pay the debts of the estate, together with specific bequests to Lucy Moore and Jane Alice Fish Hanson, the sum of $10,000. That agreement was made." She further testified that it was her understanding that she would receive the income later upon which understanding "I voluntarily gave up any claim to the income for the time being, so as to settle the debts and the payment of legacies."

Upon this and other testimony offered the court found that the agreement was made without any condition that the income was to be paid the plaintiff later. This and other findings of fact are supported by competent evidence and the facts found are sufficient to support the judgment entered. C. S., 569; *Matthews v. Fry,* 143 N. C., 384, 55 S. E., 787; *Eley v. R. R.,* 165 N. C., 78, 80 S. E., 1064; *Trust Co. v. Cooke,* 204 N. C., 566, 169 S. E., 148; *Buchanan v. Clark,* 164 N. C., 56, 80 S. E., 424; *Best v. Garris,* 211 N. C., 305, 190 S. E., 221.

It is apparent that the agreement was to the advantage of all parties. Through the contract of the legatees and the indulgence of creditors the executrices gained time which enabled them to await the passing of the prevailing economic depression and to so handle the estate as to convert it from one in which there was nothing for the residuary legatees into one in which the residuum is of real value, producing a substantial income for the life tenant. As the daughters and stepdaughter are the remaindermen they also benefit to a material extent.

The plaintiff proceeds upon the theory that all the income from the property of the estate, while it was in the hands of the executrices, belonged to her. In this she misconceives her rights under the will. If she was entitled to any interest at all it was interest on the residuary estate. At the time of the death of testator there was no residuum. The income came from property it was the duty of the executrices to apply to

other purposes. Perhaps the same result would follow even though there was no agreement. In any event, the plaintiff has not surrendered nearly so much as she seems to think.

Trust Co. v. Jones, 210 N. C., 339, 186 S. E., 335, 105 A. L. R., 1189, is factually distinguishable.

The judgment below is

Affirmed.

H. J. LEE v. M. W. CHAMBLEE.

(Filed 5 May, 1943.)

1. Trial § 22b: Bills and Notes § 27—

In a suit on a note, which appears to be under seal with defendant and another as joint makers or joint obligors, plaintiff makes out a *prima facie* case by offering the note, and motion for nonsuit should have been denied.

2. Limitation of Actions § 16—

The plea of the statute of limitations casts upon plaintiff the burden of showing that the suit was commenced within the requisite time from the accrual of the cause of action, or that otherwise it is not barred.

3. Limitation of Actions §§ 2a, 2e, 16—

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, C. S., 441, as sealed instruments against principals are not barred until lapse of ten years. C. S., 437.

4. Bills and Notes §§ 23, 26: Principal and Surety § 17½—

It is permissible to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety.

5. Limitation of Actions § 2e—

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

APPEAL by plaintiff from *Burney, J.,* at February Term, 1943, of WAKE.

Civil action to recover on promissory note.

Plaintiff alleges and offered evidence tending to show that she is the owner and in possession of a $5,000.00 promissory note, dated 30 November, 1931, due and payable to The Commercial National Bank, or order, thirty days thereafter, ostensibly under seal and signed by C. H. Chamblee and the defendant, M. W. Chamblee, apparently as joint promisors.

The defendant alleges that he signed the note in suit without any consideration as to him and solely "as an accommodation surety," all

to the knowledge of the agents of the payee at the time of its execution; and further, that there was no adoption of the word "Seal" set opposite the name of the maker, C. H. Chamblee, and the defendant who signed only as surety. The note contains no recital of a seal. The defendant pleads the three-year statute of limitations. C. S., 441. This action was instituted 29 December, 1941.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning errors.

J. M. Templeton and Simms & Simms for plaintiff, appellant.
Bunn & Arendell for defendant, appellee.

STACY, C. J. The plaintiff rested her case upon offering the note, which appears to be under seal, with the defendant and another as joint makers or joint obligors. This was sufficient to defeat the motion for nonsuit. *Allsbrook v. Walston,* 212 N. C., 225, 193 S. E., 151, and cases cited.

True, the plea of the statute of limitations cast upon the plaintiff the burden of showing that her suit was commenced within the requisite time from the accrual of the cause of action, or that otherwise it was not barred. *Drinkwater v. Tel. Co.,* 204 N. C., 224, 168 S. E., 410; *Savage v. Currin,* 207 N. C., 222, 176 S. E., 569. The plaintiff offered in evidence a note apparently executed by the defendant and another as joint obligors, with the word "Seal" in brackets opposite the name of each ostensible maker. Nothing else appearing, this would repel the three-year statute of limitations, C. S., 441, as sealed instruments against the principals thereto are not barred until the lapse of ten years. C. S., 437; *Currin v. Currin,* 219 N. C., 815, 15 S. E. (2d), 279.

It is permissible to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety. *Flippen v. Lindsey,* 221 N. C., 30, 18 S. E. (2d), 824; *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Davis v. Alexander,* 207 N. C., 417, 177 S. E., 417. The three-year statute of limitations, C. S., 441, is applicable to sureties on sealed instruments as well as on instruments not under seal. *Furr v. Trull,* 205 N. C., 417, 171 S. E., 641; *Redmond v. Pippen,* 113 N. C., 90, 18 S. E., 50; *Welfare v. Thompson,* 83 N. C., 276. See *Trust Co. v. Clifton,* 203 N. C., 483, 166 S. E., 334; *Currin v. Currin, supra.*

However, in the instant case, we are dealing with a nonsuit entered at the close of plaintiff's evidence. Considered in its most favorable light, it is sufficient to carry the case to the jury.

On the further hearing, the defendant will have an opportunity to offer evidence in support of his defense.

Reversed.

R. MALEVER, v. KAY JEWELRY COMPANY.

(Filed 5 May, 1943.)

1. Contracts § 17: Master and Servant §§ 1, 7a—

Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, as contrasted with a temporary job, terminable in good faith at the will of either party.

2. Master and Servant § 7a: Contracts § 23—

In an action to recover wages while out of work, where plaintiff's evidence tended to show that he gave up a steady job to accept an offer from defendant for permanent employment in a new store, without further agreement as to duration of time, no business usage or other circumstance being shown, and defendant discharging plaintiff upon closing his new store after eight weeks, judgment of nonsuit was properly allowed.

APPEAL by plaintiff from *Warlick, J.*, at February Term, 1943, of MECKLENBURG.

Civil action for breach of contract of hire.

The plaintiff alleges and offered evidence tending to show that on 1 December, 1941, he received a telegram from the defendant offering him "a regular permanent job" at $50 a week as salesman in the defendant's new store in Charlotte. The plaintiff was then working in Fayetteville, N. C., at a salary of $75 a week. Pursuant to instructions, the plaintiff called the defendant over long distance telephone and insisted that while he would "rather work for less in Charlotte and be at home with his family," if he gave up his position in Fayetteville, then paying a larger wage, he would expect a regular permanent job, saying: "I want you to understand I am not taking that as a Christmas job; I want it to be permanent." The defendant replied: "It will be permanent, you have my word. . . . You have a permanent, steady place with me, just like the wire says."

The plaintiff worked for the defendant eight weeks, when he was discharged without cause. Plaintiff was ready, able and willing to continue his employment. There is no contention that his services were not satisfactory.

Some time thereafter, the plaintiff secured employment in Wilmington. He sues for the weeks he was out of work.

The defendant testified that it was necessary to close one of his stores in Charlotte as they were operating at a loss; that he discussed the matter with the plaintiff and paid him in addition to his wages the sum of $200 in full satisfaction; that plaintiff suggested this amount: "He said, if I gave him $200 he would be perfectly satisfied and would be happy about it, and that that would be the end of it." Defendant fur-

ther testified that he was not aware of what the plaintiff was paid in Fayetteville until this conversation.

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

G. T. Carswell and Joe W. Ervin for plaintiff, appellant.

J. Laurence Jones for defendant, appellee.

STACY, C. J. The question for decision is whether the agreement to give the plaintiff "a regular permanent job" in the defendant's new store means any more than an indefinite general hiring terminable in good faith at the will of either party. 35 Am. Jur., 460; 39 C. J., 41.

While it is suggested in plaintiff's testimony that the inducement to give up his job in Fayetteville was sufficient consideration to support the agreement for permanent employment, still the agreement itself is for no definite time, and there is no business usage or other circumstance appearing on the record which would tend to give it any fixed duration. Anno. 35 A. L. R., 1432; 62 A. L. R., 234. Conversely, it is suggested the moving cause of plaintiff's acceptance was his desire to be in Charlotte with his family, which more than outweighed the difference in pay. He was employed until the defendant closed his store. 35 Am. Jur., 461.

The case of *Jones v. Light Co.*, 206 N. C., 862, 175 S. E., 167, cited and relied upon by the plaintiff, is not in point. There, the promise in consideration of exceptional efforts on the part of the plaintiff, was to give him "permanent employment for the term of at least ten years." Nor are the cases of *Fisher v. Lumber Co.*, 183 N. C., 485, 111 S. E., 857, *Stevens v. R. R.*, 187 N. C., 528, 122 S. E., 295, and *Dotson v. Guano Co.*, 207 N. C., 635, 178 S. E., 100, where there were agreements to give employment for life in settlement of personal injury claims, controlling on the facts of the instant record.

The general rule is, that "permanent employment" means steady employment, a steady job, a position of some permanence, as contrasted with a temporary employment or a temporary job. Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, terminable at will. *McKelvy v. Oil Co.*, 52 Okla., 81, 152 P., 414. Here, the plaintiff shows a promise of permanent employment, *simpliciter*, and no more. Anno., 135 A. L. R., 646.

We find nothing on the record to take the case out of the general rule.

Affirmed.

J. W. GROVES, JR., v. EARL McDONALD ET AL.

(Filed 5 May, 1943.)

Schools § 21—

In a civil action by a school principal against the school committee to declare rights under a contract as High School Principal and to enjoin its breach, where plaintiff alleged that, for the school year 1942-43, he gave due, legal notice to the school committee and county superintendent that his contract was still in force and that he accepted it for the coming year, defendants alleging that plaintiff was legally notified of his rejection as principal for 1942-43, and a temporary restraining order was issued, and heard by consent on 22 September, 1942, whereupon the restraining order was dissolved and the action dismissed. *Held:* (1) The dissolution of the restraining order was proper for the action sought to be enjoined is *fait accompli:* (2) The dismissal of the action was error.

APPEAL by plaintiff from *Warlick, J.,* at September Term, 1942, of MOORE.

Civil action to declare rights under contract and to enjoin its breach.

Plaintiff alleges that he was duly elected principal of Pinckney High School (located near Carthage in Moore County) for the school year 1939-40; that his contract was renewed from year to year up to and including the year 1941-42, and that he performed the duties and received the emoluments under said election and contract during the years as stated.

Plaintiff further alleges that within ten days after the closing of the school on 14 May, 1942, he gave due notice to the school committee and the county superintendent of schools, as provided by the school law, that his contract of employment was still subsisting and he accepted the employment as principal of Pinckney School for the coming year.

It is further alleged that in spite of plaintiff's binding contract for the school year 1942-43, the defendants have purported to employ one R. O. Taylor as principal of the school for the year 1942-43.

Plaintiff alleges that he is ready, able and willing to carry out his contract, and he asks for a declaration of his rights and for injunctive relief.

The defendants admit plaintiff's original employment, and allege that he was legally notified of his rejection as principal of Pinckney School for the school year 1942-43. That while notice of his rejection was not sent by registered mail, as required by the school law, nevertheless it was received by the plaintiff and he had full notice of its contents.

A temporary restraining order was issued in the cause, returnable before the judge holding the courts of the district at Rockingham in Richmond County on 7 September, 1942, and by consent continued to be heard at Carthage, Moore County, 22 September, 1942. On the hearing,

the judge found that written notice of plaintiff's rejection was mailed on 9 May, 1942, but that its receipt was denied by the plaintiff.

The temporary restraining order was dissolved and the action dismissed. Plaintiff appeals, assigning errors.

K. R. Hoyle for plaintiff, appellant.
Mosley G. Boyette for defendants, appellees.

STACY, C. J. If the only question here presented were the vacation of the restraining order, and the correctness of the ruling in not continuing it to the hearing, the appeal would be dismissed *ex mero motu*, *Yates v. Ins. Co.*, 166 N. C., 134, 81 S. E., 1062; *Wallace v. Wilkesboro*, 151 N. C., 614, 66 S. E., 657, as the action of the defendants which the plaintiff seeks to enjoin, is now *fait accompli*, or a fact accomplished, or "water in the mill-tail," as the late *Chief Justice Hoke* would say. *Rousseau v. Bullis*, 201 N. C., 12, 158 S. E., 553.

The order, however, goes farther and dismisses the action. In this, there was error. *Cox v. Kinston*, 217 N. C., 391, 8 S. E. (2d), 252; *Grantham v. Nunn*, 188 N. C., 239, 124 S. E., 309; *Owen v. Board of Education*, 184 N. C., 267, 114 S. E., 390; *Davenport v. Board of Education*, 183 N. C., 570, 112 S. E., 246; *Moore v. Monument Co.*, 166 N. C., 211, 81 S. E., 170; McIntosh Prac. & Proc., 994.

Injunction was only ancillary and not the sole purpose of plaintiff's action. He asks for a declaration of his rights under the facts alleged, and is content to withhold his election of remedies, if any he have, while awaiting such declaration. The dismissal of the action has occasioned the appeal.

Error.

W. G. BARKER v. E. P. DOWDY.

(Filed 5 May, 1943.)

1. Husband and Wife §§ 34, 38—

Connivance of the husband in the adultery of his wife constitutes a defense to an action for criminal conversation, and equally so to an action for the alienation of her affections.

2. Husband and Wife §§ 33, 38, 40—

In an action for damages by the husband against defendant for criminal conversation and alienation of his wife's affections, where the complaint alleges facts sufficient to constitute a cause of action, but admits that for six months plaintiff continued to live with his wife, protested and pleaded with her to live properly, which she refused, and alleges further that she is now living with defendant in adultery on his farm, a demurrer to the complaint was properly overruled.

BARKER *v.* DOWDY.

APPEAL by defendant from *Armstrong, J.*, at January Term, 1943, of MOORE. Affirmed.

This was an action for damages for criminal conversation and alienation of affections. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. Demurrer was overruled and defendant appealed.

Mosley G. Boyette for plaintiff, appellee.

K. R. Hoyle for defendant, appellant.

DEVIN, J. The complaint describes the tortious conduct of the defendant and sets out sufficient facts to constitute a cause of action for criminal conversation with plaintiff's wife, and also for the alienation of her affections. *Bryant v. Carrier,* 214 N. C., 191, 198 S. E., 619; *Chestnut v. Sutton,* 207 N. C., 256, 176 S. E., 743; *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769.

The demurrer, however, is based on the view that it appears on the face of the complaint that the plaintiff, with knowledge of the adulterous relations between the defendant and his wife, continued for some months to cohabit with her. This admission in the complaint is urged not as a condonation, such as might defeat an action for divorce (*Blakely v. Blakely,* 186 N. C., 351, 119 S. E., 485), but as showing connivance, active or passive, on the part of the plaintiff, in the wrongful conduct of the defendant.

While the connivance of the husband in the adultery of the wife would constitute a defense to an action for criminal conversation, and equally so to an action for the alienation of her affections (27 Am. Jur., 139), the allegations of the complaint in this action are not open to successful attack on this ground. The complaint cannot be overthrown by a demurrer. The plaintiff alleges that the matters and things complained of were carried on over his protest and against his will; that he pleaded with his wife to give up the defendant and live properly as a dutiful wife; that he had to leave the home in which they had lived, and that she refused to go with him, and that defendant is now living in adultery with her on the defendant's farm, the defendant furnishing her money.

A number of cases from other jurisdictions were cited by the appellant in support of his position, but we do not think the admissions in the complaint here are sufficient to defeat the plaintiff's action on the ground asserted in the demurrer.

The judgment overruling the demurrer is

Affirmed.

N. J. MUSE, ADMINISTRATOR OF ENNIS EDWARDS, DECEASED (NELLIE E. HOYLE, ADMINISTRATRIX D. B. N. OF ENNIS EDWARDS, DECEASED), *v.* WILBUR EDWARDS, ARTHUR EDWARDS, ROSA McNEILL AND AGGIE SHANKLE.

(Filed 5 May, 1943.)

Courts § 2c—

In order to entitle the judge of the Superior Court to review a ruling of the clerk in a matter in which the latter has original jurisdiction, an appeal must be taken within ten days after the entry of the order or judgment of the clerk, upon due notice in writing to be served upon the appellee and a copy of which shall be filed with the clerk.

APPEAL by plaintiff Nellie E. Hoyle, administratrix, from *Warlick, J.*, at September Term, 1942, of MOORE. Reversed.

Motion to dismiss defendants' appeal from the clerk was denied, and plaintiff administratrix appealed.

S. R. Hoyle for plaintiff.

H. F. Seawell, Jr., and J. Talbot Johnson for defendants.

DEVIN, J. The only question presented for review is the correctness of the ruling of the court below in denying plaintiff's motion to dismiss the defendants' appeal from the clerk to the judge.

The ruling complained of was based on the finding that on the hearing before the Clerk, 19 July, 1942, on petition for writ of assistance on behalf of the purchasers at a sale of land to make assets, the clerk took the matter under advisement, and two days later rendered decision in favor of the petitioners. Written notice of appeal to the judge was delivered to the clerk, but was not served on petitioners or their counsel. The court, however, found that at the hearing 19 July before the clerk counsel for both sides stated that in the event of an adverse decision "an appeal would be prayed to the judge at term." On 21 July defendants' counsel personally attempted to serve notice of appeal on petitioners' counsel, but not finding him in his office no other or further attempt was ever made to serve the notice of appeal on the petitioners or their counsel. At the September Term, 1942, petitioners' motion before the judge to dismiss the appeal was denied, and the clerk was directed to docket the appeal for hearing at the succeeding term.

In order to entitle the judge of the Superior Court to review a ruling of the clerk in a matter in which the latter has original jurisdiction the procedure prescribed by C. S., 633, must be followed. This section contains the following provisions: "An appeal must be taken within ten days after the entry of the order or judgment of the clerk upon due

notice in writing to be served upon the appellee and a copy of which shall be filed with the clerk of the Superior Court."

It is apparent that the appeal here was not perfected in accordance with the statute. Notice was not served on appellees or their counsel, nor was service of notice waived. The statement of counsel before the clerk's decision was rendered that an appeal would be prayed was insufficient to obviate the necessity of service of notice of appeal. Counsel for defendants apparently recognized this fact, and attempted to serve notice on plaintiff's counsel, but not finding him in made no further effort. Hence, no valid appeal having been taken, the petitioners were entitled to have their motion allowed.

The only matter before the court below was whether the defendants' appeal from the clerk had been perfected, and that is the only question presented here. The undoubted power of the judge of the Superior Court to determine matters pending in the Superior Court, whether his jurisdiction be original or derivative, is not before us. *Cody v. Hovey,* 219 N. C., 369, 14 S. E. (2d), 30. Whether the clerk had power to issue the writ of assistance does not arise on this record. *Bank v. Leverette,* 187 N. C., 743, 123 S. E., 68; *Gower v. Clayton,* 214 N. C., 309, 199 S. E., 77; McIntosh Practice and Procedure, 859. What remedies, if any, are available to the defendants under the facts as they may be made to appear we are not called upon to decide.

On the record before us, we think there was error in denying petitioners' motion to dismiss the appeal from the clerk, and that the judgment below must be

Reversed.

GEORGE STEFFAN v. H. B. MEISELMAN.

(Filed 19 May, 1943.)

1. Negligence § 19a—

In an action by plaintiff against defendant to recover compensatory and punitive damages to a restaurant business conducted by plaintiff on the ground floor of defendant's building, where the evidence of plaintiff tended to show that defendant allowed his toilet, immediately above plaintiff's restaurant, to leak so badly that plaintiff's fixtures were damaged, his food and business were ruined, defendant over a period of months, knowingly and deliberately, allowing the defective toilet to become worse and intentionally refusing to remedy same, a motion for judgment of nonsuit was properly denied.

2. Landlord and Tenant § 11—

A landlord is liable in damages to his tenant, as well as to others, for his negligent or malicious use of his own property and the instrumentalities thereupon under his control; and such liability is in no wise affected

or alleviated by the rule that a landlord is not liable for damages occasioned by the conditions of the demised premises or by his failure to repair the same.

3. Damages §§ 2, 6, 7—

In tort actions, the act being malicious or accompanied by gross negligence, recovery of profits or damages for their loss are allowable, where they are ascertainable with a fair degree of certainty; since, unlike a case arising out of contract, it is not a question whether the consequences were within the legal contemplation of the parties, the question is whether the consequences were the natural and probable result of the wrongful act.

APPEAL by plaintiff from *Armstrong, J.*, at November Term, 1942, of GUILFORD.

This action was brought to recover damages for the alleged negligence or tort of the defendant in permitting or causing contaminated water to pass from a toilet under his control in an upstairs room owned and occupied by him into the leased premises of the plaintiff underneath, in which the latter operated a restaurant, making the same unfit for occupancy and injuring his business. The case originated in High Point municipal court, where the plaintiff made a recovery, and came to the Superior Court by appeal on matters of law. It is here on appeal from that court for error in sustaining certain exceptions taken by the defendant on the trial in the municipal court.

Some time about 10 October, 1940, the plaintiff leased from the defendant a room on the ground floor of a building owned by defendant, and refitted and furnished it, and began the operation of a restaurant therein and carried on the business until 28 June, 1942.

The defendant operated a theatre in the building, and in connection with it maintained a public toilet on the second floor over plaintiff's restaurant for the convenience of patrons, which was generally accessible to visitors to the theatre, and used by defendant's servants and employees.

A short time after plaintiff occupied the building, the water from the defendant's toilet began leaking through the ceiling of the restaurant in the vicinity of the cooking outfit and places where food was kept, in a manner visible to customers of the plaintiff and causing the ceiling to be soaked and to fall down. The plaintiff notified defendant, who declined to do anything about it, telling plaintiff that if he did not like the place, he could move out and defendant could rent it for $100 a month. The water continued to leak through, damaging plaintiff's fixtures and place of business, and defendant repeatedly declined to have the trouble removed. Instead, says the plaintiff, he demanded that plaintiff pay him more money for occupation of the place, and threatened to put him out if he did not do so, and to give him more trouble than he ever saw, and perhaps lock up the place. The water, plaintiff testified, came in

"all over everything," and, on investigation, he found that it came from the defendant's toilet. He complained to defendant frequently, and defendant told him to move out because he did not want the cafe there and intended to give him trouble.

Some time in September, while there were from five to ten customers in the cafe, water began to come in quantities from the toilet down through the ceiling, over the wiener stand and cook stove and food, and the customers walked out. Plaintiff asked the theatre janitor to tell Mr. Meiselman because plaintiff could not get at him. He was locked up in the theatre and did not answer the telephone, over which plaintiff called as many as six times. Finally plaintiff called the police. Meiselman opened the door to them, and going up to the closet, they found water all over the floor. They found no one inside the theatre but Meiselman. He called a colored boy and told him to clean the place. The business was closed up that night, and remained so some time for repairs.

Plaintiff fixed the ceiling back and resumed operation of the cafe, but testified that his customers did not come back, and the business steadily dropped off until he was compelled to close. He exhibited a statement tending to show a profit for the first period of occupancy and a loss during the latter period, and stated it showed no profit after his customers stopped patronizing him because of conditions in the restaurant.

Plaintiff testified that the furniture, fixtures, and everything upon which the water fell were damaged. "The water damaged everything. It damaged everything we had in the place." He gave a detailed statement of things damaged, including food of various kinds. It damaged the fixtures, he testified, so that people would not come to eat.

Paul Manos corroborated the plaintiff as to the extent and cause of damage. He stated that the water was leaking off and on all the time, and the ceiling was dropping. He spoke to Mr. Meiselman, who never did anything about it. It came from the ladies' toilet, which was exactly over the cooking outfit.

On 17 September the water began running down, and witness sent someone to inform Meiselman. When he returned "everything was ruined. The water was coming down like a dam. The whole ceiling pulled out and fell down, and water was running over everything we had there—steamer, grill, cooking, steam table—everything." The witness testified his messenger could not get in to see Meiselman because the theatre door was locked, and he sent for the police. Meiselman opened for them. The water on the light fixtures and connections started a fire, which witness stopped by pulling the switches. Witness testified as to the damage done. He testified also as to the damage done the food—it smelled bad, customers wouldn't eat it, and it was thrown away.

He testified that there were about ten customers in the place at the time. None of them ever came back, although witness had seen them passing by. They never came back after they found out the toilets were upstairs.

The defendant introduced evidence in contradiction of the material facts testified to by plaintiff's witnesses. He further introduced the lease between Meiselman and Steffan, showing that Meiselman had made no agreement to repair the demised premises, or to be responsible for any repairs thereto, but the parties had expressly agreed to the contrary.

The plaintiff recovered in the municipal court and defendant, having made numerous exceptions covering the main features of the trial, appealed to the Superior Court, assigning errors in law. In that court many of the defendant's exceptions taken at the trial were sustained, and plaintiff appealed to this Court, assigning error in sustaining these exceptions.

Walser & Wright, C. A. York, and Blackwell & Blackwell for plaintiff, appellant.

Silas B. Casey, W. Louis Ellis, Jr., and J. Allen Austin for defendant, appellee.

SEAWELL, J. In the trial court plaintiff sought recovery of compensatory and punitive damages for injury to his properties and business, which he alleges was caused by the gross negligence or willful or malicious conduct of defendant. The defendant was unsuccessful in his motion for nonsuit in the trial court and in his objection to the issue relating to punitive damage, which latter was made upon the ground that there was no evidence justifying submission of such an issue. His exceptions on both points were sustained by the judgment now under review, the effect of which would be to dismiss the action in the municipal court when remanded to it.

In both these respects there was error in the ruling of the Superior Court sustaining defendant's exceptions. Without recapitulating the evidence or emphasizing its significance, it is sufficient to say that, taken in its most favorable light for the plaintiff, it was sufficient to justify the recovery of compensatory damages, and furnished reasonable inferences that the injury of which plaintiff complains was caused by the gross negligence or malicious wrongdoing of the defendant.

In the argument here addressed to the question of nonsuit, and we assume in the hearing below, counsel for the defendant relied strongly on *Leavitt v. Rental Co.,* 222 N. C., 81, and cited cases, which follows the rule adopted in *Fields v. Ogburn,* 178 N. C., 407, 100 S. E., 583; *Duffy v. Hartsfield,* 180 N. C., 151, 104 S. E., 139, and similar cases between

landlord and tenant, all of which relate to *repairs on the demised premises* or conditions thereupon for which it was sought to hold the owner or landlord liable. That situation does not obtain here. Steffan did not rent that portion of the building containing the toilet and had no control of it—on the contrary, it was occupied and was under the control of the defendant. The gravamen of plaintiff's case is injury inflicted upon him by the defendant in the negligent or malicious use of his own property and the instrumentalities thereupon under his control. Defendant's liability, arising from such a source, would not be affected or alleviated by the rental contract in evidence.

The evidence of plaintiff without doubt entitles him to go to the jury on the question of damage to his premises and property. The question has been raised whether it is not too speculative for consideration with respect to damages for injury to the business.

There should be no difficulty in concluding that the evidence was sufficient, if believed, to establish the fact of substantial injury to his business, free from any speculation. There was evidence to the effect that the wrongful conduct of the defendant rendered his premises—used as an eating place—unsanitary and unclean in such a way as to bring these conditions to the notice of customers. The ceiling bulged and began dropping away on account of the seepings and drippings from the water closet over the cooking outfit and place where food was kept; and the evidence discloses that the customers found out where the drippings came from and quit coming. Some time in September, when the water came down in quantities, there were as many as ten regular customers, if the evidence is to be believed, in the restaurant, all of whom walked out and did not come back any more. It is difficult to conceive of a condition more calculated to destroy a business of the kind carried on by plaintiff, and the evidence is reasonably direct that it did so.

But conceding this, it is incumbent on one who seeks to recover for injury to his business to bring to the jury evidence from which, with a reasonable degree of certainty, they may assess the damage without resort to elements that are purely speculative. Juries may not award speculative damages. The plaintiff has attempted to carry the burden by showing a loss of profit in later periods after the trouble began as compared with earlier periods when these unsanitary conditions did not exist, and during which the evidence discloses that he had built up a good business and was enjoying a profit. In discussing the legal principle involved, we think it of no great consequence whether it is sought to recover profits, as such, or simply to show the extent of the injury and the damage inflicted.

Ordinarily, at least in matters arising out of contract, loss of expected profits upon interruption or destruction of a business is too remote or

speculative to sustain a judgment for their recovery. *Machine Co. v. Tobacco Co.,* 141 N. C., 284, 53 S. E., 885; *Lumber Co. v. Power Co.,* 206 N. C., 515, 174 S. E., 427. But the rule is different where the act that occasioned the loss is malicious, since it is not a question in a tort case whether the consequences were within the legal contemplation of the parties—the question is whether the consequences were the natural and probable result of the wrongful act. Recovery of profits or damages for their loss on this principle has frequently been allowed where they are ascertainable with a fair degree of certainty. *DePalmer v. Weinman,* 15 N. Mex., 68, 103 P., 782; *Castner v. Beacon,* 114 Conn., 190, 188 A., 214, 81 A. L. R., 97; *Jackson v. Stanfield,* 137 Ind., 592, 36 N. E., 345; *Kentucky Heating Co. v. Hood,* 133 Ky., 383, 118 S. W., 337. This distinction is pointed out clearly in an extensive discussion of the principle in *Johnson v. R. R.,* 140 N. C., 574, 53 S. E., 362, *per Connor, J.* There, the rule as laid down by *Judge Christiancy* in *Allison v. Chandler,* 11 Mich., 561, is approved:

"But whatever may be the rule in actions upon contract, we think a more liberal rule, in regard to profits lost, should prevail in actions purely of tort (excepting, perhaps, the action of trover). . . . But generally, in an action purely of tort, when the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages."

The opinion further cites Sutherland, Vol. 1, sec. 70: "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of."

It was held in *Jackson v. Stanfield, supra,* that evidence is admissible showing anticipated profits, not remote or speculative, not as the measure of damages, but to aid the jury in estimating the extent of the injury sustained. This principle also is approved in *Johnson v. R. R., supra.*

Moreover, it is to be noted here that the plaintiff has demanded no damages for loss of profit after his business was destroyed or closed down—but only damages occurring while it was a going concern. *Weiss v. Revenue Building and Loan Association,* 116 N. J. L., 208, 182 A., 891, 104 A. L. R., 129.

It is our opinion that in a case of this kind it is open to the plaintiff to show a loss of profit upon the issue of injury and damage to his business, if he is able to present evidence from which the jury may be able to draw a reasonably accurate conclusion, not based on conjecture or speculation, as to the extent of injury inflicted and amount of damage caused.

In this connection plaintiff testified that the first trouble with leaking from the water closet was about the first day of March, 1941. He was bothered again in April. He testified that the net profit of the business for the period ending 1 March, 1941, was $574.74, and he sent Mr. Meiselman 10% of it. The loss for the quarter ending 30 September, 1941, was $226.08. "The place started going down after the water came in and I could not show any profit any more. The statement for the quarter ending 31 December, 1941, showed a loss of $676.97. That was after the damage. I have never made any profit in this cafe since this trouble came up. The place started losing money and started going down." The plaintiff had had an audit made of his business, which was given in evidence in corroboration of his statement. We cannot say that the evidence is too remote or too conjectural to sustain a recovery for injury to the business as one of the elements of damage. There was error in sustaining the defendant's exception in this respect.

In the court below, the defendant excepted to the instructions to the jury on the question of compensatory damage because under them the jury was permitted to award damages for injury to the business which, as we have seen, defendant regarded as too speculative. No objection is made in the brief as to the formulas used in the instructions. While there is some inexactness, and perhaps a want of clarity, in the instructions given, the specific objection of the defendant is without merit.

When a hard fought legal battle takes place between able antagonists in a case of this kind, scars are likely to be left on the terrain. But defendant's exceptions in his appeal to the Superior Court do not reveal error of such moment as to justify disturbing the result of the trial.

Appellant's exceptions here are sustained. The cause is remanded to the Superior Court of Guilford County for affirmance of the judgment in the municipal court.

Error and remanded.

STATE v. GLADYS MINTER McKINNON AND HENRY KENDRICK.

(Filed 19 May, 1943.)

1. Criminal Law § 52b—

Upon a motion for judgment as of nonsuit at the close of the State's evidence and renewed by defendant after the close of his own evidence, all the evidence upon the whole record, tending to sustain a conviction, will be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

2. Homicide § 25—

In a prosecution for murder, where the record does not disclose the testimony of any witness to the effect that deceased came to his death as

a result of a pistol shot fired by defendants, but does disclose that deceased was shot with a pistol by one defendant, aided and abetted by the other defendant, that only one shot was fired within a few feet from deceased, who fell at the shot, blood pouring from his mouth and nose, and that shortly thereafter he died with only one wound in his body, motion for nonsuit was properly denied.

3. Criminal Law § 41f, 41i—

A charge, in a criminal case, that it is the duty of the jury "to look into and very carefully scrutinize" the testimony of defendants, is not reversible error, where the court immediately adds that the law is based on common sense and reason and, after such scrutiny, if "you find that a defendant is telling the truth, then it is your duty to give his or her evidence the same weight and credibility as you would that of a disinterested witness."

4. Same—

The testimony of relatives, or parties interested in the case and defendants, should be received with caution and scrutinized with care; but, when this is done, the jury should give such testimony the weight the jury considers it entitled to, and, if the jury believes the witness, it should give his evidence the same weight as that of any other credible witness.

5. Criminal Law § 53b—

It is not mandatory on the trial judge to charge the jury relative to the reception of testimony of relatives, or parties interested and defendants, though it is permissible to do so.

6. Criminal Law § 41f—

An accused person, who avails himself of the statute, C. S., 1799, to become a competent witness, occupies the same position with any other witness, is entitled to the same privileges, receives the same protection, and is equally liable to be impeached or discredited.

7. Criminal Law § 41d: Trial § 17—

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. Rule 21, Rules of Practice in the Supreme Court.

8. Criminal Law § 55—

A motion to set aside a verdict and grant a new trial is addressed to the discretion of the court and its refusal is not reviewable on appeal.

9. Criminal Law § 77c—

Where there is no affirmative statement in the record that the defendants did or did not enter a plea to the bill of indictment, the presumption is in favor of regularity and objection thereto will not be sustained, and certainly where the record shows that the court charged the jury that the defendants and each of them pleaded not guilty to the bill of indictment.

APPEAL by defendants from *Armstrong, J.*, at January Term, 1943, of MOORE.

STATE *v.* MCKINNON.

Criminal prosecution upon an indictment charging the defendants with the murder of one Frank Merritt.

The record states the jury was chosen, sworn and impaneled, but is silent as to the plea except as stated in the charge of the court. His Honor charged the jury: "To this bill of indictment and to these degrees of unlawful homicide, the defendants and each of them pleads not guilty."

Evidence for the State in the trial below tends to show that Ida White and Gladys Minter McKinnon met at a beauty parlor, located in the colored section of Aberdeen and across the street from the home of Cornelia Minter, where Gladys Minter McKinnon lived. A quarrel ensued which resulted in an affray. The fighting took place in the street near the Minter home and several other parties joined therein. As a result of the affray both Ida White and Gladys Minter McKinnon received knife wounds.

Frank Merritt lived next to the Minter home. He and Ida White were sweethearts. He came across the yard and said: "Ida, who cut you?" Ida answered: "Lillian." Merritt took a few steps, and Gladys Minter McKinnon said: "What the hell you want? You want to take it up too?" Merritt answered: "No, I want to get them off of Ida"; and she said: "Shoot the s. o. b."; and Henry Kendrick fired a pistol and Frank Merritt fell on his face and died almost instantly.

Verdict: "That the defendants are guilty of murder in the second degree, with recommendations of mercy of the court."

Judgment: Imprisonment in the State's Prison for a period of eighteen to twenty years.

The defendants appeal, assigning error.

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

Mosley G. Boyette for defendants.

DENNY, J. Exceptions Nos. 1 and 8 are directed to the refusal of the court below to grant the defendants' motion for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence.

The defendants contend there is no evidence that Frank Merritt died as a result of the pistol fired by Henry Kendrick. That no witness testified that the pistol shot caused the death of the deceased. Therefore, the motion for judgment as of nonsuit should have been granted as to both defendants. While the record does not disclose the testimony of any witness to the effect that Frank Merritt came to his death as a result of the pistol shot fired by the defendant Henry Kendrick, it does

disclose, by evidence of witnesses for the State and the defendants, that the deceased was shot with a pistol by the defendant Henry Kendrick, who was aided and abetted by the defendant Gladys Minter McKinnon; that the pistol was fired only a few feet from the deceased; that the deceased fell as soon as the pistol was fired; that his friends and relatives rushed to him and found blood pouring from his mouth and nose; that shortly thereafter he died; that there was only one wound on the body and that only one shot was fired. In addition to this testimony, the county coroner testified he made an examination of the body of the deceased and found a pistol bullet wound in his body two or three inches below the collar bone and about three inches to the right of the center of the chest. That he probed the wound and it ranged downward. "I would say it went through the heart."

Cornelia Minter, a witness for the defendants, testified: "He was killed in the yard. . . . This boy was killed and fell right in front of me, right in front of the steps."

There can be no serious doubt in the light of the testimony on this record, as to the cause of the death of Frank Merritt. *S. v. Smith,* 221 N. C., 278, 20 S. E. (2d), 313.

Upon a motion for judgment as of nonsuit at the close of the State's evidence and renewed by the defendant after the introduction of his own evidence, all the evidence upon the whole record tending to sustain a conviction will be considered in a light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321; *S. v. Hammonds,* 216 N. C., 67, 3 S. E. (2d), 439; *S. v. Everhardt,* 203 N. C., 610, 166 S. E., 738; *S. v. Casey,* 201 N. C., 185, 159 S. E., 337; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395.

The defendants' exception No. 14 is to that portion of his Honor's charge as follows: "And that it becomes your duty to look into and very carefully scrutinize his or her testimony." The defendants contend the use of the word "very" in the above instruction was prejudicial. We do not think so, since his Honor used the following language immediately thereafter: "But the law, being based on common sense and reason, says that after you do that and find that a defendant is telling the truth, then it is your duty to give to his or her evidence the same weight and credibility as you would to that of a disinterested witness." We think the instruction given is not violative of the decisions of this Court. In *S. v. Holland,* 216 N. C., 610, 6 S. E. (2d), 217, it is said: "Since the adoption of the statute permitting a defendant to testify in his own behalf it has been held that it is not improper, when the defendant has testified in his own behalf, for the presiding judge, in his charge, to instruct the jury that his testimony should be taken 'with a grain of

allowance'; *S. v. Green,* 187 N. C., 466, 122 S. E., 178; *S. v. Nat,* 51 N. C., 114; that his testimony should be received with caution and scrutinized with care; *S. v. Williams,* 185 N. C., 643, 116 S. E., 517; *S. v. Barnhill,* 186 N. C., 446, 119 S. E., 894; *S. v. Byers,* 100 N. C., 512, *supra; S. v. Lance,* 166 N. C., 411, 81 S. E., 1092; 'is regarded with suspicion'; *S. v. Lee,* 121 N. C., 544; *S. v. Boon,* 82 N. C., 638; *S. v. Holloway,* 117 N. C., 730. When this is done the court should further instruct the jury, in substance, that after so weighing and considering the testimony of the defendant the jury should give his testimony such weight as it considers it is entitled to, and if the jury believes the witness it should give his testimony the same weight it would give the testimony of any other credible witness. *S. v. Holloway, supra; S. v. Collins,* 118 N. C., 1203; *S. v. McDowell,* 129 N. C., 523; *S. v. Lee, supra; S. v. Barnhill, supra; S. v. Williams, supra; S. v. Green, supra.*"

Clark, C. J., said in *S. v. Green, supra:* "There is no hard and fast form of expression, or consecrated formula, required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, that the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested."

The above statement, in substance, was cited with approval in *S. v. Holland, supra.* We do not think this pronouncement of the Court bearing on the testimony of relatives or parties interested in the case and defendants, was intended to approve undue emphasis by the trial court on the scrutiny or care to be exercised by the jury in considering such evidence. We doubt the wisdom of charging the jury that such testimony should be "regarded with suspicion" or taken "with a grain of allowance." In fact, it is not mandatory on the trial judge to charge the jury in this respect, but, under our decisions, it is permissible to do so and seems to be the uniform practice, but in so doing, we think the better rule or formula would be to limit the charge in this respect to language substantially in accord with that quoted above from the case of *S. v. Green.* Even under that pronouncement, we must concede that our Court has recognized, and through its decisions approved, a practice which was not contemplated by the statute authorizing defendants in criminal actions to testify in their own behalf if they wish to do so. C. S., 1799. In the case of *S. v. Wilcox,* 206 N. C., 691, 175 S. E., 122, *Justice Brogden,* speaking for the Court, said: "The common law regarded the testimony of a defendant in criminal actions as incompetent upon the theory, among others, that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely. It could

not conceive of a person 'that sweareth to his own hurt and changeth not.' Psalm 15:4. This idea of excluding the testimony of defendants in criminal actions prevailed in this State until 1881, when the Legislature enacted chapter 110, Public Laws of 1881, now C. S., 1799, Michie's Code. This statute was first construed by the Supreme Court in *S. v. Efler,* 85 N. C., 585. The Court said: 'The statute of 1881, ch. 110, sec. 2, provides that in the trial of all indictments against persons charged with the commission of crimes in the several courts of the State, the person charged shall "at his own request, but not otherwise," *be a competent witness,* and the question is as to the effect upon the rights of a defendant who sees proper to avail himself of the privilege. In declaring him to be "a competent witness" we understand the statute to mean that he shall occupy the same position with any other witness, be under the same obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited. Unless willing to become a witness, he is invested with a presumption of innocence such as the law makes in favor of every person accused of crime, and evidence cannot be offered to impeach his character unless he voluntarily puts it in issue. But by availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness.'" *S. v. Jordan,* 207 N. C., 460, 177 S. E., 333; *S. v. Dee,* 214 N. C., 509, 199 S. E., 730.

Exception No. 15 is directed to the failure of the court to charge the jury as to the effect of character evidence. The defendants testified in their own behalf, but did not put their character in issue by affirmative evidence thereof. The State, without objection, offered testimony of the bad character of the defendant, Gladys Minter McKinnon. The evidence was admissible for the purpose of attacking the credibility of her testimony. *S. v. Roberson,* 197 N. C., 657, 150 S. E., 194; *S. v. Nance,* 195 N. C., 47, 141 S. E., 468; *S. v. Colson,* 193 N. C., 236, 136 S. E., 730. Being thus admissible, no error was committed in not restricting the purpose of the evidence. *S. v. Tuttle,* 207 N. C., 649, 178 S. E., 76; *S. v. McKeithan,* 203 N. C., 494, 166 S. E., 769; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; Rule 21, Rules of Practice in the Supreme Court, 221 N. C., 544, 558.

In the *Tuttle case, supra, Schenck, J.,* says: "Nor was this evidence objectionable because the court did not instruct the jury that it was admitted only for the purpose of corroboration. '. . . Nor will it be ground for exception that evidence competent for some purpose, but not for all purposes, is admitted generally, unless the appellant asks, at the time of its admission, that its purposes be restricted to the use for which it is competent. *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; Rule 21,

Supreme Court, 200 N. C., 827.' *S. v. McKeithan,* 203 N. C., 494. The appellant did not ask that the purpose of the evidence be restricted."

The applicable portion of Rule 21, *supra,* is as follows: "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted." The defendants did not ask, at the time of its admission, that the character evidence be restricted to the credibility of the testimony of Gladys Minter McKinnon. This exception cannot be sustained.

Exceptions Nos. 17, 18 and 19 are based upon the refusal of the trial judge to set aside the verdict and grant a new trial. A motion to set aside the verdict and grant a new trial is addressed to the discretion of the court and its refusal to grant such motion is not reviewable on appeal. *S. v. Chapman,* 221 N. C., 157, 19 S. E. (2d), 250; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321; *S. v. Caper,* 215 N. C., 670, 2 S. E. (2d), 864.

Exception No. 9 is directed to that portion of his Honor's charge as follows: "Now, gentlemen of the jury, to this bill of indictment and to these degrees of unlawful homicide, the defendants and each of them pleads not guilty." This exception was taken because the record herein does not show that the defendants entered a plea to the bill of indictment. Therefore the defendants contend the judgment is void, citing *S. v. Cunningham,* 94 N. C., 824; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; and *S. v. Rice,* 202 N. C., 411, 163 S. E., 112.

We think the facts here, as to the plea, are substantially like the facts presented in the case of *S. v. Harvey,* 214 N. C., 9, 197 S. E., 620, in which *Devin, J.,* speaking for the Court, said: "In his brief defendant further assails the judgment on the ground that the record does not affirmatively show defendant's arraignment and plea. However, the record proper does not show, as a matter of fact, the absence of arraignment and plea, and in the judge's preliminary statement to the jury, in his charge, it is made to appear that 'the defendant has entered a plea of not guilty to this bill of indictment (which the judge had just read to the jury), and for this trial has placed himself upon God and his country.' The record being apparently silent, regularity would ordinarily be presumed, but in addition the case on appeal brought up by the defendant contains the affirmative statement by the judge that the defendant's plea, in the time honored form upon arraignment, was duly entered before the trial was begun."

In the instant case there is no affirmative statement in the record to the effect that the defendants did not enter a plea to the bill of indictment. The record does state the jury was chosen, sworn and impaneled and his Honor did charge the jury to the effect that the defendants and

each of them pleads not guilty to the bill of indictment. We think, in view of the facts presented, the cases of *S. v. Harvey, supra,* and *S. v. Barnett,* 218 N. C., 454, 11 S. E. (2d), 303, are controlling. See also 22 C. J., sec. 408, pp. 626-7, and sec. 450, pp. 701-2.

We have examined the remaining exceptions to the charge and find they cannot be sustained. The charge of the court, when considered contextually, as it should be, is free from prejudicial error. *S. v. Utley, ante,* 39; *S. v. Grass, ante,* 31; *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821; *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469; *S. v. Henderson,* 218 N. C., 513, 11 S. E. (2d), 462; *S. v. Smith,* 217 N. C., 591, 9 S. E. (2d), 9.

The remaining exceptions are without merit.

In the judgment below, we find

No error.

STATE v. CARL LIPPARD AND PAUL LIPPARD.

(Filed 19 May, 1943.)

1. Conspiracy § 3: Criminal Law § 23—

The charge of conspiracy to violate the law and the charge of the consummation of the conspiracy by an actual violation of the law are charges of separate offenses, and a conviction of one cannot be successfully pleaded as former jeopardy on an indictment for the other.

2. Criminal Law § 23—

Offenses are not the same, on a plea of former jeopardy, if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other, although some of the same acts may be necessary to be proven in the trial of each.

3. Indictment § 18—

The granting or denial of motions for bills of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof.

4. Trial § 4—

The allowing or disallowing of a motion for a continuance is vested in the sound discretion of the trial judge and his ruling thereon is not reviewable, where there is no manifest abuse of such discretion.

5. Criminal Law § 50a: Trial § 31—

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate the statute (C. S., 564) prohibiting the judge from expressing an opinion as to whether a fact has been suffi-

ciently proven, since this statute relates only to the expression of opinion during the trial of the case.

6. Criminal Law § 50b—

The trial judge is vested with the discretion to permit private counsel to appear, with the Solicitor for the State, in a criminal prosecution, even after the trial has been entered upon and some of the jurors selected.

7. Criminal Law § 41g—

The evidence of an accomplice, who testifies against defendants in a criminal prosecution, cannot be assailed by the defense on the ground that such witness was induced to so testify by hope or fear. Such objection is available to the witness only.

8. Evidence § 18—

In a criminal prosecution for conspiracy to violate the liquor laws, where a witness testified for the State that he was employed by defendants to haul liquor from Baltimore to Charlotte and that it was agreed that the money to pay for the liquor would be sent witness from Charlotte by telegraph in the name of one Carling, it was competent for the Charlotte superintendent of the telegraph company to testify that large sums were so sent to witness.

9. Evidence § 36—

The superintendent of a telegraph company may testify that money orders of his company introduced in evidence are the original records kept in the office of his company and of which he has charge, even where the witness did not personally make such records.

10. Criminal Law § 41g—

While the unsupported testimony of an accomplice should be received with caution, if it produces convincing proof of guilt, it is sufficient to sustain a conviction.

APPEAL by defendants from *Burgwyn, Special Judge*, at 21 September, 1942, Extra Criminal Term, of MECKLENBURG.

The defendants were tried and convicted upon a bill of indictment which charged that they, together with others, did "unlawfully and wilfully conspire, confederate and agree together to buy, possess, possess for the purpose of sale, transport and sell intoxicating liquor, and in furtherance of such conspiracy, confederation and agreement, did unlawfully and wilfully buy, possess, possess for the purpose of sale, transport and sell intoxicating liquor. . . ."

From judgment of imprisonment predicated upon a verdict of guilty the defendants appealed, assigning errors.

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

G. T. Carswell for defendants, appellants.

SCHENCK, J. Although the bill of indictment charges both a conspiracy to violate the laws relating to intoxicating liquors and the actual violation of such laws in furtherance of such conspiracy, the charge of the consummation of the unlawful purpose was not submitted to the jury, the court having limited the consideration of the jury to the offense of conspiracy, instructing the jury: "The only question before you gentlemen is a pure question of fact, that fact being: Are you satisfied beyond a reasonable doubt from this testimony in this case that these men, or any two of them, during the years 1941 and 1942, up to March 22nd, conspired together to violate the prohibition law? If you are so satisfied, it will become your duty to convict those two of them about whom you are so satisfied, or any other about whom you are so satisfied, in addition to any two of them, if you are so satisfied that more than two of them did so conspire. If you are not satisfied about any two of them or more than two of them, it will become your duty to acquit them all."

The defendants bring forward by proper exceptive assignments of error the court's refusal to allow their motion for dismissal based upon a plea of former convictions and double jeopardy.

The warrants in the cases upon which the defendants rely as former convictions charged separately that each defendant "did wilfully, maliciously, unlawfully and feloniously manufacture, buy, possess, possess for the purpose of sale, retail and transport intoxicating liquors. . . ." There was no charge of joint action or agreement and the proof of such action or agreement was in no wise necessary for conviction thereunder.

Joint action and agreement were essential elements of the only offense submitted for the consideration of the jury upon the bill of indictment upon which the defendants were convicted, namely, unlawful conspiracy.

Since the essential elements of the offenses charged in the bill of indictment in this case and in the warrants to which they had formerly pleaded guilty were not the same, the offenses were different in law and in fact. Therefore, the court properly held as a matter of law that the plea of former jeopardy was not tenable.

The charge of conspiracy to violate the law and the charge of the consummation of the conspiracy by an actual violation of the law are charges of separate offenses. *S. v. Dale,* 218 N. C., 625, 12 S. E. (2d), 556.

In enumerating certain principles applicable to a plea of double jeopardy, *Allen, J.,* in *S. v. Freeman,* 162 N. C., 594, 77 S. E., 780, states: "1. That a person cannot be tried twice for the same offense. 2. That the offenses are not the same if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other, although some of the same acts may be necessary to

be proven in the trial of each." In order to convict in a trial for conspiracy certain facts are required to be proven that are not at all essential to a conviction of the consummated offense. The consummated offense and the conspiracy to commit the offense are by no means the same. ". . . a prior prosecution, whether it results in an acquittal or whether such prior prosecution results in a conviction of a particular crime, is ordinarily no bar to a prosecution for a conspiracy to commit the same." 22 C. J. S., sec. 288, page 432.

The real issue was whether the offenses charged in the warrants to which the defendants pleaded guilty and charged in the bill of indictment upon which they were subsequently convicted were the same, and the record shows they were not. *S. v. Gibson,* 170 N. C., 697, 86 S. E., 774.

"The true test is as stated in *Rex v. Vandercomb:* Could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in the evidence, but, as alleged in the record of the second? . . . The only safe rule is to stand by the decisions of our courts, and to hold that the plea of former acquittal cannot avail, unless there should be an exact and complete identity in the two offenses charged." *Ruffin, C. J.,* in *S. v. Nash,* 86 N. C., 650.

To support the plea of former conviction or acquittal the two prosecutions must be for the same offense, it is not enough that they grow out of the same transaction. *S. v. Freeman, supra.* A previous acquittal or conviction protects the defendant from being tried again for the same offense, but is not an estoppel on the State to show the same facts, if in connection with other facts, they are part of the proof of another and distinct offense. *S. v. Hooker,* 145 N. C., 581, 59 S. E., 866. "The test (for disposing of a plea of former jeopardy) is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." *Stacy, C. J.,* in *S. v. Midgett,* 214 N. C., 107, 198 S. E., 613.

In the very recent case of *S. v. Davis, ante,* 54, *Stacy, C. J.,* reviews the decisions of this Court relative to the plea of former jeopardy and holds that the lower court was correct in ruling that the evidence was not sufficient to sustain the plea when it tended to show that the warrant to which the defendant had pleaded guilty was not as broad as the four-count indictment upon which the defendant was subsequently convicted. We have identically that same situation in the case at bar. The defendants pleaded guilty to warrants which charged the consummated offense of violating the laws relating to intoxicating liquors, and the bill of indictment upon which they have been convicted was broader and charged a conspiracy to violate such laws, as well as the actual violation thereof.

We conclude that there was no error in the ruling of his Honor that the plea of former conviction and double jeopardy was, as a matter of law, untenable.

The defendants present for consideration by proper exceptive assignments of error his Honor's refusal to allow their motions for bills of particulars. They concede, however, that the granting or denial of their motions was within the discretion of the court, and not subject to review except for palpable and gross abuse thereof. C. S., 4613; *S. v. Hinton,* 158 N. C., 625, 74 S. E., 104; *S. v. Dewey,* 139 N. C., 556, 51 S. E., 937. We have examined the record as it relates to the court's ruling upon these motions and we do not concur in the position taken by the defendants that such abuse of judicial discretion appears therein.

The defendants also present for consideration by proper exceptive assignments of error his Honor's refusal to allow their motions for continuances of the trial of the case. The allowing or disallowing of a motion for a continuance is also a matter vested in the sound legal discretion of the trial judge, and his ruling thereon is not reviewable except in case of manifest abuse of such discretion, where "the circumstances prove beyond doubt hardship and injustice." *S. v. Sauls,* 190 N. C., 810 (813), 130 S. E., 848. We have examined the record as it relates to these motions for continuances and we find no evidence justifying the conclusion that hardship and injustice has been perpetrated upon the defendants by ruling them to trial.

The statements of the court made prior to the time the case was called for trial indicating that he would not try the case until the appealing defendants were first apprehended did no violence to the statute (C. S., 564), prohibiting the judge from expressing an opinion as to whether a fact had been sufficiently proven, since such statute relates only to the expression of opinions during the trial of the case. *S. v. Jacobs,* 106 N. C., 695, 10 S. E., 1031.

The contention of the defendants that they were entitled to have a declaration of mistrial and continuance because after eight members of the jury had been selected Honorable Jake F. Newell, a member of the bar, was permitted to be associated with the solicitor for the State in the prosecution of the case is likewise untenable. The discretion vested in the trial judge to permit private counsel to appear with the solicitor has existed in our courts from their incipiency. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Carden,* 209 N. C., 404, 183 S. E., 898.

The court asked each of the jurors already selected if they were related to Mr. Newell or were his clients; and also if they were related to the Reverend Doctor Ernest Neal Orr, who Mr. Newell stated had employed him, or were members of his church, to all of which interrogatories a negative answer was given. In view of the fact that defendants had

formerly interrogated the jurors upon other subjects, it is not seen how they could have been prejudiced by his Honor's refusal to allow them to further interrogate the jurors, and especially is this true in the light of the fact that it does not appear in the record what other interrogatories the defendants desired to propound to the jurors.

The testimony of one L. W. Teter offered by the State is assailed by exceptive assignments of error properly brought forward by the appellants. Teter testified that he was employed by the defendants to drive a truck from Charlotte, North Carolina, to Baltimore, Maryland, and there to load the truck with intoxicating liquors, and bring the truck and its load to North Carolina, and that in the course of his employment he did so drive the truck and brought about fifteen loads of liquor from Baltimore to Charlotte. The objection to this testimony is based upon the contention that the witness was induced to make such statement while in custody, and that such statement was induced by hope or extorted by fear. However, the statement, if made, was not introduced in evidence, and obviously therefore could not be made the bases for valid assignments of error. Testimony to the effect that the witness hauled liquor from Baltimore to Charlotte for the defendants was given by the witness himself, from the witness stand in the due course of the trial, and it cannot be assumed that such testimony was induced by hope or extorted by fear. It would rather be assumed, since there is an absence of the contrary appearing, that the judge would have protected the witness from any abuse. Also any objection to the manner in which this testimony was procured was available only to the witness Teter and not to the defendants. *S. v. Cobb,* 164 N. C., 418, 79 S. E., 419. These assignments of error are not sustained.

The defendants likewise assail by exceptive assignments of error properly brought forward the testimony of one J. L. Nowall, superintendent of the Western Union Telegraph Company of Charlotte, to the effect that money orders in large amounts were sent via the telegraph company in the name of H. B. Carling from Charlotte, North Carolina, to L. W. Teter in Baltimore, Maryland. This evidence was introduced to corroborate the testimony of the witness Teter who had previously testified that Carl Lippard sent him the money in Baltimore with which to pay for the liquor he was to haul to North Carolina; that it was prearranged that Carl Lippard would so send the money by telegraph in the name of H. B. Carling. This evidence was clearly corroborative of the testimony of Teter.

The witness Nowall testified that the money orders introduced in evidence were the original records kept in the office of the Western Union Telegraph Company in Charlotte; that he had charge of the records. The money orders were therefore competent evidence. *Ins. Co. v. R. R.,*

138 N. C., 42, 50 S. E., 452. The fact that the witness Nowall did not personally make the records did not render them incompetent. *Flowers v. Spears,* 190 N. C., 747, 130 S. E., 710. These assignments of error are not sustained.

The defendants make the following excerpt from the charge the basis of an exceptive assignment of error, to wit: "Now, in respect to that the Court charges you that you should be cautious of convicting on the unsupported testimony of an accomplice. However, our Supreme Court has repeatedly held that the unsupported testimony of an accomplice, while it should be received with caution, if it produces convincing proof of the defendants' guilt, is sufficient to sustain a conviction." This excerpt is in accord with *S. v. Gore,* 207 N. C., 618 (620), 178 S. E., 209, and the assignment of error is therefore untenable.

On the entire record, we find

No error.

STATE v. HARVEY HUNT AND PURCELL SMITH.

(Filed 19 May, 1943.)

1. Criminal Law § 48c: Trial § 14—

In a criminal prosecution objections to the evidence of State's witness must be made to questions at the time they are asked and to answers when given. Objections not so taken in apt time are waived.

2. Criminal Law § 48c: Trial § 15—

A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling, unless abuse of discretion appears, is not subject to review on appeal.

3. Appeal and Error § 29—

Exceptions referred to in defendants' brief as "formal exceptions" and as to which no argument is made and no authority cited are deemed abandoned. Rule 28 of Rules of Practice in the Supreme Court.

4. Criminal Law § 53a: Trial § 29a—

A charge is to be construed contextually and not by detaching clauses from their appropriate setting.

5. Trial §§ 35, 36: Criminal Law § 53d—

Where the court charged the jury that they might convict defendants of rape, or of the lesser degrees thereof, as they should find from the evidence, failing to state, as to one defendant, that they might also find him "not guilty," and the court thereafter recalled the jury and again clearly instructed the jury that they might find defendants "not guilty," in terms which could not have been misunderstood, no prejudicial error is made to appear.

STATE *v.* HUNT.

APPEAL by defendants from *Burney, J.*, at November Term, 1942, of ROBESON.

Criminal prosecution upon indictment charging defendants with the capital offense of rape of one Eldora Hinson Eason.

Defendants pleaded not guilty.

While the transcript of the evidence offered by the State is long and in detail, the following is a narrative of what it tends to show:

On the afternoon of Tuesday, 27 October, 1942, around 5:30 o'clock, defendants Harvey Hunt and Purcell Smith, Indians, appeared at the place of business of Ball Cab Company in Fayetteville, North Carolina, and "wanted a cab" to take them to Rockfish Creek, which is located about four miles from Fayetteville on the Fayetteville-Lumberton highway. In a few minutes George Harrell, taxi driver operating a 1941 Plymouth, 4-door sedan, on which the name and telephone number of the Ball Cab Company appeared, left with them—defendant Hunt sitting in front seat with the driver, and defendant Smith in the back seat. When they approached the Rockfish Creek bridge defendants told the driver to "stop here," or "park here." And as he was in act of stopping Smith struck the driver in the side face with a blackjack or sandbag, and Hunt "stuck a gun" in his side. They took control of the car, robbed him of his pocketbook and contents, including about sixty-one dollars, and made him get in the back seat with his face down. Defendant Smith held him in that position at point of a gun while defendant Hunt drove the car. After passing through the town of St. Pauls and at a point about two miles below that town, Hunt turned the car into a dirt road that leads to and by the residence of Joseph Allen. The car was stopped beyond the Allen house, and Harrell was forced to get out and lie down. Defendant Smith got astride of him and, with gun in his stomach, held him there for about thirty minutes. In the meantime defendant Hunt turned the car around and drove away toward the highway. He was next seen when he overtook Mrs. Eldora Hinson Eason and her sister, Mrs. Elberta Hinson Capell, as they were walking on the highway from St. Pauls in direction of Lumberton and toward the home of their father, where they resided. He was driving a car on which name of Ball Cab Company appeared, and was coming from direction of St. Pauls toward entrance to this side road where he had left Harrell and defendant Smith. Mrs. Eason and Mrs. Capell had been to see another married sister, who was sick, and whose home was at St. Pauls. They left her home about 6:30 o'clock, "dusk dark," after having prepared supper for her and her family. Upon overtaking them defendant Hunt asked if they wanted a ride, to which they replied "No"—one saying, "We don't live very far, we will walk." Whereupon Hunt turned the car "cater-cornered across the white mark in the road," stopped opposite

them, jumped out, and, over their protests and pleadings, and with pistol in hand, forced them around, and to enter the front seat of the car—Mrs. Eason in the middle, and Mrs. Capell next to the door. He then "slammed the door . . . ran around . . . got in on the other side . . . started up the car" and, with pistol still pointed at Mrs. Eason and her sister, who were protesting and begging to be let out, drove by their home and on to the said side road into which he turned and drove to and stopped within seventy-five yards of the Joseph Allen home, near where he had left Harrell and defendant Smith. When the car came and stopped there Smith "got off," released Harrell and told him "to back off," which he did and "took off," as he expressed his leaving there. Smith then came to the car and got in the back seat, and, as he did, Hunt handed to him the gun and said: "Here, hold this on them." At this moment Mrs. Capell jumped out of the car and ran to the home of Joseph Allen. Hunt chased her a part of the way and returned to the car, and while Smith sat in the back seat, holding gun against the back of Mrs. Eason, Hunt backed the car out to the highway, and, headed away from St. Pauls, drove some distance. He then turned off the hard surface into a side road and, after going some distance thereon, stopped the car. There, as she pleaded and begged them "not to bother" her, they forced her to get out of the car, take off her step-ins and lie down in the road. Whereupon, with Smith standing there with the pistol on her, Hunt had sexual intercourse with her against her will. And, immediately thereafter, in the face of her continued pleading and begging, Hunt held the pistol on her while Smith had sexual intercourse with her against her will. She says: "I begged and pleaded like a dog." Then they took her to a highway, put her out of the car and left. From there she made her way to a near-by filling station, and got some Indian boys there to take her home. She then told her mother what had happened to her.

In the meantime, Harrell having reported his experiences to people living near, and to officers, and Mrs. Capell having reported to Joseph Allen and others at his home, to her father, and to officers her experience and the carrying away of her sister, Mrs. Eason, a search was begun. As a result, both defendants were arrested that night, in connection with which the taxi was retaken. Defendants were placed in jail. Later Harrell identified them as the men who robbed him and took the taxi. Mrs. Eason and Mrs. Capell identified defendant Hunt as the man who forced them into the car on the highway. And Mrs. Eason identified both defendants as the men who carried her away and had sexual intercourse with her against her will, as detailed by her. Also, after defendants were put in jail, upon examination that night by a doctor, the

person of each defendant bore evidence from which State contends it may be inferred that each had had recent sexual intercourse.

Defendants offered no evidence.

The verdict of the jury is: "The defendants are guilty as charged."

The judgment, as to each defendant, is death by asphyxiation. Each defendant excepts thereto and appeals therefrom to Supreme Court, and assigns error.

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

Ellis E. Page, J. E. Carpenter, and F. D. Hackett for defendants, appellants.

WINBORNE, J. Careful consideration of the several assignments of error upon which defendants challenge the judgments below fails to indicate prejudicial error.

Exceptions 2 and 3 are taken to the denial by the court of motions of defendant Hunt (1) to strike out testimony of witness as to what appeared upon the person of this defendant when examined by a doctor on the night of the alleged crime, as set forth in the narrative herein, and (2) that court instruct the jury to disregard such testimony. In this connection it appears of record that these motions were not made until the State had rested its case, and that the ground assigned by the court for denying each motion is that no objection was made to the testimony at the time it was elicited from the witness. In these rulings we find no error. The competency of such evidence finds support in the case of *S. v. Cash,* 219 N. C., 818, 15 S. E. (2d), 277. But, if it be conceded that the testimony offered is incompetent, objection thereto should have been interposed to the question at the time it was asked as well as to the answer when given. An objection to testimony not taken in apt time is waived. *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257. Afterward, a motion to strike out the testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. *S. v. Merrick, supra; S. v. Pitts,* 177 N. C., 543, 98 S. E., 767.

The exceptions 4 and 5 to refusal to grant motions for judgment as in case of nonsuit, C. S., 4643, as well as number 6, directed to a portion of the charge, are referred to in the brief for defendants as "formal exceptions." No argument is made and no authority is cited in support thereof. Hence, they are deemed abandoned. See Rule 28 of the Rules of Practice in the Supreme Court, 221 N. C., 562, at 563. *S. v. Howley,*

220 N. C., 113, 16 S. E. (2d), 705. However, the exceptions are without merit.

Exceptions 7, 12 and 16 are to portions of the charge in which the court instructed the jury that under an indictment for rape, and under the evidence and law in this case, one of five verdicts, rape, assault with intent to commit rape, assault with a deadly weapon, assault on a woman by a man over the age of eighteen years, and not guilty, may be returned as to each defendant. The objection thereto is that "the instructions . . . omit any reference to the rule of reasonable doubt." It appears of record, however, that the court fully, clearly and correctly instructed the jury as to the presumption of innocence with which defendants are clothed, and as to the burden being upon the State to prove the guilt of defendants beyond a reasonable doubt before they could be convicted of any offense. Thus, when the portions of the charge to which these exceptions relate are read in connection with that which precedes and with that which follows, there is no conflict, or room for misunderstanding, and no error is made to appear. *S. v. Utley, ante,* 39.

In closing the charge the court instructed the jury: "(You may retire, make up your verdict and let your verdict, gentlemen, reflect light, not heat, in the expression of truth and say by your verdict whether you find the defendant, Harvey Hunt, guilty of the crime of rape, or guilty of the crime of assault with intent to commit rape, or guilty of an assault with a deadly weapon, or guilty of an assault upon a female, he being a male person over 18 years of age; and say by your verdict whether you find the defendant, Purcell Smith, guilty of the crime of rape, or guilty of the crime of assault with intent to commit rape, or guilty of an assault with a deadly weapon, or guilty of an assault upon a female, he being a male person over 18 years of age, or not guilty.) Retire gentlemen and say how you find." Exception 15 is directed to the portion in parentheses—particularly in that among the verdicts which may be rendered as to defendant Hunt, that of "not guilty" is not included. However, the record shows that the jury was recalled to the courtroom and that then the court again instructed the jury "that you may find the defendant, Harvey Hunt, guilty of the crime of rape as charged, or you may acquit him of that, or find him guilty of an assault with intent to commit rape, or you may acquit him of that, or find him guilty of an assault with a deadly weapon or you may acquit him of that, and find him guilty of an assault upon a female, he being a male person over 18 years of age, or you may return a verdict of not guilty." And like instruction was given as to defendant Smith. Under these circumstances it is clear that the jury could not have understood that a verdict of "not guilty" could not be rendered. No prejudicial error is made to appear.

Several other excerpts from the charge are assigned as error. If any of these, isolated from the rest of the charge, be conceded to be subject to challenge, when they are read contextually with the portions of the charge which precede and which follow no error appears. *S. v. Utley, supra.* *Seratim* consideration of such assignments would only consume space without serving a useful purpose.

In fine, the State's evidence on which defendants were tried, as shown in the record on this appeal, manifests in them a spirit of ruthless indifference to the rights of others, and of pitiless atrociousness. The evidence as to every element of the crime alleged is sufficient to support a verdict of guilty as charged. The record shows that the case was fairly presented to the jury in a trial free from prejudicial error.

In the trial and judgments on the verdict there is

No error.

E. S. McNEILL ET AL. v. JOHNNIE L. McNEILL ET AL.

(Filed 19 May, 1943.)

1. Fiduciaries § 2: Fraud § 11: Wills § 23c: Deeds § 2c—

In certain known and definite fiduciary relations, if there be dealing between the parties, on complaint of the party in the power of the other, the relation of itself, and without other evidence, raises a presumption of fraud as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted. Among these relations are (1) trustee and *cestui que trust;* (2) attorney and client; (3) mortgagor and mortgagee; (4) guardian and ward; and (5) principal and agent.

2. Wills § 25: Deeds § 2c—

In an action to set aside deeds and issue of *devisavit vel non*, consolidated and tried together, where the evidence showed that, at the time of the execution of the instruments in suit, the grantee in the deeds and the executor and principal beneficiary in the will was the agent of grantor and testatrix and was in full charge of her farm and all of her business affairs, it was reversible error for the court to fail to charge that such circumstances create a strong suspicion of fraud and undue influence and the law casts upon such grantee and principal beneficiary the burden of removing such suspicion by offering proof that the instruments in question are the free and voluntary act of the maker.

3. Trial §§ 29a, 32—

A judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issues and arising on the evidence and this without any special prayer for instructions, which is only necessary in reference to subordinate matters. C. S., 564.

4. Evidence § 57—

A failure to testify, standing alone, ordinarily counts for naught against a party; but, when the case is such as to call for an explanation, the failure of the party, who should make such explanation, to go upon the stand may be used against him.

5. Wills § 25—

Where, in an action to set aside deeds and issues of *devisavit vel non*, consolidated for trial, the judge charged the jury that recitals in the deeds and in the will were some evidence of mental capacity, it was error for the court, upon proper prayer of caveators and those attacking the deeds, to refuse to instruct the jury that, if they were satisfied from the evidence that grantor and testatrix did not give directions for the recitals in the deeds and will, then such recitals would not be evidence of mental capacity.

6. Wills §§ 23b, 23c: Deeds § 2a—

Provisions of a will, and recitals in other writings, may be considered by a jury, in connection with other evidence, as bearing on the issue of mental capacity and undue influence.

APPEAL by plaintiffs and caveators from *Thompson, J.*, at October Term, 1942, of ROBESON.

Civil actions to set aside deeds, and issue of *devisavit vel non*, consolidated for trial and heard together, as all are based on alleged mental incapacity and the same series of events which it is alleged unduly influenced the execution of the deeds and will.

The record discloses that in December, 1938, Mrs. Florence McNeill Hall found herself a widow and the owner of a 200-acre farm in Robeson County. She made her cousin, Johnnie L. McNeill, her "supervisor" or agent and invested him with authority to look after the renting and management of her farm. In a power of attorney, executed 24 November, 1941, it is recited "the said Johnnie L. McNeill has been looking after the renting of said lands since the year 1938 . . . and whereas the said Johnnie L. McNeill has agreed that he will look after the rental of said farm and its management (for the years 1942 to 1945) without any charges to the said party of the first part as he has heretofore done," now, therefore, etc.

On 18 January, 1939, Florence McNeill Hall executed a paper writing in the form of a deed purporting to convey to Johnnie L. McNeill, in consideration of $10 and other valuable considerations, 75 acres of her land, first reserving to herself the privilege of a life estate therein. A little later, on 22 April, 1939, she executed another paper writing in the form of a deed purporting to convey to Johnnie L. McNeill and his wife, Eula McNeill, in consideration of $10 and other valuable considerations, 105 acres of her farm, first reserving to herself a life estate therein, and also subject to a certain lease executed to R. H. Nye. On the same day,

to wit, 22 April, 1939, she executed and published a paper writing purporting to be her last will and testament in which Johnnie L. McNeill is named as sole executor and principal beneficiary. The First Presbyterian Church is given some woods land, subject to be defeated, however, "if Johnnie McNeill and wife, Eula McNeill, shall pay or cause to be paid to the Trustees of the First Presbyterian Church of Lumberton, N. C., the amount of $400 in cash within twelve (12) months from the date of my death."

Thereafter, on petition duly filed before the clerk of the Superior Court of Robeson County, 19 December, 1941, Florence McNeill Hall was adjudged "incompetent, from want of understanding, to manage her affairs, by reason of physical and mental weakness, on account of old age and disease," and P. S. Kornegay was appointed trustee of her estate pursuant to provisions of C. S., 2285.

At the time of Mrs. Hall's death in April, 1942, she was eighty years of age. Her will was probated in common form on 7 April, 1942.

On 10 April, 1942, the plaintiffs instituted two actions, one to set aside the deed of 18 January, 1939, and the other to set aside the deed of 22 April, 1939, both actions being grounded on alleged mental incapacity and undue influence. Then on 23 May, 1942, a caveat was filed to the will of Florence McNeill Hall upon the same grounds of alleged mental incapacity and undue influence.

There was much evidence *pro* and *con* on both issues.

From adverse verdicts and judgments thereon, the plaintiffs and caveators appeal, assigning errors.

T. A. McNeill, McLean & Stacy, and Varser, McIntyre & Henry for caveators and plaintiffs, appellants.

L. J. Britt, F. D. Hackett, and Johnson & Timberlake for propounders and defendants, appellees.

STACY, C. J. The case here may be made to turn on exceptions to the charge.

First. The appellants except to the charge on the ground that they were given no benefit of the presumption arising from the fiduciary relation existing between the grantor and testatrix on the one hand and the grantees and principal beneficiary on the other at the time of the execution of the deeds and will.

It is in evidence that Johnnie L. McNeill, grantee in both deeds and principal beneficiary under the will, was, at the time of their execution, manager in full charge of Mrs. Hall's farming operations. This was her only business. In a letter to Howard Nye, she speaks of "Johnny Mc" as "my supervisor, he & his wife are my very best friends."

The law is well settled that in certain known and definite "fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted." *Lee v. Pearce,* 68 N. C., 76. Among these, are, (1) trustee and *cestui que trust* dealing in reference to the trust fund, (2) attorney and client, in respect of the matter wherein the relationship exists, (3) mortgagor and mortgagee in transactions affecting the mortgaged property, (4) guardian and ward, just after the ward arrives of age, and (5) principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant. *Abbitt v. Gregory,* 201 N. C., 577 (at p. 598); *Harrelson v. Cox,* 207 N. C., 651, 178 S. E., 361; *Hinton v. West,* 207 N. C., 708, 178 S. E., 356; *McLeod v. Bullard,* 84 N. C., 515, approved on rehearing, 86 N. C., 210; *Harris v. Carstarphen,* 69 N. C., 416; *Williams v. Powell,* 36 N. C., 460.

"When one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest." *Smith v. Moore* (7th syllabus), 149 N. C., 185, 62 S. E., 892.

There is also authority for the position that "when a will is executed through the intervention of a person occupying a confidential relation towards the testatrix, whereby such person is the executor and a large beneficiary under the will, such circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, and then the law casts upon him the burden of removing the suspicion by offering proof that the will was the free and voluntary act of the testator." *In re Will of Amelia Everett,* 153 N. C., 83, 68 S. E., 924.

Wigmore puts it this way: "Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted, or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied." Evidence (3rd Ed.), sec. 2503, and cases cited in note.

The doctrine rests on the idea, not that there *is* fraud, but that there *may be* fraud, and gives an artificial effect to the relation beyond its natural tendency to produce belief. *Peedin v. Oliver,* 222 N. C., 665; *Harris v. Hilliard,* 221 N. C., 329, 20 S. E. (2d), 278.

This principle, it would seem, was applicable to the facts of the instant record, as Johnnie McNeill at the time of the execution of the instruments in suit, was the supervisor of Mrs. Hall's farm and in full charge of her business affairs. He purportedly takes as grantee in both deeds and is named sole executor and principal beneficiary in the will.

The failure to present these essential features of the case to the jury must be held for error. Their pertinency is heightened by the fact that neither Johnnie L. McNeill nor his wife testified in the case. *Hudson v. Jordan,* 108 N. C., 10, 12 S. E., 1029. True, the failure to testify, standing alone and without reference to the circumstances, ordinarily counts for naught against a party, and the jury should presume nothing therefrom; but when the case is such as to call for an explanation, as here, a different situation is presented. *Powell v. Strickland,* 163 N. C., 393, 79 S. E., 872; *In re Hinton,* 180 N. C., 206, 104 S. E., 341. The authorities are at one in holding that a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issues and arising on the evidence, and this without any special prayer for instructions. C. S., 564; *S. v. O'Neal,* 187 N. C., 22, 120 S. E., 817; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501. It is only in reference to subordinate features of the case that special requests are necessary. *S. v. Ellis,* 203 N. C., 836, 167 S. E., 67.

Indeed, the statute provides that in jury trials, the judge "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." C. S., 564. We have said in a number of cases that this confers a substantial legal right upon litigants, and that it "calls for instructions as to the law upon all substantial features of the case." *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435; *S. v. Robinson,* 213 N. C., 273, 195 S. E., 824; *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530; *Wilson v. Wilson,* 190 N. C., 819, 130 S. E., 834; *Watson v. Tanning Co.,* 190 N. C., 840, 130 S. E., 833; *Bowen v. Schnibben,* 184 N. C., 248, 114 S. E., 170; *Blake v. Smith,* 163 N. C., 274, 79 S. E., 596; *Holly v. Holly,* 94 N. C., 96; *S. v. Matthews,* 78 N. C., 523; *S. v. Dunlop,* 65 N. C., 288.

The purport of the decisions may be gleaned from the following excerpts: "The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial. This is true even though there is no request for special instruction to that effect." *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630. "On the substantive features of the case arising on the evidence, the judge is required to give correct charge concerning it." *School District v. Alamance County,* 211 N. C., 213, 189 S. E., 873. "A judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special

prayer for instructions to that effect." *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501. "When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error." *Williams v. Coach Co., supra.*

A situation quite similar to the one here presented arose in the case of *Hauser v. Furniture Co.,* 174 N. C., 463, 93 S. E., 961. There, a minor between the ages of 12 and 13, suing for personal injuries, lost before the jury on the issue of contributory negligence. The failure of the judge to instruct the jury that the evidence should be considered and the issue determined in the light of the presumption against contributory negligence arising on the evidence, was held for error, and this without any special prayer for instructions, the Court saying: "It is not a mere omission in reference to a 'subordinate feature of the cause, or some particular phase of the testimony,' but is to be considered as a 'substantial defect,' which may be raised by an exception properly entered and requiring that the issue be submitted to another jury."

The same rule would seem to be applicable here. The plaintiffs and caveators lost before the jury on the issue of undue influence. No reference is made in the charge to the presumption of fraud arising out of the relation of the parties. The two cases appear to be alike. The situations are similar.

Second. In giving the contentions of the defendants and propounders, the court called the jury's attention to the recitals in the deeds as showing *ex proprio vigore* knowledge of the grantor's properties and evidence of mental capacity. Attention was also directed to the preamble and to the several clauses of the will as evidence of Mrs. Hall's mental capacity, *e.g.,* "They say and contend that the paper writing itself shows in the preamble that she was of sound mind . . . that the person best qualified to know whether or not Mrs. Hall was of sound mind at that time was Mrs. Hall herself." The preamble recites, "I, Florence McNeill Hall, . . . being of sound mind," etc.

In apt time, counsel for plaintiffs and caveators asked the court to instruct the jury that if they were satisfied from the evidence that Mrs. Hall did not give directions for the recitals in the deeds and will, "then such recitals would not be evidence in this case of mental capacity."

It would seem that in the circumstances here disclosed, the plaintiffs and caveators were entitled to this instruction.

It is true, in a number of cases the provisions of a will and the recitals in other writings have been allowed to be considered by the jury in connection with other evidence, as bearing upon the issues of mental capacity and undue influence. *In re Will of Beale,* 202 N. C., 618, 163 S. E., 684; *In re Hardee's Will,* 187 N. C., 381, 121 S. E., 667; *In re Burns'*

Will, 121 N. C., 336, 28 S. E., 519. But in no case where this has been done has it been predicated upon a finding that the testator or maker was not the author of the provisions or recitals and gave no instructions in respect of their composition. *Jones v. Williams,* 176 N. C., 245, 96 S. E., 1036. Here, the very question at issue is whether these recitals correctly express the mind of a competent person free from any fraud or undue influence, in the face of a presumption that they do not.

A careful perusal of the entire record induces the conclusion that a new trial should be awarded. It is so ordered.

New trial.

STATE v. PETE MILLER AND A. B. MILLER.

(Filed 19 May, 1943.)

1. Homicide § 11—

In a prosecution for homicide, where defendants are on their own premises, they are under no obligation to retreat, and if assaulted, they have the right to stand their ground and return blow for blow, or shot for shot, in their own necessary self-defense; and they are under no duty to "quit the combat" or give notice that they have abandoned the fight thus thrust upon them. They are entitled to have the law of self-defense, as applied to these facts, explained to the jury.

2. Homicide § 27f—

Where, in a prosecution for murder, the Millers, father and son, defendants, and the deceased Grimsleys, father and son, engaged in a fight and both sides retired from the field, and the defendants' evidence tends to show that thereafter while the two defendants were at work in or near the barn on their own premises, they were murderously assaulted with firearms by the Grimsleys and in their self-defense shot and killed both Grimsleys, it was reversible error for the court to charge the jury that self-defense would not be available to the defendants, if they provoked the fight by language or conduct towards the Grimsleys which was calculated or intended to bring about the difficulty, unless they had abandoned the fight and given their adversaries notice thereof.

APPEAL by defendants from *Thompson, J.,* at September Term, 1942, of ROBESON. New trial.

Criminal prosecution under indictments for the murder of O. D. Grimsley and for the murder of W. G. Grimsley, consolidated for trial.

The defendants live on a small farm about one-half mile east of the hard surfaced highway leading from Fairmont, N. C., to Lake View, S. C., which Pete Miller purchased from O. D. Grimsley. O. D. Grimsley owned farm land on both sides of the Miller land. To go from the homestead land on the highway to the farm on the other side of the

Miller land the Grimsleys usually traveled the farm or neighborhood road that passed the Miller home, corn crib and other outhouses.

A. B. Miller is the son of Pete Miller and lives with him. W. G. Grimsley is the son of O. D. Grimsley and lives in a house on the O. D. Grimsley place. Pete Miller is the son-in-law of O. D. Grimsley.

On the morning of 22 April, 1942, W. G. Grimsley left the home place on his way to the other farm, traveling the farm road with a mule and plow. The plow was on a sled or drag. Pete Miller had dug a small trench across this road about 200 yards east of his house, but on his land, to drain off the surface water. When W. G. Grimsley reached this drain he stopped and began to fill it up. Pete Miller sent the defendant A. B. Miller to reopen the drain. He would open it as fast as Grimsley filled it. Pete Miller then came out with a four-foot plank or slab, urged A. B. to "knock hell out of him with the hoe" and, upon arriving at the scene, assaulted Grimsley with the piece of board, or, as shown by other testimony, Grimsley assaulted A. B. and Pete, in an effort to get him off his premises, struck at him with the slab or board.

They then separated, the Millers going back to their home and Grimsley going on to the home of one Dow, the tenant on that farm. There he got Dow's gun. Dow and another tenant disarmed him. Grimsley then returned to his father's home by a woods path. He told his father, O. D. Grimsley, of the difficulty. A few minutes later the two Grimsleys and the wife of O. D. left and went to the home of W. G. Grimsley. W. G. Grimsley went in, remained a few minutes and came back. All of them, including the wife of W. G., then went down the highway to the farm road, turned into the farm road and went on to Pete Miller's house. This was about 30 minutes after the incident at the drain. From here on the evidence is in sharp conflict.

According to the evidence for the State the four Grimsleys were on their way to the other farm to pull tobacco plants. As they neared the Miller home none of the Millers could be seen. The defendants had concealed themselves in a corn crib near the path, Pete being armed with a gun and A. B. with a rifle. As the Grimsleys, who were walking ahead of their wives, went by the corn crib, Pete emerged, shot O. D. and said: "I am going to get even with you." Then A. B. Miller came from the corn crib and commenced shooting. The Grimsley men drew pistols and returned the fire. As a result both Grimsleys were killed.

The version of the defendants is quite different. After the difficulty at the drain the Millers had breakfast and Pete and A. B. went to the barn. Pete began to repair a corn and bean planter in front of the barn and A. B. went in the crib and began shucking corn. As the Grimsleys passed the dwelling Mrs. O. D. Grimsley remarked, "I do not see any of them around here." They proceeded on and discovered Pete

at the barn working on machinery. He heard Mrs. Grimsley say, "Odey, don't do that, don't do that, Pete ain't bothered you." As Pete raised up, turned and looked at them, the Grimsleys opened fire, cursing and saying they would kill him. O. D. Grimsley took a position to the right and W. G. Grimsley took a position to the left of the barn door, subjecting Pete to a crossfire. Pete Miller jumped and grabbed his shotgun just inside the barn door and fired between them. They then rushed him as he reloaded. O. D. Grimsley then said: "I will kill you, God damn you." Pete then fired a second time, the load striking O. D. in the abdomen. About this time A. B. Miller jumped out the door and, seeing the Grimsleys firing at his father, shot W. G. Grimsley with a rifle just as Grimsley was in the act of firing at Pete. Both Grimsleys died from the wounds received.

The solicitor announced at the beginning of the trial that he would not seek a verdict of murder in the first degree.

The jury returned for their verdict that Pete Miller is guilty of murder in the second degree in the death of O. D. Grimsley and not guilty as to the death of W. G. Grimsley, and A. B. Miller is guilty of manslaughter in the death of W. G. Grimsley and not guilty as to the death of O. D. Grimsley. The court pronounced judgment on the verdict and defendants appealed.

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

T. A. McNeill, W. S. Britt, C. P. Britt, and Varser, McIntyre & Henry for defendants, appellants.

BARNHILL, J. In its charge the court instructed the jury as to Pete Miller as follows:

"There is another principle applicable, as I understand the evidence in this case, and that is this: If the defendant, Pete Miller, provoked the fight or the killing by using any language or conduct toward the deceased, O. D. Grimsley, or the son of the deceased, W. G. Grimsley, which was calculated and intended to bring about the fight, then, gentlemen of the jury, the plea of self-defense would not be available to him, unless he shows that he had abandoned the fight, and that the deceased had notice of such abandonment before the mortal wound was given."

As to A. B. Miller he charged as follows:

"This plea of self-defense would not be available to the defendant, A. B. Miller, if he provoked the difficulty by language or conduct which was calculated or intended to bring about the difficulty, unless he had quitted the fight in good faith and given his adversary notice of such action on his part."

If the homicides occurred in the manner and under the circumstances disclosed by the testimony for the State there was no element of self-defense in the killings. The defendants are guilty, at least, of murder in the second degree. This, however, the defendants deny. They insist that they killed their assailants under the circumstances outlined by them. It is upon this theory and upon this state of facts that they press their plea of self-defense.

There is nothing in their testimony to indicate that they used any language calculated or intended to bring on the fight or that they otherwise provoked the difficulty. They were on their own premises. They were under no obligation to retreat. *S. v. Anderson,* 222 N. C., 148, and cases cited. If they were assaulted in the manner outlined by them they had the right to stand their ground and return blow for blow or shot for shot in their own necessary self-defense. Being on their own premises at their own home when murderously assaulted they were under no duty to "quit the combat" or give any notice that they had abandoned the fight thus thrust upon them. They are entitled to have the law of self-defense, as applied to these facts, explained to the jury.

An examination of the charge as a whole discloses that the court below conceived that the right of self-defense, if any, did not grow out of the circumstances immediately arising at the barn. It assumed instead that this fight was a continuation of the difficulty which arose some time theretofore at the drain ditch. In stating the contentions it enlarged upon this theory, both from the standpoint of the State and of the defendants, charging the jury in part as follows:

"The State says and insists further that the plea of self-defense is not available to either of the defendants in this case, because in this case the defendants, one or both of them, provoked this fight, brought on the difficulty down there where the drain was dug across the road, that that started the fight, that W. G. Grimsley was down there at the time filling possibly a little drain across the road . . . and that A. B. Miller provoked this difficulty, caused it to start in the first place, that they never quitted the fight or if they did quit it, they never notified either O. D. Grimsley or W. G. Grimsley that they had quitted the fight, but instead of that they went to their home, Pete Miller getting the shotgun and A. B. Miller getting the rifle and went down to the barn with intent, so the State says and insists, as this evidence discloses, of killing W. G. Grimsley when he came back after his mule and plow."

This tends to emphasize rather than to mitigate the error. The rule of law as stated by the judge relates to an affray presently existing and not to prior difficulties. We do not understand that under these conditions the defendants would be deprived forever thereafter of the right to defend themselves unless or until they gave some further notice to the

Grimsleys that they did not intend to pursue the matter further. The law is not so harsh or so unreasonable. While the former assault may have been the motivating cause of the gun battle it did not require the application of this limitation upon the right of self-defense.

That occurrence tends rather to show malice on the part either of the Grimsleys or of the defendants. If the Grimsleys assaulted the defendants at the barn, as contended by them, their conduct was prompted, no doubt, in part at least, by animosity engendered at the drain ditch. If the defendants waylaid and shot the Grimsleys, as contended by the State, the same is true as to them. These phases of the testimony should be submitted to the jury under proper instructions.

It follows that the quoted charge, as given, had no application to the facts in this case. Under the theory of the State the defendants deliberately concealed themselves, waylaid and killed the Grimsleys. Hence, it is not pertinent to the State's evidence. If the jury should find that the homicides occurred as testified to by the defendants the charge is equally inapposite. It was misleading and had the effect of depriving defendants of their right of self-defense.

We must not be misunderstood. Even if the Grimsleys assaulted the defendants at the barn with pistols in the manner and under the circumstances testified to by them, the guilt or innocence of the defendants would depend upon the motive which prompted them to fight back. If they engaged in the gun battle as willing participants by reason of malice or ill will instilled by the fight at the drain ditch they would be guilty of murder in the second degree. If they did so, prompted by passion aroused by an unprovoked assault and not by the motive of self-defense, they would be guilty of manslaughter at least. This, as well as the question of excessive force, is, in any event, for the jury.

The indicated error in the charge entitles the defendants to a New trial.

MRS. ADLENE CARTER v. CAROLINA REALTY COMPANY AND CATAWBA INVESTMENT COMPANY.

(Filed 19 May, 1943.)

1. Landlord and Tenant § 10—

It is the duty of the owner of an apartment house to keep that part of the premises, of which he retains control for the use of all the tenants, in a reasonably safe condition.

2. Landlord and Tenant § 11—

The landlord is not liable for injuries received by a tenant through failure of the landlord to light a common passageway, or to supply railings or guards, when the condition was the same at the time of the letting.

3. Negligence § 5—

The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable, unless the connection of cause and effect is established, and the negligent act of the defendant must be the proximate cause of the injury.

4. Landlord and Tenant § 11—

In an action against a landlord to recover damages for personal injuries, where plaintiff's evidence tended to show that she was injured in defendants' apartment house, where she lived as a tenant, by misjudging her step and falling on a badly lighted, common stairway without railing or guard, which she was in the habit of using, judgment of nonsuit was properly allowed.

APPEAL by plaintiff from *Harris, J.*, at November Term, 1942, of MECKLENBURG.

Civil action to recover damages for personal injuries resulting from a fall down a stairway in the hall of an apartment house, located at 107 Grandin Road, Charlotte, N. C., where plaintiff resided.

Plaintiff alleges the stairway was inadequately lighted, was not equipped with banisters, the steps were worn and the edges rough, all of which caused her to fall and sustain serious injuries. She further alleges the defendants permitted a refrigerator to be placed near the head of the stairway, which cut off some of the light which would have shown from another light located down the hall.

It is admitted that the defendant Catawba Investment Company, is the owner of the apartment house and the Carolina Realty Company is the rental agent of the owner.

It is also admitted the stairway consists of seven or eight steps, with a wall on each side but is not equipped with banisters and never had been so equipped.

The stairway leads from the hallway on the first floor of the apartment house to the outside entrance or back porch and to the basement of the building.

The evidence tends to show that the defendants retained control of the halls and stairways in the apartment house for the benefit of all the tenants thereof. The lights in the halls of said building were controlled by a switch in the basement of the building and were turned on and off by Lindsay Hargrove, the janitor of the building, who was an employee of the defendant, Carolina Realty Company.

The evidence discloses that plaintiff, on Monday night, 17 November, 1941, went down the stairway in question to the back porch of the apartment house to get a mop, which she kept there; she returned to her apartment using the same stairway. Later, between seven and eight o'clock, the plaintiff started down the stairway, holding the wet mop, she testified "So it wouldn't touch me. I had on good clothes," and further: "I was carrying the mop down the steps to put it back where I got it from and in doing so, stepped from one step to the other, I didn't step quite far enough over the second or third step and my heel caught on the steps. The lights were dim and this light over the steps was out. The light that gave light to the steps was out. It was dark, of course, with the light out and the other lights being dim. The lights were very dim and I could see a vision of the steps but I could not see the steps plainly." On cross-examination, she testified: "I thought I was stepping over the step. I thought I was over and when I went to put my foot down, my heel caught on the edge of the step. I didn't get it far enough over, that's what threw me. My heel caught on this edge here. I had not got my foot as far over as it was necessary to make the step and I hadn't got my foot as far over as I thought I had." She also testified there was a light in the middle of the hallway and it was burning. A refrigerator was in the hall near the top of the steps, which cut off some of the light from the hallway.

Plaintiff's evidence further tends to show the light over the stairway in question had been out for four or five nights and the janitor had been requested several days before the accident to replace the same. The janitor testified he had not been requested to replace the light, but admitted the light was not burning Saturday night, 15 November, 1941, and had not been replaced at the time of the accident.

At the close of plaintiff's evidence, the defendants moved for judgment as of nonsuit. Motion allowed and judgment signed accordingly. Plaintiff appeals, assigning error.

Guy T. Carswell and Frank H. Kennedy for plaintiff.
H. C. Jones and Brock Barkley for defendants.

DENNY, J. It is the duty of the owner of an apartment house to keep that part of the premises of which he retains control for the use of all tenants in a reasonably safe condition. In the absence of any agreement on the subject, a landlord's duty to his tenant with respect to a common passageway in a house consisting of several tenements is to keep such passageway in the condition it was in at the time of the letting, 10 R. C. L., p. 1040, and in 36 C. J., p. 215, we find the law stated as follows: "On the analogy of the lack of a common-law duty on

the part of a landlord to light common passageways, it has been held that a landlord is not liable for injuries received by a tenant through the failure of the landlord to supply railings or guards when the condition was the same at the time of the letting. But the duty to maintain railings and guards may be imposed by statute."

The defendants moved for a bill of particulars, the motion was granted, and plaintiff set forth in her bill of particulars: "That plaintiff was caused to fall on said steps by reason of the light that was under the direction and supervision of the defendants being out in the hallway and which had been out for some time prior to the time she was hurt on the night of November 17th, 1941, and too there was no banisters that plaintiff could hold to in going down the dark stairway which was unlighted by reason of the light not having been replaced, and further that the steps, by reason of usage and heavy articles having been bumped on them, the edges of them were broken and uneven, all of which caused her not to be able to see the risers of the steps and by reason of the broken and uneven edge she was unable to locate her foot properly on the steps." However, her testimony does not disclose that the physical condition of the steps had anything to do with her failure to locate her foot properly thereon. In fact, on cross-examination, she affirmed the correctness of her written version of how the accident occurred, as follows: "That I had just finished supper when I took a mop which I had used to mop the kitchen and bath out of the apartment to put it on the porch; that I had been out on the porch a little earlier, about ten or fifteen minutes earlier, to get the mop and misjudged the step when I was taking it back; that the light at the landing had been out for four or five nights; that we noticed the light out and had been complaining; that the people upstairs also had been complaining; that the hall was very dark because the light on the second floor does not shine down to the first floor. . . . I had been down them once all right on the night I was hurt; that on second thought I did go down one time during that period when the light was out to call the janitor about the heat. I do not remember that I said 'I don't know what caused my fall unless it was that I misjudged the steps, thinking I was on the bottom step when actually I wasn't.' . . . I did not understand it that way. I said in the statement that I had on low heel shoes; that I do not believe there was anything unusual on the steps or anything wrong with them. . . . That the steps were on the inside of the building; that there is no railing or anything at all to catch to; that the front light was burning but the hall is long, and this would not light these steps very well. That statement is true as near as I could make it except I didn't remember about being on the bottom step."

The testimony does not support the allegation that the steps were defective, and under the authorities it cannot be held as a matter of law that it is negligence to fail to construct a banister in connection with a stairway where there is a wall on each side thereof, and it appears the same conditions exist in respect thereto as existed at the time the tenancy began. The only act of negligence upon which the plaintiff can rely on this record for a reversal of the judgment below, is the allegation that the stairway was insufficiently lighted.

We do not think the evidence discloses any causal relation between the alleged negligence and the injury. The plaintiff was familiar with the stairway, she knew the lights were dim, she had gone up and down the stairway within ten or fifteen minutes prior to her injury and, according to her testimony, she misjudged her step; and said further: "I thought I was stepping over the step. I thought I was over and when I went to put my foot down, my heel caught on the edge of the step, I didn't get it far enough over, that's what threw me. I had not got my foot as far over as it was necessary to make the step and I hadn't got my foot as far as I thought I had."

The Court said in *Byrd v. Express Co.,* 139 N. C., 273, 51 S. E., 851: "If it is conceded that there was negligence on the part of defendant, we do not think there was sufficient evidence to be submitted to the jury that it caused the death of the plaintiff's intestate. There must always, in actions of this kind, be a causal connection between the alleged act of negligence and the injury which is supposed to have resulted therefrom. The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established, and the negligent act of the defendant must not only be the cause, but the proximate cause of the injury. Shear. & Redf. on Negligence (4th Ed.), sections 25 and 26." *Alexander v. Statesville,* 165 N. C., 527, 81 S. E., 763; *Finch v. Michael,* 167 N. C., 322, 83 S. E., 458; *Rice v. R. R.,* 174 N. C., 268, 93 S. E., 774; *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854; *Harper v. Bullock,* 198 N. C., 448, 152 S. E., 405; *Smith v. Wharton,* 199 N. C., 246, 154 S. E., 12; *Lynch v. Telephone Co.,* 204 N. C., 252, 167 S. E., 847.

The judgment of the court below is

Affirmed.

THOMAS J. HILL ET AL. v. GEORGE L. STANSBURY ET AL.

(Filed 19 May, 1943.)

1. **Public Officers §§ 7a, 8—**

In a civil action by taxpayers against county commissioners and against the treasurer of the county to recover moneys paid to such treasurer in excess of his annual salary as fixed by law, where the evidence tended to show that the county treasurer's salary was fixed at $1,800 a year in 1927, and that in 1931, agreeable to the Machinery Act of that year, the commissioners designated the county treasurer to receive tax prepayments and for this extra service allowed him $1,200 per year additional, and again in 1939 allowed him $240 more per annum, both without legislative authority, judgment of nonsuit as to the commissioners was properly allowed under the express provisions of C. S., 3206, there being no evidence of bad faith, etc., while such judgment as to the county treasurer is reversed.

2. **Public Officers § 5—**

A person, accepting a public office with a fixed salary, is bound to perform the duties of the office for the salary; and he cannot claim additional compensation even though the salary is inadequate; nor is the case altered by subsequent statutes or ordinances increasing his duties and not his salary. He takes the office *cum onere.*

APPEAL by plaintiffs from *Bobbitt, J.,* at January Term, 1943, of GUILFORD.

Civil action by taxpayers to recover on behalf of the county moneys paid to the county treasurer in excess of his salary as fixed by law.

The facts are these:

1. During the intervals here in question the salary of the county treasurer of Guilford County was fixed at $1,800 a year pursuant to ch. 247, Public-Local Laws 1927.

2. In 1931, the board of commissioners of Guilford County, agreeably to the provisions of the Machinery Act, ch. 428, sec. 805 (8), Public Laws 1931, designated the then county treasurer, W. C. Coble, to receive tax prepayments, made between 1 July and 1 October of any year, and for this extra service he was allowed $1,200 per annum.

3. In January, 1939, the defendant, W. Clarence Johnson, succeeded W. C. Coble as treasurer of Guilford County.

4. It is alleged, and there is evidence tending to show, that pursuant to appropriations made by the commissioners of Guilford County, the treasurer was paid from February, 1939, through June, 1941, at the rate of $3,000 per annum; and from July, 1941, through October, 1941, he was compensated at the rate of $3,240 per annum.

5. On 3 September, 1941, in accordance with the provisions of C. S., 3206, three of the plaintiffs herein served written demand upon the

defendants to institute a suit for the recovery of the excessive salary unlawfully received by the treasurer and unlawfully appropriated by the county commissioners. After the lapse of 60 days with no suit being instituted, this action was begun to recover for the benefit of the county the aforesaid sums in excess of the amounts allowed by law.

6. Over objection, the defendants were permitted to offer evidence tending to show that the services rendered by the defendant, W. Clarence Johnson, as Prepaid Tax Collector, were well worth the additional sums allowed and paid him.

From judgments of nonsuit entered (1) as to the county commissioners at the close of plaintiffs' evidence, and (2) as to the treasurer upon consideration of all the evidence, the plaintiffs appeal, assigning errors.

L. P. McLendon, Andrew Joyner, Jr., and York & Boyd for plaintiffs, appellants.

Clifford Frazier, King & King, and D. Newton Farnell, Jr., for defendants, appellees.

STACY, C. J. This is one of the cases that was here at the Spring Term, 1942, on motion to strike portions of the pleadings, reported in 221 N. C., 339, 20 S. E. (2d), 308.

I. THE ACTION AGAINST THE COMMISSIONERS.

The case as made out against the individual members of the board of county commissioners is wanting in sufficiency to show that they acted in bad faith, corruptly, or from motives of malice. Hence, on authority and under the express provisions of C. S., 3206, the judgment of nonsuit as to them must be sustained. *Old Fort v. Harmon,* 219 N. C., 245, 13 S. E. (2d), 426; *Moore v. Lambeth,* 207 N. C., 23, 175 S. E., 714.

II. THE ACTION AGAINST THE TREASURER.

The action against the treasurer stands on a different footing from the one against the commissioners. He received the money.

It is to be observed *imprimis* that no new office was created when the commissioners, or the governing body of the county, pursuant to the provisions of the Machinery Act, ch. 428, sec. 805 (8), Public Laws 1931, designated the county treasurer as receiver of tax prepayments, or "Prepaid Tax Collector" as he is spoken of in the record. Otherwise the constitutional provision in respect of double office-holding might call for some attention. *Brigman v. Baley,* 213 N. C., 119, 195 S. E., 617. All that was done, and all that the commissioners were authorized to do, was to designate, from among the officers named in the statute, the one to

receive the tax prepayments. *Freeman v. Comrs. of Madison,* 217 N. C., 209, 7 S. E. (2d), 354. True, this added new duties to the office of the one designated, but no additional compensation was authorized to be paid therefor. *Comrs. v. Credle,* 182 N. C., 442, 109 S. E., 88; *Borden v. Goldsboro,* 173 N. C., 661, 92 S. E., 694.

The general rule is, that where the duties of an officer have been increased by the addition of other duties germane to his office, in the absence of legislation authorizing an increase in his salary, such additional duties are to be performed without extra compensation. *U. S. v. King,* 147 U. S., 676; Anno. L. R. A., 1918 E, 761. In other words, extra compensation is not ordinarily allowed to officers for extra work, without legislative sanction. *Hoyt v. U. S.,* 13 U. S., 10 How., 109. See *Comrs. v. Davis,* 182 N. C., 140, 108 S. E., 506, where legislative authority for increasing compensation was implied. It is to be noted, however, that the rule does not extend to services rendered in an independent employment, not incidental to the duties of the office, such as might have been performed by some other person. *Converse v. U. S.,* 62 U. S., 21 How., 463; *Detroit v. Redfield,* 19 Mich., 376.

The compensation for official services is fixed by law. In some cases it may be extravagant; in others wholly inadequate. 43 Am. Jur., 150. It is not a matter of *assumpsit* or *quantum meruit. Reed v. Madison County,* 213 N. C., 145, 195 S. E., 620; *Osborne v. Canton,* 219 N. C., 139, 13 S. E. (2d), 265. Then, too, the work may become onerous from changed conditions or increased duties, but nothing in addition to the statutory reward may be claimed by the officer, however disproportionate to the value of his services it may be or may become. In such case he must content himself with the salary and fees allowed by law, and look to the bounty of the General Assembly for any additional remuneration. One who takes a public office is deemed to hold it *cum onere.* 37 Am. Jur., 879; 43 C. J., 691; McQuillin on Municipal Corporations, Vol. 2, sec. 544; Dillon on Municipal Corporations, Vol. I, 731; *Borden v. Goldsboro, supra.*

"It is a well settled rule, that a person accepting a public office with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased and not his salary. His undertaking is to perform the duties of his office whatever they may be from time to time during his continuance in office for the compensation stipulated—whether these duties are diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign"—*Potts, J.,* in *Evans v. City of Trenton,* 24 N. J. S., 764.

The salary of the treasurer of Guilford County was increased by the General Assembly of 1943, Senate Bill 57 (Laws not yet published), but the act providing for the increase does not purport to validate the excessive payments heretofore made or to affect the amounts here in suit.

It follows, therefore, that the additional amounts paid to the treasurer, over and above his salary of $1,800 a year as fixed by law, constitutes overpayments to which he is not entitled. *Carolina Beach v. Mintz,* 212 N. C., 578, 194 S. E., 309.

On appeal in respect of the commissioners, Affirmed.

On appeal in respect of the treasurer, Reversed.

W. D. YOKELEY, ADMINISTRATOR OF THE ESTATE OF GARY YOKELEY, v. KATE R. KEARNS.

(Filed 19 May, 1943.)

1. Automobiles § 12b—

When one drives an automobile on a public street and sees, or by the exercise of due care should see, small children on or near the traveled portion of the street and apparently intending to cross, it is his duty to use proper care with respect to speed and control of his car, the giving of timely warning and the maintenance of vigilant outlook, to avoid injury, recognizing the likelihood of their running into or across the street.

2. Automobiles § 18g—

In an action for damages based on negligence, resulting in the death of plaintiff's intestate, a small boy under eight years of age, where plaintiff's evidence tended to show that his intestate was struck with great force by defendant's automobile and killed, in the middle of a 39-foot city street, free from other traffic at the time, as he attempted to cross the street on his way from school, that the horn was not sounded, that the car traveled (carrying the boy's body) 126 feet after hitting the boy before stopping, and the owner was heard to say at the scene of the accident, "I told the driver to slow up," a judgment as of nonsuit was reversible error.

APPEAL by plaintiff from *Armstrong, J.,* at November Term, 1942, of GUILFORD. Reversed.

This was an action for wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendant in the operation of an automobile.

The evidence offered by plaintiff tended to show that his intestate, a boy not quite eight years of age, while attempting to cross a street in High Point, was struck and killed by defendant's automobile then being

driven for her by her employed driver. The unfortunate happening occurred shortly after noon, 17 December, 1941, near the intersection of Idol Street, on North Main Street. It appears that plaintiff's intestate, the Yokeley boy, on his way home from school, with a number of other children, had come across an open field which lay immediately east of Main Street, and had reached the east side of Main Street, apparently intending to proceed across Main Street and thence westwardly along Idol Street to his home on the latter street. Idol Street enters Main Street from the west, but does not cross. Beyond, to the east and approximately in line with Idol Street, was a path leading across the field to Johnson Street School, some 1,100 feet distant.

Defendant's automobile, occupied by herself and daughter, and driven by her chauffeur, was proceeding south along Main Street. Near the intersection of Idol Street the boy was struck and killed. The speed of automobiles in that section was limited to 25 miles per hour. Main Street was paved 39 feet from curb to curb. At Idol Street there had been painted on the pavement the words "Slow, School Zone," but at this time as the result of traffic the words had been worn quite dim. As indicating the speed of the automobile, it appeared that from the point at the intersection of Idol Street where the boy's hat and some blood were found to the point where the car stopped and the crushed body of the boy fell from the fender to the ground was 126 feet; that the grill-work on the front of the automobile was broken in, and the glass of the left headlight was broken, and the shattered glass found scattered nearly as far back as where the hat was picked up. The noise of the impact when the boy was struck was very loud, and the body was badly broken and mangled, death ensuing instantly. Immediately after the collision the defendant Mrs. Kearns was heard to say, "I told the driver to slow up," and the witness thought she added that she told him to stop, that he would hit somebody. Where the boy's hat was picked up was in the middle of Main Street in front of Idol Street, and there were spots of blood along the middle of the street to where the car stopped just to the right of center of the street. The body was lying in the center. There was no other traffic on the street at the time, and there were no parked cars on either side of the street. The horn was not sounded. To the east and to the driver's left on approaching the place of collision was an open level field without houses or obstruction to the view. A witness who passed this place in his automobile, going north on Main Street, shortly before the accident, observed the Yokeley boy and another small boy come from across the field to the east side of Main Street and cross the curb into the street and stop at the witness' warning signal. Another witness, walking, came up Idol Street from the west and turned south on Main Street. She testified she saw the Yokeley boy and a group of small

boys come to the east curb of Main Street nearly opposite the intersection of Idol Street and stop, the Yokeley boy in front. She was not observant of the approach of the defendant's automobile, or of exactly what happened, but she saw the boy's hat in the air, heard the "terrible noise" of the impact, and caught a glimpse of the rear of the automobile as it passed, and saw it stop at the point where the body fell to the ground.

It was admitted in the pleadings that defendant was in control of the automobile and that it was being driven by her driver as her agent, acting at the time within the scope of his employment. It was also stipulated that the plaintiff's intestate came to his death as a result of injuries received in the collision referred to in the complaint.

At the close of plaintiff's evidence defendant's motion for judgment of nonsuit was allowed. From judgment dismissing the action, plaintiff appealed.

C. A. York and Gold, McAnally & Gold for plaintiff.

Carter Dalton and Rupert T. Pickens for defendant.

DEVIN, J. The only question presented by this appeal is whether the plaintiff's evidence considered in the light most favorable for him was of sufficient probative force to require its submission to the jury. *Wall v. Bain*, 222 N. C., 375.

Was there evidence of negligence on the part of the defendant which proximately caused the injury and death of plaintiff's intestate? An examination of the record of the testimony offered below leads us to the conclusion that the question posed must be answered in the affirmative. Giving due consideration to the facts in evidence and to the inferences of fact reasonably deducible therefrom, we think the plaintiff was entitled to have the jury determine whether under the circumstances, and at the time and place described, the defendant failed to exercise the degree of care incumbent upon one who operates a motor vehicle upon a public street, and whether such failure was the proximate cause of the injury complained of.

A generally recognized principle of human conduct, in relation to those to whom the duty of reasonable care to avoid injury is owed, requires that the one charged with such duty should exercise that degree of care and forethought which is commensurate with the dangers reasonably to be anticipated. *Calhoun v. Light Co.*, 216 N. C., 256, 4 S. E. (2d), 858. In accord with this principle, when one drives an automobile on a public street and sees, or by the exercise of due care should see, small children on or near the traveled portion of the street and apparently intending to cross, it is his duty to use proper care with respect to the speed and control of his automobile, the giving of timely warning

and the maintenance of vigilant outlook, to avoid injury, recognizing the likelihood of their running into or across the street in obedience to childish impulses. *Moore v. Powell,* 205 N. C., 636, 172 S. E., 327; *Fox v. Barlow,* 206 N. C., 66, 173 S. E., 43; *Smith v. Miller,* 209 N. C., 170, 183 S. E., 370; 5 Am. Jur., 613; 67 A. L. R., 317 (note). The destructive result of the collision would tend to indicate excessive speed. *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88. It was said in *S. v. Gray,* 180 N. C., 697 (710), 104 S. E., 647: "He must increase his exertion in order to avoid danger to children whom he may see, or by the exercise of reasonable care should see, on or near the highway." Under such circumstances due care should be proportioned to the child's incapacity adequately to protect himself. 38 Am. Jur., 685.

We think the evidence here adds up to something more than what was held insufficient as merely speculative and conjectural under the facts in *Mitchell v. Melts,* 220 N. C., 793, 18 S. E. (2d), 406; *Pack v. Auman,* 220 N. C., 704, 18 S. E. (2d), 247; and *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661. See also *Bass v. Hocutt,* 221 N. C., 218, 19 S. E. (2d), 871.

As this case goes back for trial, we refrain from further discussion of the evidence. It will be understood, however, that in holding plaintiff's evidence sufficient to carry the case to the jury we express no opinion as to its weight. The defendant's evidence may throw a different light on the unfortunate occurrence.

The judgment of nonsuit is

Reversed.

STATE v. FRANK SMITH.

(Filed 19 May, 1943.)

1. Seduction § 1—

To convict of seduction under C. S., 4339, it is incumbent upon the State to satisfy the jury beyond a reasonable doubt (1) that the prosecutrix was at the time of the seduction an innocent and virtuous woman; (2) a promise of marriage; and (3) carnal intercourse induced by such promise. The testimony of the prosecutrix alone is not sufficient. There must be independent, supporting evidence of each essential element of the crime.

2. Seduction §§ 8, 9—

Testimony supporting prosecutrix, on an indictment for seduction under C. S., 4339, need not be in the form of direct evidence, for it is seldom possible to produce such proof in respect to some of the elements of the offense. Facts and circumstances tending to support her statements are

sufficient. And where there is such evidence, a motion for nonsuit should be denied. C. S., 4643.

APPEAL by defendant from *Carr, J.*, at October Term, 1942, of COLUMBUS. No error.

Criminal prosecution for seduction under promise of marriage.

Defendant and prosecutrix "went together" for about five years. They were engaged for about 2½ years. "He just told me that he had fell in love with me and that he did want to marry me and had I rather get married right away and live with his married brother or take a chance on waiting until he could sell his interest in that place and build another one, and I told him that I had rather wait until he could build a place of our own to live in. . . . We talked about getting married quite a few times . . . and he told me he didn't want to wait any longer and he said did I want to wait any longer and I told him no I didn't; so he said we would marry very soon." There was no date set for the marriage.

The defendant wrote prosecutrix endearing letters. In one dated 30 December, 1940, addressed to "Elsie Darling," he stated: "I am going to kiss your picture when the New Year comes in to give us good luck and because you are the only girl I am going to kiss in 1941. Why don't you do the same? Hope you will be happy and don't get blue any more because you won't have to worry about me not loving you. I do and if you can't be happy and don't want to wait any longer we will just go ahead and make a go of it now. I don't want to wait any longer either, but have just wanted to save a little money for us to build with."

On the occasion of the alleged seduction, 29 May, 1941, defendant told her that "we were going to be married, that he loved me and I loved him, that it was just a matter of time of him getting the money to be married with to live on . . . said it didn't make any difference; that it didn't matter; that we were going to get married anyway. . . . He told me we would get married then if I wanted to. . . . Under those circumstances I yielded to his embraces . . . because I loved him and because of marrying too. I wouldn't have done it otherwise."

Prosecutrix testified that defendant took her to Wilmington 29 May, and that it was on this trip she was seduced. Defendant denied that he was with her on that day but admitted he did make the trip with her to Wilmington on the 27th.

There was evidence of the good reputation of the prosecutrix, that a child was born to her and that defendant told her sister that they were to be married.

There was a verdict of guilty. From judgment thereon defendant appealed.

STATE *v.* SMITH.

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

J. A. McNorton and Herbert McClammy for defendant.

BARNHILL, J. On this record the primary question presented for decision is this: Was there error in the refusal of the court below to dismiss as of nonsuit under C. S., 4643?

The defendant was indicted under C. S., 4339. To convict the defendant of seduction as defined in this statute and as charged in the bill of indictment it was incumbent upon the State to satisfy the jury beyond a reasonable doubt (1) that the prosecutrix was at the time of the seduction an innocent and virtuous woman; (2) a promise of marriage; and (3) carnal intercourse induced by such promise. For this purpose the testimony of the prosecutrix alone is not sufficient. There must be independent supporting evidence of each essential element of the crime. *S. v. Crook,* 189 N. C., 545, 127 S. E., 579; *S. v. Ferguson,* 107 N. C., 841; *S. v. Doss,* 188 N. C., 214, 124 S. E., 156; *S. v. McDade,* 208 N. C., 197, 179 S. E., 755; *S. v. Wells,* 210 N. C., 738, 188 S. E., 326; *S. v. Brackett,* 218 N. C., 369, 11 S. E. (2d), 146; *S. v. Fulcher,* 176 N. C., 724, 97 S. E., 2.

The prosecutrix testified concerning her innocence and virtue, the promise of marriage and the seduction induced by such promise. Except for the proviso of the statute her testimony would be sufficient to repel the motion of nonsuit. Under the statute it fails to make out a case for the jury unless supported by independent testimony.

This supporting testimony, however, need not be in the form of direct evidence for, indeed, it is seldom possible to produce such proof in respect to some of the elements of the offense. Facts and circumstances tending to support her statements are sufficient. *S. v. Cooke,* 176 N. C., 731, 97 S. E., 171; *S. v. Moody,* 172 N. C., 967, 90 S. E., 900; *S. v. Smith,* 217 N. C., 591, 9 S. E. (2d), 9.

Applying this well recognized rule, we are constrained to hold that the cause was properly submitted to the jury.

There was evidence of the good reputation of the prosecutrix before and at the time of the alleged illicit intercourse. This meets the requirement of the statute on the element of innocence and virtue. *S. v. Patrick,* 204 N. C., 299, 168 S. E., 202; *S. v. Doss, supra; S. v. Brackett, supra; S. v. Moody, supra.*

The defendant and prosecutrix "went together" over a period of years. His frequent visits, his endearing letters, his statements to the sister of the prosecutrix all tend to support the evidence as to the promise of marriage. Indeed, his letter of 30 December, 1940, under the circum-

stances here disclosed, can be given no other reasonable interpretation. *S. v. Fulcher, supra.*

The prosecutrix became pregnant and in due course gave birth to a child—convincing proof of the illicit intercourse on her part.

The immediate persuasions and inducements which led to the illicit intercourse may not be proved by the evidence of third persons directly to that fact. They are to be inferred from the facts; that the man had the opportunities, more or less frequent and continued, of making the advances and propositions, and that the relations of the parties were such as that there was likely to be that confidence on the part of the woman in the declarations of devotion on the part of the man and that affection towards him personally which would overcome reluctance on her part and cause her to surrender her chastity. Courtship affords not simply an opportunity to a designing man but often the very means of persuasion by which seduction is effected.

"The fact that he was her suitor, proved otherwise than by her own testimony, tends to make credible her testimony that her proven seduction was effected by him." *Stevenson v. Belknap,* 6 Iowa, 97; *S. v. Moody, supra.*

Circumstances of this kind vary in weight and credibility in different cases, and it is for the jury to determine their strength. But when proof is made of their existence, in some degree, it cannot be said that there was no supporting evidence. A court cannot then properly direct a verdict or dismiss the action, on the ground that no case is made for the consideration of the jury. *S. v. Moody, supra; S. v. Smith, supra.*

The evidence was conflicting and the issue was sharply drawn. If the evidence for defendant is to be believed it was impossible for him to have been with the prosecutrix on 29 May or to have associated with her during the month of June. However, it is not within the province of this Court to review and weigh the testimony and determine what the verdict should have been. That was for the jury, subject to the revising power of the trial judge, if he deemed the verdict against the weight of the evidence. We may say only whether there was any evidence for the jury to consider.

We have examined the other assignments of error. They fail to disclose sufficient reason for disturbing the verdict.

No error.

STATE v. DAMON AUSTON.

(Filed 19 May, 1943.)

1. Criminal Law §§ 41f, 53c—

In a criminal prosecution, where the defendant went upon the stand in his own behalf and there was evidence offered by the State of the good character of some of its witnesses and of the bad character of defendant, a charge that such character evidence is corroborative evidence, going to the weight and credibility of the testimony of those witnesses, is not error, the natural significance being that the evidence of defendant's bad character goes to the weight and credibility of his testimony.

2. Criminal Law § 53c—

While an accused person who avails himself of C. S., 1799, and takes the stand in his own behalf assumes the position of a witness and subjects himself to all the disadvantages of that position, a charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended.

3. Criminal Law § 50a: Trial § 31—

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. C. S., 564.

APPEAL by defendant from *Armstrong, J.*, at September Term, 1942, of GUILFORD.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Allen Coleman.

The record discloses that on Sunday, 1 March, 1936, about noon, the defendant and Allen Coleman got into a fight while shooting dice on Short Spring Street in High Point; that after several licks had passed, the defendant ran off in the direction of his home on Vale Street, came back in about fifteen minutes and opened fire on Coleman with a pistol. Several shots took effect which later proved fatal. The time and place of the shooting are established by a number of witnesses.

The defendant, on the other hand, testified that about 5:00 p.m. he was going through the path where Coleman and three or four others were shooting dice; that the deceased began to curse and told him to back up, and that "I slowed up and looked at him and he went in his bosom and commenced firing at me and I went to firing at him." The defendant's plea was one of self-defense.

There was evidence tending to show the good character of three of the State's witnesses. While the defendant testified in his own behalf, he did not put his character in issue. The State offered one witness who

testified that the defendant's general reputation was bad.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for a period of not less than 15 nor more than 20 years.

Defendant appeals, assigning errors.

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

Gold, McAnally & Gold for defendant.

STACY, C. J. We have here for determination the correctness of the charge in two particulars.

First. The court instructed the jury, "there has been some character evidence offered in this case. . . . The court instructs you that that is corroborative evidence going to the weight and credibility of the testimony of those witnesses."

The defendant complains at this instruction because in addition to the character evidence of the State's witnesses, it covers the evidence of his bad character, and denominates it "corroborative evidence," which could only mean that it was corroborative of the State's witnesses as it could not corroborate the defendant's testimony. *S. v. Colson,* 193 N. C., 236, 136 S. E., 730. This interpretation appears to be somewhat strained. Its natural significance is, that the evidence in respect of the defendant's bad character would go to the weight and credibility of his testimony. For this purpose it was competent, *S. v. Traylor,* 121 N. C., 674, 28 S. E., 493, and it is not to be supposed the jury considered it in any other light. *S. v. Cloninger,* 149 N. C., 567, 63 S. E., 154; *S. v. Atwood,* 176 N. C., 704, 97 S. E., 12. The exception is not sustained.

Second. The court further instructed the jury that the defendant had the right to testify in his own behalf or to remain off the witness stand, as he should elect or be advised, "but when he does take the witness stand and testify, it is said by reason of our law that he is an interested witness, that he is interested in the outcome of your verdict and it is your duty to look into and very carefully and very cautiously scrutinize his testimony and weigh it in the light of such interest, but it is said by reason of our law, if, after doing that, you find the defendant is telling the truth, then it is your duty to give his evidence the same weight and attach to it the same meaning and credibility as you would that of a disinterested witness."

The defendant contends that this instruction unduly disparaged his testimony and disadvantaged him before the jury. *S. v. Dee,* 214 N. C., 509, 199 S. E., 730; Anno. 85 A. L. R., 545. It must be conceded that

the use of the expression "very carefully and very cautiously scrutinize" the defendant's testimony is in advance of admonitions heretofore sustained. *S. v. Holland,* 216 N. C., 610, 6 S. E. (2d), 217. As will be seen from what is said in *S. v. McKinnon, ante,* 160, this day decided, the expression is not to be commended. And even though its use here appears innocuous, its infelicity suggests that it be eschewed.

When one charged with the commission of a crime avails himself of the statute, C. S., 1799, and testifies in his own behalf, "he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness." *S. v. Efler,* 85 N. C., 585; *S. v. Fogleman,* 164 N. C., 458, 79 S. E., 879; *S. v. Griffin,* 201 N. C., 541, 160 S. E., 826; *S. v. Wentz,* 176 N. C., 745, 97 S. E., 420.

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. C. S., 564; *S. v. Winckler,* 210 N. C., 556, 187 S. E., 792; *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *Morris v. Kramer,* 182 N. C., 87, 108 S. E., 381; *S. v. Rogers,* 173 N. C., 755, 91 S. E., 854; *Chance v. Ice Co.,* 166 N. C., 495, 82 S. E., 845; *Ray v. Patterson,* 165 N. C., 512, 81 S. E., 773. "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial"—*Walker, J.,* in *S. v. Ownby,* 146 N. C., 677, 61 S. E., 630.

This is not to say that all precautionary instructions in respect of interested witnesses should be withheld from the jury, but only that the cold neutrality of the impartial judge should constantly be observed. *Withers v. Lane,* 144 N. C., 184, 56 S. E., 855; *Perry v. Perry,* 144 N. C., 328, 57 S. E., 1; *Park v. Exum,* 156 N. C., 228, 72 S. E., 309. See *Dunbar v. State,* 159 Miss., 603, 132 So., 748, as published with exhaustive annotation in 85 A. L. R., 520.

As no reversible error has been made to appear, the verdict and judgment will be upheld.

No error.

IN THE MATTER OF THE WILL OF CORNELIA EVANS.

(Filed 19 May, 1943.)

1. Wills §§ 24, 25—

Upon caveat to a will and issue of *devisavit vel non*, where there is no conflict in the testimony as to the due execution of the paper writing as a will and no evidence of undue influence or mental incapacity, it is not error for the court to charge the jury to answer the issue in the affirmative, should they find, by the greater weight of the evidence, the facts to be as testified to by the witnesses and as shown by the documentary evidence.

2. Wills §§ 24, 27—

In proceeding to caveat a will motions as of nonsuit or requests for direction of a verdict on the issues will be disallowed.

APPEAL by caveators from *Armstrong, J.*, at May Term, 1942, of MOORE. No error.

On 17 May, 1935, Cornelia Evans executed a last will and testament in which she bequeathed and devised all her personal property and real estate, except her money on hand, to her husband. He was "to have and use said land any way he chooses. But at his death any that is in his possession is to go to my grandchildren and Bill Evans in equal parts." She bequeathed her money on hand one-third to her husband and one-third to each of her two grandchildren.

The testatrix died 8 August, 1941, and her will was duly probated in common form. Thereupon the two grandchildren filed a caveat, alleging undue influence and mental incapacity. They also alleged that the purported signature of the testatrix was not, in fact, her signature.

When the cause came on for hearing in the court below the issue of *devisavit vel non* was answered in favor of the propounder. From judgment thereon the caveators appealed.

Seawell & Seawell for appellants.

Mosley G. Boyette for appellee.

BARNHILL, J. The only assignment of error in the record is in the following language: "The only exception is to the motion allowed by the judge and the judge's charge directing the verdict in the cause." It fails to point out the particular part of the charge—three pages in length—to which the exception is directed.

The judge in his charge explained the requisites of a valid will and instructed the jury as to the burden of proof. He then charged: "So in this case, gentlemen of the jury, and under the evidence in this case,

the court instructs you that if you believe the evidence and find the facts to be as testified to by the witnesses in this case and the documentary evidence as introduced in evidence, and so find by the greater weight of the evidence, the same to be true, you will answer this first issue submitted to you, or the only issue submitted to you YES. That is, that this paper writing and every part thereof is the last will and testament of Cornelia Evans, deceased, and the Court directs you as a matter of law, under the evidence in the case, if you so find by the greater weight of the evidence the facts to be true as testified by the witnesses and as shown by the documentary evidence, you will answer the issue YES."

The evidence for the propounder tends to show that the testatrix had been a school teacher for many years and was "an unusually intelligent colored woman"; that she procured one Blue to prepare or write a will for her; and that she told him what disposition she desired to make of her property. He wrote the will in accord with what he conceived to be her instructions. She read it as prepared by him; said it was all right; and signed it as her will. As she was suffering from arthritis in her right arm she had another to write her name while she held to the pen. She then requested Blue and his niece to sign as witnesses. This they did in the presence of the testatrix and in the presence of each other.

The caveators offered no testimony except as to the general reputation of one of the caveators, and there was no evidence tending to contradict the testimony of the propounder as to the due execution of the paper writing as a will. Nor was there any evidence of undue influence or mental incapacity.

Under these circumstances it was not improper for the court to give the quoted instructions. The evidence tended to show the due execution of the will. If believed and accepted by the jury it was their duty to answer the one issue in the affirmative. The court simply applied the law to the evidence in the case as it is required to do by statute. C. S., 564.

We are advertent to the opinion in *In re Will of Redding,* 216 N. C., 497, 5 S. E. (2d), 544, relied on by appellants. It is there said: "Motions as of nonsuit or requests for direction of a verdict on the issues will be disallowed." *In re Will of Hinton,* 180 N. C., 206, 104 S. E., 341, is cited in support. An examination of the latter case discloses that the Court in that case merely held that: "The request for instructions . . . to find for propounders on the issue as to undue influence, were properly disallowed." It was not held that such a charge, in any event, would be improper. We have held to the contrary. *In re Will of Harris,* 218 N. C., 459, 11 S. E. (2d), 310.

Be that as it may, an instruction which presents the issues of fact to the jury is not a peremptory instruction directing a verdict. *McGee v.*

Saint Joseph Belt Ry. Co., 93 S. W. (2d), 1111. Here, as there was no conflict in the testimony as to the due execution of the paper writing, the weight and credibility of the evidence was the only real issue of fact. This was submitted to the jury and the court expressed no opinion thereon. The caveators have no just cause to complain.

No error.

STATE v. CHARLIE HERNDON.

(Filed 19 May, 1943.)

1. Criminal Law § 52b—

On a motion for judgment as of nonsuit in a criminal case, C. S., 4643, the evidence must be considered in the light most favorable to the State.

2. Prostitution § 5c—

In a criminal prosecution for permitting property to be used for prostitution, C. S., 4358, where the State's evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant's wife was one of the operators of the place of ill fame and that its general reputation was bad, motion for judgment as of nonsuit properly denied.

3. Prostitution § 5c—

On an indictment for permitting property to be used for prostitution or assignation, evidence of the house and its inmates for chastity is competent and knowledge thereof may be proven by circumstantial evidence. The owner may not shut his eyes and close his ears to that which is patent and notorious to the community.

4. Evidence § 15—

Inconsistent statements of a witness on his examination-in-chief and on cross-examination go to his credibility and not necessarily to the competency of his evidence.

5. Trial § 15—

The refusal to grant a motion to strike out testimony, given on the trial without objection, is in the discretion of the trial judge, and is not reviewable on appeal.

APPEAL by defendant from *Thompson, J.*, at September Term, 1942, of ROBESON.

Criminal action tried upon indictment, charging Mrs. Edith Herndon, Avery Fairfax and Charlie Herndon of unlawfully and willfully maintaining and operating a place, structure and building for the purpose of prostitution and assignation, etc.

Verdict: Guilty. Judgment as to the appealing defendant: Eighteen months in jail to be assigned to work under the direction of the State Highway and Public Works Commission.

Defendant Charlie Herndon appeals, assigning error.

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

John H. Cook and Malcolm McQueen for defendant.

DENNY, J. The defendant does not contend that the evidence adduced at the trial was insufficient to show that the premises were used for the purpose of prostitution and assignation. The buildings are located across the hard-surface road from the residence occupied by the defendant and his wife, Edith Herndon, and consists of one central building, known as Herndon's Service Station, and seven cabins.

The evidence disclosed that Charlie Herndon did operate the service station and cabins several months prior to the date in question, 14 June, 1942. Later the cabins were being operated by Mrs. Herndon and the service station was closed. This defendant was present at least part of the time while the cabins were being searched by the officers on 14 June, 1942, made inquiry as to the search warrant, and, according to the testimony of one of the officers, the defendant told him two or three times before and since the raid that he wanted to sell the property and was trying to sell it. The State introduced a mortgage deed executed by the defendant and his wife, Edith Herndon, to the State of North Carolina, on the premises in question, for a bond in the sum of $300.00, dated 23 June, 1942, which instrument had been duly recorded in Robeson County, N. C.

Defendant assigns as error the refusal of his Honor to grant his motion for judgment as of nonsuit. On motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State. *S. v. McKinnon, ante,* 160; *S. v. King,* 219 N. C., 667, 14 S. E. (2d), 803; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321; *S. v. Hammonds,* 216 N. C., 67, 3 S. E. (2d), 439.

The fact that defendant's wife may have been the manager and operator of the cabins would not constitute a defense for the defendant if he, as owner, permitted the property to be used in the manner set forth in C. S., 4358, which reads in part as follows: "It shall be unlawful: . . . For any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose."

We think the evidence as to ownership and knowledge on the part of this defendant of the purpose for which the premises were used was sufficient to warrant the submission of the evidence to the jury. In the case of *S. v. Boyd,* 175 N. C., 791, 95 S. E., 161, our Court said: "In discussing this question, the Supreme Court of Indiana says, in *Graeter v. State,* 105 Ind., 271: 'In a prosecution for letting a house to be kept as a house of ill fame, evidence of the general reputation of the house and its inmates for chastity is competent. In such case actual knowledge on the part of the defendant of the kind of house kept, from having seen acts of prostitution therein need not be shown. It is sufficient to prove knowledge by circumstantial evidence. The owner of a house so kept may not shut his eyes to that which is patent to the community around him, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge.' "

In the instant case the State offered a number of witnesses who testified that the reputation of these cabins was bad.

The defendant also assigns as error the refusal of his Honor to strike out the evidence of D. L. White, as to the bad reputation of the cabins at Herndon's Service Station. The witness was allowed to testify without objection, on direct examination, that he knew the reputation of the cabins on the day of the search and it was bad. However, on cross-examination the witness said he did not know of the reputation of the place until after the indictment was found. The refusal to grant a motion to strike out testimony given on the trial without objection, is in the discretion of the trial judge, and not reviewable on appeal. *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257; *S. v. Lane,* 166 N. C., 333, 81 S. E., 620. However, an inconsistent statement in the testimony of a witness goes to the credibility of the witness, and not necessarily to the competency of the evidence. *Blanchard v. Peanut Co.,* 182 N. C., 20, 108 S. E., 332. This exception cannot be sustained.

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

No error.

STATE v. MARVIN BAXLEY.

(Filed 19 May, 1943.)

1. Indictment §§ 11, 24: Rape § 3—

On the trial of an indictment for carnal knowledge of a female under 16 years of age, C. S., 4209, time is not of the essence of the offense and a variance between allegation and proof as to the date is not material, the statute of limitations not being involved.

STATE *v.* BAXLEY.

2. Criminal Law § 41f—

Inconsistency between the testimony given by a prosecuting witness on the trial and her previous statement is a matter affecting her credibility only, and does not warrant the withdrawal of the case from the jury.

APPEAL by defendant from *Thompson, J.*, at September Term, 1942, of ROBESON. No error.

The defendant was charged with carnal knowledge of a female under the age of sixteen, in violation of C. S., 4209. There was verdict of guilty, and from judgment imposing sentence the defendant appealed.

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

F. Wayland Floyd and W. S. Britt for defendant.

DEVIN, J. The statute under which the defendant was indicted and convicted provides that "if any male person shall carnally know or abuse any female child, over 12 and under 16 years of age, who has never had sexual intercourse with any person, he shall be guilty of a felony." The elements of the offense were outlined in *S. v. Swindell,* 189 N. C., 151, 126 S. E., 417.

In the case at bar the State's evidence tended to show that the first act of sexual intercourse between the defendant, 21 years of age, and the State's witness, Gladys Lee Powell, who was then 14 years of age, took place about September, 1941. The State's witness also testified there were two other later acts, one in December, 1941, and the last in April, 1942, and that she had, previous to her first intercourse with the defendant, never had such relations with any person. The evidence was of sufficient probative force to be submitted to the jury.

The defendant complains of the verdict and judgment chiefly on the ground that the State's witness testified at the preliminary hearing that the first act of intercourse with the defendant occurred in April, 1942, and the bill of indictment charged that the offense was committed on that date, whereas on the trial in the Superior Court she testified to two prior acts of intercourse, the first taking place in September, 1941. It was urged that in respect to the time there was a variance between the bill of indictment and the proof, and that the State's witness having admitted acts of intercourse previous to the date set out in the bill, the defendant was entitled to the allowance of his motion for judgment of nonsuit.

However, as was held in *S. v. Trippe,* 222 N. C., 600, time was not of the essence of the offense, and variance between allegation and proof as to the date was not material, the statute of limitations not being involved. The State's witness testified she had never had sexual intercourse with

any other person than the defendant. It was said in the *Trippe case, supra:* "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." If the defendant was taken by surprise by the difference between the testimony of the State's witness and her previous statement as to dates, he should have asked for a mistrial or for an adjournment. Inconsistency between her testimony on the trial and her previous statement was a matter affecting her credibility only, and did not warrant withdrawal of the case from the jury. *S. v. Johnson,* 220 N. C., 773, 18 S. E. (2d), 358.

The defendant denied having had any improper relations with the State's witness, but the jury accepted the State's evidence and found him guilty. There was no error in the charge or in any ruling of the court of which the defendant can justly complain.

On the record, we conclude that in the trial there was

No error.

GLOBE POSTER CORPORATION v. JOHN S. DAVIDSON, BISHOP DALE, ET AL., PARTNERS, TRADING AS SOUTHEASTERN COLORED FAIR ASSOCIATION, CHARLOTTE, N. C., AND SOUTHEASTERN COLORED FAIR ASSOCIATION, INC.

(Filed 19 May, 1943.)

Courts § 2d—

On appeal to the Superior Court from a judgment of a justice of the peace, defendants are entitled to a trial *de novo*, even when they are called and fail to appear.

APPEAL by plaintiff from *Johnson, Special Judge,* at February Term, 1943, of MECKLENBURG.

W. T. Shore for plaintiff, appellant.

Louis J. Hunter for defendants, appellees.

PER CURIAM. This was a civil action instituted by the plaintiff against the defendants before a justice of the peace to recover for goods alleged to have been sold and delivered by the plaintiff to defendants. From an adverse judgment the defendants appealed and duly docketed their appeal in the Superior Court of Mecklenburg. In the Superior Court the defendants were called and failed to appear and prosecute their appeal, whereupon judgment by default was entered against the defend-

ants in favor of the plaintiff, without any trial *de novo*. Execution was issued upon the judgment so entered and the defendants lodged motion to restrain the sheriff from executing such execution and to vacate said default judgment. Upon hearing the defendants' motion the restraining order was duly issued and the default judgment vacated; and the cause directed to be placed on the civil issue calendar for trial. From this order the plaintiff appealed, assigning error.

The defendants were entitled to a trial *de novo*. Therefore, there was no error in striking out the default judgment entered against them and restraining action pursuant to an execution issued thereupon. C. S., 660; *Barnes v. R. R.*, 133 N. C., 130, 45 S. E., 531. ". . . if the defendant fails to appear and make his defense, even when he has appealed, there must be a trial to entitle the plaintiff to a judgment, if the defendant has raised a material issue." N. C. Prac. & Proc. (McIntosh), par. 703 (4). p. 817.

Affirmed.

ETHEL M. BARBER, ADMINISTRATRIX OF THE ESTATE OF GUY A. BARBER. v. CLYDE E. MINGES, RICHARD B. MINGES, L. DEAN MINGES, MRS. L. L. MINGES AND MRS. MARY MINGES GRIFFIN, INDIVIDUALLY AND TRADING AS SALISBURY PEPSI-COLA BOTTLING COMPANY.

(Filed 2 June, 1943.)

1. **Master and Servant §§ 37, 40e—**

The N. C. Workmen's Compensation Act, C. S., 8081 (h), *et seq.*, deals with the incidents and risks of the contract of employment, in which is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common law or other rights which pertain to the parties as members of the general public, disconnected with the employment.

2. **Master and Servant § 37—**

Expressions in the N. C. Workmen's Compensation Act, C. S., 8081 (r), regarding the surrender of the right to maintain common law or statutory actions against the employer, are not absolute. They must be construed within the framework of the Act, and as qualified by its subject and purposes.

3. **Master and Servant §§ 40b, 40f—**

In dealing with certain unscheduled occupational diseases, this Court has held common law actions to be excluded by the Workmen's Compensation Act; but in these cases the condition admittedly and allegedly arose out of the employment.

4. Master and Servant § 46a—

The Industrial Commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration.

5. Master and Servant § 40f—

The relation of master and servant is not invoked when the employee attends a good will picnic at the invitation of the employer, where the employee did no work and was not paid for attendance, nor penalized for nonattendance, nor ordered to go.

6. Master and Servant § 47—

C. S., 8081 (ff) (b), does not require the plaintiff to file a claim with the Industrial Commission, as a court of first instance, before bringing an action in the Superior Court.

STACY, C. J., concurring in result.
DENNY, J., joins in concurring opinion.
BARNHILL, J., dissenting.
WINBORNE, J., concurs in dissenting opinion.

APPEAL by plaintiff from *Rousseau, J.*, at March Regular Term, 1943, of ROWAN. Reversed.

The plaintiff administratrix brought this action to recover damages for the injury and death of her intestate, Guy A. Barber, which she alleges was caused by the negligence of defendants.

The defendants were engaged in bottling and distributing soft drinks, with an office or plant at Salisbury, and Barber was employed by them in that business. Pursuant to a custom of providing an annual outing for employees and their families in the promotion of good will, the defendants, through an agent, Sloop, organized and conducted a fishing trip to South Carolina, which Barber and members of his family attended at the invitation of the defendants. Part of the trip was made by a gasoline driven boat down Little River, South Carolina, and to the fishing grounds off the coast. There, in an attempt to start the engine by priming with gasoline poured from bottles, the boat was set on fire by an explosion of gasoline vapor, and plaintiff's intestate died as a result of burns he received.

Various acts of negligence are attributed to Sloop in the complaint, including the hiring of an unsafe boat, permitting open cans and bottles of gasoline to be used, from which the air in the boat became saturated with gasoline vapor and exploded by a spark from the engine.

The defendants moved to dismiss the action upon the ground that the North Carolina Industrial Commission had exclusive jurisdiction of the controversy under the Workmen's Compensation Act, chapter 120, Public Laws of 1929, as amended by chapter 123, Public Laws of 1935,

Michie's Code of 1939, sec. 8081 (h), *et seq.* The court below dismissed the action on that ground, and plaintiff appealed.

J. Frank Spruill and Stahle Linn for plaintiff, appellant.

Hayden Clement and Battle, Winslow & Merrell for defendants, appellees.

SEAWELL, J. On the facts alleged in the complaint, is plaintiff's demand within the exclusive jurisdiction of the Industrial Commission under the terms of the Workmen's Compensation Act, and her right to maintain an action under C. S., 160, for the wrongful death of her intestate defeated?

It would seem that the answer should be in the negative unless the facts alleged, or reasonable inferences from them, show that the relation of master and servant existed between the parties, at the time, and with respect to the transaction resulting in the injury and death; or, in other words, that the negligence causing the death was incident to the employment. That, simply stated, is the position of the plaintiff. She contends that the complaint, in its factual statements, negatives these essential conditions of jurisdiction under the Act. The position of the defendants is expressed in their brief as follows:

"The statute, broad and comprehensive in its terms, excludes all remedies other than through the Industrial Commission, whether plaintiff be invitee or licensee; whether he be on the job, or off the job; whether the accident arises out of employment, or *independently of employment.* All common law remedies of an employee are merged into the remedy under the Act, and if the plaintiff chose not to proceed in the forum provided for her, she is out of court."

Carried to its logical extreme, this would confer immunity from liability upon an employer who inflicts a negligent injury on an employee while the latter is not engaged in any activity of his employment and is far from the scene of his duties, while he is on the way to the grocer or to church, or wherever he has the right to be in the pursuit of his own affairs. The contention is too sweeping to merit serious attention except for the fact that counsel for defense cite certain decisions of this Court which have been recognized as having that significance. *Pilley v. Cotton Mills,* 201 N. C., 426, 160 S. E., 479; *Francis v. Wood Turning Co.,* 208 N. C., 517, 181 S. E., 628. We will examine these cases later.

The major argument here, on both sides, was addressed to this issue, and it constitutes almost the entire subject matter of the briefs. The condition in which the subject is left in the *Pilley* and *Francis cases, supra,* demands attention to that phase of the legal controversy, however obvious the principles governing the jurisdiction may now appear.

I. Section 11 of the Act reads as follows:

"The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, *to pay and accept compensation on account of personal injury or death by accident,* shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law or otherwise, *on account of such injury, loss of service, or death.*" Public Laws of 1929, chapter 120, section 11; Michie's Code, 1939, sec. 8081 (r).

The incidence of the law is on the status created by the contract of employment. It deals with the incidents and risks of that employment, in which concededly is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common law or other rights which pertain to the parties only as members of the general public, disconnected with the employment. "The relation of master and servant and their mutual rights and liabilities is the primary concern of the compensation acts. Unless the relationship of employer and employee exists, the acts have no bearing on a claim for personal injury damages." Schneider, Vol. 1, p. 3, sec. 2. Expressions in sec. 11 regarding the surrender of the right to maintain common law or statutory actions against the employer are not absolute—not words of universal import, making no contact with time, place or circumstance. They must be construed within the framework of the Act, and as qualified by its subject and purposes.

The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage. It is said to be acceptable to both employer and employee, because it reduces the cost of settlement and avoids delay. To the employee, it means a certainty of some sort of compensation for an injury received in the course of business; and to the employer, it reduces unpredictability of loss and puts it on an actuarial basis, permitting it to be treated as "overhead," absorbed in the sales price, and thus transferred to that universal beast of economic burden, the consumer. *Allen v. State,* 160 N. Y. Supp., 85; *Village of Kiel v. Industrial Commission* (Wis.), 158 N. W., 68. It is said to be humanitarian and economical as opposed to wasteful in the conduct of the enterprise, and is referred to the propriety of keeping loss by accident incidental to employment chargeable to the industry where it occurs. *Kennerson v. Thomas Towboat Co.,* 89 Conn., 367, 94 A., 372. It is called "an economic system of trade risk." "Losses incident to industrial pursuits are like wrongs and breakage of machinery—a cost of production." *Mackin v. Detroit-Limken Axle Co.,* 187 Mich., 8, 153 N. W., 49; *Village of Kiel v. Industrial Commission, supra.* It should be charged against

the industry responsible for the injury. *Klawinski v. Lake Shore & N. S. Ry. Co.,* 185 Mich., 643, 152 N. W., 213; Schneider, Workmen's Compensation Law, Permanent Edition, s. 1.

The Industrial Commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration. As is often the case in legislation of this type, the more definitive expressions of jurisdiction are found in the procedural features of the law. See sec. 1, subsection (f), Michie's Code of 1939, sec. 8081 (i) (f). In most jurisdictions having provisions in the law comparable to sec. 11—many of them are identical—the courts have felt constrained to construe the law as exclusive only with respect to injuries for which compensation is provided and not to exclude common law actions where no such provision is made. *Barrencotto v. Cocker Saw Co.,* 266 N. Y., 139, 194 N. E., 61; *Boyer v. Crescent Paper Box Factory.* 143 La., 368, 78 So., 596; *Donnely v. Minneapolis Mfg. Co.,* 161 Minn., 240, 201 N. W., 305; *Triff v. National Bronze & Aluminum Foundry Co.,* 135 Ohio St., 191, 20 N. E. (2d), 232, 121 A. L. R., 1131, overruling *Zajachuck v. Willard Storage Battery Co.,* 106 Ohio St., 538, 140 N. E., 405, and *Mabley & C. Co. v. Lee,* 129 Ohio St., 69, 193 N. E., 745, 100 A. L. R., 511; *Covington v. Berkeley Granite Corp.,* 182 Ga., 235, 184 S. E., 871. See annotations 100 A. L. R., 519, and 121 A. L. R., 1143. Our Court has not observed this rule; but dealing with certain unscheduled occupational diseases, has held common law actions to be excluded, although the Act makes no provision for compensation. *Lee v. American Enka Corporation,* 212 N. C., 455, 193 S. E., 809; *Murphy v. American Enka Corporation,* 213 N. C., 218, 195 S. E., 536. But in these cases the condition admittedly and allegedly arose out of the employment. The cases do not support defendants' contention.

In *Francis v. Wood Turning Co.,* 208 N. C., 517, 181 S. E., 628, upon which the defendants mainly rely, the decision, as the opinion states, "is affirmed on the authority of *Pilley v. Cotton Mills* (201 N. C., 426, 160 S. E., 479)," and it is said that the facts in that case are identical "in the instant case." But the two cases are similar only in legal history—in the fact that before a common law action was resorted to, the claims were presented to the Industrial Commission, compensation denied, and no appeal taken. In fact, as we shall presently see, there was one appeal taken after compensation was denied in the *Francis case, supra,* but the facts in these cases are far from identical.

The facts in the *Pilley case, supra,* are not stated in the report. They may be found in I. C. File 22050, Docket No. 43. Pilley fell while on duty and in the course of his employment as a watchman in defendant's

cotton mill, but was denied compensation because it was found that he collapsed as a result of a combination of diseases from which he had suffered for a long while. The complaint in the case brought in the Superior Court substantially states that he received his injury during the course of employment and through an accident arising out of it, and the demurrer in this Court points out the paragraph of the complaint so stating. Bound Records and Briefs, Fall Term 1931, 5, No. 172. As distinguished and resting upon that ground, the result reached in the *Pilley case, supra,* is correct.

The controversy in the *Francis case, supra,* came here on appeal twice—*Francis v. Wood Turning Co.,* 204 N. C., 701, and *Francis v. Wood Turning Co.,* 208 N. C., 517, *supra.* Too tedious to repeat here, the history of the case and factual background not found in the later report may be gotten from the first and fuller report in 204 N. C., 701, *et seq.*

It is sufficient to say that the case came here on plaintiff's appeal from a judgment in the court below sustaining a demurrer grounded on the fact that jurisdiction had been sustained on conflicting evidence theretofore, and the law as laid down in the former appeal had become the law of the case; and the further plea that, as plaintiff had resorted to the Industrial Commission and had not appealed from an adverse decision, under the judgment of that tribunal the matter was *res judicata* (Records and Briefs, Fall Term, 1935, 20, No. 17). Upon the facts and procedural history of the case, the result reached in the *Francis case, supra,* might be sustained. In neither the *Pilley case, supra,* nor the *Francis case, supra,* was the question presented here discussed. The opinions, seated alone upon the facts reported, are too broad in their implications.

II. Under the realistic view our Court has always taken of the contract of employment, we cannot hold that the master-servant relation is evoked by the social gesture when the employee attends a good will picnic at the invitation of the employer. There are cases guardedly so holding under the circumstances of the particular case, it is true. *Stakonis v. United Advertising Corp.,* 110 Conn., 384, 148 A., 334; *Conklin v. Kansas City Public Serv. Co.,* 226 Mo. Ap., 309, 41 S. E. (2d), 608; *Sinclair v. Wallach Laundry,* 228 N. Y. S., 686. In other cases it has been denied: *F. Becker Asphaltum Roofing Co. v. Industrial Commission,* 333 Ill., 340, 164 N. E., 668; *Maeda v. Department of Labor and Industry,* 192 Wash., 87, 72 P. (2d), 1034. In the *Stakonis case, supra,* it was noted that the employee was under direct order to attend the picnic, with a penalty for disobedience if he did not; but by *dictum* it is said that where there is a mere invitation to enjoy the hospitality of the employer, there would be no direct relation between the outing and the employment. Furthermore, some weight is given to the fact

that Stakonis was to be paid for the day's attendance. "It may fairly be said also that acting under orders of his employer, he was fulfilling one of the duties of his employment, or at least he was doing something which this defendant had annexed to the employment and made incidental to it."

In *Hildebrand v. McDowell Furniture Co.*, 212 N. C., 100, 193 S. E., 294, the employee was killed while returning on Sunday from a furniture exposition which he had attended with the superintendent of the factory merely for the pleasure of the trip, and did not work for his employer while on the trip. In that case, defining an accident arising in the course of the employment, the Court repeats the definition found in *Conrad v. Foundry Co.*, 198 N. C., 723, 725, as one which "occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed"; and finds that the phrase out of and in the course of employment "embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business." But compensation was denied on the ground that the activity of the employee had no relation to any duty he owed the master and did not tend to further his business. The Court said: "He did not work for his employer on the trip, and he was not compelled to go."

In *Perdue v. Board of Equalization*, 205 N. C., 730, 172 S. E., 396, this Court affirmed an award made to the dependents of a teacher in the graded schools at Statesville, who was killed while coaching at a football game away from the school in which he was employed. And in *Callihan v. Board of Education*, 222 N. C., 381, the Court affirmed an award made by the Industrial Commission to a teacher of vocational subjects in the public schools, who at the time of his injury was on the way to attend a monthly meeting of others engaged in like work. However, in each of these cases the evidence was sufficient to connect the activities definitely with the contract of employment.

In each case where compensation was denied, it was on the principle that the facts upon which it was claimed had no connection with the employment and, therefore, the master-servant relation which is necessary to the application of the Workmen's Compensation Act is absent. To this relation alone, is compensability an incident?

The outing sponsored by the employers in the case at bar occurred on Sunday—(see *Ridout v. Rose's Stores, Inc.*, 205 N. C., 423, 171 S. E., 642)—the employee was not paid for attendance, nor penalized for non-attendance, nor ordered to go, but was merely invited. He did no work and there is no suggestion that on this occasion he was under the control and direction of the employer in any respect. He owed no duty to the

employer or to other invited guests, or to the occasion itself, except that which was involved in civility and the observance of the social amenities. It seems a necessary conclusion that the Workmen's Compensation Act has no relation to the circumstances of his case.

The amendment made by ch. 449, Public Laws of 1933, found in Michie's Code of 1939 as Sec. 8081 (ff) (b), does not require the plaintiff to file her claim with the Industrial Commission, as a court of first instance, before bringing her action in the Superior Court. The section was intended to defer the time in which action in the proper court might be brought when mistaken resort to the Commission has been made. Such other implications as it may have are not favorable to the defendants on the question of exclusiveness of the jurisdiction.

We have nothing to do with whether the plaintiff can recover in her present action. We only say that the facts of the case as alleged in the complaint do not bring it within the jurisdiction of the Industrial Commission.

The judgment of the court below dismissing plaintiff's action is

Reversed.

STACY, C. J., concurring in result: The complaint states no claim for compensation within the Workmen's Compensation Act. *Wilson v. Mooresville,* 222 N. C., 283; *Hildebrand v. Furniture Co.,* 212 N. C., 100, 193 S. E., 294. And while the allegation in respect of employer-employee relationship might have warranted the Industrial Commission in so adjudging, had claim for compensation been filed with it, which accordingly would have tolled the provisions of C. S., 160 until final judgment by virtue of Chap. 449, Sec. 2, Public Laws 1933 (Michie's Code 8081 [ff]), still the jurisdiction of the Superior Court attaches in the first instance because of the character of the cause of action alleged. *Okla. Steel Cast. Co. v. Banks,* 181 Okla., 503, 74 P. (2d), 1168. The commercial, occupational or professional status of employer-employee relationship which is covered exclusively by the Workmen's Compensation Act was lacking at the time of and in respect to the transaction out of which plaintiff's intestate's injury arose and his death ensued. *Ridout v. Rose's Stores, Inc.,* 205 N. C., 423, 171 S. E., 642; *McCune v. Mfg. Co.,* 217 N. C., 351, 8 S. E. (2d), 219. See *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 849. The relation was after the similitude of invitor and invitee or more nearly that of host and guest. *White v. McCabe,* 208 N. C., 301, 180 S. E., 704; *Norfleet v. Hall,* 204 N. C., 573, 169 S. E., 143. The scene is outside the field of industrial employment and the coverage of the Workmen's Compensation Act. *Hollowell*

v. Dept. Con. and Devp., 206 N. C., 206, 173 S. E., 603. This defeats the jurisdictional challenge.

DENNY, J., joins in concurring opinion.

BARNHILL, J., dissenting: While, as now drafted, the majority opinion correctly states the question presented for decision, I am still unable to concur in the conclusion reached.

The case comes here on demurrer. The only question raised by the demurrer is that of jurisdiction. If it appears from the pleadings that the negligence alleged in the complaint had no relation to the employment or to the business with which it was concerned the Superior Court had jurisdiction and the judgment should be reversed. Hence, the one and only question debated in the briefs and presented to us for decision is this: Does the Industrial Commission have jurisdiction of the cause of action set out in the complaint; that is, in effect, does it appear from the pleadings that the master-servant relation existed at the time of and in respect to the alleged injury and death?

In *Reaves v. Mill Co.,* 216 N. C., 462, 5 S. E. (2d), 305, it is said that insofar as it depends upon the statute alone the jurisdiction of the Industrial Commission attaches (a) if the contract of employment was made in this State; (b) if the employer's place of business is in this State; and (c) if the residence of the employee is in this State. A practical application of the statute requires the addition of one other requisite: the employer-employee relation must exist at the time of and in respect to the injury or death or to the transaction out of which such injury or death arose. On this we now seem to be in agreement.

The relevant provision of the statute is as follows: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this Act, respectively, *to pay and accept* compensation on account of personal *injury or death* by accident, *shall exclude all other rights and remedies* of such employee, his personal representative, . . . as against his employer *at common law or otherwise,* on account of such injury, loss of service, or death." Sec. 11, Ch. 120, P. L., 1929. There is no limitation or qualification here. The sole requisite is that of the employer-employee relation in respect to the transaction out of which the injury arose. That this is the criterion of jurisdiction is the clear import of the statute. If this relation exists all other remedies are excluded. There is no middle ground and no concurrent jurisdiction. The jurisdiction of the Commission, whatever it may be, is exclusive.

When the employer-employee relation exists the employer is liable only to the extent and *in the manner specified* in the Act. Sec. 10.

Such rights and remedies are exclusive, sec. 11, and the Industrial Commission alone has jurisdiction. *Hedgepeth v. Casualty Co.*, 209 N. C., 45, 182 S. E., 704; *Pilley v. Cotton Mills*, 201 N. C., 426, 160 S. E., 479; *Tscheiller v. Weaving Co.*, 214 N. C., 449, 199 S. E., 623; *Cooke v. Gillis*, 218 N. C., 726, 12 S. E. (2d), 250.

It is admitted in the pleadings that the relation of employer and employee, as those terms are defined in the Act, existed between the deceased employee and the defendant employer. Did it exist at the time of and in relation to the injury and death or to the transaction out of which such injury and death arose? If the pleadings so disclose the judgment should be affirmed.

It is alleged in the complaint that it had become the policy or custom of the defendants to provide an annual outing or picnic for their employees "said outing or picnic being for the purpose of promoting employer-employee relations"; that pursuant to said policy an arrangement was made for an outing or picnic at Southport, N. C., for a group of its employees; that the plaintiff's intestate was included in said group at the solicitation of the defendants' manager; that he went as a member of said group; that said group of employees, including plaintiff's intestate, *was under the direction and supervision of said manager* and all expenses of said employees were being paid by the defendants; that the manager chartered the "Nightingale" with its crew for the purpose of taking said employees, including plaintiff's intestate, out to the fishing grounds in the Atlantic Ocean; and that the plaintiff's intestate and the other employees in the group boarded the boat *at the direction of* said manager.

The employer, as such, extended the invitation. The plaintiff's intestate, as employee, accepted. The trip was for the benefit of the business of the employer. The "Nightingale" was, for the time being, the premises of the employer. The employee was on the premises *at the direction* of the manager of the employer and to participate in promoting the best interest of his master. The annual picnic had become a custom—an incident of the business—for the purpose of promoting employer-employee relations, a phase of business vitally affecting its successful operation too often neglected or completely ignored by business management. Here, at least, we have employers who recognize that their employees are more than mere chattels and that upon their good will and friendship the success of the business in which they are all engaged, some as employers and some as employees, very largely depends. I, for one, am unwilling to take the position that this enterprise, prompted by this worthy motive, had no relation to the employment or to the business with which it was concerned. Instead, I insist that it related directly and substantially to the business and to the best

interest of both the employer and the employee. It tended to promote the business of the employer and to give assurance of continuing and profitable employment to the employees. In this both were interested. Surely, then, the employer-employee relation existed in respect to this transaction.

That the deceased received nothing other than entertainment in return for his time; that he performed no duty of his employment; that the injury did not arise out of or in the course of the employment; and that the risk was not incident to the employment are all facts bearing only upon compensability. They do not control jurisdiction.

To hold otherwise is but to hold that the Commission has jurisdiction only when the claim is compensable and every non-compensable case must be dismissed for want of jurisdiction. Likewise, it would require us to overrule a long line of decisions.

Nor do I agree that, in order to sustain the jurisdiction of the Industrial Commission in this case, it is necessary for us to take the view that where a contract of employment exists between parties for any purpose whatever, then by operation of the Act, all negligent injury to the employee of whatever nature, however disconnected with the employment and wherever or under whatever circumstances consummated, is a matter exclusively within the jurisdiction of the Industrial Commission. This, it is true, is apparently the view advanced by defendants. We are not required, however, to adopt all their argument in order to sustain the contention that upon this record it affirmatively appears that the Industrial Commission has jurisdiction of plaintiff's claim.

That the injury did not arise out of or in the course of employment and that it resulted from a risk which was not incident to the employment are by no means determinative of jurisdiction. The existence or non-existence of these facts is to be ascertained after jurisdiction is assumed and their non-existence does not defeat the jurisdiction of the Commission. The existence of the relation is all that is required. *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; *Davis v. Mecklenburg County*, 214 N. C., 469, 199 S. E., 604; *Dependents of Phifer v. Dairy*, 200 N. C., 65, 156 S. E., 147; *Bray v. Weatherly & Co.*, 203 N. C., 160, 165 S. E., 332 and cases cited; *Lassiter v. Tel. Co.*, 215 N. C., 227, 1 S. E. (2d), 542; *Wilson v. Mooresville*, 222 N. C., 283; *Bryan v. T. A. Loving Co.*, 222 N. C., 724; *Davis v. Veneer Corp.*, 200 N. C., 263, 156 S. E., 859; *Francis v. Wood Turning Co.*, 204 N. C., 701, 169 S. E., 654; *Beavers v. Power Co.*, 205 N. C., 34, 169 S. E., 825; *Smith v. Machine Co.*, 206 N. C., 97, 172 S. E., 880; *Porter v. Noland Co.*, 215 N. C., 724, 2 S. E. (2d), 853.

In the *Hildebrand case, supra,* the evidence tended to show that the defendant furniture manufacturer entered an exhibit in an exposition of finished furniture; that the exposition was solely to sell furniture to retailers and could in no way help defendant's employees as to methods of manufacture or improve their usefulness to the defendant; that the foreman of the glue room, along with other foremen of the plant, was asked to go; that employees who elected to go were not paid for time and were given no orders while on the trip, but that part of their expenses was paid by defendant, and plaintiff's intestate was requested to go after the end of the work week as a matter of courtesy as an "outing" or pleasure trip. Claimant's intestate was killed in an automobile accident while he was driving the car of his fellow employee back to the town in which the defendant's plant was located.

In the *Smith case, supra,* the employee left his place of employment, went to a store for his own convenience and was killed when two armed men undertook to rob the merchant.

In the *Porter case, supra,* the employee used his employer's car for a week-end pleasure trip and was injured on the return trip.

In the *Beaver case, supra,* a private photographer was taking a group picture of the night shift of the mill employees on the premises of the employer. The employer had no interest in having the picture taken; it was not for use in the business; it included only those who voluntarily wished to appear in the group; the photographer alone intended to profit; the employees had not begun their work. The bench on which claimant and others were sitting collapsed, injuring claimant.

Without undertaking to analyze the other cited cases it is sufficient to say that the facts were similar in that in each case it affirmatively appeared that at the time of the injury the employee was not about his master's business and the injury resulted from a risk which was not incident to his work. In each case cited above the Court sustained the jurisdiction of the Industrial Commission.

But it may be said that in none of these cases did the Court make any reference to jurisdiction. On this point, silence is the strength of the decisions.

Our jurisdiction is derivative. If the inferior court is without jurisdiction we have none, and it has been the consistent policy of this Court to dismiss on motion or *ex mero motu* so soon as a defect in jurisdiction is made to appear. "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action; and, if it does not, such action is, in law, a nullity. *Burroughs v. McNeill,* 22 N. C., 297; *Washington County v. Land Co.,* 222 N. C., 637; *McCune v. Mfg. Co.,* 217 N. C., 351, 8 S. E.

(2d), 219; *Shepard v. Leonard, ante,* p. 110. Hence, when we considered these and the many other cases of like import which have been before this Court on the merits we, of necessity, sustained the jurisdiction of the Industrial Commission.

If we were correct in so doing, particularly in *Hildebrand v. Furniture Co., supra; Porter v. Noland Co., supra,* and *Beaver v. Power Co., supra,* when nothing more than the relationship and an injury appeared, I cannot perceive how we can escape the same conclusion here.

Sec. 2, Ch. 449, P. L., 1933, to my mind, evidences an intent on the part of the Legislature that an employee shall test his rights first before the Industrial Commission. Otherwise, a converse provision would have been made so that if he proceeds in the Superior Court and loses he will then have time to present his claim to the Commission. He is protected if he fails to establish the employer-employee relation before the commission but he has no other recourse if he, in the beginning, seeks to evade the provisions of the Act. Ch. 120, P. L., 1929.

In any event, this statute rebuts any suggestion that the conclusion that the Industrial Commission has jurisdiction creates a "No Man's Land" in respect to jurisdiction of claims of employees for injuries shown to have no relation to the employment. In the event the commission finds that the employer-employee relation did not exist at the time of and in respect to the injury or to the transaction out of which such injury arose the doors of the Superior Court are still open to the employee. He can then present his cause in that forum.

The case comes to this: plaintiff is seeking now to assert a right her intestate surrendered in exchange for the benefits accruing to him under the Act. She should be required to present her cause in the tribunal created by the Act.

Since this dissent was tendered then re-drafted to meet changes made in the majority opinion there have been additional changes, both in substance and in form, in the majority opinion. "Nor is this all. Since writing the above in answer to the theory formerly advanced by the majority, a concurring opinion has been filed herein. The same procedure was followed in the case of *Evans v. Rockingham Homes, Inc.*, 220 N. C., 253. Here, as there, the concurrence gives added significance to the dissent." *Stacy, C. J.,* in dissenting opinion in *Williams v. McLean*, 221 N. C., 228, at p. 231, 19 S. E. (2d), 867.

Due to these circumstances further change in the form of this dissent may be in order. Be that as it may, my one and only object is to express my views on the law of the case—now in part adopted by the majority. This I have done. I am content to let it stand as written. However, it is necessary for me to add something in reply.

In *Hildebrand v. Furniture Co., supra,* an award was made. This Court reversed for the reason that the evidence failed to disclose that the injury and death arose out of and in the course of employment. It is so stated in the first paragraph of the opinion. This is all I am capable of reading into the decision.

On the first appeal in the *Francis case,* 204 N. C., 701, 169 S. E., 654, this Court specifically held that the employer-employee relation existed and the cause was remanded. The Commission then denied compensation. Francis sued in the Superior Court and a demurrer was sustained. It is said that we affirmed on the grounds that the judgment of the Industrial Commission was *res judicata.* Suffice it to say that if the Commission had no jurisdiction, no order it made could be *res judicata.* Such order would be a nullity and a nullity decides nothing.

But we may write the *Hildebrand* and the *Francis cases* out of the books and there still remain numerous cases to the same effect. I have read with care the cases cited in the majority and the concurring opinion, as well as those cited here. So far as I can find we have only two decisions in which the cause was decided adversely to the claimant for the reason that the employer-employee relation was not shown to exist at the time and in respect to the injury. The two exceptions are *Ridout v. Rose's Stores, Inc.,* 205 N. C., 423, 171 S. E., 642, and *Hollowell v. Dept. of Conservation and Development,* 206 N. C., 206, 173 S. E., 603. Each is factually distinguishable from the instant case.

We have decided, in cases originating in the Superior Court, that the employer-employee relation gives exclusive jurisdiction to the Industrial Commission even though the injury did not arise out of or in the course of the employment. *McCune v. Mfg. Co., supra; Pilley v. Cotton Mills, supra; McNeely v. Asbestos Co.,* 206 N. C., 568, 174 S. E., 509; *Francis v. Wood Turning Co., supra; Lee v. American Enka Corp.,* 212 N. C., 455, 193 S. E., 809; *Murphy v. American Enka Corp.,* 213 N. C., 218, 195 S. E., 536.

The substance of these decisions is epitomized in the syllabus in the *Lee case* as follows: "Even though the injury is not compensable under the Compensation Act the Superior Court properly dismissed the action, since plaintiff, by accepting the provisions of the Compensation Act, surrendered his right to maintain an action at common law to recover for an injury caused by the negligence of his employer, and in exchange therefor received the benefit of the employer's assumption of liability for injuries compensable under the Act regardless of negligence."

But now, after much writing on both sides, we must again come to the only real question posed for decision: Does it affirmatively appear from the admissions and the allegations made in the complaint that the employer-employee relation existed at the time of and in respect to the

injury and death of plaintiff's intestate? If so, the judgment should be affirmed. If not, it should be reversed. I vote to affirm.

WINBORNE, J., concurs in dissent.

ELSIE E. BROOCKS AND HUSBAND, T. A. BROOCKS, v. CONSTANCE L. MUIRHEAD AND WILLIAM MUIRHEAD.

(Filed 2 June, 1943.)

1. **Dedication §§ 1, 4: Municipal Corporations §§ 14, 29—**

When the owner of land has it subdivided and platted into lots, streets, and alleys, and sells and conveys the lots or any of them with reference to the plat, he thereby dedicates the streets and alleys, and all of them, to the use of the purchasers and those claiming under them, and to the public, and it is not necessary for such streets and alleys to be opened or accepted by the governing body of the town or city if they are within the limits of a municipality.

2. **Dedication §§ 1, 4: Estoppel § 3—**

Where lands have been surveyed and platted and sold, showing lots, streets, squares, parks and alleys, the original owner and those claiming under him, with knowledge of the facts, or with notice thereof, either express or constructive, are estopped to repudiate the implied representation that such streets and alleys, parks and places will be kept open for public use, although not presently opened or accepted or used by the public.

3. **Dedication § 4: Municipal Corporations § 14—**

If streets or alleyways in a subdivision of lands be obstructed there is created thereby a public nuisance, and each purchaser, or owner of property therein can, by injunction or other proper proceeding, have the nuisance abated, as there is in all such cases an irrebuttable presumption of law that such owner has suffered peculiar loss or injury.

APPEAL by defendants from *Hamilton, Special Judge,* at January Term, 1943, of DURHAM.

Civil action to have *feme* plaintiff declared legal owner of right of ingress and egress upon a certain alleyway and to enjoin defendants from obstructing the alleyway and to require *feme* defendant to remove obstructions therefrom.

While defendants, in their answer, deny the existence of the alleyway and of any interest of plaintiffs therein, as they allege in the complaint, these facts appear to be uncontroverted:

In the year 1926 James L. Griffin and others, who owned certain land adjoining the residential development in the city of Durham known as

Forest Hills, subdivided same into blocks of building lots for residential purposes and provided access thereto by certain streets, and caused a plat of the subdivision to be prepared and registered in the office of the Register of Deeds of Durham County in Book of Plats 6, at page 190. The subdivision was named Knollcrest. The blocks were designated alphabetically, the lots were numbered and the streets were named. On this plat Block C is bounded (1) on the west by Fairview Street which runs on a curve on general course of northwest and southeast, (2) on the north by Burbank Street which runs in general east and west direction, (3) on the east by the Forest Hills property, and (4) on the south by Homer Street which runs in general east and west direction. This block consists of two tiers of lots. Between these tiers there appears an unnamed strip 16 feet wide extending from Fairview Street in an eastern direction approximately through the middle of the block to the Forest Hills property and then with it in southern direction to Homer Street. The northern tier of lots Nos. 1 to 14, both inclusive, numbered consecutively from west to east, front on the south side of Burbank Street and extend in southern direction to the unnamed 16-foot strip, and the southern tier of lots Nos. 15 to 26, both inclusive, numbered consecutively from west to east, front on the northern side of Homer Street and extend in northern direction to this unnamed 16-foot strip. The part of the strip extending south to Homer Street as shown on the map formed the eastern boundary of lot 26 in Block C. Later, in the year 1930, the location of this part of the 16-foot strip, that is, the part lying between lot 26 and the Forest Hills property as above described, was changed by the terms of certain deeds and located on eastern half of lot 26, adjacent to the western half thereof, and a plat, dated 12 March, 1930, showing the change, was registered in Book of Plats 8, page 168, in the office of Register of Deeds of Durham County. On this plat the 16-foot strip is designated "16. ft. alley." Lots were sold and conveyed by James L. Griffin and others with respect, and by reference to the plat registered in Book 6 of plats, page 190, as well as with respect, and by reference in some instances to the plat registered in Book of Plats 8, page 168.

Both plaintiff Elsie E. Broocks and defendant Constance L. Muirhead acquired title to lots in the subdivision, Knollcrest, by *mesne* conveyances from James L. Griffin and others who owned and subdivided it. Plaintiff Elsie E. Broocks purchased lot No. 19 in Block C in January, 1937, and built a dwelling house on it, and she and her husband reside there. Defendant Constance L. Muirhead purchased lots Nos. 23, 24, 25, and western half of No. 26 in Block C in May, 1936. In the deeds to plaintiff Elsie E. Broocks and to defendant Constance L. Muirhead,

respectively, the description of the lots conveyed referred to the 16-foot strip through Block C as a 16-foot alley.

Thereafter, on 8 November, 1937, the executrix of James L. Griffin, deceased, and others, made a deed to Rental Realty Company, conveying therein by specific description a boundary of land "the same being Lots 7, 8, 9, 10, 11, 12, 13 and 14, Block C, and the strip of land 16 feet wide immediately south of said lots, shown as a 16-foot alley, said 16-foot strip of land extending from the northwest corner of lot No. 20 in an easterly direction to the west line of lot No. 85 of the Forest Hill property." Reference is made therein specifically to plat of Knollcrest property recorded in office of Register of Deeds for Durham County in Plat Book 6 at page 190. This deed also contains consent and agreement that "the portion of the 16-ft. alley shown on plat of Knollcrest" recorded as above set forth, "may be abandoned, and said portion of said alley may be closed."

Thereafter, on 29 November, 1937, Rental Realty Company made a deed to defendant Constance L. Muirhead conveying therein by specific description a boundary of land, "the same being lots 11, 12, 13 and 14 and the eastern 16 feet of lot 10, in Block C, as shown on Plat of the Knollcrest property of James L. Griffin and others, recorded in the office of the Register of Deeds for Durham County, and which property includes that portion of the 16-foot alley shown on said plat lying immediately south of the above numbered lots." This deed contains also this statement: ". . . it is understood and agreed that the party of the second part may close that part of said 16-foot alley extending from the northwest corner of lot No. 23 in an easterly direction, to the west line of lot No. 85 of the Forest Hill property." Lot No. 23 is one of the lots acquired by defendant Constance L. Muirhead in May, 1936, as above stated.

Thereafter, by deed dated 30 November, 1937, several parties, who owned "property either in Knollcrest or in that portion of Forest Hills adjoining Knollcrest" after reciting, among other things, that that part of "said 16 foot alley as shown on plat extending from the northwest corner of lot No. 20 in Block C. in an easterly direction to the west line of Forest Hills property has never been opened and has never been used," quitclaimed to defendant Constance L. Muirhead, Rental Realty Company and F. C. Owen and wife "all right, title, and interest which they have, or may have, in and to the following described property" specifically describing by reference to lots and Block C shown on the plat of Knollcrest, that portion of the "16 ft. alley" to which above recital related—particularly releasing to defendant Constance L. Muirhead "the eastern 175 feet of the above described strip," and to Rental Realty Company and F. C. Owen and wife the remaining portion thereof.

Thereafter, on 29 January, 1940, by exchange of deeds Rental Realty Company and F. C. Owen and wife quitclaimed to defendant Constance L. Muirhead, and she and her husband quitclaimed to Rental Realty Company and F. C. Owen and wife "all right, title and interest which they have, or may have, in and to" the parts of the alley as particularly released to them respectively as above set forth, "with the express privilege of abandoning said alleyway."

Defendant, Constance L. Muirhead, having thus acquired title to lots on both sides of that portion of the 16 foot strip of land, designated in the deeds an alley, extending east from the northwest corner of lot 23 in Block C, and having, by *mesne* conveyance, obtained consent of the original owners, and of some parties who owned lots in Knollcrest, but not of plaintiff Elsie E. Broocks, and perhaps not of others, built two brick walls which the evidence discloses are "probably several feet high" across the alleyway, with a fence on one of the walls, which the evidence discloses was probably "6 or 8 feet high." The fence, however, was later taken down. She has also planted shrubbery and has a badminton court on the 16 foot alley. And she has constructed a home upon her property. The 16 foot alley is open from Fairview Street to the lot of plaintiff Elsie E. Broocks. But that part back of the three fifty foot lots which lie between her lot and those of defendant, Constance L. Muirhead, is covered with underbrush and trees and is not in condition for vehicles to travel thereon.

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

"1. Was the 16-foot strip of land extending eastwardly from Fairview Street through Block C as shown on map of Knollcrest appearing in Book 6, page 190, dedicated as a public alley, as alleged in the complaint? Answer: Yes.

"2. If so, is the plaintiff entitled to the easement right of ingress and egress to, over and upon said alleyway? Answer: Yes."

The court thereupon signed judgment in accordance with verdict, and granted injunction as prayed. Defendants appeal to Supreme Court and assign error.

H. G. Hedrick for plaintiffs, appellees.

J. L. Morehead for defendants, appellants.

WINBORNE, J. While three questions are presented on this appeal by defendants, all of them are answered by applying the principles of dedication or equitable estoppel, and of incident remedy.

When the owner of land has it subdivided and platted into lots, streets and alleys, and sells and conveys the lots or any of them with reference to the plat, he thereby dedicates the streets and alleys, and all of them,

to the use of the purchasers and those claiming under them, and of the public. See *Ins. Co. v. Carolina Beach,* 216 N. C., 778, 7 S. E. (2d), 13, and authorities cited.

In *Hughes v. Clark,* 134 N. C., 457, 46 S. E., 956, it is stated that "Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions, streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open, and it makes no difference whether the streets be in fact open or accepted by the governing board of the towns or cities if they be within municipal corporations." To the same effect are other decisions, among which are *Green v. Miller,* 161 N. C., 24, 76 S. E., 505; *Sexton v. Elizabeth City,* 169 N. C., 385, 86 S. E., 344; *Wittson v. Dowling,* 179 N. C., 542, 103 S. E., 18. In the *Sexton case, supra,* it is stated: "The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, bases upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created." And again in the same case: "It is held that the original grantor, who sold by the map or diagram of the land as laid out into blocks and lots, streets and avenues, *and those claiming under him,* are estopped to deny the right of prior purchasers of lots to an easement in the streets represented on the map; but it is not a strict estoppel but one arising out of the conduct of the party who originally owned the land and platted it for the purpose of selling lots, and is predicated upon the idea of bad faith in him, or those claiming under him, with knowledge of the facts, or with notice thereof, either express or constructive, to repudiate his implied representation that the streets and alleys, parks and places will be kept open and unobstructed for the use of those who buy from him."

Also in *Wittson v. Dowling, supra, Hoke, J.,* expressed the principle in this way: "It is the recognized principle here and elsewhere, that when the owner of suburban property or other has the same platted, showing lots, parks, streets, alleys, etc., and sells off the lots of any of them, in reference to the plat, this, as between the parties, will constitute a dedication of the streets, etc., for public use, although not presently opened or accepted or used by the public."

And in *Conrad v. Land Co.,* 126 N. C., 776, 36 S. E., 282, an action to enjoin defendant from dividing up and selling of an open square, and from closing up or narrowing the streets leading to and surrounding it, this Court in sustaining the injunction, said: "The plaintiffs had been

induced to buy upon the map and plat, and the same was based not merely on the price paid for the lots, but it was the further consideration that the streets and public grounds designated on the map should further be kept open to the purchasers and their heirs."

Applying these principles to the factual situation in hand, the first contention of defendants that the court erred in refusing to grant their motion for judgment as of nonsuit for that there is no allegation or proof of "any special, particular, or peculiar injury of a substantial nature" to plaintiff by reason of acts of defendants of which complaint is made, is met by the holding of this Court in *Hughes v. Clark, supra,* where it is declared that "if the streets be obstructed there is created thereby a public nuisance, and each purchaser can, by injunction or other proper proceedings, have the nuisance abated, as there is in all such cases an irrebuttable presumption of law that any complaining purchaser of a lot or lots has suffered peculiar loss and injury."

In this connection it must be borne in mind that plaintiff, Elsie E. Broocks, is not asserting rights enjoyed by the general public. She is asserting rights which were acquired when she purchased, and by reason of her purchase of lot 19 in Block C with reference to the map of Knollcrest subdivision. By such purchase she acquired the appurtenant right to use the 16 foot alleyway, and to have same kept open and freed of obstruction for her use. So far as she, as a purchaser, is concerned, the dedication of the alleyway was complete, irrespective of whether it was opened and accepted by the governing body of the city for public use. In such case an irrebuttable presumption of law arose that she "has suffered peculiar loss and injury."

The second contention of defendants is that the court erred in enjoining the defendants from interfering with any rights of plaintiffs to use the strip of land in question, in the absence of allegation or proof, or finding that defendants are interfering with any such rights of plaintiffs.

The original owners, having sold lots with reference to the plat, which they caused to be made and registered, as well as those claiming under them, are estopped to deny, as against purchasers of lots, the existence of the easement in and to the alleyway and the right of plaintiff, as a purchaser of a lot with relation to the plat, to use the alleyway and to have it kept open and freed of obstruction so that she can use it. A denial of the right to use the alleyway would conceivably materially affect the selling value of plaintiff's lot. Moreover, the plaintiffs allege in their complaint, and defendants admit in their answer that defendant Constance L. Muirhead has built and is maintaining two brick walls, in the language of the answer, "across what plaintiff contends is an alleyway," and that defendants have built a fence, planted shrubbery, and made a badminton court on what plaintiffs contend is an alleyway. The jury finds with

plaintiffs' contention. But defendants contend that as that part of the alleyway between their lots and plaintiff's lot is not now open and in condition to be used by vehicular traffic, the brick walls, etc., have not interfered with use of the alleyway by plaintiffs. Even though such condition exists, the record fails to show that plaintiffs have done anything to deprive plaintiff Elsie E. Broocks of her right to the use of the alleyway, and to the extent that the brick walls are an obstruction defendants are interfering with the use of the alleyway. And the remedy of injunction is available to her. Pertinent thereto, it is held in the case of *Wheeler v. Construction Co.*, 170 N. C., 427, 87 S. E., 221, that "platting into lots and streets and selling the lots by reference to the map, dedicates the streets thereon to the public in general and to the purchaser of lots in particular"; that "injunction is the proper remedy," and that "the obstruction and closing up the street creates a nuisance, and each purchaser can, by injunction, or other proper proceeding, have the nuisance abated."

The third contention of defendants is that, there being no allegation, or proof or finding that defendants have placed any obstructions upon the strip of land which has prevented the use of it by plaintiffs, the court erred in directing defendants to remove all obstructions which they placed upon same. What is said above with regard to the second contention applies with equal force here, and, hence, we hold that the court properly ruled.

Furthermore, the charge of the court fairly presented the case, and there is no error in refusing to charge as requested by defendants.

The authorities relied upon by defendants may not be applied to facts of the present case. We find

No error.

J. M. BRANHAM, EMPLOYEE, v. DENNY ROLL & PANEL COMPANY, EMPLOYER, AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER.

(Filed 2 June, 1943.)

1. Master and Servant §§ 37, 40a—

The general purpose of the Workmen's Compensation Act, in respect to compensation for disability, is to substitute, for common law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort.

2. Master and Servant § 40a—

Disability, under the Workmen's Compensation Act, is measured by the capacity or incapacity of the employee to earn the wages he was receiving

at the time of the injury, by the same or any other employment. And the fact that the same wages are paid by the employer, because of long service, does not alter the rule.

3. Master and Servant § 53a—

Where the Industrial Commission finds a general partial disability, in adjudging the rights and liabilities of the parties, the Commission may direct compensation at the statutory rate, whenever it is shown, within 300 weeks of the accident, that claimant is earning less than his former wages, due to the injury. By so doing the Commission retains jurisdiction for future adjustments and does not exceed its authority.

4. Master and Servant § 40a—

Compensation for disfigurement is not required by the Act. Its allowance or disallowance is within the legal discretion of the Industrial Commission.

5. Same—

Disfigurement, under the Workmen's Compensation Act, must be evidenced by an outward observable blemish, scar or mutilation, and it must be so permanent and serious as to hamper or handicap the person in his earning or in securing employment.

APPEAL by plaintiff from *Grady, Emergency Judge,* at November Term, 1942, of GUILFORD. Modified and affirmed.

Claim for compensation for general partial disability under the Workmen's Compensation Act. The plaintiff, an employee of defendant Denny Roll & Panel Company, on 26 April, 1940, suffered an injury arising out of and in the course of his employment. While assisting in loading a box car he started to get out the door. His foot slipped and he fell to the ground. As a result he suffered a contusion over the lumbar spine. He is now suffering a 33⅓%, or more, general partial disability in the loss of the use of his back. This loss of use of his back is due to an old compressed fracture of the twelfth dorsal vertebra which "is probably due to this old fractured spine which probably occurred at the time of the injury." In all probability he will never again be able to do heavy manual labor.

At the time of and prior to his injury claimant was in charge of the machine room and of loading and unloading cars and trucks, acting in a supervisory capacity, "to keep things moving." He would "pinch-hit" if a man was off his machine or in the event other physical assistance was needed. He returned to his job within seven days (the waiting period under section 28 of the Act) after his injury. As he was not able to do the physical work he had theretofore done his employer hired another man and assigned some of the duties of the superintendent to claimant. He is earning the same wage and has lost no compensable time from his work. All medical bills except those of Duke Hospital

and for dental services have been paid by the employer or insurance carrier.

The commission found:

"1. That the claimant, J. M. Branham, has a 33⅓% or more general partial disability under Section 30 and that he has been tendered and has accepted employment suitable to his capacity as provided for in Section 32; and that Branham is entitled to compensation under Section 30 for 300 weeks from the date of the accident, April 26th, 1940, less such time that he has been paid full wages.

"2. That Branham has been and is being paid full wages in lieu of compensation by his employer; that Branham has lost not more than seven days (the waiting period, Section 28) from his work due to said injury by accident."

It thereupon ordered that the defendants pay to the proper parties "the reasonable medical, surgical and hospital costs of treatments rendered the claimant at Duke Hospital and for payment of dental bills incurred as a result of his injury by accident, after bills have been submitted to and approved by the Commission."

It further ordered that an award issue "providing that the defendants pay the claimant compensation at the rate of 60% of the difference between the wage he was earning before the accident and the wage that he is able to earn thereafter any time it is shown that the claimant is earning less due to his injury by accident within 300 weeks from the date of the accident." The claimant appealed to the Superior Court and when the cause came on to be heard in the court below the judge, being of the opinion that the full commission was in error in directing the award as above quoted and being further of the opinion that no award for compensation can be made at this time in view of the facts submitted, ordered the said award stricken and remanded the cause to the full commission "to the end that it proceed in accordance with the law as laid down by the court." The plaintiff excepted and appealed.

James B. Lovelace, Smith, Wharton & Jordan and George M. Chapman for plaintiff, appellant.

Ruark & Ruark for defendants, appellees.

BARNHILL, J. The Workmen's Compensation Act, Ch. 120, P. L., 1929, as amended (Michie's N. C. Code of 1939, Ch. 133 [a]), provides primarily for four several types of compensation to be paid to employees covered by the Act for injuries arising out of and in the course of their employment. They are:

1. Compensation for disability, dependent as to amount upon whether the injury produces a permanent total, a permanent partial, a total temporary or a partial temporary incapacity. Sec. 29 and 30.

2. Compensation in stipulated amounts for loss of some part of the body such as a finger or toe, a leg or arm. Sec. 31.

3. Compensation for death. Sec. 29.

4. Compensation for bodily disfigurement. Sec. 31.

The claim here made comes within the first class embracing injuries which produce a permanent partial incapacity. The compensation is to be computed upon the basis of the difference in the average weekly earnings before the injury and the average weekly wages *he is able to earn* thereafter. Sec. 30.

The general purpose of the Act, in respect to the first class, is to substitute, in cases to which it is applicable, for common-law or statutory rights of action and grounds of liability a system of money payments based upon the actual loss of wages by way of relief for workers for injuries received in the course of and arising out of their employment. *Duart v. Simmons,* 231 Mass., 313, 121 N. E., 10; *Centlivre Beverage Co. v. Ross,* 125 N. E., 220. To guard against the possibility that an injured employee may refuse to work when, in fact, he is able to work and earn wages, and thus increase or attempt to increase the amount of his compensation, the benefits of the Act are denied to him so long as he refuses, without justification, to accept employment procured for him suitable to his capacity. Sec. 32.

All payments are by way of financial relief for inability to earn wages, or for deprivation of support from wages theretofore received. "Compensation," in the connection in which it is used in the Act, means a money relief afforded according to the scale established and for the persons designated in the Act. *Duart v. Simmons, supra; Centlivre Beverage Co. v. Ross, supra.*

The statute provides no compensation for physical pain or discomfort. It is limited to the loss of ability to earn. "The loss of his capacity to earn . . . is the basis upon which his compensation must be based." Sec. 30. *Gillen v. Ocean, Etc. Corp.,* 215 Mass., 96, 102 N. E., 346, L. R. A., 1916 A, 371; *Centlivre Beverage Co. v. Ross, supra.* It is only intended to furnish compensation for loss of earning capacity. Without such loss there is no provision for compensation in Section 30, although even permanent physical injury may have been suffered. *Weber v. American Etc. Co.,* 95 Atl., 603, Ann. cases 1917 E., 153.

What, then, is the meaning of "disability" as used in the statute? It is defined in the Act: "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Sec. 2 (i).

The disability because of the injury is to be measured by the capacity or incapacity of the employee to earn the wages he was receiving at the time of the injury. It is not his inability to do the identical kind or

type of work as theretofore. That is to say, the right to compensation is not dependent upon the inability to do substantially the same work as before the injury. It is confined to the loss of ability to earn *in the same or any other employment. Smith v. Swift & Co.,* 212 N. C., 608, 194 S. E., 106.

In short, under our Act, wages earned, or the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability.

It follows that, as the claimant is now earning wages in an amount equal to those received by him prior to his injury, he has failed to show any compensable injury or incapacity.

However urgently he may insist that he is "not able to earn" his wages, the fact remains that he is receiving now the same wages he earned before his injury. That fact cannot be overcome by any amount of argument. It stands as an unassailable answer to any suggestion that he has suffered any loss of wages within the meaning of the Act.

The contention of the appellant that *Smith v. Swift & Co., supra,* is distinguishable in that in that case the employee secured employment from another employer cannot be sustained. The statute, sec. 2 (i), is clear. There is no "disability" if the employee is receiving the same wages in the same or any other employment. That "in the same" employment he is not required to perform all the physical work theretofore required of him can make no difference. Even so, if this be not "the same employment" then it clearly comes within the term "other employment." To remove the employment from one classification necessarily shifts it to the other. Furthermore, there is no language used in this section or in any other part of the statute which even suggests that "other employment" must be with a different employer.

But the appellant contends that he is not now earning his wages; that they are paid to him "because of his long service and the sympathetic attitude of his employer." Hence, he says, he is not now "able to earn" and is not earning any wage. Conceded, *arguendo,* the final result is the same. While the employer here, as is ordinarily the case, has an insurance carrier standing by under contract to pay whatever it is called upon to pay, it is the one primarily liable. It is paying and the employee is receiving more than the assessable amount of compensation. What boots it whether the "wages" received by him are paid for services rendered or as compensation for the injury received? In either event, under the express terms of the Act, he cannot recover additional compensation.

Decisions of other jurisdictions on the question here presented are by no means uniform. This lack of accord is due, in very large measure, to the difference in the phraseology of the statutes under consideration

in defining disability and in prescribing the standards or tests of compensability.

Hence, it is needless for us to undertake to analyze and differentiate the several cases cited and relied on by appellant. Suffice it to say that no decision dealing with identical language in which a different conclusion was reached has been called to our attention. See, however, Anno. 17 A. L. R., 205, and Anno. 118 A. L. R., 731.

To protect the employee against the possibility that the employer might, after the expiration of 12 months, sec. 24, discontinue the employment and thus defeat the rights of the employee, the commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. The court below entered judgment striking this provision and affirming the judgment of the commission as thus modified. The exception to the judgment challenges the correctness of this ruling. It must be held for error.

The commission adjudged the rights and liabilities of the parties. It then directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority.

Thigpen v. Ins. Co., 204 N. C., 551, 168 S. E., 845, cited and relied upon by the court below involved a claim under the permanent disability clause of an insurance policy. It is not controlling here.

The claimant likewise contends that the court below erred in overruling his exception to the refusal of the Industrial Commission to allow compensation for disfigurement. Such compensation is not required by the Act. Its allowance or disallowance is within the legal discretion of the commission. Sec. 31. See, also, Ch. 164, P. L., 1931. Furthermore, it is not made to appear that claimant had sustained a disfigurement within this provision of the statute.

To disfigure means to mar, to deface, to render less beautiful, as to disfigure the landscape with billboards. Webster's New International Dictionary. A disfigurement, then, is a blemish, a blot, a scar or a mutilation that is external and observable, marring the appearance.

The terms "facial," "head," "bodily" and "member or organ," are used in connection with the term disfigurement. They are limited by the manner of their use and must be so construed. Being so construed "any member or organ" includes only those parts of the body which are subject to disfigurement. There must be an outward observable blemish, scar or mutilation which tends to mar the appearance of the body, and, under the express terms of the Act, it must be serious. For instance, a puncture of the ear drum or the removal of a kidney would result in injury, perhaps serious, and yet no disfigurement would result.

This view is justified by recent amendments to this section. See H. B. 272, General Session Laws of 1943, C. 502.

Apparently this is the construction the commission has adopted and consistently followed. "To warrant compensation for disfigurement it must be so permanent and serious that it, in some manner, hampers or handicaps the person in his earning or in securing employment, or it must be such as to make the person repulsive to other people." *Poston v. Amer. Enka Corp.*, 1 I. C., 53. See other decisions cited in 4 Schneider, Workmen's Compensation Statutes, 2829.

The conclusions and award of the Industrial Commission should be affirmed without qualification. Judgment must be entered accordingly.

Modified and affirmed.

ROY ROSS v. ATLANTIC GREYHOUND CORPORATION.

(Filed 2 June, 1943.)

1. **Trial § 22a—**

On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable inference to be drawn therefrom. C. S., 567.

2. **Automobiles §§ 18d, 18g: Negligence § 19b—**

In an action to recover damages for personal injuries to plaintiff, a passenger on defendant's bus, where the evidence tended to show that the driver stopped his crowded bus at night on the left-hand side of the highway, in front of a filling station which was used as a bus stop, and requested plaintiff, who was near the door, to alight so that another passenger could get off, which plaintiff did, stepping into the highway where he was struck and injured by another automobile coming from the opposite direction, driven by one intoxicated, a motion for judgment as of nonsuit was properly denied.

3. **Automobiles § 18h: Negligence § 20—**

Where a passenger on a public bus alights, on the highway, at the request of the bus driver, so that another passenger could get out, and is injured by an automobile, coming from the opposite direction and driven by one who is intoxicated, it is reversible error for the court, in its charge to the jury, to compare these facts to a case where a horse is left unhitched in the street, and is frightened by a stranger and runs away, causing damage—the facts in the illustration are not similar to the facts of this case.

APPEAL by defendant from *Warlick, J.*, at September Term, 1942, of RICHMOND.

This is a civil action to recover for injuries alleged to have been received when the plaintiff was hit by an automobile driven by Clyde

Kirby, and seriously injured. The injury occurred while plaintiff was standing near the defendant's bus at Grover, N. C., where he had left the bus to let passengers alight therefrom.

The plaintiff, on the morning of 21 December, 1940, accompanied by his wife, purchased bus tickets from Rockingham, N. C., to Blacksburg, S. C. It was necessary to change busses in Charlotte, where they boarded one of defendant's busses for Blacksburg, S. C. The bus was crowded and plaintiff and his wife stood up in the aisle near the front of the bus.

The plaintiff testified that between Charlotte and Grover the bus stopped three or four times and the bus driver requested plaintiff and his wife to get off two or three times, in order to let passengers out of the bus. When the bus arrived at Grover, N. C., it was 7:30 or 8:00 o'clock p.m., and was dark. The bus was pulled over to the left-hand side of the highway on the grounds of a filling station, the regular stopping place in Grover. The plaintiff further testified: "When we stopped the driver threw the door open and asked me to step off and let the lady off as there was a lady in the back of the bus that had to travel through all the whole aisle, too, and we had to come out and let her off. As that lady and the people started coming out they just crowded me and I began to back out there to the side of the bus, out the door, and that is about the only thing I know until about three weeks later, when I was in the hospital. . . . The lights were on the bus as we stopped and when I stepped outside where it was dark I was just like I was blind for a few minutes after I stepped out there. The door is on the right side of the bus. We were parked on the left-hand side of the road. I will say the door was 3½ feet, I imagine, probably 4 feet wide. It opened to the front. I had taken about two and a half steps out from the steps of the bus there. These people in the aisle kept on coming out. Well, as they were coming out there, a bunch of ladies, about a couple of people were between my wife and I, and so I just kept backing up to keep them from stepping on my toes. There was a bunch of ladies there and the next thing I knew I was hit by an automobile and three weeks later I remembered it. The bus driver didn't give any warning about any road being there, or anything. I didn't have a bit of business getting off there. I was not familiar with the surroundings there that night where I was put off. I did not have any intention of getting off there. I could not see whether the bus stopped near the highway or some distance from the highway, or what."

Plaintiff's wife, Mrs. Roberta Ross, testified: "We were standing there talking, my husband and I, and the bus stopped and I did not even know where it stopped until he opened the door and asked us to please step off so a lady could get off. He stepped off before I did and

in some way, like people do when they get off the bus, they kinder get crowded and mixed up when more than two get off, and he was two or three steps in front of me. People standing in the aisle had to get out so the lady in the back of the bus could get by. There was a crowd out there beside the bus. I didn't get as far away from the bus when I got out as my husband did. When we were standing in the bus I couldn't see out and the driver gave no warning of any road or anything of that sort. Well, I saw some lights coming before it struck Mr. Ross and I screamed and I don't remember nothing else."

Clyde Kirby testified for plaintiff as follows: "I could not say how close the bus was to the highway. After I stopped I didn't notice and I couldn't see anything. I thought it was waiting on traffic. The bus was sitting there with its lights on. By 'waiting on traffic' I mean so it could come out in the highway." On cross-examination, this witness testified: "Yes, sir, the patrolman arrested me for driving intoxicated, and I was convicted of driving in an intoxicated condition at that time."

Plaintiff offered in evidence the deposition of Grace Belk, in which she testified as follows: "I happened to be in Grover, N. C., on 21 December, 1940, when Mr. Ross was injured. Ivy Allman and I went down in a car. Yes, the bus passed me just before we reached the filling station at Grover. Our car and the bus were both going south. After the bus passed it stopped at the first filling station on the left. We stopped. The bus was just a little bit in front of us and we stopped just behind it. Yes, we were close enough to the bus to see it stop. The bus stopped just right on the left side of the road. We stopped right behind the bus. We were over further than it was. The bus was right against the curb. Ivy Allman is in the Army. He has been in the Army two months and is at Camp Wolters in Texas at present. I did not see anyone but two boys get out before they got hit. They just stepped out and the car hit them. Yes, they were the boys that were hit by Clyde Kirby. Yes, I knew Clyde Kirby. Yes, Clyde Kirby was the only one who was in the car that hit the boys. They had just stepped out when they got hit and were right close to the bus. When they were struck they were in the highway. Yes, the car that Clyde Kirby was driving was in the highway when it hit the boys. After it struck the boys it went up the road a little piece and stopped. Yes, Clyde Kirby pulled the car over and stopped. The Ross boy was lying about two steps from our car after he was struck. He was about two steps from our car. Yes, he was lying in the highway after he was struck; he was lying about two steps from our car over in the highway."

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. From judgment thereon, the defendant appeals, assigning error.

Clyde R. Hoey and Jones & Jones for plaintiff.

Fred S. Hutchins, H. Bryce Parker, and Fred W. Bynum for defendant.

DENNY, J. The defendant assigns as error the refusal of his Honor to grant its motion for judgment as of nonsuit lodged at the close of plaintiff's evidence and renewed at the close of all the evidence.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable inference to be drawn therefrom. C. S. 567. *Wingler v. Miller, ante,* 15; *Edwards v. Junior Order,* 220 N. C., 41, 16 S. E. (2d), 466; *Coltrain v. R. R.,* 216 N. C., 263, 4 S. E. (2d), 852; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E. (2d), 601; *Dickerson v. Reynolds,* 205 N. C., 770, 172 S. E., 402; *Cromwell v. Logan,* 196 N. C., 588, 146 S. E., 233; *Brown v. R. R.,* 195 N. C., 699, 143 S. E., 536; *Robinson v. Ivey,* 193 N. C., 805, 138 S. E., 173. However, the defendant seriously contends that under the law, as laid down in *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843, the responsibility of the defendant extended only to "a safe landing" or "a landing in safety," and since there is evidence to the effect that plaintiff's injury occurred from two to ten minutes after the bus stopped and the plaintiff alighted therefrom, that defendant had discharged its duty to plaintiff, and is entitled to judgment as of nonsuit. The law applicable to the facts in *White v. Chappell, supra,* does not apply to the facts in the instant case. There the relationship of carrier and passenger had terminated prior to the time of the injury, here that relationship had not terminated but still existed at the time of plaintiff's injury. When the plaintiff's evidence on this record is considered in a light most favorable to him, we think it is sufficient to be submitted to the jury, and that his Honor was correct in overruling defendant's motion for judgment as of nonsuit. It will be noted that one of plaintiff's witnesses testified: "The bus stopped just right on the left side of the road. . . . The bus was right against the curb. . . . They just stepped out and the car hit them. Yes, they were the boys that were hit by Clyde Kirby. . . . They had just stepped out when they got hit and were right close to the bus. When they were struck they were in the highway."

The defendant also excepted to, and assigned as error, that portion of his Honor's charge as follows: "Thus, where a horse is left unhitched in the street and unattended, and is maliciously frightened by a stranger and runs away, but for the intervening act would not have run away and injury would not have occurred, yet it was the negligence of the driver in the first instance which made the runaway possible, that is, leaving the horse unattended and untied. Now, this negligence has not

been superseded or obliterated and the driver is responsible for the resulting injuries, if such should be found by the greater weight of the evidence." The defendant contends this is an instruction of law on facts not applicable to this case. We think the exception well taken, although the language to which the exception is addressed is a quotation from the case of *Balcum v. Johnson,* 177 N. C., 213, 98 S. E., 532; *S. v. McFalls,* 221 N. C., 22, 18 S. E. (2d), 700; *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10. The facts used in the illustration are not similar to the facts in this case. The horse is animate and has the power to move of its own volition without the interference or wrongful act of anyone. A motor vehicle is inanimate and cannot move of its own volition. Furthermore, the plaintiff's injury did not result from the movement of defendant's bus, either maliciously or otherwise. Moreover, where a motor vehicle is parked properly, the brakes set and the engine turned off, the owner thereof is not responsible for the independent act of a third party in negligently or maliciously starting the motor vehicle which results in damages or injuries to another. *Maloney v. Kaplan,* 233 N. Y., 426, 135 N. E., 838, 26 A. L. R., 909; *In re Rhad v. Duquesne Light Co.,* 255 Pa., 409, L. R. A., 1917D, 864, 100 Atl., 262. See Annotations 26 A. L. R., 912, for numerous authorities in support of the above view. And in our own jurisdiction, in the case of *Ward v. R. R.,* 206 N. C., 530, 174 S. E., 443, *Brogden, J.,* speaking for the Court, said: "Assuming, but not deciding, that the defendant was negligent in not taking proper precaution . . . , nevertheless the general rule of law is that if between the negligence and the injury there is the intervening crime or wilful and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it 'the causal chain between the original negligence and the accident is broken.' *Burt v. Advertising Co.,* 28 N. E., 1; *Chancey v. R. R.,* 174 N. C., 351; *Green v. Atlanta & C. A. L. Ry. Co.,* 148 S. E., 633; *Green v. R. R.,* 279 U. S., 821, 73 L. Ed., 976; *Davis v. Green,* 260 U. S., 349; *St. Louis R. R. Co. v. Mills,* 271 U. S., 343, 70 L. Ed., 979; *Strong v. Granite Furniture Co.,* 294 Pac., 303, 78 A. L. R., 465, and annotations." *Penny v. R. R. Co.,* 153 N. C., 296, 69 S. E., 238.

The question here is whether or not the plaintiff was injured by the negligence of the defendant or by the negligence of the defendant concurring with the negligence of Clyde Kirby, the driver of the auto mobile which actually struck the plaintiff—the plaintiff being free from contributory negligence. The jury, in the light of all the circumstances, must determine whether or not the defendant exercised that degree of care commensurate with its duty under its relationship to the plaintiff as carrier and passenger which existed at the time. *Horton v. Coach*

Co., 216 N. C., 567, 5 S. E. (2d), 828; *Perry v. Sykes*, 215 N. C., 39, 200 S. E., 923; *Hollingsworth v. Skelding*, 142 N. C., 246, 55 S. E., 212; *Clark v. Traction Co.*, 138 N. C., 77, 50 S. E., 518; *Lewis v. Pacific Greyhound Lines, Inc.*, 96 A. L. R., 718, 147 Ore., 588, 34 P. (2d), 616. If it did not so exercise that degree of care, then the jury likewise must determine whether or not the defendant is relieved of liability by the intervening negligence of Clyde Kirby, or by the contributory negligence of the plaintiff. These questions must be answered by the jury, in the light of all the evidence and the attending circumstances. The law relative to negligence, intervening negligence and contributory negligence, is too well settled to require a discussion thereof here. 22 R. C. L., Sec. 20, p. 136; *Milwaukee R. R. Co. v. Kellogg*, 94 U. S., 474, 24 U. S. (Law Ed.), 258; *Montgomery v. Blades*, 222 N. C., 463, 23 S. E. (2d), 844; *Haney v. Lincolnton*, 207 N. C., 282, 176 S. E., 573; *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., 36; *Harton v. Tel. Co.*, 141 N. C., 455, 54 S. E., 299.

The other assignments of error need not be discussed, since the questions presented may not arise on a new trial. We think the defendant, for the reasons given, is entitled to a new trial, and it is so ordered.

New trial.

MRS. LETTIE BAILEY, ADMINISTRATRIX OF HURLEY M. BAILEY, v. NORTH CAROLINA RAILROAD COMPANY,

and

MARVIN P. KING, ADMINISTRATOR OF DAVID CARLTON MEREDITH, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 2 June, 1943.)

1. Negligence § 19b—

It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them.

2. Negligence § 6—

The plaintiffs' negligence need not be the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendant; but he may not recover, when his negligence concurs with the negligence of the defendant in proximately producing the injury.

3. Railroads § 9—

A railroad crossing is itself a notice of danger and a traveler on the highway, before crossing the tracks, is required to look and listen to

ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.

4. Negligence § 10—

In order to invoke the "last clear chance" doctrine, plaintiff must plead and prove that defendant, after perceiving the danger, and in time to avoid it, negligently refused to do so.

5. Negligence § 19b—

In an action against a railroad for the wrongful death of plaintiffs' intestates, where the plaintiffs' evidence tends to show that such intestates drove their car upon a railroad track, at a city grade crossing, ahead of an oncoming train, by collision with which both were killed, when, in the exercise of due care, they could have seen the train and avoided the collision, the plaintiffs are barred by the contributory negligence of their intestates, and motions of nonsuit were properly allowed.

APPEAL by plaintiffs from *Bone, J.*, at October-November Term, 1942, of DURHAM.

Two civil actions to recover damages for the wrongful deaths of intestates alleged to have been caused by the negligence of the defendant, consolidated for trial by consent.

The record discloses that about 10 o'clock on the morning of 20 December, 1940, the plaintiffs' intestates were riding in a Chevrolet truck, in the city of Durham, and attempted to cross the railroad track of the defendant where it intersects Crabtree Street; that at the crossing of Crabtree Street and the railroad track the engine of the westbound passenger train of the defendant struck the truck in which the intestates were riding, killing both of them; the record does not disclose which of the intestates was driving, but does disclose that they were engaged in a joint enterprise of selling produce for a third party, and were accustomed to permit first one and then the other to drive, depending upon which one it was more convenient to do the driving.

The railroad track ran in the general direction of east and west and Crabtree Street ran in the general direction of north and south. The Chevrolet truck was being driven southward on Crabtree Street and the engine of the defendant's passenger train was being driven westward on the railroad tracks of the defendant when the collision occurred.

The evidence further discloses that a person driving southward on Crabtree Street as he approached the railroad track of the defendant had a clear unobstructed view east (to his left) down the said railroad track; that the plaintiffs drove the Chevrolet truck in which they were riding upon said railroad track, where it stalled, and while so stalled the engine of the defendant struck it, killing the intestates.

When the plaintiffs had introduced their evidence and rested their cases, the defendant lodged motions to dismiss the actions and for judgment as in case of nonsuit (C. S., 567), which motions were allowed, and from judgment predicated upon such ruling the plaintiffs appealed, assigning errors.

Fuller, Reade, Umstead & Fuller, Brawley & Brawley, and B. Ray Olive for plaintiffs, appellants.

W. T. Joyner, Spears & Hall, and H. E. Powers for defendant, appellee.

SCHENCK, J. Having reached the conclusion we have in this case it may be conceded, though it is not decided, that the defendant was negligent in not giving warning of the approach of its train by bell or whistle, in exceeding the speed limit fixed by municipal ordinance and in allowing the railroad bed at the crossing to become rough by reason of the rails being exposed from two and half to three inches in height and of holes therein.

The evidence shows that Mulberry Street runs east and west parallel to and immediately north of the railroad track, on the railroad right-of-way, and that a person traveling south on Crabtree Street enters Mulberry Street and proceeds some 40 or 50 feet before crossing the railroad track, and from the entrance into Mulberry Street to the crossing of the railroad track such person has an unobstructed view of the railroad track east of the Crabtree Street crossing—at the entrance to Mulberry Street a clear view of 250 feet down the track, and close to the track, just before entrance thereupon, an unobstructed view of the track east for "several hundred yards." James Charles Smith, the only eye witness of the collision introduced as a witness by the plaintiffs, was standing about 25 yards south of the railroad track and about 35 yards west of the crossing, testified: "I saw the train way on up the track about 400 yards, and I saw the truck drive upon the track. The train looked to be about 400 yards up the track. I saw the truck drive up on the crossing and the train was still coming. The truck looked like it was trying to get off, kinder moved back and forth and settled down at the time the train hit it. After the train hit the truck it brought it way on down there the other side of me, took it on down there the other side of the switch. I was looking at the truck the instant it was hit."

It is manifest from the evidence of the plaintiffs that if their intestates had looked east down the railroad track they could have seen the train for a considerable distance from any point after entering Mulberry Street and reaching the crossing of Crabtree Street and the

railroad track. It is inescapable that the driver of the truck proceeded to drive the truck upon the track, a known zone of danger, without stopping to avoid a collision with a train approaching from the east.

The law applicable to this case is stated in the well considered opinion of the present Chief Justice in *Godwin v. R. R.*, 220 N. C., 281, 17 S. E. (2d), 137, as follows: "It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them. *Battle v. Cleave*, 179 N. C., 112, 101 S. E., 555; *Wright v. R. R., supra* (155 N. C., 325, 71 S. E., 306); *Beck v. Hooks*, 218 N. C., 105, 10 S. E. (2d), 608. The plaintiff thus proves himself out of court. *Horne v. R. R.*, 170 N. C., 645, 87 S. E., 523. It need not appear that his negligence was the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendant. *Absher v. Raleigh*, 211 N. C., 567, 190 S. E., 897. It is enough if it contribute to the injury. *Wright v. Grocery Co.*, 210 N. C., 462, 187 S. E., 564. The very term 'contributory negligence' *ex vi termini* implies that it need not be the sole cause of the injury. *Fulcher v. Lumber Co.*, 191 N. C., 408, 132 S. E., 9. The plaintiff may not recover, in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the injury. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672. . . .

"In the application of this rule it is recognized that 'a railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the court.' *Coleman v. R. R., supra* (153 N. C., 322, 69 S. E., 251); *Carruthers v. R. R.*, 215 N. C., 675, 2 S. E. (2d), 878. We have said that a traveler has the right to expect timely warning, *Norton v. R. R.*, 122 N. C., 910, 29 S. E., 886, but the failure to give such warning would not justify the traveler in relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout. *Harrison v. R. R., supra* (194 N. C., 656, 140 S. E., 598); *Holton v. R. R., supra* (188 N. C., 277, 124 S. E., 307). 'A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.' Fourth headnote, *Cooper v. R. R.*, 140 N. C., 209, 52 S. E., 932. The same rule was declared in *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690, where *Walker, J.*, speaking for the Court, used the following language: 'On reaching a

railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective.' "

Again it is written: "The engineer had a right to assume up to the very moment of the collision that the plaintiff could and would extricate himself from danger. The fact of the failure to give a signal from the engine could not militate against the defendants, since all that such signal could have availed the plaintiff would have been to give him notice of the approach of the train, and this notice the plaintiff already had, since he saw the train at a distance of 1,500 feet down the track moving or in the act of starting to move in the direction of the crossing he was taking." *Temple v. Hawkins,* 220 N. C., 26, 16 S. E. (2d), 400.

Furthermore the plaintiffs do not plead the last clear chance, which is required before such doctrine is available, paragraph 8(f) of the complaint not being susceptible of such construction. " 'In order to invoke the "last clear chance" doctrine, plaintiff must plead and prove that the defendant, after perceiving the danger, and in time to avoid it, negligently refused to do so.' 11 C. J., 282." *Hudson v. R. R.,* 190 N. C., 116, 129 S. E., 146.

Since it is apparent that the plaintiffs' intestates, the drivers of the truck, in the exercise of due care, could have seen the approach of the defendant's train in ample time to have stopped the truck and allowed the train to go by, and thereby avoided the collision, and instead of so stopping the truck proceeded to drive it on to the track ahead of the oncoming train thereby causing the collision, we are of the opinion, and so hold, that the plaintiffs are barred from recovery by the contributory negligence of their intestates, and that his Honor was correct in allowing the motions of nonsuit properly lodged at the conclusion of the plaintiffs' evidence.

There are a number of exceptive assignments of error based upon the court's sustaining the defendant's objections to certain testimony to the effect that the engineer of the defendant's train subsequent to the collision made certain statements indicating he saw the truck on the track, and to certain testimony to the effect that the defendant after the collision and after the train had gone made certain repairs to the track by throwing gravel on the crossing. The first group of these exceptions would seem to be untenable for the reason that the testimony related to conversations between the witness and the engineer which were merely

narrative of a past occurrence and only hearsay and not competent against the defendant, *Hubbard v. R. R.*, 203 N. C., 675(678), 166 S. E., 802, and cases there cited, and the second group of these exceptions would seem to be untenable for the reason that they relate to repairs made in the track after the collision complained of, *Parrish v. R. R.*, 221 N. C., 292 (299-300), 20 S. E. (2d), 299, and cases there cited. And, *a fortiori,* the plaintiffs were not prejudiced by the refusal to admit the testimony assailed since it is not perceived how its admission could have altered the holding of the trial judge or our opinion upon the question of nonsuit.

The judgment of the Superior Court is

Affirmed.

MRS. LUMMIE HANCOCK SMITH v. THE BANK OF PINEHURST, J. HAWLEY POOLE, W. O. McGIBBONEY, TRUSTEE, AND THE MOORE COUNTY NEWS.

(Filed 2 June, 1943.)

1. Appeal and Error § 37c—

In appeals from an order granting or denying injunctive relief the findings of fact made by the court below are not conclusive. This Court may review the evidence and determine the questions of fact, as well as of law.

2. Injunctions § 11—

If a plaintiff, applying for injunctive relief as the main remedy sought in the action, has shown probable cause for supposing that he will be able to maintain his primary equity and there is reasonable apprehension of irreparable loss unless it remain in force, or, if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's rights until the controversy can be determined, the injunction will be continued to the hearing.

3. Estates § 4—

Where the equitable and legal estate in land becomes vested in one and the same person at one and the same time and in one and the same right, the two estates are merged and the lesser estates are absorbed in the fee simple thus created.

4. Same—

Where one who has an equitable title acquires the legal title, so that the same becomes united in the same person, the former is merged in the latter.

5. Same: Mortgages §§ 21, 27—

As a general rule, where a purchaser of land subject to a mortgage takes an assignment of the mortgage, the debt secured by the mortgage is extinguished.

6. Mortgages §§ 18, 32b—

A notice, from the trustee in a mortgage or deed of trust to a person authorized by him to advertise a sale of the property thereunder, to withhold or discontinue publication of the notice of sale, withdraws from such person any authority to advertise or sell the property.

7. Mortgages § 36: Bankruptcy § 9—

Where the maker of a note and mortgage is discharged in bankruptcy, such maker is no longer personally liable on the note and mortgage, which however remains a lien upon the land.

8. Mortgages § 31b—

A trustee in a mortgage or deed of trust is a proper and necessary party to an action to foreclose or to enjoin foreclosure.

APPEAL by plaintiff from *Armstrong, J.*, at February Term, 1943, of MOORE. Error and remanded.

Civil action to restrain foreclosure sale of land under power contained in trust deed, heard on notice to show cause why temporary restraining order should not be continued to the final hearing.

The plaintiff, being the owner of a tract of land containing 153.5 acres, on 6 September, 1934, executed a trust deed thereon to W. O. McGibboney, Trustee, to secure an indebtedness of $1,400.00 due to the Land Bank Commissioner, which indebtedness was payable in 10 equal annual installments, beginning 1 December, 1938.

On 17 March, 1940, plaintiff and her husband were each adjudicated bankrupts, the said mortgage debts being duly scheduled as a liability of plaintiff.

Plaintiff's homestead was allotted in said land and the residue, including the reversionary interest in the homestead, was sold subject to the mortgage, under order of the bankruptcy court and defendant bank became the purchaser.

The bank having thus acquired title to the equity of redemption, subject to the homestead, conveyed to plaintiff by quitclaim deed its reversionary interest in the homestead land. Plaintiff then paid on the note ten twenty-ninths thereof which was her proportionate part, based on the appraised value of the land.

H. F. Seawell, Sr., purchased the Land Bank Commissioner note and mortgage and the same was duly assigned to him.

Upon the urgent insistence of the vice-president of the defendant bank, H. F. Seawell, Sr., on the .... day of October, 1942, for value received, transferred and assigned the note and mortgage to defendant J. Hawley Poole, a director of the bank. Poole then executed his note to defendant bank and assigned the mortgage and note as collateral security.

Within a few days after acquiring the mortgage and note Poole obtained the consent of the trustee to advertise the land for sale under the power of sale contained therein, the sale to be had on 7 December, 1942.

The trustee, a non-resident, upon hearing from the plaintiff, directed the defendants to withhold the advertisement. This was not done but, on the contrary, after further communication with defendants, he renewed his authority therefor.

The court below offered to continue the restraining order "if the plaintiff would pay into court the amount due on said promissory note and deed of trust as aforesaid found by the court, to remain on deposit in the court to be applied to any judgment in favor of the defendant J. Hawley Poole that might be rendered upon the final hearing in this cause, but the plaintiff declined and refused to make such deposit." She then and there, however, "offered in open court to pay the holder of said note the full sum due on the same upon a proper assignment of same." Her offer was declined by defendants and the court thereupon entered judgment vacating the temporary restraining order issued by Williams, J. Plaintiff excepted and appealed.

Seawell & Seawell for plaintiff, appellant.

U. L. Spence and W. D. Sabiston, Jr., for defendants Bank of Pinehurst and J. Hawley Poole, appellees.

BARNHILL, J. In appeals of this character from an order granting or denying injunctive relief the findings of fact made by the court below are not conclusive. This Court may review the evidence and determine questions of fact, as well as of law. *Burns v. McFarland,* 146 N. C., 382; *Wallace v. Salisbury,* 147 N. C., 58; *Lee v. Waynesville,* 184 N. C., 565, 115 S. E., 51; *Tobacco Association v. Battle,* 187 N. C., 260, 121 S. E., 629; *Tobacco Association v. Patterson,* 187 N. C., 252, 121 S. E., 631; *Howard v. Board of Education,* 189 N. C., 675, 127 S. E., 704; *Johnston v. Garrett,* 190 N. C., 835, 130 S. E., 835; *Causey v. Guilford County,* 192 N. C., 298, 135 S. E., 40; *Whitford v. Bank,* 207 N. C., 229, 176 S. E., 740.

The court below found that this action was instituted after the sale on 5 December. The record discloses that it was instituted 27 November, 1942, before the sale. While it found that defendant Poole purchased the mortgage note it did not find whether he did so as agent of the bank, as alleged. Likewise, it made no finding or conclusion in respect to the admitted notice from the trustee withdrawing his consent to the advertisement of sale. Hence, we deem it advisable to review the record as a whole.

The apparent facts disclosed by the record present this picture:

Plaintiff becomes bankrupt, in large measure because of her endorsement liability to the defendant bank. Her land, upon which there is an outstanding mortgage lien, is sold and her equity of redemption is purchased by the bank. The bank, in turn, for a valuable consideration, conveys its right, title and interest in the homestead land to plaintiff. Thereafter, through the agency of the bank, the holder of the mortgage lien is induced to transfer it to defendant Poole, a director of the bank, who immediately hypothecates it with the bank as security for the money advanced with which to purchase. The bank thus becomes the owner of the land subject to the mortgage lien and also owner of the lien itself —at least as collateral security. Then, without any loss of time, the "holder" of the lien procures the consent of the trustee and proceeds to advertise the land for sale under foreclosure, including the very land the bank had conveyed to the plaintiff. When offered his money upon a transfer of the note he declined to accept.

If the defendants do not want their money, so recently invested in a mortgage lien they were so anxious to acquire that Poole borrowed and the bank loaned the money therefor, and which lien they are now so anxious to foreclose, what do they desire other than a squeeze play that will deprive plaintiff of her land and greatly benefit the bank? The record fails to answer.

Under the circumstances outlined is a court of equity unable to give aid or will it withhold its helping hand?

If the plaintiff, applying for injunctive relief as the main remedy sought in her action, has shown probable cause for supposing that she will be able to maintain her primary equity and there is reasonable apprehension of irreparable loss unless it remains in force, or if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's rights until the controversy between her and the defendants can be determined, injunction will be continued to the hearing. *Proctor v. Fert. Works,* 183 N. C., 153, 110 S. E., 861; *Cobb v. Clegg,* 137 N. C., 153; *Tobacco Association v. Battle, supra.* If the evidence raises a serious question as to the existence of the facts which make for plaintiffs rights and is sufficient to establish it, the preliminary restraining order will be continued to the hearing. *Tise v. Whitaker-Harvey Co.,* 144 N. C., 508; *Tobacco Association v. Battle, supra.*

Applying this rule to the facts in this case we are constrained to hold that the restraining order should be continued to the hearing.

Where the equitable and the legal estate in land becomes vested in one and the same person at one and the same time and in one and the same right, the two estates are merged and the lesser estates are absorbed

in the fee simple thus created. 10 R. C. L., 666. They cease to exist as such.

"Where one who has an equitable title acquires the legal title so that the same becomes united in the same person, the former is merged in the latter." *Odom v. Morgan,* 177 N. C., 367, 99 S. E., 195, and cases cited; *Peacock v. Stott,* 101 N. C., 149.

"As a general rule, where a purchaser of land subject to a mortgage takes an assignment of the mortgage, the debt secured by the mortgage is extinguished." Anno. 95 A. L. R., 107; *Lydon v. Campbell,* 204 Mass., 580, 91 N. E., 151; 3 Pom. Eq. (5th), 151.

It is alleged that the bank was the real purchaser of the lien. There are circumstances which tend to show that it is the real owner thereof and that Poole is a mere dummy holder to conceal the true status of the lien. If this be so then there has been a merger and the mortgage lien is extinguished. This issue should be decided before there is any sale under the mortgage.

The trustee is a non-resident and it is apparent that the defendants, through their attorney, were handling the preliminaries looking to the sale. On 5 November, 1942, after the notice of sale had been published in the Moore County News, the trustee wrote the attorneys for the defendants, "you are requested to withhold advertisement of the property until further notice." Admittedly the letter had reference to this sale.

This notice from the trustee to withhold or discontinue publication of notice of sale withdrew any authority the trustee had conferred on the defendants or their attorneys to advertise for him and in his name. Any advertisement of sale thereafter was that of the defendants and not that of the trustee. It broke the continuity of publication of notice required by statute, C. S., 687, and no subsequent renewal of authority could bridge the gap or restore the publication to its original status. Hence, there was no valid publication of notice of sale.

The debt, evidenced by the mortgage note, was discharged by the bankruptcy. The plaintiff is no longer personally liable thereon. It remains only as a lien upon the land described in the mortgage, only a part of which is owned by plaintiff. Hence, equity does not demand that plaintiff tender or pay into court the full amount due on the lien as a prerequisite to a continuance of the restraining order.

The reply of plaintiff was filed after the hearing in the court below. The equities she undertakes to assert therein were not considered or decided. Hence, we refrain from any discussion thereof. If the deed from the bank to the plaintiff created, as between them, a superior equity in her and gave her any right to have the land owned by the bank first applied to the discharge of the lien, then her rights in respect thereto will be fully protected at the final hearing.

The trustee was not served with summons. Neither party seeks to take advantage of this fact. Even so, he should be brought in to the end that he may be bound by any judgment which may be entered in this cause. As this is an action in the nature of an *in rem* proceeding summons may be served by publication.

There was error in the order vacating the temporary restraining order. It should be continued to the final hearing. To that end the cause is remanded for further proceedings.

Error and remanded.

MRS. VIRGINIA L. ANDERSON, ADMINISTRATRIX OF THE ESTATE OF JAMES T. ANDERSON, DECEASED, v. PETROLEUM CARRIER CORPORATION AND CLEDOUS NAYLOR.

(Filed 2 June, 1943.)

Automobiles §§ 12c, 18c, 18g—

In an action to recover for wrongful death caused by an automobile collision, where plaintiff's evidence tended to show that her intestate (on the subservient road) driving his own car and the truck of defendant (on the dominant road) were approaching the highway junction, which was well marked on all sides by signs showing its character and danger, both vehicles apparently going at a greater speed than prudence demanded and neither driver slowing down for the intersection, and plaintiff's intestate failing to yield and being killed by the consequent collision, motion for judgment as of nonsuit was properly allowed.

APPEAL by plaintiff from *Thompson, J.*, at November Civil Term, 1942, of WAKE.

The plaintiff administratrix brought this action to recover damages for the death of her husband, which she alleges was caused by the negligence of defendant. The case is here on appeal from a judgment of nonsuit upon the evidence suffered in the court below. We summarize pertinent parts of plaintiff's evidence:

It appears from this evidence, principally from the testimony of Prof. Lambe, who surveyed the premises, and the maps to which it refers, that the collision out of which the action arose occurred near New London, some distance south of Asheboro, at or near the point where Highway 49-A and Highway U. S. 52 merge into one road, which continues southward and for convenience is designated by both numbers.

Traveling the highway in a northerly direction across the juncture, it is found that Highway 49-A continues in an almost straight line,

while Highway U. S. 52 makes a considerable angle to the left, and it is so indicated on a warning road sign placed south of the junction. Highway 49-A from the junction northward has a gravel-asphalt pavement, and Highway U. S. 52 has a continuous concrete pavement. Traveling north and approaching the junction from the south, there is a sign reading HIGHWAY SLOW JUNCTION, with the word "SLOW" in glass-raised letters. The sign is 3 feet square, and the top of the sign is 5.6 feet above the ground. The next sign is a traffic representation of the intersection showing the angle indicating the left-hand departure of U. S. Highway 52 and the straight road ahead. 49-A beyond the intersection would be a straight road, and the prong in the symbol would be U. S. Highway 52 beyond the point of the intersection. Highway 49-A has only a slight curve. There is another sign upon approaching the intersection marked U. S. 52 LEFT—the "LEFT" indicates a left-hand turn at that intersection. The two roads past the intersection are of two different types of surfacing, but both hard surfaced. The area between the roads for some distance has a paving on which to drive in through a filling station located between the roads. This area is within the limits of the town of New London.

The grade is not uniform along Highway 49-A and U. S. 52, but there is an up-grade on U. S. 52 going north at the place of the collision. Coming south on Highway 49-A, there is a sign with the highways graphically represented, indicating the angle of the intersection, and showing that U. S. Highway 52 forked off to the right. This was 44½ feet from the next sign. This was marked JUNCTION U. S. 52. From the junction sign to the next is 200 feet. This sign was 5.9 ft. from the edge of the pavement, hexagonal, 3 ft. high and 4.7 ft. from the ground. It was marked THRU *STOP TRAFFIC*. Letters were large and plainly visible. The next sign is in the no-paved area between the roads, having upon it the word "STOP," which could be read easily by autoists on the right-hand side of the road when traveling that road. All these signs were placed by the Highway Commission. There was no obstruction to prevent seeing the signs, except possibly at some points, the grade.

Relatively on the north and the south of the junction of the roads were driveways leading to the west into the Price residence on the north and the school property on the south, and the accident occurred between these driveways. From the front edge of the filling station and measured along the highway, it is 499 ft. down to the school driveway. The collision occurred near the northern edge of the school driveway.

Some distance northward of this point the white line designating the middle of 49-A had been discontinued, and one line designating the middle of U. S. 52 was continuous in each direction. The collision

occurred on the west side of the road, the right forward end of the truck striking the left forward end of the automobile. The truck continued for some distance, running up on a 3 ft. bank on the west side of the road, where it stopped without turning over. The automobile was knocked back some distance down the road in a northwesterly direction, and came to rest on the west side. Plaintiff's intestate was thrown clear of the wreckage on the western bank at some distance north of the point of collision, where he died almost instantly, and his companion was left hanging out of the car. He was seriously injured, but recovered. From the markings on the ground and pavement, it appeared that the truck traveled from the place of collision a distance of some 80 or more feet, with one of the wheels broken down and dragging. The automobile was found some distance beyond.

Plaintiff's exhibit No. 3, which is a photograph, and the evidence which it is used to explain, indicate that the collision occurred at the north edge of the school driveway, where the roads had almost, if not quite, merged into one.

Glin E. Poplin, witness for the plaintiff and the only eye witness examined on the trial, testified that he was standing on the left side of the highway near the scene of the collision at the time it occurred, near the entrance to the school grounds. It was after school hours, between 3:30 and 4 o'clock. He identified the pictures used in illustration of the evidence, and pointed out places referred to in the testimony.

The witness was standing with his face turned somewhat towards the south and saw the approach of the truck, estimating its speed as 25 or 30 miles. He first saw the automobile when the truck and automobile were 30 ft. or more apart. "When the collision occurred the truck took to the west, more or less to the west. It kept in a straight course then. The automobile took to the north, in other words, sort of northwest." Upon cross-examination, he testified that he had made a statement shortly after the accident, and upon excerpts of this statement having been read to him, he reasserted their truth. That testimony is substantially to the effect that he first saw the automobile immediately after its brakes were applied, and that his attention was called to it by the screaming of the brakes; that the Buick was coming south on 49-A, and the tractor was going north on U. S. 52. At the moment he observed the Buick, it was only about 25 or 30 ft. from where the west side of 49-A, which is black surface, comes into the east side of U. S. 52, which is white concrete, and the Buick was traveling about 70 miles per hour. Witness estimated that the Buick came to rest about 20 ft. in front of the tractor and across Price's drive. One of the occupants of the Buick was thrown to a point on the western dirt shoulder about 10 or 12 ft. behind the truck after it had stopped. The distance from

the point of impact to where the front of the tractor came to a stop was estimated at 30 to 35 ft.

Upon this evidence of plaintiff, defendant demurred and moved for judgment as of nonsuit, which was allowed. The plaintiff appealed.

Douglass & Douglass for plaintiff, appellant.

Murray Allen and Royall, Gosney & Smith for defendants, appellees.

SEAWELL, J. The evidence in this case is largely circumstantial. There are certain things, however, that seem indicated:

The collision occurred where the two roads had almost, if not quite, merged into one; it occurred on the west side of the road, which would be in Anderson's lane of traffic going south, and on the wrong side for the truck going north; the truck struck the Anderson car on the left forward end with its own right front end, indicating a sharp turn to the left had been made by the truck; the force of the collision was sufficiently great to throw Anderson's body for a considerable distance up on the bank to the west, and sent the Anderson car a distance of some 100 ft., or more, to the northwest, in a direction opposite to that it was traveling; the truck, in its broken-down condition, appeared to have traversed some 80 ft. or more after the accident and run part way up the embankment. We think it must be conceded, from the evidence, that the Anderson car came out of the eastern branch of the road where the signs were marked as indicated. That would give both vehicles, at the junction point, a common area which must be traversed by the drivers of the meeting cars with prudence and with the care required by both the common and statute law.

It is insisted that if the truck had kept to its own side of the road, the Anderson car might have passed in safety, since it appears to have traversed the common ground of the junction and gotten on its right side of the road before the collision. We have considered that. But nevertheless, the evidence indicates to us that both vehicles were approaching the junction at a greater speed than prudence demanded at the risk of occupying it at the same time with disastrous results. If it be conceded that there is evidence of negligence on the part of defendant, applying the standards required by precedent, we are unable to escape the conclusion that the negligence of plaintiff's intestate made some contribution to his injury.

The judgment as of nonsuit is

Affirmed.

STATE v. JOHN FRIDDLE AND GLENN PROCTOR.

(Filed 2 June, 1943.)

1. Burglary and Unlawful Breaking § 1c—

Felonious intent is an essential element of felonious breaking and entry with intent to steal. C. S., 4235. It must be alleged and proved and the felonious intent proven must be the felonious intent alleged, which, in this case, is the "intent to steal." The same is true as to larceny.

2. Burglary and Unlawful Breaking §§ 1c, 10—

In a prosecution for felonious breaking and entering with intent to steal and for larceny, where defendants contend and offer evidence to prove that they broke into a store and removed a large quantity of sugar, having the day before fully paid therefor to the clerk of the owner, who had prearranged, with the approval of the owner, that defendants should stage the apparent crime to enable the owner to escape ration penalties, a charge that, if a person breaks and enters and takes away property of another, with the consent of his employee, that would not relieve him of all the elements of breaking and entering, and if they broke and entered, with the consent of the clerk and against the will of the owner, they would be guilty, is reversible error.

3. Criminal Law § 53f: Trial § 32—

Where the evidence and law arising thereon, in a criminal prosecution, relate to a material, substantive feature of the case, no special prayer for instructions is required, and a failure to properly instruct thereon is error.

4. Trial § 29a: Criminal Law § 53a—

The judge, in his charge to the jury, should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. C. S., 564.

APPEAL by defendants from *Armstrong, J.*, at September Term, 1942, of GUILFORD. New trial.

Criminal prosecution on indictment charging (1) felonious breaking and entry with intent to steal, under C. S., 4235; and (2) larceny.

The evidence for the State tends to show that the defendants, on or about 21 August, 1942, broke and entered the store building of one J. S. Knight in the nighttime with intent to steal and that they did, in fact, take and carry away six 100-pound bags and seven 60-pound bags of sugar.

The defendants admit that they entered the store building and removed the sugar but they contend, and offered evidence tending to show, that it was by pre-arrangement with one Thurman Jones, a clerk or employee of Knight in charge of the store. Their evidence tends to show that Knight had an excess amount of sugar for which he would

have to surrender ration coupons or else surrender the sugar, unless it was made to appear that the sugar had been stolen; that Jones approached them, explained the situation and stated that if they could report the sugar as stolen they would not be required to surrender coupons. He arranged to sell the sugar to them on condition that they remove it at night. Jones unlocked the window, told them how to enter and the way to go after they had loaded. He also told them that Knight knew about and had consented to the arrangement which he was making. They paid for the sugar on the afternoon of 21 August and removed it that night as directed.

There was a verdict of guilty. From judgment thereon defendants appealed.

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

J. Hampton Price and George A. Younce for defendants, appellants.

BARNHILL, J. The court, in the course of its charge, instructed the jury as follows:

"The court did instruct you and again instructs you, that if a person takes property with the consent of the owner or breaks into a building with the consent of the owner, that he might be guilty of some other crime, but he would not be guilty of breaking and entering or larceny. But the court likewise instructs that if a person takes the property of another with the consent of his employee or some other person connected with the actual owner, that would not relieve a person of all of the other elements of larceny or breaking and entering the store in this case. And the court instructs you that if you are satisfied by the evidence beyond a reasonable doubt that the defendants in this case, or either of them, broke into this store and took the sugar or any of the sugar mentioned in the bill of indictment therefrom and did so with the consent of Mr. Jones and against the will of Mr. Knight, and you so find beyond a reasonable doubt, the defendants would be guilty of breaking in and entering and larceny."

The defendants except. They also except for that the court failed to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon, particularly in respect to felonious intent.

The second exception, under C. S., 564, standing alone, is not sufficiently presented. However, the two, in effect, present the same question and are so interrelated that they may be treated as one.

The defendants admit that they broke and entered and that they took and carried away 1,020 pounds of sugar. They deny, however, that they

did so with a felonious intent. Their defense rests upon this contention and the existence or non-existence of this intent was the real and only issue of fact presented. They now challenge the sufficiency of the charge in respect thereto.

Felonious intent is an essential element of the crime defined in C. S., 4235. It must be alleged and proved, and the felonious intent proven, must be the felonious intent alleged, which, in this case, is the "intent to steal." *S. v. Spear,* 164 N. C., 452, 79 S. E., 869; *S. v. Crisp,* 188 N. C., 799, 125 S. E., 529. The same is true as to larceny. *S. v. Arkle,* 116 N. C., 1017; *S. v. Holder,* 188 N. C., 561, 125 S. E., 113.

The court, in the quoted part of its charge, made "against the will of Knight" the test of guilt. Again when the jury returned for further instructions it repeated this charge, adding that "if a person takes the property of another with the consent of his employee or some other person connected with the actual owner, that would not relieve the person of all the other elements of larceny or breaking and entering the store in this case," and further, that if they broke and entered and took the sugar "with the consent of Jones and against the will of Knight . . . the defendants would be guilty of breaking and entry and larceny."

While, perhaps, the consent of the employee "does not relieve the person of all the other elements" of the crime, neither does it burden them therewith. Nor does the fact that the breaking and entry was against the will of the owner create guilt as a matter of law. The intent with which the act was committed is material. The breaking and entry and the taking, it is true, must be without the consent and against the will of the owner. It must also be with felonious intent—here the intent to steal.

The court, in its general charge, explained the essential elements of the two offenses and instructed the jury that "both the taking and the carrying away must be with a felonious intent." It is urged, therefore, that the charge as a whole, when considered contextually, renders harmless any apparent defect in the instructions to which exception is entered. But the absence of any reference to felonious intent in the specific instruction as given is not the primary grounds of complaint.

In neither instruction was a finding of anything more than that the breaking and entry and the taking was against the will of the owner required. And it was categorically stated that the consent of the employee, in the absence of consent of the owner, would not relieve from guilt.

The alleged agreement with the clerk, if true, has a material bearing upon the issue of felonious intent even though the owner did not consent. If Jones made the representations about which they testified and they, relying thereon in good faith, entered the store and removed the sugar,

honestly believing that the owner had consented or that the clerk was authorized to consent thereto, there would be no felonious intent to steal although Knight, in fact, had not consented. At least the jury would be justified in so finding.

Furthermore, there is no evidence that the defendants took anything other than the sugar. Unquestionably Jones had the right to sell and to receive payment. He, according to the defendants, did so in the daytime when sales are ordinarily made. Title then passed to defendants. Hence, upon this state of facts, they did not take and carry away any property of Knight, as alleged.

It follows that the evidence for defendants raised questions affecting the issue of felonious intent. Did Jones authorize the entry? If so, did he do so as a co-conspirator or on his own initiative or was he, in fact, acting for the owner? Did he by his statements mislead defendants and cause them to believe that Knight had consented or to believe that he had the authority to make the agreement? Did defendant take and carry away any property belonging to Knight?

The answer to each question has a direct and material bearing on the issue of criminal intent.

On this phase of the case the court failed to fully explain and apply the law to the evidence offered. On the contrary, it stated to the jury that the consent of the employee, in the absence of the consent of the owner, would not affect the guilt of the defendants. As a result the defendants have been deprived of the full benefit of their defense.

This evidence and the law arising thereon relates to a material, substantive feature of the case. No special prayer was required. *Bowen v. Schnibben,* 184 N. C., 248, 114 S. E., 170; *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530, and cases cited; *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630.

The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved. *Bird v. U. S.,* 180 U. S., 356, 45 L. Ed., 570. The judge should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. *S. v. Rogers,* 93 N. C., 523; *S. v. Jones,* 87 N. C., 547; *Guyes v. Council,* 213 N. C., 654, 197 S. E., 121. A failure to do so must be held for reversible error.

The defendants are entitled to a

New trial.

ALVIN HIATT v. T. W. RITTER.

(Filed 2 June, 1943.)

1. Public Amusements § 2—

The proprietor of a place of public amusement impliedly warrants that the premises, appliances and amusement devices are safe for the purposes for which they are designed, but he does not contract against unknown defects not discoverable by ordinary or reasonable means.

2. Same—

The proprietor of a bathing establishment owes to his customers a duty to exercise reasonable care to maintain the premises in a safe condition; but he does not insure his patrons against accident; and his duty to patrons is satisfied when he uses reasonable care to maintain the premises in a safe condition for their proper use by the patrons.

3. Negligence §§ 1a, 5—

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, which is a requisite for actionable negligence.

4. Public Amusements § 2: Negligence § 19a—

In an action for recovery of damages for personal injuries, where plaintiff's evidence tended to show that plaintiff, a patron of defendant's swimming pool, jumped into the water from the side of an ordinary slide board, which he knew how to use, instead of sliding down same to the sandy place at its bottom made for landing, and in so doing struck and injured his foot on the sharp end of a bolt supporting the slide board, motion for judgment of nonsuit should have been allowed.

APPEAL by defendant from *Bobbitt, J.*, at February Term, 1943, of DAVIDSON.

This is a civil action to recover damages alleged to have been sustained on 26 July, 1939, by the plaintiff, a man 28 years of age, by reason of the negligence of the defendant in failing to install and maintain properly, an amusement device, to wit, a slide board, used in connection with defendant's swimming pool, known as Ritter's Lake. The slide board was 36 feet long, 2 feet wide, with wooden side rails about 6 inches high, and the height thereof at its highest point was approximately 18 feet above the water level. The bottom of the slide was metal. The slide board was supported by steel braces attached to planks 2 inches thick and 6 inches wide, said planks being fastened to concrete sills in the bottom of the pool. The braces were set at an angle. The bolt which fastened the particular brace complained of herein protruded approximately ¾ of an inch above the nut. "The bolt sticking up was very

rusty and the end kinder come to a point, not a real sharp point, but kinder rounded."

The evidence discloses the water was 5½ feet deep at the place where plaintiff was injured. The brace in question was located approximately 2 feet from the end of the slide, and the slide at that point was 2 feet above the water. There was sand at the bottom of the pool where patrons entered the water from the end of the slide.

The plaintiff, and other employees of the Fremont Hosiery Mills, at Thomasville, N. C., were on a picnic at Ritter's Lake at the time of his injury. He paid the usual charge for the privilege of using the swimming pool and the facilities in connection therewith.

Plaintiff testified: "There was a slide board in the swimming pool. It was just an ordinary slide board like all swimming pools. I went up it, sliding down several times and played around under it. I went down, started to slide down, and the board was not level, or something—water didn't wet it all the way down, so we sat there a minute, me and Glenn Pool. He did not slide down off the end. He jumped off on the right-hand side. Q. You both were talking—did you both slide down and stop. Ans.: Yes, he slid down first and me behind him and we were sitting on the board talking. We heard someone coming up to slide down on the other side, and we jumped off and he jumped off on the right-hand side and I turned and jumped off on the left-hand side, and my foot struck the brace going down and kinder slid it down for a little piece, and something went in my foot and hurt it bad. I had all my weight on it and I tried to move my foot and I could not. I had to wiggle myself around before I could get loose from this thing in the bottom of the pool."

The injury to plaintiff's foot was serious due to infection, and plaintiff alleges and offers evidence tending to show said injury is permanent.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit, and renewed his motion at the close of all the evidence. Motion denied.

From verdict and judgment awarding plaintiff damages in the sum of $2,000.00, defendant appeals, assigning error.

H. R. Kyser for plaintiff.
McCrary & DeLapp for defendant.

DENNY, J. The only question presented on the record is whether or not his Honor erred in refusing to grant defendant's motion for judgment as of nonsuit.

The defendant's exception to his Honor's ruling poses this question: Was the defendant negligent in the construction or maintenance of the slide, as alleged in the complaint? We do not think so. "The proprietor

of a bathing establishment owes to his customers a duty to exercise reasonable care to maintain the premises in a safe condition; but he does not insure the safety of his patrons against accident; and his duty to patrons is satisfied when he uses reasonable care to maintain the premises in a safe condition for their proper use by the patrons. *Rom v. Huber* (1919), 93 N. J. L., 360, 108 Atl., 361, affirmed in (1920) 94 N. J. L., 258, 109 Atl., 504." 22 A. L. R., pp. 635-6.

In 26 R. C. L., p. 721, sec. 20, we find the law stated as follows: "Where a party maintains a bath house or a diving or swimming place for the use of the public for hire, and negligently permits any portion of the same or its appurtenances, whether in the house or of the depth of the water or in the condition of the bottom or in things thereon, to be in an unsafe condition for its use in the manner in which it is apparently designed to be used, a duty imposed by law is thereby violated; and if an injury to another proximately results from the proper use of the same without contributory negligence, a recovery of compensatory damages may be had."

And in 62 C. J., p. 865, sec. 48, it is said: "The proprietor of a place of public amusement impliedly warrants that the premises, appliances, and amusement devices are safe for the purposes for which they are designed, the doctrine being subject to no other exception or qualification than that he does not contract against unknown defects not discovered by ordinary or reasonable means."

These authorities are in accord with the law approved by our own Court in *Smith v. Agricultural Society,* 163 N. C., 346, 79 S. E., 632, quoting from 38 Cyc., 368, as follows: "The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed."

In the instant case the plaintiff used the slide board a number of times, he knew that such a device had to be firmly supported by braces. He testified: "It was an ordinary slide board like all swimming pools. I went up it sliding down several times and played around under it." At the point where plaintiff jumped into the water the brace was plainly visible for a distance of two feet between the board and the surface of the water. He and a friend had been sitting near the end of the board with their feet hanging down the side. They had been engaged in conversation. Upon hearing someone climbing the ladder at the other end of the slide, they elected not to get off at the end of the board, in the usual and customary manner, where sand had been placed on the bottom

of the pool for the protection of patrons, but instead they elected to jump off of the side of said board, and plaintiff was injured.

An amusement device, however simple, may be dangerous if not used in the manner in which it is apparently designed to be used. It is clear, we think, that the plaintiff herein used the slide board in an unusual and unexpected manner. "Injuries, resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause or is an unusual effect of a known cause and therefore not expected, must be borne by the unfortunate sufferer." *Martin v. Mfg. Co.*, 128 N. C., 264, 38 S. E., 876; and in *Osborne v. Coal Co.*, 207 N. C., 545, 177 S. E., 769, this Court said: "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." Also in *Brady v. R. R.*, 222 N. C., 367, 23 S. E. (2d), 334, this Court quoted with approval from *Stone v. R. R.*, 171 Mass., 536, 41 L. R. A., 794, as follows: "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."

The judgment of the Court below is

Reversed.

MICHAEL PAPPAS v. GUS CRIST, HARRY CRIST, W. L. KETCHUM, J. C. PETTEWAY, AND J. C. THOMPSON.

(Filed 2 June, 1943.)

1. Trial § 22b: Appeal and Error § 40e—

Upon motion for judgment of nonsuit after the evidence of both sides has been offered, the defendants' evidence, unless favorable to plaintiff, cannot be taken into consideration except, when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff.

2. Partnership § 6—

False representations of one partner, for his own benefit and in fraud of the rights of his co-partner, ascertained in time by those with whom he dealt, will not afford a valid ground for defense to a suit by the partner so defrauded.

3. Contracts §§ 16, 23—

The execution, delivery and recording by the owners of a long term lease on premises, which they had contracted to lease to plaintiff, is such a renunciation of their agreement as to give plaintiff the right to treat it as a present breach and sue at once for damages.

APPEAL by plaintiff from *Bone, J.*, at October Term, 1942, of ORANGE. Reversed.

This was an action to recover damages for breach of contract to lease a portion of a building to the plaintiff.

The plaintiff, a resident of Orange County, alleged and offered evidence tending to show that in February, 1941, he and defendant Gus Crist entered into an agreement with defendants, Ketchum, Petteway and Thompson (hereinafter called lessors), to lease on completion a portion of a building then being erected by them in Jacksonville, North Carolina. The terms of the lease were agreed upon, a memorandum thereof was signed by the lessors, and the plaintiff made an advance payment of $25. Thereafter plaintiff incurred additional expense in making arrangements for occupying the premises. In May, 1941, shortly before the completion of the building, plaintiff learned that the lessors had executed a formal lease for five years on the premises to Gus and Harry Crist, and that this lease had been duly registered.

The defendants admitted the material facts, and alleged that, relying upon the false representation of Gus Crist that the plaintiff had surrendered his interest in the first agreement, they had executed and delivered to Gus and Harry Crist a five-year lease of the premises, and they offered evidence tending to show that after they learned of the falsity of the representations upon which they had acted they obtained cancellation of the lease and tendered possession of the premises to the plaintiff, who failed and refused to accept the same or to go on with the lease. Subsequently they renewed the lease to Gus and Harry Crist, who are now in possession.

Defendants' motion for nonsuit at the close of plaintiff's evidence was denied. But upon renewal of the motion at the close of all the evidence the motion was allowed, and judgment was entered dismissing the action. Plaintiff appealed.

L. J. Phipps for plaintiff.

John D. Warlick for defendants W. L. Ketchum, J. C. Petteway and J. C. Thompson.

Albert J. Ellis for defendant, Gus Crist.

DEVIN, J. The admissions in the pleadings and the evidence, in the main uncontradicted, reduce the inquiry to a narrow compass. It was

established that defendants, owners of a building, entered into an agreement with the plaintiff to lease to him and another certain premises then nearing completion, and that the plaintiff made the advance payment required. A written memorandum of the agreement was signed by the lessors. Subsequently, without the knowledge of plaintiff, the lessors executed and delivered a formal lease conveying the premises to others for the term of five years, and this lease was duly recorded. The plaintiff offered evidence that he had incurred expense in addition to the advance payment in preparation for occupation of the premises, and had suffered damages in other respects. Thus far the plaintiff's evidence went, and no farther. The motion for judgment of nonsuit was properly denied. The plaintiff had made out a *prima facie* case.

The defendants, lessors, thereupon offered evidence tending to show that though they had executed the lease conveying the premises to Gus and Harry Crist for a term of five years, they had done so in consequence of the false representation made to them by Gus Crist that the plaintiff Pappas had surrendered his interest in the first agreement, and that upon discovery of the falsity of this representation they had remedied the error into which they had unwittingly fallen by procuring cancellation of the lease, and had tendered possession of the premises to the plaintiff in accord with the terms of the agreement sued on, and plaintiff had failed to accept their offer.

At the close of all the evidence defendants' renewed motion for judgment of nonsuit was allowed. While the defendants' evidence, if accepted, would appear to constitute a defense, neither in his pleading nor in his testimony does the plaintiff admit those facts, and hence the defendants' evidence could not be considered on a motion for nonsuit. Under the rule only the plaintiff's evidence can be considered, and that in the most favorable light for him. *Yokeley v. Kearns, ante,* 196; *Newby v. Realty Co.,* 182 N. C., 34 (41), 108 S. E., 323. As was said in *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598, "In considering the last motion (for nonsuit), the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with the plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff." *Gregory v. Ins. Co., ante,* 124, and cases cited. Manifestly, defendants' evidence which tends to defeat plaintiff's cause, to contradict his testimony, or to show a new and distinct defense cannot be considered on a motion for judgment of nonsuit. The weight and credibility of the evidence are matters within the exclusive province of the jury.

Whether the evidence offered by the defendants tending to show their effort to correct the error into which they had been led by Gus Crist and their tender of possession to the plaintiff would have entitled them to

an instruction in their favor, if these were found to be the facts, is not now presented.

It was suggested in defendants' brief that the plaintiff should be held bound by the representations of Gus Crist with whom he expected to go into business as a partner. But the false representations of one partner for his own benefit and in fraud of the rights of his co-partner, ascertained in time by those with whom he dealt, would not afford a valid defense on this ground. The representation of Gus Crist was in denial of his partnership with plaintiff and manifestly beyond the scope of any implied agency. Sec. 9, ch. 374, Public Laws 1941; 20 Am. Jur., 227.

Defendants' contention that plaintiff's action for damages for breach of contract should fail because instituted before the breach had been completed is negatived by the testimony. Here the owners had executed, delivered and put to record a formal long term lease of premises which they had promised, upon consideration, to lease to the plaintiff. This would seem to constitute an unequivocal and absolute renunciation of the entire agreement to make the lease to the plaintiff, and he had a right to treat it as a present breach and repudiation of the agreement made with him. *Slaughter v. Barnett,* 114 Fla., 352, 105 A. L. R., 460, annotations; *Bu-Vi-Bar Petroleum Corp. v. Krow,* 40 F. (2d), 488, 69 A. L. R., 1295, annotation 1303; *N. Y. Life Ins. Co. v. Viglas,* 297 U. S., 672 (681); *Roehm v. Horst,* 178 U. S., 1; 12 Am. Jur., 969-970; Am. Law Institute Restatements, Contracts, sec. 318.

In *Edwards v. Proctor,* 173 N. C., 41, 91 S. E., 584, *Walker, J.,* speaking for the Court, uses this language: "When parties enter into a contract for the performance of some act in the future, they impliedly promise that, in the meantime, neither will do anything to the harm or prejudice of the other inconsistent with the contractual relation they have assumed. . . . It has, therefore, been held (the Massachusetts Court dissenting from this view in *Daniels v. Newton,* 144 Mass., 530; 19 Am. Rep., 384) that if one party to the contract renounces it, the other may treat the renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire performance to which the contract binds the promisor. 9 Cyc., 635, 636, and notes." *University v. Ogburn,* 174 N. C., 427, 93 S. E., 986; *Highway Com. v. Rand,* 195 N. C., 799 (805), 143 S. E., 851.

In 3 Williston on Contracts, section 1317, it is said: "Again it is often thought to allow a plaintiff to sue and recover full damages before the time for the completion of all the defendant's performance is to allow the doctrine of anticipatory breach, yet this is not the case. As soon as a party to a contract breaks any promise he has made, he is liable to an action. In such an action the plaintiff will recover whatever damages the breach has caused."

Without expressing any opinion as to the merits of the action, we conclude the motion for nonsuit was improvidently allowed, and that the judgment dismissing the action must be

Reversed.

JOE WOODS, ADMINISTRATOR OF EDWARD WOODS, v. ROADWAY EXPRESS, INC.,

and

FRED B. SWANN, ADMINISTRATOR OF MABEL LEE SWANN, v. ROADWAY EXPRESS, INC.

(Filed 2 June, 1943.)

1. Evidence § 28—

In an action to recover for wrongful death from an automobile collision, there was no error in the court's exclusion of testimony of the father of plaintiff's intestate, driver of one of the cars, that he saw his son's dead body, in the funeral home and saw a wound on his left arm, in an attempt to show that intestate had his left arm held out as a signal for a left turn at the time of the accident.

2. Trial § 32—

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions.

3. Evidence §§ 19, 42b—

Where, in an action for wrongful death by automobile collision, an occupant of the car, driven by plaintiff's intestate, was thrown out of the car by the impact, (1) evidence that such person stated that she told plaintiff's intestate that the collision "was going to happen, that he was driving in and out of traffic, and running past cars," was competent to contradict a denial by such person, while on the stand, that she made such statements; (2) and, when it was made to appear that such statements were almost contemporaneous with the collision, they are competent as *pars res gestæ*.

4. Evidence § 30a—

In an action for damages resulting from an automobile collision, there is no error in the court's refusal to allow a witness to use a photograph to explain his testimony, when the photograph is not shown to be a true representation of the wreck, and the record does not show how the witness would have so used the photograph.

5. Appeal and Error § 39e: Trial § 36—

Errors in the court's charge, on an issue answered in favor of the party who makes the exceptive assignments of error, are harmless. To be reversible, the error must be material and prejudicial to appellant's rights.

WOODS *v.* ROADWAY EXPRESS, INC., and SWANN *v.* ROADWAY EXPRESS, INC.

APPEAL by plaintiffs from *Bone, J.*, at October Term, 1942, of ORANGE.

Two actions to recover damages for the wrongful deaths of the plaintiffs' intestates, alleged to have been caused by the negligence of the defendant, consolidated for the purpose of trial.

On 6 October, 1941, about 8 o'clock p.m., on Highway No. 70, in Orange County, west of Hillsboro, Edward Woods was driving a Chevrolet automobile in an easterly direction. In the automobile with him were Mabel Lee Swann, Robert Swepson, Hallie Pearl Swepson and Christine Swepson. On the said highway at the same time and at the same place and going in the same direction, H. L. Lowdermilk was driving a trailer-truck of the Roadway Express, Inc., the defendant.

The automobile in which the intestates were riding passed the truck of the defendant, and after going some distance slowed up, and the driver of the defendant's truck endeavored to pass the intestates' automobile, when said automobile was turned suddenly to the left, the north, to enter an intersecting road, thereby causing a collision between the truck and the automobile, resulting in the deaths of the intestates, Edward Woods and Mabel Lee Swann.

The jury found in the case of Woods' administrator that the defendant was guilty of actionable negligence, that the intestate was guilty of contributory negligence, and denied recovery; and in the case of Swann's administrator that the defendant was guilty of negligence and awarded the plaintiff damages in the sum of one thousand dollars.

From judgment predicated on the verdict each of the plaintiffs appealed, assigning errors.

Thomas C. Carter, June A. Crumpler, and Graham & Eskridge for plaintiffs, appellants.

Bonner Sawyer and Sapp & Sapp for defendant, appellee.

SCHENCK, J. The first exceptive assignment of error set out in appellants' brief relates to the court's exclusion of testimony of the father of the intestate Woods to the effect that he, the witness, saw the body of his dead son in the funeral home and saw the wound on the left arm. This testimony was offered ostensibly to show that the intestate had his left hand outside of the automobile, as a signal of his intention to turn to the left, at the time of the fatal collision. The witness not being an expert, could not have testified as to the cause of the fatal collision when he did not see it occur. This assignment is untenable.

The second and third exceptive assignments of error set out in appellant's brief relate to the court's failure to instruct the jury not to consider certain testimony, objection to which was sustained. In the ab-

sence of a request for such instruction, such assignment of error is untenable. No such request was made.

The fourth and fifth and eleventh exceptive assignments of error set out in appellants' brief relate to the admission, over objection, of testimony to the effect that immediately after the collision Hallie Pearl Swepson, who was thrown out of the automobile, stated that she had told the driver of the automobile that this (collision) was going to happen, that he was driving in and out of traffic, running past cars. This testimony was first admitted for the limited purpose of contradicting the testimony of Hallie Pearl Swepson to the effect that she had made no such statements, and, subsequently, was admitted generally when a witness, one Bernard, testified that Hallie Pearl Swepson, "was thrown from the car as the trailer hit it, and she came running back, she was hollering I told him not to do it, I told him not to do it—in their colored language," she said, "I told him not to go in and out, and not to drive like he was crazy." We are of the opinion that his Honor's ruling was correct. The testimony under investigation was clearly competent to contradict the former testimony of Hallie Pearl Swepson, and when it was made to appear that the statements were made almost contemporaneous with the collision, and were spontaneous utterances of the mind while under the influence of the transaction, such testimony became competent generally as *pars res gestæ,* no matter by whom made. *Young v. Stewart,* 191 N. C., 297 (302-3), 131 S. E., 735, and cases there cited.

The twelfth exceptive assignment of error relates to the reference made in the charge to the testimony admitted as *pars res gestæ.* Since there was no error in the admission of the testimony there was no error in referring to it in the charge.

The sixth, seventh, ninth and tenth exceptive assignments of error set out in the appellants' brief relate to evidence which it is contended are purely conclusions and opinions of the witnesses, and are therefore incompetent. We do not concur in these contentions for the reason that we are of the opinion that the evidence assailed was nothing more than a "shorthand statement of facts" as they existed. *Myers v. Utilities Co.,* 208 N. C., 293 (295), 180 S. E., 694.

The eighth exceptive assignment of error which relates to the refusal of the court to allow the witness to use a certain photograph to explain his testimony cannot be sustained for the reason, first, that the photograph was not shown to be a true representation of the wreck; second, it does not appear in the record how the witness would have used the photograph to explain his testimony.

The thirteenth, fourteenth, fifteenth and nineteenth exceptive assignments of error set out in the appellants' brief relate to excerpts from his Honor's charge. All of these excerpts were addressed to the first issue

in each case, which presented the question as to whether the plaintiffs' intestates were injured and killed by the actionable negligence of the defendant. The jury answered the first issue in each case in the affirmative, that is, in favor of the plaintiffs; therefore, if there was error in any of the excerpts assailed, such error was harmless to the plaintiffs, appellants. "To be reversible it must appear that the error was material and prejudicial to appellant's rights. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604." *White v. McCabe,* 208 N. C., 301 (304), 180 S. E., 704.

The sixteenth, seventeenth and eighteenth exceptive assignments of error set out in the appellants' brief relate to excerpts from his Honor's charge upon the second issue in the case of Woods' administrator which presents the question as to whether the intestate by his own negligence contributed to his own injury and death. We have examined the charge as it relates to the contributory negligence of the intestate Woods, the driver of the automobile, and we find it free from prejudicial error. If the plaintiff administrator desired a fuller and more detailed charge it was his duty to ask therefor by presenting prayers for special instructions. C. S., 565; *S. v. Spillman,* 210 N. C., 271, 186 S. E., 322; *S. v. Jackson,* 190 N. C., 862, 129 S. E., 582.

The twentieth exceptive assignment of error set out in the appellants' brief relates to the charge of his Honor upon the second issue in the case of Swann's administrator addressed to the measure of damages. We have examined the pertinent portion of the charge and find no prejudicial error therein. If the plaintiff desired a fuller or more detailed charge it was incumbent upon him to have requested it by way of prayers for special instructions. The fact that the court failed to charge that the father of the intestate would have been entitled to her earnings until she had reached the age of 21 years, if error, was error in favor of the plaintiff, and, therefore, not prejudicial.

We have examined the entire record, and each assignment of error in detail, and are left with the impression that the plaintiffs have had a fair and impartial trial, and, therefore, find

No error.

IN RE JEFFRESS.

(Filed 2 June, 1943.)

Insane Persons §§ 17, 18: Guardian and Ward § 6: Appeal and Error § 18—

Where a person has been adjudged incompetent, under C. S., 2285, and a trustee of his property appointed, and thereafter, upon petition before the clerk under C. S., 2287, by the person so adjudged incompetent, after his trustee or guardian has been made a party as required by ch. 145, Public Laws 1941, he is found competent by a jury and is so adjudged by the clerk, the Superior Court has power to review the matter, on proper showing for *certiorari* by the trustee or guardian, and it would seem that the procedure provided in C. S., 2285, on appeal might appropriately be followed on such review.

APPEAL by Louise A. Jeffress, Trustee, from *Bobbitt, J.*, at January Civil Term, 1943, of GUILFORD.

Application by Louise A. Jeffress, Trustee of Edwin B. Jeffress, for *certiorari* to review restoration proceeding before the clerk of the Superior Court of Guilford County, it being found on such hearing that Edwin B. Jeffress is "now sane, and of sound mind and memory, and competent to manage his own affairs."

The record discloses that on 4 December, 1934, Edwin B. Jeffress was adjudged "incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of disease," in a proceeding under C. S., 2285, and Louise A. Jeffress, his wife, was appointed trustee of his property, estimated to be worth in excess of half a million dollars.

On 24 October, 1942, a petition was filed before the clerk by Edwin B. Jeffress alleging that he was then sane and of sound mind and memory, and asking that a jury of six freeholders be summoned to inquire into his sanity as provided by C. S., 2287. Louise A. Jeffress, Trustee, was made a party to the proceeding as required by ch. 145, Public Laws 1941. She filed answer and denied the allegations of the petition.

On the hearing, the jury found in favor of the petitioner as above indicated. The clerk held that he was without authority, discretionary or otherwise, to set aside the verdict and entered judgment thereon, and ordered the Trustee to file her final account and be discharged.

Thereafter, on 25 November, 1942, the Trustee applied to the judge of the Superior Court for a writ of *certiorari* and *supersedeas*, which was granted and the matter placed on the civil issue docket for hearing at the next civil term, Guilford Superior Court. The respondent filed answer and asked that the writ be dismissed and the judgment of the clerk confirmed.

At the January Civil Term, 1943, Guilford Superior Court, the matter came on for hearing and resulted in a dismissal of the writ, and confirmation of the clerk's order, the court holding that the trustee "has no status or position adverse to the respondent whereby she is entitled to a review of the proceedings," and further that the petitioner "has shown no error in law in the conduct of said proceedings."

From this ruling, the Trustee appeals, assigning errors.

G. C. Hampton, Jr., E. D. Broadhurst, and S. J. Stern for petitioner, appellee.

Brooks, McLendon & Holderness and R. D. Douglas for respondent, appellant.

STACY, C. J. The question for decision is whether the application of the trustee for a review of the restoration proceeding should be entertained. The trial court answered in the negative upon two grounds, (1) because the trustee is not such a party as may ask for a review, and (2) for that no error in the proceeding has been shown. We are inclined to a different view.

In limine, it will be observed that on petition before the clerk under C. S., 2285, to declare a person incompetent from want of understanding to manage his affairs, which may be filed by any person in behalf of the one deemed incompetent, either the petitioner or the respondent is permitted to appeal from the finding of the jury to the next term of the Superior Court, when the matters at issue are to be regularly tried *de novo* before a jury. Conversely, no such right of appeal is provided by C. S., 2287, when the proceeding is for restoration to competency. *Ray v. Ray,* 33 N. C., 357.

In consequence of the decision in *In re Dry,* 216 N. C., 427, 5 S. E. (2d), 142 (1939), the General Assembly of 1941 amended the restoration statute so as to provide "that in all cases where a guardian has been appointed . . . said guardian shall be made a party to such action before final determination thereof." Ch. 145, Public Laws 1941. On petition before the clerk under this section, which may be filed by the person formerly adjudged incompetent, or by any friend, relative or guardian of such person, and wherein the guardian is required to be made a party before final determination, the clerk is directed, upon notice, to issue an order to the sheriff of the county commanding him to summon a jury of six freeholders to inquire into the matter, and the jury is enjoined to "make return of their proceedings under their hands to the clerk, who shall file and record the same." Hence, the proper method of review would be by application for *certiorari. In re Sylivant,* 212 N. C., 343, 193 S. E., 422; *In re Cook,* 218 N. C., 384, 11 S. E. (2d),

142; *Unemployment Compensation Com. v. Kirby,* 212 N. C., 763, 194 S. E., 474.

If the guardian or trustee be sufficiently interested to make him a necessary party to the restoration proceeding before final determination, it would seem that such guardian or trustee has sufficient interest to ask for a review, should he be aggrieved or adversely affected by the result. *In re Bayer,* 108 Wash., 565, 185 P., 606; *Hunter v. Buchanan,* 87 Neb., 277, 127 N. W., 166, 29 L. R. A. (N. S.), 147, Ann. Cas. 1912 A, 1072; 2 Am. Jur., 961; 2 R. C. L., 55.

As the proceeding before the clerk is summary in character, *In re Dry, supra,* with the result falling short of *res judicata, Johnson v. Ins. Co.,* 217 N. C., 139, 7 S. E. (2d), 475, it may be Brobdingnagian to speak of errors in the proceeding. *Bethea v. McLennon,* 23 N. C., 523. However, it appears that the clerk undertook to charge the jury. In this he arrayed the different contentions, instructed them as to the burden of proof, and ended with these apparently conflicting peremptory instructions:

1. "I charge you, gentlemen of the jury, that if upon consideration of all the evidence you are satisfied by the greater weight thereof and find the facts to be as contended by the petitioner, and as testified to by those witnesses offered by the petitioner, then it is your duty to answer the issue Yes."

2. "I charge you, gentlemen of the jury, that if you find from the evidence the facts to be as contended by the respondent and as testified by the witnesses offered by her, then it is your duty to answer the issue No."

Moreover, it is alleged that the finding of the jury is clearly contrary to the weight of the evidence. The clerk concluded that he was without authority to interfere with the verdict. To say that six freeholders selected by the sheriff, with no right of challenge, can decide the matter irrevocably, is to ascribe to the statute an unusual grant of unbridled power. See *Dowell v. Jacks,* 58 N. C., 417; *Smith v. Smith,* 106 N. C., 498, 11 S. E., 188; *Groves v. Ware,* 182 N. C., 553, 109 S. E., 568; *Bethea v. McLennon, supra.* A reinquisition under C. S., 2285, would only be circuitous and needlessly repetitious.

Without further comment on the proceeding before the clerk, we think the showing is sufficient to warrant a review of the matter in the Superior Court. *In re Dewey,* 206 N. C., 714, 175 S. E., 161. By analogy, it would seem that the procedure provided in C. S., 2285, on appeal might appropriately be followed on such review. See *Higdon v. Light Co.,* 207 N. C., 39, 135 S. E., 710; *S. v. Carroll,* 194 N. C., 37, 138 S. E., 339.

Error and remanded.

MRS. CLARA HOWELL PHILLIPS v. JUSTIN E. PHILLIPS.

(Filed 2 June, 1943.)

1. Divorce §§ 11, 13—

Under C. S., 1667, authorizing an action for alimony without divorce, subsistence and counsel fees *pendente lite* may now be allowed.

2. Divorce § 13—

Although the plaintiff does not ask for divorce in a suit under C. S., 1667, she must charge and prove such injurious conduct on the part of the husband as would entitle her to a divorce *a mensa et thoro* at least.

3. Divorce § 5—

Condonation, in an action between husband and wife, is a specific affirmative defense to be alleged and proven by the party insisting upon it, and is not required to be negatived by the opposing party.

4. Divorce § 11—

The allowance of subsistence and counsel fees *pendente lite* is in the discretion of the trial court, who is not required to make formal findings of fact upon such a motion, unless the charge of adultery is made against the wife; and the court's ruling will not be disturbed in the absence of abuse of discretion.

APPEAL by defendant from *Thompson, J.*, at October Civil Term, 1942, of ROBESON.

The plaintiff brought this action against her husband for alimony without divorce under C. S., 1667, alleging that he had separated himself from her and failed to provide necessary subsistence according to his means and condition in life. She further alleged as grounds of her action that defendant had committed adultery at various and sundry times, and had been living as man and wife with a certain woman in Brunswick County.

The complaint then is addressed to a description of the defendant's estate and earning capacity.

The defendant replied, denying substantial allegations of the complaint except as to his adultery. He admits that he was convicted of that crime in Brunswick County.

Plaintiff made a motion for subsistence and counsel fees *pendente lite*, which was heard upon affidavits and oral testimony at October Civil Term, 1942, by Thompson, Judge. At that time there was elicited from the plaintiff an admission that defendant had visited her during the pendency of this action for one night, and that the two occupied the same bed. Plaintiff, however, testified that there was no sexual intercourse. The defendant insisted that his offense was thereby condoned as a matter of law.

Judge Thompson passed upon the testimony and found that although the defendant had come to the house of the plaintiff on 12 October, 1942, and remained during the night, occupying the same bed with her, no marital or sexual relations were had, and held that there was no condonation of the adultery of the husband, as a matter of law, upon these facts.

At the same term of court, upon these affidavits and oral testimony, Judge Thompson, finding pertinent facts, made an order allowing subsistence to the plaintiff pending the final determination of the issues, of $35.00 per month, beginning with the month of October, 1942, and an additional sum of $75.00 attorney's fees *pendente lite,* the said sum to be taken into consideration when final allowance of attorney's fees have been made.

The order provides that the complaint should have the effect of *lis pendens,* entitling the plaintiff to a lien on the property for the satisfaction of allowances made in the order.

The defendant appealed from the order, assigning errors.

Varser, McIntyre & Henry for plaintiff, appellee.
Ellis E. Page and F. D. Hackett for defendant, appellant.

SEAWELL, J. We do not understand that it is contended that subsistence and counsel fees *pendente lite* may not now be allowed under C. S., 1667, authorizing an action for alimony without divorce. The original Act of 1871-72 did not so provide; but successive amendments by ch. 24, Public Laws of 1919, and ch. 123, Public Laws of 1921, permitted an allowance of subsistence and of counsel fees pending the hearing on the issues. See history of this legislation *per Adams, J.,* in *Moore v. Moore,* 185 N. C., 332, 335, 117 S. E., 12; *Peele v. Peele,* 216 N. C., 298, 4 S. E. (2d), 616; *Holloway v. Holloway,* 214 N. C., 662, 200 S. E., 436. The defendant merely contends that, as a matter of law, such allowances should not be made upon the facts of this case and on plaintiff's own showing.

Under C. S., 1667, although the plaintiff does not ask for divorce, she must charge and prove such injurious conduct on the part of the husband as would entitle her to a divorce *a mensa et thoro,* at least. She charged abandonment, failure to support, and adultery, which is sufficient to satisfy the statute.

Although he had made no plea of condonement in his answer, the defendant undertook to set up this defense against plaintiff's motion for alimony and counsel fees *pendente lite.*

In *Blakely v. Blakely,* 186 N. C., 351, 119 S. E., 485, referring to the defense of condonation, it is said: "It is very generally regarded as a specific affirmative defense to be alleged and proved by the party insisting upon it, and is not required to be negatived by the opposing pleader. *White v. White,* 171 Va., 244; *Odom v. Odom,* 36 Ga., 386; 9 R. C. L., 386. And decisions of our own Court, in *Kinney v. Kinney,* 149 N. C., 321; *Steel v. Steel,* 104 N. C., 631-638, and other cases, are in full approval of the general principle."

We see no reason why this rule of practice should not be enforced since the defense affects the plaintiff's case so importantly, and the rule is similar to that which obtains with respect to many other affirmative defenses which go to the defeat of the action. The defendant not having relied upon condonation in his answer should not be heard upon the point in resisting the motion for subsistence and suit money.

The defendant contends that the complaint and testimony of the wife fully establish that he had made adequate provision for her subsistence and that she has income out of this provision sufficient for suit money. But there are so many things to be taken into consideration upon such a question that it is difficult to conceive how it could ever become a matter of law, except upon an abuse of discretion by the trial judge, which does not appear in the case at bar. If there are such cases, they must be rare. In this connection it may be proper to note that the discretion given to the trial judge is so wide that he is not required to make formal findings of fact upon such a motion, unless the charge of adultery is made against the wife. *Southard v. Southard,* 208 N. C., 392, 180 S. E., 665; *Price v. Price,* 188 N. C., 640, 125 S. E., 264.

Of course, the introduction of evidence and the finding of facts were for the sole purposes of the motion, and the facts found are not conclusive on the trial of the issues. *Moore v. Moore, supra.*

We conclude that no error is disclosed in defendant's appeal, and the order is

Affirmed.

STATE OF NORTH CAROLINA, EX REL. R. B. JONES, ADMINISTRATOR, CUM TESTAMENTO ANNEXO, DE BONIS NON, OF HENRY HAYNIE, DECEASED, *v.* E. C. GRIGGS, PRINCIPAL; AND K. W. ASHCRAFT, THE BANK OF WADESBORO, EXECUTOR OF L. D. ROBINSON, DECEASED; W. HENRY LILES, L. J. HUNTLEY, AND F. M. HIGHTOWER, EXECUTORS OF F. M. HIGHTOWER, DECEASED, AND EFFIE A. LITTLE AND H. W. LITTLE, JR., EXECUTORS OF H. W. LITTLE, DECEASED; AND THE FIRST NATIONAL BANK OF WADESBORO, N. C., ADMINISTRATOR OF C. M. BURNS, DECEASED, SURETIES; AND E. C. GRIGGS, INDIVIDUALLY, H. BATTLE GRIGGS, HERBERT C. GRIGGS AND MRS. DAVID G. BALLINGER.

(Filed 2 June, 1943.)

1. Trial § 54—

Where the court below in denying a motion made no findings of fact on the point involved, but there was evidence to support the ruling and no request was made that the facts be found, it will be presumed on appeal that the court found sufficient facts to support its conclusions.

2. Courts § 1b: Executors and Administrators § 27—

While the clerk of the Superior Court has exclusive original jurisdiction as to matters of probate and the judge has no power therein unless the matter is brought before him by appeal, the Superior Court in term is by statute constituted a forum for the settlement of controversies over estates. C. S., 135.

3. Executors and Administrators § 26—

While the clerk of the Superior Court is not necessarily bound by an agreement of the parties to approve an account and is free to exercise his own judgment on matters of probate as long as they are before him, the agreement does bind the parties who signed it, in the absence of mistake or fraud or other inequitable conduct.

4. Contracts § 7c—

An agreement not to sue, or to withdraw a defense, or to waive an objection in another forum, is binding when based upon the valuable consideration of mutual promises, and the court is not without jurisdiction to sanction it.

5. Judgments §§ 1, 4—

A consent judgment is the contract of the parties, entered upon the records with the approval and sanction of a court of competent jurisdiction, and such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud, or mistake, and in order to vacate such a judgment an independent action must be instituted.

APPEAL by movant, H. Battle Griggs, from *Armstrong, J.*, at March Term, 1943, of ANSON. Affirmed.

Motion in the cause by H. Battle Griggs to strike out a paragraph from the judgment previously rendered by consent. Motion denied and movant appealed.

J. F. Milliken for movant, appellant.
Fred J. Coxe for plaintiff, appellee.

DEVIN, J. The movant, H. Battle Griggs, sought to have stricken out the seventh paragraph of a consent judgment heretofore entered in the above entitled cause. His motion for this purpose was denied by the court below, and he brings the case here for review of this ruling.

From the recital of the facts in this case when it was here at Spring Term, 1941, as reported in 219 N. C., 700, 14 S. E. (2d), 836, it appears that the action was originally instituted by R. B. Jones, administrator *cum testamento annexo, de bonis non,* of the estate of Henry Haynie, against the former administrator of the estate, E. C. Griggs, and the sureties on his bond, for an accounting. To this action the original defendants asked that H. Battle Griggs, Herbert C. Griggs, Mrs. David C. Ballinger and E. C. Griggs, individually and as executor of Mrs. Sarah Griggs, be made parties defendant. Their motion was allowed by the Superior Court at November Term, 1940, and this Court affirmed. These last named defendants are related to each other, and to the cause, in the following manner. Henry Haynie's daughter Sarah married E. C. Griggs, and H. Battle Griggs and Herbert C. Griggs are their children. Mrs. Ballinger is a daughter of Sarah Griggs by a former marriage. Sarah Griggs is dead and E. C. Griggs is the executor of her estate.

Having been made parties, H. Battle Griggs and others filed answers in the cause, alleging among other things that there had been turned over to the plaintiff as administrator of the Haynie estate property which belonged to the estate of Mrs. Sarah Griggs, and to which plaintiff was not entitled. It was further alleged in movant's answer that the plaintiff, having no right to administer property rightfully belonging to the estate of Mrs. Sarah Griggs, had "no right to charge against the same expenses, attorneys' fees and commissions."

Subsequently, at September Term, 1942, all the parties to the suit entered into an agreement to adjust, compromise and settle the entire controversy, and the agreement was drawn up in the form of a judgment and signed by all the parties or their attorneys, including the personal signature of the movant, H. Battle Griggs. This agreement, reciting in detail the terms of the various agreements entered into between the parties, was approved by the presiding judge and entered on the records of the court.

Paragraph 7 of the consent judgment, which movant now seeks to have stricken out, relates to the accounts heretofore filed by the plaintiff as administrator of the Haynie estate in the office of the clerk, and recites the agreement that they "are hereby approved by all the parties."

. . . "and no objections thereto shall be filed by any of the defendants."

The movant, H. Battle Griggs, in his motion in the cause, alleged that he did not know paragraph 7 was in the judgment when he signed it, that he did not have an opportunity to read it and was misled by the plaintiff. The court below, in denying his motion, made no findings of fact on this point, but, as there was evidence to support the ruling and as there was no request that the facts be found, it will be presumed that the court found sufficient facts to support his conclusion. *Parris v. Fischer & Co.*, 219 N. C., 292, 13 S. E. (2d), 540; *Rosser v. Matthews*, 217 N. C., 132, 6 S. E. (2d), 849; *Dunn v. Wilson*, 210 N. C., 493, 187 S. E., 802. The movant's attack on the offending paragraph on this ground is not sustained.

Movant's only other ground of attack is that the court did not have power to sanction the agreement into which he entered with the other parties to this litigation, for the purpose of settlement and compromise, because paragraph 7 relates to the matter of certain administration allowances which are in the exclusive jurisdiction of the clerk.

Undoubtedly the clerk of the Superior Court has exclusive original jurisdiction as to matters of probate, and the judge has no power to allow or disallow an item in an administrator's account unless the matter is brought before him by appeal. In that event, usually, after ruling on the questions of law, the matter should be remanded to the clerk. The distinction between the judge's jurisdiction in civil actions and special proceedings, and in matters strictly of probate, is pointed out in *In re Styers*, 202 N. C., 715, 164 S. E., 1231. See also *Cody v. Hovey*, 219 N. C., 369, 14 S. E. (2d), 30. It is true the Superior Court in term is by statute constituted a forum for the settlement of controversies over estates (C. S., 135), and the power of the Superior Court to entertain administration suits and for the settlement of estates is well recognized. *In re Hege*, 205 N. C., 625, 172 S. E., 345; *In re Estate of Wright*, 200 N. C., 620, 158 S. E., 192; *Fisher v. Trust Co.*, 138 N. C., 90, 50 S. E., 592.

But we do not understand that paragraph 7 of the consent judgment purports to usurp the probate functions of the clerk, or to allow or disallow an item or to direct the clerk to do so. The agreement was that the accounts were approved by the parties. The clerk is not necessarily bound by an agreement of the parties to approve an account and is free to exercise his own judgment on matters of probate so long as they are before him. But the agreement does bind the parties who signed the contract. The movant here has agreed that he would make no objection to the plaintiff's account. An agreement not to sue, or to withdraw a defense, or to waive an objection to a proceeding in another forum, is binding when based upon the valuable consideration of mutual promises,

and the court is not without jurisdiction to sanction such an agreement. *Bailey v. McLain,* 215 N. C., 150, 1 S. E. (2d), 372. In the absence of proof of mistake or fraud or other inequitable conduct, one who has signed an agreement with other parties may not be permitted to abrogate any part of it over their objection. An agreement lawfully entered into and based on consideration should not be set aside except for gravest reasons. In the apt phrases of the Apostle Paul, "Though it be but a man's covenant, yet if it be confirmed, no man disannulleth, or addeth thereto." Gal. 3:15.

Consent judgments and the efforts to avoid their consequences have frequently engaged the attention of our courts. The underlying principles have been repeatedly stated. In a well considered opinion in *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209, *Winborne, J.,* speaking for the Court, states the law in these words: "It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and that such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and that in order to vacate such judgment an independent action must be instituted." Numerous decisions are cited in support.

The agreement entered into by H. Battle Griggs, the movant, as contained in the consent judgment and evidenced by his signature, cannot be treated as a nullity. His contract that no objection should be filed was binding on him, whatever its effect on the clerk, and he may not be permitted now to withdraw his consent. We conclude that the ruling of the court below denying the motion to strike the seventh paragraph from the consent judgment must be

Affirmed.

J. F. O'KELLY v. C. L. BARBEE.

(Filed 2 June, 1943.)

Automobiles § 9d—

Where plaintiff, a guest passenger, and defendant were driving, at night on a paved road in defendant's car, when suddenly the lights on the car went out and defendant, as he was slowing down to stop, asked plaintiff to open the door and look out and warn him of danger, which plaintiff did, and in response to such warning defendant cut his wheels back on the pavement so suddenly that plaintiff was thrown from the car and was injured, the car traveling its own length only after the accident, defendant was confronted with an emergency and motion for judgment as of nonsuit properly allowed.

O'KELLY *v.* BARBEE.

APPEAL by plaintiff from *Blackstock, Special Judge,* at January Term, 1943, of DURHAM.

Civil action instituted by plaintiff, a guest passenger in an automobile, to recover for personal injuries alleged to have resulted from the defendant's negligent operation of the automobile.

Plaintiff and defendant are partners engaged in the retail grocery business. On the night of 11 December, 1941, the plaintiff had gone with the defendant, in defendant's automobile, on an errand of personal business for the defendant. As they were returning to Durham over the new Duke Road, somewhere between 8:00 and 10:00 o'clock, the lights on the car blew out. At that time the defendant was not traveling fast, probably 30 or 35 miles an hour. Plaintiff testified: "When the lights went out everything was real black. Mr. Barbee said, 'Open the door and look out and see where we are in the road, so I will know what to do.' I opened the door and said, 'You are on the shoulder now,' and when I said that he just pulled the wheel over like that. He turned it to the left to get back on the highway. He was off the right side of the road and he turned it back into the highway to the left, and when he turned it he was so quick that I pitched right out of the car."

The defendant testified, as a witness for plaintiff, as follows: "After the lights went out I asked Mr. O'Kelly to watch and not let me run off the road. When I asked him to watch he opened the door, and after he opened the door he said something about I was off the road, and about that time I felt my front wheels run off the pavement. He said that I was about to run off the road. About the same time I felt my front wheels drop from the pavement, and I cut it pretty sharp. I cut the steering wheel to the left. When I cut my wheel to the left I saw Mr. O'Kelly's feet, or rather I felt them, and I stopped the car and jumped out and ran back and found him lying on the pavement. At the time I cut my wheel to the left I knew that Mr. O'Kelly had the door open and was looking out the door." On cross-examination, this witness identified a written statement signed by him on 17 December, 1941, in which he said: "I had been driving about 40 or 50 miles an hour on the right side of the road, and as soon as my lights went off I started to stop. I said something to Mr. O'Kelly about watching his side of the road and letting me know if I was about to run off the road. I did not ask him at any time to open the door, and look out. However, Mr. O'Kelly did open the door, and somehow fell out. My car was stopped about a car's length from where I found Mr. O'Kelly on the road, and he was unconscious. My car was in the center of the pavement, and I at no time ran off the pavement."

At the close of plaintiff's evidence, defendant moved for judgment as of nonsuit. Motion allowed. Judgment signed accordingly. Plaintiff appeals, assigning error.

Victor S. Bryant for plaintiff.
Fuller, Reade, Umstead & Fuller for defendant.

DENNY, J. We do not think the evidence on this record, when considered in the light most favorable to plaintiff, establishes actionable negligence on the part of defendant. The accident occurred at night, after the lights on defendant's automobile blew out and before the car was stopped, which according to the evidence was immediately thereafter. The automobile was stopped within about the car's length of where the accident occurred. The defendant was confronted with an emergency, and the evidence does not disclose a failure on his part to exercise ordinary care in the operation of his automobile under the circumstances. *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661; *Grimes v. Coach Co.,* 203 N. C., 605, 166 S. E., 599.

The judgment of the court below is

Affirmed.

S. C. RIPPLE v. T. A. M. STEVENSON.

(Filed 2 June, 1943.)

1. Partnership § 5—

In an action by one partner against the other on a promissory note, which appears on its face to be a personal transaction between the parties, which the plaintiff's evidence confirms, a motion for nonsuit was properly denied.

2. Contracts §§ 8, 16—

It is permissible for the parties to agree that a note shall be paid only in a certain manner, i.e., out of a particular fund, by the foreclosure of collateral, or from rents collected, etc. And this part of the agreement may be shown, though it rests in parol.

APPEAL by defendant from *Gwyn, J.,* at January Term, 1943, of FORSYTH.

Civil action to recover on promissory note in words and figures as follows:

"$2500.00 Winston-Salem, N. C.
Oct. 22, 1930

"Ninety days after date, I promise to pay to S. C. Ripple or order Twenty-Five Hundred & No/100 Dollars for value received in Services payable with interest after date at Wachovia Bank & Trust Company.

T. A. M. Stevenson (Seal)."

The plaintiff alleges that on 15 April, 1932, the defendant made a payment of $75.00 on his note, which was duly credited thereon. The present action was instituted 11 April, 1942.

The defendant admits the execution of the note, but pleads that it was to be paid out of rents or profits to be derived from an office building to be erected on a lot owned by plaintiff and defendant as tenants in common. It is admitted that there were no such rents or profits.

The defendant further pleads payment of $1,143.80 on 22 June, 1931, derived from other transactions, which he alleges the plaintiff failed to credit on the note. He also pleads the ten-year statute of limitations in bar of the plaintiff's right to recover.

Upon the issues thus joined, the jury returned a verdict in favor of the plaintiff. From judgment thereon, the defendant appeals, assigning errors.

Fred M. Parrish for plaintiff, appellee.

Richmond Rucker and Womble, Carlyle, Martin & Sandridge for defendant, appellant.

STACY, C. J. We have here for determination, (1) the merit of the motion for judgment as in case of nonsuit, and (2) the correctness of the charge.

The right to maintain the action is challenged on the ground that the plaintiff is not the real party in interest, as the "services" for which the note was given were rendered to the partnership of Ripple and Stevenson. *Chapman v. McLawhorn,* 150 N. C., 166, 63 S. E., 721. Even so, it also appears that the note represents a personal transaction between the parties. At least, such is the plaintiff's evidence, and this would seem to be sufficient to defeat the motion for judgment of nonsuit under one or more of the exceptions set out in *Pugh v. New Bern,* 193 N. C., 258, 136 S. E., 707.

It is permissible for the parties to agree that a note shall be paid only in a certain manner, *e.g.,* out of a particular fund, by the foreclosure of collateral, or from rents collected from a certain building, etc. *Jones v. Casstevens,* 222 N. C., 411. And this part of the agreement may be shown, though it rest in parol. In *Wilson v. Allsbrook,* 203 N. C., 498, 166 S. E., 313, the alleged agreement was, that the note there in suit should be paid "from rents collected by the defendant." Here, the defendant alleges a similar agreement. However, the jury did not accept the defendant's contention in respect of the mode of payment. See *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847; *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320.

In the light of the theory of the trial, as announced in the pleadings and pursued on the hearing, the case presents little more than controverted issues of fact, determinable alone by the jury. There are a number of exceptions to the charge, some of omission, others of commission, but a careful perusal of the entire record induces the conclusion that none of them can be sustained. It would be repetitious of familiar principles to discuss them in detail. The usual formula of contextual interpretation is to be applied to the charge. *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360.

On the record as presented, the verdict and judgment will be upheld.

No error.

THE CITY OF RALEIGH, A MUNICIPAL CORPORATION, v. MECHANICS & FARMERS BANK.

(Filed 14 July, 1943.)

1. Statutes § 5a: Courts § 1a—

Wisdom or impolicy of legislation is not a judicial question. The province of this Court ends when it interprets the legal effect of legislative enactments.

2. Statutes § 5a—

As a rule, in determining the construction to be given legislative enactments, the courts are not controlled by what the Legislature itself apparently thought the proper interpretation, but the language employed, taken in connection with the context, the subject matter and the purpose in view, must be considered in order to ascertain the legislative intent.

3. Same—

When the heading of a section is misleading or is not borne out by the explicit language of the statute itself, it may be disregarded; but, when the meaning is not clear or there is ambiguity, the heading, which the Legislature had adopted in enacting the statute, becomes important in determining the legislative intent.

4. Municipal Corporations § 34: Limitation of Actions § 2a—

In a suit under C. S., 7990, to foreclose a statutory lien on abutting property, given a city for street improvements, all installments of the amounts assessed therefor, which are ten years overdue when action is brought, are barred by the statute of limitations under C. S., 2717 (a), now N. C. Code, 1943, secs. 160-93, and no part of the proceeds of sale can be applied to the payment of such installments.

5. Statutes § 5b: Constitutional Law §§ 4a, 4d: Limitation of Actions § 1b: Municipal Corporations § 34—

The Legislature may set a time clock even for the sovereign; and the maxim *nullum tempus occurrit regi* is not applicable to statutes which impose a limitation upon the exercise of powers granted municipalities for the enforcement of statutory liens of assessments for public improvements.

6. Municipal Corporations § 34—

Local assessments may be a species of tax, but they are not taxes as generally understood in constitutional restrictions and exemptions.

7. Constitutional Law § 4b: Taxation § 1—

There is no provision of the N. C. Constitution directly forbidding the Legislature to pass any law releasing or remitting taxes.

8. Process § 2—

In a civil action, the delivery of summons and copy of complaint to the sheriff for service fixes the beginning of the action as of that date.

WINBORNE, J., dissenting.

STACY, C. J., and BARNHILL, J., concur in dissenting opinion.

APPEAL by plaintiff from *Burney, J.*, at February Term, 1943, of WAKE. Affirmed.

This was a civil action for the foreclosure of street assessment liens, under C. S., 7990, on eight lots in the city of Raleigh, described in the pleadings, now owned by the defendant.

It was admitted that the proceedings for the assessment on the described lots of the apportioned cost of the local improvements were sufficient to subject said lots to a lien in favor of the plaintiff therefor, in accordance with the statutes. The improvements were made in 1926 and 1927, and the cost chargeable to said lots was made payable, in each case, in ten equal annual installments thereafter. The installments were successively due the first Monday in October each year, with interest from the date of confirmation of the assessment. Certain of the earlier installments were paid when due, but the others remain unpaid. The number and amount of installments paid and those unpaid are set out in the pleadings and are undisputed. The summons in this action was issued 3 October, 1942, and summons with copy of the complaint was

delivered to the sheriff for service 5 October, 1942. The first Monday in October, 1932, was the 3rd day of that month. The defendant pleaded the statute of limitations as to each unpaid installment which became due more than ten years before the institution of the action.

Jury trial was waived, and the court, after finding the facts, concluded "that each and all unpaid annual installments and interest thereon which became due and payable on or before the 4th day of October, 1932, are barred by the ten years' statute of limitations, being sec. 2717 (a), N. C. Code, ch. 331, Public Laws 1929," and that the liens growing out of said installments are also barred and no part of the proceeds of sale can be applied to the payment of such installments. It was further concluded that the installments due in 1933, 1934, 1935, and 1936, together with interest thereon, were valid liens on the described lots.

It was thereupon adjudged that the payment in full of the installments not barred should constitute a discharge of all claims and demands of the plaintiff on account of the improvements referred to, and that upon failure to pay, the described lots should be sold by the commissioners appointed for that purpose.

To the conclusions of law and the judgment thereon the plaintiff duly excepted and appealed to this Court.

P. H. Busbee and John G. Mills, Jr., for plaintiff City of Raleigh, appellant.

William Henry Hoyt, of counsel.

Briggs & West and Murray Allen for defendant Mechanics & Farmers Bank, appellee.

Wellons & Wellons, W. A. Dees, Edward B. Hope, William B. Campbell, J. W. Ellis, Folger & Folger, F. O. Carver, R. B. Lee, P. V. Critcher, Waller D. Brown, Thorp & Thorp, Womble, Carlyle, Martin & Sandridge & Nat S. Crews, G. H. Jones, counsel amici curiæ.

DEVIN, J. The plaintiff's appeal brings up for review the ruling of the court below that in a suit to foreclose the statutory lien on abutting property, given the city for street improvements, the installments of the amounts assessed therefor which are ten years past due are barred by the statute of limitations.

The particular question posed is whether chapter 331, Public Laws 1929 (sec. 2717 [a], N. C. Code), should be construed to impose a limitation of ten years, in a foreclosure suit under C. S., 7990, as to all installments of the amounts assessed for street improvements which are ten years overdue when action brought.

It is admitted that several of the annual installments assessed against the lots now belonging to the defendant were more than ten years past due when this action was instituted. Hence, if the Act of 1929 be construed to be a statute of limitation, this action as to such installments is barred. Thus, the determinative question for decision is clearly presented.

In chapter 56 of the Consolidated Statutes are codified all the general laws relating to municipal corporations, and beginning with sec. 2703 and extending through sec. 2737 are found the particular statutes regulating assessments for public improvements. The subject matter embraced in each of these sections is indicated by the heading. Sec. 2717 relates to the enforcement of payment of assessments. At the Session of 1929 the Legislature, by ch. 331, amended sec. 2717 by adding thereto provisions for reinstating and extending assessments in arrears, and then added an entirely new section to the Consolidated Statutes, to appear next after 2717, as follows: "2717 (a). Sale of Foreclosure for Unpaid Assessments Barred in Ten Years: No Penalties. No statute of limitation, whether fixed by law especially referred to in this chapter or otherwise, shall bar the right of the municipality to enforce any remedy provided by law for the collection of unpaid assessments, whether for paving or other benefits, and whether such assessment is made under this chapter or under other general or specific acts, save from and after ten years from default in the payment thereof, or if payable in installments, ten years from the default in the payments of any installment. No penalties prescribed for failure to pay taxes shall apply to special assessments, but they shall bear interest at the rate of six per cent per annum only . . ."

While this act may be lacking in that degree of precision ordinarily to be found in restrictive statutes, we think the legislative intent to fix a time limit of ten years for the institution of a suit to foreclose a street assessment lien sufficiently appears.

In view of the decision of this Court in *Morganton v. Avery,* 179 N. C., 551, 103 S. E., 138, holding the three years' statute of limitations applicable to suits to enforce collections of street assessments, and the decision in *Drainage District v. Huffstetler,* 173 N. C., 523, 92 S. E., 368, holding the ten years' statute applicable to drainage assessments, and *Schank v. Asheville,* 154 N. C., 40, 40 S. E., 687, holding the assessment had the effect of a judgment and lien, and *Coble v. Dick,* 194 N. C., 732, 140 S. E., 745, likening the assessment to a statutory mortgage, and in view of the local statutes prescribing for certain towns different limitations, as well as the provision of C. S., 8037, then in force, prescribing a limitation of five years for tax foreclosure for municipal corporations, it is reasonably to be inferred that by the language in which this section

was expressed the General Assembly intended to clarify the situation and to establish the uniform limitation of ten years for the enforcement by municipalities of the remedies provided by law for the collection of unpaid assessments.

While the legislative intent is to be gathered from the language used, it is obvious that the Legislature in this instance understood it was providing such a limitation, for it enacted a new section to follow immediately after 2717, and gave the new section the caption "Sale of Foreclosure for Unpaid Assessments Barred in Ten Years." The significance of this heading is materially aided by the fact that it was enacted by the Legislature itself as a part of the Act. Also, on the margin of the original act, ch. 331, Public Laws 1929, as indicating its context, appear the words "Foreclosure for unpaid installments barred after ten years," and in the recent revision of our statutes, enacted by the General Assembly of 1943, entitled General Statutes of 1943, section 2717 (a), appears as section 160-93 with the heading "Sale or foreclosure for unpaid assessments barred in ten years."

As a rule in determining the proper construction to be given legislative enactments, the courts are not controlled by what the Legislature itself apparently thought the proper interpretation should be, but the language employed, taken in connection with the context, the subject matter and the purpose in view must be considered in order to ascertain the legislative intent, which, after all, is the primary purpose of all judicial construction. *S. v. Humphries,* 210 N. C., 406, 186 S. E., 473. As was said by *Walker, J.,* in *S. v. Earnhardt,* 170 N. C., 725, 86 S. E., 960: "It is common learning that a statute must be so construed as to give effect to the presumed and reasonably probable intentions of the Legislature and so as to effectuate that intention and the object for which it was passed."

True, when the heading of a section is misleading or is not borne out by the explicit language of the statute itself, it may be disregarded, but when the meaning is not clear or there is ambiguity the heading which the Legislature has adopted in enacting the statute becomes important in determining the legislative intent. The heart of a statute is the intent of the lawmaking body. As was said by *Chief Justice Marshall* in *U. S. v. Fisher,* 2 Cranch (U. S.), 358 (356): "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." To the same effect is the statement of *Chief Justice White* in *Knowlton v. Moore,* 178 U. S., 41 (65), and in *McGuire v. Comr. of Int. Rev.,* 313 U. S., 1 (9), it was said: "While the title of an act will not limit the plain meaning of the text, it may aid in resolving an ambiguity." While the caption may not

control the text when it is clear, it may be called in aid of construction. *In re Will of Chisholm,* 176 N. C., 211, 189 S. E., 498.

Thus, the clear implication that the Act of 1929 was intended to establish ten years as the period of limitation for the foreclosure of the lien is fortified by the definite expression by the Legislature itself in the caption that foreclosure should be barred in ten years.

It would seem also that succeeding Legislatures also considered that the Act barred foreclosure suits on assessment installments ten years past due, for in 1931, and again in 1933, and again in 1935, and again in 1937, and again in 1939, and again in 1941, and again in 1943, municipal corporations were given the right by resolution to extend the time of payment of installments, which would enable them to avoid the bar of the statute, if they desired to do so.

From an examination of these statutory provisions we think it may fairly be gathered that it was the legislative purpose to provide the purchaser or owner of real property in a city with some period of relief against an ancient assessment, and that those more than ten years past due should not be brought forward in a suit for the foreclosure and sale of his property. Statutes of repose are in the interest of the security of titles. The suggestion that to hold a suit to enforce collection of unpaid installments barred after ten years would add to the burden of other taxpayers is equally true of every kind of unpaid tax, whether due to the insolvency of the taxpayer or the negligence of the tax collector, but that was a matter for the consideration of the Legislature and not the courts.

In the exercise of its undoubted power to construe and give authoritative interpretation to the acts of the General Assembly, this Court has several times considered the Act of 1929 and construed it as prescribing a limitation of ten years to a suit to foreclose the lien of an assessment for local improvements.

In *Statesville v. Jenkins,* 199 N. C., 159, 154 S. E., 15, decided in 1930, where the city sought foreclosure of lien on defendant's lot for street paving assessment, payable in ten annual installments, the defendant pleaded the ten years' statute of limitations. The local act contained no limitation. The case was heard in the Superior Court at November Term, 1929, and the court below held the action barred. On appeal this was reversed, and the Act of 1929 held inapplicable for the reason that this Act did not give a reasonable time within which to bring the action before the bar became effective. It was said in the opinion: "The statute we are considering fixed no time limit for the commencement of action, but barred all assessments ten years from the default in the payment of any installment." In the two dissenting opinions in that case it was thought the three years' statute applied (*Morganton v.*

Avery, supra), and hence the plaintiff city "was in no position to complain at the holding that seven installments are barred under the 1929 statute."

In *High Point v. Clinard,* 204 N. C., 149, 167 S. E., 690, decided in 1933, an action to recover delinquent street assessments, the three years' statute of limitations was pleaded (*Morganton v. Avery, supra*), and it was contended that the Act of 1929, passed after the bar was complete, could not extend the right of action. It was held, however, that the ten years' statute of limitations, as decided in *Drainage District v. Huffstetler, supra,* applied. *Statesville v. Jenkins, supra,* was cited.

In *Farmville v. Paylor,* 208 N. C., 106, 179 S. E., 459, decided in 1935, the ten years' statute of limitations was pleaded to an action to collect street paving assessments. While the case turned upon the construction of the accelerating clause in C. S., 2716, the decision proceeded upon the view that each installment was subject to the bar of ten years after default, citing *High Point v. Clinard, supra.*

In *Charlotte v. Kavanaugh,* 221 N. C., 259, 20 S. E. (2d), 97, the applicability of the Act of 1929 to civil actions to foreclose liens for street assessments was directly involved and carefully considered, and definitely decided by a unanimous Court. After quoting the statute in full, the Court said, *Denny, J.,* delivering the opinion: "Here the municipalities, the sovereigns, are expressly named in the statute of limitations, and we think the General Assembly intended to bar all assessments for local improvements after ten years from default in the payment thereof, or, if payable in installments, in ten years from default of any installments, and we hold that the ten-year statute of limitations is applicable to assessments for local improvements and that the same are barred from and after ten years from default in the payment thereof, or, if payable in installments, ten years from default in the payment of each installment, unless the time for payment has been extended as provided by law." There was no petition to rehear.

The last cited decision was rendered Spring Term, 1942. The Legislature which convened subsequent thereto made no change in this statute except to extend the limitation from ten years to fifteen years, as applicable to the city of Charlotte. Ch. 181, Public Laws 1943. Obviously the law on this point was regarded as settled.

The appellant, however, calls attention to the statement in *Asheboro v. Morris,* 212 N. C., 331, 193 S. E., 424, that "Where the sovereign elects or chooses to proceed under C. S., 7990, no statute of limitations is applicable." In that case the action was to foreclose the lien of a street assessment confirmed in 1925. The first installment was due 1 October, 1926, and the suit was brought 31 May, 1932. Only the three years' statute was pleaded. The ten years' statute was not involved.

In *Charlotte v. Kavanaugh, supra,* referring to this case, it was said: "In that case, however, not having been pleaded, the applicability of the ten-year statute was not directly involved and the provisions of sec. 1, ch. 331, Public Laws of 1929, were not called to the attention of the Court. The effect of this statute on former decisions of this Court was not decided."

It is contended by the plaintiff that the maxim *nullum tempus occurrit regi* should be applied here, and that the city of Raleigh, exercising the power of sovereignty, should not be barred by the lapse of time in the effort to enforce the lien of a special assessment imposed for a public improvement.

While this ancient maxim has lost much of its vigor by the erosions of time, and by legislative enactment, it is still regarded as the expression of a sound principle of government applicable to actions to enforce the sovereign rights of the State. Notwithstanding the inclusive provisions of sec. 420 of the Consolidated Statutes that "the limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties" (*Threadgill v. Wadesboro,* 170 N. C., 641, 87 S. E., 521), it has been uniformly held that no statute of limitations runs against the State, unless it is expressly named therein. *Wilmington v. Cronly,* 122 N. C., 388, 30 S. E., 9; *Asheboro v. Morris, supra.* However, where in the statutes affording a remedy by a municipal corporation for enforcing the statutory lien of an assessment for public improvement a limitation of time is imposed upon the exercise of that power, manifestly the principle expressed in the quoted maxim is not controlling.

It is contended by appellant that the power to assess property for local improvement, granted to a municipal corporation as a political subdivision of the State, is an exercise of the State's sovereign power to tax and the power to collect taxes should not be restricted. In *Kinston v. R. R.,* 183 N. C., 14, 110 S. E., 645, *Justice Hoke,* speaking for the Court, used this language: "While local assessments of this kind are not regarded as a tax in the sense of a general revenue measure, we have several times held that the right to enforce them is referred to the power of taxation possessed and exercised by government." In *Tarboro v. Forbes,* 185 N. C., 59, 116 S. E., 87, *Adams, J.,* writing the opinion of the Court, states the law as follows: "But there is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of the term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the

general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public." The distinction between the general power to tax and proceedings for enforcement of special assessments was pointed out in *Charlotte v. Kavanaugh, supra; Saluda v. Polk County,* 207 N. C., 180, 176 S. E., 298; and *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24. But the statute here invoked is applicable not so much to the right as to the remedy, not so much to the power as to its particular exercise. It affects the right "to enforce any remedy provided by law for the collection of unpaid assessments." It deals only with actions by municipalities to enforce local assessments. In *Raleigh v. Jordan,* 218 N. C., 55, 9 S. E. (2d), 507, a suit to enforce a lien on property for the unpaid taxes of 1925 and 1926, barred by the Act of 1933, it was said: "In some states the Constitution directly forbids the Legislature to pass any law releasing or remitting taxes. There is no such provision in our Constitution. If other parts of the Constitution should be considered as preventing the direct release of taxes, there would seem to be no question that the Legislature may deal with the lien of taxes as it sees fit, may determine when there should be a lien, when it should attach, and when it should cease." And in *Charlotte v. Kavanaugh, supra,* it was said: "Unquestionably the General Assembly has the right to fix the procedure and prescribe the limitations under which specifically granted powers shall be exercised."

In *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808, cited by appellant, it was said there was no statutory bar to an action to foreclose the tax lien, but this case, decided in 1925, as also did *Wilmington v. Cronly, supra,* decided in 1898, referred to the general lien for *ad valorem* taxes and did not relate to special assessments for local improvements.

Logan v. Griffith, 205 N. C., 580, 172 S. E., 348, was the case of an individual suing on a tax sale certificate. This was held barred by C. S., 8037, which was then in force. While it was said in that case "the sovereign may proceed under C. S., 7990, to foreclose the lien, in which event no statute of limitations is applicable," the reference was to *ad valorem* taxes for general purposes. *New Hanover v. Whiteman, supra,* was cited in support. The Act of 1929 was not involved and was not referred to. Its effect upon actions by municipal corporations to enforce payment of special assessments was not considered or decided. However, the power of the Legislature to set a time clock even for the sovereign, as was done by C. S., 8037, with respect to municipalities, was distinctly affirmed.

The appellant excepted to the ruling of the court below that in the event of foreclosure sale the proceeds would be available only for the

discharge of the installments not barred. This is based upon the view that even if installments more than ten years past due be held barred by the statute of limitations, the funds derived from the sale, if consummated, should be applied to the payment of all unpaid installments, including those more than ten years past due, and the case of *Demai v. Tart,* 221 N. C., 106, 19 S. E. (2d), 130, is cited in support.

While the determination of this question may not become necessary, since the payment of the installments not barred would discharge the liens and avoid a sale, we think the principle enunciated in the *Demai case, supra,* is not applicable to the facts in this case. It was held in that case that where a deed of trust on land secured a debt evidenced by two notes, one barred by the statute of limitations and the other not, the trustee following foreclosure sale had the right to apply the proceeds to the payment of the entire unpaid debt, represented by the balance due on both notes. But this was upon the view that the language of C. S., 437 (3), barring an action for the foreclosure of a mortgage unless begun "within ten years of the last payment on the same," referred to the debt secured by the mortgage, without regard to its subdivision into separate notes. The decision was based on the sound principle that the deed of trust created a lien upon the lands and set them apart in trust for the payment of the debt, with suitable provision for sale and application of the proceeds, as a separable specific agreement, and raised "an obligation with respect to both the debt and the lands not comprehended in the promissory notes given with respect to the same debt but in addition thereto."

This principle, so aptly stated in the opinion written for the Court by *Justice Seawell,* was an outgrowth of the relationship of debtor and creditor, of the primary personal obligation of the mortgagor to pay the debt. Here the ordinary relationship of debtor and creditor did not exist. There was no personal obligation to pay. The statute creating the lien operated only *in rem,* and subjected the particular parcel of land to a statutory foreclosure and sale for nonpayment of a sum apportioned as representing the benefits accruing to that lot, and without regard to successive transfers of title.

It will be noted also that the Act of 1929 prescribes the time limit of ten years "from the default in the payment of any installment." This was interpreted in *Charlotte v. Kavanaugh, supra,* to mean "ten years from default in the payment of each installment," p. 269.

If it be thought that effect should be given to the provisions relative to *ad valorem* taxes in C. S., 2815, that the lien for taxes levied shall attach to all the real estate of the taxpayer and shall continue until such taxes shall be paid, it may be noted that C. S., 2713, relating to local assessments provides only that the assessment when confirmed shall be a

lien on the real property against which it is assessed, superior to all other liens.

Whether there ought to be a statute of limitations limiting the time for the enforcement of liens for street assessments is a matter for the Legislature. "Wisdom or impolicy of legislation is not a judicial question. *Sidney Spitzer & Co. v. Comrs. of Franklin County,* 188 N. C., 30. Policy of legislation (is) for the people, not courts. *Bond v. Town of Tarboro,* 193 N. C., 248. Courts do not say what the law ought to be, but only declare what it is. *State v. Revis,* 193 N. C., 192." *Reed v. Highway Com.,* 209 N. C., 648 (655), 184 S. E., 1. The province of this Court ends when it interprets the legal effect of legislative enactments and determines "with cold neutrality" the questions of law properly presented for decision.

The finding by the court below, to which no exception was noted, that summons in this case was delivered to the sheriff for service 5 October, 1942, fixed the beginning of the action as of that date. C. S., 475; *Webster v. Sharpe,* 116 N. C., 466, 21 S. E., 912; *Morrison v. Lewis,* 197 N. C., 79, 147 S. E., 729; *Cherry v. Whitehurst,* 216 N. C., 340, 4 S. E. (2d), 900. Hence, the ruling that the installment which became due and payable 3 October, 1932, was barred before the summons was delivered to the sheriff for service, must be upheld.

The amounts of the installments of the assessments on defendant's lots constituting valid liens thereon at the time of the institution of this action, together with interest thereon, sufficiently appear from the admissions in the pleadings and the judgment. No question was raised here as to the correctness of the amounts properly to be ascertained under the court's rulings.

After careful consideration we reach the conclusion that the judgment below must be

Affirmed.

WINBORNE, J., with whom STACY, C. J., and BARNHILL, J., concur, dissenting: The questions involved on this appeal are of great concern not only to all taxpayers within the city of Raleigh but to all those in every municipality in the State of North Carolina. The statute pleaded by defendant in limitation of this action is in derogation of sovereign authority and of common right. The case calls for deliberate consideration in the "cold neutrality" of law and justice unaffected by pride of opinion in former decisions rendered by this Court.

The appellant, city of Raleigh, challenges, and seeks to have this Court reconsider former decisions, and to hold (1) That the 1929 Act, chapter 331, section 1, subsection (b), designated C. S., 2717 (a), is not an independent ten-year statute of limitation, imposing a limit where

none existed before, but is merely an amendatory act applicable only when any prior act prescribed a shorter period for commencing actions to enforce special assessments; and (2) that there is no statutory bar to an action instituted by a municipality under the provisions of C. S., 7990, to foreclose the lien of assessments for public improvements. This calls for reconsideration in particular the case of *Charlotte v. Kavanaugh,* 221 N. C., 259, 20 S. E. (2d), 97.

The majority opinion contains these pronouncements: (1) The policy of the State as established over the years is expressed in the maxim *nullum tempus occurrit regi,* which "is still regarded as the expression of a sound principle of government." (2) It has been uniformly held that "no statute of limitations runs against the State unless it is expressly named therein." (3) The Act of 1929, chapter 331, is "lacking in that degree of precision ordinarily to be found in restrictive statutes." With these premises, we are all in accord. With the reasoning and conclusions thereafter announced, we disagree.

In stating our views we deem it necessary to advert to and state, consider and apply basic principles, and to review decided cases.

I. ASSESSMENTS IN ESSENTIAL CHARACTER ARE A SPECIES OF TAXES.

The right to assess land benefited thereby, for cost of public-local improvement, is usually referred to the power of taxation inherent in a sovereign state. The Legislature alone has the right to exercise this power. This it may do directly, or it may delegate the power to municipal corporations as governmental agencies of the State. In either event, therefore, assessments, when levied, deriving their existence from the sovereign power of taxation, of necessity, assume and retain the character of the power which gives them legality. As taxes are enforced contributions of money assessed upon property in general by authority of the sovereign state to the maintenance of government, *Orange County v. Wilson,* 202 N. C., 424, 163 S. E., 113, assessments are enforced contributions of money levied upon particular property by authority of and under the taxing power of the sovereign state to defray the costs of public improvements. As taxes shall be levied only for public purposes, N. C. Constitution, Art. V, section 3, *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597; *Palmer v. Haywood County,* 212 N. C., 284, 193 S. E., 668, 113 A. L. R., 1195; *Sing v. Charlotte,* 213 N. C., 60, 195 S. E., 271, assessments shall be levied only for public purposes. 44 C. J., 481; *Kinston v. R. R.,* 183 N. C., 14, 110 S. E., 645. And as taxes shall be uniform as to each class of property taxed, N. C. Constitution, Art. V, section 3, assessments under the Local Improvement Act shall be uniform on all property benefited within the meaning of the Act. C. S., 2710.

These principles are in accord with the great weight of authority. Dillon's Commentaries on the Law of Municipal Corporations, sections 1430, 1431; Page and Jones in Treatise on Law of Taxation by Local and Special Assessments, sections 8, 89, pages 13, 89; McQuillin in The Law on Municipal Corporations, sections 2165, 2166, 2170, Vol. 52, 2 Ed., pages 568, 573, 593; 25 R. C. L., 85; 44 C. J., 481, Municipal Corporations, sections 2806, 2807; *Spencer v. Merchant,* 125 U. S., 345, 31 L. Ed., 763; *Bauman v. Ross,* 167 U. S., 548, 42 L. Ed., 270. *Cain v. Comrs.,* 86 N. C., 8; *Raleigh v. Peace,* 110 N. C., 32, 14 S. E., 521; *Greensboro v. McAdoo,* 112 N. C., 359, 17 S. E., 178; *Hilliard v. Asheville,* 118 N. C., 845, 24 S. E., 738; *Asheville v. Trust Co.,* 143 N. C., 360, 55 S. E., 800; *Kinston v. Wooten,* 150 N. C., 295, 63 S. E., 1061; *Schank v. Asheville,* 154 N. C., 40, 69 S. E., 681; *Tarboro v. Staton,* 156 N. C., 504, 72 S. E., 577; *Justice v. Asheville,* 161 N. C., 62, 76 S. E., 822; *Felmet v. Canton,* 177 N. C., 52, 97 S. E., 728; *Durham v. Public Service Co.,* 182 N. C., 333, 109 S. E., 40, 42 S. Ct., 290, 261 U. S., 149, 67 L. Ed., 580; *Kinston v. R. R.,* 183 N. C., 14, 110 S. E., 645; *Tarboro v. Forbes,* 185 N. C., 59, 116 S. E., 81; *Gunter v. Sanford,* 186 N. C., 452, 120 S. E., 41; *Gastonia v. Cloninger,* 187 N. C., 765, 123 S. E., 76; *Comm. v. Epley,* 190 N. C., 672, 130 S. E., 497; *R. R. v. Ahoskie,* 192 N. C., 258, 134 S. E., 653; *Greensboro v. Bishop,* 197 N. C., 748, 150 S. E., 495.

(a) In Dillon's Commentaries, *supra,* treating of taxing power as exercised in the imposition of special assessments for local improvements, it is said, "Although taxation to create revenues to meet the general expenses of the government or municipality and special assessments to pay for local improvements have a common origin in the taxing power of the State, many features exist which distinguish such special assessments from taxes generally so called. Like general taxes, special assessments are enforced proportional contributions. . . . In a general levy of taxes the contribution is exacted in return for the general benefits of government; in special assessment the contribution is exacted because the property of the taxpayer is considered by the Legislature to be benefited over and beyond the general benefit of the community." Section 1430. And, the author continues, "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvement is a branch of the taxing power, or included in it." Section 1431.

Also in the work of Page and Jones, *supra,* the authors say: "By the great weight of authority assessment of first class, that is, assessments which are to be justified upon the theory of benefits, are held to be referable to the power of taxation; and to be a special form of the exercise of that power." Section 89, Vol. 1, page 145. These authors

also point out "that by the great weight of authority a local assessment levied in return for the benefits conferred upon the property assessed by the improvement for which the assessment is levied is a kind of tax. The power to levy local assessments is said to be 'essentially a power to tax.' The power of levying a local tax is 'distinguishable from our general idea of a tax, but owes its origin to the same source or power.' This proposition means, primarily, that an assessment is an enforced contribution to a public object." Section 8, Vol. 1, page 13.

McQuillin, *supra,* speaking of the "nature of special assessment or taxation," states: "Local assessments or special taxes for the payment of the cost of certain kinds of public improvements commonly prevail and are generally sustained under the exercise of the power of taxation." Section 2165, Vol. 5 (2d), page 568. And again, "The foundation of the power to lay a special assessment or a special tax for a local improvement of any character . . . is the benefit which the object of the assessment or tax confers on the owner of the abutting property or the owners of property in the assessment or special taxation district which is different from the general benefit which the owners enjoy in common with other inhabitants or citizens of the municipal corporation." *Ibid.* Section 2166, page 573. And speaking of the power to levy assessments, the author states, "As a municipality is without inherent power to levy special assessments or taxes for local improvements, such power must originate by constitution, statute or charter. This power exists in the Legislature, or, it may be said that, primarily the State Legislature alone has power to provide for paying for local improvements by special assessments, and may be exercised directly or indirectly within the limits of the Constitution, and therefore it may be delegated to municipalities. . . . Thus the general proposition that the Legislature may delegate to local corporate authorities the power to provide for improvements and levy special assessments or taxes therefor on abutting property or property in a benefit district is generally sustained, provided the Constitution of the State does not restrict the right." Section 2170, Vol. 5, page 593.

In 25 Ruling Case Law, 85, these expressions are found: "Notwithstanding the distinctions made between local assessments and general taxes, the laying of special or local assessments is now generally recognized as an exercise of the taxing power, rather than the police power or the right of eminent domain." "The word 'taxes' in a broad sense includes special or local assessments on specific property benefited by a local improvement for the purpose of paying therefor." "A special assessment is taxation in the sense that it is a distribution of that which is originally a public burden growing out of an expenditure primarily for a public purpose."

And in 44 C. J., 481, Municipal Corporations, section 2807, the text reads: "It is very generally held that special assessments or special taxes to pay for local improvements are not taxes in the ordinary sense of the term. They are not taxes within the meaning of the term as generally understood in constitutional restrictions and exemptions. Nevertheless, it is equally well settled that the power to levy special assessments and taxes for local improvement is not an exercise of the power of eminent domain; that special assessments and special taxes are at least in the nature of a tax because they must be levied for a public purpose, and because they are enforced contributions on the property owner for the public benefit; that the levy thereof is an exercise of and referable to the taxing power, and an attribute of sovereignty . . ."

(b) The Supreme Court of the United States, speaking in regard to validity of assessments, expresses accordant view in *Spencer v. Merchant, supra,* where, in considering decision of Supreme Court of the State of New York, the Court said: "The power to tax belongs exclusively to the legislative branch of the government. . . . The Legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of a territorial district which should be taxed for a local improvement is within the province of legislative discretion." Similar expressions are found in the *Bauman case, supra.*

(c) In this State this Court has repeatedly held that the right to assess for local improvements is referred to the power of taxation. In *Raleigh v. Peace* (1892), *supra, Shepherd, J.,* says: "The authority of the Legislature, either directly or through its local instrumentalities, to exercise the taxing power in the form of local or special assessments, has been so firmly established by judicial decision in this and other states of the Union that it can hardly, at this late day, be considered an open question." And, after calling upon authorities in support of this pronouncement, the Court continues, "And it is also to be observed that while they are taxes in a general sense, in that the authority to levy them must be derived from the Legislature, they are nevertheless not to be considered as taxes falling within the restraints imposed by Article V, section 3, of the Constitution, although the principle of uniformity governs both," citing *Cain v. Comrs., supra,* and other authorities.

In *Asheville v. Trust Co.* (1906), *supra, Connor, J.,* states: "The power to impose upon property the cost of public improvements, measured by the peculiar and special benefit sustained, has been settled beyond controversy. It is uniformly held that this power is based upon the right to tax, and not that of eminent domain." And after quoting from *Bauman v. Ross, supra,* and citing *Raleigh v. Peace, supra,* the opinion

continues, "It is equally well settled that 'assessments being a peculiar species of taxation, there must be a special authority of law for imposing them.' "

In *Tarboro v. Staton* (1911), *supra, Hoke, J.*, speaking of assessment for certain street improvements, says: "The right to make them as a general proposition is referred to the sovereign power of taxation, which is primarily, and as a rule exclusively, a legislative power."

In *Kinston v. R. R.* (1921), *supra, Hoke, J.*, again speaking for the Court, after observing that local assessments for public improvements are not regarded as a tax in the sense of a general revenue measure, and that the Court has several times held that the right to enforce them is referred to the power of taxation possessed and exercised by government, as quoted in the majority opinion, continues by saying immediately that "they have been frequently denominated and held to be a special tax, in transactions of the kind presented here."

And in *Gunter v. Sanford* (1923), *supra, Adams, J.*, after reviewing the authorities on the subject, says: "As we have heretofore indicated, the statutes prescribing the method of improving the streets of the town and regulating assessments against property are referred to the right of taxation, and the exercise of such right is not judicial but entirely legislative. The legislative authority is vested in the General Assembly (Const., Art. II, sec. 1), and counties and municipalities, as was said in *Jones v. Comrs.*, 137 N. C., 579, are regarded merely as agencies of the State for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision—a principle which has been consistently maintained in decisions of this Court."

And in *Comm. v. Epley* (1925), *supra,* the grant of power to levy drainage assessments is characterized as "this power to tax, which is the highest and most essential power of the government, an attribute of sovereignty and absolutely necessary for the existence of the drainage district . . ."

(d) The General Assembly of this State, in respect to collecting taxes, has declared that the words "tax" and "taxes" shall be construed to include in their meaning "any taxes, special assessments or costs, interest or penalties imposed upon property or polls," "unless such construction or definition would be manifestly inconsistent with or repugnant to the context." C. S., 7974, formerly Revisal, 2851. The definition, in substantial sameness, is included in the Machinery Act of 1939, chapter 310, Article I, section 2 (32).

Moreover, the General Assembly, in prescribing for collection of assessments levied under the Local Improvement Act, chapter 56, Public

Laws 1915, as amended, now Article 9, chapter 56, of the Consolidated Statutes of North Carolina, treats assessments as taxes are treated. In that article it is provided that assessments shall become due and payable on the date on which taxes are payable, and if not paid when due, they "shall be subject to the same penalties as are now prescribed for unpaid taxes, in addition to the interest" thereon, C. S., 2717, as amended, and that for assessment, not paid as therein prescribed, the property on which the assessment is levied "shall be sold by the municipality under the same rules, regulations, rights of redemption and savings as are now prescribed by law for the sale of land for unpaid taxes." C. S., 2716.

Furthermore, the statute pertaining to collection of unpaid municipal taxes, C. S., 2816, provides that "the officer who has charge of the collection of taxes in any city shall, in the collection of taxes be vested with the same power and authority as is given by the State to sheriffs for like purpose." And with respect thereto, the sheriffs are charged with the duty of selling land for delinquent taxes and issuing to the purchaser thereof a written certificate, C. S., 8024, which, if the municipality become the purchaser, can be foreclosed at its election in an action in the nature of an action to foreclose a mortgage under the provisions of C. S., 8037.

Also C. S., 7990, is expressly made available to the municipality to foreclose the lien of the assessment on the particular property, just as the lien of taxes on land are foreclosed.

In this connection it is also pertinent to note here: That while in the Machinery Act of 1939, chapter 310, Article XVII, entitled "Collection and Forecloure of Taxes," certain changes are made in the then existing law pertaining thereto, it is provided in section 1723 of the Act, that all provisions of this article shall apply (1) to all taxes originally due within the fiscal year beginning on or after 1 July, 1939, (2) with certain exceptions, to all taxes uncollected at time of ratification of the article, originally due within the fiscal year beginning 1 July, 1938, (3) in certain designated respects, other than foreclosure of tax lien by action in nature of action to foreclose a mortgage, to all taxes, due and owing to taxing units at the time of the ratification of the article, originally due within the fiscal years beginning on or before 1 July, 1937; but (4) in respect to taxes originally due within fiscal years beginning on or before 1 July, 1937, the provisions for foreclosure, sections 1720 as to alternative method of foreclosure and subsections (a) to (j) of section 1719 pertaining to foreclosure of tax liens by action in nature of action to foreclose a mortgage, "shall be in addition to, but not in substitution for, the provisions of laws in force immediately prior to the ratification of this article"; that, except as in section 1723 provided, the collection and foreclosure of taxes originally due within fiscal years be-

ginning on or before 1 July, 1938, shall be under the provisions of law in force immediately prior to ratification of the article, including section 7990 of the Consolidated Statutes, which is specifically preserved in full force and effect as an alternative method for the foreclosure of taxes so originally due; and that a cause of action for the foreclosure of the lien of any special benefit assessment may be included in any complaint filed in actions brought under said section 1719, subsection (i).

Thus it appears that the text writers, the courts and the General Assembly have considered assessments fundamentally a species of taxes.

II. MUNICIPAL CORPORATIONS ACT IN SOVEREIGN CAPACITY IN LEVYING AND IN ENFORCING COLLECTION OF ASSESSMENTS IN DIRECT ACTION.

When a municipal corporation, to whom the General Assembly delegates the power to make public improvements, and to assess lands abutting thereon, or benefited thereby, for all or a part of the cost of the improvement, exercises such power, it acts as an agency of the State. *Jones v. Comrs.*, 137 N. C., 579, 50 S. E., 291; *Gunter v. Sanford, supra.* And, of necessity, the municipality acts in like manner when in direct action, under the provisions of C. S., 7990, formerly Revisal, 2866, it proceeds to enforce the assessment lien. Moreover, under the express provisions of C. S., 7990, not only a lien upon real estate for taxes, but an assessment lien upon same may be enforced thereunder by an action in the nature of an action to foreclose a mortgage, in which the court shall order a sale of the real estate. And the statute provides further that "when such lien is in favor of the State or county, or both, such action shall be prosecuted by and in the name of the county"; and "when the lien is in favor of any other municipal corporation the action shall be prosecuted by and in the name of such corporation."

Also in cases in which the provisions of C. S., 7990, are specifically invoked, and the question is considered, the decisions of this Court are uniform in holding that when a county or other municipal corporation proceeds under the provisions of C. S., 7990, to foreclose a tax lien, as distinguished from an action to foreclose a tax sale certificate under the provisions of C. S., 8037, which it may elect to do, it proceeds as a part of the State sovereignty, and there is no statutory bar. *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808; *Wilkes County v. Forester,* 204 N. C., 163, 167 S. E., 691; *Asheboro v. Morris,* 212 N. C., 331, 193 S. E., 424; *Charlotte v. Kavanaugh, supra.*

Moreover, the right of a drainage district to proceed in its own name and in sovereign capacity in the foreclosure of drainage assessments, under C. S., 7990, is recognized in the cases of *Drainage District v. Huffstetler,* 173 N. C., 523, 92 S. E., 368; *Comm. v. Epley, supra; Wilkin-*

son v. Boomer, 217 N. C., 217, 7 S. E. (2d), 491; *Nesbit v. Kafer,* 222 N. C., 48, 21 S. E. (2d), 903.

III. THE MAXIM—NULLUM TEMPUS OCCURRIT REGI—SUBSISTS AT LEAST IN RESPECT TO TAXES.

This maxim, that time does not bar the sovereign, "although originally a matter of royal prerogative, is now based upon the public policy of protecting the citizens of the State from the loss of public rights and revenues through the negligence of officers of the State." Headnote expressive of opinion in *Guaranty Trust Co. of New York v. United States,* 304 U. S., 126, 82 L. Ed., 1224. To like effect are pronouncements of the Supreme Court of the United States in *Gibson v. Chanteau,* 13 Wall. (80 U. S.), 92, 20 L. Ed., 534; *United States v. Nashville, C. & St. L. R. Co.,* 118 U. S., 120, 30 L. Ed., 81, 6 S. Ct., 1006; *United States v. Whited and Whelass,* 246 U. S., 552, 62 L. Ed., 879, 38 S. Ct., 367; *United States v. St. Paul, M. & M. R. Co.,* 247 U. S., 310, 62 L. Ed., 1130, 38 S. Ct., 525; *Bowers v. New York & Albany Lighterage Co.,* 273 U. S., 346, 71 L. Ed., 676, 47 S. Ct., 389.

The Court states in *United States v. Nashville, C. & St. L. R. Co., supra,* that "it is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitation, unless Congress has clearly manifested its intention that it should be so bound." Moreover, this Court in the case of *Avery County v. Braswell,* 215 N. C., 270, 1 S. E. (2d), 864, quotes with approval these expressions of the principle "the Government is not responsible for the laches or wrongful acts of its officers," *Waite, C. J.,* in *Hart v. United States,* 95 U. S., 316, 24 L. Ed., 479, and "the State is not ordinarily estopped by acts of misfeasance on the part of its officers." *Winslow, C. J.,* in *S. v. Pederson,* 135 Wis., 31, 114 N. W., 828.

Though there are to be found in decisions of this Court differences in opinion as to the extent to which this maxim is abrogated by our statute, C. S., 420 (formerly in reverse order, Revisal, sec. 375, the Code sec. 159 and C. C. P. sec. 38), the decisions are clear in holding that, in respect to taxes, the maxim is still the law in this State. *Wilmington v. Cronly,* 122 N. C., 383, 30 S. E., 9; *S. c.,* 122 N. C., 388, 30 S. E., 9; *R. R. v. Comrs.,* 82 N. C., 259; *Jones v. Arrington,* 94 N. C, 541; *Wilmington v. McDonald,* 133 N. C., 548, 45 S. E., 864; *New Hanover County v. Whiteman, supra; Shale Products Co. v. Cement Co.,* 200

N. C., 226, 156 S. E., 777; *Wilkes County v. Forester, supra; Logan v. Griffith,* 205 N. C., 580, 172 S. E., 348; *Asheboro v. Morris, supra; Charlotte v. Kavanaugh, supra.* Compare *Hospital v. Fountain,* 129 N. C., 90, 39 S. E., 734.

Numerous references to the subject appear in the reports. There is the statement in the case of *Furman v. Timberlake,* 93 N. C., 66, decided in 1885, that "the maxim is no longer in force in this State, having been abrogated by the provisions of The Code, sec. 159," now C. S., 420. Then in the first case of *Wilmington v. Cronly, supra,* decided in 1898, it is declared: "It needs no citation of authority to show that statutes of limitation never apply to the sovereign unless expressly named therein—*nullum tempus occurrit regi*—and the act in question . . . authorizing the State, county, or city to recover these delinquent taxes contains no limitation, and neither the ten years nor the three years statute applies." And in the second case of *Wilmington v. Cronly, supra* (1898), it is said: "No statute of limitation runs against the sovereign unless it is expressly named therein. This is immemorial law, based on reasons of public policy, which has been observed by all governments." Then in the case of *Threadgill v. Wadesboro,* 170 N. C., 641, 87 S. E., 521, decided in 1916, referring to Revisal, 375, now C. S., 420, and another statute relating to real estate, there is this observation: "Construing those sections, the Court has held that the maxim *nullum tempus occurrit regi* no longer obtains here, even in the case of collecting taxes, unless the statute applicable to or controlling the subject provided otherwise," citing the first case of *Wilmington v. Cronly, supra,* and *Furman v. Timberlake, supra.* And in the case of *Manning, Attorney-General of North Carolina, v. R. R.* (1924), 188 N. C., 648, 125 S. E., 555, referring to the provisions of C. S., 420, it is said: "The Court has construed this section to mean that the maxim has been abrogated and is not in force in this State unless the statute applicable to or controlling the subject otherwise provides," citing *Furman v. Timberlake, supra,* and *Threadgill v. Wadesboro, supra,* and indicates a challenge to the decision in the *Wilmington v. Cronly cases, supra.* However, it may be noted here that this statement in the *Manning case, supra,* is predicated on the statements in the *Furman* and *Threadgill cases,* as above quoted. But reference to the *Furman and Threadgill cases, supra,* shows that the question was not before the Court in either case. And even as a *dictum* the principle as there stated is challenged by other and later decisions. In fact, in the *Manning case, supra,* it is stated: "Whether a distinction may be found in the public policy of preserving the public revenues (in *Cronly cases, supra,* the collection of delinquent taxes), or in the statute controlling the subject, we need not decide." Following this, in the year 1925, the Court expressly held in *New Hanover County*

v. Whiteman, supra, that "statutes of limitation never apply to the sovereign, unless expressly named therein," and that *"nullum tempus occurrit regi* is a principle of government which still retains its ancient vigor in respect to taxes," citing *Wilmington v. Cronly, supra.* This ruling appears to have been adhered to in later cases above cited. *New Hanover County v. Whiteman; supra; Wilkes County v. Forester, supra; Asheboro v. Morris, supra;* and *Charlotte v. Kavanaugh, supra.* In the *Kavanaugh case, supra,* the all-inclusive statement appears that "The principle laid down and oft repeated in our decisions that 'no statute of limitations runs against the sovereign, unless it is expressly named therein,' is sound, and in the collection of taxes, levied as provided by law, this principle ought not to be abridged or proscribed." And in the instant case the majority opinion contains the pronouncement that the maxim "is still regarded as the expression of a sound principle of government applicable to actions to enforce the sovereign rights of the State"—and that "notwithstanding the inclusive provisions of sec. 420 of the Consolidated Statutes . . . it has been uniformly held that no statute of limitations runs against the State, unless it is expressly named therein." With this premise, we are in accord.

Moreover, it is well settled in decisions dealing with the subject that in principle and in practice counties, cities, towns and other municipal corporations come under the influence of the maxim when and to the extent that they are properly considered governmental agencies of the State, as and in so far as the maxim is preserved in this State. *Wilmington v. Cronly, supra* (two cases); *Wilmington v. McDonald, supra; Wilmington v. Moore,* 170 N. C., 52, 86 S. E., 775; *New Hanover County v. Whiteman, supra; Asheboro v. Morris, supra; Charlotte v. Kavanaugh, supra.* In the case of *Charlotte v. Kavanaugh, supra,* the Court states the principle conversely somewhat in this way—that statutes of limitation apply to the State and the political subdivisions thereof in actions "brought in the name of the State or for its benefit, or for the benefit of political subdivisions thereof, when the action is not brought in the capacity of its sovereignty." It is therein specifically stated that the "action was brought by the city of Charlotte in its capacity of sovereignty." And the present action is brought by the city of Raleigh in its sovereign capacity.

Again, in this Charlotte case, it is also said: "When an action is brought by the sovereign under section 7990 to collect a tax duly levied as provided by law, no statute of limitation applies."

In this connection, and in the light of the principle that statutes of limitation never apply to the sovereign, unless expressly named therein, the fact that it is provided that the lien of municipal taxes on real estate continues until the taxes are paid, C. S., 2815, and no such provision

appears as to the lien of assessments, C. S., 2713, is immaterial in an action instituted under C. S., 7990, by a municipality in its sovereign capacity.

IV. PRIOR TO EFFECTIVE DATE, 19 MARCH, 1929, OF CHAPTER 331, PUBLIC LAWS 1929, IN WHICH C. S., 2717 (a), WAS ENACTED, NO STATUTE LIMITED THE TIME FOR COMMENCING ACTIONS UNDER C. S., 7990, TO FORECLOSE ASSESSMENT LIENS.

Neither the three-year statute of limitations, C. S., 441 (2), relating to actions upon liability created by statute, nor the ten-year statute, C. S., 437, relating to actions (1) upon judgments, or (3) for foreclosure of a mortgage, or deed in trust for creditors, on real property, nor the ten-year statute, C. S., 445, relating to actions for relief not otherwise provided for in the specific statutes, effective prior to 19 March, 1929, contains any reference to actions instituted in the name of the State, or of any of its governmental agencies to foreclose the lien of taxes or assessments for public improvements. And C. S., 7990, contains no limitation upon the commencing of actions thereunder. But it is to be noted in each of these cases, *Drainage District v. Huffstetler, supra; Morganton v. Avery,* 179 N. C., 551, 103 S. E., 138; *Statesville v. Jenkins,* 199 N. C., 159, 154 S. E., 15; *High Point v. Clinard,* 204 N. C., 149, 167 S. E., 690; and *Farmville v. Paylor,* 208 N. C., 106, 179 S. E., 459, actions instituted in sovereign capacity on assessments for public improvements, either the three-year, C. S., 441 (2), or the ten-year statute of limitation, C. S., 437 (1), in which the sovereign is not expressly named, was considered applicable.

In this connection it is noted that: (1) In the *Drainage District case, supra,* decided in 1917, an action to foreclose a drainage assessment, the Court in an opinion by *Allen, J.,* held that the action "is not barred, as it falls within the statute of limitations barring action upon judgments within ten years, and the statute providing that an action on a liability created by statute shall be brought within three years has no application." (2) In the *Morganton case, supra,* decided in 1920, an action to enforce "a tax assessment or charge for paving certain sidewalks . . . under Private Laws 1885, chapter 61" as amended, the Court, *Brown, J.,* writing, without making any reference to the case of *Drainage District v. Huffstetler, supra,* held that the three-year statute of limitation, Revisal, 395 (2) (now C. S., 441 [2]), relating to actions upon liability created by statute, applies. (3) In the *Statesville case, supra,* decided in 1930, a controversy without action relating to assessment for street improvements made by the city under authority of its charter, in an opinion by *Clarkson, J.,* the case turned on the provisions of the charter—the Court

holding that no statute of limitations applied—*Stacy, C. J.*, dissenting, and *Brogden, J.*, concurring in dissent. (4) In the *High Point case, supra,* decided in 1933, an action on street assessments, *Stacy, C. J.*, speaking for the Court, the decision turned on that in *Drainage District v. Huffstetler, supra.* (5) And in the *Farmville case, supra,* decided in 1935, an action on paving assessments, in the opinion by *Schenck, J.*, it is stated that it is conceded the assessments are liens against lots of defendants "unless the cause of action is barred by the ten-year statute of limitation," citing "C. S., 437," and the *High Point case, supra.* However, the only point decided, and on which affirmance of judgment for plaintiff rests is "that the provision for the acceleration of the maturity of deferred installments upon default in payment of past-due installments is for the benefit of the creditor town, and is not self-operative, and that the town, upon default, may either institute foreclosure proceedings or may waive the acceleration provision without starting the running of the statute of limitations."

In review of these cases it is worthy to note that only in the *Morganton case, supra,* was the municipality denied recovery, and, patently, there is confusion in the decisions. This is conceded in the case of *Charlotte v. Kavanaugh, supra,* and virtually so in the opinion of the majority in the present case. Apparently this is due to the manner in which they have been presented, for the question as to the applicableness of the principle that "statutes of limitation never apply to the sovereign, unless expressly named therein," a principle upon which all hands now agree, was not considered and passed upon in the opinions rendered by this Court in any of them. It is true, however, that in the briefs for plaintiffs in the *Statesville* and *High Point cases, supra,* attention was called to the principle. Nevertheless, and in all these cases it appears to have been assumed that either the three-year statute of limitation, C. S., 441 (2); Revisal, 395 (2), or the ten-year statute, C. S., 437 (1) and (3); Revisal 391 (1) and (3), applies, and this without regard to the 1929 Act, C. S., 2717 (a), with respect to which no decision was made. Hence, the decisions there are not controlling here (1) in the light of the principle that assessments are, in essential character, taxes, in the levying of which and in the enforcing of the lien thereof by direct action, authorized under C. S., 7990, the municipality acts in sovereign capacity; and (2) in the light of the principle that no statute of limitation runs against the sovereign, unless expressly named therein.

On the other hand, in the case of *Asheboro v. Morris, supra,* the plaintiff contended that when an action was brought under C. S., 7990, the statute of limitation does not apply—the defendant having pleaded the three-year statute of limitation. *Barnhill, J.*, speaking thereto, said:

"Where the sovereign elects or chooses to proceed under C. S., 7990, no statute of limitation is applicable," citing *Logan v. Griffith,* 205 N. C., 580, 172 S. E., 348; *New Hanover County v. Whiteman, supra.* And the trend of the decision in the case of *Charlotte v. Kavanaugh, supra,* is that prior to the 1929 Act, above referred to, there was no statute of limitation applicable to an action instituted under C. S., 7990, to foreclose the lien of assessments for public improvements. Moreover, in the present case, it is noted that the majority does not now contend that there was any such statute, prior to the enactment of the 1929 statute, C. S., 2717 (a).

V. THE PROVISIONS OF THE LOCAL IMPROVEMENT ACT OF 1915, CHAPTER 56 OF PUBLIC LAWS 1915, AS AMENDED, NOW ARTICLE 9 OF CHAPTER 56 OF CONSOLIDATED STATUTES, MANIFEST A PUBLIC POLICY.

In the Local Improvement Act the General Assembly formulated, and has set forth a State-wide public policy that every municipality in the State shall have power, by resolution of its governing body, upon petition of at least a majority of the owners, representing at least a majority of all the lineal feet of frontage of land abutting upon the street or part of a street proposed to be improved, to cause local improvements to be made on such street, or such part of a street, the cost of which, exclusive of specified items, to be apportioned and borne, one-half by local assessment upon abutting property, unless the petition shall request, and specify a larger proportion to be so assessed, to be apportioned on frontage basis, and to be a lien thereon superior to all other liens and encumbrances, and one-half, or less proportion in conformity with petition, by the municipality at large. "No land in the municipality," as expressly declared, "shall be exempt from local improvement." Authority is given for "Local Improvement Bonds" to be issued by the municipality to raise the amount and portions of the cost to be borne by the municipality, for the payment of the principal and interest of which a tax shall be levied upon all the taxable property in the municipality. Authority is also given for "Assessment Bonds" to be issued by the municipality to raise the amount and portion of the cost assessed upon the abutting property, and it is provided that the moneys collected from assessment shall be kept in a special fund and used only for the purpose of paying principal and interest of "Assessment Bonds" so issued. But, if for any cause, the fund on hand at time of any annual tax levy be insufficient to meet principal and interest on such bonds maturing in the year, the amount of deficiency shall be included in the tax levy on all taxable property in the municipality. Thus, street improvements, made under and pursuant to such provisions of the Local Improvement Act,

are public improvements, and the due enforcement of the lien of assessments therefor, is a right in which the public, that is, the taxpayers in general of the municipality, has an interest.

In view of this manifest State-wide public policy that at least one-half of the cost of a public improvement, within the meaning of the Act, shall be borne by the abutting property benefited thereby, the intent of the General Assembly, by subsequent act, to prescribe a bar to ultimate enforcement of assessments made pursuant to such policy, should be "expressed in terms too clear to admit of doubt." Unless and until the General Assembly enacts an applicable statute so expressed, the Court should not resort to interpretive construction to give such effect to any statute, and thereby shift to the municipality at large the burden of benefits which accrue to owners of particular property from a public improvement made in accordance with such public policy.

VI. STATUTES, ABROGATING RIGHTS IN WHICH THE PUBLIC IN GENERAL HAS AN INTEREST, ARE SUBJECT TO RULE OF STRICT CONSTRUCTION IN FAVOR OF THE SOVEREIGN.

This principle has been applied to exemption from taxation and assessment, as well as to statutes of limitation, including statutes of limitation as to collecting of taxes. (1) As applied to exemption from taxation see *R. R. v. Alsbrook,* 110 N. C., 137, 14 S. E., 652; affirmed on writ of error in 146 U. S., 279; *United Brethren v. Comrs.,* 115 N. C., 489, 20 S. E., 626; *Trustees v. Avery County,* 184 N. C., 469, 114 S. E., 696; *The Providence Bank v. Billings* (1830), 4 Peters, 514, 7 L. Ed., 939; *The Ohio Life Ins. & Fra. Co. v. Debolt* (1853), 18 How., 416, 14 L. Ed., 997; *Farrington v. Tennessee* (1877), 95 U. S., 79, 24 L. Ed., 558; *Vicksburg, S. & P. R. Co. v. Dennis,* 116 U. S., 665, 29 L. Ed., 770; *Yazoo & Mississippi Valley R. Co. v. Thomas* (1889), 132 U. S., 174, 33 L. Ed., 302; *R. R. Commission v. Los Angeles Ry. Co.* (1929), 280 U. S., 145, 74 L. Ed., 234; *Pacific Co. Ltd. v. Johnson* (1931), 285 U. S., 480, 76 L. Ed., 893; *Hale v. State Board of Assessments,* 302 U. S., 95, 82 L. Ed., 72; *New York Rapid Transit Co. v. New York* (1937), 303 U. S., 573, 82 L. Ed., 1024.

In the *Alsbrook case, supra,* the pertinent headnotes epitomizing the opinion of the Court, read: "1. The power of taxation being essential to the life of government, exemptions therefrom are regarded as in derogation of sovereign authority and common right, and will never be presumed. 2. The grant of an exemption from taxation must be expressed by words too plain to be mistaken; if a doubt arises as to the intent of the Legislature, that doubt must be resolved in favor of the State." In support of the decision there the Court cited, and quoted from several of the cases of the Supreme Court of the United States above cited.

In the *Billings case, supra, Chief Justice Marshall,* speaking for the Supreme Court of the United States, said: "That the taxing power is of vital importance; that it is essential to the existence of government are truths that it cannot be necessary to reaffirm . . . As a whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear . . . We must look for the exemption in the language of the instrument and, if we do not find it there, it would be going very far to insert it by construction."

In the *Debolt case, supra, Chief Justice Taney* expresses the principle in this way: "The rule of construction, in cases of this kind, has been settled by this Court. The grant of privileges and exemptions to a corporation (is) are strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms. Neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held by the Court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken . . . Nor does the rule rest merely on the authority of adjudged cases. It is founded in principles of justice, and necessary for the safety and well-being of every State in the Union . . . If they come here to claim an exemption from their equal share of the public burden, or any such exemption or privilege they must show their title to it . . . and that title must be shown by plain and unequivocal language."

In the *Dennis case, supra,* after quoting the principle as declared in the *Billings case, supra,* and in another, *Gray, J.,* gives this review: "In subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that 'neither the right of taxation nor any other power of sovereignty will be held by this Court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken'; that exemption from taxation 'should never be assumed unless the language used is too clear to admit of doubt'; that 'nothing can be taken against the State by presumption or inference; the surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the Legislature, that doubt must be resolved in favor of the State'; that a State 'cannot by ambiguous language be deprived of this highest attribute of sovereignty'; that any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend either in scope or duration, beyond what the terms of the concession clearly require'; and that such exemptions are regarded 'as in derogation of

sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grants, construed *strictissimi juris.*'"

And in the *New York case, supra, Reed, J.,* of the Court as it is now constituted, states that "More than a hundred years ago it was stated by *Chief Justice Marshall* in *Providence Bank v. Billings* . . . that the taxing power is of such 'vital importance' that we must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction"; and that "at the present term, the Court has reiterated that contracts of tax exemption are 'to be read narrowly and strictly,'" *Cardoza* in *Hale v. State Board of Assessments, supra.* (2) This Court has applied the rule to exemptions claimed from assessments for street improvement in *Durham v. Public Service Co., supra.* In this case *Hoke, J.,* states the rule in this manner: "The power to impose these assessments for local improvements is properly referred to the sovereign power of taxation, and it is the accepted principle of interpretation that no license, permit or franchise from a municipal board or from the Legislature itself will be construed as establishing an exemption from the proper exercise of this power, or in derogation of it, unless the bodies are acting clearly within their authority and the grant itself is in terms so explicit as to be free from any substantial doubt," citing *R. R. v. Alsbrook, supra,* and other cases. (3) As to statutes of limitation, the Supreme Court of the United States has applied the rule of strict construction in favor of the government in many cases, among which are these: *United States v. Nashville, C. & St. L. R. Co., supra; United States v. Whited and Whelass, supra; United States v. St. Paul, M. & M. R. Co., supra; Dupont deNemours & Co. v. Davis,* 264 U. S., 456, 68 L. Ed., 788, 44 S. Ct., 364; *Bowers v. New York & Albany Lighterage Co., supra; Independent Coal & Coke Co. v. United States,* 274 U. S., 640, 71 L. Ed., 1270, 47 S. Ct., 714.

Moreover, the Circuit Court of Appeals, 8th Circuit, in the case of *United States v. Southern Lumber Co.,* 51 F. (2d), 956, 78 A. L. R., 619, in which writ of *certiorari* was denied, 284 U. S., 680, 76 L. Ed., 574, 52 S. Ct., 197, held that statutes limiting the time for collection of taxes are strictly construed in favor of the government.

See also *Asbury v. Albemarle,* 162 N. C., 247, 78 S. E., 146, 44 L. R. A. (N. S.), 1189, in which this Court held that "statutes in derogation of common rights or offering special privileges are to be construed liberally in favor of the public and strictly against those specially favored."

For further elaboration, see 3 Sutherland Statutory Construction (3d Ed. Horack), sec. 6301.

In the light of these principles we come to the final point.

VII. THE 1929 ACT, CHAPTER 331, SECTION 1, SUBSECTION (B), C. S., 2717 (a), IS NOT AN INDEPENDENT TEN-YEAR STATUTE OF LIMITATION, IMPOSING A LIMIT WHERE NONE EXISTED BEFORE, BUT IS MERELY AN AMENDATORY ACT APPLICABLE ONLY WHEN ANY PRIOR ACT PRESCRIBED A SHORTER PERIOD FOR COMMENCING ACTIONS TO ENFORCE SPECIAL ASSESSMENTS.

The majority opinion concedes that the 1929 "Act may be lacking in that degree of precision ordinarily to be found in restrictive statutes." That it is so, we are in accord. But with the reasoning and conclusions thereafter announced, we disagree.

In the first place, it is said by the majority that this Court has several times considered the Act of 1929 "and construed it as prescribing a limitation of ten years to a suit to foreclose the lien of an assessment for local improvements." This statement is challenged. It was not so held in *Statesville v. Jenkins, supra,* nor in *High Point v. Clinard, supra,* nor in *Farmville v. Paylor, supra,* nor in any case cited by the majority save and except the one case of *Charlotte v. Kavanaugh, supra.* In the *Statesville case, supra,* the statute was held to be inapplicable to the factual situation there in hand, and as stated hereinbefore the case turned upon provisions of the city charter. In the *High Point case, supra,* as in the *Statesville case, supra,* it may have been assumed that the statute is a statute of limitation, yet it was not so decided and as hereinbefore stated the decision in the *High Point case, supra,* turned on that in the case *Drainage District v. Huffstetler, supra,* decided in 1917. Moreover, in the *Farmville case, supra,* the 1929 statute is not mentioned anywhere. In this *Farmville case, supra,* C. S., 437, and the *High Point case, supra,* are cited as guide posts. A decision is not an authority upon a question not considered by the Court, though involved in a case decided. See *Durauseau v. U. S.,* Cranch, 307, 3 L. Ed., 232; *Buel v. VanNess,* 8 Wheaton, 312, 5 L. Ed., 624; *New v. Oklahoma,* 195 U. S., 252, 49 L. Ed., 182, and other cases cited in notes to 2 Digest, U. S. S. C. Reports, L. Ed., 23-27. Thus when the case of *Charlotte v. Kavanaugh, supra,* came on for consideration the Court had made no decision upon the effect of this statute. In that case the 1929 statute was applied as a ten-year statute of limitation. The question now presented calls for reconsideration of the decision there made. The majority approves that construction. In arriving at that decision, the majority overturns the policy of the State in construing a statute admittedly "lacking in that degree of precision ordinarily to be found in restrictive statutes," and proceeds in reverse to construe the 1929 Act liberally in favor of "those specially favored" and strictly against "the public," rather than "liber-

ally in favor of the public and strictly against those specially favored." *Asbury v. Albemarle, supra,* and other cases above cited.

The principal reason assigned for so overturning the policy of the State in construing such statute is that "We think it may fairly be gathered that it was the legislative purpose to provide the purchaser or owner of real property in a city with some period of relief against an ancient assessment . . . Statutes of repose are in the interest of the security of titles." Thus the doctrine of fair play, equality of treatment as between the benefited landowner and the general taxpayers, and the inhibition against special privileges (N. C. Const., Art. I, section 7) are to be subordinated to "the interest of the security of titles." We disagree with the reasoning assigned and with the interpretation placed upon the statute.

Reference to the 1929 Act discloses that it expressly amends chapter 56 of the Consolidated Statutes. The Act is so captioned, and section 1 reads: "That chapter fifty-six of the Consolidated Statutes of one thousand nine hundred and nineteen be and the same is hereby amended as follows: (a) By adding at the end of section two thousand seven hundred seventeen of Consolidated Statutes the following . . . (b) By adding next after section two thousand seven hundred seventeen of the Consolidated Statutes a section as follows: '2717 (a) . . . (c) By inserting next after section two thousand seven hundred and twenty-two of the Consolidated Statutes a section as follows: . . .'" The context of the entire act clearly shows that the terms "in this chapter" and "under this chapter" as used in the subsection under consideration, and the term "by this chapter" as used in subsection (c) of the Act, refer to chapter 56 of the Consolidated Statutes and not to the Act being enacted. In this light it is clear that the clause "whether fixed by law especially referred to in this chapter" means "whether fixed by law especially referred to" in chapter 56 of the Consolidated Statutes, and not to the Act being enacted, which in ordinary course of legislative procedure would later become a chapter in the bound volume of 1929 Public Laws. And in this connection it is noted that chapter 56 refers indirectly to C. S., 8037, which prescribes a statute of limitation as to actions to foreclose the lien of a tax sale certificate in that it provides (1) that after the assessment roll is confirmed a copy of it shall be delivered to the tax collector or officer charged with duty of collecting taxes, C. S., 2713, and (2) that in the event of default in payment of the assessment installments "such property shall be sold by the municipality under the same rules, regulations, right of redemption or savings as are now provided by law for the sale of land for unpaid taxes." In the sale of land for unpaid tax, the sheriff is charged with the duty of issuing to the purchaser of the land a written tax sale certificate, C. S., 8024, effective

at that time, and the provisions of C. S., 8037, were open to the purchaser to bring an action in the nature of an action to foreclose a mortgage to foreclose the lien of the tax sale certificate. And in C. S., 8037, it is provided that every county or other municipal corporation shall have the right to foreclose for taxes under the provisions of this section, but that "no such actions by such corporations shall be barred by the lapse of time as is above provided in this section, or by the law for other actions, but only by the lapse of five years from the delivery of the certificate of sale or deed sought to be foreclosed." And it is argued that the words "or otherwise" used in the section, C. S., 2717 (a), could refer to private acts relating to the city of Rocky Mount. Public Laws 1907, chapter 209, as amended by Private Laws 1923, chapter 46. But in view of the fact that it is not clear what is the meaning of the clause, "whether fixed by law especially referred to in this chapter or otherwise," it is, in the language of *Chief Justice Marshall,* "going very far to insert it by construction." The section in framework reads, "No statute of limitation . . . shall bar the right of the municipality to enforce any remedy provided by law for the collection of unpaid assessments . . . save from and after ten years from default in the payment thereof . . ." Thus it is clear that the Act operates upon statutes of limitation, and not independently upon the commencing of actions as is usual in statutes of limitation. It is true that the caption to the section is "Sale of foreclosure for unpaid assessments barred in ten years." The majority, resorting to this heading of the section for light as to the intent of the General Assembly in enacting the statute, of necessity concedes that the meaning of the words used in the section is doubtful or ambiguous. As the heading is no part of the Act and cannot enlarge or confer powers, nor control the words of the Act, resort to it for aid in ascertaining the intention of the Legislature may not be had unless the words so used are doubtful or ambiguous. Thus the necessity of resorting to it to aid in ascertaining the intent of the General Assembly is in itself violative of the rule of strict construction, *strictissimi juris,* which is the proper rule to be applied to a statute in derogation of sovereign authority and of common right. *R. R. v. Alsbrook, supra; Yazoo & Mississippi Valley R. Co. v. Thomas, supra.* However, in any event, "Sale of foreclosure for unpaid assessments" might properly refer to a sale under judgment in an action to foreclose an assessment sale certificate under C. S., 8037. Thus the meaning of this heading itself is doubtful and ambiguous.

Hence, after full reconsideration, we are constrained to the view that the 1929 Act, section 2717 (a), is not an independent statute of limitation, and that there is no statutory bar to an action instituted by a municipality, under the provision of C. S., 7990, to foreclose the lien of assessments for public improvements. The fact that chapter 331, Public

Laws 1929, has been amended at several sessions of the General Assembly changing its terms as applicable to statutes of limitation affecting a number of cities, and in one instance an entire county, would seem to suggest a legislative interpretation accordant herewith, and not as importing a general statute of limitations within itself. Likewise, quite contrary to the view taken in the majority opinion, the fact that, at successive sessions in 1931 to 1943, the General Assembly passed acts pertaining to the extension of time of payment of installments of assessments, would tend to show that the 1929 Act was not intended to be an independent statute of limitation.

The case in hand comes to this: Landowners petition the city or municipality for local street or sidewalk improvements with the understanding that one-half the cost is to be assessed against the abutting properties. The property owners neglect to pay their assessments, and the city or municipality fails to enforce collections for a period of ten years. The statute of limitations is pleaded and the landowners take the special benefits and throw the total cost upon the general coffers of the city or municipality. Thus they take their cake and eat it too. The law is otherwise in respect to taxes, and so it ought to be in respect to local improvement assessments.

The present decision will transfer all local improvement assessments of more than ten years standing to the general taxpayers of the community. Those who have neglected to pay for the past ten years are rewarded for their delinquency by a release of their assessments, albeit the organic law inveighs against special privileges except in consideration of public services. N. C. Const., Art. I, section 7. To release the assessments in respect to a few, simply because they have failed to pay, is to accomplish by indirection that which may not be done directly. The final result is inequality of treatment. Special privilege is its essence. We dissent.

CITY OF RALEIGH, A MUNICIPAL CORPORATION, v. RALEIGH CITY ADMINISTRATIVE UNIT AND DISTRICT OF THE STATE PUBLIC SCHOOL SYSTEM.

(Filed 14 July, 1943.)

1. Municipal Corporations § 34: Schools § 30—

Lands owned by "The School Committee of Raleigh Township, Wake County," and used exclusively for public school purposes, are liable for assessment for street improvements made by the city of Raleigh under Art. 9, ch. 56, of the Consolidated Statutes.

2. Constitutional Law § 4b: Taxation § 19—

While the Constitution of North Carolina provides that property belonging to the State or to municipal corporations shall be exempt from taxation (Art. V, sec. 5), assessments on public school property for special benefits thereto, caused by the improvement of the street on which it abuts, are not embraced within the prohibition.

3. Mandamus § 1—

Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have the clear legal right to demand it, and the parties to be coerced must be under legal obligation to perform the act sought to be enforced.

4. Mandamus § 2c: Schools § 30—

In the absence of allegation and proof that funds are available, *mandamus* lies to compel the proper school authorities to raise funds by taxation with which to pay a valid assessment for street improvements, as it would be against public policy to enforce collection of the assessment by foreclosure.

WINBORNE, J., dissenting.

STACY, C. J., and BARNHILL, J., concur in dissenting opinion.

APPEAL by plaintiff and defendant from *Burney, J.*, at February Term, 1943, of WAKE. Affirmed.

Civil action to collect unpaid assessments charged for local improvements against several lots owned by the defendant in the city of Raleigh.

The defendant admitted the improvements were made and the assessments duly levied, but denied that the assessments were enforceable against its property, for that the same was owned and used exclusively for public school purposes. Defendant also pleaded the ten years' statute of limitations as a bar to all installments which became due ten years or more before the institution of the action. It was admitted that summons and complaint were delivered to the sheriff for service on 30 September, 1942, and served 5 October, 1942.

The case was heard below on an agreed statement of facts, from which the court made the following conclusions of law:

"(1) That the properties of defendant, therein described, are not exempt from assessment for local improvements levied pursuant to Article 9 of chapter 56 of the Consolidated Statutes of North Carolina.

"(2) That it is the legal duty of the Raleigh City Administrative Unit and District of the State Public School System to make provision in its annual budget for the payment of special assessments duly levied upon its properties where such assessments are due and payable, and the collection thereof is not barred by the statute of limitations.

"(3) That defendant having made no objection, plaintiff had the legal right to make assessments for local improvements, payable in ten equal annual installments, bearing interest at the rate of six per centum per annum payable on the first Monday in October after assessment is confirmed, notwithstanding that defendant, as the property owner, did not give to plaintiff notice in writing within thirty days, or any time, that it would elect to pay the assessments in annual installments, and that said assessments did not become due and payable in a lump sum by reason of failure of defendant to give such notice.

"(4) That all assessment installments, which became due and payable ten years prior to 30 September, 1942, the date on which summons in this action was delivered to the sheriff of Wake County for service on defendant, are barred by the ten-year statute of limitation as embraced in section 1, chapter 331, Public Laws 1929, designated section 2717 (a) of Consolidated Statutes of North Carolina, as pleaded by defendant.

"(5) That no assessment installment which became due and payable less than ten years prior to 30 September, 1942, is barred by the ten-year statute of limitation.

"(6) That *mandamus,* directing defendant to include in its annual budget the amount of all overdue assessment installments not barred by the statute of limitations, is the proper remedy of plaintiff to enforce the collection of said assessments—such remedy being impliedly authorized by Article 9 of chapter 56 of the Consolidated Statutes of North Carolina."

It was thereupon adjudged (1) that the principal of the several unpaid assessment installments which were not barred under the rule stated, with accrued interest, are liens on the specific parcels of real property against which the assessments were levied; (2) that the said properties being owned and used exclusively for public school purposes, a foreclosure of said liens is against public policy; (3) that the defendant include one-third of said amounts in its budget for each of the fiscal years, beginning 1 July, 1943, 1944, and 1945, respectively, to be applied in payment and satisfaction of said liens, and defendant is ordered to make such payments.

The amounts chargeable to each specific lot described in the pleadings were set out in detail in the judgment.

Both plaintiff and defendant excepted to the judgment and appealed to this Court.

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

Jones & Brassfield for defendant.

DEFENDANT'S APPEAL.

DEVIN, J. Two questions are presented for decision by the defendant's appeal.

1. Were the lands owned by "The School Committee of Raleigh Township, Wake County," and used exclusively for public school purposes, liable for assessment for street improvements made by the city of Raleigh under the provisions of Article 9, chapter 56, of the Consolidated Statutes, on the dates when the assessments were levied and confirmed by the city of Raleigh as shown in the statement of facts?

We think the answer to this question must be in the affirmative. While the Constitution of North Carolina provides that property belonging to the State or to municipal corporations shall be exempt from taxation (Art. V, sec. 5), assessments on public school property for special benefits thereto caused by the improvement of the street on which it abuts are not embraced within the constitutional prohibition.

In *Tarboro v. Forbes,* 185 N. C., 59, 116 S. E., 81, where this question was considered and decided against exemption, *Adams, J.,* speaking for the Court, states the law as follows: "But there is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of the term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit."

Furthermore, in the Local Improvement Act itself, C. S., 2710 (4), it is expressly provided that: "No lands in the municipality shall be exempt from local assessment." In *Winston-Salem v. Smith,* 216 N. C., 1, 3 S. E. (2d), 328, *Winborne, J.,* writing the opinion, uses this language: "By the statute imposing the assessment the Legislature has the power to determine what property is benefited by the improvement and when it does its determination is conclusive upon the owners and the courts." Compare *Greensboro v. Bishop,* 197 N. C., 748, 150 S. E., 495.

It appears from the agreed statement of facts in this case that the petition for paving the several streets to which the controversy relates was signed in the name and under the authority of the School Committee, by its chairman, and that without such signature the petition would not have been sufficient for the improvement to have been made.

2. Is *mandamus,* directing the Raleigh City Administrative Unit to make provision in its annual budget for the payment of the special assessments in controversy in this action, the proper remedy for the enforcement of collection of the assessments? The answer is Yes.

It is well settled in this State that "*mandamus* lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have the clear legal right to demand it, and the parties to be coerced must be under legal obligation to perform the act sought to be enforced," *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *White v. Comrs. of Johnston County,* 217 N. C., 329, 7 S. E. (2d), 825, and cases there cited. Also *Champion v. Board of Health,* 221 N. C., 96, 19 S. E. (2d), 239.

The school property in question being subject to assessment for public improvements, within the meaning of the Local Improvement Act, now Article 9 of chapter 56 of Consolidated Statutes, and the amount of the assessments having been established by judgment in this case, the plaintiff has the clear legal right to have the assessments and interest thereon paid, and, upon default thereof, to enforce the collection. But, as the property is held and used exclusively for public school purposes, the court properly ruled that it would be against public policy to enforce collection of the assessments by foreclosure sale of the property. On the other hand, the amount of assessments having been so established, it follows that the proper school authority is under clear legal duty to pay the assessments, if funds be available for that purpose, and *mandamus* would lie to compel such payment. *Champion v. Board of Health, supra; Drainage District v. Comrs.,* 174 N. C., 738, 94 S. E., 530. See also Annotations 95 A. L. R., 689, at page 700. But if funds be not available, the proper school authority is under clear legal duty to put in motion machinery prescribed by law for raising funds by taxation with which to pay the assessments, and *mandamus* would lie to compel the performance of such duty. In the absence of allegation and proof that funds are available for the purpose, *mandamus* lies to compel performance of the legal duty to raise funds therefor. *Hickory v. Catawba County,* 206 N. C., 165, 173 S. E., 56. Compare *Champion v. Board of Health, supra.*

In this connection it appears from the agreed facts that defendant Raleigh City Administrative Unit was set up under the provisions of section 4 of the School Machinery Act of 1933, chapter 562, to embrace and embracing the territory theretofore within the boundary of the Raleigh Township special charter district over which "The School Committee of Raleigh Township, Wake County," a body corporate, exercised the powers granted in its charter. By the same section of the School Machinery Act of 1933 the special charter district was declared non-

existent, and the Raleigh City Administrative Unit became the administrative agency, and "The School Committee," as "trustees of the former district," using the language of *Seawell, J.*, in *Bridges v. Charlotte,* 221 N. C., 472, 20 S. E. (2d), 825, "were retained only as a local administrative body of that unit, shorn of all administrative authority other than that which they get from the School Machinery Act." See also *Evans v. Mecklenburg County,* 205 N. C., 560, 172 S. E., 323. And it became the duty of the Raleigh City Administrative Unit, as such administrative agency, to file with the tax levying authorities annual budgets requesting, among other things, funds for debt service and capital outlay. Section 17 of the School Machinery Act. Thus, *mandamus* was properly granted in the judgment from which this appeal is taken.

PLAINTIFF'S APPEAL.

The plaintiff's appeal is based upon exception to the ruling below that installments of assessments ten years past due when the action was instituted are barred by the statute of limitations. C. S., 2717 (a).

This question was presented and decided in *Raleigh v. Bank, ante,* 286, where the ruling complained of was affirmed. Hence, on the authority of that decision, we hold that the bar of the statute applies to all installments of assessments which became due and payable ten years prior to 30 September, 1942. The amounts found collectible and those held barred are set out in the judgment.

On defendant's appeal: Affirmed.

On plaintiff's appeal: Affirmed.

WINBORNE, J., with whom STACY, C. J., and BARNHILL, J., concur, concurring in part and dissenting in part: The decision on plaintiff's appeal here is predicated on decision on plaintiff's appeal in No. 449, *Raleigh v. Bank, ante,* 286, and is contrary to our views there expressed. We, therefore, dissent here upon the grounds stated there.

We concur in the disposition of the defendant's appeal.

STATE v. ANDREW WILSON FARRELL.

(Filed 14 July, 1943.)

1. Criminal Law § 44: Trial § 4: Appeal and Error § 37b—

Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal.

2. Constitutional Law §§ 28, 33: Appeal and Error § 40g—

Constitutional rights are not to be granted or withheld in the court's discretion. When a motion for continuance, in a criminal case, is based on a right guaranteed by the Federal and State Constitutions, 14th Amend. U. S. Constitution, Art. I, secs. 11 and 17, N. C. Constitution, the question presented is one of law and not of discretion, and the decision of the court below is reviewable.

3. Constitutional Law § 28: Criminal Law § 46—

The right to have counsel, as well as the right to face one's accusers and witnesses with other testimony, is guaranteed by both the N. C. and U. S. Constitutions, and together they include the opportunity fairly to prepare and present one's defense and form an integral part of a fair trial. The court's duty to administer justice without delay must be in conformity to these rights.

4. Constitutional Law §§ 28, 33—

In a criminal prosecution for a capital offense, in a county 150 miles from where the prisoner was born and spent most of his life, upon a plea of insanity made by counsel assigned to represent the accused and motion for time to prepare the defense, an order requiring the case to be tried within three and one-half days, exclusive of Sunday, was a violation of due process of law, regardless of the merits of the case.

SEAWELL, J., dissenting.
DEVIN, J., concurs in dissenting opinion.

APPEAL by defendant from *Burgwyn, Special Judge,* at March-April Term, 1943, of DURHAM. New trial.

Criminal prosecution on indictment charging the capital felony of rape.

On 23 March, 1943, defendant was arrested and imprisoned, charged with the rape of his stepdaughter, about 8 years of age. A term of criminal court then being in session, a bill of indictment was promptly returned by the grand jury.

The defendant being without means to employ counsel, the court, on Saturday, 27 March, 1943, assigned Hon. R. H. Sykes as counsel to represent him. The defendant was thereupon duly arraigned and entered his plea of "not guilty." (He was later permitted to withdraw this plea and enter a plea of "not guilty by reason of insanity.")

On Monday, 29 March, another term of court for the trial of criminal cases was convened with Burgwyn, Special Judge, presiding. On that day counsel for defendant appeared and moved for time in which to have defendant observed by a psychiatrist or alienist. The court thereupon directed that Doctor Owens of the State Hospital at Raleigh be summoned to come to Durham and observe the defendant. This he did, but neither the length of the observation nor the result thereof is made to appear.

On 31 March, 1943, the court set the case for hearing on Thursday, 1 April, at 2:30 p.m., and ordered a special venire from Orange County.

On the morning of 1 April, "to meet the ends of justice," an order was entered directing that defendant be taken to Duke Hospital for observation and examination by Doctor Lyman, a psychiatrist.

Immediately upon the call of the case for trial, counsel for the defendant filed the following written petition and motion:

"R. H. Sykes, being first duly sworn, deposes and says:

"That on Saturday, March 27, 1943, I was appointed by Judge J. J. Burney, Judge Presiding at the March Criminal Term of Durham County Superior Court, as attorney to represent Andrew Wilson Farrell.

"That said defendant is charged by Bill of Indictment of the Grand Jury of the crime of committing rape upon his own stepdaughter, eight years of age, the crime having been committed March 23, 1943.

"That promptly after my first interview with the said defendant, I was of the opinion that he was insane and unable to prepare his defense, and asked permission of the Court to have him examined by experts to determine his sanity or insanity. That such permission was allowed, and (I) immediately contacted the head of the Department of Psychiatry of Duke University to make such examination. I was informed that owing to the stress of other engagements it would be impossible to start such an examination until Thursday, April 1, 1943. That application was made to the Court for a continuance of the trial until the next term on the ground that sufficient time was not allowed for me to properly prepare the case, which involved the life or death of the prisoner. Upon disallowance of said motion for continuance, the Department of Duke University stated that they would endeavor to make the examination in time for the trial set for Thursday, April 1. The examination has not now been completed, and I have been unable to have any interview with the experts as to what their conclusions are as to the defendant's mental condition.

"That the defendant has no relatives in Durham County other than his wife and the stepchild upon whom it is charged he committed the crime; has no money or property out of which to defray the expenses of preparing the trial; that the defendant was born and raised at Hallsboro, in Columbus County, North Carolina, where his mother now resides, and she is a woman without property, whose husband is now confined to his bed with paralysis. I am informed that many of the people who have known the prisoner from his childhood would be able to testify as to his insanity, but I have not had time to confer with them, or obtain means of having them come to Durham for this purpose. Owing to the imminence of the trial, there has been no opportunity to have depositions of these people taken for use at the trial.

"I have given most of my time during the intervening five days to the preparation of the case, but owing to the gravity of the charge, and the severity of the punishment in case of conviction, I am of the opinion that the proper preparation cannot be made for trial at this term of Court.

"I respectfully move the Court that this case be continued for this term to be tried at a subsequent term of Criminal Court for Durham County, the next term being set for May, 1943, in order to give sufficient time for a proper preparation of the case."

The motion for continuance was denied. In respect thereto the court made the following entry:

"The Court finds as a fact that the defendant was indicted by the Grand Jury of Durham County during the week ending March 27th; that on Saturday of said week, at the time of and immediately prior to the defendant's arraignment upon the bill, counsel was assigned to him, to-wit, Honorable R. H. Sykes, and that upon his arraignment he entered a plea of not guilty and for his trial placed himself upon God and his Country; that on Monday of the following week counsel appeared before the Court and stated that he desired time in which to secure observation of the defendant by psychiatrists or alienists. Whereupon the Court directed that Doctor Owens, of the State Hospital in Raleigh, should come to Durham and observe the defendant; that on Tuesday, the said Doctor Owens, at the request of the Court, did come to Durham and did observe the defendant; that thereafter the court ordered that the defendant be taken from jail in the custody of the officers and carried to Duke University Hospital to be observed there by psychiatrists which were selected by the defendant's counsel, and that this was done on Wednesday afternoon and Thursday morning. That the Court was informed that the alienists or psychiatrists would be able to and would render their opinion in respect to the mental condition of the defendant on Thursday afternoon. On Wednesday morning it was suggested to the Court by counsel for the defendant by affidavit that he thought the proper ends of justice would be met by obtaining a jury from another county than Durham County and the Court being of the opinion that such was the case directed that a special venire of one hundred persons should be summoned from Orange County to be present in the courtroom at 2:30 on Thursday, April 1, from which panel the jury to try the case should be chosen. That this motion was submitted after the one hundred men, or such of them as had been served, had presented themselves at Court for service on the jury. In respect to any witness which this defendant may desire to have brought here from Columbus County, the Court now directs that the Sheriff of this county, or one of his deputies, shall immediately go to Columbus County with such subpœna as the defendant's

counsel may see proper to issue and subpœna each and every one of such witnesses as may be found in said county. And the court further directs that the County of Durham shall defray the expenses of any and all witnesses which this defendant's counsel may see fit to summons from Columbus County or any other county whom he may deem necessary to testify in respect to the mental condition, past and present, of the defendant."

Pursuant to the directions of the court, a subpœna was issued 1 April, directed to the sheriff of Columbus County commanding him to summons for defendant the witnesses named therein to appear on 2 April, at 9:30 a.m. The return of the subpœna does not show which of these witnesses were actually subpœnaed but two appeared and testified in behalf of the defendant.

During the progress of the trial the prisoner offered in evidence the unverified statement or report of Doctor Lyman, the psychiatrist, which is as follows:

"DUKE UNIVERSITY
DURHAM
NORTH CAROLINA

"School of Medicine
Department of Neuropsychistry
Reply to undersigned.

April 1, 1943.

"Judge Robert H. Sykes
410-11-12 Geer Bldg.
Durham, N. C.

"Dear Judge Sykes:

"On the morning of April 1, 1943, I had an interview with Andrew Wilson Farrell in the presence of Sheriff Belvin and two other men. The impression I got from this interview and from the report made by Dr. Adams is as follows:

"In my opinion, Farrell is *not* lacking in sufficient intelligence to understand the nature and meaning of the crime for which he is charged.

"It is further my opinion that Farrell is aware of the social responsibility for maintaining virginity in women, except when legally married to them. He made specific statements to this effect. Although he refrained from making any clear and positive answers with respect to maintaining sexual innocence of children, his silence implied awareness of responsibility toward them as well.

"There is a bare possibility that Farrell is suffering from a disease which may rob one of 'moral judgment,' namely, syphilis in the form of

dementia paralythica or general paralysis. He gave a history suggesting a venereal disease which may have been syphilis, he stated that he had some treatment, but the amount he indicated is not adequate to guarantee against the late development of general paralysis. This possibility seems very unlikely. He showed no tremors and speech changes. However, this disease has not been positively ruled out by my examination.

"There is only one valid argument which impressed me as feasible for his defense in the eyes of the law, as I know it: He consistently maintained that he had been drinking and that he could not remember what he did. I do not have evidence to show that he was sufficiently under the influence of alcohol to alter his responsibility at the time. I am unable to decide whether or not he had amnesia to the degree which he claimed. This latter part is hard to prove unless he announces under examination that he can recall what happened.

"I regret that my interview carries such limited value. In case you care to know some of the topics covered in my interview, I enclose a typewritten copy of my sketchy notes. They do not cover all the topics, do give most of them, do not give the exact words used, do give the sense.

Sincerely yours,

(Signed) RICHARD S. LYMAN

RICHARD S. LYMAN, M.D."

The trial was completed on 2 April. The jury having returned the verdict "Guilty of rape," judgment that the defendant suffer the penalty of death was pronounced. The defendant excepted and appealed.

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

R. H. Sykes and Powell & Lewis for defendant, appellant.

BARNHILL, J. Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal. *S. v. Allen,* 222 N. C., 145; *S. v. Wellmon,* 222 N. C., 215, and cases cited; *S. v. Rhodes,* 202 N. C., 101, 161 S. E., 722. This rule is so firmly established in this and other jurisdictions as to become axiomatic. It is not debated here.

But when the motion is based on a right guaranteed by the Federal and State Constitutions, 14th Amend., U. S. Const., Art. I, sections 11 and 17, N. C. Const., the question presented is one of law and not of discretion, and the decision of the court below is reviewable.

The authority to rule a defendant to trial in a criminal prosecution attaches only after the constitutional right of confrontation has been

satisfied. The question is not one of guilt. Nor does it involve the merits of the defense he may be able to produce. It is whether the defendant has had an opportunity fairly to prepare his defense and present it. *S. v. Whitfield,* 206 N. C., 696, 175 S. E., 93. This is not a matter of discretion. The law must first say where the line of demarcation is and on which side the case falls. Constitutional rights are not to be granted or withheld in the court's discretion.

"The rule undoubtedly is, that the right of confrontation carries with it not only the right to face one's 'accuser and witnesses with other testimony' (sec. 11, Bill of Rights), but also the opportunity fairly to present one's defense. *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *S. v. Garner,* 203 N. C., 361, 166 S. E., 180; *S. v. Hightower,* 187 N. C., 300, 121 S. E., 616; *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152." *S. v. Whitfield, supra;* Anno. 84 A. L. R., 544; Anno. 84 L. Ed., 383.

The right to have counsel as well as the right of confrontation is guaranteed. Art. I, sec. 11, N. C. Const. Where the crime charged is a capital felony this right becomes a mandate. C. S., 4515.

The two—the right to counsel and the right of confrontation—are closely interrelated and, together, form an integral part of a fair trial. Hence, this requirement as incorporated in C. S., 4515, was not intended to be a mere formality. It does not contemplate that counsel shall "be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense." *North v. People,* 28 N. E., 966 (Ill.).

While it is the duty of the court to see that justice is administered speedily and without delay, the trial must be in conformity to the constitutional mandates. One of these is that a defendant in a criminal case shall have counsel to represent him, *Knox County Council v. State,* 130 A. L. R., 1427; 1 Cooley's Const. Lim. (8th), 696; 12 Am. Jur., 307, and the right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused, and to prepare his defense. *Avery v. Alabama,* 306 U. S., 444, 84 L. Ed., 377; *North v. People, supra; People v. Cooper,* 366 Ill., 113, 7 N. E. (2d), 882.

The duty imposed on the courts to assign counsel to defend one accused of a capital crime who is himself unable to employ counsel means more than the mere appointment of counsel. Such duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. A reasonable time for preparation must be allowed between the time of the assignment of counsel by the court and the date of trial. Anno. 84 A. L. R., 544. "The law of the land" is "a law which hears before it condemns," and the right to be heard comprehends the right to be

heard through counsel who has had a fair opportunity to acquaint himself with the law and the facts of the case.

These rights—of confrontation and to counsel—are guaranteed not only by our Constitution but also by the Due Process Clause (14th Amend.) of the Federal Constitution. "Due process of law includes the right to counsel and its accustomed incidents of consultation with the prisoner and opportunity for preparation for trial and for the presentation of a proper defense at the trial." *Powell v. Alabama,* 287 U. S., 45, 77 L. Ed., 158, and cases cited; 6 R. C. L., 453, sec. 449, Anno. 84 A. L. R., 544; Anno. 84 L. Ed., 383; 11 Am. Jur., 1106, sec. 316.

Hence, the one and only question here presented is this: Did the refusal of the trial court to grant the prisoner's motion for a continuance impinge upon his constitutional right of confrontation, in that it denied him a reasonable time within which to prepare and present his defense?

We may concede that if the only issue to be tried was that of guilt or innocence, based on the facts of the alleged offense, ample time was allowed. There could be but few material witnesses to this issue and the witnesses were local and readily available. But such is not the case. The defense here was insanity. This required investigation of the law of insanity as a defense to crime, as well as of the facts. And the investigation of the facts would include not only interviews with experts but also with relatives, friends and prospective lay witnesses.

The prisoner spent most of his life in Columbus County. There his relatives and others best acquainted with the history of his mental condition lived, more than 150 miles from Durham by automobile or bus. Travel by rail is circuitous and time-consuming. Even so, consultation with some of these was necessary before counsel could know to what extent, if any, he could press his defense.

Likewise, there are preliminary motions and orders to be made in a cause wherein the indictment charges a capital felony. Court was in session. It was the duty of counsel to be in attendance and immediately available.

It was a physical impossibility for counsel to be in attendance at court; to consult with the psychiatrist; to prepare the law; and to interview witnesses in Columbus County, all within the brief period of three and one-half days—exclusive of Sunday.

No reputable lawyer would undertake voluntarily to defend a man charged with a capital felony in which the defense of insanity was interposed without following this preparatory procedure. This was the duty of counsel here and the defendant had the right to demand reasonable time therefor.

It is true that the court, on the day the case was set for trial, directed the issuance of a subpœna for any witness in Columbus County or

elsewhere desired by the prisoner and made arrangement for its service. Was this subpœna issued and served? Two witnesses from Columbus County appeared and testified in behalf of the prisoner on the day the defendant was convicted and sentenced to death. Otherwise, the record proper does not answer. Even so, we would not undertake to make it appear that the prisoner has been put to a disadvantage in this respect by concealing or ignoring a known fact. The clerk of the Superior Court has certified a subpœna as a part of the record below. This shows that it was issued 1 April, commanding the sheriff of Columbus County to summons the four witnesses therein named.

It is likewise true that an examination by Doctor Lyman, a psychiatrist, was ordered. But the examination by the psychiatrist was ordered on the day the trial began and was not completed. His report so indicates, and it is so asserted without challenge. (See affidavit.)

Granted that the subpœna was issued and served and that the examination was had under the circumstances here disclosed, the requirements of the law are not fulfilled in such manner.

Nor is it enough to assume that counsel, being forced to trial, exercised his best judgment in proceeding without preparation. Neither he nor the court could say what a prompt and thorough-going investigation would disclose.

Assuming the mental capacity of the prisoner (a material issue upon which he has not been fully heard), he may deserve to suffer the penalty of death. There is little in this record to the contrary. But this is not the issue. Whether his defense before a jury after full preparation would have availed him is for the present purpose immaterial. The law provides one mode of trial and it is the same for the innocent and for the guilty. The fact that an accused person on the trial may be shown to be guilty is not, of itself, sufficient reason to deny him full opportunity to present, through counsel, such defense as he may have to the charge. *People v. Lavendowski,* 326 Ill., 173, 157 N. E., 193; *People v. Kurant,* 331 Ill., 470, 163 N. E., 411.

It is vain to give the accused a day in court with no opportunity to prepare for it or guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or the law of the case. *Commonwealth v. O'Keefe,* 298 Pa., 169, 148 Atl., 73. "A right observed according to form, but at variance with substance, is a right denied." *S. v. Whitfield, supra.*

The prompt disposition of criminal cases and the vigorous administration of the criminal law are essential. Certainly this is true in respect to crimes such as the one here charged. But we must not forget that it is cases of this very nature that are most apt to cause us to fail to see with an unprejudiced eye and to judge with that singleness of

purpose so essential to the fair and impartial administration of the law "in the calm spirit of regulated justice." *Powell v. Alabama, supra.*

But it has been urged that the trial was conducted without error, and that, therefore, the verdict should not be disturbed. This we cannot concede.

The court instructed the jury in part as follows:

"Now, Gentlemen, in this case the defendant has entered a plea in respect to the alleged crime, entered a general plea of not guilty, and another plea of not guilty by reason of insanity.

"In respect to that, I charge you further that by this plea that he says he admits the act or does not deny the act but says that if he did commit the act he would not be responsible by reason of insanity."

As there is no exceptive assignment of error directed to this part of the charge, it cannot be made the basis of an order for a new trial. Nor perhaps should we discuss it at length. However, it is not amiss to direct attention thereto in answer to the argument made.

We conclude that to force this defendant to trial under the circumstances here disclosed is not due process of law and does not preserve the right of confrontation, regardless of the merits of the case. For this reason there must be a

New trial.

SEAWELL, J., dissenting: I cannot agree with the majority in the disposition of this case. The oath taken by a judge of the Superior Court requires him to administer justice "without denial or delay." The circumstances of this case bring the denial of the motion to continue fully within the ordinary discretion of the trial judge, without denying due process of law or infringing any other right of the defendant, and in the exercise of that discretion, the trial was patently not accelerated by any public demand or feeling on the part of the court engendered by the enormity of the crime of which defendant was accused. The accused was as fully heard upon the question of his insanity as the circumstances of the case warranted, and a close scrutiny of the record does not warrant the assumption that he was prejudiced by a refusal to continue the case.

In his dissenting opinion in *Lochner v. People of New York,* 198 U. S., 45, 49 L. Ed., 937—involving an alleged violation of the same constitutional right—*Mr. Justice Holmes* observed: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."

In the present case, I think it depends upon a sound sense of values which will penetrate beyond nonessentials into a proper appraisal of the facts in their true perspective and in their relation to a rule of fairness

upon which we all agree. I am satisfied that the constitutional rights of the defendant were adequately protected.

DEVIN, J., concurs in dissent.

JANE MONTGOMERY v. GRACE M. BLADES, ADMINISTRATRIX OF WILLIAM B. BLADES, DECEASED, SOUTHERN RAILWAY COMPANY AND CITY OF DURHAM.

(Filed 14 July, 1943.)

Appeal and Error § 43—

Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former hearing, and no new facts appear, no new authorities cited, and no new positions assumed. Rule 44, Rules of Practice in the Supreme Court, 221 N. C., p. 570.

SEAWELL, J., dissenting.

PETITION by plaintiff for a rehearing on defendant's appeal from judgment of the Superior Court of Durham County in this action.

Victor S. Bryant and James R. Patton, Jr., for plaintiff, petitioner.

W. T. Joyner and Hedrick & Hall for Southern Railway Company, respondent.

Claude V. Jones and S. C. Brawley for City of Durham, respondent.

SCHENCK, J. On 12 May, 1943, petition to rehear was allowed only on the question whether the decision in *Montgomery v. Blades,* 218 N. C., 680, should be held controlling, and the petition was duly docketed for a rehearing. Rule 44 (6), Rules of Practice in the Supreme Court, 221 N. C., 570. On 2 June, 1943, upon examination of petition and briefs filed the petition was dismissed for the reason that the grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing, and no new facts were made to appear, no new authorities were cited and no new positions were assumed. *Weston v. Lumber Co.,* 168 N. C., 98, 83 S. E., 693; *Jolley v. Telegraph Co.,* 205 N. C., 108, 170 S. E., 145.

That the decision in 218 N. C., 680, was duly considered by the Court is manifested in the opinion assailed by these words: "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." *Montgomery v. Blades,* 222 N. C., 469.

Petition dismissed.

SEAWELL, J., dissenting: The conditions on which this case has been submitted to the Court for limited consideration are not clear. Perhaps it was intended to submit the question whether the law as declared in *Montgomery v. Blades,* 218 N. C., 680, is, technically speaking, the law of the case. The discussion of that question would now be largely academic. What I have to say has been fully said in the opinion on the former hearing—218 N. C., 680, *supra*—which applies with as much force to the evidential facts as it did to the factual statement in the complaint, because upon the critical question involved they are identical.

When the case was here upon the first appeal on demurrer to the complaint, the controversy was over the question whether upon the factual statement in the complaint, the negligence of Blades did not insulate the negligence of the corporate defendants in not lighting the supporting piers in the middle of the underpass. Two references to the complaint in the opinion upon the present appeal make it clear that this opinion has the effect of overruling the decision in the former case as it applied to this particular, without differentiation of fact between the allegations of the complaint and the evidence. In these references the allegations of the complaint with reference to Blades' negligence, as they are incorporated in the evidence, are quoted as substantial reasons for sustaining the nonsuit. *Montgomery v. Blades,* 222 N. C., 463, 23 S. E. (2d), 844, 847, 848. The fact that on the former appeal the Court dealt with a demurrer to the complaint and on the present appeal a demurrer to the evidence is not significant, since the same principle of law is involved and the same factual situation. In fact, the plaintiff fulfilled in the evidence every factual commitment she made in the complaint on this phase of the controversy, and she was entitled to the benefit of the law of the case as laid down in the former appeal.

But aside from the obvious departure from a rule which has been thought gravely necessary to maintain a respect for the stability of judicial opinion and the propriety of dealing consistently with those who are compelled to submit their conflicting claims to a court which, both in theory and practice, should be one of final authority, I cannot agree with the conclusion reached in the majority opinion or the reasoning on which it is based. Without expressing any opinion on the merits of the case, I believe that there were reasonable inferences from the evidence respecting the foreseeability of the intervening negligence with which the jury alone had the right to deal. The case was properly submitted to the jury.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1943

W. C. SAMPLE v. LEM JACKSON AND H. P. WILLIAMS, CONSTABLE OF ELIZABETH CITY TOWNSHIP, PASQUOTANK COUNTY, NORTH CAROLINA.

(Filed 22 September, 1943.)

1. Bankruptcy §§ 7, 3½—

In a suit by plaintiff, judgment debtor, against defendant, judgment creditor, to enjoin a sale under execution on the judgment, which was taken and docketed within four months of the bankruptcy of plaintiff, who alleges insolvency at the time of docketing, evidence that plaintiff was unable to meet his obligations as they currently became due, supported by the petition and schedules in bankruptcy, is insufficient to show insolvency under the Bankruptcy Act of 1898, and judgment of nonsuit affirmed.

2. Bankruptcy § 3½—

Petition, schedules and adjudication in bankruptcy under the Act of 1898, in a proceeding filed almost four months after the docketing of a judgment against the bankrupt, under attack on account of the alleged insolvency of the bankrupt at the time of docketing, are not evidence of such insolvency.

3. Judgments § 32—

There is sufficient identity between two causes to support the plea of *res judicata*, unless the allegations and proof in the second show some substantial element for the support of plaintiff's case which was wanting at the former hearing.

APPEAL by plaintiff from *Bone, J.*, at February Term, 1943, of PASQUOTANK.

The plaintiff brought this action to enjoin the enforcement by sale of land under execution of two judgments in favor of defendant, judgment creditor, against the plaintiff, judgment debtor, rendered and docketed on 20 June, 1932, respectively in the sum of $1,000.00 and the sum of $300.00.

Subsequently to the docketing of these judgments, to wit, on 19 October, 1932, Sample, the plaintiff herein, filed a voluntary petition in bankruptcy, and in his several schedules listed as unsecured debts notes in the sum of $1,300.00 to Lemuel Jackson for borrowed money; lands of a gross estimated value of $5,000.00, encumbered by three deeds of trust constituting liens upon the property in the total sum of $11,527.55, and personal property encumbered by various liens reducing the value to less than $500.00.

Following the adjudication due notice was given to all the creditors, and the first meeting of creditors was held 26 November, 1932. Actually, none of the creditors appeared at this meeting.

At this time an order was made by the referee, Honorable R. W. Herring, substantially as follows:

"From a thorough examination of the Bankrupt, his schedules, his Attorney, and from other information obtained by the Referee, it was made to appear to the satisfaction of the Court that the real estate owned by the Bankrupt is encumbered by valid liens, and that the equity therein, if any, is worth less than $1,000.00; and that a part of the personal property owned by the said Bankrupt is encumbered by valid liens, and that the equity in the encumbered personal property, together with the unencumbered personal property owned by the Bankrupt, including life insurance policies on the life of the bankrupt, is worth less than $500.00. That there is absolutely nothing in this case for unsecured creditors:

"It is, therefore, without objection, ORDERED, ADJUDGED and DECREED by the Court: (1) That the real estate and personal property owned by the Bankrupt, set out in his schedules and above referred to, including life insurance policies on the life of the Bankrupt be, and the same is hereby abandoned as assets for general creditors; and that the said real estate be, and the same is hereby assigned and allotted to the said William Camillus Sample, Bankrupt, as his Homestead, subject to valid claims resting thereon; and that the said personal property belonging to the said Bankrupt, listed in his schedules, and above referred to, including life insurance policies on the life of the Bankrupt, be and the same is hereby assigned and allotted to the said William Camillus Sample, Bankrupt, as his Personal Property Exemption, subject to valid liens resting thereon; (2) That no trustee be appointed; (3) That no

further meeting of the creditors be held; and (4) That this case be, and the same is hereby declared closed as a no-asset case."

No objection was made at any time to this order, and the method of assigning to the bankrupt his homestead and personal property exemption has not been challenged.

In due course, on 9 August, 1933, Sample received his discharge, in the usual form, providing, after recitals, as follows:

"IT IS THEREFORE ORDERED by the Court that said William Camillus Sample be discharged from all debts and claims which are made provable by said Acts against his estate, and which existed on the 19th day of October, A.D. 1932, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

Subsequently, the present defendant Jackson sought to enforce the judgments above described by execution and sale of the lands set apart to Sample as his homestead exemption, and Sample brought an action to enjoin the sale upon the ground that the debt had been discharged and the lien of the judgments dissolved or avoided by the bankruptcy proceeding and discharge of the bankrupt. Upon the final hearing before Judge Hamilton at the October Term, 1942, of Pasquotank Superior Court, Sample suffered an involuntary nonsuit, and the defendant officer was authorized to proceed with the execution sale. There was no appeal. The present action, subsequently brought, seeks the same remedy.

In his complaint the plaintiff sets up the proceedings substantially as here set out, and in addition thereto alleges his insolvency at the time Jackson obtained the judgments he now seeks to enforce, omitting reference to the prior action to enjoin the sale under execution. It is alleged, as a matter of law, that the judgments lost their liens by the bankruptcy proceeding and discharge of the bankrupt.

The defendant answered, denying that the proceeding in bankruptcy or the discharge of the bankrupt had the effect of avoiding the lien of his judgments; denied the insolvency of Sample at the time the judgments were taken and docketed, and pleaded that under the judgment in the former action to restrain sale under execution the controversy had become *res judicata,* and alleged as additional matter that the indebtedness had been created through fraud of the debtor and therefore was not subject to discharge in bankruptcy. This, in his reply, the plaintiff denied.

Upon the hearing the plaintiff introduced recorded evidence of the judgments against him, with dates of rendition and docketing, and of the proceeding in bankruptcy, as above set out; and further introduced

evidence tending to show insolvency of Sample at the time the judgments were taken and docketed.

Upon his plea of *res judicata* the defendant introduced the judgment roll in the former action by the plaintiff to restrain execution sales of the land under the several judgments. By stipulation of counsel it is agreed that, upon comparison of the present action, the documentary evidence in each is the same, and the only difference in the two cases was "the allegation of insolvency made by the plaintiff, which allegation alleges his insolvency at the time of the acquisition of the judgments held by the defendant Jackson, the only difference between the evidence at the trial on the other case and the evidence offered by plaintiff at the trial of this present action is the oral testimony of plaintiff, W. C. Sample, relating to his insolvency at the time of acquisition of the judgments above referred to."

The defendant, in apt time, having made motions for judgment of nonsuit upon the evidence, it was agreed by counsel that Judge Bone might consider together the motion for nonsuit and the defendant's plea of *res judicata,* or estoppel.

Motion for nonsuit was allowed and judgment was accordingly signed, from which plaintiff appealed, assigning error.

J. W. Jennette and McMullan & McMullan for plaintiff, appellant.

M. B. Simpson for defendant, appellee.

SEAWELL, J. Passing the question of whether section 67 (f) of the Bankruptcy Act of 1898 is available to the discharged bankrupt in avoiding a judgment lien taken within the four months period next preceding the filing of the petition and while he was insolvent, we first consider defendants' plea of estoppel—the effect as *res judicata* of the judgment of nonsuit rendered in the former proceeding before Judge Hamilton, which dealt with the subject of the present suit and in which the plaintiff sought the same relief.

From the stipulation of counsel there appears to be sufficient identity between the two cases and evidence adduced on the trials to support the plea of *res judicata*—unless in the allegation and proof in the present case there is some substantial element making for the support of plaintiff's case which was not present at the former hearing.

The plaintiff contends that this element is supplied by the allegation and evidence in the present suit relating to his insolvency at the time the judgments were rendered against him, and insists that Judge Hamilton's order of nonsuit in the former action must necessarily be referred to the want of such allegation and evidence therein.

It may be conceded that if the provisions of the Act which plaintiff seeks to invoke are available to him in the present proceeding—on the theory advanced by him—the difference in the two suits, if the evidence is really of the character claimed for it, is sufficient to defeat the plea of estoppel. At least such insolvency at the time of the acquisition of the lien is essential to its avoidance under the cited provision of the Bankruptcy Act and must be shown.

But the defendant raises the question whether in the case at bar plaintiff's evidence in this respect is adequate to the issue.

The plaintiff's evidence goes so far as to indicate that he was financially unable to pay his debts at that time; that he was behind with installments at the bank and unable to pay the interest as it became due, and he introduced certain portions of his petition filed in the bankruptcy proceeding nearly four months after the docketing of the judgments, showing from the schedules filed that his assets were much less in value than his liabilities at that time. But neither the filing of the petition nor the adjudication in bankruptcy are evidence of the existence of insolvency at the prior date when the judgments were taken, *Liberty National Bank v. Bear,* 265 U. S., 365, 68 L. Ed., 1057, 1060; *U. S. v. Oklahoma,* 261 U. S., 253, 67 L. Ed., 638; and upon the same principle, we do not regard the disclosures in the schedules filed with the petition as tending to prove such condition when the judgments were taken.

The testimony of the defendant as to his insolvency indicates no more than that he was unable to meet his obligations as they currently became due. That would constitute insolvency as it is understood in the practice under State law and under earlier bankruptcy acts, *Flowers v. Chemical Co.,* 199 N. C., 456, 154 S. E., 736; *Mining Co. v. Smelting Co.,* 119 N. C., 417, 25 S. E., 954; *Wager v. Hall,* 16 Wall (U. S.), 584, 21 L. Ed., 504; but as the plaintiff must obtain his relief, if at all, from the Bankruptcy Act, we must observe the definitions of that law and conform our proof to its standards.

The Bankruptcy Act of 1898 provides that a person shall be deemed insolvent within the provisions of the Act "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." Bankr. Act, sec. 1 (15); 11 U. S. C. A., sec. 1 (15). This definition is based upon a mathematical rule, exact but fairly easy of application.

The evidence does not institute such a comparison between the aggregate value of plaintiff's property and the total of his liabilities on the critical date, and it is therefore insufficient to engender an inference of his insolvency at that time within the meaning of the term as used in the

Bankruptcy Act. This has been considered a matter of substance, and we do not believe the Court would be justified in overlooking it in the present case.

The main proposition presented to us for decision is a matter of first impression in this State and one of importance. We expressly refrain from deciding it until it is presented to us unembarrassed by other pleas which, temporarily at least, preclude its consideration.

The judgment of nonsuit is

Affirmed.

W. H. THOMPSON v. THE STATE OF NORTH CAROLINA, W. KERR SCOTT, COMMISSIONER OF AGRICULTURE, AND L. Y. BALLENTINE, W. I. BISSETTE, L. L. BURGIN, CHARLES F. CATES, CLAUDE T. HALL, W. G. HARGETT, D. R. NOLAND, MISS ETHEL PARKER, J. H. POOLE, AND LIONEL WEIL, CONSTITUTING THE BOARD OF AGRICULTURE OF THE STATE OF NORTH CAROLINA.

(Filed 22 September, 1943.)

1. Mortgages § 13b—

In a proceeding for the removal of a trustee and the appointment of a substitute trustee, under C. S., 2583, all interested persons referred to in the statute include only the trustor, trustee, or trustees and all of the *cestuis que trustent*, whose interests are secured by the deed of trust in which the trustee or trustees are sought to be removed and another substituted.

2. Same—

The statutes, providing for the removal and substitution of trustees in deeds of trust, which are in effect at the time of the execution of such instruments, become a part thereof, as fully as if incorporated therein.

3. Same—

Where a trustee is substituted in accordance with the method expressed in a deed of trust, no proceedings are necessary under C. S., 2583; and a deed made by the substitute trustee passes the title to the purchaser at a foreclosure sale.

APPEAL by defendants from *Bone, J.*, at Chambers in Tarboro, N. C., 21 August, 1943. From WASHINGTON.

This is a controversy without action and the facts and contentions pertinent to the appeal are as follows:

1. The defendants, through the Commissioner of Agriculture, contracted to purchase from the plaintiff 493.5 acres of land, situate in Washington County, N. C.

2. C. I. Milliard, a predecessor in title to the lands involved herein, and his wife, Nellie Drake Milliard, executed a deed of trust on 1 November, 1919, conveying said lands to the Trust Company of Norfolk, Va., as trustee, to secure one bond of even date therewith in the sum of $25,000.00, payable to the Colonial Joint Stock Land Bank of Norfolk, said deed of trust being recorded in the office of the Register of Deeds of Washington County, in Book 79, page 560. Thereafter, on 20 September, 1920, the Colonial Joint Stock Land Bank of Norfolk, for value received, assigned and transferred all its right, title and interest to the Federal Land Bank of Columbia.

3. On 6 March, 1920, C. I. Milliard and wife, Nellie Drake Milliard, conveyed the property in question to Elms Farm Company by deed, which is recorded in the office of the Register of Deeds of Washington County, in Book 78, page 183, and in this conveyance the grantee assumed the aforesaid indebtedness.

4. On 1 February, 1921, the Elms Plantation Company (the name having formerly been Elms Farm Company) executed a deed of trust to the Trust Company of Norfolk, as trustee for the John L. Roper Lumber Company, to secure an indebtedness of $15,201.30. On 31 December, 1927, the Elms Plantation Company, the John L. Roper Lumber Company, C. I. Milliard and the Trust Company of Norfolk, by instrument recorded as aforesaid in Book 102, at page 87, substituted M. S. Hawkins as trustee in lieu of the Trust Company of Norfolk, in the deed of trust referred to above dated 1 February, 1921.

By instrument dated 13 April, 1929, and duly recorded as aforesaid in Book 105, at page 65, F. A. Milliard acquired the indebtedness to the John L. Roper Lumber Company, secured by the aforesaid deed of trust dated 1 February, 1921.

5. By deed dated 5 February, 1930, and duly recorded, the Elms Plantation Company reconveyed the property to C. I. Milliard, subject to both the aforesaid deeds of trust.

6. On or about 18 October, 1930, the Federal Land Bank of Columbia, as petitioner, filed a petition in the Superior Court of Washington County before the clerk against the Trust Company of Norfolk, C. I. Milliard and Nellie Drake Milliard, his wife, as respondents. Among other things the petition alleged that the Trust Company of Norfolk was an inactive corporation, without a functioning Board of Directors, and was incompetent to exercise the trust as provided in the deed of trust executed as aforesaid on 1 November, 1919; and prayed the court to appoint Z. V. Norman as substitute trustee in lieu of said corporation. All the respondents filed answers admitting the allegations of the petition and consenting to the removal of said trustee. Thereafter, on 28 October, 1930, the clerk of the Superior Court signed an order substituting

Z. V. Norman as trustee in such instrument in lieu of the Trust Company of Norfolk.

Z. V. Norman, as substitute trustee, proceeded to foreclose the aforesaid deed of trust, dated 1 November, 1919, and conveyed the property to the Federal Land Bank of Columbia by deed of foreclosure, dated 10 December, 1930, and recorded in the office of the Register of Deeds of Washington County, in Book 101, at page 320.

7. The Federal Land Bank of Columbia conveyed the aforesaid lands to W. H. Thompson, the plaintiff herein, by deed dated 21 July, 1936, which deed was duly recorded as provided by law.

The defendants contend that plaintiff's title is defective because in the proceedings instituted by the Federal Land Bank of Columbia to have Z. V. Norman appointed substitute trustee, under the provisions contained in C. S., 2583, the parties interested in the junior deed of trust referred to herein, were not made parties to the proceeding. The court below held that the plaintiff, W. H. Thompson, is the owner of the land in question, in fee simple, and free from the lien of the junior deed of trust referred to herein, dated 1 February, 1921, from Elms Plantation Company to Trust Company of Norfolk, and entered judgment accordingly.

From said judgment the defendants appeal and assign error.

Carl L. Bailey for plaintiff.

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

DENNY, J. In substituting a trustee under the provisions of C. S., 2583, the statute provides that all persons interested shall be made parties to the proceeding. Does *all persons interested* include junior lienholders? We do not so hold.

The case of *Guion v. Melvin,* 69 N. C., 242, involved the appointment of a trustee under the statute now under consideration. The trust involved both real and personal property. The trustee had died. The real property descended to the trustee's heirs and the personal property passed to his administrator, clothed with trusts. The heirs at law and the administrator refused to execute the trust. Whereupon, one of the several *cestuis que trustent* filed an *ex parte* petition for the removal of the trustees and for the appointment of a substitute trustee. The Court held that a trustee could not be removed and another substituted in an *ex parte* proceeding; that the application is in the nature of a civil action, and all persons interested must be made parties. The Court said: "If in the present case one of many *cestuis que trustent* can, upon

an *ex parte* application, remove a trustee whom all the parties have chosen to execute the trust, can take from him the possession of the property and transfer it to the mover's nominee, without giving the trustee or the other parties interested any opportunity to be heard, it must follow that one of several *cestuis que trustent* may do so in every case, and the consequences are too obvious to need mention. . . . *As to parties.* Of course no one can suppose that by the death of a trustee there ceases to be a trustee. The real property descends to his heirs, and the personalty goes to his administrator, clothed with trusts. The plaintiff properly made the heirs and administrator parties defendant. The other *cestuis que trustent* who have an interest in the question ought either to be made parties, or the summons should be on behalf of the plaintiff and all others in like situation who choose to come in, and they should receive notice of the pendency of the action."

In the instant case the proceeding was not *ex parte* and the only question is whether or not all interested persons, as required by the statute, were parties to the proceeding under consideration. It will be noted that in the case of *Guion v. Melvin, supra,* the Court held the interested parties to be the trustees and the *cestuis que trustent.* Furthermore, the reasons given in the opinion for making all the *cestuis que trustent* parties to the proceedings, clearly indicate that the necessary parties are to be limited to the trustee or trustees sought to be removed and those parties who have a right to participate in the selection of the substitute trustee.

The defendants further contend that junior lienholders ought to be made parties to a proceeding to appoint a substitute trustee, so that in the event of foreclosure they may the more easily recognize the deed of trust being foreclosed as one affecting the lands on which they hold a second lien. This position is untenable.

In *Trust Co. v. Padgett,* 194 N. C., 729, 140 S. E., 714, it is held that where a trustee is substituted in accordance with the method expressed in a deed of trust, no proceedings are necessary under the provisions of C. S., 2583; and a deed made by the substituted trustee passes the title to the purchaser at a foreclosure sale. On the other hand, while the provisions of a deed of trust are contractual, *Mitchell v. Shuford,* 200 N. C., 321, 156 S. E., 513; *Brown v. Jennings,* 188 N. C., 155, 124 S. E., 150; *Eubanks v. Becton,* 158 N. C., 230, 73 S. E., 1009, the statutes providing for the removal and substitution of trustees in deeds of trust, which are in effect at the time of the execution of said instruments, become a part thereof, as fully as if incorporated therein. *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14; *Hood, Comr. of Banks, v. Martin,* 203 N. C., 620, 166 S. E., 793; *Headen v. Ins. Co.,* 206 N. C., 270, 173 S. E., 349; *Bank v. Bryson City,* 213 N. C., 165, 195 S. E.,

398; *Spain v. Hines,* 214 N. C., 432, 200 S. E., 25; *Rostan v. Huggins,* 216 N. C., 386, 5 S. E. (2d), 162.

C. S., 2583, was in effect at the time of the execution of both deeds of trust referred to herein, and the parties to those instruments were charged with knowledge of the fact that a trustee might be substituted in accordance with the terms of the statute. This statute has been amended so as to provide an alternative method of substituting a trustee in an *ex parte* proceeding. See chapter 78 of the Public Laws of 1931, as amended by chapter 227 of the Public Laws of 1935, N. C. Code of 1939 (Michie), 2583a. However, in a proceeding for the removal of a trustee and the appointment of a substitute trustee, under the provisions of C. S., 2583, we hold that all interested persons referred to in the statute include only the trustor, trustee or trustees and all the *cestuis que trustent,* whose interests are secured by the deed of trust in which the trustee or trustees are sought to be removed and another substituted.

The judgment of the court below is

Affirmed.

R. P. RICHARDSON AND C. S. BURTON v. GREENSBORO WAREHOUSE AND STORAGE COMPANY.

(Filed 22 September, 1943.)

1. Contracts § 1—

There must be a substantial agreement of the parties upon the subject matter of the treaty to constitute a contract—a meeting of the minds.

2. Contracts §§ 6, 8—

Where a contract is in several writings and not in a single document, the Court will not be astute to detect immaterial differences which might defeat the contract, but will try to give each writing a reasonable interpretation according to the intention of the parties.

3. Contracts § 8: Pleadings §§ 13½, 15—

Where there is no ambiguity in the instruments upon which plaintiffs rely as a contract, they are subject to construction by the court, without the aid of a jury.

4. Contracts §§ 4, 11a—

Acceptance must be unqualified and in the terms of the offer, without material conditions not included or implied in the offer; otherwise, such purported acceptance constitutes a counter-proposal which the other party is not bound to accept.

5. Contracts §§ 4, 11b—

The acceptance of an offer to sell property, based upon the condition that plaintiffs' attorneys shall first pass upon the title, is not an unqualified acceptance of the offer and does not bind the defendant.

RICHARDSON *v.* STORAGE CO.

APPEAL by defendant from *Phillips, J.*, at May Civil Term, 1943, of ROCKINGHAM. Reversed.

Glidewell & Glidewell and Sapp & Sapp for plaintiffs, appellees.

Brooks, McLendon & Holderness and Douglas & Douglas for defendant, appellant.

SEAWELL, J. Plaintiffs brought suit in Rockingham County to recover damages for the breach of a contract to sell and convey to them certain property in the city of Greensboro, Guilford County, described in the complaint. The case comes here upon demurrer to plaintiffs' pleading, to which two exhibits, "A" and "B," are attached and made a part thereof. Exhibit "A," designated by plaintiffs as the offer, is in the nature of an option given to plaintiffs to purchase the property described in the complaint, which, with immaterial changes, was executed by defendant. The complaint alleges certain parol modifications of this document with which our further discussion is not necessarily concerned. Exhibit "B" is a communication from plaintiffs to W. F. Ross, agent for defendant, purporting to exercise the option and accept defendant's "offer." The object of the action is recovery of damages for the breach of the contract to convey. General allegations are made in the complaint relative to the existence and nature of the contract; but the contract itself is exhibited and identified, and the plaintiffs declare upon it. It therefore defines their rights before this Court and would do so in the trial court if no demurrer had been made. Hence, if it fails in law, there is no general allegation in the complaint that would avail the plaintiffs against the demurrer.

The defendant demurred to the complaint as not stating a cause of action for that an inspection of these writings reveals that plaintiffs have not at any time made an unqualified acceptance of defendant's offer, but, on the contrary, have attached to such purported acceptance material conditions which were not included or implied in the offer, but constitute counter-proposals which defendant was not bound to accept. In support of the demurrer, the defendant points out a number of these alleged discrepancies between the offer and the purported acceptance which it is contended indicate that the parties had reached no agreement. It is not necessary to consider them all. In particular, our discussion does not include the effect of the allegation of the parol modification of the offer with respect to the terms of payment, since a conclusion as to that matter would not alter the decision.

There is no ambiguity in the instruments upon which plaintiffs rely as a contract and they are, therefore, subject to construction by the court

without the aid of a jury. *Drake v. Asheville,* 194 N. C., 6, 138 S. E., 343; *Morrison v. Parks,* 164 N. C., 197, 80 S. E., 85.

We think there is at least one provision in the last communication of the plaintiffs to the defendant—relied upon as an acceptance—upon which decision may safely rest. The following provision occurs in plaintiffs' purported acceptance:

"This offer is made subject to the approval of the title by our attorneys, Messrs. Smith, Wharton and Jordan, which we will obtain as soon as reasonably possible. . . . In the event our attorneys should report to us that they are unable to approve the title to said property, then the check for $15,000.00 is to be returned to us by you, and all parties concerned shall thereupon be relieved of all further liability with respect to this transaction."

Concededly, and indeed upon inspection and comparison, there is no provision of this nature in defendant's offer. It is defended by the plaintiffs as immaterial and perhaps not at variance with the implied duty of the defendant to make a good title. The defendant insists that it is a matter of substance, involving a right which it had neither expressly nor impliedly proposed to surrender.

Substantial agreement of the parties upon the subject matter of the treaty is essential to the definition of a contract—there must be a meeting of the minds. *Croom v. Goldsboro Lumber Co.,* 182 N. C., 217, 108 S. E., 735; *Elks v. North State Life Ins. Co.,* 159 N. C., 619, 75 S. E., 808; *Roberta Manufacturing Co. v. Royal Exchange Assurance Co.,* 161 N. C., 88, 76 S. E., 865. Where the contract, as here, is in several writings—as offer and acceptance—and not contained in a single document which both parties have executed, the Court will not, of course, be astute to detect immaterial differences in the phrasing of offer and acceptance which might defeat the contract, but will try to give to each writing a reasonable interpretation under which substantial justice may be reached according to the intent of the parties. But it is the mutual intent that governs, and for this reason there must be substantial agreement between offer and acceptance in all material particulars in order that such mutuality may appear. There must be no lack of identity between offer and acceptance, *Standard Sand & Gravel Co. v. Casualty Co.,* 191 N. C., 313, 131 S. E., 754; and the parties must appear to have assented to the same thing in the same sense, *Trollinger v. Fleer,* 157 N. C., 81, 72 S. E., 795.

That is the crux of the case before us. The contract attempted between the parties, if consummated, was integral in its nature and, considering its object, its terms were not separable. They were all directed to the purpose of conveying the land. The plaintiffs in their acceptance of defendant's offer had no right to impose additional terms, or, at that

time, to introduce new and substantially different conditions into the treaty not found in the offer to which it is responsive. The effect of such an acceptance so conditioned is to make a new counter-proposal upon which the parties have not yet agreed, but which is open for acceptance or rejection. *Standard Sand & Gravel Co. v. Casualty Co., supra; Dodds v. St. Louis Union Trust Co.,* 205 N. C., 153, 170 S. E., 652; *Rucker v. Sanders,* 182 N. C., 607, 109 S. E., 857; *Morrison v. Parks, supra; Wilson v. Storey Lumber Co.,* 180 N. C., 271, 104 S. E., 531; *Cozart v. Herndon,* 114 N. C., 254, 19 S. E., 158; *Iselin v. United States,* 271 U. S., 136, 70 L. Ed., 872. The proposition is elementary, but particularly well expressed in *Wilson v. Storey Lumber Co., supra,* and *Cozart v. Herndon, supra,* to which attention is directed.

The counter-proposal of the plaintiffs that the title should be passed upon by attorneys of their own selection before it should be accepted and the property paid for is material and important. The land belonged to the defendant. It, not the plaintiffs, had the right to name the conditions on which it would part with the title. It is true that delivery of the thing sold is required of the defendant; and it is implied in a contract to convey land, unless differently agreed, that the seller must give a good title. But it is not implied in law or, as far as we know, required by any controlling custom, that attorneys of plaintiffs' selection should be designated to pass upon the title, and that their adjudication thereon should be final, and possibly have the effect of annulling the contract. In *Dickey v. Hurd et al.,* 33 Fed. (2d), 415, the plaintiff undertook to attach a similar provision to his acceptance, unqualified in other respects. The Court said: "This was not an unequivocal and unconditional acceptance of the offer. It was the introduction of a new term. If Mr. Hurd, by the terms of his offer, impliedly agreed to give a good merchantable title, one that a court of competent jurisdiction would determine to be merchantable, he did not impliedly agree to furnish a title 'the legality and merchantability' of which should meet the approval of Mr. Dickey's counsel, and that, if it did not meet their approval, then in that contingency Mr. Dickey should not be regarded as bound by his acceptance." Williston on Contracts, par. 77, and cases cited. The defendant, we think, unquestionably would have the right to participate in the selection of counsel to whom the title might be referred, or to have it left to the courts where, without any stipulation to the contrary, it otherwise would have gone in case of controversy, and there is no implication in defendant's offer that it intended to surrender that right.

We are of opinion that the letter of plaintiffs, regarded by them as an acceptance of defendant's offer, was deprived of that character by the introduction of a material condition affecting the transfer and acceptance of the title, not contemplated in the offer. It amounted to a

counter-proposal which defendant had the right to accept or reject as it saw fit, without incurring liability to the plaintiffs.

It can hardly be doubted that plaintiffs so regarded it, since they closed the communication as follows: "This offer is made subject to acceptance by your principal today." Indeed, the logical import, and doubtless the legal effect of this language is to give to the defendant the right to accept or reject plaintiffs' offer.

The demurrer should have been sustained. The judgment to the contrary is

Reversed.

HERMAN NEWBERN v. C. R. PUGH ET AL.

(Filed 22 September, 1943.)

Contracts § 4—

Acceptance must be unqualified and in the terms of the offer; otherwise no contract results.

APPEAL by plaintiff from *Bone, J.*, at March Term, 1943, of PASQUOTANK.

Civil action to recover damages for alleged breach of contract or option to sell the "Pugh" house and lot in Elizabeth City.

From judgment of nonsuit entered upon consideration of all the evidence, the plaintiff appeals, assigning errors.

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

J. Henry LeRoy for defendants, appellees.

PER CURIAM. A careful perusal of the record fails to disclose any consummated contract upon which the plaintiff predicates his right of action. The plaintiff did not "sign the papers," as he was required to do by defendant's letter of 6 February, 1942, but returned them for modification, giving as his reason that the option "would be without effect" unless the defendant's husband joined in the agreement. The defendant then sold the property to another.

The case is not like *McAden v. Craig,* 222 N. C., 497, 24 S. E. (2d), 1, or *Samonds v. Cloninger,* 189 N. C., 610, 127 S. E., 706. It is more nearly in line with *Richardson v. Warehouse and Storage Co., ante,* 344, herewith decided.

Affirmed.

ROBERT GIBBS v. WILLIAM RUSS, JR., AND NORTH CAROLINA PULP COMPANY OF PLYMOUTH, NORTH CAROLINA.

(Filed 22 September, 1943.)

1. Trial § 22a: Appeal and Error §§ 39a, 39g—

The burden is on the appellant, not only to show error, but prejudicial error.

2. Trial § 22b: Appeal and Error § 39d—

A refusal to admit competent evidence, which, when considered with all the other evidence, fails to make out a case for the jury, is harmless error.

3. Trial § 22a: Appeal and Error § 40c—

Where the only evidence to sustain the cause of action alleged by plaintiff is incompetent, but erroneously admitted, and an appeal is taken by defendant from the refusal of judgment of nonsuit thereon, this Court will not overrule the trial court and grant the nonsuit.

4. Negligence § 19a: Automobiles § 24c: Partnership § 8—

The mere ownership of an interest in an automobile does not make the owner of such interest liable for injuries caused by the automobile; nor is a partnership liable for an injury done by such vehicle owned by it if the driver, even though a partner, be not acting within the scope of the business and authority of the partnership.

5. Automobiles §§ 18g, 24c: Partnership § 2—

In an action to recover damages for personal injuries to plaintiff caused by the alleged negligent operation, by one of defendants, of a truck jointly owned by both defendants, where all of plaintiff's evidence, admitted and rejected, taken in its most favorable light, tends to show that the other defendant had no interest in, and received no benefit from the operation of the truck at the time in question, such evidence is insufficient to establish the relation between the defendants of principal and agent or that of partnership and judgment of nonsuit, as to the defendant not operating the truck at the time of the accident, sustained.

APPEAL by plaintiff from *Johnson, Jr., Special Judge,* at May Term, 1943, of BEAUFORT.

Civil action to recover for personal injury.

Plaintiff in complaint filed alleges: That on 15 June, 1942, defendants owned and operated a Chevrolet auto truck which defendant Russ was driving with the express consent of the corporate defendant, "from Pantego on the strong turn of the road into the Pungo road"; that "on approaching the curve the driver was going at a high, wanton, and reckless rate of speed and negligently failed to slow down his speed and to take the truck under control and attempted to go around the curve at a recklessly high speed and without reasonable and prudent care" by

reason of which as proximate cause the truck, on which plaintiff was riding, turned over and was thrown on plaintiff's leg, breaking same "to the extent and a condition that required amputation" thereby proximately causing damage to plaintiff.

Defendants filed separate answers in which material allegations of the complaint were denied. And in its answer thereto the corporate defendant specifically averred that at the time of the alleged injury to plaintiff it had no right, title or interest in, or control of the Chevrolet truck in question, and that in the operation of it defendant Russ was not performing any act of agency for or in behalf of it.

Upon the trial plaintiff testified that he was riding on the back of the truck which defendant Russ was driving on the highway from Pantego to the Pungo road; that when just out of the corporate limits of Pantego Russ drove the truck around a curve between forty and fifty miles per hour; and that in so doing the truck was turned on plaintiff, and broke his leg so that it was amputated above the knee.

Plaintiff then without objection offered in evidence the adverse examination of defendant Russ taken before the clerk under C. S., 900-901, in pertinent part as follows: "My name is William Russ, Jr. . . . the truck was mine and my daddy's. I don't exactly know whether I owned the truck at that time. The truck is now owned by my dad and me. I had possession of the truck at the time. My dad and I borrowed $900.00 from the North Carolina Pulp Company to buy this truck. The deed or certificate of title was made in my name. The Pulp Company held the title until I paid for the truck . . . by paying $1.00 for each unit of the wood I hauled to the North Carolina Pulp Company. I had not paid for the truck at the time of the accident. I was not permitted to use the truck without permission of the Pulp Company. I was to haul only pulpwood, nothing without their permission. At the time of the accident I was hauling potatoes and had permission from the Pulp Company to do so. We were short of men and I wanted to haul a few loads of potatoes for Ben Aycock. I picked up the three men who were on the truck; had hauled one load and started after another when the truck turned over. Permission was granted to do this by my dad asking Mr. Earl if it would be all right. I did not hear my father make this request. He told me he had done so." The witness Earl called by plaintiff testified that he was manager of the wood and land department of the North Carolina Pulp Company.

Then for the express purpose of showing that defendants Russ and the Pulp Company jointly owned the truck plaintiff offered to introduce in evidence (1) the remainder of the examination of Russ in which he had testified that the Pulp Company without his knowledge took out a policy of insurance on the truck, for his protection, which he later

approved, and on which he paid the premium, and (2) the terms of the policy in which, among others, these items appear: "(1) Name of insured—North Carolina Pulp Company and Will Russ . . . insured, (x) individual . . . (x) corporation . . . Business or occupation of the named insured: Paper Mfrs. Employer." Objection thereto was sustained and plaintiff excepted. In deference to the ruling of the court in sustaining the objection as just stated "and upon intimation of the court that plaintiff could not recover," as stated in the judgment, plaintiff submitted to a nonsuit as to the defendant Pulp Company and appealed to the Supreme Court and assigns error.

Mistrial and continuance were ordered as to the case against defendant Russ.

H. S. Ward for plaintiff, appellant.

Norman & Rodman for defendant Pulp Company, appellee.

WINBORNE, J. The question involved on this appeal is worded in the brief of the counsel for plaintiff in this manner: "Another nonsuit, of course; this time voluntary, but enforced by exclusion of essential testimony, to wit, that part of the evidence of defendant Russ contained in his examination by plaintiff before the clerk, which appears from the middle of page 2 to bottom of page 4 of the record; also the insurance policy."

It is contended that for the purpose of showing that the truck in question was owned jointly by defendants Russ and the Pulp Company this testimony and the policy were competent as evidence in the case. Even so, conceding that the purpose for which the testimony and policy were offered by plaintiff comes within the principle announced and applied in *Davis v. Shipbuilding Co.*, 180 N. C., 74, 104 S. E., 82, in *Rivenbark v. Oil Corp.*, 217 N. C., 592, 8 S. E. (2d), 919, and in *Isley v. Winfrey*, 221 N. C., 33, 18 S. E. (2d), 702, and referred to and discussed in *Herndon v. Massey*, 217 N. C., 610, 8 S. E. (2d), 914, we are of opinion that the error is harmless in that when the excluded evidence is considered with all other evidence admitted at the trial, plaintiff fails to make out a case for the jury. The burden is on the plaintiff as appellant, not only to show error but prejudicial error, *Wilson v. Lumber Co.*, 186 N. C., 56, 118 S. E., 797; *Collins v. Lamb*, 215 N. C., 719, 2 S. E. (2d), 863; *Tolley v. Creamery, Inc.*, 217 N. C., 255, 7 S. E. (2d), 502.

Moreover, the present case is distinguishable from those cases in which a new trial is ordered as in *Morgan v. Benefit Society*, 167 N. C., 262, 83 S. E., 479; *Midgett v. Nelson*, 212 N. C., 41, 192 S. E., 854; *Ledwell v. Milling Co.*, 215 N. C., 371, 1 S. E. (2d), 841; *Brown v. Montgomery Ward & Co.*, 217 N. C., 368, 8 S. E. (2d), 199; *Caulder v.*

Motor Sales, Inc., 221 N. C., 437, 20 S. E. (2d), 338; *Webster v. Charlotte*, 222 N. C., 321, 22 S. E. (2d), 900, and the line of cases holding that where the only evidence to sustain the cause of action alleged by plaintiff is incompetent, but erroneously admitted, and an appeal is taken by the defendant for the refusal of judgment of nonsuit thereon, this Court will not overrule the trial court and grant the nonsuit. The reason assigned for such holding is that if the evidence had been ruled out, as it should have been, the plaintiff may have substituted other competent evidence in its place to support his cause of action.

In the case in hand, however, the evidence was rejected and the plaintiff then had the opportunity to mend his fences and offer other evidence if available. And in such event, the burden is on the plaintiff to offer such other evidence which will, with the rejected competent evidence, make out a case for the jury.

Applying these principles to the case in hand, the evidence admitted, together with the evidence rejected, taken in the light most favorable to plaintiff, shows, and all that it tends to show is that the truck jointly owned by defendants Russ and Pulp Company for the purpose of hauling pulpwood was at the time in question being operated by Russ with consent of the Pulp Company in hauling Irish potatoes for one Ben Aycock, a third person. There is no evidence that the Pulp Company had any interest in the hauling of the Irish potatoes or that it was receiving any benefit from it or that the truck was being operated in its behalf. Thus with respect to the operation of the truck in hauling Irish potatoes, the evidence is insufficient to establish between the Pulp Company and defendant Russ the relationship of principal and agent or that of partnership.

However, plaintiff does not contend that the mere ownership by the Pulp Company of an interest in the truck would make it liable for personal injuries caused by the truck, *Parrott v. Kantor*, 216 N. C., 584, 6 S. E. (2d), 40; nor does the plaintiff contend that a partnership would be liable for an injury done by a truck owned by it if the driver, even though a partner, be not acting within the scope of the business and authority of the partnership. 40 Am. Jur. Partnership, sections 136, 137. But the plaintiff contends that a relation of partnership existed between the defendant Russ and Pulp Company with respect to the operation of the truck for hauling pulpwood and that upon that being shown, and upon evidence of the consent of the Pulp Company for Russ to operate the truck in hauling Irish potatoes for Ben Aycock being also shown, the law will imply that the partnership was enlarged to cover such operation. *Non sequitur.*

Hence, the judgment below is

Affirmed.

ROY LEE RUSSELL, MINOR, BY AND THROUGH HIS NEXT FRIEND, T. A. RUSSELL, PLAINTIFF, v. JAMES CUTSHALL AND SEVEN-UP ASHEVILLE COMPANY, INC., DEFENDANTS.

(Filed 22 September, 1943.)

1. Automobiles §§ 24a, 24b—

Ordinarily, one who is engaged to operate a motor vehicle has no implied authority, by virtue of his employment, to invite or permit third persons to ride; and the employer is not liable for personal injuries sustained by the invitee while in such machine, except, perhaps, when willfully or maliciously inflicted. The particular nature of the employment, or the circumstances at the time, or acquiescence on the part of the employer may create an exception to this rule.

2. Principal and Agent § 8a: Corporations § 20: Automobiles § 24a—

In the case of an urgent emergency an employee at times may act so as to bind his employer without previous authority.

3. Automobiles §§ 18g, 24c—

In an action for damages for personal injuries to plaintiff, a minor, who was invited or permitted by corporate defendants' driver to ride on the running board of its truck, such injuries being allegedly caused by the negligence of the driver, where there is no evidence that the driver was acting in the apparent scope of his authority or that such an emergency existed as would authorize the driver to employ assistance, disregarding the question of contributory negligence, the plaintiff was a trespasser as far as the corporate defendant was concerned, and judgment of nonsuit as to it was proper.

APPEAL by plaintiff from *Clement, Judge,* at April Term, 1943, of MADISON. Affirmed.

Civil action to recover damages for personal injury resulting from the negligent operation of a truck by the individual defendant.

The corporate defendant is engaged in bottling and selling carbonated drinks in Buncombe and adjoining counties. It delivered crates of its drinks by truck. The individual defendant Cutshall was one of its truck drivers. On 1 August, 1941, he was making a trip on Highway 209 serving different customers. He intended during his trip to go on to Bluff, N. C., to deliver merchandise to a Mrs. Connor, aunt of the infant plaintiff. When Cutshall reached Hot Springs he stopped for some time. When he left he took on Ed McGaha and Ralph Finley as passengers, who occupied the cab. As he was leaving McGaha saw plaintiff and asked Cutshall to stop so that he could speak to him. McGaha asked plaintiff to go home with him. Plaintiff declined, but stated that he would like to go to Bluff to see his aunt. Cutshall volunteered to take him. During the conversation Cutshall told plaintiff he was going to Mrs. Connor's store, that plaintiff could go along and come right back

with him. "He wanted me to show him the way up there." Plaintiff got on the running board of the truck with one of the passengers holding to him. When the truck had proceeded some distance it ran off the road under conditions that would indicate negligence on the part of the driver. Plaintiff was thrown off and suffered personal injuries.

At the conclusion of the evidence for plaintiff the court, on motion of defendants, entered judgment of nonsuit as to the corporate defendant. Plaintiff excepted, submitted to a voluntary nonsuit as to the individual defendant, and appealed.

Don C. Young and Guy V. Roberts for plaintiff, appellant.
Smathers & Meekins for defendant, appellee.

BARNHILL, J. There is no contention that the defendant's driver had express authority to take on passengers. Hence the one question here presented is this: Was Cutshall, under the circumstances existing at the time, acting within the apparent scope of his authority when he invited or permitted plaintiff to ride on the running board of the defendant's truck?

Ordinarily, one who is engaged to operate a motor vehicle has no implied authority, by virtue of his employment, to invite or permit third persons to ride; and the employer is not liable for personal injuries sustained by the invitee while riding in such machine except, perhaps, when willfully or maliciously inflicted. *Dover v. Mfg. Co.*, 157 N. C., 324, 72 S. E., 1067; *Cotton v. Transportation Co.*, 197 N. C., 709, 150 S. E., 505; *Cole v. Motor Co.*, 217 N. C., 756, 9 S. E. (2d), 425; 35 Amer. Jur., 1016; 5 Blashfield Cyc. Auto. L. & P., 146 (see n. 72 for authorities), 148; *Looney v. Bingham Dairy*, 282 Pac., 1030, 73 A. L. R., 427; *Union Gas and Electric Co. v. Crouch*, 174 N. E., 6, 74 A. L. R., 160; *Wigginton Studio v. Reuter's Adm'r*, 254 Ky., 128, 71 S. W. (2d), 14; *Yanowitz v. Pinkham*, 168 Atl., 700; *Bilow v. Kaplan*, 164 Atl., 694; *Morris v. Dame's Ex'r*, 171 S. E., 662; *Hartman v. Badger Tobacco Co.*, 246 N. W., 577, Anno. 74 A. L. R., 163; *Rolfe v. Hewitt*, 125 N. E., 804, 14 A. L. R., 125; *Morris v. Fruit Co.*, 124 S. E., 807. See, also, 5 Blashfield Cyc. Auto. L. & P., 152.

In the *Cotton case, supra,* the plaintiff, as here, was invited to ride on the running board of the vehicle. Judgment for plaintiff was vacated, and the motion to dismiss as in case of nonsuit was sustained.

The particular nature of the employment, or the circumstances existing at the time, or acquiescence on the part of the employer may create an exception to this general rule. *Fry v. Utilities Co.*, 183 N. C., 281, 111 S. E., 354; *Hayes v. Creamery*, 195 N. C., 113, 141 S. E., 340; *Cole v. Motor Co., supra.*

In an effort to bring his case within the exceptions to the general rule plaintiff alleges in his complaint, as the basis of his claim, that Cutshall was acting within the scope of his implied authority: "that the defendant customarily carried passengers in the conduct of their business in this area of Spring Creek for the purpose of creating good will for the corporate defendant, advertising its products, and in otherwise promoting the interest of the defendant Company."

There is a total absence of any evidence in the record tending to sustain this allegation. On the contrary, plaintiff himself testified that he had not theretofore seen any driver of the defendant carrying a passenger. Hence knowledge and consent on the part of the employer cannot be implied so as to support an inference that the driver was acting within his ostensible authority.

But in the course of the cross-examination of plaintiff he testified: "I did not ask him to let me ride, I didn't ask him that. The driver did want me to go to Mrs. Connor's store and show him the way up there . . . said I could ride to the store and I could go and he would bring me right back with him. . . . The only reason on earth for him to ask me to go and show him where my aunt, Virgie Connor's store was, only to show him the way." Although there is no allegation that the plaintiff was invited to go along to "show him the way," he cites this evidence as tending to show an emergency in which Cutshall was authorized to and did act in behalf of his employer in obtaining assistance.

Conceding that in case of an urgent emergency an employee at times may act so as to bind his employer without previous authority, *Barrier v. Thomas and Howard Co.*, 205 N. C., 425, 171 S. E., 626; *Perkins v. Wood and Coal Co.*, 189 N. C., 602, 127 S. E., 677; *Vassor v. R. R.*, 142 N. C., 68, 54 S. E., 849, no such emergency is disclosed on this record. Bluff is on Highway 209 and "the man couldn't get lost on this road going to my aunt's store unless he turned off on another road. There is no highway turning off. This was a U. S. Highway well marked. McGaha (one of the other passengers) was familiar over in that country. He knew where my aunt's store was. I have seen him there before." So plaintiff testified.

The case of *D'Allesandro v. Bentivoglia*, 285 Pa., 72, 131 Atl., 592, in which the employee took a boy fourteen years of age to guide him to an unknown destination, is directly in point. It is there said: "Entirely aside from the question of the plaintiff's contributory negligence in riding on the running board of a moving motor car, we agree with the court below that 'an employer is liable only for the acts of his servant done in the scope of his employment, and the employment in this case did not include taking the minor plaintiff for a ride' either as 'a passenger,' which the statement of claim alleges he was, or as an assistant

(*Byrnes v. Pittsburgh B. Co.*, 259 Pa., 357, 361, 103 A., 53, L. R. A. 1918-C, 1198; see, also, *Hughes v. Murdoch S. & T. Co.*, 269 Pa., 222, 112 A., 111); for no such emergency is shown by the record before us as would warrant the driver of the truck is (*sic.*) imposing the responsibility of an employer of the minor plaintiff on defendant. Unless an emergency is shown where the servant is unable alone to perform the work which he was engaged to do, authority to employ an assistant is not proved. *Byrnes v. Pittsburgh B. Co., supra.*"

We conclude that when Cutshall invited or permitted plaintiff to ride on his master's vehicle, which was designed to haul freight and not passengers, he went beyond the scope of his employment. As to the corporate defendant, plaintiff was a trespasser. It is not liable in damages for the personal injuries sustained by him.

In view of our conclusion here we need not decide whether, in any event, the contributory negligence of plaintiff would bar recovery.

The judgment of the court below is

Affirmed.

ANNIE MAE HOGAN DUCKETT, JULIA HOGAN BALDWIN, BESSIE HOGAN MITCHELL, WILLARD A. HOGAN, MORRIS G. HOGAN, AND LEO HOGAN, HEIRS AT LAW OF BERTIE HOGAN LYDA, DECEASED, v. FRED W. LYDA.

(Filed 22 September, 1943.)

1. Deeds §§ 11, 12: Boundaries § 3a—

It is presumed that a grantor in a deed intended to convey something, and the deed will be upheld unless the description is so vague or contradictory that it cannot be ascertained what thing in particular is meant.

2. Deeds § 12: Boundaries § 3a—

The description in a deed must identify the land or furnish the means of identifying it under the maxim *id certum est quod certum reddi potest.*

3. Deeds § 12: Boundaries § 3c—

When the description is not sufficient in itself to denote the land conveyed, resort may be had to extrinsic evidence. But evidence *dehors* the deed is admitted to "fit the description to the thing" only when it tends to explain, locate, or make certain some call or descriptive term used in the deed.

4. 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 new or different title; and where a husband, in such a partition, is made a joint grantee with his wife he acquires no title.

5. Ejectment § 14—

In ejectment evidence that a party is or has been in possession, or went into possession of the premises is admissible.

APPEAL by defendant from *Blackstock, Special Judge,* at March Term, 1943, of BUNCOMBE. Affirmed.

Civil action in ejectment.

Bertie Hogan, daughter of J. A. Hogan, married the defendant, and subsequent thereto died without having had a child born to the marriage. The plaintiffs, her brothers and sisters, are her heirs at law.

The plaintiffs allege that at the time of her death she was seized and possessed of three several parcels of land. The defendant is in possession of said land described in the complaint, and the plaintiffs bring this action to recover possession thereof.

On 21 August, 1920, J. A. Hogan executed and delivered to Bertie Hogan, then unmarried, a deed containing the following description:

"Situate, lying and being in State of North Carolina and in County of Buncombe, on Sweed Creek, and bounded and more particularly described as follows:

"Beginning on a stake in the center of the public road in G. W. Vanderbilt and Mitchell Taylor line. Thence North with the center of the public road twenty-three poles to a stake in the center of the public road. Thence West fourteen poles and ten feet to a stake in J. A. Hogan's line. Thence South with J. A. Hogan's line to the BEGINNING. Containing one acre."

This is the first tract described in the complaint.

Charles Hogan, one of the children of J. A. Hogan, died intestate, never having married. Plaintiffs and Bertie Hogan Lyda were his heirs at law. At the time of his death he was seized and possessed of a four-acre tract of land. Plaintiffs and Bertie Hogan Lyda subdivided said tract of land and on 27 August, 1932, they, with the joinder of their respective spouses, interchanged deeds so that each became seized and possessed in severalty of one share of the subdivision. These conveyances are, in form, deeds of purchase and sale with full covenants of warranty. Lot No. 2 of the subdivision was conveyed to Bertie Hogan Lyda and husband, Fred W. Lyda, the defendant. This is the second tract described in the complaint.

As to the third tract described in the complaint, the plaintiffs, during the trial, submitted to judgment as in case of nonsuit.

When the cause came on to be heard in the court below the parties waived trial by jury and agreed that the judge should hear the evidence, find the facts, and render judgment thereon. The court below, being of the opinion that the description in the J. A. Hogan deed was sufficiently

definite to admit of parol evidence to fit the description to the land conveyed, admitted such testimony and found as a fact that the land claimed by the plaintiffs was conveyed thereby and that they are now the owners and entitled to the possession thereof. It likewise concluded from the evidence offered that the deeds to the Charles Hogan tract, interchanged by the plaintiffs and Bertie Hogan Lyda, were in fact partition deeds and that the defendant took no title to Lot No. 2 by virtue of the fact that he was named as grantee in the deed thereto. Judgment was entered accordingly.

To the decree adjudging that the plaintiffs are the owners and entitled to the possession of the two said tracts of land and assessing damages for the wrongful detention thereof the defendant excepted and appealed.

James E. Rector for plaintiffs, appellees.

J. W. Haynes for defendant, appellant.

BARNHILL, J. While there are numerous exceptions in the record they present only two questions for decision: (1) Is the description in the J. A. Hogan deed to Bertie Hogan too vague and indefinite to admit of extrinsic evidence to fit the description to the land intended to be conveyed; and (2) is defendant, as surviving tenant by entirety, seized of the second tract—Lot No. 2 of the Charles Hogan land?

It is presumed that the grantor in a deed of conveyance intended to convey something, and the deed will be upheld unless the description is so vague or contradictory that it cannot be ascertained what thing in particular is meant. *Proctor v. Pool,* 15 N. C., 370; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 547.

But this intent must be ascertained from the description contained in the deed, which must set forth a subject matter, either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers. *Massey v. Belisle,* 24 N. C., 170; *Wharton v. Eborn,* 88 N. C., 344; *Peel v. Calais, post,* 368. The description must identify the land or furnish the means of identifying it under the maxim *id certum est quod certum reddi potest. Dickens v. Barnes,* 79 N. C., 490; *Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889, and cases cited; *Peel v. Calais, supra.*

When the description is not sufficient in itself to denote the land conveyed resort may be had to extrinsic evidence if the deed furnishes the means of identification. *Kea v. Robeson,* 40 N. C., 373; *Harrell v. Butler,* 92 N. C., 20; *Self Help Corp. v. Brinkley, supra; Peel v. Calais, supra.*

But evidence *dehors* the deed is admissible to "fit the description to the thing" only when it tends to explain, locate, or make certain some

call or descriptive term used in the deed. It is the deed that must speak. The oral evidence must only interpret what has been said therein. *Self Help Corp. v. Brinkley, supra,* and cases cited.

Adverting to the description in the J. A. Hogan deed, in the light of these principles, we are of the opinion that it contains calls and references sufficient to make it susceptible of identification. It may be made definite and certain by evidence *dehors* the deed. This we think the plaintiffs have done.

The calls are for natural boundaries—the road and J. A. Hogan's line—and, if the beginning point is ascertainable, they are such as to describe a tract of land triangular in shape.

The beginning point is "on a stake in the center of the public road in G. W. Vanderbilt and Mitchell Taylor line." Plaintiffs offered evidence tending to show that Vanderbilt owned land on the east side of the public road and Taylor owned property on both sides. The Vanderbilt line crosses or intersects the Taylor line in the public road. "The Vanderbilt and Taylor line crosses the public road where it comes into a V-shape, the Taylor line running this way and the Vanderbilt line comes to the corner and makes a perfect square. The Taylor line runs right into it and goes on into the woods." Hence a stake here in the public road where these lines intersect is in both lines. It is a definite, certain, and ascertainable point.

The evidence likewise locates the J. A. Hogan line. The beginning point and the Hogan line being established, as found by the court below, the calls are definite and enclose the first tract as claimed by the plaintiffs. Furthermore, the defendant's wife went into possession under the deed and made improvements thereon, claiming it as her own.

There is ample evidence in the record to sustain the finding of the court below that the deeds interchanged by the heirs of Charles Hogan for parcels of his land were in fact partition deeds. This being true the conclusion that the defendant took nothing under the deed to him and his wife for the share allotted to her is clearly in accord with the decisions of this Court. The subject was fully discussed, with the citation of numerous authorities, at the last term of this Court. *Wood v. Wilder,* 222 N. C., 622. Repetition at this time would be supererogatory.

In ejectment, evidence that a party is or has been "in possession" or "went into possession" of the premises is admissible. *Bryan v. Spivey,* 109 N. C., 57, 13 S. E., 766; *Berry v. McPherson,* 153 N. C., 4, 68 S. E., 892; *Cross v. R. R.,* 172 N. C., 119, 90 S. E., 14. Defendant's exceptions to this type of evidence offered by plaintiffs cannot be sustained.

We have examined the other exceptive assignments of error. They fail to point out any substantial error in the trial.

The judgment below is

Affirmed.

MRS. H. O. CHARNOCK v. FORREST C. TAYLOR, DEFENDANT, AND ET & WNC TRANSPORTATION COMPANY, SECOND PARTY DEFENDANT.

(Filed 22 September, 1943.)

1. Courts § 11—

The *lex loci*, or law of the *situs*, determines the substantive rights of the parties, and the *lex fori* governs in matters of remedy and procedure.

2. Courts § 13: Torts § 6—

If there is no right of action in the sovereignty where the alleged tort occurred, there is none anywhere.

3. Courts § 11: Torts § 6—

Under the common law there is no right of action by one joint tort-feasor to enforce contribution from another, and Tennessee follows the common law.

4. Courts § 11: Evidence § 3—

C. S., 1749, requires our courts to take judicial notice of the laws of Tennessee.

5. Courts § 13: Torts § 6—

It was not the purpose and it is not the effect of C. S., 618, to create a cause of action in contribution between joint tort-feasors when the *lex loci delicti* gives none.

6. Torts § 5—

The liability of joint tort-feasors to one who has sustained an injury through their common negligence is joint and several; and the injured party may sue either of them separately or any or all of them together, at his option.

7. Torts §§ 5, 6—

In so far as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of C. S., 618, to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him.

APPEAL by defendant Forrest C. Taylor from *Alley, J.*, at Regular July Term, 1943, of BUNCOMBE.

The plaintiff, Mrs. Charnock, brought this action against the defendant, Forrest C. Taylor, to recover damages for an injury alleged to have

been sustained through the negligence of the said Taylor in connection with the collision of an automobile in which plaintiff was riding in the city of Bristol, Tennessee.

The defendant answered, denying negligence and alleging that plaintiff received her injury, if at all, through the sole negligence of the ET & WNC Transportation Company, a Tennessee corporation; but still denying his negligence, alleges that if in truth and fact he was negligent, the said ET & WNC Transportation Company was, in this respect, a joint tort-feasor with him in negligently causing plaintiff's injury, and asked for contribution in case recovery was had against him.

Seeking to avail himself of the provisions of C. S., 618, as amended, Taylor filed a petition to bring in the Transportation Company as a party, which was allowed by the clerk. Service was made upon the Company in this State.

Since the complaint of Mrs. Charnock contained no allegation of negligence against the Transportation Company, that defendant demurred to the complaint as not stating a cause of action against it. At the same time it demurred to the answer of Taylor, which asked affirmative relief, as not stating a cause of action against this defendant, for that in this respect the Tennessee law applies and governs, and this does not recognize contribution between joint tort-feasors, or permit an action by one joint tort-feasor against another to recover contribution.

The demurrer to the answer of Taylor was sustained, and the defendant Taylor appealed.

Harkins, Van Winkle & Walton for defendant Forrest C. Taylor, appellant.

George A. Shuford for second party defendant, ET & WNC Transportation Company, appellee.

SEAWELL, J. Whether for reasons of comity (*Bond v. Hume,* 243 U. S., 15, 61 L. Ed., 565), or for convenience, or out of respect for the fact that those who are in the jurisdiction of a foreign sovereignty, even temporarily, are under the protection of its laws and must conform their conduct to them (*Ala. etc. R. R. Co. v. Carroll,* 97 Ala., 126, 138, 11 So., 803), the rule in case of conflict of laws may be stated generally as follows: As to substantive laws, or laws affecting the cause of action, the *lex loci*—or law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based—will govern; as to the law merely going to the remedy, or procedural in its nature, the *lex fori*—or law of the forum in which the remedy is sought—will control. *Howard v. Howard,* 200 N. C., 574, 158 S. E., 101; *Farfour v. Fahad,* 214 N. C., 281, 199 S. E., 521. "The broad, uncontroverted

rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself, while the *lex fori* controls all that is connected merely with the remedy." 11 Am. Jur., Conflict of Laws, sec. 14. To put it concisely, the *lex loci,* or law of the *situs,* determines the substantive rights of the parties, and the *lex fori* governs in matters of remedy and procedure.

The rule is followed with practical uniformity in its particular application to actions founded in tort: Matters affecting the substantial rights of the parties are determined by the *lex loci delicti commissi,* and remedial, or procedural, rights are determined by the law of the forum.

Within this rule are questions relating to the existence or non-existence of a cause of action—that is, whether the circumstances out of which the litigation arose created or gave rise to such right. This is stated concisely in 15 C. J. S., Conflict of Laws, sec. 12, as follows: "The *lex loci delicti* governs the substantial aspects of torts, and determines whether a right of action in tort has been created and its extent." In Restatement, Conflict of Laws, sec. 378, the American Law Institute expresses the rule: "The law of the place of wrong determines whether a person has sustained a legal injury." *Young v. Masci,* 289 U. S., 253, 77 L. Ed., 1158, 88 A. L. R., 170. See same case, 83 A. L. R., 869. *Gray v. Gray,* 87 N. H., 82, 174 A., 508; *Russ v. R. R.,* 220 N. C., 715, 18 S. E. (2d), 130; *McDonald v. Mallory,* 77 N. Y., 546, 550. In *Howard v. Howard, supra,* Minor on Conflict of Laws, 479, sec. 194, is quoted with approval:

" 'If under the *lex loci* there is a right of action, comity permits it to be prosecuted in another jurisdiction; but if under the *lex loci* no right of action is created or exists, then it exists nowhere and can be prosecuted in no jurisdiction.' *Pender v. Machine Co.,* 35 R. I., 321; L. R. A. 1916-A, 428. This statement of law is generally accepted."

The case at bar is novel only in one aspect. No case under similar conflict of laws has been brought to our attention involving a demand for contribution between joint tort-feasors. But the rule is broad enough to cover that situation, since such demand would not arise except as it grew out of the tortious transaction and the relation thus brought about between the parties.

With respect to legal liability for contribution between joint tort-feasors, the laws of North Carolina and the laws of Tennessee, where admittedly the collision of the vehicles and injury of plaintiff occurred, are at variance. Under the common law there is no right to an action by one joint tort-feasor to enforce contribution from another. *Lineberger v. Gastonia,* 196 N. C., 445, 146 S. E., 79; *Guthrie v. Durham,* 168 N. C., 573, 84 S. E., 859; *Gregg v. Wilmington,* 155 N. C., 18, 70 S. E., 1070; *Doles v. R. R.,* 160 N. C., 318, 75 S. E., 722. In North

Carolina the common law in this respect has been superseded by statute, amending C. S., 618; in Tennessee it still prevails, and was in force at the time of the occurrence on which this litigation is based. *Aderson v. Saylors,* 40 Tenn. (3 Head), 551; *Rhea v. White,* 40 Tenn. (3 Head), 121; *Cohen v. Noel,* 165 Tenn., 600, 56 S. W. (2d), 744, 746.

The effect of section 618 of the Consolidated Statutes, as amended, was to give a right or cause of action to a joint tort-feasor against his fellow participant in the negligent act to enforce contribution—this right to be asserted in any action brought to recover for the injury, or independently after judgment has been taken; and the Act provides machinery for bringing such joint tort-feasor into the case.

The liability of joint tort-feasors to one who has sustained an injury through their common negligence is joint and several; and the injured party may sue either of them separately or any or all of them together, at his option. *Raulf v. Light Co.,* 176 N. C., 691, 694, 97 S. E., 236; *Cox v. Lumber Co.,* 193 N. C., 28, 136 S. E., 254; *Watts v. Lefler,* 194 N. C., 671, 140 S. E., 435; *Lineberger v. Gastonia, supra.* In so far as the legal rights of this plaintiff are concerned, when she has elected to sue one of them, the others are not necessary parties and she cannot be compelled to pursue them; nor can the defendant originally sued avail himself of the provisions of C. S., 618, to compel the plaintiff to join issue with a defendant whom, for reasons of her own, she has elected not to sue. The fact that the person thus made a party is brought into formal and technical relation with the parties to the original litigation, and particularly with the plaintiff in whose behalf he was originally liable, is without legal significance. It follows that the circumstance that at the instance of the petitioner the Transportation Company has been improvidently made a party to this action in company with proper and necessary parties, including the plaintiff who had the right to sue it, avails the defendant Forrest C. Taylor nothing as to his own cause of action. He cannot borrow from the plaintiff or improve his legal status by leaning upon her cause of action. The defendant who has availed himself of the provisions of C. S., 618, cannot, of course, rely upon any liability of the party he has brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. It was not the purpose, and it is not the effect, of C. S., 618, to create a cause of action in contribution between joint tort-feasors when the *lex loci delicti* gives none. The defendant, therefore, stands here upon his legal rights as they may be given him under the laws of Tennessee with respect to the right of action he attempts to assert against the Transportation Company. As we have said, the laws of Tennessee, of which we are required to take judicial notice (C. S., 1749)—and their import is not disputed here—follow the common law, and do not give to the defendant any right or

cause of action for contribution from his alleged joint tort-feasor, and none is created for him by C. S., 618, as against the law of the jurisdiction in which the circumstances giving rise to the alleged cause of action arose. The decisions in this jurisdiction stand upon the rule tersely expressed in *Gray v. Gray, supra:* "If there is no ground of action in the sovereignty where the tort is alleged to have occurred, there is none anywhere."

Demurrer was properly sustained, and the judgment is

Affirmed.

N. H. HARRISON, JR., v. MRS. GERTRUDE A. DARDEN AND HUSBAND, P. H. DARDEN,

and

N. H. HARRISON, JR., v. MRS. NEVA C. DARDEN AND HUSBAND, S. F. DARDEN.

(Filed 22 September, 1943.)

1. Reference § 4a: Appeal and Error § 37e—

On a consent reference the findings of fact by the referee, approved by the judge, are conclusive on appeal if there is competent evidence to support the findings.

2. Appeal and Error § 37e—

Upon failure to bring up the evidence on appeal, there is a presumption that the findings of a referee are supported by the evidence.

3. Betterments § 3—

A deed executed to defendant, pursuant to judgment in a suit to foreclose a tax certificate to which plaintiff and defendant were both parties, constitutes color of title in a subsequent action between the same parties involving betterments.

4. Betterments §§ 3, 4—

In order to entitle a defendant to compensation for the enhanced value of land due to permanent improvements placed thereon by him, it must appear that he held the land in good faith, under color of title believed by him to be good, and that he had reasonable ground for such belief.

5. Betterments § 7—

Under C. S., 700, in an action involving betterments, rents and rental values of the lands, which were obtained by defendants solely by reason of the improvements put on the lands by themselves, cannot be used to offset compensation to defendants for these improvements.

6. Same: Registration § 3—

There is nothing in ch. 47, C. S., known as the Torrens Law, which prevents the courts from proceeding to determine the value of improve-

ments claimed by defendants, who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party and ascertained by a consent reference.

APPEAL by plaintiff from *Dixon, Special Judge,* WASHINGTON Superior Court. Decided 20 May, 1943. Affirmed.

The two cases entitled as above were consolidated for trial. These actions were instituted to recover the possession of certain lands, some 500 acres in area, alleged to have been wrongfully withheld by the defendants, Gertrude A. Darden and her husband, P. H. Darden, as to one portion, and by the defendants, Neva C. Darden and her husband, S. F. Darden, as to the other.

These actions resulted in judgment for the plaintiff as against all the defendants at January Term, 1941. In the judgment it was recited: "The court finds that the defendants, Gertrude A. Darden and Neva C. Darden, while holding the premises under color of title believed by them to be good, have made improvements on the lands, and that the parties have heretofore stipulated that the question of betterments, improvements, rents and damages should be passed upon at a subsequent term." No exception was taken to the judgment, or to this recital. Subsequently at October Term, 1941, a consent reference was agreed to, and the order made by Judge Carr recited that the plaintiff and defendants consented "that the cause should be referred to make findings of fact as to betterments, damages, rents, issues and profits, pursuant to the provisions of sections 699 to 703, inclusive, of the Consolidated Statutes, and upon findings of fact so made to make conclusions of law."

The matter was referred to Malcolm Paul as referee, who heard the evidence and by consent made personal inspection of the premises. He reported to the court his findings of fact and conclusions of law that the enhanced value of the land by reason of improvements put thereon by Gertrude A. Darden, including taxes paid, was $2,168.12, and that she was chargeable for rents, wood and timber cut and removed $1,256.00, leaving balance due her of $812.12; that the value of the improvements made upon the land by defendant Neva C. Darden, including taxes paid, was $1,337.50, subject to the charge of $30.00 for rent and timber cut, leaving balance due her of $1,307.50.

Exceptions to the referee's report were filed by the plaintiff. The court, after considering and reviewing the evidence and the referee's report, found that the facts were the same as those found by the referee and set out in his report, and in all respects approved and confirmed his conclusions of law. Judgments were rendered accordingly decreeing that the value of the improvements so established should constitute liens on plaintiff's lands.

Plaintiff excepted to the judgment and appealed.

Z. V. Norman and J. D. Paul for plaintiff.
Carl L. Bailey for defendants.

DEVIN, J. The judgments appealed from were based upon the findings of fact made by the referee, concurred in and approved by the trial judge. The reference having been by consent, it is the established rule in this jurisdiction that the findings of the referee approved by the judge are conclusive upon appeal if there was competent evidence to support the findings. *Wallace v. Benner,* 200 N. C., 124, 156 S. E., 795; *Usry v. Suit,* 91 N. C., 406. Appellant has not brought up the evidence heard by the referee, nor has he pointed out any material fact not supported by evidence. However, the plaintiff assigns error in the rulings below as to several matters of law to which he has noted exception.

The plaintiff excepts to the opinion expressed in the referee's report that the recital in the original judgment that the defendants "while holding the premises under color of title believed to be good made improvements on the lands," should be regarded as a determination by the court of the fact of the belief of the defendants in the validity of their title. However, the failure of the plaintiff to except to this statement in the judgment and his joining in the stipulation in the same connection that the question of improvements, rents and damages should be passed on at a subsequent term, together with his waiver of the filing of petition for betterments by the defendants, would seem to lend support to the expression of the view complained of. In this connection the referee added the specific finding that at the time of making the improvements on the land the defendants had reasonable grounds to believe their title to be good. Furthermore, it appears that the defendants entered into possession of the lands under deed executed pursuant to the judgment in a suit to foreclose a tax sale certificate, to which suit plaintiff was a party, and that defendants' possession was with the knowledge of the plaintiff and so continued for five or six years before the present suit was instituted. The findings and conclusions on this point may not now be successfully challenged by the plaintiff. It is well settled that in order to entitle a defendant to compensation for the enhanced value of land due to permanent improvements placed thereon by him, it must appear that he held the land in good faith under a colorable title believed by him to be good, and that he had reasonable ground for such belief. *Rogers v. Timberlake, ante,* 59; *Barrett v. Williams,* 220 N. C., 32, 16 S. E. (2d), 405; *Pritchard v. Williams,* 176 N. C., 108, 96 S. E., 733.

Plaintiff excepts to the failure of the referee to note in his findings as to the condition of the land a distinction between standing and down trees. It is contended this would have afforded a more accurate method

of determining the condition and value of the land, but we do not regard this exception as of sufficient moment to require additional findings of fact.

Plaintiff assigns error in the ruling of the court below in approving the findings and conclusions of the referee as to the rental value of the lands. The referee and also the court took the view that the rents and rental values of the lands which were obtained by the defendants solely by reason of the improvements put on the lands by themselves could not be used to offset compensation for these improvements. This seems to be the rule prescribed by the statute, C. S., 700, which excludes "the use of the improvements thereon" from estimates against the defendants of the clear annual value of the premises during the time of possession. As the lands at the time of defendants' entry were covered by woods and swamps, some of which had been burned over, and were uncultivated, the referee's conclusion that plaintiff was only entitled to set-off against the value of improvements a nominal rental value was properly approved by the court. According to the finding the land had no substantial rental value at the time of defendants' entry.

Plaintiff's exception to the court's approval of the referee's finding as to the value of standing timber removed by and chargeable to the defendants cannot be sustained in the absence of showing that these findings were not supported by the evidence. As the evidence heard by the referee was not sent up, we must presume there was evidence to support the findings on these matters. *Caldwell v. Robinson,* 179 N. C., 518, 103 S. E., 75.

The plaintiff complains that the referee failed to find that the value of the rent and the waste committed by defendants exceeded the enhancement in value of the land caused by improvements put on the land by the defendants. But in the absence of any evidence in the record as to the character, amount and value of these items, we are unable to help him. The suggestion that the original fertility of the soil may have been dissipated and wasted by the defendants is not sufficient to justify the conclusion that the plaintiff has been materially prejudiced by the action of the referee and the court in this respect.

The argument is also made by the plaintiff that since his title had been registered under ch. 47, C. S., known as the Torrens Law, claim for betterments in this action could not be enforced. True, this statute provides a particular method for the registration of transfers, liens and claims against land which has been brought under its provisions. But except as otherwise specially provided in the act, registered land is subject to the jurisdiction of the courts in the same manner as if not so registered. C. S., 2379. We find nothing in these statutes that would prevent the court from proceeding to determine the value

of improvements claimed by defendants, who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party, and ascertained by a reference to which he has formally consented.

The judgments of the court below were ordered recorded by the register of deeds on the registry of plaintiff's certificate for the land. C. S., 2413.

An examination of the entire record leads to the conclusion that the facts have been established in the manner selected by the parties, and that the judgments based thereon must be

Affirmed.

JOHN B. PEEL AND WIFE, LIZZIE PEEL; ED BULLOCK, SURVIVING HUSBAND OF CARNEY PEEL BULLOCK; NAOMI BULLOCK MOORE; WINSLOW BULLOCK; ANNIE MAY BULLOCK; JOHN BULLOCK; ROMEO BULLOCK; THE LAST THREE PERSONS NAMED BEING MINORS, APPEARING BY THEIR NEXT FRIEND, ED BULLOCK, v. J. D. CALAIS AND WIFE, ISABELLE C. CALAIS; CHARLES T. HOYT; MARJORIE HOYT CARTER AND HUSBAND, H. C. CARTER III; ISABELLE B. HOYT, A WIDOW; AND DR. H. C. NEBLETT.

(Filed 22 September, 1943.)

1. Deeds §§ 11, 12: Boundaries § 3a—

Every deed of conveyance must set forth a subject matter, either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers. The description must identify the land or furnish the means of identifying, under the maxim *id certum est quod certum reddi potest*, the *locus in quo*.

2. Ejectment § 15: Boundaries § 3e—

When resort is had to evidence *aliunde* to make the description in a deed complete, the weight and credibility of the evidence thus offered is for the jury.

3. Ejectment § 15: Trial § 22b—

In a petition for partition, converted into an action in ejectment by defendants' plea of sole seizin, where a common source of title is admitted and the description, in the deed relied upon by defendants, does not sufficiently identify the *locus in quo* as a part of the land conveyed, without resort to evidence *dehors* the deed of defendant, a judgment of nonsuit as to plaintiff is erroneous.

APPEAL by plaintiffs from *Bone, J.*, at February Term, 1943, of BEAUFORT. Reversed.

Petition for partition in which the defendants answered, pleading sole seizin. Upon the issue thus raised the cause was transferred to the civil issue docket for trial as in ejectment.

The plaintiffs are heirs at law of one R. C. Peel, deceased. The defendants claim title to the land in controversy by *mesne* conveyances from Samuel Peel, one of the children of R. C. Peel.

In 1910 R. C. Peel owned a tract of land in Beaufort County on the south side of the Military Road and extending to a line 60 feet north of the high water mark of Pamlico River. His father devised to him the adjoining strip of land 60 feet wide bounded on the north by the first tract and on the south by Pamlico River, which tract was used in connection with or as a part of a fishery.

On 28 December, 1910, Peel conveyed to his daughter a tract of land containing 20 acres, being approximately the middle third of the first tract. On the same date he executed and delivered to his son, Samuel Peel, a deed containing the description as follows: "A certain tract or parcel of land in Beaufort County, State of North Carolina, adjoining the lands of Samuel Peel, R. C. Peel, and others, and bounded as follows, *viz.:* Beginning on Griffin's line 30 feet from the high water mark; thence an easterly course, 30 feet from the water, to John Peel's line; thence beginning at a stake on this line 300 feet from John Peel's line and running a northerly course to the Military Road, to a stake 300 feet from John Peel's line; thence with said line to the river, containing 22 acres, more or less."

The petitioners instituted this action for the partition of the second tract 60 feet wide extending along the banks of Pamlico River, said strip being described in the will of George Peel and in the petition as follows: "A strip of land lying on Pamlico River, and running back from said river a distance of 60 feet, bordering on the east by the land conveyed by me to John B. Peel; on the north by my own land; on the west by Ellen Griffin's land; and on the south by Pamlico River."

In the trial below plaintiffs offered the will of George Peel showing the devise of the land in controversy to R. C. Peel and evidence of their relationship as heirs at law of said Peel, together with certain oral testimony tending to locate said devise. The defendants offered certain record evidence and oral testimony.

At the conclusion of all the evidence the court, on motion of the defendants, entered judgment of nonsuit, and the plaintiffs excepted and appealed.

John H. Bonner and H. S. Ward for plaintiffs, appellants.

Grimes & Grimes and Rodman & Rodman for defendants, appellees.

BARNHILL, J. It is conceded that R. C. Peel owned the land in controversy. He is the common source of title. Plaintiffs claim as his heirs at law. The defendants claim by *mesne* conveyances from Samuel Peel. Apparently, on this record, plaintiffs concede that the Peel deed contains a description sufficiently definite to convey the eastern portion of the first tract, containing approximately one-third thereof. At least they make no claim thereto. They contend that the description does not embrace the second or fishery tract and that it is too vague and uncertain to admit of parol evidence "to fit the description to the thing." Hence the merits of this appeal turn upon the correct interpretation of the deed from R. C. Peel to Samuel Peel.

"Every deed of conveyance must set forth a subject matter, either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers." *Massey v. Belisle,* 24 N. C., 170; *Wharton v. Eborn,* 88 N. C., 344. The description must identify the land or furnish the means of identifying under the maxim, *id certum est quod certum reddi potest,* the *locus in quo. Dickens v. Barnes,* 79 N. C., 490; *Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889, and cases cited.

It is a well recognized principle of law that when the description in a deed is not sufficient in itself to denote the land conveyed resort may be had to extrinsic evidence when the description furnishes the means of identification—that is, when the ambiguity is latent, parol evidence is admissible to fit the description to the land. *Self Help Corp. v. Brinkley, supra,* and cases cited; *Kea v. Robeson,* 40 N. C., 373; *Harrell v. Butler,* 92 N. C., 20.

But when resort is had to evidence *aliunde* to make the description complete, the weight and credibility of the evidence thus offered is for the jury. Hence it follows that if the description contained in the deed does not sufficiently identify the *locus in quo* as a part of the land conveyed without resort to evidence *dehors* the deed the nonsuit must be reversed.

The specific description begins on Griffin's line 30 feet from the high water mark and runs thence an easterly course 30 feet from the water to John Peel's line. There is more than one body of water and many high water marks in Beaufort County. To which high water mark and to what body of water is reference made? Perhaps this defect is supplied by the admission of the plaintiffs that reference is had to Pamlico River and that the beginning point is at the letter "B" on the court map, and that the first call runs from "B" to "I" as shown on the map. Even so, it does not so appear on the face of the instrument. The description then retraces this line 300 feet to another beginning point and runs thence a northerly course to Military Road, to a stake 300 feet from

John Peel's line; thence with said line to the river. If we adopt the view that the last call is for John Peel's line then there is no call from the point on Military Road to John Peel's line.

But this is not the material defect as it affects this controversy. The last call, "with said line to the river," assuming that it is the John Peel line to which reference is made, "overshoots" the point "I," which is the terminus of the first line, and extends to the river. The call for the river is as the terminus of a line and not as a natural boundary. There is no language used sufficient to extend the line from that point so as to enclose the *locus in quo*. Even if we concede that the general description "adjoining the lands of John Peel, Griffin, and others" is sufficient, by resort to extrinsic evidence, to supply the line from the original beginning point to the river on the western side of the land in controversy, the fact still remains that there is no attempt to close the calls so as to embrace the land along the river. Hence the deed does not set forth any subject matter certain in itself.

Whether the description contains latent ambiguities which may be explained by evidence *aliunde* is not presented for decision on this record. If we concede that such ambiguities exist and that the deed furnishes the means of identifying the land, resort must be had to extrinsic evidence, the weight and credibility of which must be submitted to the jury.

Of course, when the plaintiffs are relying on testimony *aliunde* to supply defects in a description and fail to offer sufficient evidence to be submitted to the jury a nonsuit is proper. But such is not the case here. The defendants rely upon the deed in question. They are the ones who seek to identify the land described. Failure of proof in this respect aids the plaintiffs.

The plaintiffs are entitled to have their cause submitted to a jury. To that end the judgment of the court below is

Reversed.

CRESCENT HAT COMPANY, INC., v. MORRIS CHIZIK.

(Filed 22 September, 1943.)

1. Constitutional Law § 23: Judgments § 40—

Under Art. IV, sec. 1, of the Constitution of the United States a judgment of a court of another state, when properly authenticated, is entitled in the courts of this State to be given full faith and credit.

2. Judgments § 40—

In an action in this State, based on a judgment rendered by a court of the State of New York, defendant has a right to interpose proper

defenses, for example: (1) he may defeat recovery by proof of fraud practiced in obtaining the judgment, which may have prevented an adverse trial; (2) or show want of jurisdiction of person or subject matter; (3) or plead a counterclaim of payments since rendition.

3. Same: Pleadings § 15—

Where plaintiff brought an action in this State against defendant, based on a judgment of a New York court, and defendant by answer alleged as defense and counterclaim (1) false representations of plaintiff relating to the merits of the subject matter and made anterior to the New York judgment; (2) and an unliquidated claim for damages arising out of an independent tort, plaintiff's demurrer *ore tenus* to such answer, defense and counterclaim was properly allowed.

APPEAL by defendant from *Clement, J.,* at April Term, 1943, of BUNCOMBE.

Civil action to recover on judgment obtained in court of record in State of New York as hereinafter shown.

The parties to this action stipulate and agree, as appears in the record on this appeal, in substance, that in the municipal court of the City of New York, Borough of Manhattan, First District, State of New York, a court of record, having a seal, a judgment was rendered in favor of Crescent Hat Company, plaintiff there as well as here, against Morris Chizik, defendant there as well as here, for the sum of $784.00, which included interest and court costs to date of rendition, on which defendant received a credit of $272.30 on 5 May, 1939, leaving a balance of $511.70, the amount sought to be recovered in this action.

Defendant, in amended answer further answering the complaint filed in this action in which plaintiff declares upon the said judgment, avers, summarily stated: (1) That the said judgment was obtained in an action instituted by plaintiff against defendant for an alleged breach of contract to purchase men's hats, in which action plaintiff alleged: (a) that in April, 1937, its representative at the place of business of defendant in Asheville, North Carolina, sold defendant an order of hats, which were shipped to defendant but which defendant refused to accept; (b) that the hats consisted of a special order made for defendant, by reason of which plaintiff could not dispose of them to advantage; and (c) that the hats were then in its possession in its warehouse; (2) that upon these allegations, denied by defendant, the case came to trial in March, 1939, and plaintiff exhibited in court four or five men's hats and represented that the entire shipment of hats made by plaintiff for defendant pursuant to order were in possession of plaintiff in its warehouse in New York subject to the orders and disposition of defendant, which representations were false and fraudulent and constituted a fraud upon the court in that the plaintiff did not have the hats in its warehouse and

possession—having prior thereto sold the same and received the sale price therefor and full value thereof, of all of which defendant was ignorant; (3) that subsequent to the rendition of the judgment as aforesaid plaintiff, in further effort to cheat and defraud defendant, caused an execution to be issued on said judgment and knowingly had a jobber's lot of worthless hats of styles and shapes in vogue many years prior to 1937 gotten together by plaintiff for the express purpose, levied on, advertised and sold under the false assumption by the officers and false representation to them by plaintiff that said lot of worthless hats were the same hats manufactured by plaintiff for defendant in 1937—the defendant had the worthless hats purchased at said sale for price of $300, and shipped to him at Asheville, and finding same of "practically no value" and unsalable, without seriously affecting the good will and prestige of the business he had built up, stored in basement of his store, and defendant made no effort to sell them; and (4) that plaintiff not only received the proceeds of the sale and disposition of the hats made in 1937 under original order, but also received the $300, less the cost of court, by reason of all of which plaintiff is not entitled to recover anything because of the judgment as aforesaid.

Later, by order of court, defendant amended his answer and averred: "That the plaintiff had the original order of hats in its possession for the disposition and benefit of the defendant, and while said hats were in its possession and before the levy of the execution in New York, as aforesaid, the said plaintiff disposed of the original order of said hats and converted the same to their own use, thereby injuring and damaging the defendant in the sum of $784.00, the reasonable value thereof, and the additional sum of $300.00 paid by defendant for the lot of worthless hats, as aforesaid, or a total injury and damage to the defendant in the sum of $1,084.00," and prays judgment "That the defendant recover of the plaintiff the sum of $1,084.00 to be used as an offset and payment of the balance shown by the judgment in the New York action," and for costs and other and further relief.

In reply plaintiff denied the material averment of the further answer of defendant.

When the case came on for trial in court below, and after the jury was impaneled and the pleadings read, plaintiff demurred *ore tenus* and moved to dismiss the further answer and defense and counterclaim. The court sustained the demurrer and allowed the motion. Exception by defendant.

Thereupon, on evidence introduced by plaintiff, the issue was submitted to and answered by the jury in favor of plaintiff. From judgment thereon, defendant appealed to Supreme Court and assigns error.

Lee & Lee for plaintiff, appellee.

J. A. Patla and Don C. Young for defendant, appellant.

WINBORNE, J. The validity of the judgment obtained by plaintiff against defendant in the New York court, and sued on in this action, is not controverted by defendant. Therefore, under Article IV, section 1, of the Constitution of the United States the judgment when properly authenticated is entitled in the courts of this State to be given full faith and credit. However, in challenging a foreign judgment "defendant has a right to interpose proper defenses; he may defeat recovery by proof of any fraud practiced in obtaining the judgment which may have prevented him from having an adverse trial of the issue . . . or by showing want of jurisdiction either as to the subject matter or as to the person of the defendant." *Bonnett-Brown Corp. v. Coble,* 195 N. C., 491, 142 S. E., 772. See also *Mottu v. Davis,* 151 N. C., 237, 65 S. E., 969; *S. c.,* 153 N. C., 160, 69 S. E., 63; *Williamson v. Jerome,* 169 N. C., 215, 85 S. E., 300. Defendant may also plead as counterclaim payments made since the rendition of the judgment. *Roberts v. Pratt,* 158 N. C., 50, 73 S. E., 129.

The defense set up by defendant is (1) that the judgment obtained in the New York court was procured by fraud in that plaintiff exhibited hats in court and falsely represented that the hats in question were then in plaintiff's possession subject to the orders and disposition of the defendant, when in truth and in fact plaintiff had already sold same and received full value therefor, and (2) that plaintiff further perpetrated a fraud on and to the damage of defendant by having sold under execution worthless hats which plaintiff had substituted for the hats involved in the suit in which the New York judgment was obtained.

Admitting the truth of these averments, as we must do upon demurrer in testing the sufficiency of the pleading, the first defense fails in that false testimony given at the trial is "held not to constitute extrinsic fraud upon which a successful attack upon the judgment can be based," *Devin, J.,* on defendant's appeal in *Cody v. Hovey,* 216 N. C., 391, 5 S. E. (2d), 165, where it is stated that the same rule applies in New York, citing *Jacobowitz v. Herson,* 268 N. Y., 130. See also *Mottu v. Davis, supra.* Furthermore, the alleged false representations were anterior to the entry of the judgment in the New York court, and relate to the merits of the subject matter, as to which inquiry is precluded in suit on such judgment. *Land Bank v. Garman,* 220 N. C., 585, 18 S. E. (2d), 182, and cases cited.

The second defense is nothing more than an unliquidated claim for damages arising out of an independent tort which cannot be made the subject of set-off or counterclaim. *Finance Corp. v. Lane,* 221 N. C.,

189, 19 S. E. (2d), 849; McIntosh, N. C. P. & P., page 494, and there is no allegation of payment.

The judgment below is

Affirmed.

HOUSE CHEVROLET COMPANY, INC., v. EDWARD P. CAHOON AND MURIAL CAHOON, AND W. A. BEALS.

(Filed 22 September, 1943.)

1. Venue § 2a—

If an action be one in which the recovery of personal property is not the sole or chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. C. S., 463 (4).

2. Same—

Where plaintiff brings an action in the county of his residence, based upon a note secured by a chattel mortgage on an automobile, against three defendants, two of whom executed the said note and mortgage and are residents of another county, and the third defendant, who has possession of the car, is a resident of a third county, the chief relief sought is the collection of the debt and a claim and delivery for the car is only ancillary, so that the action should not be removed.

APPEAL by defendant Beals from *Dixon, Special Judge,* at April Term, 1943, of WASHINGTON.

This is an action instituted in Washington County by the plaintiff, the House Chevrolet Company, to collect $275.00, with interest from 3 January, 1940, from the defendants Edward P. Cahoon and Murial Cahoon, alleged to be due on a note executed by said defendants to said plaintiff, wherein the ancillary remedy of claim and delivery was invoked to recover the possession of a certain Chevrolet automobile upon which said defendants Cahoon had executed a chattel mortgage to the plaintiff to secure the payment of the note sued on, that said automobile might be sold and so much of the proceeds of such sale as might be necessary applied to the payment of said note. At the time of the institution of this action in Washington County the plaintiff had its principal office in that county, and the automobile was in the possession of the defendant Beals in Pasquotank County, and the defendants Cahoon were residents of Tyrrell County.

On 9 July, 1941, summons was issued by the clerk of Washington County to the sheriff of Pasquotank County against the defendant Beals, which summons was accompanied by the order in the claim and delivery proceeding directing the sheriff of Pasquotank to seize the automobile

and deliver the same to the plaintiff. Defendant Beals filed a replevy bond and retained the possession of the automobile.

On 12 July, 1941, summons was issued by the clerk of Washington County to the sheriff of Tyrrell County for the defendants Edward P. Cahoon and Murial Cahoon, which was duly served on 14 July, 1941. There accompanied the summons, and was served therewith, a copy of an order made by the clerk of Washington County extending the time for filing complaint until 28 July, 1941, based upon application of the plaintiff wherein it is stated that "the nature and purpose of this action are . . . to obtain immediate possession of the property described in the affidavit hereto attached to satisfy a debt upon which property the plaintiff is the holder of a chattel mortgage which said debt thereby secured is past due and unpaid."

On 25 July, 1941, the plaintiff filed the only complaint filed in the action in which it alleged: That the plaintiff was a corporation with its principal place of business in Washington County; that the defendants Cahoon became indebted to the plaintiff on 3 January, 1940, in the sum of $275.00 and executed and delivered a promissory note for said amount on said date; that said note was secured by a chattel mortgage upon a Chevrolet automobile; that no part of said note had been paid, although past due, and that the plaintiff is entitled to recover of the defendants Cahoon the full amount thereof; that the process in claim and delivery had been issued and the said automobile described in the chattel mortgage was in the possession of the defendant Beals in Pasquotank County and had been seized by the sheriff of that county; that the plaintiff was entitled to have said automobile sold and so much of the proceeds of such sale as may be necessary therefor applied to the payment of said note; and finally prayed that it recover of the defendants Cahoon the full amount of the note, with interest, and that it be adjudged that the plaintiff is entitled to the possession of the automobile, to have the same sold, and the debt owed to it paid from the proceeds of such sale.

The defendant W. A. Beals lodged motion before the clerk of Washington County to have the cause transferred to Pasquotank County, for that he was a resident of that county and the automobile was in his possession in that county. The clerk denied the motion and the defendant Beals excepted and appealed to the judge at term.

The cause came on for hearing on appeal before Dixon, J., at term and he found as a fact, *inter alia,* "that all of said process (the two summonses and ancillary proceeding in claim and delivery), was actually issued, and so intended to be issued, in the same cause," and "ordered as follows: That the summons and ancillary proceeding in claim and delivery issued for and served upon W. A. Beals, and the summons for

and served upon the defendants, Edward P. Cahoon and Murial Cahoon, are and were in, and intended to be in, the same action; that to such extent as there was severance between said process, if any, the same is abolished and is in all respects consolidated into one action"; and denied the motion of the defendant Beals to remove the cause to Pasquotank County.

To the order of the court denying his motion to remove the cause to Pasquotank County the defendant Beals objected, excepted and appealed to the Supreme Court.

Carl L. Bailey for plaintiff, appellee.

M. B. Simpson for defendant Beals, appellant.

SCHENCK, J. The question posed by this appeal is as stated in appellant's brief, namely, "Did the court commit error in refusing to remove this case from Washington County to Pasquotank County?"

C. S., 463 (4), provides that actions for the recovery of personal property must be tried in the county in which the subject of the action or some part thereof is situated.

If the action be one in which the recovery of personal property is not the sole or chief relief demanded it is not removable to the county in which personal property is located, *Bowen Piano Co. v. Newell,* 177 N. C., 533, 98 S. E., 774; but, on the other hand, if the action be one in which the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. *Fairley Bros. v. Abernathy,* 190 N. C., 494, 130 S. E., 184.

Therefore, the answer to the question posed lies in the determination of whether the sole or chief relief demanded in the case at bar is the recovery of personal property. The appellant Beals contends that as to him at least it is, in fact he contends as to him it is the only relief sought; while the appellee, the House Chevrolet Company, contends that the action is a single action against all of the defendants and, when considered as a whole, the principal relief sought and demanded is the payment of the debt due by the defendants Cahoon to it, and the seizure of the personal property upon which they executed a chattel mortgage to secure the debt was but ancillary to the principal purpose of the action.

We are of the opinion, and so hold, that the contention of the appellee, the plaintiff, is correct, that is, that the chief relief sought is the collection of the debt, and that the subjection of the automobile to sale for such purpose is but incidental.

The right of the plaintiff to recover the amount of the debt sued for is in no wise based upon the seizure and sale of the automobile. In

this respect, as in others, the case at bar is distinguishable from *Marshburn v. Purifoy*, 222 N. C., 219, 22 S. E. (2d), 431.

The contention of the defendant that there were two actions pending: one against the defendant Beals and one against the defendants Cahoon, is untenable for the reason that the court below both found as a fact and adjudicated as a matter of law that the summons and ancillary proceeding in claim and delivery issued for and served upon W. A. Beals and the summons for and served upon defendants Edward P. Cahoon and Murial Cahoon were in, and intended to be in, the same action. The record furnished sufficient evidence upon which to base this finding of fact by the court below and we are therefore bound thereby, and such finding of fact supports the conclusion of law which is based thereupon.

The judgment below is

Affirmed.

R. L. CHESSON v. KIECKHEFER CONTAINER COMPANY, A CORPORATION, AND NORTH CAROLINA PULP COMPANY, A CORPORATION.

(Filed 22 September, 1943.)

1. Evidence § 29: Trial § 14—

In a trial before a referee, where by written stipulation counsel on both sides agreed, in lieu of offering oral evidence, that the stenographer's transcript of the sworn testimony of the witnesses at a previous trial of the case in the Superior Court, together with exhibits, should constitute the evidence before the court, there was no error, when this evidence was subsequently offered before a jury, for the court to decline to rule on the objections interposed when the evidence was originally offered, it appearing from the record that the only objections originally interposed were to testimony which was competent.

2. Constitutional Law § 17: Reference § 8: Trial § 52—

While the ancient mode of trial by jury has been preserved in our present Constitution, Art. I, sec. 19, the right in civil cases may be waived (Art. IV, sec. 13), and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver.

3. Constitutional Law § 17: Reference § 13—

In reference cases the trial by jury is restricted by the statute (C. S., 573) to the written evidence taken before the referee, which sufficiently complies with the constitutional mandate, if the testimony is taken under oath in the manner prescribed by law, with opportunity to cross-examine.

APPEAL by plaintiff and defendants from *Bone, J.*, at April Term, 1943, of CHOWAN.

CHESSON *v.* CONTAINER CO.

This was an action to recover damages for the alleged breach of contract for the cutting and delivery of pulp wood. The case was here at Spring Term, 1939, reported in 215 N. C., 112, 1 S. E. (2d), 337, and again at Fall Term, 1939, reported in 216 N. C., 337, 4 S. E. (2d), 886, where the pertinent facts are set out. On the last appeal error was found and the case sent back for a new trial. Thereafter, at January Special Term, 1941, of Chowan Superior Court, Judge Grady, then presiding, ordered a compulsory reference, to which order both plaintiff and defendants excepted. The referee, from the evidence presented, found that no contract had been entered into between plaintiff and defendants, or either of them, and that defendants were not liable. Upon exceptions to the referee's report, filed by the plaintiff, issues were submitted to the jury at April Term, 1943, resulting in verdict for plaintiff and an award of $690.79 damages.

From judgment on the verdict, plaintiff and defendants appealed.

J. H. Hall and J. Henry LeRoy for plaintiff.

Z. V. Norman and W. D. Pruden for defendants.

DEFENDANTS' APPEAL.

DEVIN, J. Both plaintiff and defendants excepted to the order of compulsory reference entered by Judge Grady, but the decision of the referee being in favor of the defendants, they filed no exceptions to the report. However, the plaintiff did file exceptions to the referee's findings and conclusions, demanded jury trial and tendered appropriate issues. The defendants moved that the report of the referee be confirmed. This was denied, and the issues which were raised by the pleadings and pointed by the plaintiff's exceptions to the referee's findings, were submitted to the jury upon the evidence which had been considered by the referee, and verdict was returned in favor of the plaintiff. Defendants' motion to confirm the referee's report, on the ground that plaintiff had not preserved his right to trial by jury, was properly denied.

Defendants assign error in the ruling of the court in the trial below with respect to their right to have their objections to certain testimony considered. The question arose out of these facts. It had been agreed, by written stipulation, by counsel for the parties in the hearing before the referee that in lieu of offering oral evidence the stenographer's transcript of the sworn testimony of the witnesses offered in a previous trial of the case in the Superior Court, together with the exhibits, should constitute the evidence before the referee. When this evidence, which had been presented to and considered by the referee under the stipulation, was offered before the jury in the present trial in the Superior Court, it

was ruled that under the terms of the stipulation all this evidence was in without objection, and the court declined to rule on the objections which had been interposed when the testimony was originally offered. Whether the court was correct in its interpretation of the effect of the stipulation need not be decided since upon examination of the record we find that the only objections there appearing were to testimony which was competent for the purpose of corroboration, and the jury was so instructed. Hence defendants' assignment of error based on this ground cannot be upheld. It was not contended that defendants could be heard to offer new objections.

The defendants in their argument and brief question the constitutionality of the statute authorizing compulsory reference as being an infringement upon the right of trial by jury. Right to trial by jury is a basic and fundamental feature of our system of jurisprudence. *Jacob v. City of New York,* 315 U. S., 752. In North Carolina this right has been regarded from the earliest times as one of the safeguards of the liberties of the people and as one of the essentials to the due administration of justice. It was provided in our first Constitution, in 1776, that "In all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Denial of this right by legislative act was held unconstitutional in *Bayard v. Singleton,* 1 N. C., 5, in 1787. The identical language of the original provision has been preserved in sec. 19, Art. I, of the present Constitution. But the right to trial by jury in civil cases may be waived (Art. IV, sec. 13, Const. of N. C.), and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. *Brown v. Clement Co.,* 217 N. C., 47, 6 S. E. (2d), 842; *Gurganus v. McLawhorn,* 212 N. C., 397, 193 S. E., 844; *Booker v. Highlands,* 198 N. C., 282, 146 S. E., 68; *Lumber Co. v. Pemberton,* 188 N. C., 532, 125 S. E., 119. In the instant case the defendants filed no exception to the referee's report and waived their right to ask for jury trial. However, the plaintiff preserved this right and a jury trial was had. It is true the trial by jury in such case is restricted by the statute (C. S., 573) to the written evidence taken before the referee (*Makely v. Montgomery,* 158 N. C., 589, 73 S. E., 999), but the competency, in proper cases, of written depositions for the production of proof in civil actions is unquestioned. C. S., 1809. In such cases, it sufficiently complies with the constitutional mandate if the testimony was taken under oath in the manner prescribed by law, with opportunity to cross-examine. The right accorded the defendant in a criminal prosecution to confront the witnesses against him does not apply to civil actions. Art. I, sec. 11, Const. N. C.

Whether the reference was within the purview of C. S., 573, is not presented as the defendants did not move to strike out the reference, but on the contrary moved to confirm the report and excepted to the court's denial of their motion. *Reynolds v. Morton,* 205 N. C., 491, 171 S. E., 781; *Brown v. Clement,* 217 N. C., 47, 6 S. E. (2d), 842. That the plaintiff's evidence was sufficient to withstand a motion for nonsuit was decided in a former appeal. *Chesson v. Container Co.,* 215 N. C., 112 (114), 1 S. E. (2d), 357.

We conclude that there was no error in the trial below which would warrant another trial of this case.

PLAINTIFF'S APPEAL.

The only exceptions brought forward by the plaintiff in his assignments of error relate to the judge's charge to the jury on the issue of damages. From an examination of the charge on this phase of the case, we are left with the impression that the instructions to the jury were free from error, and that the plaintiff has no just ground of complaint.

On defendants' appeal: No error.

On plaintiff's appeal: No error.

STATE v. CHARLIE DAVIS, JR.

(Filed 22 September, 1943.)

1. Homicide §§ 4b, 5, 16—

The intentional use of a deadly weapon in a homicide imports malice and raises a rebuttable presumption of murder in the second degree, placing the burden upon the defendant to show such circumstances as may reduce the crime to manslaughter, or entitle him to an acquittal.

2. Homicide §§ 1, 16, 25—

When the intentional use of a deadly weapon, in an unlawful manner, is admitted or proven and, as a result of such unlawful use, an innocent bystander is killed, nothing else appearing, it is murder.

3. Homicide §§ 16, 25—

Where no admission is made or presumption raised, calling for an explanation or reply on the part of the defendant, the plea of not guilty challenges the credibility of the evidence, even if uncontradicted, since there is a presumption of innocence which can only be overcome by a verdict of the jury.

4. Homicide §§ 27a, 27d—

In a homicide case, where the defendant offered no evidence and the State's evidence showed an intentional and unlawful killing with a deadly

weapon, without mitigating circumstances which would reduce the offense to manslaughter or entitle defendant to an acquittal, there is no error in a charge that, if the jury believe the testimony and find the facts, beyond a reasonable doubt, to be as all the witnesses testified, it is their duty to bring in a verdict of murder in the second degree.

APPEAL by defendant from *Burgwyn, Special Judge*, at February Term, 1943, of PASQUOTANK.

Criminal prosecution upon indictment charging the defendant with the murder of Elijah Spence.

About 11:30 o'clock on the night of 5 September, 1941, the defendant and one George Spence, brother of deceased, were fighting inside of and then in front of Wiley Skinner's place of business on Ehringhaus Street, in Elizabeth City, when one Nelson Bass approached with a pistol. Bass told George Spence to stop or he would shoot him. The defendant told Bass that if he would not shoot Spence to give him the gun and that he, the defendant, would shoot him. While Bass and the defendant were arguing, Spence ran to the lunchroom of his father, which was about a block away. At the time the lunchroom was occupied by Alonzo Spence, father of the deceased, Elijah Spence the deceased, and a Mr. Thomas. George Spence came into the lunchroom and entered a bedroom adjacent thereto. Immediately thereafter the defendant and two other boys entered the lunchroom. The defendant fired three shots, wounding Alonzo Spence and killing Elijah Spence.

The defendant immediately left for Norfolk, Va., and was not apprehended until the latter part of January, 1943. After he was arrested, according to the evidence, he made the following statement to the chief of police of Elizabeth City, to wit: "He and George had been having lots of trouble every time they got together; that that night prior to the shooting that he and George had had a fight and he went in with the intention of hitting George, but did not intend to shoot Elijah. That it was an error on his part in shooting Elijah."

Verdict: Guilty of murder in the second degree. Judgment: Defendant be imprisoned in the State Prison for a period of not less than seventeen years nor more than twenty years. Defendant appeals to the Supreme Court, assigning errors.

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

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

DENNY, J. Defendant's first exception is to the following portion of his Honor's charge: "The law of this State is, that when a killing occurs with a deadly weapon, and I charge you a pistol is a deadly weapon, the

law presumes malice, and an unlawful killing with malice is murder in the second degree, and when that is established to the satisfaction of the jury beyond a reasonable doubt, the prisoner at the bar would be guilty of murder in the second degree unless he offers testimony himself or the jury can find from the testimony offered against him facts and circumstances that would relieve the crime of murder and thus reduce it to manslaughter."

The defendant's objection is addressed to the failure of the court to charge the jury that it is the intentional killing of a human being with a deadly weapon which raises the presumption of malice. In the case of *S. v. Burrage, ante,* 129, 25 S. E. (2d), 393, cited in support of defendant's contention, it is properly held that where a defendant is on trial under an indictment for murder, and contends and offers evidence tending to show that he did not intend to kill the deceased but that the deceased was shot in a struggle over a pistol in his hand, "failure to instruct the jury that the presumption only arises upon an admission, or the proof of the fact of an intentional killing with a deadly weapon is prejudicial error."

Justice Seawell, speaking for the Court in the case of *S. v. Debnam,* 222 N. C., 266, 22 S. E. (2d), 562, said: "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." In the instant case the defendant offers no testimony in mitigation of the charge against him. The evidence shows that his use of a deadly weapon was intentional, and the fact that he said he intended to shoot George Spence and not the deceased does not enhance his position in the eyes of the law. Where the intentional use of a deadly weapon in an unlawful manner is admitted or proven and as a result of such unlawful use an innocent bystander is killed, nothing else appearing, it is murder. *S. v. Lilliston,* 141 N. C., 857, 54 S. E., 427. See also *S. v. Utley, ante,* 39, 25 S. E. (2d), 195, and the cases there cited. This exception cannot be sustained.

The second exception is to the following portion of his Honor's charge: "I charge you if you believe the testimony and find the facts to be as all the witnesses testified to, beyond a reasonable doubt, it would become your duty to find the defendant guilty of murder in the second degree."

Stacy, C. J., said in *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846: "It is error for a trial judge to direct a verdict in a criminal action, where there is no admission or presumption calling for an explanation or reply on the part of the defendant." *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663. Where no admission is made or presumption raised, calling

for an explanation or reply on the part of the defendant, the plea of not guilty challenges the credibility of the evidence, even if uncontradicted, since there is a presumption of innocence which can only be overcome by a verdict of the jury. *S. v. Hill,* 141 N. C., 769, 53 S. E., 311; *S. v. Riley,* 113 N. C., 648, 18 S. E., 168.

Here the defendant offered no evidence, and the State's evidence shows no mitigating circumstances which would reduce the offense to manslaughter or entitle the defendant to an acquittal. On the other hand, the evidence shows the defendant intentionally and unlawfully killed the deceased with a deadly weapon, which raises the presumption of malice, and, nothing else appearing, constitutes murder in the second degree. On the evidence as disclosed by the record in this case, we do not think the instruction complained of unduly invaded the province of the jury. The jury was left free to accept or reject the evidence, but instructed as to their duty should they believe the testimony and find the facts to be as testified to by all the witnesses, beyond a reasonable doubt. *S. v. Riley, supra.*

No error.

STATE v. WILLIAM VICKS.

(Filed 22 September, 1943.)

1. Criminal Law § 53a: Trial § 29a—

A charge to the jury must be considered contextually.

2. Rape § 1c—

In a criminal prosecution for rape, the court charged the jury that if the State's evidence satisfied them beyond a reasonable doubt that defendant had carnal knowledge of prosecutrix, by force and violence, against her will, it would be their duty to return a verdict of guilty, but should such evidence fail to so satisfy them, then they need not find defendant guilty of rape, where in other parts of the charge the jury was definitely instructed not to convict of rape if not so satisfied, there is no error.

3. Criminal Law § 41b: Evidence § 22—

Permission for the solicitor to cross-examine a State's witness, in a criminal prosecution, is within the sound discretion of the court.

4. Appeal and Error § 38: Trial § 36—

Where the court, at the time testimony is withdrawn, definitely instructs the jury not to consider same, there is a presumption on appeal that the jury obeyed such instruction, unless prejudice appears or is shown by appellant, on whom the burden rests.

5. Rape § 1d—

Positive testimony of rape by prosecutrix is sufficient to carry the case to the jury, even when her evidence is denied by defendant, and nonsuit under C. S., 4643, properly denied.

APPEAL by defendant from *Bone, J.*, at March Term, 1943, of CHOWAN. No error.

This was a criminal action wherein the defendant was charged with rape upon his fourteen-year-old daughter.

The State offered the testimony of the prosecutrix, Ola Dean Vicks, to the effect that the defendant struck her several times on the head, knocked her down, and while she was prostrate on the floor, forcibly and against her will inserted his private parts into her private parts. There was adminicular evidence from other witnesses.

The defendant was the only witness in his own behalf, and denied that he struck and knocked down the prosecutrix, and denied that he inserted or attempted to insert his private parts into her private parts, and testified that the most he did was to slap the prosecutrix, his daughter, for disobedience, which angered her.

From sentence of death predicated upon a jury verdict of guilty of rape the defendant appealed, assigning errors.

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

Herbert Leary for defendant, appellant.

SCHENCK, J. The appellant reserved exception, and sets out the same in his brief, to an excerpt from the charge of the court as follows: "But if the State has, by evidence, satisfied the jury beyond a reasonable doubt that this defendant had carnal knowledge or sexual intercourse, the two terms being synonymous, with the prosecutrix, and that he accomplished it by force and violence, and against her will, it would be your duty to return a verdict of guilty of rape, as charged in the bill of indictment. If the evidence of the State fails to so satisfy you then you need not find him guilty of rape, and it would be your duty to consider the question of his guilt or innocence upon one of the lesser offenses which I have already mentioned and concerning which I will instruct you further in a few moments."

The words principally assailed in the appellant's brief are "then you need not find him guilty of rape." It being the contention of the appellant that the court should have used instead of these words language to the effect that "it would be your duty to return a verdict of not guilty of the charge of rape." If the words assailed were standing alone there

would be more force to the exception, but when they are read in connection with the rest of the charge, as they must be, we find no error therein.

The court was charging the jury as to the different verdicts they could render, namely, guilty of rape as charged in the bill of indictment, guilty of an assault with intent to commit rape, guilty of an assault upon a female, and not guilty. The instruction given in the charge is to the effect that if the jury should fail to find the defendant guilty of rape as charged in the bill of indictment then it would become their duty to consider the question of his guilt or innocence of the lesser offenses of an assault with intent to commit rape or an assault upon a female. Therefore, when the court used the words "and it would then become your duty to consider the question of his guilt or innocence upon one of the lesser offenses," it was tantamount to charging the jury that if the evidence failed to satisfy them beyond a reasonable doubt of the essential elements of rape, they would acquit the defendant of that charge, and any lack of positiveness that may have arisen, or any option that may have appeared to have been given by the phrase "you need not find him guilty of rape" was destroyed.

The instruction is clarified in slightly different language later on in the charge as follows: "If you find from the evidence and beyond a reasonable doubt that he had carnal knowledge, that is the defendant, had carnal knowledge of his daughter, Ola Dean Vicks, forcibly and against her will as already defined to you by the court it would be your duty to return a verdict of guilty of rape as charged. If you do not so find and have a reasonable doubt about it then you should not convict him of rape, but you should then consider the question as to whether he is guilty of any lesser offense, and if you come to consider his guilt or innocence of some lesser offense then you should determine whether he is guilty of an assault with intent to commit rape or not."

When the whole charge is considered contextually it is definite and leaves the jury no option to convict the defendant of rape if the evidence failed to satisfy them beyond a reasonable doubt of each of the essential elements of the offense. The charge must be considered contextually. *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821; *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Meares,* 222 N. C., 436, 23 S. E. (2d), 311; *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Grass, ante,* 31, 25 S. E. (2d), 193; *S. v. Utley, ante,* 39, 25 S. E. (2d), 195.

The exception of the defendant to the court's permitting the solicitor to cross-examine a State's witness is untenable, such permission being vested in the sound discretion of the court, *In re Will of Williams,* 215 N. C., 259, 1 S. E. (2d), 857; and for the further reason that such testimony was ultimately withdrawn from consideration of the jury by the court, *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260.

The exception that the court failed in its general charge to instruct the jury not to consider the withdrawn testimony is untenable for the reason that the court definitely instructed the jury at the time of the withdrawal of the testimony not to consider it. "We cannot assume that the jury disobeyed the court's instruction and considered the evidence, but we must presume the contrary, unless prejudice appears or is shown by the appellant in some way. The burden is on him to prove it." *S. v. Lane,* 166 N. C., 333, 81 S. E., 620.

The exceptions addressed to the denial of the defendant's motion to dismiss the action and for a judgment of nonsuit and not guilty, C. S., 4643, are obviously untenable, since the testimony of the prosecutrix alone was sufficient to carry the case to the jury. The credibility and weight thereof was for the jury not the court.

We have given the case the careful consideration which the gravity of its result demands, and upon the record we find

No error.

JOHN L. MORRISON v. CANNON MILLS COMPANY.

(Filed 22 September, 1943.)

Negligence §§ 5, 19a—

In an action to recover damages against defendant by plaintiff, who was an employee of a transportation company engaged in delivering caustic soda, a dangerous substance, by truck to defendant's mills, where plaintiff alleged negligence by defendant for failure to furnish him (a) a proper place to work, (b) suitable appliances, (c) and sufficient help, and plaintiff's evidence tended to show that he was unloading caustic soda from the tank on the truck to defendant's tank and the help furnished by defendant quit at his quitting time and defendant, knowing the absence of help and of proper appliances for safety, was injured while attempting alone to disconnect the hose from the truck to the tank. *Held:* (1) Defendant owed no duty to plaintiff to furnish a safe place, suitable appliances, and sufficient help; and (2) plaintiff on his own evidence, was guilty of contributory negligence; and (3) judgment of nonsuit was proper. C. S., 567.

APPEAL by plaintiff from *Nettles, J.,* at June Term, 1943, of BUNCOMBE.

This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, wherein the contributory negligence of the plaintiff is pleaded in bar of his recovery.

The allegations of the complaint are to the effect that the plaintiff was an employee of and the driver of a truck of the Southern Oil Transportation Company, which is not a party to this action, and on

11 October, 1942, drove a truck of his employer loaded with caustic soda, a dangerous substance, from the plant of the Champion Fibre Company, at Canton, North Carolina, to the plant of the defendant, the Cannon Mills Company, near Concord, North Carolina, and that after unloading the said caustic soda into the receiving tank of the defendant company from the tank of the truck of the transportation company the plaintiff undertook to disconnect the hose of the truck from the pipe of the receiving tank and was injured by caustic soda being blown back upon his body, more especially in his eyes.

In the plaintiff's brief he states that "The plaintiff contended that the proximate cause of his injuries was the negligent failure of the defendant to furnish him (a) a suitable and proper place in which to work, (b) suitable and proper appliances and equipment with which to work, and (c) sufficient help and assistance to assure the proper and safe performance of the work required to be done by him."

The answer of the defendant contains, *inter alia,* the allegation that the plaintiff was contributorily negligent in that he "negligently and carelessly undertook to perform said disconnecting operation by himself" and that all of the injury which the plaintiff suffered "was proximately caused or contributed to by the negligent way and manner in which the plaintiff, of his own motion and by himself, undertook to make the disconnecting operation, with full knowledge of the way and manner in which it could be safely done, obtained from past experience in performing the identical operation."

When the plaintiff had introduced his evidence and rested his case the defendant moved to dismiss the action and for a judgment as in case of nonsuit (C. S., 567), which motion was allowed, and from judgment predicated upon this ruling the plaintiff appealed, assigning error.

Guy Weaver for plaintiff, appellant.

Smathers & Meekins for defendant, appellee.

SCHENCK, J. It should be noted in the outset that there was no relationship of master and servant or of employer and employee existing between the defendant, the Cannon Mills Company, and the plaintiff, John L. Morrison, and that there was no contractual relation existing between the plaintiff, or his employer, and the defendant. The plaintiff was an employee of the Southern Oil Transportation Company and was engaged in driving a truck of his employer in hauling caustic soda from Canton, North Carolina, to Concord, North Carolina. In fact, it appears from plaintiff's testimony that he has received an award from the transportation company under the Workmen's Compensation Act

based upon the injury alleged in this action. Therefore, it would appear that the defendant, the Cannon Mills Company, owed no duty to the plaintiff to furnish him either a safe place in which to work, proper appliances and equipment with which to work, or sufficient help and assistance to assure safe performance of the work.

However, entertaining the view, as we do, that the plaintiff's own evidence establishes his contributory negligence, it may be conceded, though it is not decided, that the defendant was negligent in that its employee furnished to assist in unloading the caustic soda from the tank on the truck to the receiving tank at the plant of the defendant quit the work before the unloading was completed, thereby leaving the plaintiff alone to disconnect the connecting hose and pipe of the truck and receiving tank, and in failing to provide water near-by to be used to wash off the caustic soda in the event it came in contact with the body of those engaged in the unloading, which two acts of negligence are most strongly urged in plaintiff's brief.

The plaintiff's own testimony was to the effect that the employee of the defendant informed him (the plaintiff) that he was quitting the work as quitting time had arrived and he would receive no pay for overtime, and further that the plaintiff knew that there was no water immediately available at the place where the caustic soda was being unloaded, and notwithstanding this information and knowledge of the assistant quitting the work and of the absence of water near-by, the plaintiff alone attempted to disconnect the hose of the tank of the truck from the pipe of the receiving tank and in so doing caustic soda was blown out of the hose and pipe on to him, which could not be immediately washed off, and he was thereby injured. If it was negligence on the part of the Cannon Mills Company to fail to furnish an assistant to help in the unloading of the caustic soda, a dangerous undertaking, or if it was negligence on the part of the Cannon Mills Company to fail to have water near-by the place of unloading, and these two derelictions were both known to the plaintiff, and, notwithstanding this knowledge, he undertook alone the task of unloading, his action in so doing manifested a failure to use due care for his own protection in the performance of hazardous work, the danger of which was known to him, and constituted negligence that contributed to the plaintiff's injury, and such being the case, under the decisions of this Court, the action was properly dismissed and the judgment as in case of nonsuit was properly entered.

The judgment of the Superior Court is

Affirmed.

INDUSTRIAL BANK OF ELIZABETH CITY, N. C., v. RESOLUTE FIRE INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND.

(Filed 22 September, 1943.)

1. Insurance §§ 21, 22d—

In an action by plaintiff to recover on a fire insurance policy, with loss payable clause to plaintiff, as mortgagee, and resisted under provision making policy void for failure to give ownership, when other than sole and unconditional, where the existence of another mortgage at the time of issuance of policy does not affirmatively appear, judgment of nonsuit was erroneous.

2. Same—

Under fire insurance policy providing that policy shall be void for failure to give ownership, when other than sole and unconditional, the existence of an undisclosed mortgage on the insured property, would seem to vitiate the policy or relieve the company from liability thereunder, except as to any lien, mortgage, or other encumbrance specifically set forth therein as required by the policy.

3. Evidence § 15: Trial § 23: Insurance § 25c—

Discrepancies and contradictions in plaintiff's evidence (here whether or not suit was brought within the time specified in an insurance policy) are for the jury, and not for the court.

APPEAL by plaintiff from *Bone, J.*, at June Term, 1943, of PASQUOTANK.

Civil action to recover on a policy of insurance.

The record discloses that on 6 January, 1941, the defendant issued a policy of insurance on a Plymouth automobile protecting it against fire and lightning, the loss, if any, being made payable to the assured, Clarence Griffin, Jr., and the Industrial Bank of Elizabeth City, as its interest may appear. The interest of the Industrial Bank, at the time of the execution of the policy, was that of mortgagee to the extent of $225.40, and at the time of loss this had been reduced to $129.40.

The contract of insurance contains the following pertinent provisions:

1. "This entire policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof."

2. "Unless otherwise provided by agreement in writing added hereto, and except as to any lien, mortgage, or other encumbrance specifically set forth and described in paragraph D of this policy, this company shall not be liable for loss or damage to any property insured hereunder while subject to any lien, mortgage or other encumbrance."

3. "Except as to any lien, mortgage, or other encumbrance specifically set forth and described in paragraph D of this policy, this entire policy

shall be void unless otherwise provided by agreement in writing added hereto, if the interest of the assured in the subject of this insurance be or become other than unconditional and sole lawful ownership."

4. "No suit or action on this policy . . . shall be sustainable . . . unless commenced within twelve (12) months next after the happening of the loss."

The plaintiff's mortgage is specifically set forth and described in paragraph D of the policy.

On 6 January, 1941, another mortgage was given on the Plymouth automobile in question to secure a note of $38.00, payable to F. Webb Williams. This mortgage was registered 14 June, 1941.

It is in evidence that the subject of the insurance was destroyed by fire some time between June and October, 1941. The plaintiff's action was commenced 29 September, 1942.

From judgment of nonsuit entered at the close of plaintiff's evidence, the plaintiff appeals, assigning errors.

M. B. Simpson for plaintiff, appellant.

J. Kenyon Wilson for defendant, appellee.

STACY, C. J. Three questions are to be answered in determining the correctness of the nonsuit.

In the first place, while the plaintiff's mortgage, the policy in suit and the Williams mortgage all bear date 6 January, 1941, it does not affirmatively appear that the Williams mortgage was in existence at the time of the issuance of the policy. Hence, on demurrer to the evidence, the question of concealment or misrepresentation concerning this mortgage would seem to be for the jury. *Wells v. Ins. Co.*, 211 N. C., 427, 190 S. E., 744.

Secondly, as no provision was made by agreement in writing added to the policy for the Williams mortgage, its existence at the time of the loss would seem to vitiate the policy or relieve the defendant from liability thereunder, except as to any lien, mortgage, or other encumbrance specifically set forth and described in paragraph D of the policy. *Roper v. Ins. Co.*, 161 N. C., 151, 76 S. E., 869. The plaintiff's mortgage is so described in paragraph D of the policy which brings it within the exception, and is therefore not affected by the Williams mortgage. *Bank v. Assurance Co.*, 188 N. C., 747, 125 S. E., 631. Indeed, the exception appears to have been made for the benefit of the plaintiff. *Dixon v. Horne*, 180 N. C., 585, 105 S. E., 270.

Thirdly, the evidence is equivocal as to whether suit was commenced within twelve months next after the happening of the loss. This makes

it a matter for the twelve. *Dozier v. Wood,* 208 N. C., 414, 181 S. E., 336. Discrepancies and contradictions, even in plaintiff's evidence, are for the jury, and not for the court. *Shell v. Roseman,* 155 N. C., 90, 71 S. E., 86.

The evidence which makes for the plaintiff's claim appears to be sufficient to overcome the demurrer.

Reversed.

STATE v. WILLIE PRINCE.

(Filed 22 September, 1943.)

1. Homicide §§ 4b, 5, 16—

The intentional killing of a human being with a deadly weapon implies malice and raises a rebuttable presumption of murder in the second degree.

2. Homicide §§ 16, 27a, 27d—

In a homicide case, where proofs or admissions have raised a presumption of murder in the second degree, the law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury—the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident or misadventure; and a charge that proof "to the satisfaction of the jury" requires a stronger intensity and higher degree of proof than what is described as proof "by the greater weight of the evidence" is erroneous and entitles defendant to a new trial.

APPEAL by defendant from *Blackstock, Special Judge,* at March Term, 1943, of SWAIN.

Criminal prosecution upon an indictment charging defendant with murder of one Clarence Cable.

In the trial court the defendant entered plea of not guilty and relied upon a plea of self-defense.

On the call of the case for trial the solicitor for the State announced in open court that the State would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter, as the facts may warrant.

Verdict: Guilty of murder in the second degree.

Judgment: Confinement in State Prison for a term of not less than 20 nor more than 25 years.

The defendant appeals to the Supreme Court and assigns error.

STATE *v.* PRINCE.

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

B. C. Jones, R. B. Morphew, and R. L. Phillips for defendant, appellant.

WINBORNE, J. Portions of the charge to the jury, to which assignments of error 7 and 8 are directed and well taken, affect substantial right of defendant and exceptions thereto entitle him to a new trial.

It appears in the record on appeal that the court, after charging the jury with respect to the presumptions arising upon the admission or proof of an intentional killing of a human being with a deadly weapon, properly charged that upon such admission or proof the burden is upon the defendant to show to the satisfaction of the jury facts and circumstances sufficient to excuse the homicide or to reduce it to manslaughter. *S. v. Capps,* 134 N. C., 622, 46 S. E., 730; *S. v. Quick,* 150 N. C., 820, 64 S. E., 168; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541; *S. v. Sheek,* 219 N. C., 811, 15 S. E. (2d), 282, and numerous other cases. Then, after stating that to meet this burden defendant is not required to prove beyond a reasonable doubt the facts upon which he relies in excuse or mitigation of the homicide, and after defining reasonable doubt, the court continued with the portions to which the above exceptions relate as follows: "But the defendant does not meet the requirement of the law when he satisfies the jury merely by the greater weight of the evidence of the truth of the facts he relies on in mitigation, justification or excuse. By the greater weight of the evidence is meant simply evidence that is of greater or superior weight, or evidence that is more convincing, or evidence that carries greater assurance than that which is offered in opposition thereto." Exception No. 7. And "our court has said that the phrase 'to the satisfaction of the jury' is considered to bear a stronger intensity of proof than that 'or by the greater weight or preponderance of the evidence.' So to prove a fact or facts to the satisfaction of the jury requires a higher degree of proof and signifies something more than a belief founded on the greater weight of the evidence, but does not require as high a degree or as strong an intensity of proof as proof beyond a reasonable doubt." Exception No. 8.

The intensity of the proof required is that the jury must be satisfied. Even proof by the greater weight of the evidence may be sufficient to satisfy the jury. Hence, the correct rule as to the intensity of such proof is that when the intentional killing of a human being with a deadly weapon is admitted, or is established by the evidence, "the law then casts upon the defendant the burden of proving to the satisfaction of the

jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury . . . the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident or misadventure." *S. v. Benson,* 183 N. C., 795, 111 S. E., 869.

However, there may be found in the opinions of the Court statements which if lifted from the context may support the charge as given, but when such statements are considered contextually the rule as generally stated requires that if there be evidence sufficient for the consideration of the jury, of which the court shall be the judge, the intensity of such evidence must be "simply to the satisfaction of the jury," of which the jury alone is the judge.

It is not deemed necessary to deal with other exceptions which may not recur on another trial.

New trial.

STATE v. WILLIAM HENRY POOLE.

(Filed 22 September, 1943.)

Criminal Law § 80—

In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the court, the motion of the Attorney-General to docket and dismiss, under Rule 17, is allowed.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the February Term, 1943, Pasquotank Superior Court, the defendant herein, William H. Poole, was tried upon indictment charging him with the murder of one Andrew Jackson Sawyer, which resulted in a conviction of "murder in the first degree," and sentence of death as the law commands on such verdict.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court. The clerk certifies that "no case on appeal has been filed in my office and there has been no request for transcript of the record either by the defendant or his counsel, and therefore the appeal has not been perfected."

The time for bringing up the case on appeal has expired, and in the absence of any apparent error, which the record now before us fails to disclose, the motion of the Attorney-General to docket and dismiss 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.

J. E. BATTLE v. SOUTHERN RAILWAY COMPANY, MRS. MARGARET COLVILLE, ADMINISTRATRIX OF J. L. COLVILLE, AND W. S. LACKEY.

(Filed 22 September, 1943.)

Negligence § 10—

In an action against a railroad to recover damages for personal injuries to plaintiff, a licensee, the doctrine of last clear chance does not apply unless such licensee is apparently in a helpless condition upon the railroad track, since otherwise the engineer has the right to expect, up to the moment of impact, that he will leave the track in time to avoid the injury.

APPEAL by plaintiff from *Blackstock, Special Judge,* at May Term, 1943, of JACKSON.

Stillwell & Stillwell and Don C. Young for plaintiff, appellant.

W. T. Joyner and Jones, Ward & Jones for defendants, appellees.

PER CURIAM. This is an action against the Southern Railway Company and its employees for personal injuries to the plaintiff alleged to have been caused by the negligent failure of the defendants to avail themselves of the last clear chance to avoid running a train over the plaintiff while in a helpless condition on the railroad track of the corporate defendant.

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

Since we are of the opinion, and so hold, that there was not sufficient evidence to be submitted to the jury of the plaintiff being down or in an apparently helpless condition on the track, so that the engineer or fireman saw, or, by the exercise of ordinary care in keeping a proper lookout, could have seen such helpless condition of the plaintiff in time to have stopped the train before striking him, there was no error in the ruling of the court, and the judgment as in case of nonsuit was properly

entered. The doctrine of last clear chance does not apply in cases of this nature unless the licensee upon a railroad track is in an apparently helpless condition, since otherwise the engineer has the right to expect up to the moment of impact that he will leave the track in time to avoid injury. *Justice v. R. R.*, 219 N. C., 273, 13 S. E. (2d), 553; *Mercer v. Powell*, 218 N. C., 642, 12 S. E. (2d), 227.

The judgment is

Affirmed.

G. H. VALENTINE, EXECUTOR OF THE ESTATE OF CHARLES TREADWELL TRASK, DECEASED, v. EDWIN GILL, COMMISSIONER OF REVENUE.

(Filed 29 September, 1943.)

1. Statutes § 5a—

The whole Revenue Act of 1939 and all of its parts are to be considered *in pari materia*, and construed accordingly.

2. Same—

The Revenue Act of 1939, ch. 158, sec. 933, gives the Commissioner of Revenue the power to construe the said Act and such construction will be given due consideration by the courts, although it is not controlling.

3. Taxation § 18—

The inheritance tax of the 1939 Revenue Act is not a tax on the property, but on the transfer of the property; and, while there must be an identity of the property, which is the subject of the transfer and claimed to be recurrently taxed, to qualify for the exemption provided in sec. 12, the exemption is allowed only to the transferees as set out in secs. 3 and 4.

4. Same—

The exemptions from recurrent inheritance taxes within two years, allowed under sec. 12 of the Revenue Act of 1939, are applicable only to immediate current transfers of property upon which the tax is imposed; and the relationship as set out in secs. 3 and 4 must exist between the transferee and the immediate decedent from whom the property has been received.

5. Same—

Where inheritance taxes, under the Revenue Act of 1939, are paid on property passing from a wife's estate to her husband, who dies within less than two years thereafter leaving the same property to a sister of his deceased wife, a second inheritance tax must be paid thereon.

APPEAL by plaintiff from *Alley, J.*, at March Term, 1943, of HENDERSON.

This is a "controversy without action" submitted under authority of sections 626, 627, and 628 of the Consolidated Statutes, and heard by

consent of parties by Judge Felix E. Alley, without a jury, at the March, 1943, Term of Henderson Superior Court. It is brought here by the plaintiff's appeal from the judgment therein rendered.

The controversy concerns the validity of an inheritance tax imposed by Article 1, section 1, of the Revenue Act of 1939—chapter 158, Public Laws of 1939—on a transfer of property coming into the hands of the plaintiff, executor under the will of Charles Treadwell Trask, with respect to a devise and bequest to Carrie A. Marsh, sister of the deceased wife of the testate.

The facts essential to an understanding of the appeal are as follows:

On 3 March, 1939, Kathleen M. Trask died intestate, leaving her husband, Charles Treadwell Trask, her sole distributee, and under the law, entitled to all her personal property remaining for distribution after settling the estate. He thus acquired from the estate of his wife net assets in the sum of $9,849.30, part of which was paid to him during his lifetime, and part of which was paid to his executor by the administrator of his wife's estate. The inheritance tax upon this transfer was duly paid.

On 8 February, 1940, the said Charles Treadwell Trask died, leaving a last will and testament in which, after providing for two small legacies, he left the remainder of his property to Carrie A. Marsh, sister of his late wife. It is agreed that the amount of the residuary bequest to Carrie A. Marsh is $7,840.80, and that it was part of the property acquired by Trask from the estate of his wife in the manner above described. Upon this transfer to Carrie A. Marsh, the defendant Commissioner of Revenue demanded the inheritance tax which he conceived to be imposed by the above cited provisions of the Revenue Act. The plaintiff executor paid the tax under protest, demanded its refund in apt time, and brought this action for its recovery. Revenue Act, section 936. The actual recovery demanded by the plaintiff is in the sum of $617.96—since it is admitted that the legacies provided in the will constituted taxable transfers. The amount named is the tax computed on the value of the assets acquired by Trask from his wife's estate and bequeathed to Carrie A. Marsh, his deceased wife's sister.

From a judgment of the court below upholding the tax, plaintiff appealed, assigning error.

G. H. Valentine for plaintiff, appellant.

Attorney-General McMullan and Assistant Attorney-General Adams for defendant, appellee.

SEAWELL, J. Section 1 (Article 1) of the Revenue Act—chapter 158, Public Laws of 1939—imposes an inheritance tax upon transfers of

property at a scheduled rate, applicable to the classes named, as set out in sections 3, 4, and 5, respectively, designated as Classes A, B, and C. We are more immediately concerned with sections 3 and 4, certain provisions of which are by reference incorporated in section 12. The latter section exempts from recurring taxes within two years under the conditions therein named. It is as follows:

"SEC. 12. RECURRING TAXES.—Where property transferred has been taxed under the provisions of this article, such property shall not be assessed and/or taxed on account of any other transfer of like kind occurring within two years from the date of the death of the former decedent: Provided, that this section shall apply only to the transferees designated in Sections three and four of this article."

By the proviso in this section the exemption is limited to transferees designated in sections 3 and 4 of the statute, and to this we must look for their definition. Section 3 designates certain Class A beneficiaries, who are defined as lineal issue or lineal ancestor, or husband or wife of the person who died possessed of such property, or stepchild of such person, or child adopted by the decedent according to applicable law. The transferees designated in section 4 as Class B beneficiaries are defined as follows: The brother or sister, or descendant of either, or the uncle or aunt by blood of the person who died possessed. There is a further class, C, consisting of strangers to the blood, which is mentioned here only in connection with what we may further have to say as to the policy of the law.

Carrie A. Marsh, the residuary beneficiary under the will of Trask, is the sister of Kathleen M. Trask, from whom the property was derived through the succession of Trask under the intestate laws during the two-year period, but is a stranger to Trask, from whom she received the property, with respect to any relationship mentioned in sections 3 and 4 as conditions necessary to the exemption. The taxability of the transfer under the will, therefore, depends on whether she must rely for the exemption on a relationship to Trask, the decedent from whom she received the property, or may be permitted to establish such relationship with Kathleen M. Trask, from whom the property was mediately derived. This resolves itself substantially into the question: What decedent does the statute intend to designate as "the person who died possessed" of the property, as used in sections 3 and 4? Does it mean *any* person who may have died possessed during the two-year period, or does it refer only to the decedent concerned with the transfer sought to be taxed?

If the statute under consideration were doubtful or equivocal in its significance, there might be more need to rely upon the rules of construction presented to us by the contending parties. In terms the

Revenue Act gives to the Commissioner of Revenue the power to construe the law—section 933—and such construction will be given due consideration by the courts, although it is not controlling. *Reade v. Durham,* 173 N. C., 668, 92 S. E., 712; *Commissioners v. Board of Education,* 163 N. C., 404, 408, 79 S. E., 886. It is pointed out by the defendant Commissioner that it has been so construed as to make the tax applicable under the facts of this case; that this construction has had the approval of the Attorney-General in an advisory opinion, controlling upon the Department until reversed or modified by court action; and that it has been uniformly followed in the administration of the law and presumably acquiesced in by the Legislature, which has not seen fit to make any modifying amendment. *Robertson v. Downing,* 127 U. S., 607, 32 L. Ed., 269; *Helvering v. Winmill,* 305 U. S., 79, 82 L. Ed., 52; *Powell v. Maxwell,* 210 N. C., 211, 186 S. E., 326; *Cannon v. Maxwell,* 205 N. C., 420, 171 S. E., 624; *Hannah v. Board of Commissioners,* 176 N. C., 395, 97 S. E., 160; *Commissioners v. Board of Education, supra; Gill v. Commissioners,* 160 N. C., 176, 76 S. E., 203. The defendant further points out that the exemption sought under section 12 is in the nature of an exception to the general taxing provisions of the statute—section 1 of this article—and that the burden rests upon the plaintiff to show that the beneficiary of the estate he represents is qualified for the exemption by bringing her within these exceptive provisions of the law, strictly construed. *Odd Fellows v. Swain,* 217 N. C., 632, 9 S. E. (2d), 365; *McCanless Motor Co. v. Maxwell,* 210 N. C., 725, 188 S. E., 389; *Stedman v. Winston-Salem,* 204 N. C., 203, 205, 167 S. E., 813. All of which must be conceded. On the other hand, the plaintiff urges upon us that the incidence of the law upon the party and property taxed, and the consequences of its enforcement, must be considered in construing it; and if we should conceive the Act as having two possible meanings with reasonable doubt as to which was intended, this, too, is within recognized rules of interpretation. *Trust Co. v. Young,* 172 N. C., 470, 90 S. E., 568; *S. v. Johnson,* 170 N. C., 685, 86 S. E., 788; *Tax Commission v. Harrington,* 126 Md., 157, 94 A., 537. Thus, the plaintiff contends that the construction placed upon the law by the Commissioner has resulted in bringing about a recurrent taxation within the two-year period on the transfer of property actually derived, although mediately, from a sister of the beneficiary, which it is contended is against the spirit of the law, contrary to its policy, and an event which section 12 of the Revenue Act, properly construed, was intended to prevent.

We think, however, that we need hardly go much further than the grammatical construction and syntax of the law to find its meaning.

The categories of relationship named in sections 3 and 4 are stated with that precision which is necessary to a taxing measure, and are both inclusive and exclusive, and are controlling in applying the exemption. To qualify for the exemption there must, of course, be an identity of the property which is the subject of the transfer and claimed to be recurrently taxed. However, the tax is not on the property, but on the transfer; and the exemption is to the transferee. *Trust Co. v. Maxwell,* 221 N. C., 528, 20 S. E. (2d), 840; *Hagood v. Doughton,* 195 N. C., 811, 143 S. E., 841.

When there have been successive transfers of the property during the two-year period, we think there is sound reason for holding that the law intends to limit and define the exemption to the circumstances attending the immediate transfer sought to be taxed, and to limit the transferee claiming the exemption to the relationship existing between such transferee and the decedent from whom the estate is received—such transferee must be a Class A or Class B beneficiary of such decedent.

The whole Revenue Act, of which section 12 and its inclusive references are a part, has a connotation of application to the current transfer upon which the tax is imposed—and all of its parts are to be considered *in pari materia.* This is particularly true of sections 3 and 4, which are more definitely expressive of the general intent of the exempting section 12. There the significant terms referred to in section 12 are connected with other matters too obviously concerned with the current transfer to be ignored—the classifications and applied rates. So connected, the term "person who died possessed of the property," nothing else appearing, would leave no doubt that it had reference to the immediate transfer. We cannot see that it is further generalized by anything we find in section 12. Each of the terms incorporated in section 12 by reference to sections 3 and 4 have, by their syntax, the same connotation—*noscitur a sociis.*

If it were necessary to invoke any policy to sustain the construction of the statute, which we regard as unambiguous, we think it may be found in the Act itself. Radical differences in the rate of the tax imposed are observed between Classes A, B, and C—proceeding from those most intimately related by consanguinity and domestic ties, through the class less closely related, down to utter strangers. It is not remarkable that this policy should be reflected when we come to total exemption from recurrence of the tax within the two-year period. The Act reflects the same philosophy which underlies the statutes of descent and distribution. It recognizes in the decedent the privilege of disposition of his property; and, if not the moral and social obligations which rest upon him with respect to its exercise, yet, indeed, the fitness of his provision for those more closely related to him by consanguinity or marital ties. This

privilege may be exercised either by testamentary disposition or by leaving his property to be distributed under the law—which he may find to be in accord with his desire; as, indeed, public policy, as reflected in the statutes of descent and distribution when that desire is left unexpressed, is in substantial agreement with a natural, voluntary distribution. There is, therefore, a sound basis for the exemption provided in the Act when we confine it to the immediate transaction—none at all when we extend it to more remote transfers which do not contemplate the adventitious transfer to a person who happens to be related within the categories prescribed in the Act to a former decedent from whom the property is derived.

It cannot be denied that there is a relationship between all of the parties to this transaction, which has a moral appeal. In the exercise of its prerogative the Legislature might have extended the exemption to cover the facts and circumstances of this case; but it has not done so, and we cannot amend the law—nor do we suggest that the Legislature has been unwise in the exercise of its discretion. Simply stated, the bequest to Carrie A. Marsh is taxable because of her want of relationship to the testator within the categories named in the exemptive provisions of the law.

The judgment of the court below is

Affirmed.

JESSIE FROY FRANCIS v. W. B. FRANCIS AND MARSHALL FRANCIS, ADMINISTRATORS OF J. J. FRANCIS, DECEASED.

(Filed 29 September, 1943.)

1. Executors and Administrators § 15d: Contracts § 5—

Where certain family relationships exist, the performance of valuable services by one member of the family for another, within the unity of the family, is presumed to have been rendered pursuant to a moral or legal obligation and without expectation of compensation; but this is a presumption which may be overcome by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other.

2. Same—

The rule, that services within the family unity are presumed to be gratuitous, is not recognized in this State to such an extent as to raise the presumption against a daughter-in-law or a son-in-law.

3. Trial § 49: Appeal and Error § 37b—

The allowance or denial of a motion to set aside the verdict, on the ground of an excessive recovery, is within the sound discretion of the trial judge.

FRANCIS *v.* FRANCIS.

APPEAL by defendants from *Johnson, Special Judge,* at March Term, 1943, of NORTHAMPTON. No error.

This was an action to recover for services rendered defendants' intestate. Plaintiff's evidence tended to show that she was daughter-in-law of the decedent, lived in the home with him and performed needed personal services for him during several years preceding his death when he was in ill health following a paralytic stroke. Defendants' evidence tended to show the services were gratuitous, were in consideration of gifts to plaintiff and her husband, and were of less value than claimed.

In response to issues submitted to them the jury found that plaintiff rendered the services to defendants' intestate as alleged, and that at the time payment therefor was intended by the decedent and expected by the plaintiff. Substantial recovery was awarded.

From judgment on the verdict, defendants appealed.

Gay & Midyette for plaintiff.

Eric Norfleet, Lloyd J. Lawrence, R. Jennings White, and Russell H. Johnson for defendants.

DEVIN, J. Defendants contend that their motion for judgment of nonsuit should have been allowed, for the reason that the plaintiff was the daughter-in-law of the decedent; living with him in his home as a member of the family, and hence was under obligation to render household and personal services without additional compensation. They point out that there was no express contract to pay, and that under the circumstances the legal presumption that the services were gratuitously rendered has not been successfully rebutted.

The legal principles involved seem to have been well settled by the decisions of this Court. The general rule that the performance of valuable services for one who knowingly and voluntarily accepts the benefit thereof raises the implication of a promise to pay, is subject to the modification that, where certain family relationships exist, services performed by one member of the family for another, within the unity of the family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Keiger v. Sprinkle,* 207 N. C., 733, 178 S. E., 666. "But," said *Stacy, C. J.,* in *Nesbitt v. Donoho,* 198 N. C., 147, 150 S. E., 875, "this is a presumption which may be overcome by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other."

In the most recent case in which this question was considered, *Landreth v. Morris,* 214 N. C., 619, 200 S. E., 378, the Court declined to give

effect to the presumption of gratuitous service in a case where the services were rendered by a daughter-in-law to her father-in-law. *Justice Seawell,* delivering the opinion, uses this language: "As to the *feme* plaintiff, the daughter-in-law, we note the rule that in this State the fact of 'family unity,' of itself, is not sufficient to give rise to the presumption of gratuitous service; there must also be a certain relationship between the parties from which it may be supposed the services were referable to some moral or legal duty which the servitor recognizes as impelling. . . . It cannot be said that usage in this State recognizes the moral responsibility of a daughter-in-law, or a son-in-law, to such an extent as to raise a presumption of gratuitous service arising out of that relation. The presumption is adopted in *Callahan v. Wood, supra* (118 N. C., 752, 24 S. E., 542), repudiated in *Dunn v. Currie,* 141 N. C., 123, 53 S. E., 533; ignored in *Henderson v. McLain,* 146 N. C., 329, 59 S. E., 873; and denied in *Nesbitt v. Donoho,* 198 N. C., 147, 150 S. E., 875."

Applying those principles to the facts in the case at bar, we think there was evidence, considered in the most favorable light for the plaintiff, tending to show that plaintiff's services were, at the time, intended to be paid for by the decedent, and were rendered by the plaintiff with that expectation. The motion for judgment of nonsuit was properly denied.

The defendants assign error in the ruling of the trial court with respect to certain testimony admitted over defendants' objection and to which exceptions were noted, but from an examination of the record we find no prejudicial error in the rulings complained of. Certain questions propounded to defendants' witnesses were excluded by the court, but the record does not disclose what answers, if any, the witnesses would have made, hence no error is apparent. Defendants also assign error in the court's instructions to the jury as to the reasonable value of the plaintiff's services, on the ground that no definite basis for determining the amount was shown. We think, however, this was properly left to the jury, the particular services rendered having been described in detail by plaintiff's witnesses.

In their brief and oral argument defendants suggest error in certain other of the court's instructions to the jury, but in the absence of timely exception, or assignment of error based thereon, these questions are not properly presented for our decision.

The defendants' exception to the denial of their motion that the verdict be set aside on the ground that the recovery was excessive does not avail them on appeal to this Court, since the motion was addressed to the sound discretion of the trial judge and no abuse of discretion is suggested.

In the trial we find

No error.

STATE v. W. B. McKEON, ALIAS ARTHUR ROSSE.

(Filed 29 September, 1943.)

1. Appeal and Error § 1—

An appeal is for the purpose of correcting alleged errors of law apparent on the face of the record.

2. Appeal and Error § 5—

On a motion in arrest of judgment, made originally in the Supreme Court, it is appropriate to grant the relief, when, and only when, some fatal error or defect appears on the face of the record proper.

3. Indictment § 9: Criminal Law §§ 14, 20—

Where there is no challenge to the indictment prior to a plea of guilty, under C. S., 4606, the offense is deemed to have been committed in the county alleged in the indictment.

4. Criminal Law §§ 17, 77d—

In a criminal prosecution, where defendant entered a plea of guilty and thereafter appealed, on "an agreed case on appeal" wherein it was stated that the offense was committed in a county other than the county appearing in the indictment, this discrepancy will be disregarded, first, because it is at variance with the record, and second, because of its immateriality, as the appeal is from a judgment rendered on a plea of guilty.

APPEAL by defendant from *Parker, J.*, at May-June Term, 1943, of EDGECOMBE.

Criminal prosecution tried upon indictment charging the defendant with breaking into Sprinkle's Service Station in Edgecombe County on 30 May, 1943, and stealing therefrom money and goods of less than $20 in value, the property of Sprinkle's Service Station.

To this indictment, the defendant, a 16-year-old boy from Worcester, Mass., came into court and pleaded guilty.

Judgment: Six months on the roads, to be suspended for two years upon condition that the father of the defendant pay the costs and take the defendant back home with him.

On 11 June, 1943, the defendant served notice of appeal, and stated in the notice that the "appeal is taken because the said judgment is contrary to law and the evidence in the case."

In an "agreed case on appeal," signed by the solicitor and counsel for the defendant, it is stated that the defendant was first tried in the Recorder's Court of Rocky Mount and bound over to the Superior Court of Edgecombe County; that he was without counsel or guardian to assist him prior to entering his plea of guilty in the Superior Court and that Sprinkle's Service Station is not located in Edgecombe County, but is located in that portion of Rocky Mount which is in Nash County.

It does not appear that this last circumstance was brought to the attention of the trial court. Thereafter, following the adjournment of the May-June Term of court, the defendant's father came to Tarboro and employed counsel, who immediately gave notice of appeal.

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

H. H. Philips for defendant.

STACY, C. J. The defendant pleaded guilty to the charge as contained in the bill of indictment. There was no other plea before or after judgment in the Superior Court. The appeal is to correct alleged errors of law apparent on the face of the record. *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9; *S. v. Warren,* 113 N. C., 683, 18 S. E., 498; *S. v. Finch,* 218 N. C., 511, 11 S. E. (2d), 547; 2 Am. Jur., 987.

On motion in arrest of judgment, made initially in this Court, *S. v. Finch, supra,* it is appropriate to grant the relief, when, and only when, some fatal error or defect appears on the face of the record proper. *S. v. Black,* 216 N. C., 448, 5 S. E. (2d), 313; *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281; *S. v. Bryson,* 173 N. C., 803, 92 S. E., 698; *S. v. Turner,* 170 N. C., 701, 86 S. E., 1019. No such error or defect appears on the face of the record in the instant case. *S. v. Linney,* 212 N. C., 739, 194 S. E., 470. It is true, in the "agreed case on appeal" the offense is laid in Nash County, rather than in Edgecombe, which would be fatal if it appeared in the indictment, *S. v. Beasley,* 208 N. C., 318, 180 S. E., 598, but this discrepancy is to be disregarded, first, because it is at variance with the record proper, *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413; *Ins. Co. v. Bullard,* 207 N. C., 652, 178 S. E., 113, and second, because of its immateriality as the appeal is from a judgment rendered on a plea of guilty. *S. v. Abbott,* 218 N. C., 470, 11 S. E. (2d), 539. We are confined to the case as it was made to appear in the Superior Court.

It is provided by C. S., 4606, that in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement. *S. v. Oliver,* 186 N. C., 329, 119 S. E., 370; *S. v. Noland,* 204 N. C., 329, 168 S. E., 412. Hence, as no challenge to the sufficiency of the indictment was interposed prior to the defendant's plea of guilty, the offense is deemed to have been committed in Edgecombe County. *S. v. Ray,* 209 N. C., 772, 184 S. E., 836; *S. v. Shore,* 206 N. C., 743, 175 S. E., 116.

On the record as presented, no fatal error has been made manifest. The result, therefore, cannot presently be disturbed.

Affirmed.

JOHN A. DALTON v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 29 September, 1943.)

1. State § 2a—

A state cannot be sued in its own courts or elsewhere unless it has consented to such suit, by statutes or in cases authorized by provisions of the organic law, instanced by Art. III, Const. of U. S.; Art. IV, sec. 9, Const. of North Carolina.

2. State § 1—

The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute.

3. State § 2a: Eminent Domain §§ 6, 14—

The special proceeding, provided by C. S., 3846 (bb) and 1716, is to furnish a procedure to condemn land for a public purpose and to fix compensation for the taking thereof and does not in any way authorize an action for breach of contract.

APPEAL by respondent from *Alley, J.*, at April Term, 1943, of RUTHERFORD.

This is a special proceeding instituted under the provisions of C. S., 3846 (bb) and 1716, *et seq.*, wherein the petitioner, John A. Dalton, seeks to recover damages for the taking of his land by the respondent, the State Highway and Public Works Commission, for widening of a state highway, U. S. No. 74, near the village of Chimney Rock, in Rutherford County, and included in the items of damage alleged in the petition, by amendment, is the failure of the respondent to comply with its agreement with the petitioner, made prior to the moving of petitioner's house, to replace such house upon a good foundation in as good a condition as it was in its original state.

The following issues were submitted to the jury, and answered thereby as shown, to wit:

"1. What sum, if any, is the petitioner entitled to recover of the respondent by reason of the widening of the highway at the place in question? Answer: '$900.00.'

"2. What benefits, general or special, if any, accrued to the petitioner by reason of the widening of said highway? Answer: 'None.'

"3. Did the respondent agree to remove petitioner's residence in as good condition as it was in its original state? Answer: 'Yes.'

"4. Did respondent commit a breach of said contract, as alleged in the petition? Answer: 'Yes.'

"5. What damage, if any, is petitioner entitled to recover by reason of said breach? Answer: '$1,100.00.'"

From judgment for $2,000.00 predicated on the verdict, in favor of the petitioner the respondent appealed, assigning errors.

R. L. Whitmire and J. S. Dockery for petitioner, appellee.
Charles Ross and Ernest A. Gardner for respondent, appellant.

SCHENCK, J. The respondent objected and reserved exception to the submission of issues 3, 4, and 5, which relate to the petitioner's allegation and contention that he is entitled to recover damages for breach of contract to place petitioner's house on a good foundation in as good condition as it was in its original state, in addition to damages for the taking of his land for the widening of the highway. We are constrained to hold that this exception is well taken. The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute. *McKinney v. Highway Com.*, 192 N. C., 670, 135 S. E., 772; *Yancey v. Highway Com.*, 222 N. C., 106, 22 S. E. (2d), 256. The purpose of the special proceeding provided by C. S., 3846 (bb) and 1716, is to furnish a procedure to condemn land for a public purpose and to fix compensation for the taking thereof, and does not in any way authorize an action for breach of contract. A State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suit, by statutes or in cases authorized by provisions in the organic law, instanced by Art. III, Const. U. S.; Art. IV, sec. 9, Const. of North Carolina; *Carpenter v. R. R.*, 184 N. C., 400, 114 S. E., 693; and for the further reason, it would seem, that in a special proceeding for condemnation, being entirely statutory, a cause of action for breach of contract cannot be joined, and in such proceeding the measure of recovery is limited to the difference between the fair market value of the land before and after the taking thereof, with due allowance for general and special benefits accruing from the improvement of the highway. *Allen v. R. R.*, 102 N. C., 381, 9 S. E., 4; *Abernathy v. R. R.*, 150 N. C., 97, 63 S. E., 180.

For the error in submitting the issues to which exception was reserved the respondent is entitled to a new trial and it is so ordered.

New trial.

CLEO WILSON v. SOUTHERN RAILWAY COMPANY.

(Filed 29 September, 1943.)

Negligence § 10—

In an action for the negligent injury by defendant of plaintiff, who drove a tractor, to which were attached plows, on the railroad track of

defendant, where it stalled and plaintiff remained on the track in an attempt to get the tractor and plows across, after he had seen defendant's train approaching, until injured, judgment of nonsuit was proper on authority of *Temple v. Hawkins*, 220 N. C., 26.

APPEAL by plaintiff from *Alley, J.*, at March-April Term, 1943, of TRANSYLVANIA.

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

Evidence for plaintiff in the trial court tends to show in brief these facts: Plaintiff was injured on the morning of 18 December, 1942, when stricken by a freight train of defendant moving on its line of railroad from Hendersonville toward Brevard in the State of North Carolina at a farm road crossing over the railroad track. He was operating a tractor to which plows were attached. As he traveled along the farm road at a speed of five or ten miles per hour, and when "about 25 or 50 feet" from the railroad track at the crossing, where the track towards Hendersonville was in view for a distance of five hundred yards, plaintiff looked in that direction and no train was in sight. Thereupon, he changed "into low gear to ease the tractor across," but after the front wheels of the tractor passed over the rail of the track the plows caught against the rail. About two minutes later the train hit him. From the time plaintiff looked when "about 25 or 50 feet" from the track, and after looking in other direction, plaintiff had his head down watching the plows, and he did not again look down the railroad track in the direction of Hendersonville until he saw the train "something like ten or fifteen feet" away, after which he "started to get out and jump off" but the train hit him.

There was judgment as of nonsuit at close of evidence of plaintiff, from which he appeals to the Supreme Court and assigns error.

Edward H. McMahan for plaintiff, appellant.

W. T. Joyner and Jones, Ward & Jones for defendant, appellee.

PER CURIAM. The factual situation here is similar to that in the recent case of *Temple v. Hawkins*, 220 N. C., 26, 16 S. E. (2d), 400. The decision there, in conformity with well established principle in long line of decisions in this State, is appropriate here. Hence, under authority of that case, the judgment below is

Affirmed.

ED. N. VANCE v. E. C. GUY, D. T. VANCE, LLOYD ALDRIDGE, AND JEFF HOWELL.

(Filed 13 October, 1943.)

1. Minerals and Mines § 2: Estates § 1—

When rights to the minerals in land have been, by deed or reservation, severed from the surface rights, two distinct estates are created, and the estate in the mineral interests is subject to the ordinary rules of law governing the title to real property.

2. Minerals and Mines § 3: Adverse Possession § 17—

The presumption, that one in possession of the surface of land has also possession of the minerals, does not apply when these rights have been segregated.

3. Adverse Possession §§ 5, 9a—

Where one enters into possession of land, under a deed purporting to convey the land by definite lines and boundaries, without reservation or exception, his deed constitutes colorable title to the entire interest and estate in the land, in accordance with the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos.*

4. Adverse Possession §§ 3, 6—

Possession of real property, to be adverse, must be actual, open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership and of an intention to exercise dominion against all other claimants. Such possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible.

5. Adverse Possession § 9b—

Where one enters into possession of land, under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another.

6. Adverse Possession §§ 3, 19, 20—

Where plaintiff's evidence tends to show his actual possession of a part of a 375-acre tract of land and his continuous operation of three or four mines thereon, the question becomes one not of extent of possession but of its character, and a charge to the jury, that plaintiff's possession would depend upon the size of his operations, was error.

7. Evidence § 34—

A will, duly proven and allowed in New York according to our statute, C. S., 4152, when it appears that an exemplified copy thereof so showing has been recorded here in the county where the land lies, is admissible in evidence in the courts of this State, as a link in a chain of title.

VANCE *v.* GUY.

APPEAL by plaintiff from *Pless, J.*, at July Term, 1943, of AVERY. New trial.

Plaintiff instituted this action to establish his title to the mineral rights in a tract of land containing 375 acres, and to recover for mica alleged to have been mined and removed therefrom by the defendants. The mineral rights in 68 acres of the tract were disclaimed. The plaintiff's title to the surface rights in the land described was not controverted, but defendants alleged that the mineral rights had been by previous conveyances segregated, and that the defendants were the owners of the minerals and mineral rights in said land as evidenced by chain of conveyances from the original title owner. They denied trespassing on any property of plaintiff.

Plaintiff sought to establish his title to the mineral rights claimed by showing adverse possession under color of title for more than seven years prior to the institution of the action. In support of his contention plaintiff testified in substance that he entered into possession of the land under deed dated 5 March, 1925, which purported to convey the land to him by definite boundaries, in fee simple, without reservation. He offered evidence tending to show that at the time he acquired the land mining was being done on the land, and that these operations were continued by him, and by those who operated under his lease and who paid him royalties, up to the present time; that he continuously operated the mine known as the Branch mine, and that no other person other than his employees and lessees had mined on the land, except on the 68-acre tract. He further testified that though he moved his residence off the land in 1931 he had agents and people living on the place looking after, leasing and working the mines, and the work was continued by his employees and representatives. It was testified there was another mine on the land known as the Pittman mine operated by plaintiff's lessee Buchanan, and after the latter's death plaintiff's employees looked after the work in the mine and collected royalties, continuing until 1938 and 1939. Plaintiff testified that from another mine called Black mine some mica and feldspar were taken, after plaintiff acquired the property, and for which he received royalties. "I know somebody worked every year in the Black and Pittman mines." The amount of royalties received was sufficient to pay interest on plaintiff's $6,000 debt on the land. Plaintiff also testified that at the Branch mine there was an open cut 40 to 75 feet wide, 600 to 800 feet long, and from 3 to 20 feet deep.

There was other evidence tending to show that the workings on plaintiff's land were "small operations"—carried on with pick, shovel and wheelbarrow; that the so-called mines were small openings, not more than a quarter to half an acre in extent, including the surrounding dumps. A shaft not completed was being sunk at the time of the suit.

There was evidence tending to show that defendants owning adjoining land had excavated under plaintiff's land and removed a large amount of mica therefrom. It was alleged that the value of the mica wrongfully removed amounted to $84,000.

Defendants offered deeds showing conveyance to them of the minerals and mineral rights in and under the land, and connected chain of title from the original grant from the State in 1796.

The court charged the jury, among other things, that from the deeds and conveyances offered the defendants had the superior title to the mineral rights involved, and that the plaintiff, holding the inferior or junior title, under the deed of 1925, must show adverse possession of the mineral rights under the colorable title of that deed. To the court's construction that defendants' paper title was superior plaintiff excepted.

The court defined adverse possession under color of title and charged in substance that if the plaintiff had shown by the greater weight of the evidence adverse possession of a portion of the land described in the conveyance under which he entered, his possession would be extended by construction of law to the outer boundaries of his deed, and, if so continued, openly, notoriously and adversely, as defined, for seven years, would ripen his imperfect or colorable title into a good one as to all the land described in his deed not actually occupied by the defendants.

Other instructions to the jury to which exceptions were noted were as follows:

"If the possession taken under the junior title is for a portion of the land so very minute and small that the true owner, even in the exercise of ordinary vigilance might remain ignorant that it included his land, or might mistake the character of the possession or the intention of the occupant, it might fairly be doubted that the deed should be held to extend beyond the actual boundaries. . . .

"So, gentlemen of the jury, if you had a deed for a hundred acres of land capable of being used as pasture, and you took your cow out and staked her off on a place in that land, just one little area where she could graze, you could not ripen title to one hundred acres and claim that you had used it to the extent of its ability to be used. On the other hand, if you put 75 or 100 head of cattle on that 100 acre tract so that they could roam all over it, even if for some reason they never went to one particular portion of the land, you could still ripen title to the whole 100 acres. . . .

"As I say, the defendants don't have to prove he had possession, but he (plaintiff) must prove affirmatively by the greater weight of the evidence that he had such possession as would indicate to the world an intention to claim the whole 375 acres for a period of at least seven years. If he has not done that, he cannot prevail.

"The defendants in reply say there has not been any such operations as would put the defendants or anybody else on notice that the plaintiff was claiming the mineral rights to this 375 acres of land. The defendants say when you consider the size of the opening of the dump, from one-fourth to one-half acre of land, and that to use or hold dominion over the mineral rights of an acre of land in 375 acres is not sufficient notice in which to put them or anybody else on notice that he was claiming the mineral rights over the whole 375 acres."

Just before the conclusion of the charge counsel for plaintiff addressed the court as follows: "As I understand, if the plaintiff or his representative mined any portion of this land sufficient to show his claim of ownership in that there being no possession by the other side, such acts will extend to his outer boundaries, under the Gilchrist case." Thereupon the court stated, "I gave what I conceived to be the law along that line. That would be dependent upon the size of that operation, even though it were just in one part."

The following issue was submitted to the jury: "Is the plaintiff the owner of and entitled to the possession of the minerals and mineral rights described in the complaint as alleged in the complaint?" For their verdict the jury answered the issue "No."

From judgment on the verdict plaintiff appealed.

Charles Hughes, W. C. Berry, and Burke & Burke for plaintiff.

McBee & McBee, J. V. Bowers, and Proctor & Dameron for defendants.

DEVIN, J. The plaintiff's asserted claim of title to the minerals and mineral rights in the land described in the complaint having been denied by the verdict and judgment below, he brings the case here for review, assigning error in the trial, and particularly in the judge's instructions to the jury on the determinative issue.

It is admitted that by deeds or reservations in deeds the surface and the mineral rights in the land have been segregated. Plaintiff's title to the surface rights therein are not controverted. By this action he seeks to establish his title also to the mineral rights, and to recover for valuable minerals alleged to have been wrongfully removed from the land by the defendants. In the absence of other means of proof of title to these minerals (*Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142), plaintiff bases his right to recover upon seven years' adverse possession and user of the minerals and mineral rights, under color of title, as provided by the statute, C. S., 428.

It is an established principle of law that when rights to the minerals in land have been by deed or reservation severed from the surface rights,

two distinct estates are created, and that the estate in the mineral interests, being part of the realty, is subject to the ordinary rules of law governing the title to real property. The presumption that one in possession of the surface has also possession of the minerals does not apply when these rights have been segregated. *Davis v. Land Bank,* 219 N. C., 248, 13 S. E. (2d), 417; *Vance v. Pritchard,* 213 N. C., 552, 197 S. E., 182; *Banks v. Mineral Corp.,* 202 N. C., 408, 163 S. E., 108; *Hoilman v. Johnson,* 164 N. C., 268, 80 S. E., 249. Plaintiff's entry into possession of the land, in 1925, having been under a deed purporting to convey the land by definite lines and boundaries, and without reservation or exception, his deed constituted colorable title to the entire interest and estate in the land, in accord with the maxim, *cujus est solum, ejus est usque ad coelum et ad inferos.* 25 C. J. S., 20. The question then presented and sharply controverted was whether plaintiff's acts of ownership and occupancy of the minerals and mineral rights were sufficient to constitute adverse possession as defined in the law for the statutory period, so as thereby to vest in him a good title. What constitutes adverse possession has frequently been considered by this Court, and the opinions in the decided cases contain comprehensive definitions of the meaning of the term in the law of real property, notably in *Berry v. Coppersmith,* 212 N. C., 50, 193 S. E., 3; *Locklear v. Savage,* 159 N. C., 236, 74 S. E., 347; *Currie v. Gilchrist,* 147 N. C., 648, 61 S. E., 581. Possession of real property to be adverse must be actual possession, and must be open, decided and notorious as the nature of the property will permit, indicating assertion of exclusive ownership, and of intention to exercise dominion over it against all other claimants. The possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible. *Locklear v. Savage, supra; Davis v. Land Bank, supra.*

It is also well settled that where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another. *Currie v. Gilchrist, supra;* 1 Am. Jur., 909.

Plaintiff excepted to the judge's instruction to the jury with respect to the extent of the portion of the property adversely occupied and possessed under color which would be sufficient to constitute constructive possession of the whole, and complains that the court's language tended to convey to the jury the impression that mere smallness of the area occupied would prevent the application of the principle of constructive possession. It

appears from the record that the court instructed the jury in this connection, if the possession was of a portion "so very minute and small that the true owner in the exercise of ordinary vigilance might remain ignorant that it included his land or might mistake the character of the possession or the intention of the occupant, it might fairly be doubted that the deed should be held to extend beyond the actual boundaries (occupancy)." We think this statement of a principle of law applicable to slight and unintentional encroachment upon adjoining lands under a mistake or misapprehension as to the true dividing line (*Currie v. Gilchrist, supra*), was likely to be misunderstood by the jury when considered in the light of the facts of this case where the evidence tended to show continuous operation by the plaintiff of three or four mines or openings of comparatively small area on the entire tract, and as indicating the expression of a doubt in the mind of the court that such possession was in law sufficient to extend the possession beyond that actually occupied.

This impression was doubtless strengthened by the court's final word to the jury, when, in response to inquiry from counsel as to the application of the rule of constructive possession to the mining of a portion of the land, he stated, "I gave what I conceived to be the law along that line. That would depend upon the size of that operation even though it were just in one part." Also we think the illustration which the able judge gave for the purpose of explaining the legal principles involved, was susceptible of inferences as to the facts in this case beyond that which he intended. It was not a question of the extent of the possession but of its character. *Green v. Harman,* 15 N. C., 158. The instruction that plaintiff must prove that he had such possession as would indicate to the world an intention to claim the whole 375 acres, inadvertently overlooked the fact that plaintiff disclaimed title to the mineral rights in 68 acres embraced within the bounds of the 375 acre tract.

Under the circumstances of this case we think the instructions to the jury complained of, in the respect herein noted, must be held for error, and that this was sufficiently material and prejudicial to require a new trial.

The plaintiff's exception to the admission of the will of George Leask as one of the links in defendants' chain of title to the mineral interests in the land is without merit. The will appears to have been proven in New York in the manner prescribed by the North Carolina statutes, and the copy or exemplification of the will so showing, duly certified, was admitted to record in Avery County. C. S., 4152; *Vaught v. Williams,* 177 N. C., 77, 97 S. E., 737. That the corporate name of defendants' grantor was amended in accord with the New York statute appears from the recitals in the deed.

Defendants' contention that the judgment in this case should be affirmed for the reason that plaintiff failed to make out a case of continuous adverse possession for the statutory period cannot be sustained. We think the plaintiff's evidence, considered in the light most favorable for him, was sufficient to require submission of the case to the jury.

Other exceptions brought forward in plaintiff's assignments of error are not discussed or decided as they may not arise upon another trial.

For the reasons stated there must be a

New trial.

STATE v. BRUCE GREGORY.

(Filed 13 October, 1943.)

1. Criminal Law § 53d—

Where there is no evidence of a less degree of the crime charged, the court is not required to instruct the jury that they may convict of a less grade of the same offense.

2. Criminal Law § 56—

A verdict of a jury is not vulnerable to a motion in arrest of judgment because of defects in the indictment, unless the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which defendant is found guilty.

3. Same—

An indictment must be liberally construed upon a motion in arrest of judgment for defects therein.

4. Indictment § 7—

The purpose of an indictment is twofold: first, to make clear the offense charged so that the investigation may be so confined, that proper procedure may be followed and applicable law invoked; second, to put defendant on reasonable notice so that he may make his defense.

5. Indictment § 9—

As a general rule, an indictment is sufficient when it charges the offense in the language of the statute.

6. Same: Assault and Battery § 8—

In an indictment, under Michie's Code, sec. 4214, it is not necessary to describe the injury further than in the words of the statute.

7. Assault and Battery §§ 7a, 7c—

Where in a trial of an indictment, under Michie's Code, sec. 4214, defendant is convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's Prison, there is error, as the offense described in the verdict is at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the court as provided by the statute. C. S., 4215.

STATE *v.* GREGORY.

APPEAL by defendant from *Dixon, Special Judge,* at June Term, 1943, of JOHNSTON.

The defendant was tried at the June Term, 1943, of Johnston Superior Court on a bill of indictment reading as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Bruce Gregory, late of the County of Johnston, on the 8th day of May in the year of our Lord one thousand nine hundred and forty three, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously assault one Will Register with a deadly weapon, to wit, a pocket knife, inflicting serious injuries not resulting in death, with intent to kill and murder the said Will Register, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The principal State's witness, Register—who claims to have been assaulted—testified that on the night of 8 May of that year, being in Benson, he went down an alley between the Peacock Drug Store and Benton Printing Company to attend a call of nature. When he got back of the drug store, intending to turn into the alley behind the drug store, someone "hollered" at him. Not seeing the person and failing to understand what he said, he stopped and tried to determine where the voice came from, saw a man sitting on some steps that ran up the side of the building. He heard the man say that he would "do something" or would "come down there," whereupon he turned around sharply and walked back up the alley. When he reached a point about fifteen feet from Main Street in the alley, someone, whom he later identified as the defendant, ran up behind him and struck him in the throat with a knife, and he felt soreness from the lick and pain. He was walking toward Main Street when struck. Witness thereupon turned around quickly and began to strike his assailant with both fists. He was cut not only in the throat, but severely in the back.

Upon cross-examination, he denied having any bottle in his hand or striking at anybody with a bottle, or putting his hands upon defendant's clothing.

There was evidence to the effect that blood spurted from the wound in the neck both there and in the hospital, that it was serious and might have caused his death by hemorrhage. The wound in the back was severe, but would not have caused death. After eight days in the hospital and ten days in bed at home, the witness recovered.

The defendant Gregory testified that he was sitting on the stairway which ran up from the alley on the side of the drug store building to his apartment over that store; that he had sent his wife out through the alley to get a drink of Coca-Cola; that meantime the prosecuting witness came into the alley to attend to a call of nature, and Gregory asked him

to leave, telling him that his wife had gone to the drug store and would be back in about half a minute. Witness went to where Register was and again told him that witness' wife had gone to the drug store and would be back any time, and Register said, "Damn you and your wife both," picked up a large bottle found in the alley and struck witness on the left side of his head, then grabbed his overall bib. Witness asked Register to turn him loose, but he continued to hold witness, striking at him on the back and hips. After vainly endeavoring to disengage himself in the fight, witness testifies that he put his hand in his pocket, brought out his knife and "cut himself loose," but did not cut Register any more after he was turned loose. Witness stated that he fought in self-defense and because he feared that Register would beat him to death, and to keep Register from killing him.

Other testimony is cumulative or corroboratory, and unnecessary to an understanding of the decision.

The case was submitted to the jury, which found as its verdict the following: "Guilty of assault with intent to kill." Upon this verdict judgment was rendered that defendant serve a term of not less than three nor more than four years in the State Prison at Raleigh. Defendant moved to arrest the judgment upon the following grounds: That the indictment was fatally defective in failing to describe the nature and extent of the injury so that its seriousness might be apparent to the court; that the verdict was not responsive to any offense of which he might be convicted under the indictment; and failing his discharge on these grounds, that he should be punished only for a simple assault, that being the highwater mark of the verdict under any possible theory of its validity.

The defendant also excepted to the failure of the judge to instruct the jury upon simple assault.

The motions to set aside the verdict and in arrest of judgment were overruled, and the defendant appealed.

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

C. C. Canaday and J. R. Barefoot for defendant, appellant.

SEAWELL, J. The exception to the judge's charge needs little discussion. Although the jury might have exercised the privilege given it under pertinent statutes discussed elsewhere, and convicted the defendant of an assault of less grade than that charged, and even of simple assault, the court is not required to encourage such inconsistency where there is no evidence of such minor offense. *S. v. Elmore,* 212 N. C., 531, 532, 193 S. E., 713; *S. v. Lee,* 192 N. C., 225, 134 S. E., 458; *S. v. Smith,*

201 N. C., 494, 160 S. E., 577; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605; *S. v. White,* 138 N. C., 704, 51 S. E., 44. There is no evidence of simple assault apparent in the record.

We direct our attention to the motion in arrest of judgment.

It is usually held, and so in this State, that the verdict of the jury is not vulnerable to a motion in arrest of judgment because of defects in the indictment, unless the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty. 23 C. J. S., Criminal Law, sec. 1533; 15 Am. Jur., Criminal Law, sec. 436; *S. v. Jones,* 218 N. C., 734, 735, 12 S. E. (2d), 292. As to other less serious defects, objection must be made by motion to quash the indictment or, in proper cases, a bill of particulars may be demanded. Appellant contends that the failure of the indictment to particularly describe the nature and extent of the injury, charged to be serious, is such a fatal defect.

Chapter 101, Public Laws of 1919 (Michie's Code of 1939, sec. 4214), creates a statutory offense in which several elements theretofore appearing merely as aggravating circumstances were combined as essential elements of the crime denounced. Said section reads as follows:

"4214. ASSAULT WITH DEADLY WEAPONS WITH INTENT TO KILL RESULTING IN INJURY.—Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or be worked on the county roads for a period not less than four months nor more than ten years."

Long prior to the enactment of this statute, the Legislature, in an act (C. S., 4215), which, in its main features, dates back to the early seventies, had dealt with the general subject of assault—including assault as known at the common law—and had attempted to lay down a schedule of punishments according to the aggravation of the offense, and at the same time, by the first proviso of this statute, taken in connection with Art. IV, sec. 27, of the Constitution, carved out of the general jurisdiction of assaults given the courts an original and exclusive jurisdiction in the courts of justice of the peace, where no deadly weapon had been used and no serious injury inflicted. Pertinent parts of that section read as follows:

"4215. PUNISHMENT FOR ASSAULT.—In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days;

but this proviso shall not apply to cases of assault with intent to kill," etc.

In support of his contention that the indictment is fatally defective in its failure to more particularly describe the nature and extent of the injury, appellant cites *S. v. Battle,* 130 N. C., 655, and also relies upon the cases collected and cited in that opinion. Analyzing these cases, all of which were decided prior to the enactment of 4214, *supra,* the Attorney-General contends that the requirement with respect to a fuller description of the injury is wholly referable to the necessity of determining the jurisdiction under the then existing condition of the law. It is pointed out that what constitutes a serious injury, when the facts are determined, is a matter of law; and the description of the injury afforded a convenient method by which the court might *in limine* determine its jurisdiction without entering upon a fruitless investigation only to find that it was without jurisdiction. Unquestionably, some of the decided cases deal solely with the subject of jurisdiction, and may have the connotation contended for by the Attorney-General.

However, there was no question of jurisdiction involved in *S. v. Battle, supra,* since, although the offense might have been initially charged as a simple assault, it was committed within one mile of the courthouse, and during the court term, and, therefore, by an exception not noted above, was within the concurrent jurisdiction of both the Superior and inferior courts. Code, section 892; *S. v. Bowers,* 94 N. C., 910. In this case the failure to describe the nature and extent of the damage done was held to strip the indictment of such qualifying expressions as were necessary to raise it out of the grade of a simple assault, and the case was remanded for punishment accordingly.

Where the Superior Court takes cognizance of an assault, except where concurrent jurisdiction has been given it of simple assault under certain conditions which do not here appear, it is, of course, necessary that the bill of indictment sufficiently charge an offense within the original jurisdiction of the higher court; and if, upon inspection, it does not charge such an offense, the jurisdiction must fail. These matters frequently came up for consideration by the Court under the statute cited—4215—and form the basis of much discussion in the opinions collected in *S. v. Battle, supra.* We think, however, the requirement that the nature and extent of the injury should be more specifically described was as much due to the more meticulous standards of the common law, under which the concepts and definitions of offenses took form largely through the experience of administration and without the aid of definitive statutes; and, as a means of "playing safe," indictments were viewed with great, and often unnecessary, strictness. Now, under a motion for arrest of judgment for a defect in the indictment, it must

be liberally construed. 15 Am. Jur., Criminal Law, s. 435, and cited cases.

The purpose of an indictment is at least twofold: First, to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; second, to put the defendant on reasonable notice so as to enable him to make his defense. When these purposes are served, the functions of the indictment are not so impaired by the omission of subordinate details—in this case a more particular description of the injury—as to necessitate an abruption of the judicial investigation in which, if it is allowed to proceed, the questioned condition may be made clear and the rights of the accused protected by the application of legal standards.

As we have stated, the effect of the 1919 Act—section 4214, Michie's Code, *supra*—is to create a separate and distinct statutory offense in which are incorporated as essentials to the crime a number of circumstances theretofore considered merely as an aggravation of the assault—amongst them the fact of serious injury. In our opinion, the statement in the indictment that the assault inflicted serious injury is sufficient without further elaboration, and the fact becomes a matter of proof upon the trial. Except as a convenience in determining the jurisdiction of the court in the first instance, it is questionable whether the insistence that so significant an expression as "serious injury" be further explained served any useful purpose, even at common law. In the present instance, we feel that the more reasonable rules pertaining to indictments for statutory crimes should be pursued.

As a general rule, an indictment is sufficient when it charges the offense in the language of the statute. *S. v. Gibson,* 221 N. C., 252, 20 S. E. (2d), 51; *S. v. Jackson,* 218 N. C., 373, 375, 11 S. E. (2d), 149; *S. v. Abbott,* 218 N. C., 470, 476, 11 S. E. (2d), 539.

"The indictment strictly follows the words of the statute, and that is laid down in all the authorities as the true and safe rule. It is true there are some few exceptions, but we do not think they embrace this case." *S. v. George,* 93 N. C., 567, 570.

For a typical exception, see *S. v. Williams,* 210 N. C., 159, 185 S. E., 661.

We hold that the indictment in this respect is sufficient.

The jury found the defendant guilty of an assault with intent to kill. Appellant's challenge to this verdict presents the question whether it states an offense of which the accused could be found guilty under the indictment without superadding a qualification that would make it unacceptable in law.

As above stated, under the indictment the jury was authorized to find the defendant guilty of a less grade of assault, or even of a simple assault.

C. S., 4639; C. S., 4640; *S. v. Goff,* 205 N. C., 545, 551, 172 S. E., 407; *S. v. Hefner,* 199 N. C., 778, 155 S. E., 879; *S. v. Strickland,* 192 N. C., 253, 134 S. E., 850. C. S., 4639, relative to assaults, is especially applicable.

Assault with intent to kill is an indictable offense at common law; *S. v. Elmore, supra; S. v. Boyden,* 35 N. C., 505; which, it is said, is recognized everywhere. 26 Am. Jur., p. 577, sec. 597. Commonly, no distinction is made between the expressions "intent to murder" and "intent to kill." Designated *in ipsissimis verbis* it is by the terms of the second proviso of C. S., 4215 expressly excepted from the punishment assigned to simple assault and to the jurisdiction into which it falls. It is within the category of offenses of which the jury might find, and did find, defendant guilty in the downward progress from the greater to the lesser offense. Thus far we find no legal difficulty upon the record.

But the offense described in the verdict is at most a misdemeanor; *S. v. Boyden, supra; S. v. Elmore, supra;* and not punishable as a felony by imprisonment in the State's Prison, as here attempted. C. S., 4171. The effect of the verdict is to find the defendant guilty of a misdemeanor, punishable by fine or imprisonment, or both, at the discretion of the court, as provided in the statute—C. S., 4215.

For these reasons, appellant's motion in arrest of judgment is allowed, and the judgment is arrested. But the validity of the trial and verdict is unaffected, and the case is remanded to Johnston County Superior Court, where a proper judgment will be rendered on the verdict in accordance with this opinion.

Error and remanded.

MARGARET ELIZABETH SASSER BUTLER, MINOR, BY HER NEXT FRIEND, LEO R. BUTLER, v. R. W. WINSTON AND WIFE, ANNIE McKIMMON WINSTON.

(Filed 13 October, 1943.)

1. Infants §§ 1, 14—

The Court will never make a decree when one of the parties sues by a next friend, who has, or may have, an interest in the suit opposed to that of the infant. And even the next friend's attorney must be equally disinterested. A mere colorable, adverse interest is a sufficient disqualification for either.

2. Wills § 27: Guardian and Ward § 18—

The policy of the law will not permit an issue of *devisavit vel non* to be determined by the consent of the parties thereto, where some of them are infants.

3. Infants § 14: Insane Persons § 15: Guardian and Ward § 18—

In the case of infant parties, the next friend, guardian *ad litem* or guardian cannot consent to a judgment against the infant, without an investigation and approval by the court.

4. Infants §§ 10, 12—

The appointment of a guardian *ad litem* is to protect the interest of the infant defendant at every stage of the proceeding, and the court will not approve an order appointing a guardian *nunc pro tunc.*

5. Guardian and Ward § 7: Infants §§ 10, 12: Estates § 11—

In a proceeding under C. S., 1744, to sell all the contingent interest in certain lands of minors and unborn children, the petitioners, who were represented by a guardian, where judgment of sale was signed on the day before the guardian's appointment, such judgment is void.

6. Estates § 11—

In a proceeding, under C. S., 1744, to sell real property in which there is a contingent interest, the plaintiff must be a person having a vested interest in the property to be sold and the sale must be passed upon by the judge of the Superior Court at term. The contingent interest alone cannot be sold.

7. Judgments § 22b: Estoppel §§ 3, 4—

Where a judgment is void and that fact appears from the record, it cannot be pleaded as an estoppel, and is subject to collateral attack, and will be treated as a nullity.

8. Judgments §§ 22a, 22b—

Those claiming through the purchaser of lands, title to which is affected by a void judgment, take subject to the infirmities in the title of their predecessors.

9. Equity § 2: Estoppel § 10—

Any knowledge of a fact, the truth of which may be ascertained by proper inquiry, puts the party on notice and deprives him of his equity.

APPEAL by defendants from *Frizzelle, J.,* at April Term, 1943, of JOHNSTON.

This is an action in ejectment for the recovery of 187½ acres of land situate in Johnston County. The plaintiff and defendants claim the late Sarah Florence Parrish as a common source of title. The plaintiff, who is a granddaughter of the late Sarah Florence Parrish, claims title as a devisee under her grandmother's will. The defendants claim title by *mesne* conveyances from Mozelle Parrish Sasser, who was the daughter and the sole heir at law of the late Sarah Florence Parrish.

The paper writing propounded and admitted to probate in common form as the last will and testament of Sarah Florence Parrish contains, *inter alia,* the following provision: "That all my other property whatsoever, and wherever located shall go to my grandchild, Margaret Elizabeth

Sasser." This clause includes the 187½ acre tract, title to which is in controversy, and the will therefore becomes a link in the chain of title asserted by the plaintiff.

The defendants allege and contend that the paper writing propounded and admitted to probate was not the last will and testament of Sarah Florence Parrish, and that Sarah Florence Parrish died intestate, leaving as her sole heir at law her daughter Mozelle Parrish Sasser, who conveyed the lands in controversy to the predecessors in title of the defendants.

The defendants allege and contend that a judgment entered in a caveat proceeding against the paper writing propounded and admitted to probate as the will of Sarah Florence Parrish, which adjudges that said paper writing is not such will, is an estoppel to the plaintiff's asserting title thereunder; and also that a judgment of sale in a special proceeding subsequently instituted before the clerk to sell any contingent interests of the plaintiff and others in said lands, under which judgment sale was made to the predecessors in title of the defendants, is likewise an estoppel to the plaintiff's asserting title to such lands.

The plaintiff in reply alleges and contends that she is not bound by nor estopped by the judgments in either the caveat proceeding or in the subsequent attempted special proceeding instituted to sell contingent interests in the *locus in quo,* for the reason, *inter alia,* that she was an infant at the time such judgments were entered and was never properly made a party to either proceeding.

The case was submitted to the court upon an agreed statement of facts, and it was further agreed that the judge might enter his judgment out of term and out of the district. His Honor entered judgment that the plaintiff "is the owner in fee and entitled to the immediate possession of" the *locus in quo,* and ordered, "in accordance with the agreed facts . . . that all other matters in controversy in connection with said lands be and the same are retained, without prejudice, for further proceedings." To this judgment the defendants objected, and preserved exception, and appealed to the Supreme Court.

Parker & Lee and Jane Agnes Parker for plaintiff, appellee.
Leon G. Stevens for defendants, appellants.

SCHENCK, J. There are two questions presented by this appeal: first, is the plaintiff estopped by the judgment entered in a caveat proceeding to assert title to the *locus in quo* under the paper writing propounded and admitted to probate as the last will and testament of Sarah Florence Parrish; and, second, is the plaintiff estopped by the judgment of sale

entered in a proceeding instituted before the clerk to sell any contingent interests of hers, and of certain others, to assert title to the *locus in quo?*

We are of the opinion, and so hold, that both questions should be answered in the negative.

As to the judgment in the caveat proceeding: It appears from the record and the agreed statement of facts that Mozelle Parrish Sasser, the daughter and only heir at law of Sarah Florence Parrish, and Margaret Elizabeth Sasser (now Butler) filed the caveat to the paper writing propounded and admitted to probate as the will of Sarah Florence Parrish, by their next friend, one J. T. Sasser; that the next friend is the husband of one of the caveators and the father of the other and was represented by the same attorneys in both capacities; it further appears that, although represented by the same person as next friend, the interests of the caveators Mozelle Parrish Sasser and Margaret Elizabeth Sasser (now Butler) are antagonistic, for the reason that if the paper writing is upheld as the will of Sarah Florence Parrish, deceased, Margaret Elizabeth Sasser would take by devise the *locus in quo,* whereas if such paper writing is not so upheld then Mozelle Parrish Sasser, as the sole heir at law of Sarah Florence Parrish, would take by inheritance the *locus in quo,* and also her husband, J. T. Sasser, the next friend, would take an interest therein as tenant by curtesy initiate. With these antagonistic interests existing, the next friend consented to a judgment declaring that the paper writing was not the will of Sarah Florence Parrish and that she died intestate, and thereby Mozelle Parrish Sasser, her daughter, became the owner of the *locus in quo* by inheritance. The manner of thus bringing into court Margaret Elizabeth Sasser was insufficient and unauthorized by law and the judgment rendered must be disregarded as void. *Johnson v. Whilden,* 171 N. C., 153, 88 S. E., 225. "The Court will never make a decree, when one of the parties sues by a next friend and that next friend has, or may have, an interest in the suit, opposed to that of the infant. It will require another *next friend* to be appointed to attend to the cause in behalf of the infant." 4th Syllabus of *Walker v. Crowder,* 37 N. C., 478. "The Court cannot permit a suit to be carried on in the name of an infant by a next friend who can have an interest in conflict with that of the infant." *Walker v. Crowder, supra.* "If he (the next friend) has any interest at all in the suit it must be thoroughly consistent with that of his wards. Even his attorney must be equally disinterested, and a mere colorable interest is a sufficient disqualification for either, if at all adverse." *Ellis v. Massenburg,* 126 N. C., 129, 35 S. E., 240, and cases there cited.

The question involved in *Holt v. Ziglar,* 159 N. C., 272, 74 S. E., 813, was somewhat similar to the one involved in the instant case. In that case their father and mother as their guardians *ad litem* consented to an

answer to the issue of *devisavit vel non* in their own favor, and the Court said: "The policy of the law will not permit the last will and testament of a person to be set aside by consent. An issue of *devisavit vel non* is not such a proceeding as can be determined by the consent of the parties thereto, where some of them, as in this case, are infant children. So careful is the law to give effect to the disposition of property that even the witnesses to the will are regarded as the witnesses of the law and not the witnesses of any particular party." Likewise, in *Wyatt v. Berry,* 205 N. C., 118, 170 S. E., 131, where the service upon an infant represented by a guardian *ad litem* appeared not to have been made in accord with statute, and the answer filed by the guardian *ad litem* simply denied the complaint but did not disclose the interest of the infant, the judgment was held void upon its face and therefore subject to collateral attack, it is said: "The judgment is void as against the plaintiff in this action not only because she was not a party to the action in which it was rendered. It appears upon its face that the judgment was rendered by consent of the parties to the action. For that reason, if it be conceded that the plaintiff was a party defendant by virtue of the order of the court, and the appointment of the guardian *ad litem* for her, the judgment is void. It is well settled in this jurisdiction, at least, that in the case of infant parties, the next friend, guardian *ad litem,* or guardian cannot consent to a judgment against the infant, without an investigation and approval by the court. McIntosh, North Carolina Practice and Procedure, p. 721; *Keller v. Furniture Co.,* 199 N. C., 413, 154 S. E., 674; *Rector v. Logging Co.,* 179 N. C., 59, 101 S. E., 502; *Bunch v. Lumber Co.,* 174 N. C., 8, 93 S. E., 374; *Ferrell v. Broadway,* 126 N. C., 258, 35 S. E., 467."

As to the judgment in the special proceeding: The petition therein appears to have been filed by Margaret Elizabeth Sasser (now Butler) and certain other minors and unborn children, by R. E. Batton, guardian, to sell the contingent interests of the petitioners in the *locus in quo.* It appears from the record and from the agreed statement of facts that the judgment authorizing and directing the guardian R. E. Batton to sell and convey "all right, title or interest which said infants (the petitioners) may have in and to said lands upon payment by said John Moore Strong to him of the sum of $300.00" was signed by the clerk of the Superior Court of Johnston County on 16 January, 1936, whereas the appointment of R. E. Batton as guardian of Margaret Elizabeth Sasser and others was made on 17 January, 1936. It therefore appears that the judgment authorizing and directing the sale of the *locus in quo* could not have been binding upon the plaintiff who was in no wise a party to the proceeding at the time it was entered, and as to her the judgment is void. It nowhere appears that the appointment was made or attempted to be

made *nunc pro tunc,* and even if such an appointment had been so made it could not have availed the defendants. It is said in *Ellis v. Massenburg, supra,* at page 134: "We may say here that the object of the appointment of a guardian *ad litem* is to protect the interest of the infant defendant, to which protection he is entitled at every stage of the proceeding; and we cannot approve of an order appointing a guardian *ad litem nunc pro tunc.* If it is sought thereby to bind the infant by something already done when he had no opportunity for defense, it is manifestly unjust; while if it has no such effect we can see no necessity for making it retroactive."

And for the further reason the judgment pleaded as an estoppel was entered in what purports to be a special proceeding commenced before the clerk, whereas the purpose of such proceeding was to sell the contingent interests in real estate of certain minors and persons not *in esse,* and such a purpose must be accomplished, if accomplished at all, by virtue of the statute, C. S., 1744. The petition alleges in paragraph 10: "That the only right which the petitioner herein has in and to the lands described herein is a contingent interest." The statute provides that "in all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale . . . of the property by a proceeding in the Superior Court. . . . Said proceeding may be commenced by summons by *any person* having a *vested interest* in the land, and all persons *in esse* who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other civil actions. . . ." Since the petitioners claimed only a contingent interest in the land, and since the statute provides that the proceeding may be commenced by any person having a vested interest therein, as well as the fact that the proceeding was instituted before the clerk instead of being brought at term by summons as in other civil actions, it would appear that the proceeding was a nullity for want of jurisdiction and the judgment therein void. *Smith v. Witter,* 174 N. C., 616, 94 S. E., 402.

It further appears that the proceeding was not in accord with the statute in that it was for the purpose of selling contingent interests separately instead of the whole estate. *Pendleton v. Williams,* 175 N. C., 248, 95 S. E., 500, and cases there cited; *Dawson v. Wood,* 177 N. C., 158, 98 S. E., 459. In the case of *Lide v. Wells,* 190 N. C., 37, 128 S. E., 477, the Court declined to uphold an order of sale made in a proceeding which fell short of a compliance with C. S., 1744.

Both of the judgments relied upon by the defendants as an estoppel to the plaintiff asserting title to the *locus in quo* being void, and this

fact being apparent from the records, such judgments are subject to collateral attack, and will be treated everywhere as a nullity. *High v. Pearce,* 220 N. C., 266, 17 S. E. (2d), 108; *Clark v. Homes,* 189 N. C., 703, 28 S. E., 20, and cases there cited; *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716. And those claiming through the purchaser of the lands, title to which are effected thereby, take title subject to the infirmities in the title of their predecessors. "He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title and thus takes it with the burden attending it." *Dudley v. Jeffress,* 178 N. C., 111, 100 S. E., 253. If Mozelle Parrish Sasser, the defendants' predecessor in title, could not successfully plead the estoppel, the defendants cannot do so. *Trust Co. v. White,* 189 N. C., 281, 126 S. E., 745. In deraigning their title the defendants were bound by any infirmity discoverable in the title of their predecessors in title, *Smith v. Fuller,* 152 N. C., 7, 67 S. E., 48, and any vitiating fact, the truth of which might have been ascertained by proper inquiry, deprives a party of the defense of being an innocent purchaser. "It is a well settled rule that any knowledge of a fact, the truth of which may be ascertained by proper inquiry, puts the party on notice, and deprives him of his equity. *Ijames v. Gaither,* 93 N. C., 358." *Whitted v. Fuquay,* 127 N. C., 68, 37 S. E., 141.

All of the facts which the plaintiff urges to invalidate the judgments in the caveat proceeding and in the proceeding to sell contingent interests in real estate and pleaded by the defendants as estoppel to her asserting title to the *locus in quo,* appeared on the records and were easily discoverable upon examination. The defendants' predecessors in title were fixed with the knowledge of the records, and through them the defendants were likewise fixed with such knowledge. Hence, the contention of being innocent purchasers cannot avail the defendants.

The judgment of the Superior Court is

Affirmed.

OXFORD ORPHANAGE (SUCCESSOR TO OXFORD ORPHAN ASYLUM), v. J. C. KITTRELL, MRS. LELIA (LELA) MOSS, ET AL.

(Filed 13 October, 1943.)

1. Estates §§ 6, 9a, 9c: Wills § 33c: Trusts § 1d—

Where testator devised realty to his wife and another for life, remainder to plaintiff, a charitable corporation, to have and to hold, and use and apply after paying upkeep, to its maintenance, but should plaintiff refuse this gift or devise or later reject it, then to testator's heirs, and life tenants, who are now dead, allowed the property to deteriorate very

badly and some of it burned, all without action for waste by plaintiff, who has sold and leased some of the property and contracted to sell the remainder, there is no forfeiture, abandonment, refusal or rejection of the property. The gift is not a charitable trust but is a fee simple remainder, subject to reverter upon a failure to accept or a rejection after acceptance, and plaintiff is free to sell in its discretion.

2. Estates § 9c—

A remainderman has a right to proceed against the life tenant for waste, but this right is optional.

3. Abandonment § 1—

Abandonment is the giving up of a thing absolutely, without reference to any particular person or purpose, and includes both the intention to relinquish all claim to and dominion over the property and the act by which this intention is executed. There can be no abandonment in favor of an individual or for a consideration, as such an act would be a gift or sale.

4. Deeds § 14b: Estates § 6—

A clause in a conveyance will not be construed as a condition subsequent unless it expresses, in apt and appropriate language, the intention of the parties to that effect, and a mere expression of the motive inducing the grant, or a statement of the purpose for which the property is to be used, is not sufficient to create such condition.

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

APPEAL by defendants, heirs at law of John R. Moss, from *Dixon, Special Judge,* at March Term, 1943, of VANCE. Affirmed.

Civil action under the Uniform Declaratory Judgment Act.

The plaintiff contracted to sell to J. C. Kittrell a certain parcel of land in Henderson, Vance County, N. C., which is a part of the devise to it in remainder under the will of John R. Moss. Kittrell refused to comply with his contract for that he was advised that under the terms of said will plaintiff could not convey a good and marketable title. Thereupon, plaintiff instituted this action against Kittrell and the heirs at law of John R. Moss for a decree construing said devise and adjudicating the respective rights of the parties in the *locus in quo* and under the contract of purchase and sale.

John R. Moss died 2 May, 1913, possessed of certain lands in Henderson, N. C. He left a last will and testament in which, after making certain specific gifts, he devised the remainder of his real estate to his wife for life with remainder to the Oxford Orphan Asylum (now Oxford Orphanage). The gift in remainder is in the following language:

"After the death of my wife and Mr. Vivian, I give, devise and bequeath all my real estate to the Oxford Orphan Asylum for the white race situate at Oxford, North Carolina, and to have and to hold and use

and apply the same in so far as it will go after paying for keeping it in repair, for the maintenance of said institution. Should it refuse this gift and devise or later reject it because it might prove unprofitable or for any other cause, then and in that event I revoke and cancel this devise to it and give, devise and bequeath said real estate to my heirs at law."

Arthur Vivian, named in the devise, has been dead for some years, and Mrs. Lelia Moss died 25 December, 1942, after the institution of this action.

At the time of the testator's death there were six buildings on the property at North Henderson and some sixteen or seventeen on the other property. Three of the buildings at North Henderson were sold by the executrix to pay debts of the estate. Fire destroyed five of the buildings on the Young Street front, and the other buildings were removed from the property because they had become untenantable and were fire hazards.

At present there are five houses on the Chestnut-Young-Gary-Peace streets property, and two small dwellings and a small store building on the North Henderson lot. All the buildings except one are old, badly deteriorated, and have small rental value.

The plaintiff at various times from 31 March, 1930, to 25 August, 1940, paid taxes, insurance, and street assessments on a part of the property in the total sum of $523.45.

On 15 October, 1917, the life tenant leased the property to one Ross for a stipulated rent and the agreement to keep the property in tenantable repair and to pay one-half of the taxes. This lease was sold to one Beck. In 1932 the life tenant brought suit against Beck for damages for waste and destruction and for breach of the condition to keep the property in tenantable repair. Plaintiff, on its own motion, became a party plaintiff to this suit. The action was terminated by a compromise agreement under which the life tenant and Beck entered into an agreement in which the life tenant leased to Beck said premises from 1 March, 1933, to 28 February, 1939, subject to termination by the prior death of the life tenant. Claim for damages was released, and Beck agreed to pay $400.00 per annum rental and taxes and street assessments for a period of six years.

On 6 March, 1930, plaintiff conveyed to Mrs. Janie Hall Perry a lot on Chestnut Street, being a part of the devise, subject to a ninety-nine year lease executed by plaintiff on the same day. On 14 January, 1943, it conveyed a part of said property to J. M. Peace, and has contracted to sell the remainder of said property.

During the existence of the life estate plaintiff made no effort to keep the buildings on said property in good repair and took no action against the life tenant for waste.

When the cause came on to be heard in the court below the parties entered into a written stipulation waiving trial by jury, agreeing upon the facts substantially as above stated, and requesting the court to render a declaratory judgment upon the pleadings in this cause and the facts agreed upon by the parties.

Thereupon, the court made certain additional findings of fact and adjudged:

"(1) That the 'Item Fifth' of the will of the late John R. Moss vested in the Oxford Orphanage a fee simple title to the property therein devised to it, subject to the life estates of Arthur Vivian and Mrs. Lelia Moss, both of whom are now dead.

"(2) That there is no restriction against alienation in said will and that the Oxford Orphanage has the right to and can convey a good fee simple title to the property devised it under 'Item Fifth' of said will.

"(3) That the conveyances heretofore made or agreed to be made by said Orphanage are in all respects authorized, ratified and confirmed, both upon the construction of the will and in the exercise of its equity jurisdiction. The proceeds of any such sales to go to the Oxford Orphanage for its use and benefit."

The defendants, heirs at law of John R. Moss, duly excepted to the judgment entered and appealed.

Perry & Kittrell for plaintiff, appellee.

O. B. Moss and I. B. Watkins for defendants, appellants.

BARNHILL, J. While the defendants, heirs at law of John R. Moss, the testator, in their answer claim title to the *locus in quo,* they do not allege that the plaintiff refused to accept or, having accepted, later rejected the devise, so as to invoke the terms of the reverter clause. Instead, in support of their claim, they allege that the deterioration and destruction of the buildings was due to the negligence of the life tenant and constitutes acts of waste; that the removal of structures therefrom was wrongful and unlawful; that it was the duty of the remainderman to prevent the loss and destruction of said property; and that by its negligence in failing so to do it violated the terms of the will and forfeited all interest in the property. They pray that the Court decree that both the life tenant (who has died since the institution of this action) and the remainderman have forfeited all right, title, and interest in said property and the title thereto is now vested in them.

Hence the answer, considered in the light of allegations of waste and negligence and the prayer for a decree of forfeiture, would seem to indicate that the defendants initially relied upon the law of forfeiture for waste.

We concur in the view of the court below that appellants acquired under the will no such interest in the land as would entitle them to maintain the claim of forfeiture as thus alleged. *Browne v. Blick,* 7 N. C., 511; *Gordon v. Lowther,* 75 N. C., 194; *Latham v. Lumber Co.,* 139 N. C., 9, 51 S. E., 780; *Hybart v. Jones,* 130 N. C., 227, 41 S. E., 293; *Richardson v. Richardson,* 152 N. C., 705, 68 S. E., 217; *Batten v. Corporation Commission,* 199 N. C., 460, 154 S. E., 748.

But they now contend that the gift to plaintiff created an estate on condition expressed in the devise; that plaintiff has rejected or abandoned the gift; and that, under the reverter clause contained in the will, the title to the property now vests in the heirs at law.

For a proper determination of the question thus presented it is convenient, and perhaps essential, that we separate the gift into its two essential parts. (1) The devise is to plaintiff "to hold and use and apply the same in so far as it will go after paying for keeping it in repair, for the maintenance of said institution." This is the sum total of the gift itself. But there is a condition subsequent with a provision for reverter attached. (2) The title to the property is to revert to the heirs at law of the testator if the devisee should "refuse this gift and devise or later reject it because it might prove unprofitable or for any other cause."

Hence the provision for reverter is limited to a refusal to accept or a rejection after acceptance. Has the conduct of plaintiff been such as to call this provision into play?

That the plaintiff accepted the gift cannot be gainsaid. It is now admitted. But the defendants say that the plaintiff, by its failure to maintain the property or to take any action against the life tenant for waste, and by its conveyances and attempts to convey has abandoned the property and that such abandonment is in law a rejection. This position is equally untenable.

The plaintiff had the right to proceed against the life tenant for waste committed or permitted by her. The exercise of this right, however, was optional. It was not compelled to proceed or risk the loss of its interest in the property. That it refrained from harassing the widow of its benefactor with demands and suits for damages cannot be held for cause for forfeiture. Nor is it any evidence of abandonment or rejection of the gift in remainder.

But plaintiff's action was not altogether negative. From time to time it came to the aid of the life tenant and paid taxes on the property. It voluntarily joined in an action against a lessee for damages for breach of contract to keep in repair. It leased and conveyed parcels of the property. These were positive acts of ownership effectively refuting any intent to abandon or reject.

The former conveyances and the present offer to convey by plaintiff does not constitute an abandonment. "The word 'abandonment' has a well defined meaning in the law which does not embrace a sale or conveyance of the property. It is the giving up of a thing absolutely, without reference to any particular person or purpose, and includes both the intention to relinquish all claim to and dominion over the property and the external act by which this intention is executed, and that is, the actual relinquishment of it, so that it may be appropriated by the next comer." *Church v. Bragaw,* 144 N. C., 126, 56 S. E., 688. "There can be no such thing as abandonment in favor of a particular individual or for a consideration, as such an act would be a gift or a sale." *Richardson v. McNulty,* 24 Cal., 339; *Church v. Bragaw, supra.* "The well understood meaning in the law of the term 'abandonment' does not embrace a sale, gift, or other transfer of property." 1 C. J. S., 6. When there is a sale or gift, or a transfer in any other mode provided by law, the continuity of the possession is preserved and any intent to abandon is refuted. 1 C. J. S., 6; *Church v. Bragaw, supra;* Black's Law Dict., p. 4; 1 Words and Phrases, Permanent edition, pp. 4, 5, and 57.

The appellants further insist, however, that the gift was in trust for the use of the orphanage; that the plaintiff is, by express language, charged with the duty of "keeping it in repair"; that this creates a condition subsequent; and that the failure to keep in repair constitutes a breach of this condition, working a forfeiture.

The gift is of a fee simple estate in remainder, limited only by the provision for reverter upon a failure to accept or a rejection after acceptance. *Church v. Refining Co.,* 200 N. C., 469, 157 S. E., 438; *Hall v. Quinn,* 190 N. C., 326, 130 S. E., 18; *Lassiter v. Jones,* 215 N. C., 298, 1 S. E. (2d), 845; *Church v. Bragaw, supra; St. James v. Bagley,* 138 N. C., 384, 50 S. E., 841; *Cook v. Leggett,* 88 Ind., 211.

A clause in a conveyance will not be construed as a condition subsequent unless it expresses, in apt and appropriate language, the intention of the parties to this effect (*Braddy v. Elliott,* 146 N. C., 578, 60 S. E., 507), and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition. *Hall v. Quinn, supra; Church v. Refining Co., supra; Shields v. Harris,* 190 N. C., 520, 130 S. E., 189; *Shannonhouse v. Wolfe,* 191 N. C., 769, 133 S. E., 93; *University v. High Point,* 203 N. C., 558, 166 S. E., 511; *Tucker v. Smith,* 199 N. C., 502, 154 S. E., 826; *Lassiter v. Jones, supra; Cook v. Sink,* 190 N. C., 620, 130 S. E., 714.

"A grantor can impose conditions and can make the title conveyed dependent upon their performance. But if he does not make any condition, but simply expresses the motive which induces him to execute the

deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive." 2 Devlin on Deeds, sec. 838; *St. James v. Bagley, supra; Mauzy v. Mauzy,* 79 Va., 537.

The court below approved the sale in the exercise of its equity jurisdiction. *Johnson v. Wagner,* 219 N. C., 235, 13 S. E. (2d), 419. As the devise did not create a charitable trust and a fee simple title was conveyed, the plaintiff is free to sell in its discretion. Hence we need not discuss this phase of the judgment entered.

The judgment below is

Affirmed.

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

MAE B. SMITH v. MARY ANN SMITH, AN INFANT APPEARING HEREIN BY W. B. ALLSBROOK, GUARDIAN AD LITEM.

(Filed 13 October, 1943.)

1. Appeal and Error § 40a—

The only exception, being to the judgment below, presents the question whether error appears on the face of the record; and the judgment being an essential part of the record, the Court will take notice of errors appearing in it, correct them and enter such judgment upon the facts established as in law ought to be rendered.

2. Dower § 7: Estates § 9e: Insurance § 24d—

Where a part of a hotel building, including certain furniture and fixtures which were adjudged part of and a necessary incident to the realty, was allotted to and accepted by the widow, in the settlement of her husband's estate, as realty and as her dower, such furniture and fixtures must be considered a part of the realty in adjusting a division, between the widow and heir, of fire insurance collected for a loss on the property.

3. Interest § 2—

Annuities, under C. S., 1791, must be computed at four and one-half per cent and not at six per cent.

APPEAL by defendant from *Williams, J.,* at April Term, 1943, of HALIFAX.

Civil action to establish a claim arising upon application of proceeds of fire insurance received upon the burning of property in which the dower of plaintiff was allotted and applied to discharge a debt of her deceased husband to which she was surety and which was secured by deed of trust on said property, and to have same declared a lien on land of which her husband died seized and which descended to defendant as his only child and sole heir at law.

Upon the admissions in the pleadings and verdict of the jury upon issues submitted, these facts, in substance, are incorporated in the judgment below:

1. John Claude Smith died intestate in Halifax County, North Carolina, on 7 November, 1939, seized of the land described in the complaint, among other, the Smith hotel building composed of a building or buildings located on lots 1001 through 1009 on the west side of Roanoke Avenue in the city of Roanoke Rapids, including a basement, hotel lobby, hotel store room, three store rooms on the ground floor, fifty hotel rooms and hallways on the second floor, and fire escape leading from the second floor to the ground, and also possessed of furniture and equipment in the hotel. He was survived by his widow, plaintiff, Mae B. Smith, and his only child and sole heir, defendant, Mary Ann Smith.

2. Prior to his death John Claude Smith with his wife, the plaintiff, Mae B. Smith, as surety, borrowed $50,000 and secured same by a deed of trust on the Smith hotel property above described and other property, but exclusive of the hotel furniture and equipment.

3. After the death of John Claude Smith, in an action by the administrator of his estate against the plaintiff here and the defendant here, as the widow and the sole heir of John Claude Smith, an order was entered by which the administrator was authorized to borrow $28,000.00, and to secure same by a second deed of trust on the Smith hotel property, exclusive of the hotel furniture and equipment, with which to pay debts of the intestate, except the balance due on the first mortgage indebtedness, by authority of which the loan as authorized was procured and secured.

4. Thereafter, there was allotted to plaintiff as her dower the portion of the building or buildings on lots 1001 through 1009 on the west side of Roanoke Avenue in the city of Roanoke Rapids, used in operating and carrying on Smith's hotel, comprising the lobby space, hotel store room and stairways on the ground floor, all of the second floor of the building, including fifty hotel rooms and hallways and the fire escapes leading from the second floor to the ground, and all furniture and equipment in the Smith hotel, which furniture and equipment had "been adjudged to be a part of and necessarily incident to said real estate."

5. After the dower was allotted to plaintiff, the administrator of John Claude Smith filed final account, which was duly audited, examined and approved by the clerk of the Superior Court of Halifax County.

6. Thereafter, a fire of unknown origin, over which plaintiff had no control and which did not arise out of her negligence, destroyed the Smith hotel building on the west side of Roanoke Avenue, and also the furniture and equipment in the hotel, and plaintiff's life estate in and to the same was thereby terminated or destroyed.

7. At the time of the said fire, insurance in the amount of $37,500.00 was in force on all of the building or buildings known as the Smith hotel building—the named insured and beneficiaries being "Mae B. Smith individually and/or Mae B. Smith, as Guardian of Mary Ann Smith, as their interests may appear," which insurance was pledged as collateral and additional security for the payment of the indebtedness secured by the first and second deeds of trust hereinabove referred to—premiums on said insurance having been apportioned between and paid by Mae B. Smith and Mary Ann Smith in the proportion that the value of "Mae B. Smith's dower estate in said buildings bore to the value of all of said property." Under this apportionment plaintiff paid 34 per cent of the premiums, and received 34 per cent of the rents and profits.

8. At the time of said fire, insurance was in effect on the furniture and equipment in Smith's hotel in the amount of $6,000.00—the named insured and beneficiaries being "Mae B. Smith, individually, and/or Mae B. Smith as guardian of Mary Ann Smith, as their interests might appear"—all the premiums therefor having been paid by Mae B. Smith. This insurance was not pledged as collateral to the indebtedness secured by the deeds of trust above designated.

9. After the fire, the proceeds of the insurance on the buildings, $37,500.00, were paid to the holder of the balance of the indebtedness on first and second deeds of trust and applied to the payment thereof. And the proceeds of the insurance, $6,000.00, on the furniture and equipment in Smith's hotel were paid over to Mae B. Smith, individually, and as guardian of Mary Ann Smith, and are being held in a special account awaiting legal determination of defendant's interest therein.

10. As found by the jury (a) the life expectancy of Mae B. Smith is 28.2 years, (b) the value of lots 1001 through 1009 on the west side of Roanoke Avenue in the city of Roanoke Rapids, with all improvements thereon at the time of the fire, was $75,000.00, and (c) at the time of the fire value of plaintiff's dower estate in that portion of the buildings on lots 1001 through 1009 on the west side of Roanoke Avenue, in which the Smith's hotel was being carried on, was $25,500.00.

11. Based upon an expectancy of 28.2 years and a 6 per cent annuity from 34 per cent of the proceeds of insurance on the buildings, the court finds as a fact that the present cash value of plaintiff's interest in the proceeds of the insurance on said buildings is $10,283.90, with interest thereon from 12 February, 1943, the date on which the same was applied to pay the indebtedness secured by the deeds of trust, and concludes that to that extent plaintiff is a creditor of the estate of John Claude Smith, but that the debt therefor could not have been collected by action or other due proceeding from the administrator of the intestate—hence, the

defendant is liable for the debt, but not beyond the value of the property inherited by her from John Claude Smith.

12. Based upon expectancy of 28.2 years and a 6 per cent annuity in all of the proceeds of the insurance on the furniture and equipment in Smith's hotel, the present cash value of plaintiff's interest the court finds is $4,839.48.

Upon the foregoing findings of fact and conclusions of law the court adjudged: (1) That as between the plaintiff and the defendant, plaintiff is the owner of and entitled to $4,839.48 of the proceeds of insurance on the furniture and fixtures in Smith's hotel, and directs the guardian of Mary Ann Smith to pay same to Mae B. Smith, the plaintiff, individually; (2) That the plaintiff Mae B. Smith recover of Mary Ann Smith the sum of $10,283.90, with interest thereon from 12 February, 1943, for the payment of which a specific lien is given (a) upon the defendant's interest in the proceeds of insurance on furniture and fixtures in Smith's hotel, $1,160.52, and directs the guardian of Mary Ann Smith to pay the same to Mae B. Smith, individually, to be credited and applied on this judgment; and (b) upon all of the right, title, interest and estate in and to all of the real estate, specifically described by reference, which the defendant Mary Ann Smith inherited from John Claude Smith.

Defendant appeals to the Supreme Court and assigns error.

Allsbrook, Benton, Gay & Midyette for plaintiff, appellee.

W. B. Allsbrook for defendant, appellant.

WINBORNE, J. The only exception appearing in the record on this appeal is "to the judgment as rendered by the court" below. This presents for decision only the question whether error appears on the face of the record. *Cooper v. Cooper,* 221 N. C., 124, 19 S. E. (2d), 237; *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139; *Jones v. Griggs,* 219 N. C., 700, 14 S. E. (2d), 836, and numerous other cases. See N. C. Digest, subject Appeal and Error, key number 274 (7). Moreover, the judgment being an essential part of the record, the Court will take notice of errors appearing in it, correct them and enter such judgment upon the facts established as in law ought to be rendered. *Thornton v. Brady,* 100 N. C., 38, 5 S. E., 910, and many other later cases. See Shepard's N. C. Citations.

In the case in hand error appears upon the face of the judgment.

First: It appears that the furniture and equipment in Smith's hotel were adjudged to be a part of and necessarily incident to the real estate, that is, the hotel building, and that same were allotted to and accepted by plaintiff as real estate and as part of her dower. The jury has found

that at the time of the fire the value of plaintiff's dower estate in the portion of the building in which Smith's hotel was being carried on was $25,500.00. Of this valuation the furniture and equipment having been considered a part of the real estate, the value of them must necessarily have been at least $6,000.00, the amount for which same were insured, leaving no more than $19,500.00 as the value of plaintiff's dower in the building itself rather than $25,500.00 upon which the present cash value of her annuity for life in the proceeds of the insurance on the building was calculated. And if the value of the furniture and equipment was greater than $6,000.00, for which it was insured, the value of plaintiff's dower in the building itself should be proportionately reduced and the present cash value ascertained accordingly.

Second: The annuity should have been computed at four and one-half per cent, and not at six per cent. The statute, C. S., 1791, provides that: "When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year may, computed at four and one-half per cent, be considered as an annuity and the present cash value be ascertained as herein provided."

Other than as here indicated the judgment entered appears to be in accordance with well settled principles of law. See *Purvis v. Carstaphan*, 73 N. C., 575; *Gwathmey v. Pearce*, 74 N. C., 398; *Gore v. Townsend*, 105 N. C., 228, 11 S. E., 160; *Foster v. Davis*, 175 N. C., 541, 95 S. E., 917; *Chemical Co. v. Walston*, 187 N. C., 817, 123 S. E., 196; *Blower v. MacKenzie*, 197 N. C., 152, 147 S. E., 829; *Barnes v. Crawford*, 201 N. C., 434, 160 S. E., 464; *Brown v. McLean*, 217 N. C., 555, 8 S. E. (2d), 807; see also C. S., 59-60; *Badger v. Daniel*, 79 N. C., 372; *Moffitt v. Davis*, 205 N. C., 565, 172 S. E., 317; *Price v. Askins*, 212 N. C., 583, 194 S. E., 284.

The cause is remanded to the end that the value of the furniture and hotel equipment be ascertained and calculations made in accordance with this opinion and for judgment.

Error and remanded.

STATE OF NORTH CAROLINA, ON THE RELATION OF E. M. UNDERWOOD, AS CLERK OF THE SUPERIOR COURT OF LEE COUNTY, AND LEE COUNTY, v. W. G. WATSON, STANDARD ACCIDENT INSURANCE COMPANY, AND THE NATIONAL BANK OF SANFORD.

(Filed 13 October, 1943.)

1. Clerks of Superior Courts § 23—

In an action by a clerk of the Superior Court against his predecessor in office for the recovery of records, money, etc., in the hands of the outgoing

clerk by virtue or under color of his office, C. S., 943, an order, making the county a party plaintiff, was improvidently entered, and allegations in the answer, asserting a cross action and further defense against the county, were properly stricken. And it follows that related allegations in the reply, by way of answer to such cross action and further defense, should have been stricken also.

2. Clerks of Superior Courts § 23g: Judgments § 29—

A judgment of a court of competent jurisdiction, removing a clerk of the Superior Court from office, creates a vacancy in the office of clerk, and, when no appeal is taken, is conclusive.

3. Clerks of Superior Courts § 23e—

In an action by the clerk of the Superior Court against his predecessor in office, for possession of records, books and funds under C. S., 943, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegation to like effect, there was error in allowing a motion to strike such affirmative allegations.

4. Clerks of Superior Courts §§ 23b, 23c: Public Officers §§ 7c, 8—

Our statutes provide two separate and distinct remedies against clerks of the Superior Courts—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the officer, C. S., 354; and one in behalf of the new clerk against his predecessor in office to recover possession of records, books, papers and money in the hands of the outgoing clerk by virtue or under color of his office. C. S., 943.

5. Clerks of Superior Courts § 23b: Statutes § 5a—

Authority for an individual to sue an officer for money wrongfully detained, C. S., 354, and C. S., 357, allowing damages at twelve per cent on any such recovery, relate to the same subject matter, are part of one and the same statute, and must be construed together.

6. Clerks of Superior Courts § 23c—

Whether or not the clerk is entitled to the benefits of C. S., 357, in a suit against his predecessor, is not now decided; but, granting that he is not so entitled, the law allows interest by way of damages on money wrongfully detained.

APPEAL by defendants from *Williams, J.*, at July Term, 1943, of LEE. Modified and affirmed.

Civil action instituted by relator clerk against his predecessor in office and his surety for an accounting, heard on motions to strike pleadings.

Defendant Watson was elected clerk of the Superior Court of Lee County in 1934, and was re-elected for the term beginning the first Monday in December, 1938. The defendant surety company was surety upon his official bond. On 17 December, 1941, Watson was removed

from office under judgment of court in an action then pending. Relator Underwood was appointed to fill the unexpired term. He thereupon instituted this action to compel the defendant Watson to turn over and deliver to him the records, documents, papers, moneys, and property belonging to said office and theretofore held by Watson by virtue or under color of his office. The defendant bank was joined for the purpose of obtaining an injunction against the disposition of funds on deposit in said bank in the name of Watson, clerk of the Superior Court.

Complaint being filed, the defendants appeared and moved the court that Lee County be made a party plaintiff. On said motion, Stevens, J., entered an order making Lee County a party plaintiff and requiring plaintiffs to file a bill of particulars as to all items alleged to be due.

Plaintiffs then filed an amended complaint in which no cause of action in behalf of Lee County against defendants, or either of them, is stated. The defendants separately answered and in their answers undertook to set up a cross action against Lee County. To this cross action and other affirmative defenses contained in the answers, plaintiffs replied.

After all pleadings had been filed defendants moved to strike certain allegations contained in plaintiffs' reply, and plaintiffs filed a counter-motion to strike certain allegations contained in the answers, including the allegation of a cause of action against Lee County.

When the cause came on to be heard on said motions in the court below judgment was entered striking the allegation of the cause of action against Lee County and other allegations contained in the answer. The defendants excepted and appealed.

Teague & Williams and Gavin, Jackson & Gavin for plaintiffs, appellees.

K. R. Hoyle, J. G. Edwards, and S. R. Hoyle for defendant Watson, appellant.

A. J. Fletcher for defendant Standard Accident Insurance Company, appellant.

BARNHILL, J. While the motions and counter-motions challenge the propriety of a large number of allegations in the pleadings, the order striking the allegations in the answers undertaking to set up a cross action against Lee County is the real crux of the controversy. If the judgment below is sustained in this respect most of the other challenged allegations, both in the reply and in the answers, go out as a matter of course.

The defendants allege, in substance, that during Watson's tenure of office Lee County instituted numerous tax foreclosure actions, which were prosecuted to final judgment; that as a result official fees accrued to the

clerk in the total sum of $46,193.50, of which $9,564.06 has been paid, leaving a balance of $36,629.44 still due and unpaid; and that the county is legally indebted to Watson in said amount. Watson demands judgment therefor. Defendant insurance company prays that it be allowed as an offset against any amount which may be adjudged to be due by Watson to plaintiff.

Lee County seeks no recovery against either defendant. It has no interest in any recovery which may be had by Underwood, and Underwood is in no way connected with the matters alleged against the county. As between them there is no community of interest in either cause of action. The amount claimed by Watson, if recovered, would belong to him individually. It would form no part of funds on hand by virtue or under color of his office. Underwood could recover no part thereof. Hence this cross action is wholly independent of and unrelated to the cause of action relied on by the relator clerk.

To permit the allegations to stand would require the trial of two distinct and independent actions in one. The plaintiff would be required to stand by while defendants undertake in their cross action to recover funds of a third party with which to pay any recovery he may obtain. His cause would be complicated and confused by evidence entirely irrelevant to his action. The law does not contemplate that a litigant shall be so prejudiced in the prosecution of his cause.

The order making Lee County a party plaintiff was improvidently entered. The allegations in the answers asserting a cross action against it were properly stricken. It follows that the court below erred in refusing to strike related allegations in the reply by way of answer to the cross action.

There was no error in the order striking defendants' second further defense. The efforts of the county to control the management of funds in the hands of the clerk; its change of method of audit and accounting; its alleged false entries and fictitious charges; and its other conduct alleged therein do not constitute a defense to this action. Nor does the fact that defendant may have been harassed, embarrassed, and hindered in the discharge of his duties as clerk by the interference and intermeddling of the board of commissioners excuse him from accounting to his successor for any money actually received by him under color of his office for which he has not accounted. He is called upon to account for the true amount due and nothing more—and this is the measure of his liability.

The defendants denied the allegations in the complaint that the relator Underwood was duly appointed as clerk of the Superior Court to fill the vacancy caused by the removal of Watson and has duly qualified and is now acting as such. In addition, they made further affirmative allega-

tions to like effect. The affirmative allegations were stricken. In this there was error.

The defendant Watson was removed from office by judgment of a court of competent jurisdiction, creating a vacancy in the office. From that order he did not appeal. He is concluded thereby. Even so, the relator must allege and show that he is the party appointed to fill the vacancy. Unless estopped by his conduct so to do, the defendant may both deny the allegation and affirmatively assert the contrary. Although, ordinarily, a simple denial is sufficient, this does not preclude as objectionable a positive assertion by way of denial.

The relator Underwood seeks to recover the several funds itemized in the bill of particulars "with damages thereon as provided by law," and the "damages" are estimated at twelve per cent. The court correctly declined to strike the allegations of damages.

Our statutes provide two separate and distinct remedies—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the clerk, C. S., 354, and one in behalf of the clerk against his predecessor in office to recover possession of records, books, papers, and money in the hands of the outgoing clerk by virtue or under color of his office. C. S., 943.

Authority for an individual to sue an officer for money wrongfully detained (C. S., 354) was granted by an Act adopted in 1793. 1 Potter, Laws of North Carolina, ch. 384 (1819). This Act provided for summary judgment against constables only. Later another Act was adopted making provision for summary judgment against other public officials, including clerks. 2 Potter, Laws of North Carolina, ch. 1002, sec. 1 (C. S., 356). Section 2 of the Act provides that the aggrieved party may recover, over and above the sum detained, damages at the rate of twelve per centum per annum from the time of such detention until payment. This section has been brought forward in the various codifications and is now C. S., 357. Hence the two sections, C. S., 354, and C. S., 357, relate to the same subject matter and are a part of one and the same statute. They must be construed together. *Pasquotank County v. Hood,* 209 N. C., 552, 184 S. E., 5.

The interest by way of damages is allowed to the individual entitled to the money and who sues for the same. *S. v. Gant,* 201 N. C., 211, 159 S. E., 427. See also *Windley v. Lupton,* 212 N. C., 167, 193 S. E., 213, and *Wood v. Bank,* 199 N. C., 371, 154 S. E., 623.

The right of the clerk to bring an action does not rest on any injury done to him, but on the ground that the law requires that each successive clerk shall receive from the retiring clerk all the records, books, papers, moneys, and property of his office in order that the business of the clerk of the Superior Court may be conducted intelligently, systematically,

and economically. *Peebles v. Boone,* 116 N. C., 57, 21 S. E., 187, 59 A. L. R., 53; *State Ex Rel. Gilmore v. Walker,* 195 N. C., 460, 142 S. E., 579; *S. v. Martin,* 188 N. C., 119, 123 S. E., 631. It rests on an entirely different statute. C. S., 943.

In view of the distinctions between the two acts, is the clerk here entitled to the benefits of C. S., 357? This we have not been called upon to decide. Granted that he is not. Even so, the law allows interest by way of damages on money wrongfully detained. *King v. Phillips,* 95 N. C., 245; *Ripple v. Mortgage Corp.,* 193 N. C., 422, 137 S. E., 156; *Bank v. Insurance Co.,* 209 N. C., 17, 182 S. E., 702. From what date, upon what amount, and at what rate interest is to be allowed will be decided by the trial court on the verdict rendered.

The motions to strike came on to be heard before the judge presiding at term. The cause was pending on the docket of that court. The jurisdiction to hear and decide the motions cannot be successfully assailed. *Shepard v. Leonard, ante,* 110.

The judgment below must be modified to accord with this opinion.

Modified and affirmed.

STATE ON RELATION OF A. O. HEDGEPETH v. L. L. SWANSON, SHERIFF OF VANCE COUNTY, AND THE NATIONAL SURETY COMPANY.

(Filed 13 October, 1943.)

1. Public Officers §§ 7a, 7b—

While public officers, acting in a judicial or *quasi*-judicial capacity, are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of judgment, even though such judgment be erroneous; however, when public officers in such cases, instead of acting in an honest exercise of their judgment, act corruptly or of malice, such officers are liable to an individual for damages suffered by reason of such corrupt and malicious conduct.

2. Public Officers § 7b: Sheriffs § 6d: Principal and Surety §§ 17, 20—

Where the complaint alleges that defendant, a sheriff, in procuring a search warrant for plaintiff's premises and a warrant for his arrest upon a charge of violating the prohibition laws, acted corruptly and with malice, wantonly, falsely, without probable cause and without regard for the public interest, and out of hate and revenge, it was error for the court below to sustain a demurrer *ore tenus.* As defendant surety company is the sheriff's bondsman and liable for his misconduct, C. S., 354, it follows that there was likewise error in sustaining the demurrer filed by it.

APPEAL by the plaintiff from *Burney, J.,* at June Term, 1943, of VANCE.

This is a suit instituted by the plaintiff in the name of the State against one defendant as Sheriff of Vance County and the other as surety upon the official bond of the Sheriff, for injuries alleged to have been caused by the misconduct in office of the Sheriff, under the provisions of Consolidated Statutes, 354. The complaint alleges that the defendant sheriff set out and wrongfully and negligently left fire burning at a still on land adjoining the land of the plaintiff, and that said fire spread over and damaged the land of the plaintiff, and that the defendant made no effort to extinguish such fire when informed of the danger incident thereto; and further, that five days after said fire had burned his woods and timber the plaintiff caused a warrant to be issued for the defendant charging him with a violation of C. S., 4312, by setting fire to brush and other material whereby other property was endangered and destroyed, without keeping the same properly guarded; that immediately after the warrant procured by the plaintiff had been served upon him the defendant Sheriff secured a search warrant for the premises of the plaintiff, charging that the plaintiff did have in his dwelling "spirituous and intoxicating liquors for the purpose of selling said liquors as strong drink," and thereafter on the same day the defendant secured a criminal warrant charging the plaintiff "with operating a whiskey still and did manufacture intoxicating whiskey," and upon this warrant the defendant caused plaintiff to be arrested at his home in the presence of his wife and children, and imprisoned until he gave bond. It is alleged that "the defendant, Swanson, then acting by virtue and under color of his office as Sheriff of Vance County, and inspired not by any regard for the public interest or welfare, but simply and solely out of hate, vengeance and malice toward this plaintiff, wilfully, wantonly, falsely and maliciously, contriving and intending to injure the plaintiff, and to cause plaintiff to be arrested," procured from a justice of the peace a search and seizure warrant, authorizing the defendant Swanson to search the premises of the plaintiff; and it is also alleged "That the said defendant, Swanson, at the same time he procured the search and seizure warrant . . . by means of a false and malicious affidavit as hereinbefore set forth, went before . . ., the Clerk of Recorder's Court of Vance County, and falsely, wantonly, and maliciously, and without reasonable or probable cause therefor, charged the plaintiff, before the Clerk of the Recorder's Court, with violation of the liquor laws of the State by operating a whiskey still and manufacturing intoxicating liquor, and by means of a false and malicious affidavit caused said Clerk of Recorder's Court to make out a writ in due form of law for the arrest of plaintiff, and said defendant, Swanson, falsely, maliciously, and without probable cause caused plaintiff to be arrested on said charge, . . ." and that when the case came on for trial the "Judge of the Recorder's Court directed that said

prosecution and warrant be *nol prossed.* That a *nol pros* was thereupon entered in said cause and said prosecution was thereby ended and wholly determined, and this plaintiff was released from his bond and discharged from said Court"; that in swearing out the warrants aforesaid the defendant "Swanson was actuated throughout, not by any regard for the public interest, but solely and exclusively by the hate, malice and spirit of revenge which he entertained toward the plaintiff"; and ". . . in swearing out said warrants and procuring the searching of the plaintiff's premises, and the arrest and prosecution of plaintiff upon a criminal charge, professed to be acting, and was acting, under and by virtue and color of his office, as Sheriff of Vance County."

To the complaint the defendants, and each of them, filed demurrers *ore tenus* upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were sustained and the action dismissed, to which ruling the plaintiff objected and preserved exception, and appealed to the Supreme Court.

Hill Yarborough, J. M. Peace, and A. A. Bunn for plaintiff, appellant.

Gholson & Gholson and J. P. & J. H. Zollicoffer for defendants, appellees.

SCHENCK, J. This action was instituted by the plaintiff, in the name of the State, against the defendant Swanson in his official capacity as Sheriff of Vance County, and the defendant, the National Surety Company, as surety on the Sheriff's official bond.

The question posed by this appeal is whether a sheriff is liable in his official capacity in an action for malicious prosecution for damages to an individual caused by acts involving the exercise of judgment and discretion and committed within the scope of his official duties?

The law applicable to the facts alleged in the complaint, as enunciated by the opinions of this Court, is that public officers acting in a judicial capacity or *quasi*-judicial capacity are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of his judgment though his judgment may have been erroneous; however, in cases where a public officer, even judicial or *quasi*-judicial, instead of acting in an honest exercise of his judgment, acts corruptly or of malice, such officer is liable in a suit instituted against him by an individual who has suffered special damage by reason of such corrupt and malicious action. In other words, no action lies against a public officer for an honest exercise of his discretion, though erroneous, but for a corrupt or malicious exercise of discretion such officer may be made to respond in damages to an individual injured thereby; *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735; "It is other-

wise in the case of judicial officers and also of administrative officers when engaged in official acts involving the exercise of judgment and discretion, in which case they are sometimes termed *quasi*-judicial. The principle governing in these cases is that they cannot be held responsible unless it is alleged and proved that they acted 'corruptly or with malice.' " *Hipp v. Farrell,* 169 N. C., 551, 86 S. E., 570; *ibid.,* 173 N. C., 167, 91 S. E., 831; *Moye v. McLawhorn,* 208 N. C., 812, 182 S. E., 493; *Old Fort v. Harmon,* 219 N. C., 241, 13 S. E. (2d), 423; *Wilkins v. Burton,* 220 N. C., 13, 16 S. E. (2d), 406.

Applying this law to the allegations of the complaint we are constrained to hold that his Honor erred in sustaining the demurrers *ore tenus* lodged by the defendants.

There is ample allegation of the fact that the defendant in procuring the search warrant for the plaintiff's premises and the warrant for his arrest upon a charge of violating the prohibition laws acted corruptly and with malice. True, the words "corruptly" or "corruption" are not used to describe the action of the defendant but the words "falsely," "wantonly," "out of revenge" and "without regard to the public interest" all imply corrupt action on the part of the defendant Sheriff. And the words "out of hate," "malicious" and similar expressions in the complaint are a clear allegation of malice. The complaint likewise alleges that the action of the defendant Sheriff in procuring the search of the plaintiff's premises and arrest of his person was "without probable cause."

The requirements for an action for malicious prosecution against a public officer to recover damages caused by the performance of discretionary acts by such officer in a corrupt and malicious manner having been alleged, the demurrer to the complaint filed by the Sheriff was erroneously sustained, and since the defendant surety company was liable, under C. S., 354, which provides "every such officer and the sureties on his official bonds shall be liable to the persons injured for all acts done by said officer by virtue or under color of his office," to any person injured by reason of any misconduct of the Sheriff in office, it follows that the sustaining of the demurrer to the complaint filed by the surety was likewise erroneous. *Price v. Honeycutt,* 216 N. C., 270, 4 S. E. (2d), 611.

The judgment of the Superior Court is

Reversed.

STATE v. DR. C. DILLIARD, JR.

(Filed 13 October, 1943.)

1. Evidence §§ 27, 41—

In a criminal prosecution for performing an operation on a pregnant woman, evidence of prosecutrix that she was told by a third person about the operation defendant gave, in explanation of her visit to defendant, is not hearsay and is competent.

2. Evidence § 47—

Expert testimony is admissible where it relates to matters requiring expert skill or knowledge in the medical field, about which a person of ordinary experience would not be capable of forming a satisfactory conclusion, unaided from one learned in the medical profession.

3. Evidence § 52—

Where a medical expert witness merely expresses his professional opinion upon an assumed finding of facts, and the facts assumed are supported by the testimony previously offered, such evidence is competent.

4. Appeal and Error §§ 6b, 6f, 23—

Broadside exceptions will not be considered. An assignment under C. S., 564, must particularize and point out specifically wherein the court failed to charge the law arising on the evidence.

5. Criminal Law § 56—

A motion in arrest of judgment must be based on some matter which appears, or for the omission of some matter which ought to appear, on the face of the record, creating a vital defect in some phase of the proceeding.

6. Criminal Law § 54c—

Upon the trial on an indictment charging the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, C. S., 4226, 4227, there was a verdict of guilty, and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered; and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby.

APPEAL by defendant from *Frizzelle, J.*, at April Term, 1943, of WAYNE. No error.

Criminal prosecution on bill of indictment charging: (1) That the defendant performed an operation upon the prosecutrix, quick with child, with intent to destroy such child. C. S., 4226; and (2) that the defendant performed an operation upon the prosecutrix with intent to procure a miscarriage. C. S., 4227.

The prosecutrix, a resident of Wilmington, N. C., discovering that she was pregnant, telephoned defendant at Whiteville, N. C. She then inter-

viewed him twice, once in August and once in September, relative to procuring an abortion. At that time she did not have the necessary money. In December she visited his office, then in Goldsboro, at which time he performed an operation on her "to get rid of the baby." The first operation did not produce the desired results. She returned to his office on a Tuesday and he again submitted her to treatment. On the following Saturday morning she gave premature birth to a fairly well developed child, about 7½ lunar months of age. It was either stillborn or died at birth. This prosecution followed.

When the cause came on to be tried in the court below, the jury returned a general verdict of guilty. Upon being polled at the request of the defendant, they stated, each for himself, that they found him guilty on the first count but did not consider the second count. The court then directed them to return to their room and consider the second count. They then returned a verdict of not guilty on the second count. The court below pronounced judgment, and the defendant excepted and appealed.

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

J. Faison Thomson for defendant, appellant.

BARNHILL, J. The defendant offered no testimony in defense. But the nurse who acted as an attendant in his office did testify in behalf of the State. Her testimony and that of the prosecutrix was amply sufficient to repel a motion to dismiss under C. S., 4643, and to require the determination of the issue of guilt or innocence by the jury.

The prosecutrix testified that she went to see the defendant to obtain his services and "I told him Mrs. Haifle told me about him, the operation he gave. She had told me about this operation he gave." To her statements as to what she told him the defendant excepted and moved to strike. The exception is bottomed upon the assumption that this was hearsay testimony. It cannot be sustained.

This was a statement made to the defendant in explanation of the visit by prosecutrix. Its probative force does not depend, in whole or in part, upon the competency and credibility of any person other than the witness. *S. v. Green,* 193 N. C., 302, 136 S. E., 729; *S. v. Lassiter,* 191 N. C., 210, 131 S. E., 577; *S. v. Simmons,* 198 N. C., 599, 152 S. E., 774; *Teague v. Wilson,* 220 N. C., 241, 17 S. E. (2d), 9. It does not put at issue the truth or falsity of the statement made by Mrs. Haifle. It derives its value from the credibility of the witness. It was made on oath and the maker was subject to cross-examination. Hence it does not come within the hearsay rule.

The State examined Dr. A. H. Elliott, Health Officer of New Hanover County, who saw the body of the child after birth. During his examination he was asked certain hypothetical questions, to which defendant excepted.

The hypothetical question answered by the witness clearly assumed the facts and circumstances surrounding the treatment rendered prosecutrix by defendant and the subsequent premature birth relied on by the State to establish the crime charged. It combined substantially all the facts about which evidence was offered, and it was sufficiently explicit for the witness to give an intelligent and safe opinion. The witness drew no inference from the testimony. He merely expressed his professional opinion upon an assumed finding of facts, and the facts assumed were supported by testimony previously offered. It related to matter requiring expert skill or knowledge in the medical field about which a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert information from one learned in the medical profession. *Pigford v. R. R.,* 160 N. C., 93, 75 S. E., 860; *S. v. Bowman,* 78 N. C., 509; *Ray v. Ray,* 98 N. C., 567; *Martin v. Hanes Co.,* 189 N. C., 644, 127 S. E., 688; *Godfrey v. Power Co.,* 190 N. C., 24, 128 S. E., 485. Subsequent questions addressed to the doctor, to which exception was entered, merely sought and obtained explanation and simplification of his opinion. The testimony was competent.

Defendant likewise makes broadside exception to the charge for that it fails "to declare and explain the law arising from the facts." In his brief under this assignment he contends that the court failed to charge on the clause "unless the same shall be necessary to preserve the life of the mother." Apparently this provision of the statute constitutes an exceptive proviso, of which the defendant must take advantage by way of defense. *S. v. Connor,* 142 N. C., 700, 55 S. E., 787; *S. v. Johnson,* 188 N. C., 591, 125 S. E., 183; *S. v. Epps,* 213 N. C., 709, 197 S. E., 580; *S. v. Davis,* 214 N. C., 787, 1 S. E. (2d), 104, and cases cited. This we need not now decide for the reason that the assignment is too general and indefinite to present any question for decision. *Rooks v. Bruce,* 213 N. C., 58, 195 S. E., 26; *S. v. Webster,* 218 N. C., 692, 12 S. E. (2d), 272; *Jackson v. Lumber Co.,* 158 N. C., 317, 74 S. E., 350; *Davis v. Keen,* 142 N. C., 496, 55 S. E., 359. Unpointed, broadside exceptions will not be considered. *McKinnon v. Morrison,* 104 N. C., 354, 10 S. E., 513; *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175. The Court will not go on a voyage of discovery to ascertain wherein the judge failed to explain adequately the law in the case. *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735. The assignment must particularize and point out specifically wherein the court failed to charge the law arising on the evidence.

The jury returned a general verdict of guilty. Upon being polled at the request of the defendant, each juror stated that he found the defendant guilty on the first count. Eleven said they did not consider the second count. One stated, "I understood it took the second count in consideration if we all found him guilty on the first count." Whereupon, the verdict of guilty on the first count was entered, and the court directed the jury to return to their room and reach a verdict on the second count. They then, after further deliberation, returned for their verdict on the second count "not guilty on the second count." The record fails to disclose any exception to this proceeding entered at the time. But the defendant, after the rendition of the verdict, moved in arrest of judgment. This motion must be denied.

A motion in arrest of judgment must be based on some matter which appears, or for the omission of some matter which ought to appear, on the face of the record, creating a vital defect in some phase of the proceeding. *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281, and cases cited; *S. v. Linney,* 212 N. C., 739, 194 S. E., 470; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321.

Here no defect appears. A verdict of guilty was rendered. Upon being polled, the jurors, each for himself, stated that it related to the first count. It was so entered. As to that the record is clear, and it was upon this verdict that judgment was pronounced. Even if we concede—and we do not—that the further proceedings in respect to the second count were irregular, the verdict on that count was "not guilty." It follows that the defendant has not been prejudiced thereby.

The other assignments of error not specifically discussed are untenable.

In the trial below we find

No error.

STATE v. LEROY CAMERON AND ROBERT J. CAMERON, JR.

(Filed 13 October, 1943.)

1. Larceny § 1—

Larceny is the felonious taking and carrying away of the goods and property of another, with the intent to deprive the owner of the use thereof and with a view to some advantage to the taker.

2. Larceny § 5—

Where nearly eight months intervene between the alleged theft and the stolen property being found in the possession of defendants, there is no presumption of fact of guilt of defendants under the doctrine of recent possession.

3. Larceny § 7—

In a criminal prosecution for larceny and receiving of a bicycle, where the evidence tended to show that the bicycle was taken in the night from a parked truck, and was found near the same place about eight months thereafter in the possession of defendants, who made contradictory and false statements about how they came by it, there is not sufficient evidence to convict and a motion for nonsuit should have been granted. C. S., 4643.

APPEAL by defendants from *Williams, J.*, at July Term, 1943, of LEE.

Criminal prosecution tried upon indictment charging defendants, in two counts, (1) with the larceny of a bicycle of value less than twenty dollars, the property of H. L. Clark, and (2) with receiving said bicycle, knowing it to have been feloniously stolen, taken and carried away contrary to the form of the statute, etc.

In the trial court evidence for the State as disclosed in the record on this appeal tends to show these facts: On 18 August, 1942, about 5 o'clock in the afternoon, while H. L. Clark was moving, and on his way from Jacksonville to Greensboro, in this State, in a pick-up truck and trailer, with a bicycle owned by him tied on top of the load on the truck, and after passing through and beyond Sanford westwardly on the Boone Trail, a tire on the trailer blew out at the farm of G. L. Stroupe, making it necessary to have repairs made to the tire. He put the truck "under the shed or barn on the Stroupe place"—the big green barn on the left side of the highway, in which barn fodder and hay were stored. The bicycle "was taken off that night"; "it had been roped down." Clark told Stroupe about it, and he reported it to the officers. Clark next saw and identified the bicycle in June, 1943, about two months after the sheriff and a patrolman had found it, on Saturday night, 3 April, 1943, about 10:15 o'clock, in possession of defendants as they were tying it on the front bumper of a Ford coach parked on the right side of the highway about 150 feet beyond the barn from Sanford. Both tires of the bicycle were flat. It was "real dusty." Between the spokes there were small pieces of hay and fodder—blades of fodder hung in the spokes. The sheriff and the patrolman chanced to pass along the highway a few minutes before and saw the parked Ford coach. In it there was a Negro woman whom they later ascertained to be the wife of defendant LeRoy Cameron. She told them that the driver "got out and left the car and she didn't know where he was gone." The officers rode up the road two or three miles and came back, and, finding the defendants there in the dark with the bicycle as above stated, they got out and interrogated defendants about where they got the bicycle. They made contradictory statements in the course of questioning by the officer. Defendant LeRoy Cameron first said that the bicycle belonged to his brother, Robert, Jr., who was at home, when in fact Robert, Jr., was

present; that Robert "had left it there for him to pick up"; and that he, LeRoy, "got it right up here above the road in the bushes." Thereupon, at the request of the sheriff, LeRoy went with him to show him where he, LeRoy, found the bicycle—beside a fence that came down just about where the car was parked—an open spot—hard ground, little grass—with small cedar trees—but no fodder and no "marking" there. Defendant LeRoy Cameron also told the officers that the bicycle belonged to his brother Arthur who got it up at John Hubbard's home—out of the barn—and brought it down that afternoon on a truck and put it out there that night and had sent him, LeRoy, to get it—that "his brother told him to come out and get it."

The next day Arthur Cameron, brother of defendants, took the patrolman and showed him "where he left the bicycle." The place he showed was about 200 yards from where LeRoy Cameron took the sheriff the night before.

John Hubbard, as witness for the State, testified that while there were barns on the Tomberlin place on which he lived in a rented house, he did not farm, and did not rent or have a barn; that Arthur Cameron did not get the bicycle from him; and that he never saw it until it was shown in court.

The defendant Robert Cameron, Jr., was not heard by the officers to say anything when LeRoy Cameron said in his presence that the bicycle belonged to his brother, Robert, Jr., but later stated to the officers that the bicycle did not belong to him and that he had never seen it before.

While there is evidence that Arthur Cameron lived, and was tenant on the Stroupe farm until "last Fall," and that the defendants and their mother lived on the place at one time several years ago, the evidence is that the defendants now live "on a place . . . five or six miles from the Stroupe place."

G. L. Stroupe, as witness for the State, testified that defendants had worked for him off and on many different times, and that the other brother, Arthur, was working there all the time; that LeRoy had worked for him in the "brick at New River" and came up with him often on week ends; that Robert helps on the farm some, helps keep the yard—helps do anything that was to be done "when I could get him to work." This witness testified at length, but the sum and substance of his testimony is that through their brother the defendants had "legal access" to the barn, but that he would not swear that he had seen either one of them on his place for a week prior to the alleged theft, and that he doubted whether he himself was there a week before or not. He said, "I doubt it very seriously," and that he thinks that Junior was living on the place in August, 1942, "but I wouldn't swear that; I think he was." Then in answer to question by the court, "Is that your best recollection?" he answered, "Yes, sir."

Upon the trial below the court instructed the jury: "If you convict both under the first count, charging larceny, you need not consider the charge of receiving stolen property."

Verdict: Guilty of larceny as charged in the bill of indictment.

Judgment: Each to be confined in the common jail of Lee County for not less than eighteen months nor more than two years, and assigned to work the roads under the direction of the State Highway and Public Works Commission.

Defendants and each of them appeal to the Supreme Court, and assign error.

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

K. R. Hoyle for defendants, appellants.

WINBORNE, J. This is the determinative question on this appeal: Is the evidence, taken in the light most favorable to the State, sufficient to take the case against defendants to the jury on the charge of larceny, and to support against them a verdict of guilty of larceny? It arises upon defendants' exceptions to the refusal of the court (1) to grant their motions for judgment as in case of nonsuit under provisions of C. S., 4643, and (2) to give certain peremptory instructions. We are of opinion that the exceptions are well taken.

Larceny is the felonious taking and carrying away of goods and property of another with intent to deprive the owner of the use thereof and with a view to some advantage to the taker. *S. v. Holder,* 188 N. C., 561, 125 S. E., 113.

The trial court properly held that because of the length of the period of time, nearly eight months, intervening between the date of the alleged theft of the bicycle and the date on which it was found in their possession there is from the bare fact of possession of the bicycle by defendants no presumption of fact of the guilt of either of the defendants under the doctrine of recent possession, and that the fact of such possession by them becomes only a circumstance to be considered in connection with other evidence bearing upon the guilt or innocence of the defendants. This appears to be in accordance with decisions of this Court. *S. v. McFalls,* 221 N. C., 22, 18 S. E. (2d), 700, and cases cited. See also *S. v. Rights,* 82 N. C., 675; *S. v. Jennett,* 88 N. C., 665; *S. v. Hullen,* 133 N. C., 656, 45 S. E., 513; *S. v. Reagan,* 185 N. C., 710, 117 S. E., 1; *S. v. Riley,* 188 N. C., 72, 123 S. E., 303. In the light of this ruling of the trial court, we are of opinion that evidence connecting defendants with the original taking

of the bicycle is lacking. That either of defendants was on the Stroupe farm or in vicinity of the Stroupe barn at the time of the taking is purely conjectural. The witness was unwilling to swear that he had seen them there, and the jury should not be permitted on testimony of the witness to speculate that they were there. *Mitchell v. Melts,* 220 N. C., 793, 18 S. E. (2d), 406.

Moreover, while their possession may raise a suspicion as to the lawfulness of it, the evidence points to the fact that they obtained possession from other person than the owner of the bicycle. Hence, the verdict rests in the realm of speculation.

The judgment below is

Reversed.

JOHN H. "PAT" HIGGINS v. MATILDA HIGGINS, ORA LEE WILLIS AND SAM WILLIS.

(Filed 13 October, 1943.)

1. Deeds §§ 13a, 17d—

In construing a clause in a deed providing for support and maintenance, its legal effect must be determined by a construction of the entire instrument. A collateral agreement, not appearing in the deed, in the absence of fraud or mistake which would warrant a reformation of the instrument, will not support an equitable lien on the premises conveyed for the enforcement of the collateral agreement.

2. Deeds § 17d—

The grantee, in a deed containing a covenant for support and maintenance, has a right to convey the land and to transfer the charge to his grantee, who would take with notice of the provisions in the original deed.

3. Same: Equitable Liens § 1—

Where plaintiff's conveyance of lands contained a provision that grantee would keep grantor in sickness and old age and grantee conveyed the lands in fee, receiving in exchange therefor other lands in fee to himself and wife by the entireties without covenant for support, which, after the death of the husband, the wife, one of defendants, conveyed to the other defendants, reserving a life estate to herself and plaintiff, with provision that one of grantees is to give reasonable amount of aid to plaintiff in sickness and old age, on suit for breach of covenant for support of plaintiff and verdict for plaintiff on all issues, it was error for the court to hold that plaintiff is entitled to an equitable lien upon the lands of defendants.

APPEAL by defendants from *Alley, J.,* at January Term, 1943, of YANCEY.

Civil action against defendants for alleged breach of covenant for support and maintenance.

Plaintiff executed a deed to James Higgins, dated 20 March, 1922, in consideration of $500.00 to him paid by James Higgins, and after the description of the land in said conveyance, there appears the following: "I further agree to keep him in sickness and old age."

On 17 March, 1925, James Higgins and wife, Matilda Higgins, conveyed said land to J. Will Higgins in exchange for other land. The land received in exchange was conveyed to James Higgins and Matilda Higgins, and held by them for some years as tenants by the entirety, and the conveyance to them contains no provision for the support of John H. Higgins, the plaintiff. James Higgins died and thereafter, on 7 June, 1940, Matilda Higgins conveyed the land to Ora Lee Willis and her minor son, Sam Willis, which deed contains the following provisions: "This deed will not come in effect until the death of Matilda Higgins and John Pat Higgins and they are to have full control as long as they live. The said Ora Lee Willis is to give reasonable amount of aid and care in sickness and old age, or this deed be *None* void."

A guardian *ad litem* was duly appointed for Sam Willis.

The jury returned the following verdict:

"1. Did the plaintiff institute his action within 3 years from the time his cause of action arose? Ans.: 'Yes.'

"2. Did the plaintiff institute his action within 10 years from the time his cause of action arose? Ans.: 'Yes.'

"3. Did James Higgins in his lifetime accept the Deed for the land therein described, from J. H. Higgins, dated March 20th, 1922, on condition and with the understanding and agreement that he would from time to time, keep and maintain the said J. H. Higgins, in his sickness and old age, as alleged in the complaint? Ans.: 'Yes.'

"4. Did James Higgins, in his lifetime, commit a breach of said condition and agreement in his lifetime, as alleged in the complaint? Ans.: 'Yes.'

"5. Did Matilda Higgins at the time, or thereafter, of the execution of the deed to her and James Higgins, assume the obligation of support of John H. Higgins? Ans.: 'Yes.'

"6. Did Matilda Higgins commit a breach of said condition? Ans.: 'Yes.'

"7. Did Matilda Higgins execute the deed dated June 7, 1940, to Ora Lee Willis and Sam Willis, on condition and with the understanding and agreement that the said Ora Lee Willis was to give or provide a reasonable amount of aid and care in sickness and old age to the said John H. Higgins? Ans.: 'Yes.'

"8. Did Ora Lee Willis commit a breach of said condition and agreement on which she accepted said deed? Ans.: 'Yes.'

"9. What sum, if any, is the plaintiff entitled to recover of the defendants, as the reasonable amount for support and maintenance of John H. Higgins in his sickness and old age? Ans.: '$1.00 per day.'"

Thereupon the court, in construing the verdict of the jury, signed a judgment for the plaintiff in the sum of $485.00, being the amount plaintiff was entitled to recover under the verdict at one dollar per day from 7 June, 1940, to 6 October, 1941, the date of the institution of the action, for the reasonable support of the plaintiff so long as he may live and providing further that said judgment shall constitute a specific lien on the land conveyed to James Higgins and wife, Matilda Higgins, by J. Will Higgins in exchange for the land originally conveyed by the plaintiff to James Higgins, describing said land by metes and bounds; and, also providing therein that said judgment shall not constitute any lien, debt or obligation against the defendant Sam Willis except in so far as it affects the land referred to and described therein.

Defendants appeal and assign error.

Briggs & Atkins and R. W. Wilson for plaintiff.

Sanford W. Brown and Charles Hutchins for defendants.

DENNY, J. The only question presented on this record for our consideration, is whether or not the court erred in holding that under the verdict of the jury the plaintiff is entitled to an equitable lien on the land now owned by the defendants; that is, upon land conveyed to James Higgins and wife, Matilda Higgins, by J. Will Higgins in exchange for the original tract of land conveyed by the plaintiff to James Higgins.

The other exceptions set out in the record are not preserved, as required by Rule 28 of the Rules of Practice in the Supreme Court, 221 N. C., 562, and are to be considered as abandoned. Therefore the defendants are not resisting judgment against them for the sum of $485.00, nor for the future support of the plaintiff, but they contend the facts established by the verdict of the jury constitute nothing more than a personal obligation to support the plaintiff, and are insufficient under the decisions of this Court to support a charge on the land owned by these defendants.

In construing a clause in a deed providing for support and maintenance, its legal effect must be determined by a construction of the entire instrument. *Marsh v. Marsh,* 200 N. C., 746, 158 S. E., 400. Consequently, a collateral agreement not appearing in a deed, in the absence of fraud or mutual mistake, which would warrant a reformation of the instrument, will not support an equitable lien on the premises conveyed for the enforcement of the collateral agreement.

Whether or not the provision, "I further agree to keep him in sickness and old age," is sufficient to constitute a charge on the land described in the original conveyance from the plaintiff to James Higgins, we need not decide, since that question is not presented on this record. However, conceding, but not deciding, that the provision in the original deed is sufficient to constitute a lien or charge on the land, the grantee had the right to convey the land and to transfer the charge to the subsequent grantee, and the subsequent grantee took with notice of the provision in the original deed. 26 C. J. S., 485, *et seq.*, sec. 150.

The deed, dated 17 March, 1925, from J. Will Higgins to James Higgins and wife, Matilda Higgins, as tenants by the entirety, is a warranty deed in fee simple and recites a consideration of $2,000.00, and contains no covenant or condition for the support of John H. Higgins, the plaintiff. On 7 June, 1940, more than 15 years after James Higgins and the defendant, Matilda Higgins, obtained the above deed, Matilda Higgins executed a deed to the premises to Ora Lee Willis and her minor son, Sam Willis, and, after the description of the land in said deed, there appears the conditions set out in the statement of facts herein. Those conditions, particularly on the question of support of this plaintiff, are vague, and cannot be held as a covenant for the support of this plaintiff which would constitute a charge on the premises therein conveyed.

The verdict of the jury does establish the fact that at the time James Higgins accepted the original deed from John H. Higgins, dated 20 March, 1922, it was understood and agreed that James Higgins "would from time to time, keep and maintain the said J. H. Higgins in sickness and old age"; and further that said obligation was assumed by the defendants. However, the assumption of that obligation by these defendants, in the light of the facts presented on this record, at most, constitute nothing more than a personal obligation on their part. The position of the plaintiff is far less persuasive than that of others in cases where covenants have been held to be personal. *Taylor v. Lanier,* 7 N. C., 98; *Perdue v. Perdue,* 124 N. C., 161, 32 S. E., 492; *Ricks v. Pope,* 129 N. C., 52, 39 S. E., 638; *Lumber Co. v. Lumber Co.,* 153 N. C., 49, 69 S. E., 929; *Bailey v. Land Bank,* 217 N. C., 512, 8 S. E. (2d), 614.

Courts will guard with jealous care the rights of the aged and infirm who have conveyed their land in the belief that they were making provision for support and maintenance in their declining years. And an examination of the decisions of this Court will disclose a strong and uniform tendency to treat a claim for support and maintenance as a charge on the land, which will follow it into the hands of purchasers, whenever the provision contained in the conveyance will justify such a construction. *Laxton v. Tilly,* 66 N. C., 327; *Helms v. Helms,* 135 N. C., 164, 47 S. E., 415; *Bailey v. Bailey,* 172 N. C., 671, 90 S. E., 803;

Marsh v. Marsh, 200 N. C., 746, 158 S. E., 400. The facts in this case, however, do not entitle the plaintiff to an equitable lien on the land of the defendants described in the judgment below.

Except as herein modified, the judgment below is affirmed. Let the costs be divided equally between the plaintiff and the defendants.

Modified and affirmed.

STATE v. WILLIE SMITH.

(Filed 13 October, 1943.)

1. Evidence § 36—

It is proper for the court to allow a witness, solely for the purpose of refreshing his memory, to examine a record or statement (1) prepared by him; (2) prepared under his supervision; or (3) made by another in his presence.

2. Evidence § 51—

The competency of a witness as an expert is properly addressed to the sound discretion of the trial judge.

3. Evidence § 48a—

In a prosecution for homicide, where a witness is tendered by the State and found by the court to be an expert in chemistry and toxicology, and the witness testifies that an analysis made by him of stains, on the clothing worn by the defendant on the night of the murder, showed the presence of human blood, an exception thereto, on the ground that the witness is not an expert hematologist, cannot be sustained.

4. Homicide § 14—

A bill of indictment, drawn in the statutory form as required by C. S., 4614, includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect.

5. Same—

C. S., 4200, does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth.

6. Homicide § 27h—

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

7. Appeal and Error § 29—

Exceptions not argued or referred to in appellant's brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562.

STATE *v.* SMITH.

APPEAL by defendant from *Parker, J.*, at May Term, 1943, of WARREN.

Criminal prosecution tried upon indictment charging defendant with the murder of one Vernon Powell.

The evidence discloses that Vernon Powell was killed in his place of business in the town of Warrenton, shortly before midnight on 31 December, 1942. The defendant was seen in the place of business of the deceased, by J. W. Scott, chief of police of the town of Warrenton, a few minutes before the body of the deceased was found. Death was caused by two compound fractures of the skull induced by the use of an axe. There was evidence that the motive for the killing was robbery.

Verdict: "Guilty in the first degree of murder."

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

Julius Banzet for defendant.

DENNY, J. The evidence against the defendant, other than certain confessions, was circumstantial. The circumstantial evidence tended to establish the identification of money of the deceased traced to the possession of the defendant; blood stains on the clothing defendant was wearing on the night of the murder; that defendant was the last person seen with deceased and was seen immediately after the murder running away from the scene; and possession by defendant on 1 January, 1943, of a pistol previously in the possession of the deceased.

The defendant excepts to the ruling of the trial judge in allowing L. W. Tappan, a Special Agent for the State Bureau of Investigation, to read a written report for the purpose of refreshing his recollection as to statements made by the defendant to the witness. The report was dictated by the witness from notes taken by him during a conversation with the defendant on 25 January, 1943. The court permitted the witness to use the report solely for the purpose of refreshing his recollection.

We do not think the ruling of his Honor violative of the decisions of this Court upholding instances where a witness, solely for the purpose of refreshing his memory, has been permitted to examine a record or statement (1) prepared by him; (2) prepared under his supervision; or (3) made by another in his presence. In the case of *S. v. Finley,* 118 N. C., 1161, 24 S. E., 495, the State offered to prove by a witness who was present at the taking of a deposition, the statements of the deceased made at that time as dying declarations. The Court held: "The statements beyond question were admissible as the dying declarations of the deceased. *S. v. Mills,* 91 N. C., 581. His Honor allowed against the objection of

defendant Finley, the witness to read over the deposition of the deceased, taken in the witness' presence, that he might refresh his memory in reference to the matter. The objection was properly overruled. It was not necessary under the circumstances that the witness should have written the paper himself in order that he might read it to refresh his memory. Greenleaf's Ev., section 436; *S. v. Staton,* 114 N. C., 813." *S. v. Teachey,* 138 N. C., 587, 50 S. E., 232; *Spaugh v. Penn,* 174 N. C., 774; 93 S. E., 693; *Story v. Stokes,* 178 N. C., 409, 100 S. E., 689; *S. v. Coffey,* 210 N. C., 561, 187 S. E., 754; *Rosenmann v. Belk-Williams Co.,* 191 N. C., 493, 132 S. E., 282. The memorandum is not the evidence. The evidence is the present recollection of the witness after refreshing his memory by referring to the memorandum. An exhaustive annotation on this subject will be found in 125 A. L. R., 19, *et seq.*

Dr. Haywood M. Taylor, Assistant and Associate Professor of Chemistry and Toxicology since 1930, in Duke University, was tendered by the State and found by the court to be an expert in chemistry and toxicology. The purpose in using the expert testimony of Dr. Taylor was to show that an analysis made by him of certain stains on the coat and trousers worn by the defendant on the night of the murder, showed the presence of human blood. The defendant does not object to the ruling of the court in holding the witness to be an expert in chemistry and toxicology, but enters an exception on the ground that the witness is not an expert hematologist. The exception cannot be sustained. The qualifying examination clearly shows Dr. Taylor competent to testify as an expert in chemistry as to his findings and analysis made by him of the stains found on defendant's clothing. Moreover, the competency of a witness as an expert is properly addressed to the sound discretion of the trial judge and ordinarily is not reviewable. *S. v. Smith,* 221 N. C., 278, 20 S. E. (2d), 313; *S. v. Smoak,* 213 N. C., 79, 195 S. E., 72; *Hardy v. Dahl,* 210 N. C., 530, 187 S. E., 788; *S. v. Gray,* 180 N. C., 697, 104 S. E., 647; *Geer v. Durham Water Co.,* 127 N. C., 349, 37 S. E., 474; *Flynt v. Bodenhamer,* 80 N. C., 205. Furthermore, after the qualifying examination of the witness by counsel for defendant, no objection was made to the testimony of Dr. Taylor and no motion made to strike out his testimony as being incompetent.

The bill of indictment upon which the defendant was tried contains the essential elements as required by C. S., 4614. The bill contains no allegation or count to the effect that the homicide was committed in the perpetration of a robbery. For this reason the defendant excepts to the refusal of the court to instruct the jury as follows: "The court charges you that in this case the defendant, Willie Smith, is charged in the bill of indictment with the murder of Vernon Powell with premeditation and deliberation and malice aforethought; that the indictment does not charge

that the said defendant murdered the said Vernon Powell in the perpetration of a robbery. The evidence in this case tends to show that the said Vernon Powell was murdered by some person or persons in the perpetration of a robbery. You, therefore, cannot find this defendant guilty as charged in the bill of indictment." The exception is untenable. Every averment necessary to be made is contained in the bill of indictment. *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522; *S. v. Fogleman,* 204 N. C., 401, 168 S. E., 536; *S. v. Logan,* 161 N. C., 235, 76 S. E., 1.

C. S., 4200, provides that "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . ." This statute, however, does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment when committed in the manner therein set forth.

The very interesting question presented in the case of *S. v. Watkins,* 200 N. C., 692, 158 S. E., 393, and discussed by *Stacy, C. J.,* in a concurring opinion *quœre de dubiis,* is not presented here. There can be no doubt but that the charge of murder committed in the perpetration of a robbery is included in a bill of indictment drawn in the statutory form, as required by C. S., 4614. *S. v. Fogleman, supra; S. v. Donnell,* 202 N. C., 782, 164 S. E., 352.

The eighth exception is to the refusal of the court to give the jury the following instruction: "If the jury should find from the evidence and beyond a reasonable doubt that the defendant killed Vernon Powell with an axe, nothing else appearing, it will be your duty to find the defendant guilty of murder in the second degree." His Honor's ruling was correct. This identical question has been passed upon many times by this Court. See *S. v. Miller, supra,* and the cases cited therein, and *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821.

The remaining exceptions set out in the record are not argued or referred to in defendant's brief. These exceptions are therefore deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562.

In the trial below, we find

No error.

STATE v. LUCILLE DEGRAFFENREID.

(Filed 13 October, 1943.)

1. Evidence §§ 29, 33½—

The accuracy and authenticity of the record not being questioned, a mimeographed transcript of the case on appeal in a criminal prosecution, as agreed to by counsel, where no countercase served and no exceptions filed, constitutes the case on appeal, and it is competent as evidence, on a subsequent trial of the same case, to impeach a witness who repudiates his former testimony. Conversely, it would have been competent to corroborate a witness.

2. Trial §§ 19, 31: Criminal Law § 53e—

The trial court shall not intimate or give an opinion to the jury whether a fact has been fully or sufficiently proved, this being the true province of the jury.

3. Homicide §§ 27e, 28—

In a homicide case a charge that, if the jury is satisfied that the killing was without malice but the prisoner fails to satisfy them that the killing was not unlawful, it would be their duty to return a verdict of manslaughter, is erroneous as presupposing an intentional killing with a deadly weapon. And a verdict of murder in the second degree will not cure the error.

4. Homicide § 16—

Upon admission or proof of an intentional killing of a human being with a deadly weapon, the law raises two presumptions against the slayer, first, that the killing was unlawful, and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. But the jury alone may determine whether an intentional killing has been established, where no admission of the fact is made.

5. Homicide § 27h—

On the trial of a criminal prosecution, when under the indictment it is permissible to convict the defendant of "a less degree of the same crime" (C. S., 4640), and there is evidence tending to support the milder verdict, the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in respect to the lesser offense is not cured by a verdict convicting defendant of a higher offense charged in the indictment.

6. Homicide § 16—

At the threshold of a criminal prosecution for homicide, the burden is on the State to establish the guilt of the accused beyond a reasonable doubt; hence, the intermediate steps necessary to invoke the aid of the legal presumptions of murder and manslaughter must first be taken by the prosecution.

APPEAL by defendant from *Williams, J.*, at July Term, 1943, of LEE.

STATE *v.* DEGRAFFENREID.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Ollie Moore.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for not less than 16 nor more than 20 years.

The defendant appeals, assigning errors.

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

K. R. Hoyle for defendant.

STACY, C. J. This is the same case that was before us at the Fall Term, 1942, reported in 222 N. C., 113, 22 S. E. (2d), 217, with full statement of the facts, to which reference may be had to avoid repetition.

On the present trial, as on the former, Thomas (Fat) McLean was a witness for the State. His testimony now is quite different from what it was then. It is much more damaging to the defendant and in many respects in conflict with what he said on the original hearing.

On cross-examination, he repudiated much of his testimony given on the former trial, and denied giving it. Whereupon the defendant "for the purpose of impeachment and contradiction of the State's witness, Thomas (Fat) McLean, offered his testimony at the former trial of this case, as contained in the mimeographed transcript of this case on appeal to the Supreme Court, Fall Term, 1942." Objection by the State; sustained; exception.

Presumably, the basis of the ruling was want of identity or proof of the record, but it is to be observed, according to the transcript, the defendant "offered his testimony at the former trial of this case," and its accuracy or the authenticity of the record seems not to have been mooted. At least, such is the impression gained from the agreed statement of case on appeal. Moreover, it appears from an examination of the mimeographed record offered by the defendant that the "statement of case on appeal," as therein contained, was signed by defendant's counsel; that service was accepted by the solicitor and no countercase was served or exception filed thereto, which thus constituted it the statement of case on appeal by operation of law, and that it purports to recite "all the evidence" in the case. It is a part of the record of this case on the former appeal, and is so certified by the clerk of Lee Superior Court, the trial court in both instances. 20 Am. Jur., 104. Its competency as evidence to impeach the witness is supported by what was said in *Blalock v. Whisnant,* 216 N. C., 417, 5 S. E. (2d), 130; *Chemical Co. v. Kirven,* 130 N. C., 161, 41 S. E., 1; *Aiken v. Lyon,* 127 N. C., 171, 37 S. E., 199; *S. v. Hunter,* 94 N. C., 829; *S. v. Voight,* 90 N. C., 741.

The defendant was within his rights in asking the witness if he did not testify to a different state of facts on the original hearing, and "his testimony at the former trial of this case" was competent as tending to impeach him. *S. v. McLeod,* 8 N. C., 344; *Bank v. Pack,* 178 N. C., 388, 100 S. E., 615; *Edwards v. Sullivan,* 30 N. C., 302. Conversely, it would have been competent as corroborative evidence to support the witness, if and when his credibility had been attacked. *S. v. Exum,* 138 N. C., 599, 50 S. E., 283; *S. v. Whitfield,* 92 N. C., 831. If competent for any purpose, or for the purpose offered, it was error to exclude it. *Allen v. Allen,* 213 N. C., 264, 195 S. E., 801. See *S. v. Kiziah,* 217 N. C., 399, 8 S. E. (2d), 474.

There is another exception, one to the charge, which deserves attention. As the court was concluding its instructions to the jury, the following expression was used:

"If you are satisfied from the evidence in this case that the killing of the deceased was without malice, but the prisoner has failed to satisfy you that the killing was not unlawful, it would be your duty to return a verdict of guilty of manslaughter."

Counsel for defendant insists that this instruction presupposes an intentional killing with a deadly weapon, whereas the jury alone on the evidence in the case was competent to make such determination. The point seems to be well taken. It is provided by C. S., 564, that the trial court shall not intimate or give an opinion to the jury whether a fact has been fully or sufficiently proved, this being the true office and province of the jury. *S. v. Oakley,* 210 N. C., 206, 186 S. E., 244; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417. It is true, upon admission or proof of an intentional killing of a human being with a deadly weapon, the law raises two presumptions against the slayer, first, that the killing was unlawful, and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869. But the jury alone may determine whether an intentional killing has been established where no admission of the fact is made by the defendant as none was made here.

Nor would the fact that the jury returned a verdict of guilty of murder in the second degree cure the error, even though it went only to the charge of manslaughter. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187. The rule is, that on the trial of a criminal prosecution, when under the indictment it is permissible to convict the defendant of "a less degree of the same crime" (C. S., 4640), and there is evidence tending to support the milder verdict, the defendant is entitled to have the different views presented to the jury, under a proper charge, and an error in respect of the lesser offense is not cured by a verdict convicting the defendant of a

higher offense charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a lesser degree of the same crime if the different views, arising on the evidence, had been correctly presented by the trial court. *S. v. Burnette,* 213 N. C., 153, 195 S. E., 356; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501.

True it is, that upon the establishment or admission of an intentional killing of a human being with a deadly weapon, the law casts upon the defendant the burden of satisfying the jury that the killing was without malice if he would escape a conviction of murder in the second degree, and that it was justifiable if he would avoid a conviction of manslaughter. *S. v. Sheek,* 219 N. C., 811, 15 S. E. (2d), 282; *S. v. Prince, ante,* 392. But at the threshold of the case the burden is on the State to establish the guilt of the accused beyond a reasonable doubt. *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340; *S. v. Redman,* 217 N. C., 483, 8 S. E. (2d), 623. Hence, the intermediate steps necessary to invoke the aid of the legal presumptions above mentioned must first be taken by the prosecution. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387.

It results from what is said above that the defendant is entitled to another hearing. It is so ordered.

New trial.

STATE v. LEROY CAMERON.

(Filed 13 October, 1943.)

1. Larceny § 7—

In a prosecution for larceny, where the State's evidence showed that defendant and a companion entered the filling station of prosecutor who, after making change for defendant, laid his pocketbook, containing about ninety dollars, on the counter and went out with the companion to service his car, leaving defendant who followed shortly and drove off with his companion, when prosecutor missed his pocketbook and reported to the sheriff, who arrested defendant next day, finding on his person eighty-six dollars in bills, three of which were identified as having been in the pocketbook when it disappeared, motion for nonsuit and prayers for peremptory instructions in favor of defendant were properly refused.

2. Trial §§ 29a, 32: Criminal Law §§ 53a, 53f—

The court is not required to charge on a subordinate feature of the case in the absence of a request therefor at the proper time.

3. Trial § 33: Criminal Law § 53g—

On a criminal prosecution, objections to the court's statement of the contentions of the State and the defendant, in its charge to the jury, will not be sustained, where no unfairness appears therein and the contentions as stated were predicated on reasonable deductions from the evidence.

4. Same—

While the judge was stating the contentions of the parties in a criminal case, objection was made by defendant that a certain witness did not testify as stated by the court and the court at once instructed the jury that they were to be governed by their own recollection of what the witness said, there is no reversible error.

APPEAL by defendant from *Harris, J.*, at March Term, 1943, of LEE. No error.

The defendant was charged with the larceny of a sum of money, the property of the State's witness Howard. There was verdict of guilty, and, from judgment imposing sentence, defendant appealed.

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

K. R. Hoyle for defendant.

DEVIN, J. Defendant's motion for judgment of nonsuit was properly denied. There was evidence, considered in the light most favorable for the State, tending to show that on the evening in question defendant in company with one Clegg came into the store and filling station of witness Howard, and that the defendant Cameron purchased a package of cigarettes, offering in payment a ten dollar bill saying that was the only money he had. The witness Howard in making change took out his pocketbook containing approximately ninety dollars in paper money and laid it on the counter behind the scales. At this juncture Clegg called for four gallons of gasoline, and Howard and Clegg went out of the store room to the front to service Clegg's automobile, leaving defendant Cameron alone in the store. Defendant shortly afterwards followed Clegg out of the store, and he and Clegg left in the latter's car. A few minutes later Howard discovered that his pocketbook and money were gone, and notified the sheriff. The defendant Cameron was arrested next day and on his person was found a billfold containing eighty-six dollars in paper money. Of this, witness Howard identified three bills as his and as having been in his pocketbook when taken—one a $20 bill, identified by a brown spot on the end; a $5 bill, identified by a pencil mark around the figure "5"; and a $1 bill identified by having been torn in two and pasted back together. Clegg, testifying as to what took place at the store, corroborated Howard in the main, but testified defendant came out of the store behind him.

Defendant did not become a witness, but offered his mother, who testified that the day before he was arrested she had given the defendant $61 in money to pay for repairs to an automobile. We think the evidence

offered by the State was sufficient to carry the case to the jury and to support the verdict. *S. v. McKinnon, ante,* 160. Defendant's prayers for peremptory instructions in his favor were properly refused.

The defendant excepted to certain testimony which was admitted over his objection, but upon examination of the record we find no error in the rulings of the court thereon. Defendant also noted several exceptions to the court's instructions to the jury, but all of those were pointed to those portions of the charge in which the contentions of the State and the defendant were being arrayed. No objection was made at the time. *S. v. Reddick,* 222 N. C., 520. No unfairness appears in the manner in which the contentions were stated, nor do we find any contention stated which was not predicated on a reasonable deduction from the testimony. It was urged upon us, also, that there was error in the court's reference to the State's contention that the evidence of defendant's mother should not be accepted because unreasonable and prompted by the natural desire to help her son, without at the same time stating the proper rule of law as to the consideration to be given the testimony of interested witnesses. *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388. However, this was a subordinate feature of the case and there was no request that the court charge thereon. *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *Bank v. Yelverton,* 185 N. C., 314 (320), 117 S. E., 299; *School District v. Alamance County,* 211 N. C., 213 (226), 189 S. E., 878; *S. v. Kiziah,* 217 N. C., 399 (407), 8 S. E. (2d), 474. The defendant's contention that his mother's testimony was reasonable and credible was stated by the court in the same connection with the contrary contention of the State. We are unable to discover any prejudicial error in this respect of which the defendant can justly complain.

The defendant also assigns error in that in the court's charge relative to the identification of the money it was stated that the State contended the witness Howard had described the three bills before they were shown him by the sheriff. On objection at the time by defendant's counsel that neither Howard nor the sheriff had so testified, the court properly instructed the jury that they were to be governed by their own recollection of what the witnesses had said. Exception on this ground cannot be sustained.

The case presented an issue of fact which the jury resolved against the defendant. We find nothing in the record of the trial which would justify setting aside the verdict and judgment.

No error.

FARMERS FEDERATION, INC., v. GILBERT H. MORRIS.

(Filed 13 October, 1943.)

1. Frauds, Statute of, § 5—

Whether a promise is an original one, not coming within the statute of frauds, or a collateral one, required by the statute to be in writing, is to be determined from the circumstances of its making, the situation of the parties, and the objects sought to be accomplished. Where the intent is doubtful the solution usually lies in summoning the aid of a jury.

2. Frauds, Statute of, §§ 5, 7—

In respect of the character of a promise, whether or not it is original or collateral under the statute of frauds, it is competent to show that the defendant had a personal, immediate and pecuniary interest in the transaction, and for this purpose it is proper to inquire about his entire connection with the person for whom the debt was made.

3. Evidence § 25: Frauds, Statute of, § 7—

It is not required that evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.

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

APPEAL by plaintiff from *Nettles, J.*, at January Term, 1943, of BUNCOMBE.

Civil action to recover for merchandise furnished and delivered The Haywood, Inc., on personal responsibility of the defendant.

It is alleged that in July, 1940, the defendant, who at that time was president of The Haywood, Inc., a corporation engaged in the restaurant business in the city of Asheville, induced the plaintiff to furnish the corporation goods and merchandise upon promise that he would be personally responsible for all bills so contracted. It is in evidence that the defendant said "he wanted credit extended to The Haywood, Inc.; that Mrs. Little was running it; that she was a fine woman and that he was backing her. . . . I am backing her, and I will see that it is paid."

It was further alleged that the defendant had an immediate, personal, pecuniary interest in the corporation and its business.

The defendant denied the allegations of the complaint and pleaded the statute of frauds.

On cross-examination, the plaintiff undertook to question the defendant about the formation of the corporation—his endorsement of note to secure the original funds—and his continued interest therein. Mrs. Little was also questioned about the defendant's interest in the business.

The court confined the examination of these witnesses "to the time of the alleged purchase of these supplies." Exception. Plaintiff's counsel: "He admits that he was president and a stockholder of the company." The Court: "I think that is as far as you can go."

From verdict and judgment for defendant, the plaintiff appeals, assigning errors.

Smathers & Meekins for plaintiff, appellant.

Sale, Pennell & Pennell for defendant, appellee.

STACY, C. J. Whether a promise is an original one not coming within the statute of frauds, or a collateral one required by the statute to be in writing, is to be determined from the circumstances of its making, the situation of the parties, and the objects sought to be accomplished. *Simmons v. Groom,* 167 N. C., 271, 83 S. E., 471; *Balentine v. Gill,* 218 N. C., 496, 11 S. E. (2d), 456; *Dozier v. Wood,* 208 N. C., 414, 181 S. E., 336. Where the intent is doubtful, the solution usually lies in summoning the aid of a jury. *Whitehurst v. Padgett,* 157 N. C., 424, 73 S. E., 240. The issue was properly submitted to the jury in the instant case. *Taylor v. Lee,* 187 N. C., 393, 121 S. E., 659; *Peele v. Powell,* 156 N. C., 553, 73 S. E., 234, on rehearing, 161 N. C., 50, 76 S. E., 698.

The instant case comes well within the example put by Mr. Clark in his work on Contracts, 67: "If, for instance, two persons come into a store and one buys and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking and must be in writing; but if he says, 'Let him have the goods and I will pay,' or 'I will see you paid,' and credit is given to him alone, he is himself the buyer, and the undertaking is original."

In respect of the character of the promise, it was competent to show that the defendant had a personal, immediate and pecuniary interest in the transaction. *Balentine v. Gill, supra; Whitehurst v. Padgett, supra.* For this purpose, it was proper to inquire about his entire connection with the corporation.

In excluding the evidence offered and limiting the cross-examination to the time of the purchase of the supplies, the jury was left without a full knowledge of the facts and denied information regarding the defendant's long-continued interest in the business which would have thrown some light on the matter. "Anything which shows the intention or the actual contract of the parties is material, and any evidence which goes to show the intention of the parties is admissible whether it be by way of conduct or documentary in nature." 34 Cyc., 980, quoted with ap-

proval in *Henley v. Holt,* 214 N. C., 384, 199 S. E., 383, and *Potato Co. v. Jeanette,* 174 N. C., 236, 93 S. E., 795.

The examination was also pertinent as tending to impeach the defendant who testified on his examination in chief that he had no conversation with plaintiff's witnesses as detailed by them on the witness stand. "It is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." *Bank v. Stack,* 179 N. C., 514, 103 S. E., 6.

A new trial seems necessary. It is so ordered.

New trial.

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

STATE v. JOSEPH O'CONNOR AND SURETY, TAR HEEL BOND COMPANY.

(Filed 13 October, 1943.)

Bail § 4: Judgments § 22e—

Upon judgment *nisi,* in a criminal prosecution, against defendant and his appearance bond and *sci. fa.* served on his surety and upon return at a subsequent term, judgment absolute entered against defendant and surety, where subsequently defendants moved to set aside the judgment for surprise and excusable neglect, C. S., 600, for that the case did not appear on the calendar, with no allegation or evidence of any meritorious defense, their motion was properly denied.

APPEAL by defendant surety, Tar Heel Bond Company, from *Frizzelle, J.,* at May Regular Term, 1943, of HARNETT.

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

M. O. Lee and H. Paul Strickland for the Harnett County Board of Education.

Neill McK. Salmon and C. P. Barringer for defendant surety, appellant.

PER CURIAM. O'Connor was indicted in the Superior Court of Harnett County for breaking and entering, and his codefendant in this proceeding, the Tar Heel Bond Company, became surety for his appearance in court to answer the charge. Upon his failure to appear at September Term, 1941, of said court, judgment *nisi* was entered against O'Connor

and his said surety, and *sci. fa.* issued and served upon the defendant surety. Upon return of the *sci. fa.* at January, 1942, Term of the court, upon motion of the solicitor, judgment absolute was entered against O'Connor and his surety, the Tar Heel Bond Company, in the amount of $2,000.00, the penal sum named in the bond.

Subsequently, the defendants made a motion to set the judgment aside because of surprise and excusable neglect—C. S., 600—alleging that they had been misled because the motion for judgment absolute did not appear for hearing on the printed calendar of cases to be heard at that term. The motion was denied and defendants appealed.

Inspection of the record discloses that defendants, in their motion, made no allegation that they had any meritorious defense, and none was presented on the hearing of their motion. *Dunn v. Jones*, 195 N. C., 354, 356, 142 S. E., 320; *Bank v. Duke*, 187 N. C., 386, 122 S. E., 1; *Cayton v. Clark*, 212 N. C., 374, 193 S. E., 304. The motion was properly denied.

Judgment affirmed.

MRS. MINNIE GARDNER GILLIS v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY AND GRADY LITTLE.

(Filed 20 October, 1943.)

1. Libel and Slander §§ 2, 5—

Words, spoken in the presence and hearing of others, containing the imputation of the commission of the crime of larceny, are slanderous and actionable *per se*.

2. Libel and Slander § 13: Corporations §§ 25a, 25b—

In an action for slander, where plaintiff's evidence tended to show in its most favorable light that one of two defendants, who was manager of his codefendant's store, while acting in the scope of his employment on the store premises, falsely charged in a loud voice, in the presence of others, that plaintiff had stolen a package from the said store, a case of actionable wrong is made out, in the absence of allegations in the answer that the charge was true or its utterance privileged, and motion for judgment of nonsuit was properly denied.

3. Corporations §§ 20, 25a: Master and Servant § 21b—

The designation "manager" implies general power and permits a reasonable inference that such manager is vested with the general conduct and control of his employer's business in and around the premises, and his acts are, when committed in the line of his duty and in the scope of his employment, those of his principal.

4. Master and Servant § 21b: Corporations § 25a—

When the servant is engaged in the work of his master, doing that which he is employed or directed to do, and an actionable wrong is done to

another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question. And this principle is applicable to actions for slander.

5. Libel and Slander §§ 5, 16—

The author of a defamation, whether it be libel or slander, is liable for damages caused by, or resulting directly and proximately from, any secondary publication or repetition which is the natural and probable consequence of his act.

6. Corporations § 25a: Master and Servant § 21b—

Private instructions by employers to employees not to commit torts will not relieve the employer from liability for such acts committed by an employee within the scope of his authority and in the line of his duty, in an effort to preserve and safeguard his master's property. The master is liable even if the particular act, committed under such circumstances, was in violation of direct and positive instructions.

7. Libel and Slander § 14—

In an action for damages for slander, where in his charge to the jury the trial judge properly and fairly stated the evidence pertinent to the issues, and the contentions of the parties, in compliance with C. S., 564, and it appearing that the jury sufficiently understood the elements of actionable defamation necessary to be found before any liability could attach to defendants, there was no error in the court's failure to give a more elaborate definition of slander.

8. Appeal and Error § 39a—

It is only when the court's ruling on some material matter is prejudicial, amounting to the denial of a substantial right, that a new trial will be granted.

9. Appeal and Error § 29—

Exceptions not discussed in appellant's brief are deemed abandoned. Rule 28.

BARNHILL, J., dissenting.

WINBORNE, J., concurs in dissenting opinion.

APPEAL by defendants from *Clement, J.*, at March Term, 1943, of BUNCOMBE. No error.

This was an action to recover damages for slander. It was alleged that the defendant Little spoke of and concerning the plaintiff that she had stolen a bundle or package from defendant company's store, and further that the defamatory words were spoken while Little was acting within the scope of his employment by his codefendant as manager of the store. The defendants denied that the slanderous words alleged were spoken by defendant Little, or that the corporate defendant was liable therefor.

Upon issues submitted there was verdict that defendant Little spoke of and concerning the plaintiff, in the presence and hearing of another or others besides her husband, in substance, the words alleged in the complaint, and that defendant Little was at that time acting within the course and scope of his employment. Compensatory damages in the sum of $1,400.00 were awarded.

From judgment on the verdict, defendants appealed.

Don C. Young and James S. Howell for plaintiff.

Williams & Cocke for defendants.

DEVIN, J. This was an action for damages for slander, and comes to us on defendants' appeal from a judgment on the verdict of the jury in favor of the plaintiff. It was determined by the jury, in response to issues submitted, that the defendant Little, falsely charged, in the presence and hearing of others, that the plaintiff had stolen a package from the defendant company's store, of which he was the manager in charge, and that at the time and with respect to the defamation complained of defendant Little was acting within the scope of his employment by his codefendant.

As the basis of their appeal defendants assign certain errors in the rulings of the trial judge in the admission and exclusion of evidence, and in his instructions to the jury.

It is contended that defendants' motion for judgment of nonsuit should have been allowed, but we think plaintiff's evidence, considered in the light most favorable for her, warranted submission of the case to the jury. The testimony of the plaintiff, her husband and another witness that defendant Little uttered the charge in substance as alleged in the complaint, in the presence and hearing of another or others besides her husband, was sufficient to make out a case of actionable wrong on the part of defendant Little, in the absence of allegations in the answer that the charge was true or its utterance privileged. The words spoken containing the imputation of the commission of the crime of larceny were actionable *per se*. *Roth v. News Co.*, 217 N. C., 13, 6 S. E. (2d), 882; *Bryant v. Reedy*, 214 N. C., 748, 200 S. E., 896; *Flake v. News Co.*, 212 N. C., 780, 195 S. E., 55; *Elmore v. R. R.*, 189 N. C., 658 (671), 127 S. E., 710; *Cotton v. Fisheries Products Co.*, 177 N. C., 56, 97 S. E., 712; *Jones v. Brinkley*, 174 N. C., 23, 93 S. E., 372.

The defendant company's motion and its prayer for a directed verdict on the second issue were based on the further ground that there was no evidence to justify submission to the jury of the question of its liability for the defamatory words spoken by defendant Little.

The determinative question is whether the plaintiff's evidence affords any reasonable ground for the assumption that at the time and in respect to the utterance of the words complained of defendant Little was acting within the course and scope of his employment by his codefendant. Giving the plaintiff the benefit of every fact and inference of fact pertaining to the issues involved, which may be reasonably deduced from the evidence (*Cole v. R. R.*, 211 N. C., 591, 191 S. E., 353), it appears that Little was manager of the defendant company's large grocery store in Asheville and had full charge of the premises and operations at that location; that he had under his supervision and control the parking space for customers of the store which the company provided on its premises just in front of the store and between it and the street; that on either side of the walkway from the street to the store, a distance of 30 to 40 feet, were places for automobiles, arranged for the convenience of customers and to invite and encourage their patronage. The defendant Little referred in his testimony to this space as "my grounds." On the occasion alleged, Friday, 3 July, 1942, about noon, all this space was occupied by cars, and many people were going in and out the store, and to and from the automobiles. At the time it was thought by one witness that as many as 200 people were on the premises, in and around the front of the store. Plaintiff's car was parked facing the walkway and about 10 or 15 feet from the front door. Little, the manager, was on duty, standing near the front door watching the checkers or cashiers (there were five stands for this purpose), and the customers coming and going. It was his duty as manager to supervise, control and further his employer's business and to safeguard its property. He saw the plaintiff, accompanied by her husband, pass out of the store with a wrapped package in her arms, going to their parked car. The package proved to be a dressed chicken which plaintiff had purchased. Apparently, not having seen plaintiff's husband pay the cashier for the article, and reaching the conclusion that it was being stolen, Little went to the plaintiff's car, and in loud and angry tones charged her with stealing the package. He required her to come back into the store for investigation, whereupon the cashier told the manager the article had been paid for. Later Little went out to plaintiff's automobile and in a low voice apologized to her. This evidence is susceptible of the reasonable inference that Little, while on duty, and acting in the line of his duty to his employer with respect to premises and property of which he had been given charge and supervision, in the effort to preserve his employer's goods and prevent their wrongful removal, and as incidental to the performance of this duty, made the charge against the plaintiff of which she now complains.

We think the evidence of sufficient probative force to warrant submission to the jury of the question of the corporate defendant's liability.

In *Kelly v. Shoe Co.*, 190 N. C., 406, 130 S. E., 32, it was said: "The designation 'manager' implies general power and permits a reasonable inference that he was invested with the general conduct and control of defendant's business in and around their Wilmington store, and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." Though the employer may not be held liable if the employee of his own motion and incensed by an imagined wrong against his employer oversteps the bounds of lawful behavior, yet liability does flow from the wrongful acts of the employee committed in attempting to do what he was employed to do when his acts are done in the line of duty and within the scope of his employment. *Kelly v. Shoe Co., supra.* A distinction is to be observed between a wrongful act done to another by an employee in consequence of and to avenge an injury to his employer's goods already committed, and one done to prevent such injury from being committed or consummated, in the furtherance of his employer's interests. *Daniel v. R. R.*, 136 N. C., 517, 48 S. E., 816; *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145. In *Parrish v. Mfg. Co.*, 211 N. C., 7, 188 S. E., 817, the line of distinction is laid down between those cases in which the liability of the employer attaches for torts of the employee committed while the latter is engaged in what he was employed to do and while he is at the time about his employer's business, and those cases where the injury to a third person occurs while the employee is engaged in some private matter of his own, outside the legitimate scope of his employment, and without specific authority from the employer. A similar distinction was pointed out in *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501, and *McLamb v. Beasley,* 218 N. C., 308, 11 S. E. (2d), 283; *D'Armour v. Hardware Co.*, 217 N. C., 568, 9 S. E. (2d), 12.

If the tort of the employee is committed in the course of doing the employer's work, and for the purpose of accomplishing it, it is the act of the employer, and he is responsible whether the wrong done be occasioned by negligence or reckless purpose to accomplish the employer's business in an unlawful manner. As was succinctly said by *Stacy, C. J.*, in *Dickerson v. Refining Co.*, 201 N. C., 90, 159 S. E., 446, "When the servant is engaged in the work of the master, doing that which he is employed or directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question."

The principle that the employer is to be held liable for the torts of his employee when done by his authority, express or implied, or when they are within the course and scope of the employee's authority, is equally

applicable to actions for slander. *Cotton v. Fisheries Products Co., supra; Sawyer v. Gilmers, Inc.*, 189 N. C., 7, 126 S. E., 183; 35 Am. Jur., 1001.

This principle was recently considered by this Court in case of *Hammond v. Eckerd's*, 220 N. C., 596, 18 S. E. (2d), 151. While in that case judgment of nonsuit as to the corporate defendant was affirmed, the facts in some material respects were different from those in our case. There the clerk at the cigar counter of defendant's store followed a customer out of the store and along the street and charged him with having stolen cigars. It was said in the opinion by *Winborne, J.*, "Applying those principles to the case in hand, it is manifest that the employment of Richard E. Young, Jr. (the cigar clerk) carried no implied authority to go out of the store and prefer charges against, and cause the search of a third party, as attributed to him. . . . On the other hand, the evidence tends only to show that Richard, Jr., was employed as a mere clerk behind the cigar stand, and that he sold cigars. Furthermore, if the custody of the cigars were under his control and, if his suspicion had been well founded, the cigars had already been stolen, and passed from his possession and out of the store. Under such circumstances the defamatory language used and the acts committed, while outside the store, and on the street, are clearly without the scope of his employment, and cannot possibly be brought within the limits of implied authority of an agent."

In *Lamm v. Charles Stores Co.*, 201 N. C., 134, 159 S. E., 444, an action for malicious prosecution, it was held that the action of the manager of the store in causing the issuance of a warrant for the plaintiff for uttering what was thought to be a forged check, which he had accepted for goods sold, was beyond the scope of his employment. It appeared in that case that defendant operated a cash store and had issued written instructions if a manager cashed a personal check he would be held responsible. Apparently the manager then was acting in his own interest in having the warrant issued. In the case at bar defendant Little had no personal interest in the matter save to preserve his employer's goods. In *Redditt v. Mfg. Co.*, 124 N. C., 100, 32 S. E., 392, the opinion of *Faircloth, C. J.*, apparently draws a distinction between public and private corporations with respect to defamation by an agent, but in the opinion of *Douglas, J.*, concurred in by a majority of the Court, the principle was adhered to that a corporation is liable for slander uttered by its agent in the course and scope of his employment and in aid of the company's interest.

The defendants' excepted to the admission of testimony tending to show repetition of the slander by third persons not authorized by the defendants. We think this evidence was competent under the rule laid down in *Sawyer v. Gilmers, Inc.*, 189 N. C., 7, 126 S. E., 183. It was

there said, "We hold it to be the law in this State that the author of a defamation, whether it be libel or slander, is liable for damages caused by or resulting directly and proximately from any secondary publication or repetition which is the natural and probable consequence of this act. . . . If the defamation is uttered under such circumstances as to time, place or conditions as that a repetition or secondary publication is the natural and probable consequence of the original defamation and damage resulting therefrom, he is liable for such damages and evidence of such repetition or secondary publication and of damages resulting therefrom is admissible."

In the case at bar, as in the *Sawyer case, supra,* the trial judge cautioned the jury that this evidence was not offered to show defendant Little made the statement alleged, but only for the purpose of showing whether or not it injured plaintiff's reputation. It was in evidence that the defamatory words complained of here were uttered in a public place, in loud and angry tones, and that at the time and place of their utterance a large number of people were in close proximity. One witness, who testified he heard the words spoken, was in an automobile parked in a driveway near-by.

Defendant excepted to the exclusion of the question asked defendant Little as to what instructions had been given him by the corporate defendant "relative to making any statement to people that might be interpreted as accusing them of stealing." The witness, if permitted, would have answered, "We are never to accuse anyone as to taking anything and to lay no accusation against anyone of having taken anything." While it does not appear when, how, by or to whom the instructions referred to were given, such evidence, if properly presented, may have been competent in corroboration of the witness' testimony that he did not make the accusation charged. But private instructions of this character would not have had the effect of relieving the defendant from liability for defamation uttered by the manager if in fact he was at the time acting within the scope of his authority and in the line of his duty, in the effort to preserve and safeguard the company's property and to prevent its being carried off the premises. Otherwise an employer could avoid all liability for the torts of his employees by the simple expedient of instructing them not to commit them. It is not necessary that the employer should have known that the act complained of was to be done. It is enough if the injury is caused by the wrongful act of the employee while acting in the scope of his employment. *Pierce v. R. R.,* 124 N. C., 83, 32 S. E., 399. "To make the master liable it is not necessary to show that he expressly authorized the particular act; it is sufficient to show that the servant was acting at the time in the general scope of his authority, and this although he departed from his instructions,

abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury." *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145. "The master is liable even if the particular act committed under such circumstances was in violation of direct and positive instructions." *Barnhill, J.,* in *West v. Woolworth Co.,* 215 N. C., 211, 1 S. E. (2d), 546.

Where the wrong done to a third person is within the general scope of the employee's authority, is in the line of his duty, and is in furtherance of the employer's business a deviation from actual authority will not necessarily foreclose recovery, *Cole v. Motor Co.,* 217 N. C., 756, 9 S. E. (2d), 425, though a substantial deviation from the scope of the duties imposed on the employee will relieve the employer of liability for those acts not immediately connected with his employer's business. *Parrott v. Kantor,* 216 N. C., 584, 6 S. E. (2d), 40; *McLamb v. Beasley, supra.*

We do not regard the exclusion of the proffered testimony under the circumstances as prejudicial to the corporate defendant, or sufficient to overthrow the verdict and judgment in plaintiff's favor. It is only when the court's ruling on some material matter is prejudicial, amounting to the denial of a substantial right that a new trial will be justified. *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863; *Wilson v. Lumber Co.,* 186 N. C., 56, 118 S. E., 797.

Defendants noted exception to the judge's charge in that his definition of slander was not sufficiently comprehensive. The words excepted to appear to have been stated at the outset of the charge in connection with general reference to the nature of the case. However, in his instructions to the jury more particularly addressed to the first issue, the trial judge stated the essential facts necessary to be found from the testimony before the issue as to the malicious utterance in the presence of others of the defamatory words alleged could be answered in favor of the plaintiff. The jury was further cautioned that unless they found by the greater weight of the evidence that defendant Grady Little used in substance the words "you stole that bundle," or "you have got a bundle you stole," they should answer the first issue no. The evidence pertinent to the several issues was stated to the jury and the contentions of the parties thereon fairly arrayed. There is no suggestion that C. S., 564, was not complied with. We think the jury sufficiently understood the material elements of actionable defamation necessary to be found before any liability could attach to the defendants. Under these circumstances, we think the absence of more elaborate definitions may not be held for error. The court's instructions as to agency and scope of authority seem to have been in substantial compliance with the decisions of this Court.

The court declined defendants' requests for instructions predicated on the assumption that only the witness Austin Livingston heard the slanderous words spoken by defendant Little on this occasion. These requests were properly refused. The evidence offered in support of plaintiff's claim, considered in the light most favorable to her, opened the door to the wider implication that the accusation was made in the presence and hearing of other persons besides Livingston and her husband.

Other exceptions noted at the trial not discussed in defendants' brief are deemed abandoned. Rule 28.

Upon consideration of the entire case as it appears in the record, we conclude that the verdict and judgment should be upheld.

No error.

BARNHILL, J., dissenting: That the manager of the corporate defendant was acting in the course and scope of his employment at the time complained of would seem to be supported by this record. In this conclusion I concur. However, I cannot agree that no material or prejudicial error was committed in the trial.

Slander is the speaking of defamatory words of and concerning a person in the presence and hearing of another. The defamatory language does not give rise to a cause of action unless some third party hears and understands the words used in their defamatory sense. That is, the language must be defamatory, and it must be so understood by at least one hearer. *Hedgepeth v. Coleman,* 183 N. C., 309.

Only one person other than plaintiff's husband testified that he heard. He understood Little to say, "You took the package." This is quite different from "You stole the package." The one is slanderous *per se;* the other is not.

Yet the sum total of the court's charge on the first issue was as follows:

"Slander is where words are falsely spoken which are injurious to the reputation of another. . . .

"Now, Gentlemen of the Jury, the burden of that issue (the first issue) is on the plaintiff to satisfy you by the greater weight of the evidence before you would answer that issue Yes. If the plaintiff has done so, you will answer it Yes. If the plaintiff has not done so, then you will answer it No. . . .

"It is not necessary that you find he used the exact words that she 'stole' the chicken. Notice the words of the issue—Did he speak of and concerning her 'in substance the words alleged in the complaint,' which is that she had stolen the chicken?"

The second paragraph above quoted was then repeated.

At no time, even in the statement of contentions, did the court instruct the jury that plaintiff must show that the defamatory language was

used "in the presence and hearing of others." Nor was the jury instructed that it must appear that the language was understood in its defamatory sense.

There are exceptions in the record which challenge the sufficiency of this charge, and I am of the opinion that they should be sustained.

The witness who heard did not know the defamed, and he did not repeat the defamation until more than six months thereafter. The plaintiff, on the other hand, voluntarily gave currency to the charge by the institution of this action eleven days after the occurrence. Even so, the court in its charge on the issue of damages draws no distinction between repetitions of the charge traceable to Little's utterance on the one hand and those which proximately resulted from the institution of the action on the other. Surely plaintiff cannot complain because of "talk" which resulted from her own act.

I vote for a new trial.

WINBORNE, J., concurs in dissent.

No. 305

SOUTHERN MILLS, INC., v. SUMMIT YARN COMPANY AND BELDING HEMINWAY COMPANY.

No. 306

SOUTHERN MILLS, INC., v. SUMMIT YARN COMPANY AND BELDING HEMINWAY COMPANY.

(Filed 20 October, 1943.)

1. Pleadings § 16a—

If the defect in the pleading, upon demurrer under C. S., 507, relates merely to misjoinder of actions, the court will, under C. S., 516, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated; but where there is a misjoinder both of causes and of parties, this procedure cannot be followed.

2. Same—

Where plaintiff, in a suit against two corporate defendants, joins a cause of action based upon an alleged breach of contract by one of the defendants only, with a cause of action against the other defendant to compel an audit of its affairs, under C. S., 1146, on demand of a stockholder, and also, in the same complaint, asserts another cause of action against the first defendant for fraud and deceit, judgment of the court below, overruling defendants' demurrers, is reversed and the action dismissed.

3. Pleadings §§ 16a, 20—

Upon the dismissal of an action for misjoinder of parties and causes, appeals from all preliminary orders such as for an audit of the books of one of the defendants, C. S., 1146, are dismissed.

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

THESE appeals were argued together here and will be considered consolidated for the purpose of discussion.

No. 305.

This is an appeal by defendants from the judgment rendered by *Rousseau, J.*, at the July Term, 1943, of Lincoln Superior Court, overruling demurrers identical in nature, separately filed by defendants, in which they asked dismissal of plaintiff's action for misjoinder of parties and causes of action.

The plaintiff brought the action for relief against the defendants under the following alleged circumstances:

The plaintiff, a domestic corporation, was the owner of a cotton mill plant, with equipment for the manufacture of cotton yarns in the city of Lincolnton, in this State. The defendant Belding Heminway Company was a corporation under the laws of Connecticut, extensively engaged in the manufacture, sale and distribution of textile products over a wide area, including several states, directly and through its subsidiaries. This company entered into negotiations with the plaintiff for the purchase of its plant, which resulted in the following agreement:

"BELDING HEMINWAY CORTICELLI.

"119 West 40th Street
New York, N. Y.
March 17th, 1942

"Southern Mills, Inc.,
Lincolnton,
North Carolina.

"Dear Sirs:

"This will confirm that our agreement with you of March 5, 1942, is mutually canceled and in place thereof, we have made a new agreement as follows:

"1. Belding Heminway Company will form a corporation which will purchase from you the inventory shown on the attached schedule, together with all necessary supplies which are now used to have a complete operating unit. The figures are taken from an appraisal made by

W. F. Kincaid, Jr., of Lincolnton, North Carolina. You agree that the inventory will be in good condition on the closing date and free and clear of all liens, claims and encumbrances.

"2. You will assign to us your lease on the mill property which you occupy at Lincolnton, North Carolina; you agree that all provisions of the lease will be performed as of the date of closing and the new company will assume the lease as to all obligations accruing on and after the date of closing. The present rental is One Hundred Seventy-five ($175.00) Dollars per month. You represent and warrant that the rent under the lease until September, 1943, is at the rate of One Hundred Seventy-five ($175.00) Dollars per month; that the lease terminates on that date unless the tenant elects to extend the term for a further period of two (2) years, such notice to be given by July, 1943.

"3. You are to furnish the services of Mr. M. M. Rudisill for a period of sixty (60) days for which the new company is to pay him Seventy-five ($75.00) Dollars per week to assist in operating the plant.

"5. The new company will pay you for the foregoing, the sum of Eighty-five Thousand ($85,000.00) Dollars and Twenty-five (25%) per cent of its authorized capital stock at the closing date. We shall have the exclusive option to buy your Twenty-five (25%) per cent stock interest in the new company for Forty Thousand ($40,000) Dollars at any time within five (5) years from the closing date.

"4. This transaction is to be authorized by the stockholders and directors of your company and we are to have certified copies of their resolutions.

"6. The deal will be closed at Lincolnton, North Carolina, March 19, 1942, with the understanding that if two or three days are needed to complete the incorporation or check the inventory, the closing date may be adjourned for that length of time at our request.

"If this represents your understanding of the transaction, will you please confirm it by signing one copy of this letter and also having the signature of Mr. M. M. Rudisill affixed as his confirmation to agree to it in so far as he is personally interested in the transaction.

"Read and Agreed to:

Very truly yours,

SOUTHERN MILLS, INC.
By: M. M. RUDISILL,
Secretary & Treasurer.
(Signed): M. M. RUDISILL."

BELDING HEMINWAY COMPANY
(Signed) H. A. JOHNSON,
H. A. JOHNSTON,
Vice President."

To this agreement was attached a schedule or inventory identifying the property, subject of the sale.

In pursuance of this agreement the Belding Heminway Company organized a "new company" under the corporate title "Summit Yarn Company," which is now codefendant in this action. On 19 March, 1942, the Belding Heminway Company notified the plaintiff that the Summit Yarn Company had been organized pursuant to the agreement of 17 March, 1942, and with the notification enclosed two checks—one for $50,000 drawn by Belding Heminway Company to the order of Summit Yarn Company and endorsed by the latter company to the order of Southern Mills, Inc.; another check of Belding Heminway Company by Stahle Linn, Attorney, payable to Southern Mills Company in the amount of $35,000, making $85,000 in all. Also, the notice was accompanied with a stock certificate for 50 shares of the capital stock of Summit Yarn Company, which was 25% of all the authorized capital stock of the company at that date. These deliveries were accompanied by detailed statements in a letter, including the following: "We deliver these checks and this stock certificate, and you accept the same, in full settlement of all obligations of Summit Yarn Company and Belding Heminway Company to you by virtue of the said agreement of March 17, 1942."

On the same date the plaintiff conveyed all of the scheduled property to the Summit Yarn Company in pursuance of its agreement.

The complaint sets up the following grievances, for which plaintiff demands redress:

That the Belding Heminway Company artfully concealed from the plaintiff all details of the organization of the "new company"; that as organized, the officers of the Summit Yarn Company are the identical individuals who are also officers of the Belding Heminway Company; that the latter company by virtue of this fact and by virtue of its ownership of practically two-thirds of the stock dominates the new company, controls all of its actions, and uses it for the sole profit and advantage of the Belding Heminway Company; that its affairs are mismanaged, its ability to earn money for the stockholders has been destroyed, and its stock rendered worthless and the corporation reduced to insolvency.

Furthermore, it is alleged that at the time of the negotiations for the purchase of property and at the time the contract was made, it was understood and stipulated between the parties that $85,000 should be paid to the new corporation for three-fourths of its stock, and that the said $85,000 should be paid to the plaintiff for the property which it conveyed, and, as additional consideration, 25% of the capital stock of the new company should be delivered to it. It is alleged that the Belding Heminway Company failed to pay $85,000 for its proportion of the capital stock of the new company, but on the contrary, wrongfully and fraudulently secured the same for less than $12,000, "notwithstanding

the fact that the defendant Summit Yarn Company acquired from this plaintiff, through trickery and fraud perpetrated upon this plaintiff by the defendants, its valuable properties and business of the value of $127,540.00."

It is further alleged that the Belding Heminway Company fraudulently represented to plaintiff that it had complied with the terms of the agreement; whereas, it had not done so, and by such false representation relied upon by the plaintiff, it induced plaintiff to convey to the Summit Yarn Company its property aforesaid for $85,000 and stock which, because of the machinations of the Belding Heminway Company and the mismanagement of the corporation, has become worthless. It is further alleged that the Belding Heminway Company has set up a claim of indebtedness against the Summit Yarn Company in the amount of $350,000.

The complaint sets up that the plaintiff has never received any notice of stockholders' meetings of the Summit Yarn Company and has been studiously deprived of any information about its affairs; that plaintiff has repeatedly demanded, in writing, an audit of the affairs of the company, and the demand has been refused.

In its prayer for relief the plaintiff asks specifically for judgment: First, for recovery of $40,000 against defendants, jointly and separately; second, for an audit of the affairs of the Summit Yarn Company; third, for the appointment of a receiver to liquidate and wind up the affairs of the Summit Yarn Company; fourth, for an adjudication that any recovery had by plaintiff shall be paramount and superior to any claim of Belding Heminway Company against the Summit Yarn Company, and that plaintiff's demand be satisfied before any distribution of the assets of the Summit Yarn Company to the defendant Belding Heminway Company, or any of its officers or agents.

The defendants separately demurred to the complaint in identical terms, as follows (quoting from demurrer of Summit Yarn Company):

"Now comes the defendant, Summit Yarn Company, within the time fixed by statute, and demurs to plaintiff's complaint, for that there is a misjoinder of causes of action and of parties, in that, upon the face of the complaint, the plaintiff alleges four distinct causes of action, as follows:

"1. An alleged cause of action against the defendant, Belding Heminway Company, for breach of contract for the alleged failure of said defendant to pay the sum of $85,000 for three-fourths of the capital stock of the defendant, Summit Yarn Company, which alleged cause of action relates only to the defendant Belding Heminway Company.

"2. An alleged cause of action sounding in tort against the defendants, Summit Yarn Company and Belding Heminway Company, because of

alleged fraudulent representations with respect to the due performance by the defendant, Belding Heminway Company, of the contract referred to in the complaint, whereby plaintiff was fraudulently induced to part with the title to its property.

"3. An alleged cause of action, in the nature of a stockholder's derivative suit against the defendant, Belding Heminway Company, for fraudulent mismanagement of the affairs of the defendant, Summit Yarn Company, which alleged cause of action relates only to the defendant, Belding Heminway Company.

"4. An action under Section 1146 of the North Carolina Code for an audit of the books of the defendant, Summit Yarn Company, which alleged cause of action relates only to the defendant, Summit Yarn Company.

"WHEREFORE, the defendant, Summit Yarn Company, prays that this demurrer to plaintiff's complaint be sustained and that plaintiff's action be dismissed.

LINN & LINN,
Attorneys for Defendant
Summit Yarn Company."

The demurrers were overruled, and defendants excepted and appealed

Sheldon M. Roper for plaintiff, appellee.

Linn & Linn for defendant Summit Yarn Company, appellant.

Jonas & Jonas for defendant Belding Heminway Company, appellant.

SEAWELL, J. Standing uncontradicted, the complaint sets up a number of causes of action which entitle the plaintiff to legal redress. The defendants have not challenged any of the several statements of grievance as not constituting a cause of action. Probably it is realized that the more causes there are the better is the position of defendants upon their demurrer. We are not now concerned with their sufficiency in law.

A demurrer of this nature analyzes the complaint to see whether the causes of action set up therein are so related as to permit joinder under C. S., 507; and to see whether the parties brought in have a unity of interest with respect to the alleged causes of action.

In spite of the able argument of counsel for the plaintiff, we are not convinced that the rules of pleading have not been infringed. Emerging from the complicated transactions to which plaintiff attributes its injuries and upon which it bases its several causes of action, we find at least two claims or causes of action, for which specific relief is sought, which in a legal sense have no definite relation to each other as required in C. S., 507, and are, therefore, misjoined. Neither of them, taken separately, concerns or affects both defendants.

There is a cause of action for breach of contract against the Belding Heminway Company for failure to pay $85,000 for three-fourths of the stock in the new company, for which certainly no legal liability can be imputed to the Summit Yarn Company, but which, if it constitutes a liability at all, must be considered as addressed solely to the Belding Heminway Company; and there is a cause of action stated under C. S., 1146, against Summit Yarn Company to compel an audit of the affairs of that company upon the demand of a stockholder, which cannot be asserted, and is not asserted, against Belding Heminway Company. It is to be noted here that plaintiff cannot proceed under the cited statute to procure evidence to be used in a case against Belding Heminway Company. That must be obtained, if at all, under appropriate procedure.

Also, plaintiff has asserted a cause of action against Belding Heminway Company for fraud and deceit in falsely representing that it had complied with its contract, thereby inducing plaintiff to convey its property to Summit Yarn Company. This also is unrelated to the cause of action for audit against the Summit Yarn Company and affects only the Belding Heminway Company.

There is, therefore, a misjoinder both of causes of action and of parties.

There are other defects in the complaint of a like nature which need not be pointed out.

If the defect in the pleading related merely to misjoinder of actions, the Court might, under C. S., 516, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated. *Gattis v. Kilgo,* 125 N. C., 133, 136, 24 S. E., 246; but where, as here, there is a misjoinder both of causes of actions and of parties who have no community of interest, this proceeding cannot be followed. *Beam v. Wright,* 222 N. C., 174, 176, 22 S. E. (2d), 270, and cases cited; *Citizens National Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Rose v. Fremont Warehouse, etc., Co.,* 182 N. C., 107, 109, 108 S. E., 389.

The judgment of the court below overruling defendants' demurrers is reversed and the action dismissed.

No. 306.

In this we consider an appeal by defendants from an order in the same cause (see summary of complaint *supra*) made by Pless, J., at a hearing had upon notice at Chambers in Lenoir, 15 May, 1943. Prior to that time plaintiff had pressed its demand for an audit by motion before Judge Wilson Warlick, supported by affidavits, and an order to show cause why the relief should not be granted was served upon the defend-

ants. Upon the hearing under this order before Judge Pless, defendants exhibited a copy of an audit furnished the plaintiff, which the latter assailed as insufficient—as containing only a compilation of figures from the balance sheets of the company, not calculated to give the information contemplated in the statute (C. S., 1146). Judge Pless, being of that mind, ordered that a proper audit be made of the books of the Summit Yarn Company at the expense of the corporation, and appointed an auditor for that service.

We might say that dictionary definitions alone will not determine the character of the audit required under C. S., 1146, upon demand by the stockholder. Some discretion must certainly be vested in the court to see, at least, that it reasonably reflects the information customarily given in audits of that kind, so that the interested stockholder may be able to discover whether the assets of the company are being administered in accordance with sound corporate practice. But that matter is no longer before us. Appeal on a matter of this sort is held to be fragmentary and is subject to dismissal on that account—*Cole v. Trust Co.*, 221 N. C., 249, 20 S. E. (2d), 54; but it is not necessary to invoke that rule. The dismissal of the action itself (under No. 305) carries with it all proceedings of this nature taken in the cause during its pendency. Its subject matter no longer existing, the appeal is dismissed.

In No. 305—Action dismissed.

In No. 306—Appeal dismissed.

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

M. V. McCOTTER v. G. M. REEL, MAYOR, AND J. W. COWELL, J. L. RIGGS, JR., AND COLUMBUS LAND, CONSTITUTING THE BOARD OF COMMISSIONERS OF THE TOWN OF BAYBORO.

(Filed 20 October, 1943.)

1. Statutes § 5a—

The different provisions of Public Laws of 1939, ch. 158, relative to granting license for the sale of beer and wine, are *pari materia* and must be read together as one connected whole.

2. Intoxicating Liquors § 2—

An "on premises" license to sell beer is not available, as a matter of right, to any citizen who may qualify under the provisions of sec. 511, Public Laws 1939, ch. 158. Compulsory issuance thereof is in any event limited to the businesses enumerated in sec. 509. *Inclusio unius est exclusio alterius.*

3. Same—

In applying to a board of town commissioners for an "on premises" license to sell beer, petitioner seeks the right to engage in a business regulated by statutes, which prescribe certain conditions precedent thereto and require the governing body of the municipality to determine the facts upon which issuance of the license depends. Where this body considers the application and denies the license, the presumption is that it found facts sufficient to support its conclusions, and judgment, denying a writ of *mandamus* and dismissing the action, should be entered.

APPEAL by defendants from *Frizzelle, J.,* at Chambers at Snow Hill, N. C., 23 June, 1943. Reversed.

Petition for writ of *mandamus.*

On 2 June, 1943, the defendants served notice on the plaintiff that they had information that he was flagrantly violating the law by selling to the public wines and lager beer without license, and directed him to close and to dispose of all beers and wines by twelve o'clock midnight, 4 June, "otherwise the board will proceed to enforce the laws in such matters."

The plaintiff on 9 June filed application with the defendants, the governing board of the town of Bayboro, for a license to sell wine and beer. The application was in the form and contained the information required by statute, except that it did not specify the type of license desired.

On 9 June the defendants wrote the plaintiff as follows:

"The Board of Town Commissioners have met and considered your application for license to sell beer and voted not to issue said license at the present time."

On 10 June plaintiff filed his petition for writ of *mandamus* requiring and compelling the defendants to issue to him a license for the sale of wine and beer as provided by law.

On 14 June warrant was issued against the plaintiff charging him with the sale of beer without applying for or obtaining license therefor. On 15 June the plaintiff appeared in court and entered a plea of guilty of selling beer without a license. Judgment was entered that "the defendant pay the costs, and apply to Town Commissioners for license in a legal way."

When the cause came on to be heard before Frizzelle, J., in Chambers, the court found that the plaintiff had duly filed his application for license to sell beer in the town of Bayboro, and "that in his application he set forth his qualifications required by statute which entitled him to such license; and that the governing board of said town had denied the application. Being of the opinion "that the plaintiff is entitled to have issued a license for the sale of beer for the town of Bayboro," the court entered judgment ordering and requiring the defendants to issue to the

plaintiff an "on premises" license for the sale of beer in accordance with the application filed. The defendants excepted and appealed.

R. E. Whitehurst for plaintiff, appellee.

W. H. Lee for defendants, appellants.

BARNHILL, J. The plaintiff rests his case primarily on section 513, chapter 158, Public Laws of 1939, which provides that "it shall be mandatory that the governing body of a municipality or county issue a license to any person applying for same when such person shall have complied with the requirements of this article." He takes the position that when he filed his application containing the information required by section 511 he "complied with the requirements of this article," and license must be issued. Apparently, the court below, in concluding "that in his application he set forth his qualifications required by statute, *which entitled him to such license,*" adopted the same view. (Italics supplied.)

This position cannot be sustained. This and other pertinent provisions of the statute, Article VI, chapter 158, Public Laws of 1939, are *pari materia* and must be read together as one connected whole.

(1) A person desiring a license to sell wine or beer at retail must make application to the governing board of the municipality in which the privilege is to be exercised, and the application must disclose the information required by section 511.

(2) Before any such license shall be issued the governing body of the municipality shall satisfy itself that statements required by subsections (1), (2), (3), (4), and (5) are true. Sec. 511.

(3) "On premises" license "shall be issued" for *bona fide* restaurants, cafes, cafeterias, hotels, lunch stands, drug stores, filling stations, grocery stores, cold drink stands, tea rooms, or incorporated or chartered clubs. Sec. 509. Businesses to which "on premises" license "shall be issued" for the sale of wine are even more restricted. Sec. 509½ (1). See ch. 339, Public Laws 1941.

(4) When the municipal board is satisfied that these statutory requirements have been met "it shall be mandatory that it issue the license applied for." Sec. 513.

Considering the facts appearing on this record in the light of these statutory requirements, we are led to the conclusion that plaintiff is not entitled to the relief sought.

While the application for license did not specify the type desired—whether "on premises" or "off premises"—the record seems to make it clear that the petitioner seeks an "on premises" license for the sale of beer. He now admits that he is not entitled to a license to sell wine.

An "on premises" license to sell beer is not available as a matter of right, to any citizen who may qualify under the provisions of section 511. Compulsory issuance thereof is in any event limited to the businesses enumerated in section 509. *Inclusio unius est exclusio alterius.* Petitioner operates a pool room. His is not a *bona fide* restaurant, cafe, or other business designated in the statute. At least it does not so appear. He cannot invoke the mandatory provisions of the act.

Beer is classified as an alcoholic beverage. Sec. 1, ch. 1, Public Laws 1923. Its sale is regulated by Article VI, chapter 158, Public Laws of 1939, enacted "To regulate the manufacture, transportation, and sale of certain beverages," and known as the "Beverage Control Act of one thousand nine hundred and thirty-nine." A violation of the provisions of this statute by selling beer without license is a violation of the prohibition law within the meaning of section 511 thereof. At the time of the hearing it affirmatively appeared that petitioner had been convicted of violating the prohibition law "within two years." Whatever the conditions may have been at the time the board acted, he was disqualified at the time of judgment.

In applying for an "on premises" license to sell beer, petitioner seeks the right to engage in a business regulated by statute. The Legislature has prescribed certain conditions precedent, and it has cast upon the governing body of defendant municipality, as a fact-finding agency, the duty to determine the state of facts upon which the issuance of such license depends. It considered the application and denied the license. The presumption is that it found facts sufficient to support its conclusion. Indeed, the record contains evidence which tends to show that petitioner at the time he made application was engaged in selling beer without license, in open defiance of law, and was maintaining a disorderly place where drinking and gambling were permitted, and which exercised a demoralizing influence in the community—all of which tends to show that it was not one of the enumerated *bona fide* businesses.

The defendants insist, therefore, that in the absence of allegation of capriciousness, bad faith, or disregard of law the Court is without authority to review or reverse the action of the board. *Pue v. Hood, Comr. of Banks,* 222 N. C., 310. While this position is forcefully maintained, with citation of authority, we need not now discuss or decide the question thus presented. For, conceding the authority of the court and viewing the facts in the light most favorable to the petitioner, he has failed to establish a clear legal right to an "on premises" license to sell beer. *Harris v. Board of Education,* 216 N. C., 147, 4 S. E. (2d), 328, and cases cited.

Judgment denying the writ of *mandamus* and dismissing the action must be entered.

Reversed.

THOMAS C. PROPST, ADMINISTRATOR, v. HUGHES TRUCKING CO.

(Filed 20 October, 1943.)

1. Process §§ 8, 10—

When service of process on a nonresident, through the Commissioner of Motor Vehicles, as provided in ch. 75, Public Laws 1929, as amended by ch. 36, Public Laws 1941, is sought, it is essential that the sheriff's return show that such service was made as specifically required by these statutes, and that copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed.

2. Pleadings § 22: Process § 3—

In a civil action, where summons is issued and served and complaint filed against defendant under an erroneous name, and such defendant, on special appearance, moves to dismiss for want of jurisdiction on that ground, and plaintiff files a motion to amend summons and complaint to conform to the defendant's true name, there is no error in allowing the motion to correct the mistake.

APPEAL by defendant from *Rousseau, J.*, at July-August Term, 1943, of CLEVELAND.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the negligence, default or wrongful acts of the defendant when its truck collided with an automobile near Selma, Johnston County, N. C., causing war munitions in the truck to explode and kill plaintiff's intestate, who was riding in another automobile near the scene of the explosion.

Summons was issued against Hughes Trucking Company and forwarded to the sheriff of Wake County for service upon the Commissioner of Motor Vehicles, agent of the nonresident defendant under ch. 75, Public Laws 1929, as amended by ch. 36, Public Laws 1941.

The sheriff made the following return upon the summons: "Served Mar. 5, 1943, by delivering copy of the within summons . . . to . . . W. H. Rogers, Jr., Assistant Commissioner Motor Vehicle Bureau of the State of North Carolina, statutory process agent of the Hughes Trucking Company, a foreign corporation."

The Commissioner of Motor Vehicles mailed notice of such service and copy of the process to Hughes Trucking Company, Charleston, S. C., by registered mail and received return receipt signed by "Geo. M. Hughes (signature or name of addressee) . . . Date of Delivery, March 8, 1943."

Thereafter, Hughes Transportation, Inc., entered a special appearance and moved to dismiss for want of jurisdiction on the ground that while plaintiff had sought to bring it into court on the above service, no valid

and binding process had been issued and served against the petitioner or movant.

On the disclosures made in the special appearance, the plaintiff filed motion to amend the summons and complaint to conform to the defendant's true name, Hughes Transportation, Inc. This motion was allowed over objection and exception.

From order denying the motion to dismiss and allowing correction of defendant's name in the summons and complaint, the defendant appeals, assigning errors.

Clyde R. Hoey for plaintiff, appellee.
Robinson & Jones for defendant, appellant.

STACY, C. J. The plaintiff is an administrator of a resident decedent; the defendant a foreign corporation; the cause of action for wrongful death, growing out of a motor vehicle accident or collision, occurring on a public highway in this State.

Service of summons is sought to be had through the Commissioner of Motor Vehicles, as provided by ch. 75, Public Laws 1929, as amended by ch. 36, Public Laws 1941, for service of process on nonresident operators of motor vehicles on the public highways of this State. 21 R. C. L., 1347.

It is provided by the statute in question, as amended, that a nonresident who accepts the benefits of our laws by operating a motor vehicle on the public highways of this State shall be deemed to have appointed the Commissioner of Motor Vehicles "his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally." *Dowling v. Winters,* 208 N. C., 521, 181 S. E., 751. The constitutionality of this law was upheld in *Ashley v. Brown,* 198 N. C., 369, 151 S. E., 725.

It is further provided in the statute that "service of such process shall be made by leaving a copy thereof with a fee of one dollar, in the hands of said Commissioner of Motor Vehicles, or in his office, and such service shall be sufficient service upon the said nonresident; provided that notice of such service and a copy of the process are forthwith sent by registered mail . . . to the defendant and the defendant's return receipt and

the plaintiff's affidavit of compliance . . . are appended to the summons or other process and filed with . . . papers in the cause."

An alternative method of service of process on nonresident defendants is provided by ch. 33, Public Laws 1931, but as this method was not followed in the instant case, it has no present application.

The pertinent provision of the statute is, that service of process shall be made by leaving copy thereof with a fee of one dollar, "in the hands of the Commissioner of Motor Vehicles, or in his office." There is no finding on the present record that this was done, and it is not made manifest by the sheriff's return. 21 R. C. L., 1360. "Delivering copy . . . to . . . W. H. Rogers, Jr., Assistant Commissioner Motor Vehicle Bureau" may or may not be the same as leaving copy in the office of the Commissioner of Motor Vehicles, albeit the notice mailed by the Commissioner would seem to indicate his receipt of the summons. 23 Am. Jur., 564; Annotation: 98 A. L. R., 1437; Notes: 47 Law Ed., 987; 23 L. R. A., 499. Opportunity should be given the sheriff to make a true and accurate return, if in fact his service was in accordance with the statute. *Lee v. Hoff,* 221 N. C., 233, 19 S. E. (2d), 858.

The plaintiff should also file affidavit of compliance as required by the statute, if he would avoid possible future challenge to any judgment that may be rendered in the cause. *Casey v. Barker,* 219 N. C., 465, 14 S. E. (2d), 429.

There was no error in allowing the motion to correct the mistake in defendant's name. C. S., 547; *Clevenger v. Grover,* 212 N. C., 13, 193 S. E., 12; *Lee v. Hoff, supra; Dunn v. Aid Society,* 151 N. C., 133, 65 S. E., 761; *Garrett v. Trotter,* 65 N. C., 430; *Lane v. R. R.,* 50 N. C., 25. *Cf. Hogsed v. Pearlman,* 213 N. C., 240, 195 S. E., 789.

Error and remanded.

STATE v. WALTER TYSON.

(Filed 20 October, 1943.)

Assault and Battery § 14: Rape § 5—

In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea and found as a fact that the female referred to was a child nine years of age and defendant was thirty-four years of age, and also that the assault was aggravated, shocking and outrageous, the accepted plea is for a misdemeanor under C. S., 4215, and judgment that defendant be confined to the State's Prison for not less than eight nor more than ten years, is a violation of N. C. Const., Art. I, sec. 14, and C. S., 4173.

STATE *v.* TYSON.

APPEAL by defendant from *Frizzelle, J.,* at September Term, 1943, of PITT.

Criminal prosecution upon an indictment charging the defendant with assault with intent to commit rape.

At the conclusion of the State's evidence, the defendant moved for judgment as of nonsuit upon the charge of assault with intent to commit rape, and tendered to the court a plea of guilty of an assault upon a female.

The court, being of the opinion that the State's evidence was not sufficient to warrant the submission of the case to the jury on the charge of assault upon a female with intent to commit rape, accepted the plea tendered by the defendant. Thereupon, the court found as a fact that the child, the female referred to in the bill of indictment, is nine years of age, and that the defendant is thirty-four years of age.

The court further found: "That the assault committed by the defendant was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, as will be disclosed by the testimony in the record."

Judgment: That the defendant be confined in the State's Prison for not less than eight nor more than ten years. Defendant appeals, assigning error.

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

Wm. J. Bundy for defendant.

DENNY, J. Defendant's only exception is to the sentence imposed as being violative of the Constitution of North Carolina, Art. I, sec. 14, and the statutes prescribing punishment for misdemeanors. The exception must be sustained.

C. S., 4173, provides: "All misdemeanors, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or state prison for not less than four months nor more than ten years, or shall be fined."

While his Honor found that the assault was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, the court did not find the offense to be infamous. Moreover, we do not think the plea tendered by the defendant, and accepted by the court, constituted a plea of guilty to an infamous offense, but, on the contrary, constituted a plea of guilty of a misdemeanor punishable as provided in C. S., 4215.

In the case of *S. v. Smith,* 174 N. C., 804, 93 S. E., 910, the defendant was tried upon a bill of indictment charging a secret assault. The evidence tended to show an aggravated assault with a deadly weapon, defendant firing twice with a pistol and slightly injuring the prosecuting witness. At the conclusion of the State's evidence, the defendant tendered a plea of guilty of assault with a deadly weapon, which plea was accepted by the State. The court sentenced the defendant to four years imprisonment in the penitentiary. Upon appeal this Court, in passing upon the identical question which is presented on this record, said: "The decision in *McNeil's case* is epitomized in the headnotes as follows: 'Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine or imprisonment in the county jail, or both. Hence, a general verdict of "guilty" upon an indictment containing three counts, to wit, one for an assault with a deadly weapon with intent to kill, another for a similar assault with intent to injure, and a third for a common assault and battery, will not, since the Act of 1870-71, ch. 43, justify imprisonment in the penitentiary. Fine and imprisonment at the discretion of the court does not confer the power to imprison in the penitentiary.' While the language of section 3620 authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of the punishment is referred to the discretion of the trial judge, and his sentence may not be interfered with by the appellate Court, except in case of manifest and gross abuse. This position is emphasized by the fact that, under the former law (chapter 167, Laws 1868, secs. 8 and 7), an assault with a deadly weapon, or by any means likely to produce death, with intent to kill, could be punished by imprisonment in the penitentiary not exceeding ten years; and, in section 7, an assault with a deadly or dangerous weapon, without intent to kill, but with intent to injure, was so punishable not exceeding five years; and the statute of 1870-71, chapter 43, now Revisal, sec. 3620 (now C. S., 4215), was substituted for these sections and was enacted for the express purpose of repealing them. . . . Recurring to the many decisions imposing sentence for misdemeanors, we find none where a sentence of more than two years has been approved." *S. v. Driver,* 78 N. C., 429; *S. v. Stokes,* 181 N. C., 539, 106 S. E., 763; *S. v. Hill,* 181 N. C., 558, 107 S. E., 140; *S. v. Williams,* 186 N. C., 627, 120 S. E., 224; *S. v. Crews,* 214 N. C., 705, 200 S. E., 378.

There is error in the judgment rendered below, and the case is remanded to Pitt County Superior Court, to the end that a proper judg-

ment may be rendered on the plea tendered by the defendant and accepted by the State, in accordance with this opinion.

Error and remanded.

SOUTHERN MILLS, INC., v. J. P. T. ARMSTRONG, HAROLD A. JOHNSTON AND STAHLE LINN, OFFICERS AND DIRECTORS OF THE SUMMIT YARN COMPANY.

(Filed 20 October, 1943.)

1. Process § 1—

Due service of process is necessary to subject a party to the jurisdiction of the court. Only personal service was recognized at common law, and when substituted service is authorized by statute it is *strictissimi juris.*

2. Process § 5—

Service of process upon a nonresident individual by publication is valid only in proceedings *in rem* or *quasi in rem* (except in actions for divorce), and any judgment predicated thereupon can have no efficacy *in personam.*

3. Same—

To make valid substituted service under C. S., 484, the nonresident defendant not only must have property in the State, but the subject of the suit must be within the jurisdiction, or under the control of the court by attachment, restraining order, or otherwise.

4. Process §§ 5, 11: Mandamus § 4—

A *mandamus,* or mandatory injunction, can only operate *in personam;* and in an action under C. S., 1178, to compel the directors of a domestic corporation to pay dividends, so far as substituted service of process on nonresident directors is relied upon, the proceeding is a nullity.

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

APPEAL by plaintiff from *Rousseau, J.,* at July Term, 1943, of LINCOLN.

The plaintiff company is a resident corporation and a stockholder in the Summit Yarn Company, also a resident corporation, and the defendants are the officers and directors of said yarn company, one of whom is a resident of the State and the other two are nonresidents. The action is brought to compel a declaration of dividends among its stockholders from the accumulated profits of said yarn company, under the provisions of C. S., 1178.

Service of summons was made personally upon the resident defendant, Mr. Linn, and service of summons was attempted to be made by publication upon the two nonresident defendants, Messrs. Armstrong and Johnston.

The nonresident defendants each entered special appearances and moved to dismiss the action as to each of them, for the want of jurisdiction, for the reason that there had been no valid service of summons upon either of them. The motion to dismiss was allowed, and order predicated thereon entered, to which plaintiff reserved exception and appealed.

Sheldon M. Roper for plaintiff, appellant.
Jonas & Jonas for defendants, appellees.

SCHENCK, J. The question posed by this appeal is: Was the personal service on a resident, one of three directors of a domestic corporation, and service by publication upon two nonresidents, the other two directors of such corporation, sufficient to subject said two nonresidents to the jurisdiction of the court? We think, and so hold, that the answer is in the negative.

Due service of process is necessary to subject a party to the jurisdiction of the court. Only personal service was recognized at common law, and when substituted service is authorized by statute it is *strictissimi juris,* and being of rigid right, a party invoking it is entitled to cold law—no more, no less. *Stanton v. Thompson,* 234 Mo., 7. "The court must see that every prerequisite prescribed exists in any particular case before it grants the order of publication." *Bacon v. Johnson,* 110 N. C., 114, 14 S. E., 508.

The statute in this State relating to the subject, C. S., 484, authorizes the court or judge to grant an order that service be made by publication where the defendant "is not a resident, but has property in this State, and the court has jurisdiction of the subject of the action." This is the only provision made by the statute for substituted service upon a nonresident individual (except in actions for divorce). It does not appear in the instant case that either of the nonresident defendants has property in the State which has been brought within the jurisdiction of the courts, or to which plaintiff makes any claim. This action is simply "for a *mandamus,* mandatory injunction or other appropriate judgment . . . commanding the defendants . . . to declare and pay out to the plaintiff and other stockholders of the Summit Yarn Company . . . the accumulated earned profits" of the company during 1942—purely an action *in personam* to bring the defendants under the jurisdiction of the court to compel obedience to its mandates.

Being an action *in personam* the defendants could not be subjected to the jurisdiction of the court by any form of constructive service of process. Service of process upon a nonresident individual by publication is valid only in proceedings *in rem* or *quasi in rem,* and any judgments

predicated thereupon can have no efficacy *in personam*. *Stevens v. Cecil*, 214 N. C., 217, 199 S. E., 161, and cases there cited.

A nonresident defendant not only must have property in the State but the subject of the suit must be within the jurisdiction, or under the control of the court by attachment, restraining order, or otherwise. *Winfree v. Bagley*, 102 N. C., 515, 9 S. E., 198; *Suskin v. Trust Co.*, 213 N. C., 388, 196 S. E., 407.

"Jurisdiction in case of actions *in personam* can only be acquired by personal service of process within the territorial jurisdiction of the court, or by acceptance of service, or by a general appearance, actual or constructive, . . . this is strictly an action *in personam*. An injunction can only operate *in personam;* and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity, and, on motion properly made, it should be dismissed; . . . and a judgment *in personam* against a citizen of a foreign state, in a cause wherein he did not appear, although notice was served on him by publication, is a nullity." *Hoke, J.*, in *Warlick v. Reynolds*, 151 N. C., 606, 66 S. E., 657.

"Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 570.

The judgment of the Superior Court dismissing the action as to the nonresident defendants, Messrs. Armstrong and Johnston, is

Affirmed.

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

THE TEXAS COMPANY v. I. FRANK HOLTON (ORIGINAL PARTY DEFENDANT), AND COASTAL OIL COMPANY (ADDITIONAL PARTY DEFENDANT).

(Filed 20 October, 1943.)

1. Pleadings § 15: Landlord and Tenant § 14—

In an action between plaintiff and defendant for the recovery of premises leased by defendant to an oil company, which transferred and assigned the lease, without warranty, covenant, or assurance of possession, to plaintiff, an amended complaint against the oil company, which was made a party, containing an allegation that the company's president told the other

defendant that the lease had not been assigned, without any allegation of collusion, is demurrable as not stating a cause of action.

2. Slander of Title § 2b—

An allegation that one defendant represented and claimed to a co-defendant that it had never assigned the lease, in suit between the parties, to plaintiff and that the plaintiff had no right to the possession of the property therein, does not state a cause of action for slander of title.

APPEAL by plaintiff from *Stevens, J.*, at May Term, 1943, of CRAVEN. Affirmed.

The demurrer of defendant Coastal Oil Company to the amended complaint was sustained, and plaintiff appealed.

Wm. Dunn and R. E. Whitehurst for plaintiff, appellant.

L. I. Moore for defendant, appellee.

DEVIN, J. The plaintiff appealed from the judgment below sustaining the demurrer of the Coastal Oil Company to the amended complaint. From the pleadings it appears that plaintiff instituted its action for the recovery of certain premises wrongfully taken and withheld by defendant Holton, alleging that the lease thereon executed by Holton to the Coastal Oil Company had been assigned to the plaintiff by the Oil Company. Defendant Holton, answering, denied that a valid assignment of the lease had been made to the plaintiff by the Coastal Oil Company, and filed a counterclaim for damages to the property while plaintiff was in possession. Upon motion of the plaintiff the court entered an order making Coastal Oil Company party defendant, and the plaintiff filed an amended complaint alleging the assignment of the lease on the property to it by the Oil Company, and further that the president of the Oil Company had represented to defendant Holton that the lease on the premises had not been assigned to the plaintiff, and that in consequence of this representation Holton wrongfully took possession of the property. Plaintiff also alleged that the assignment of the lease contained assurance to plaintiff, assignee, of the use and occupancy of the property for the term of the lease, and plaintiff called upon the Oil Company to defend and save harmless the plaintiff from the tortious acts of Holton. Plaintiff asked that it recover judgment against defendant Oil Company for the damage and expense it may suffer by reason of the counterclaim of Holton.

However, the written and recorded assignment of the lease by defendant Oil Company to the plaintiff, which was asked to be taken as a part of the complaint, recites merely that the lease executed by Holton to the Oil Company was thereby transferred and assigned to the plaintiff,

without further stipulation, save as to the rent. No warranty, covenant or assurance of possession appears.

It also appears from plaintiff's pleadings that it based its action against Holton upon the validity of the assignment of the lease to it by the defendant Oil Company. It alleged that Holton had wrongfully resumed possession of the premises without its knowledge or consent, or that of the Oil Company, and in its reply to Holton's cross action the validity of the assignment, and of the Oil Company's right to assign, were again asserted.

We think the defendant Oil Company's demurrer to the amended complaint, on the ground that it fails to state facts sufficient to constitute a cause of action against the Oil Company, was properly sustained. If the plaintiff succeeds in its action against Holton, and establishes its right to the possession of the property as assignee of the lease, it has no cause of action against the assignor. Likewise, in the present status of the pleadings, it may not be permitted to maintain an action based upon its anticipatory failure to uphold the validity of the assignment, in the absence of obligation on the part of the Oil Company to defend.

The allegation in the amended complaint that defendant Oil Company's president had represented to Holton that the lease had not been assigned, standing alone, would not be sufficient to save the pleading from the demurrer. There is no allegation of collusion between the Oil Company and Holton. On the contrary, their interests appear antagonistic, and it was stated in the argument that an action between them was now pending, relative to the rents on this property.

The plaintiff's contention that the complaint states a cause of action against the Oil Company for slander of title cannot be sustained. The allegation that defendant through its president "represented and claimed to defendant Holton that it had never assigned said lease to the plaintiff, and that the plaintiff had no right to the possession of the property," cannot be held sufficient to set out a cause of action for malicious defamation of title. *Cardon v. McConnell,* 120 N. C., 461, 27 S. E., 109; *McElwee v. Blackwell,* 94 N. C., 261; 129 A. L. R., 179 (annotation); 33 Am. Jur., 313.

The judgment sustaining the demurrer of defendant Coastal Oil Company is

Affirmed.

JOHN H. ABRAMS v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 20 October, 1943.)

Insurance § 32d: Trial § 38—

In an action to recover under the terms of a life insurance policy, where plaintiff also alleges a wrongful cancellation of the policy, such allegation is an additional cause of action and, defendant admitting the cancellation, it was error for the trial court to refuse to submit an issue on the question of such cancellation.

APPEAL by plaintiff from *Parker, J.*, at June Term, 1943, of EDGECOMBE.

Civil action to recover of the defendant the proceeds of a life insurance policy, dated 27 January, 1926, issued on the life of Joe Ellis, for $1,000.00, payable upon death to plaintiff, John H. Abrams, his nephew, as beneficiary. The premiums are stipulated in the policy contract to be payable on each 27th day of January, May, August and November. The insured, Joe Ellis, was adjudicated *non compos mentis* on 14 April, 1938, and committed to the State Hospital for the Insane at Raleigh, N. C., where he resided until his death on 11 October, 1941. Defendant admitted knowing these facts prior to August, 1939. The premiums on the policy were paid by plaintiff, John H. Abrams, being collected from him by a local agent of the company, up to and including the premium due 7 May, 1939.

On 27 August, 1939, the local agent of defendant company called on plaintiff, John H. Abrams, for payment of a premium which defendant company claimed was due 27 July, 1939, and, upon Abrams' statement that he did not have any money, he was informed by the agent that that day was the last day of grace, that he could not accept payment thereafter except "with a certified form" (meaning application for reinstatement).

Plaintiff testified that he thereafter examined the policy and found that the premium was not due until 27 August, that within the grace period of 31 days provided in the policy, he tendered the premium to the local agent of the defendant, and that the agent refused to accept the premium, stating that the policy had lapsed. The agent of the defendant denied that tender was made to him.

The defendant admits that in issuing the policy referred to herein, the dates for the payment of the quarterly premiums are stated in the policy as contended by the plaintiff, to wit, on the 27th day of January, May, August and November of each year, but alleges that patently the dates should have been on the 27th day of January, April, July and October of each year.

The defendant further admits that upon the lapse of said policy for the nonpayment of the premium due 27 July, 1939, it canceled the policy and remitted the net cash value thereof by check to the insured, which check was never cashed.

The plaintiff alleged and offered evidence tending to show that at the time of the attempted cancellation of the policy, no premium was due and payable under the terms of the contract, and that the cancellation was attempted without giving notice as required by law, either to the insured or the plaintiff.

Plaintiff tendered the following issues:

"1. Did the defendant fail to give due notice of premium due and payable under said policy as of August 27th, 1939, as alleged in the complaint?

"2. Did the plaintiff offer to make payment of the premium due and payable under said policy as of August 27th, 1939, and within thirty-one days thereafter, as alleged in the complaint?

"3. Was the insured, Joe Ellis, *non compos mentis* from April, 1938, until his death in October, 1941, as alleged in the complaint.

"4. Did the defendant wrongfully attempt to lapse the policy of insurance sued on as of July 27th, 1939, as alleged in the complaint?

"5. In what amount, if any, is defendant indebted to plaintiff by reason of said policy of insurance?"

His Honor refused to submit issues Numbers 1, 3 and 4, to which plaintiff duly excepted.

To the first issue submitted to the jury, being Number 2 as set forth above, the jury answered "No." To the issue Number 5 as set forth, the jury answered "$7.00."

Judgment was entered accordingly. The plaintiff appealed and assigns error.

H. D. Hardison and Henry C. Bourne for plaintiff.

Smith, Wharton & Jordan and Battle, Winslow & Merrell for defendants.

DENNY, J. The plaintiff is seeking a recovery under the terms of the policy referred to herein. He alleges a tender of the premium in controversy while the policy was in force and that the defendant refused to accept the tender. Plaintiff testified in support of his allegations. The defendant denied tender. The issue submitted on this question was answered by the jury in favor of the defendant.

We find no error in the trial below which would warrant a new trial on the question of tender and the issue must stand. *Pinnix v. Griffin,* 221 N. C., 348, 20 S. E. (2d), 366.

However, the plaintiff also alleges wrongful cancellation of the policy, which constitutes a cause of action for breach of contract and one which is not inconsistent with the cause of action based on the contract. The defendant admits the cancellation of the policy. *Lykes & Co. v. Grove,* 201 N. C., 254, 159 S. E., 350; *Bare v. Thacker,* 190 N. C., 499, 130 S. E., 164; *Irvin v. Harris,* 182 N. C., 647, 109 S. E., 867; *Fleming v. Congleton,* 177 N. C., 186, 98 S. E., 449; *Pritchard v. Williams,* 175 N. C., 319, 95 S. E., 570. It was error to refuse to submit an issue on the question as to whether or not the policy of insurance was wrongfully canceled. *Garland v. Jefferson Standard Life Ins. Co.,* 179 N. C., 67, 101 S. E., 616; C. S., 6465.

We deem it unnecessary to discuss the other exceptions, since they may not arise upon another trial.

For the reasons stated, there must be a

Partial new trial.

McIVER PARK, INC., v. W. J. BRINN AND WIFE, MARGARETTA H. BRINN (ORIGINAL DEFENDANTS), AND S. J. HINSDALE, MRS. JOHN M. WINFREY, MRS. JOHN C. ENGLEHART, MISS NELL HINSDALE, MRS. HAROLD JOSLIN, AND JOHN W. HINSDALE (ADDITIONAL DEFENDANTS).

(Filed 3 November, 1943.)

1. Trial § 11—

Where actions are pending in the same court, at the same time, between the same parties and involving substantially the same facts, they may be consolidated. This principle applies to tax foreclosure suits. C. S., 7987, 7990.

2. Process § 12—

On objection to the original summons for that it fails to show that it was received by the sheriff, where it appears from the judgment roll that a summons, called an *alias,* was later issued and served, the persons so served are in court and bound by the judgment therein.

3. Pleadings § 29½: Appeal and Error § 37b—

If any pleadings, summons, affidavit, or order is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original, C. S., 544; and the judgment of the trial court permitting lost pleadings, etc., to be substituted, is not reviewable.

4. Evidence § 33½—

On application to substitute a copy for a lost original *alias* summons, it is competent for a deputy sheriff to testify that he remembers making service of such *alias* summons as indicated on the copy thereof.

5. Judgments § 29—

Parties to a tax foreclosure suit, who have been served, are bound by the judgment therein without regard to: (1) the authority, or want thereof, in an attorney who receipted for their share of proceeds of sale on the judgment docket; or (2) the validity of a deed to one holding title from purchaser in such tax suit, by a married woman (a party) without the joinder of her husband.

6. Taxation § 40c—

Where the judgment of foreclosure, in a tax suit, C. S., 7990, authorized a sale, in default of payment of all taxes, etc., on or before sixty days from the date of the judgment, and the original sale was held within sixty days of such date and after two resales, the last of which was held more than three months after the date of the judgment, the sale was finally consummated, there was ample opportunity to redeem, and sale and confirmation are valid.

7. Same: Infants §§ 12, 15—

In a suit to enforce a tax lien (C. S., 7987) by foreclosure (C. S., 7990), where the affidavit, orders and notices appear sufficient in form to constitute service by publication upon all persons named therein, both adult and minors, their heirs and assigns, known and unknown, C. S., 484 (3) and (7), yet, minors, if any, must be represented by guardian, or guardian *ad litem*, otherwise such minors are not bound by the judgments in the action. C. S., 451, 452, 453, and Machinery Act of 1939, ch. 310, Art. XVII, sec. 1719 (e).

8. Judicial Sales §§ 6, 7: Taxation § 40c—

In the absence of fraud, or the knowledge of fraud, one who purchases at a judicial sale, or who purchases from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter, and that the judgment on its face authorized the sale.

9. Specific Performance § 4—

Specific performance of a contract to convey land will not be decreed when the vendor cannot make a good title to the land sold, or when his title thereto is doubtful, or when he can convey only an undivided interest therein.

10. Infants §§ 12, 15: Taxation § 40c—

Where the record in a tax foreclosure proceeding shows an unknown party in interest, without evidence and finding that he left no minor heirs and no other heirs not before the court, the judgment confirming the sale and deed to the purchaser are invalid as to the interest of any minor heirs of such party.

APPEAL by defendants W. J. Brinn and wife, Margaretta H. Brinn, from *Frizzelle, J.*, at Chambers by consent, 19 August, 1943. From LEE.

Civil action for specific performance of written contract for purchase of certain land.

These facts appear to be uncontroverted:

On 15 July, 1941, plaintiff and defendant W. J. Brinn entered into a written contract by the terms of which plaintiff agreed that, on or before 24 July, 1941, and for an agreed purchase price, it would make, execute and deliver to him, or such person as he may in writing direct, "a good and sufficient deed, with full covenants and warranties, release of dower, etc.," conveying subject to certain restriction referred to, "a good and merchantable title in fee simple" to a certain lot of land, specifically described, and being Lot No. 5 in the Palmer addition to McIver Park surveyed as set forth, containing six acres, more or less; and defendant W. J. Brinn agreed to accept such deed so tendered and to pay the agreed purchase price. Defendant W. J. Brinn having directed that deed be made to him and his wife, plaintiff, on 15 July, 1941, and again on 29 August, 1941, tendered to defendants W. J. Brinn and wife a deed sufficient in form to meet the requirements of its agreement to convey said land subject to restrictions referred to as above set forth, but defendants refused to accept same and to pay the purchase price for that, aside from the restrictions to which the conveyance was to be subject, plaintiff did not have, and could not convey same by a good and merchantable title in fee simple.

The land so in controversy is embraced within the boundary of certain tracts of land, containing 117.6 acres more or less, of which Job Palmer died seized about the year 1910 and which was divided among his four heirs at law by order of court in 1911. To his son Amos Palmer, referred to also as J. Amos Palmer and as J. A. Palmer, lot No. 3, containing 22¼ acres, and subdivision A of lot No. 1, known as the dower lot, containing 6 acres, were allotted; and to his son Walter Palmer, referred to also as J. Walter Palmer and as J. W. Palmer, lot No. 4, containing 23¼ acres, and subdivision D of lot No. 1, known as the dower lot, containing 5½ acres, were allotted. The subdivisions A and D of lot No. 1 were allotted subject to the dower of Emeline Palmer, widow of Job Palmer, who died in the year 1932. And the land in controversy is part of the lands so allotted to Amos Palmer and to Walter Palmer.

As to the Amos Palmer land so allotted to him in the division of the Job Palmer land: J. Amos Palmer and wife, Minnie, by deed dated 21 February, 1912, and registered, conveyed same to his son, Sam Palmer, and his daughter, Lenora Palmer (who afterwards married Ned Berryman), and on 26 April, 1938, Lenora Palmer Berryman and husband, Ned Berryman, by quitclaim deed, of record, conveyed to K. R. Hoyle her one-half interest and other interest she might have in the two lots conveyed to her as above stated. And as to the Walter Palmer land allotted to him in the division of the Job Palmer land,

Walter Palmer died in the year 1929 seized of same and survived by his wife, Margaret Palmer, and two children, Henrietta, who married Ed McNeill, and Lula Belle Palmer. Thereafter, on 30 September, 1938, two separate foreclosure proceedings were instituted by Lee County under C. S., 7987, and C. S., 7990, to foreclose liens of delinquent taxes on the Amos Palmer land and on the Walter Palmer land, respectively. And plaintiff claims title to land in controversy under commissioner's deed executed under authority of orders in said tax foreclosure proceedings. The portions of these proceedings to which the questions involved on this appeal relate will be referred to in proper place hereinafter.

This cause was referred, and to certain findings of fact and conclusions of law made by the referee both plaintiff and defendants Brinn filed exceptions, and to the rulings of judge of the Superior Court on these exceptions, and to judgment rendered, defendants Brinn except and assign error, and appeal to the Supreme Court.

K. R. Hoyle and W. W. Seymour for plaintiff, appellee.
Teague & Williams for defendants, appellants.

WINBORNE, J. While the record on this appeal is voluminous, and the judgment rolls in the tax foreclosure proceedings appearing as exhibits, and as supplemented by addenda, are unusual in their arrangement, sufficient facts are discoverable, and have been ferreted out, for an understanding of the points to which the challenge to the judgment below is directed as set forth in questions involved as stated in brief for appellants filed in this Court. These questions, with pertinent facts, are considered *seriatim*.

The first, third and eighth questions may be considered together. They are not sustainable. The first relates to the refusal of the court to make new parties to this action. The third relates to a finding by judge of Superior Court that the summons issued in November, 1939, in the tax foreclosure proceeding relating to the Amos Palmer land was just another summons in the same action as that instituted in September, 1938—in amendment to finding by referee that it commenced a new action. The eighth challenges the validity of an order of the clerk of Superior Court consolidating the action as originally instituted and the action resulting from the issuance of summons in November, 1939. The facts show that while the action was originally instituted under C. S., 7987, and C. S., 7990, for the foreclosure of the lien of delinquent taxes for the years 1928 to 1936, a change was made in attorney for the plaintiff, Lee County, and a summons was issued in November, 1939, and another complaint was filed declaring on the lien of delinquent taxes for years 1933 to 1937, both inclusive. In his answer to this complaint, defendant

K. R. Hoyle, individually and as Trustee, suggested and prayed that the two actions (so referred to) be consolidated. The order of consolidation followed in March, 1940. And the judgment roll of the proceeding fails to show objection by any party thereto. The power of the court to consolidate certain actions is recognized and frequently exercised. Where actions are pending in the same court, at the same time, between the same parties, and involving substantially the same facts, they may be consolidated. See McIntosh N. C. P. & P., 536, *et seq.* *Henderson v. Forrest,* 184 N. C., 230, 114 S. E., 391; *Brady v. Moton,* 185 N. C., 421, 117 S. E., 339; *Blount v. Sawyer,* 189 N. C., 210, 126 S. E., 512, and cases cited.

Therefore, if the issuance of the summons in November, 1939, commenced a new action the order of consolidation was proper, as both were pending in the same court, at the same time, between the same parties, and involved substantially the same facts. But appellant also contends that the summons issued in November, 1939, fails to show that it was received by the sheriff, and, hence, no new action was instituted. Nevertheless, the judgment roll shows that a summons called an *alias* was issued on 5 March, 1940, and was served either personally or by publication, and the referee so finds, and the judge properly approves the finding. The persons served include those whom the court refused to make parties to present action. They were in court there, and, except such as were minors, for whom no guardian *ad litem* was appointed, are bound by the judgment rendered there, and, hence, there was no necessity for them to be brought into court in this action.

The second question as restated in supplemental and additional brief of counsel for appellant relates to this factual situation: In the tax foreclosure proceeding relating to Amos Palmer land, it being made to appear by affidavit of K. R. Hoyle, original attorney for plaintiff therein, and a party thereto, that the original papers had been lost, and could not after due diligence be found, but that the papers presented by him are true and correct copies of (a) the original *alias* summons and return showing service on certain named defendants, (b) affidavits and order for publication of summons and copies served, (c) answer of K. R. Hoyle and order appointing Edwards as commissioner, (d) order substituting T. J. McPherson as commissioner in certain tax cases, and reports of Edwards, commissioner, and raised bids and orders, the clerk, finding that such papers are true copies of the originals, ordered that same be substituted and restored and ordered filed as a part of the judgment roll in the cause. And it does not appear that any objection was made in the tax foreclosure proceeding as to the regularity of the order substituting copies for the lost originals. However, defendants Brinn in present action object and except to admitting in evidence that part of the judg-

ment roll. Furthermore, said defendants herein object and except to testimony of Deputy Sheriff Bullock that he remembers making service of the *alias* summons as indicated thereon.

These exceptions are properly overruled for these reasons: First: It is provided by statute in this State, C. S., 544, that if any pleading is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original. Moreover, in *Bray v. Creekmore,* 109 N. C., 49, 13 S. E., 723, it is held that judgment of the trial court permitting lost pleadings to be substituted is not reviewable. See also *Walden v. Cheek,* 193 N. C., 744, 138 S. E., 13. Second: The competency of the testimony of the officer finds support in the recent case of *Lee v. Hoff,* 221 N. C., 233, 19 S. E. (2d), 858, where the authorities are cited.

The fourth question is formal and, in the light of decision on other questions, needs no consideration.

The fifth and ninth questions may be considered together. The fifth relates to a receipt on the judgment docket for the distributive shares of the balance of proceeds of sale of the lands, after payment of taxes and costs, due Thomas Palmer and Charles (Jabo) Palmer. It is in these words "Received of W. G. Watson, C. S. C., his check #992 for $333.33 in full settlement of amount due Tom and Jabo Palmer as stated above. This April 9, 1941. (Signed) H. F. Seawell, Jr., Attorney for above named under agreement from Lenora Berryman."

H. F. Seawell, Jr., not having appeared in the case as attorney for Thomas Palmer and Charles (Jabo) Palmer, defendants Brinn challenge the efficacy of the receipt as an estoppel upon Thomas Palmer and Charles (Jabo) Palmer. Be that as it may, the judgment roll in the tax foreclosure reveals, and the referee finds as a fact, and the judge approves the finding that notice of summons as to Thomas Palmer and Charles (Jabo) Palmer was duly served by publication, pursuant to an order of the clerk dated 5 October, 1938, directing each of them to appear at the office of the clerk of Superior Court of Lee County on or before 11 November, 1938, and answer or demur to the complaint or judgment would be rendered against them as prayed; that they did not answer, and that judgment was rendered against them, and no appeal therefrom was taken. The ninth question relates to the correctness of the ruling of the court that Charles (Jabo) Palmer was duly served with summons and made a party to the foreclosure proceeding. The above answers the question, and the consolidation order to which the eighth question relates removes all doubt that Charles (Jabo) Palmer was a party to the action when the orders of foreclosure and confirmation of sale were entered. Hence, these questions fail to present error.

The sixth question relates to the effect of a finding by the judge that after the delivery and registration of the deed from the commissioner to H. A. Palmer, purchaser of the Walter Palmer land at the foreclosure sale, Lula Belle Palmer purchased from H. A. Palmer a portion of the land, and received a deed from him therefor, and that later she, with the joinder of Henrietta McNeill, but without the joinder of the husband of Henrietta McNeill, executed and delivered to McIver Park, Inc., a warranty deed therefor. Appellant challenges the binding effect of this deed in so far as Henrietta McNeill is concerned. The purpose of the introduction of this deed in evidence apparently was to show a ratification of the sale by both Lula Belle Palmer and Henrietta McNeill, whom the court finds were the owners of the land at the time of the institution of the tax foreclosure action.

If it be conceded that the purpose failed as to Henrietta McNeill, and we need not decide whether it did or did not, the judgment roll shows that she and her husband, Ed McNeill, had been personally served with summons prior to the entry of interlocutory judgment of foreclosure and subsequent sale pursuant thereto and confirmation of sale and execution of deed by the commissioner, by all of which she is bound.

The seventh question challenges the sufficiency of the description of the lands as listed to support a valid sale. With regard to the Amos Palmer land the referee finds that "during the years 1927 to 1939, both inclusive, the lands in controversy herein were listed on the original abstract sheets for the purpose of taxation" in West Sanford Township in which the same are located as variously specifically described. This is a finding that the lands in controversy were listed in those years, and the finding is not challenged, even though the conclusion which follows is challenged. Moreover, the referee states that "plaintiff and defendants stipulated and agreed that the above constituted the sole listing of said lands for said years, and that none of said lands were listed for said years by any other person or otherwise than as above set out." Furthermore, the lands as listed are definitely described in the complaint and judgment in the foreclosure proceeding. And with regard to the Walter Palmer lands there are similar findings of fact and stipulations. Hence, the challenge was properly overruled.

The tenth question is whether the original sale on 6 July, 1940, having been held within sixty days from the date of the interlocutory order of foreclosure, 20 May, 1940, is invalid, even though the resales were had after the expiration of such time. It appears that in the interlocutory order of foreclosure, after declaring the amount of delinquent taxes a lien upon the lands, it is ordered "that in default of the payment of the foregoing taxes, and interest thereon, with the cost of this action, into the office of the clerk of this court on or before sixty days from the date

of this judgment, the defendants and all persons claiming by, through or under them be forever barred and foreclosed of all equity of redemption in and to the land herein described, and upon expiration of said period the commissioner hereinafter named shall make sale as hereinafter provided." It is thereinafter provided that the land be, and is condemned to be sold under direction of the court, for the purpose of discharging the tax lien, and that the commissioner therein appointed sell said lands at public auction at the courthouse door in Lee County, North Carolina, to the highest bidder for cash, after having advertised notice of the sale as therein set forth and report the said sale to the court. It further appears that the bid at the sale on 6 July, 1940, was raised, and a resale had, and that the bid at the resale was raised and the land resold, and that the bid at the second resale was confirmed on 26 August, 1940—the clerk finding as a fact that the sale was held in all respects in compliance with the provisions of notice and as required by law. The sale was thus finally had and consummated more than three months after the order of sale. Furthermore, it does not appear that any party in interest has been deprived of right to redeem within the sixty days allowed—forsooth, a right which could have been exercised at any time before valid confirmation. See *Beaufort County v. Bishop,* 216 N. C., 211, 4 S. E. (2d), 525. Hence, the point raised is untenable.

The twelfth question turns upon rulings on other questions herein considered.

The eleventh and thirteenth questions, the latter presented in supplemental brief of appellant, raise a more serious question. The eleventh question challenges the sufficiency of the deed as tendered to defendants Brinn to convey a good and merchantable title in fee simple as plaintiff contracted to do. The thirteenth question challenges the sufficiency of the orders of 5 October, 1938, and 13 March, 1940, for publication of notices of summonses and *alias* summonses and of the notices of publication thereon to bring minor heirs at law of Sam Palmer, if any, into court.

In this connection evidence taken before the referee tends to show that Sam Palmer, who acquired an undivided half interest in the Amos Palmer land, left North Carolina when a small child, and has not since returned to the State; that he married; that he died in Pennsylvania about eight or ten years ago; and that it is not known by his relatives, who testified in the present action, whether he had any children; but that his brother, Thomas, on a visit to his father about four years ago, talked about Sam and said that he was married but said nothing about his family—whether or not his widow was living or whether or not he had any children.

Pertinent findings of fact by the referee, approved by the court, are substantially these: (1) That Amos Palmer, who was married three

times, first to Annie, second to Minnie, and third to Rosa, died on or about 19 July, 1942, survived by his third wife, Rosa Palmer, and a daughter, Lenora Palmer, child of the first marriage, who married Ned Berryman, and two sons, Thomas Palmer, who never married, and Charles (Jabo) Palmer, who is not married, children of the second marriage, "and any heirs at law there may be of a son, Samuel Palmer," child of the second marriage, "who left the State of North Carolina about the year 1913, when he was a small lad, who married and died in Homestead, Pennsylvania, about the year 1933." (2) That at the time summons was issued and complaint filed in the said tax foreclosure suit Samuel (Sam) Palmer was dead, and "if he left him surviving a wife and/or children that such wife and children were nonresidents of the State of North Carolina." (3) That the notice of summons, published under order of 5 October, 1938, was directed: "To Sam Palmer and Minnie Palmer, Thomas Palmer and H. G. Kime, their respective wives and husbands, and the unknown heirs at law, if any, of the above named persons, and all persons, firms or corporations claiming any interest in the subject of the action." (4) That on 21 November, 1938, the clerk entered an interlocutory judgment of foreclosure in which it is adjudged that "none of the defendants other than K. R. Hoyle, Trustee, and those claiming by, through and under Sam Palmer have any interest in said property or in the distribution of the proceeds from said sale." And it is noted that the order further provides that "any surplus funds from the proceeds of said sale over and above the amount of taxes, interest and cost be held by the clerk of the Superior Court, and, at expiration of six months from the date of advertisement in this cause, shall be turned over to the defendant, the land owner." In connection with the adjudication in the order it may be recalled, as hereinbefore stated, that Lenora Palmer and Sam Palmer acquired the Amos Palmer land by deed from J. Amos Palmer and wife in the year 1912, and that Lenora Palmer, as Lenora Palmer Berryman, and her husband conveyed her interest to K. R. Hoyle, Trustee, by deed dated 28 April, 1938. (5) That on 13 March, 1940, which was after the order of consolidation of 11 March, 1940, to which the eighth question hereinabove referred to relates, T. J. McPherson, the attorney for the plaintiff Lee County, made an affidavit to the effect that summons had been returned by the sheriff of Lee County with endorsement thereon that after due search the defendants Sam Palmer and wife, Mrs. Sam Palmer, and Thomas Palmer and wife, Mrs. Thomas Palmer, are not to be found in Lee County, and that after due diligence said parties cannot be found in the State of North Carolina, and their whereabouts are unknown, and that they "and the heirs at law and the unknown heirs of either, if any, and their assigns, if any, have an interest in the said subject matter of this action," and are proper

parties to the action, and prays that an order be entered directing service by publication as provided by law, on "said Sam Palmer and wife, Mrs. Sam Palmer, and Thomas Palmer and wife, Mrs. Thomas Palmer, and the heirs at law and any unknown heirs and assigns of either or any of them." (6) That clerk of Superior Court, under date of 13 March, 1940, ordered that notice of summons be published as directed. The notice, under caption of the case, was addressed "To Sam Palmer and wife, Mrs. Sam Palmer, Thomas Palmer and wife, Mrs. Thomas Palmer, and to their heirs at law and unknown heirs and assigns, if any." (7) That on 20 May, 1940, judgment of foreclosure was entered under the caption of "Lee County *v.* Amos Palmer and wife, Mrs. Amos Palmer, Sam Palmer and wife, Mrs. Sam Palmer, . . . and the unknown heirs at law, if any, and assigns of Sam Palmer . . . and all persons, firms or corporations" interested in the subject matter (omitting other names for brevity) decreeing in pertinent part that "in default of the payment of the foregoing taxes . . . on or before sixty days from the date of this judgment, the defendants and all persons claiming by, through or under them be forever barred and foreclosed of all equity of redemption in and to the land herein described . . ." (8) The judge of Superior Court, in addition to and in amendment of findings of fact by the referee, finds as a fact (a) that on 11 November, 1940, the clerk of Superior Court entered a final order of distribution of the excess of proceeds of sale of the Amos Palmer land over and above the taxes and costs, distributing two-thirds to K. R. Hoyle, Trustee, and one-third to Thomas Palmer and Charles (Jabo) Palmer as heirs at law of Sam Palmer; and (b) "that the instant action was commenced and instituted more than one year after the making and delivery and registration of the deed from T. J. McPherson, Commissioner, to the plaintiff in this action . . ." and that McIver Park, Inc., became the purchaser of the Amos Palmer land in good faith and for full value, and without knowledge of any irregularity in said proceedings, if there were such. Exception 4.

The judgment roll in the tax foreclosure proceeding fails to show that a guardian *ad litem* was appointed to answer for any minor child or heir at law of Sam Palmer, then deceased, and there is no finding of fact in the present action that Sam Palmer left surviving no minor child or heir at law.

Appellants well say that under the facts found, if Sam Palmer, who died in 1933, left children surviving, such children could have been minors at the time when the notices of summonses were published, and still be minors. The question then arises as to whether the service of notice to "the heirs at law and unknown heirs" of Samuel Palmer, "if any," is sufficient to bring any minor child of Samuel Palmer into court?

And, if so, in the absence of representation by guardian *ad litem,* is such child bound by the judgment of foreclosure?

While the affidavit, orders and notices appear sufficient in form to constitute service by publication of notice of summons in accordance with prescribed procedure upon all persons named therein, including heirs at law of Sam Palmer, both adult and minors, C. S., 484 (3) and (7), yet the minors, if any, not having been represented by a guardian *ad litem* would not be bound by the judgment of confirmation rendered in the action. C. S., 451, 452 and 453. *Moore v. Gidney,* 75 N. C., 34; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873; *Hill v. Street,* 215 N. C., 312, 1 S. E. (2d), 850; *Cox v. Cox,* 221 N. C., 19, 18 S. E. (2d), 713; *Simms v. Sampson,* 221 N. C., 379, 18 S. E. (2d), 705, and cases cited.

The tax foreclosure action, instituted under the provisions of C. S., 7990, to enforce tax liens against the Amos Palmer land declared under and by virtue of provisions of C. S., 7987, is an action in the nature of an action to foreclose a mortgage, in which the court may order a sale of such land for the satisfaction of the amount adjudged to be due. In such action it is provided by statute, C. S., 484 (3) and (7), that if any person having an interest in the real estate be a nonresident of this State, or be unknown to plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit, service of summons may be made by publication. It is also provided by statute, C. S., 451, that in all actions when any of the defendants are infants, whether residents or nonresidents of this State, they must defend by their general or testamentary guardian, if there be one within this State, and if they have none in the State, and any of them has been summoned, the court in which the action is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian *ad litem,* to defend in behalf of such infants, and the guardian *ad litem* so appointed shall file an answer to the complaint within the time prescribed. C. S., 453. *Graham v. Floyd, supra.* This applies alike to cases where notice of summons is made by publication. C. S., 452.

Moreover, in the Machinery Act of 1939, chapter 310, Article XVII, entitled "Collection and Foreclosure of Taxes," in effect at the time of the order of foreclosure on 13 March, 1940, it is provided in section 1719 (e) that while the fact that the listing taxpayer or any other defendant is a minor shall not prevent or delay the collector's sale or the foreclosure of the tax lien, all such defendants shall be made defendants and served with summons in the same manner as in other civil actions. It is also provided therein that persons who shall have disappeared or cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons may be served by publication.

Furthermore, it may be noted that in section 8038 of the Consolidated Statutes of 1919 provision was made for the owner or occupant of any land sold for taxes, or any person having a lien or interest or estate therein to redeem the same at any time within one year after the day of such sale, and for infants to redeem any land belonging to them within one year after the expiration of such disability in like terms as if the redemption had been made within one year from the date of sale. This statute, as it relates to infants, was applied in the case of *Hill v. Street, supra*, where *Devin, J.*, distinguished other cases.

However, in the Machinery Act of 1939, chapter 310, Article XVII, above referred to, section 1725, certain sections of the Consolidated Statutes of North Carolina, as amended, including section 8038, are thereby repealed except as otherwise provided in sections 1723 and 1724 of that article, the latter section not being pertinent to question now under consideration. And, while in section 1723 no reference is made to C. S., 8038, it is provided that numerous sections thereof, including section 1721, "shall also apply, to the extent that such application does not affect any action already taken or affect private rights already vested at the time of ratification of this article, to all taxes, due and owing to taxing units at the time of the ratification of this article, originally due within fiscal years beginning on or before 1 July, 1937, whether such taxes have heretofore been included in tax sales certificates or not, and whether such taxes are included in pending foreclosure actions or not." And section 1721 regarding time for contesting validity of tax foreclosure titles, provides that "no action or proceeding shall be brought to contest the validity of any title to real estate acquired, by a taxing unit or by a private purchaser, in any tax foreclosure action or proceeding authorized by this act or by other laws of this State in force at the time of acquisition of said title, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained, after one year from the date on which the deed is recorded"; with provisos not here pertinent. Moreover, by said section 1723, C. S., 7990, is specifically preserved in full force and effect with respect to taxes originally due on or before 1 July, 1938.

Conceding, therefore, that C. S., 8038, be superseded by the provisions of the above section 1721 of the Machinery Act of 1939, chapter 310, with respect to present action, such provisions must be read in connection with statutes pertaining to service of summons upon minors, and the requirement that minor defendants be represented by guardian *ad litem*—the procedure by which minors are brought into court so as to be bound by judgment rendered in the action. Hence, in the present action, in so far as minors, if any, who have not been properly brought in court, are concerned, the date on which the deed is recorded, within the meaning of

said section 1721, would be the date on which a deed, executed under authority of a judgment binding on them, is recorded.

It is a well settled principle that, in the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchases from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter of the proceeding, and that the judgment on its face authorized the sale. *Graham v. Floyd, supra; Bladen County v. Breece,* 214 N. C., 544, 200 S. E., 13, and cases cited.

Applying this principle to case in hand, the purchaser at the tax foreclosure sale, looking to the proceeding to see if the court had jurisdiction of the parties, finds: (1) That those claiming by, through and under Sam Palmer had an interest in the land being sold—see interlocutory judgment of foreclosure, 21 November, 1938; (2) that Sam Palmer could not be found in the State of North Carolina, and that it was thought necessary to make his heirs at law parties to the proceeding, and that they were unknown—see affidavit, orders and notices of publication of summons; and (3) that no guardian *ad litem* had been appointed for any minor heir of Sam Palmer, if he be dead. And such purchaser is charged with notice of the law that minors who are not represented by guardian *ad litem* in a civil action to foreclose the lien of taxes are not bound by the judgment therein. Furthermore, there is no suggestion of fraud. Hence, purchaser at sale in question fails to come within the meaning of *bona fide* purchasers.

Specific performance of a contract to convey land will not be decreed when the vendor cannot make a good title to the land sold, or when his title thereto is doubtful, *Trimmer v. Gorman,* 129 N. C., 161, 39 S. E., 804; *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79; 24 L. R. A., 514, and *Thompson v. Power Co.,* 158 N. C., 587, 73 S. E., 888, or when he can convey only an undivided interest therein. *Bryan v. Read,* 21 N. C., 78.

On the record as now presented it appears that in the tax foreclosure action in question it was assumed that Sam Palmer was dead, that he left no children, and that his sister Lenora Palmer Berryman and his brothers Thomas and Charles (Jabo) Palmer were his heirs at law, and accordingly the proceeds of sale were distributed. However, there is no finding of fact in that respect. If the court should find that Sam Palmer died leaving no lineal issue surviving, or that he left lineal issue surviving none of whom was a minor at the time of service by publication of the notice of summons in the foreclosure proceeding in March, 1940, nothing else appearing, then the judgment confirming the sale, and deed to purchaser pursuant thereto would be valid. But if Sam Palmer died leaving lineal issue surviving, any of whom was a minor, the judgment

confirming the sale would not be binding on such minor, and to the extent of the interest of the minor, deed to purchaser pursuant to the judgment would not convey the title.

The cause will be remanded for the ascertainment of facts in these respects to the end that judgment may be rendered in accordance with such facts.

Error and remanded.

GARFIELD THOMAS v. L. H. HIPP, GEORGE DICKENS AND FRED HARRIS.

(Filed 3 November, 1943.)

1. Boundaries §§ 10, 11—

In a processioning proceeding to establish the true boundary line between adjoining landowners, the burden of proof is on plaintiff and it is error for the trial court, in the absence of an agreement by the parties that one of two designated lines is the true line, to charge the jury to answer the issue in favor of that one of such lines as they find is supported by the greater weight of the evidence.

2. Boundaries §§ 1, 11—

What constitutes the dividing line between adjoining landowners is a matter of law, but the true location of the line must be settled by the jury under correct instructions based upon competent evidence.

3. Boundaries § 9a—

A junior deed is incompetent to locate a corner or line in a senior instrument.

4. Adverse Possession § 9a—

A deed which is inoperative because the land intended to be conveyed is incapable of identification, from the description therein, is inoperative as color of title.

5. Adverse Possession § 17—

The party asserting title by adverse possession must carry the burden on that issue.

APPEAL by defendant Hipp from *Sink, J.*, at January-February Term, 1943, of LEE.

Processioning proceeding instituted 25 September, 1937, to establish the boundary line between adjacent lands of petitioner and the defendant, L. H. Hipp. The pertinent facts are in substance as follows:

1. Petitioner alleges that he is the owner in fee and in possession of a certain tract of land in Deep River Township, Lee County, N. C., adjoining the right of way of the Seaboard Air Line Railway Company

and the land of the defendant, and described as follows: "Beginning at Hipp's corner on the Western edge of the S. A. L. Ry. right-of-way, and running thence as Hipp's and George Dickens' lines N. 87 W. 29.40 chains to Dickens' and Fred Harris' corner in a road; thence S. 1¼ W. as the Bryant line 15 chains to an iron stake in a field; thence S. 87 E. 20 chains to a stake in the Western edge of said R. R. right-of-way; thence northward as said right-of-way to the Beginning, containing 37 acres, more or less."

2. The aforesaid land was conveyed to plaintiff by C. B. Crutchfield and wife, 10 March, 1924, and the deed duly recorded as provided by law.

3. Petitioner alleges "That the defendant Hipp, whose lands adjoin petitioner's lands on the North, is claiming an interest in said lands of petitioner by reason of the location of the northermost or first line as set out in the above description, his said claim being that the said line is southward of its true course as set out in said description."

4. O. E. Seawell and wife conveyed to L. H. Hipp, on 18 August, 1912, which conveyance is duly recorded as provided by law, a tract or parcel of land situate in Deep River Township, Lee County, N. C., adjoining lands of S. W. Womble and E. F. Watkins, and described as follows: "Beginning in the western edge of the S. A. L. Railroad right-of-way, and running thence with said right-of-way N. 33 E. 6.15 chains to a stake; thence N. 58 W. 5.78 chains to a stake; thence N. 13 W. 8.68 chains to a stake near the road; thence W. 17.20 chains to a stake; thence S. 16.34 chains to a stake; thence East 21.80 chains to the beginning, containing 34½ acres, excepting 2 acres, etc."

5. The southeast or beginning corner of the Hipp land is also the beginning corner designated in the plaintiff's deed. The last call in the description of the Hipp land, to wit, E. 21.80 chains to the beginning, is the northern line of plaintiff's land which adjoins the land of defendant Hipp, and is the first call in plaintiff's deed, which runs with Hipp's and Dickens' line, but is given a bearing of N. 87 W. 29.40 chains to Dickens' and Fred Harris' corner. Hence, the southern line of the Hipp land is the northern line of plaintiff's land.

6. Maps showing certain surveys of the properties, including larger tracts of land out of which the tracts of the plaintiff and defendant Hipp were carved, were used in the trial below and said maps were forwarded with the record to this Court. One of the maps was made by J. W. Blanchard, Surveyor, Rosehill, N. C., in April, 1942, by order of the court, and is designated "Court Survey." Three lines appear on the Court Survey as dividing lines between the lands of the plaintiff and the defendant Hipp. The Court Surveyor ran the respective lines shown on the Court map, as follows: (1) By beginning at a point designated A, the termination of the first call in plaintiff's deed, and thence

from A to a point designated G., in western edge of right of way of S. A. L. Railway Co., a distance of 50 feet from the center of said railroad, by reversing the course in the first call in the plaintiff's deed, to wit, S. 87 E., without variation. The court in its charge to the jury refers to this line as No. 1. (2) The line designated as A. to 7 on the Court map was run by reversing the course in the first call in plaintiff's deed, beginning at A the termination of said call and thence S. 86.25 E. to a point designated "7" in the western edge of the right of way of the S. A. L. Railway, and 50 feet from the center of said railroad, which allowed a magnetic variation since the date of the execution of plaintiff's deed in 1924. The court in its charge refers to this line as No. 2. (2) The dotted line from A. to a point designated as "12," a point only 25 feet from the center of the railroad of the S. A. L. Railway Co., showing a magnetic bearing of N. 83.30 W., which is the true boundary line between the property of plaintiff and defendant Hipp, according to the contentions of defendant Hipp, was referred to by the court in its charge as "The third line."

7. Issues were submitted and answered as follows:

"1. What is the true dividing line between the lands of the plaintiff and the land of the defendant Hipp? Ans.: 'Line No. 2.'

"2. Has the plaintiff trespassed on the lands of defendant Hipp, as alleged in his answer? Ans.: 'No.'

"3. What damages is defendant Hipp entitled to recover therefor? Ans.: 'None.'

"4. Is the defendants' claim for damages, as alleged in his further answer and counterclaim, barred by the three-year statute of limitation, as alleged by the plaintiff? Ans.: ....."

Judgment was signed accordingly. Defendant L. H. Hipp appeals, assigning error.

T. J. McPherson and Gavin & Jackson for plaintiff.

K. R. Hoyle for defendant.

DENNY, J. The appellant excepts and assigns as error the following portion of his Honor's charge: "The law says that when you have weighed all of the testimony and evidence in this case in the scales of justice, Thomas' contentions, evidence and testimony upon the one side and Hipp's contentions, evidence and testimony on the other, if the scales shall be tilted downward in favor of Thomas upon the first issue, then it would be your duty to answer the issue either the first line or the second line, as you may find the facts in that degree to indicate."

We think the exception well taken, since there was no agreement between the parties that the true boundary line between the adjoining

lands of the plaintiff and the defendant Hipp was one of the three lines designated on the map made by the Court Surveyor as was the case in *Boone v. Collins,* 202 N. C., 12, 161 S. E., 543; *McCanless v. Ballard,* 222 N. C., 701, 24 S. E. (2d), 525. In a processioning proceeding to establish a boundary line, which is in dispute, what constitutes the dividing line is a matter of law, but the true location of the dividing line must be settled by the jury under correct instructions based upon competent evidence. *Greer v. Hayes,* 216 N. C., 396, 5 S. E. (2d), 169; *Greer v. Hayes,* 221 N. C., 141, 19 S. E. (2d), 232; *Huffman v. Pearson,* 222 N. C., 193, 22 S. E. (2d), 440; *McCanless v. Ballard, supra.*

It will be noted in the statement of facts that the Court Surveyor, in running the two lines shown on the Court map, which are most favorable to the plaintiff, ran both lines from the point designated A, the termination of the first call in plaintiff's deed, by reversing said call. In running line A to G., designated by the court as line No. 1, the most favorable line to the plaintiff, the Surveyor made no allowance for magnetic variation. In running line A. to 7, the next most favorable line to the plaintiff, designated by the court as Line 2, the Surveyor made allowance for magnetic variations since 1924, the date of the execution of plaintiff's deed.

The plaintiff's deed, being a junior instrument and calling for a corner in the Hipp land as the beginning corner, and running thence with the line of the Hipp land, is incompetent as evidence to locate the corner or the line referred to and described in the deed previously made to the defendant, L. H. Hipp. *Euliss v. McAdams,* 108 N. C., 507, 13 S. E., 162; *Sasser v. Herring,* 14 N. C., 340; *Corn v. McCrary,* 48 N. C., 496. Also we find that in the case of *Dula v. McGhee,* 34 N. C., 332, the Court said: "Where a grant calls for the line of an older grant, the rule is, that it must go to it, unless a natural object or a marked tree is called for, and before the calls of the junior grant can be ascertained, those of the elder must be located. This is established by many decisions; *Miller v. White,* 2 Hay., 160; ..... *v. Heritage,* 2 Hay., 327; *Bradbury v. Hooks,* N. C. T. Rep., 1; *Tate v. Southard,* 1 Haw., 45."

In the instant case, however, an examination of the description contained in the deed executed in 1912 to the defendant Hipp, will disclose that the description begins in the western edge of the S. A. L. Railway right of way and continues with courses and distances to stakes, thence to the beginning. A stake is an imaginary point. The beginning is somewhere in the western edge of the right of way of the S. A. L. Railway Company, but where is unknown. It does not appear from the description in the record that the southern boundary line of the Hipp land can be definitely located which may remit the defendant Hipp to a claim for title by adverse possession. *Mann v. Taylor,* 49 N. C., 272; *Deaver v.*

Jones, 114 N. C., 649, 19 S. E., 637; *Holmes v. Sapphire Valley Co.,* 121 N. C., 410, 28 S. E., 545; *Barker v. Railway,* 125 N. C., 596, 34 S. E., 701; *Kennedy v. Maness,* 138 N. C., 35, 50 S. E., 450; *Cathey v. Lumber Co.,* 151 N. C., 592, 66 S. E., 580; *Higdon v. Howell,* 167 N. C., 455, 83 S. E., 807. Whether or not any one or more of the corners called for in the Hipp deed are marked by permanent or known monuments, from which corner or corners the line in dispute may be located, under the maxim, *id certum est quod certum reddi potest,* is not presented on this record, and therefore the question is not decided. *N. C. Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889; *Duckett v. Lyda, ante,* 356, 26 S. E. (2d), 918; *Peel v. Calais, ante,* 368, 26 S. E. (2d), 916.

A deed which is inoperative because the land intended to be conveyed is incapable of identification, from the description therein, is inoperative as color of title, *Katz v. Daughtrey,* 198 N. C., 393, 151 S. E., 879; hence, if the defendant Hipp is remitted to a claim for title by adverse possession to establish his line which is in dispute, the adverse possession must have been for twenty years prior to the institution of this proceeding. The defendant's southern line wherever established, whether from the description in his deed or by adverse possession for the required statutory period, will constitute the northern line of plaintiff's land and the true dividing line between the adjoining lands of the plaintiff and the defendant Hipp. However, the burden being on the plaintiff to establish the true dividing line between the adjoining land of the plaintiff and the defendant Hipp, and it not appearing from this record that the southern boundary line of the Hipp land can be definitely located from his deed, the plaintiff may make out a *prima facie* case for the consideration of the jury upon competent evidence as to the location of the true boundary line as called for in his deed by a reverse survey of the course and distance of the first call in said deed, which calls for a known and established corner. *Jarvis v. Swain,* 173 N. C., 9, 91 S. E., 358; *Land Co. v. Lang,* 146 N. C., 311, 59 S. E., 703; *Dobson v. Finley,* 53 N. C., 498. In determining the location of this line, proper magnetic variations since 1924 should be allowed. But, as stated above, the location of the boundary line as called for in the junior deed will not be controlling if the true location of the boundary line can be ascertained from the Hipp deed or by the adverse possession of the defendant Hipp of the land intended to be conveyed to him in the deed executed in 1912. If, however, the true boundary line between the adjoining lands of the plaintiff and the defendant Hipp cannot be established from the description in the Hipp deed or by the adverse possession of the defendant Hipp, south of the course called for in the first call of plaintiff's deed, the

course and distance as given in plaintiff's deed may prevail. *Lumber Co. v. Bernhardt,* 162 N. C., 460, 78 S. E., 485.

The party asserting title by adverse possession must carry the burden on that issue. *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381.

For the reasons stated, we think there should be a new trial; however, we suggest a recast of the pleadings so as to present the question of adverse possession to the jury should the submission of such an issue become necessary.

We deem it unnecessary to discuss the other assignments of error, since they may not arise on another trial.

New trial.

A. C. PARSONS v. D. T. WRIGHT AND WIFE, MYRTIE WRIGHT.

(Filed 3 November, 1943.)

1. Highways § 6—

The term *highway* is the generic name for all public ways, including roads, streets, railroads, bridges, canals, navigable rivers; and *roads* and *streets* include all highways by land.

2. Highways § 7—

Cartways are an auxiliary part of the public road system and they are designated *quasi*-public roads, and the condemnation of private property for such use has been sustained upon the ground that it is a valid exercise of the power of eminent domain.

3. Highways § 13—

A *quasi*-public way located in a rural section is, under our statute, a cartway. When it is within the corporate limits of a town or city it is an alley. Location determines the name, but the essential characteristics are the same.

4. Municipal Corporations § 5—

When a municipal corporation is established, it takes control of the territory and affairs over which it is given authority, to the exclusion of all other governmental agencies. The authorities of counties, embracing such cities or towns, are precluded from exercising the same power within the same territory.

5. Municipal Corporations § 29: Highways § 7—

General statutes of the State, in regard to public highways, do not apply to the streets and alleys of an incorporated town or city, and the county authorities have no power or authority over such streets and alleys.

6. Highways § 14—

The law relating to cartways, Public Laws 1931, ch. 448, was not intended to withdraw from cities and towns any part of their exclusive control over their streets, and other public ways, and confers no jurisdiction on the clerk of the Superior Court to establish an alley within an incorporated town.

APPEAL by defendants from *Burgwyn, Special Judge,* at April Term, 1943, of MONTGOMERY. Reversed.

Petition in special proceedings before the clerk of the Superior Court to establish a cartway. The plaintiff owns a lot, upon which is located a tenant house, in the town of Star. The defendant D. T. Wright owns an adjoining lot which lies between plaintiff's lot and the public street. The only way of access plaintiff has to his lot is over a driveway across the municipal cemetery. He seeks to have a cartway established extending from the northeastern edge of his lot along the eastern end of defendants' lot to the street. Defendants deny the right of the plaintiff to the cartway and challenge the jurisdiction of the clerk.

The clerk entered an order granting the petition and appointing commissioners to lay out the cartway and assess the damages. Defendants appealed to the Superior Court. When the cause came on to be tried in the court below there was a verdict and judgment for the plaintiff, and the defendants appealed.

Seawell & Seawell for plaintiff, appellee.

L. L. Moffitt and J. A. Spence for defendants, appellants.

BARNHILL, J. Does the clerk of the Superior Court have jurisdiction of a proceeding to lay off and establish a cartway within a municipality? If this question is resolved in favor of the defendants the other questions presented on this appeal become immaterial.

"The term *highway* is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers." Bouvier's Dict., Tit. Highway; Elliott, Roads and Streets, p. 1; 25 Am. Jur., 340.

The term "street" is ordinarily applied to a public way in a city, town, or village, and the word "road" to a free public way in the county, while the two—roads and streets—include all public highways by land, whether designated as highway, road, street, alley, lane, place, or boulevard. 1 Lewis Em. Dom. (3rd), p. 171; 25 Am. Jur., 342.

Cartways are public roads in the sense that they are open to all who see fit to use them, although the principal benefit inures to the individual or individuals at whose request they were laid out. The term is used

merely for the purpose of classification and to distinguish a class of roads benefiting private individuals who, instead of the public at large, should bear the expense of their establishment and maintenance. They are designated *quasi*-public roads, and the condemnation of private property for such use has been frequently sustained upon that ground as a valid exercise of the power of eminent domain. *Cook v. Vickers,* 141 N. C., 101, 58 S. E., 740; *Barber v. Griffin,* 158 N. C., 348, 74 S. E., 110; *Waldroup v. Ferguson,* 213 N. C., 198, 195 S. E., 615; 50 C. J., 380, sec. 5. They are properly considered an auxiliary part of the public road system of the county, although they are distinguished from public highways proper. *Cook v. Vickers, supra.*

The term "alley" relates exclusively to a way in a town or city. 13 R. C. L., 18, sec. 7. When not qualified by the word "private," it is a narrow passage for the convenience of the owner of property abutting thereon and of the persons dealing with him. 13 R. C. L., 18, sec. 7; 25 Am. Jur., 343. It is available for all who desire to use it, and it forms a part of the system of streets or public ways of the town or city. 2 C. J., 1151.

Hence, a *quasi*-public way located in a rural section is, under our statute, a cartway. When it is within the corporate limits of a town or city it is an alley. Location determines the name, but the essential characteristics are the same.

Primarily, all power over all thoroughfares is with the Legislature. This power has been so delegated by the Legislature as to give control of urban ways to the cities and towns, and of suburban ways, other than state highways, to the county boards—now the State Highway Commission. Ch. 145, Public Laws 1931. In keeping this control subdivided, an orderly system has been provided with reference to the establishment, improvement, repair, and vacation of ways, and the sources from which the necessary funds are derived, and the officers executing these various functions and expending such funds.

When a municipal corporation is established it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental agencies. The object of incorporating a town or city is to invest the inhabitants of the municipality with the government of all matters that are of special municipal concern, and certainly the streets are as much of special and local concern as anything connected with a town or city can well be. It ought, therefore, to be presumed that they pass under the exclusive control of the municipality so soon as it comes into existence under the law. *Gunter v. Sanford,* 186 N. C., 452, 120 S. E., 41; 1 Elliott on Roads and Streets, sec. 505; 2 Cooley on Taxation, 1251; 44 C. J., 889, sec. 3608. See also *Gastonia v. Cloninger,* 187 N. C., 765, 123 S. E., 76.

It is usually given express power by its charter to lay out and open streets. Such is the case here. Ch. 84, Private Laws 1913. Charter provisions are supplemented by our general statutes. C. S., 2787. Under the power thus conferred the municipal authorities are the sole judges of the necessity or expediency of exercising that right. 44 C. J., 889, sec. 3608. Its power over its streets is exclusive. *Moore v. Meroney,* 154 N. C., 158, 69 S. E., 838; *Waynesville v. Satterthwait,* 136 N. C., 226, 48 S. E., 661; *Michaux v. Rocky Mount,* 193 N. C., 550, 137 S. E., 663. County authorities embracing such city or town are precluded from exercising the same power within the same territory. 1 Lewis Em. Dom. (3rd), 700, sec. 383. (See n. 24 for authorities.) "In the nature of things, there can be no divided control of the streets within the limits of a city . . ." *McGrew v. Stewart,* 32 Pac., 896; *Board of Com'rs v. Chicago, M. & St. P. Ry. Co.,* 132 N. W., 675.

This authority extends to alleys as a part of the system of streets. C. S., 2787 (11). "When it is proposed by any municipal corporation to condemn any land . . . for the purpose of opening . . . any . . . alley . . . an order or resolution of the governing body of the municipality at a regular or special meeting shall be made stating generally, or as nearly as may be, the nature of the proposed improvement for which the land is required . . ." Sec. 2792 (b), Michie's N. C. Code of 1939.

General statutes frequently give to some county board or corresponding body power to control all highways within its jurisdiction, without excepting streets. It is well settled, however, that if a city be given power to control streets, its exercise of that power is exclusive, and a county board acting under a general road law will have no jurisdiction within its borders. 44 C. J., 160, sec. 2278; *Board of Com'rs v. Chicago, M. & St. P. Ry. Co., supra.*

General statutes of the state, in regard to public highways, do not apply to the streets and alleys of an incorporated town or city, and the county authorities have no power or authority over city streets for any purpose without the consent of the city authorities. 1 Elliott, Roads and Streets (4th), 608; *Board of Com'rs v. Chicago, M. & St. P. Ry. Co., supra; State v. Chicago, I. & L. Ry. Co.,* 51 N. E., 914 (Ill.).

The law relating to cartways was revised and re-enacted in 1931. Ch. 448, Public Laws 1931. We must assume that the Legislature, when it came to enact this statute, was fully aware of and took into consideration the accepted meaning of "cartway" as distinguished from an alley, and that it had no intent to withdraw from cities and towns any part of their exclusive control over their streets and other ways of public travel. It must be deemed to have acted with knowledge of the general principles which apply to such political subdivisions and the expectation that they

shall exercise the usual jurisdiction of such subdivisions exclusively, and not divide it with other public or *quasi*-public agencies.

Sound principle requires that the courts should hold that the creation of a municipal corporation implies, in the absence of clear words to the contrary, that it shall have control of the streets within its territorial limits to the exclusion of county officers. This seems to be the reasonable rule, consistently followed in this State. Intention to modify this "exclusive power over the streets" and to disturb this prevailing orderly system should be manifest before the courts could construe the act in question as giving the clerk of the Superior Court control of the establishment of cartways or alleys within an incorporated town. This "exclusive power" vested in a city is utterly inconsistent with the exercise of any such power by the clerk or other county official. *State v. Chicago, I. & L. Ry. Co., supra.*

A contrary holding would result in confusion and disastrous conflicts of jurisdiction and authority. It ought not to be inferred, without strong reason, that the Legislature intended such a result.

No such reason is made to appear. On the contrary, the Legislature used the word "cartway," the term ordinarily employed to designate a *quasi*-public way, auxiliary to the county road system. It did not include "alley," a similar way located within a municipality and forming a part of the system of streets. That it did not intend to go further than the language used implies seems to be clear.

We conclude, therefore, that chapter 448, Public Laws of 1931, confers no jurisdiction on the clerk of the Superior Court to establish an alley within an incorporated town. His jurisdiction is limited to those *quasi*-public ways which become an auxiliary part of the county road system.

For the reason stated the judgment below is

Reversed.

J. D. MOOSE v. S. C. BARRETT.

(Filed 3 November, 1943.)

1. Statutes § 5d—

The general rule is that when a statute creates a liability where none existed before and denominates its violation a misdemeanor, and prescribes remedies for its enforcement, such remedies are usually regarded as exclusive. *Expressio unius est exclusio alterius.*

2. Laborers and Materialmen's Liens § 4—

Where a statute required that every purchaser of baled cotton should pay the county cotton weigher ten cents for every bale bought or weighed

within the county, giving the weigher a lien for his fee and making a willful and wanton failure to settle with or report to the weigher an indictable offense, the remedies are exclusive and no action for a debt is created.

APPEAL by defendant from *Burgwyn, Special Judge,* at June Term, 1943, of CABARRUS.

Civil action to recover cotton weigher's compensation for baled cotton purchased by the defendant at Midland in Cabarrus County.

Plaintiff alleges that he is entitled to recover 10 cents for each and every bale of cotton purchased by the defendant in Cabarrus County, outside the city of Concord, and not settled for or reported to him during the three years next immediately preceding the institution of the action. The defendant was a merchant at Midland and a buyer of cotton. The amount is not in dispute. It was agreed that the issue of indebtedness should be answered $202.20, "if entitled to anything."

It is admitted that none of the baled cotton in question was weighed by the plaintiff, and that no reports were made to him in respect thereof.

From verdict and judgment for plaintiff, the defendant appeals, assigning errors.

L. E. Barnhardt for plaintiff, appellee.
Hartsell & Hartsell for defendant, appellant.

STACY, C. J. The question sought to be presented is whether the cotton weigher of Cabarrus County can recover of a private citizen for baled cotton bought or weighed by him in the county, outside the city of Concord, where no services are rendered by the cotton weigher in connection with the cotton so bought or weighed.

It is provided by ch. 238, Public Laws 1895, as amended by ch. 95, Public-Local Laws 1919, that the cotton weigher of Cabarrus County "shall receive as compensation for his services the sum or sums to be collected and paid as hereinafter provided: Every person, firm or corporation who buys baled cotton in the city of Concord shall pay to the said cotton weigher twenty cents per bale for all cotton bought by him in said city; . . . and every person, firm or corporation who buys baled cotton in Cabarrus County, outside of the city of Concord, shall pay to the said cotton weigher of Cabarrus County ten cents per bale for each bale of cotton bought by him or it, or weighed or caused to be weighed for manufacture, shipment or transportation; and it shall be lawful for the said person buying said cotton to retain from the amount of money due the seller or owner of such cotton the sum of five cents for each bale so bought, weighed or caused to be weighed; and it shall be the duty of

each and every person, firm or corporation who buys or weighs any baled cotton in said county, outside the city of Concord as and for any of the purposes hereinbefore set out, to weigh said cotton at its true and just weight . . . and shall make a detailed report of the cotton so bought or weighed by him or it to the cotton weigher of Cabarrus County on the first day of each month, . . . and settle with and pay over to said cotton weigher, the amount due for the cotton bought or weighed by him or it; and any person willfully and wantonly violating the provisions of this section shall be guilty of a misdemeanor; and the said cotton weigher shall have a lien on any cotton weighed by him or other person as hereinbefore provided."

The foregoing provisions were repealed by ch. 489, Public Laws 1943, and others substituted in their stead, but it is conceded they were in effect at the times for which the plaintiff sues.

The plaintiff rendered no services in connection with the transactions for which he claims compensation. He did not weigh any of the cotton in question, nor were any reports made to him in connection therewith. He is given a lien on the baled cotton bought or weighed by the defendant at Midland in Cabarrus County, but he is not seeking to enforce the lien. His action is to hold the defendant personally liable for his "compensation" of 10 cents for each and every bale of cotton so bought or weighed by the defendant. Willful and wanton failure on the part of the defendant to settle with the cotton weigher or to report his transactions is made indictable, *S. v. Tyson,* 111 N. C., 687, 16 S. E., 238, but no civil personal liability appears to be prescribed therefor, certainly none *ipsissimis verbis. Intendant v. Sorrell,* 46 N. C., 49. The case is not one of common-law origin. No such right as here asserted existed at common law. All of plaintiff's rights and remedies are statutory. *Noland Co. v. Trustees,* 190 N. C., 250, 129 S. E., 577; 1 Am. Jur., 411. The legislation not only creates the liability upon which plaintiff sues, but also prescribes the remedies for its enforcement. *Morganton v. Avery,* 179 N. C., 551, 103 S. E., 138; *R. R. v. Brunswick County,* 198 N. C., 549, 152 S. E., 627.

There is no allegation that the defendant in buying the cotton in question retained five cents a bale from the amount due the seller, or that such sum, if retained, would belong to the plaintiff. *Hill v. Stansbury, ante,* 193. Moreover, it would seem that the remedies prescribed by the statute were intended to be exclusive. *Expressio unius est exclusio alterius. McCotter v. Reel, ante,* 486; *Moffitt v. Davis,* 205 N. C., 565, 172 S. E., 317. "Where a right is given and a remedy provided by statute, the remedy so provided must be pursued." *People v. Craycroft,* 2 Cal., 243, 56 Am. Dec., 331; 25 R. C. L., 1058; 1 Am. Jur., 410. Evidently the General Assembly did not regard the "amount due for the

cotton bought or weighed" as a debt, since it provided criminal sanctions in case of willful and wanton failure to comply with the provisions of the statute. "There shall be no imprisonment for debt in this State, except in cases of fraud." Const., Art. I, sec. 16.

The general rule is that where a statute creates a liability where none existed before and denominates a violation of its provisions a misdemeanor, and prescribes remedies for its enforcement, such remedies are usually regarded as exclusive. 1 Am. Jur., 411; 25 R. C. L., 982.

"It is also a rule of general recognition that when a statute gives a right and creates a liability which did not exist at common law, and at the same time points out a specific method by which the right can be asserted and the liability ascertained, that method must be strictly pursued"—*Wagner, J.*, in *Jefferson County Farm Bureau v. Sherman,* 208 Iowa, 614, 226 N. W., 182.

Cureton of Texas puts it this way: "The general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable"—*Cureton, C. J.*, in *Mingus v. Wadley,* 115 Tex., 551, 285 S. W., 1084.

An enunciation of the applicable principle was made in *Pollard v. Bailey,* 20 Wall., 520, 22 L. Ed., 376. There it was said: "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action; but where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." See *Beckman v. Buckwalter,* 341 Pa., 561, 20 A. 2d. 198; 1 R. C. L., 323.

True, in the instant case the supposed lien may be unsuitable to the purposes intended, yet it is what the General Assembly had seen fit to prescribe. No doubt its obvious impolicy led to the repeal of this part of the statute and the substitution of other provisions in its stead. The provision in respect of criminal liability may have been regarded as adequate. *Hickman v. City of Kansas,* 120 Mo., 110, 25 S. W., 225, 23 L. R. A., 658, 41 Am. St. Rep., 684.

This view of the statute relieves us from the necessity of passing upon the constitutionality of the act or from the need of deciding whether a public officer can recover "compensation for his services" of a private citizen for matters in connection with which he has rendered no service. *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22; Annotation: 116 A. L. R., 245; 28 R. C. L., 7.

The case is not like *Bickett v. Tax Com.,* 177 N. C., 433, 99 S. E., 415, where the collection "through the ginner" of 25 cents "on each bale of cotton ginned" in the State, to create an indemnity fund to safeguard

the State Warehouse System, was under consideration. It more nearly resembles a proceeding to enforce a charge against specific property, where no personal liability attaches. *Wadesboro v. Coxe,* 215 N. C., 708, 2 S. E. (2d), 876; *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24.

Perhaps it should be observed that an expression of the police power, such as we have here, may differ both in kind and effect from an act to raise revenue. *State and Guilford County v. Georgia Company,* 112 N. C., 34, 17 S. E., 10; Notes: 23 L. R. A. (N.S.), 267; 51 L. R. A. (N.S.), 731; Ann. Cas. 1912-C, 256.

On the record as presented, the plaintiff's action must fail.

Reversed.

EMMA PEARL DAUGHTRY v. W. H. DAUGHTRY, ADMINISTRATOR C. T. A. OF SARAH KEEN, TRUDIE MAE BASS AND HUSBAND, HUBERT BASS; ANNIE J. STRICKLAND AND HUSBAND, L. W. STRICKLAND.

(Filed 3 November, 1943.)

1. Frauds, Statute of, § 9—

An oral contract to give or devise real estate is void by reason of the statute of frauds, C. S., 988, and no action for a breach thereof can be maintained.

2. Same: Executors and Administrators § 15d—

Where personal services have been rendered in compliance with an oral contract to give or devise real estate and such contract is void by reason of the statute of frauds, the party injured by the breach thereof may maintain an action on implied *assumpsit* or *quantum meruit* for the value of the services rendered.

3. Trial § 22a: Appeal and Error § 40e—

When the only defendants, who have any interest adverse to the plaintiff, move for judgment of nonsuit, C. S., 567, which is granted, objection and exception thereto, upon the theory that only some of defendants lodged the motion, are untenable.

APPEAL by plaintiff from *Stevens, J.,* at March Term, 1943, of SAMPSON.

This is an action instituted by the plaintiff, Emma Pearl (Keen) Daughtry, for the recovery of $6,000.00, as damages for breach of an oral contract alleged to have been made by the late John W. Keen and his wife, the late Sarah Keen, of the first part, and Mellia Catherine Reeves on behalf of the plaintiff, Emma Pearl Reeves (subsequently Keen), her infant daughter, of the second part, whereby and wherein the parties of the first part agreed that they would give or devise their real estate

to the plaintiff, and the party of the second part agreed that the parties of the first part might adopt her infant daughter, Emma Pearl Reeves, and change her name from Reeves to Keen; and it is alleged that the party of the second part in all respects complied with the said contract, and the adoption as therein contemplated was accomplished; that the parties of the first part have both died, and have not only failed to convey or to devise their real estate to the plaintiff, Emma Pearl (Reeves) Keen (now by marriage Daughtry), but on the contrary have by will devised a large portion of their real estate to the defendant Trudie Mae Bass, devising but a small portion thereof to the plaintiff and to the defendant Annie J. Strickland; that the plaintiff during the lives of John W. Keen and Sarah Keen rendered to them valuable personal services; that by reason of the breach of the said contract the plaintiff has suffered damages in the sum of $6,000.00, and by reason of the rendition of said services for which she has received no compensation she is entitled to recover the sum of $6,000.00 upon the theory of implied *assumpsit* or *quantum meruit*.

When the plaintiff had introduced her evidence and rested her case, the defendants Trudie Mae Bass and her husband, Hubert Bass, moved for judgment as in case of nonsuit and to dismiss the action, and renewed said motion at the close of all the evidence (C. S., 567), which motion was allowed, and from judgment predicated upon such ruling the plaintiff appealed, assigning error.

J. Faison Thomson for plaintiff, appellant.

A. McL. Graham and W. H. Fisher for Trudie Mae Bass and her husband, Hubert Bass, defendants, appellees.

SCHENCK, J. In the course of the trial the plaintiff upon her own motion, upon leave of court, deleted from her complaint all allegations as to any cause of action based on the theory of implied *assumpsit* or *quantum meruit* and took a voluntary nonsuit as to any cause of action based on such theory. Whereupon the defendants Trudie Mae Bass and her husband, Hubert Bass, urged their motion for a judgment as of nonsuit upon all theories and for dismissal of the entire action, which motion was allowed, and from judgment predicated upon such ruling the plaintiff appealed, assigning errors.

The plaintiff upon her own request and motion having submitted to a voluntary nonsuit as to any alleged cause of action on the theory of implied *assumpsit* or *quantum meruit* based upon personal services rendered by her to her adopting parents, the only question left for answer by this Court is: Can an action for breach of an oral contract to give or to devise real estate be maintained for damages resulting therefrom,

as upon a breach of a special contract? The decisions of this Court impel a negative answer.

The law is to the effect that an oral contract to give or to devise real estate is void by reason of the statute of frauds, C. S., 988, which provides that "all contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing . . ." *Hager v. Whitener,* 204 N. C., 747, 169 S. E., 645; *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331, and cases there cited; *Lipe v. Trust Co.,* 206 N. C., 24, 173 S. E., 316.

The same decisions cited to sustain the principle that an oral contract to give or devise land is void are likewise authority for the principle that where personal services have been rendered in compliance with an oral contract to give or to devise real estate in return therefor, and such contract is void by reason of the statute of frauds, the party injured by the breach thereof may maintain an action on implied *assumpsit* or *quantum meruit* for the value of the services rendered.

In the instant case, however, the plaintiff upon her own motion and request has submitted to a voluntary nonsuit as to any and all causes of action based on the theory of implied *assumpsit* or *quantum meruit,* and is therefore relegated to her action to have the land devised by Sarah Keen to Trudie Mae Bass and Annie Strickland and herself sold and the proceeds therefrom applied to the payment of $6,000.00 damage, which she alleges she has suffered by reason of the breach of the oral contract to give or to devise real estate to her. This action must necessarily fail as such oral contract to give or to devise lands was a contract to convey lands and since it has not, and no memorandum nor note thereof has been, put in writing, is void.

Objection and exception is urged by the appellant to the dismissal of the entire action when the only motion lodged for such action was lodged by the defendants Trudie Mae Bass and her husband, Hubert Bass.

It is true that the other defendants did not join in the motion for dismissal. Upon analysis the reason for this is apparent. First, the defendant Annie J. Strickland filed no answer, and appeared as a witness for the plaintiff and testified in effect that she was willing to lose the small amount of real estate devised to her by the late Mrs. Sarah Keen if the plaintiff was enabled to recover on the oral contract which the plaintiff alleged was made and breached. The interest of this defendant was in no wise adverse to the interest of the plaintiff, hence no motion to dismiss the action would be expected to emanate from this source.

Second, the defendant W. H. Daughtry, Administrator *c. t. a.* of Sarah Keen, while he filed answer, practically admitted all of the alle-

gations of the complaint, and as to those allegations not admitted, he "neither admits nor denies the same, but asks that the issues of fact raised by the other defendants and the plaintiff be submitted to a jury on their pleadings." This defendant likewise was a witness in behalf of the plaintiff, and gave testimony in no wise antagonistic to her claim, and withal was the husband of the plaintiff. No motion to dismiss the action would be expected to emanate from this source.

Third, in the course of the trial a voluntary nonsuit was taken as to the defendant L. W. Strickland. So no motion to dismiss could come from this source.

Fourth, the only remaining defendants were Trudie Mae Bass and her husband, Hubert Bass, and they lodged the motion for dismissal. This was to be expected, since Mrs. Bass was the principal beneficiary under the will of the late Mrs. Sarah Keen, having been devised the larger portion of her real estate, and if the plaintiff should succeed in her action to have the land of the late Mrs. Sarah Keen sold to pay the $6,000.00 alleged to be due the plaintiff for breach of the oral contract to give or to convey lands, Mrs. Bass would be the loser. Since Mrs. Bass and her husband, Hubert Bass, are the only defendants who had any interest adverse to the interest of the plaintiff, it was well within her right, moral and legal, to lodge the motion for a dismissal of the entire action. The objection and exception to the judgment of nonsuit as to the entire action upon the theory that only some of the defendants lodged motion therefor are untenable.

The judgment of the Superior Court is

Affirmed.

DUPLIN COUNTY v. EVA EZZELL.

(Filed 3 November, 1943.)

1. Judgments § 8½—

The general rule that an unanswered complaint, which has been served with summons on defendant, entitles the plaintiff to judgment by default, applies to actions for foreclosure of tax liens.

2. Judgments § 22g: Appeal and Error § 2—

An irregular judgment is one rendered contrary to the course and practice of the court, and a motion in the cause to set aside a judgment or to vacate subsequent decrees and procedure, on the ground of irregularities, properly presents questions for judicial review, though not all irregularities in procedure are fatal.

3. Taxation § 40c—

In an action to foreclose a tax lien on land, C. S., 7990, the mere inadequacy of the price bid therefor is not sufficient to avoid the sale and cancel the deed to the purchaser, unless some element of fraud, suppression of bidding, or other unfairness in the sale appears.

APPEAL by plaintiff and purchaser, B. D. Johnson, from *Harris, J.*, at May Term, 1943, of DUPLIN.

This was an action instituted by Duplin County to foreclose the tax lien on defendant's land for unpaid taxes for the years 1932 to 1935. Summons and complaint were personally served on the defendant, and, no answer having been filed, judgment by default was rendered by the clerk, and sale of the land by a commissioner was ordered. Thereafter the commissioner reported that he had sold the land, after due advertisement, in accordance with law and the judgment in the cause, and that Duplin County was the last and highest bidder in sum of $89.12. No objection to the sale or advance bid having been made, the sale was confirmed by the clerk, and the county having assigned its bid to B. D. Johnson, the commissioner was directed, upon payment of the purchase money, to execute deed to him. Deed was accordingly executed and delivered, and after due notice to defendant writ of possession was ordered to issue. Shortly thereafter defendant retained counsel and filed motion before the clerk to set aside the judgment and orders and the sale thereunder on account of alleged irregularities appearing on the face of the record. This motion was denied by the clerk, and the defendant appealed to the judge. It further appeared that in the order of confirmation the clerk had found that the sale was open and fair, and that the price bid was the reasonable worth of the land. However, subsequent to the denial of defendant's motion, at the request of the defendant, the clerk amended his findings to the extent only of finding that the land was worth $800 to $900.

Upon consideration of the appeal from the clerk, the judge found that the defendant was old and ignorant and without counsel until the filing of her motion, that the land was worth $800 or $900, and that the price bid at the sale, together with the unpaid taxes for subsequent years to and including 1942 to be paid by the purchaser, would amount to $325. The judge further found that the decree of confirmation of the sale was based upon a false impression as to the value of the land. Thereupon it was concluded that it would be inequitable and against good conscience to permit the sale to stand, and it was ordered that the sale be set aside, the deed to B. D. Johnson canceled of record, and the land resold.

From this judgment the plaintiff Duplin County and B. D. Johnson appealed.

Gavin & Gavin for Duplin County.
L. A. Beasley for B. D. Johnson.
Chas. P. Gaylor for defendant.

DEVIN, J. It is apparent that the Judge did not rule upon the matters presented by the appeal from the clerk. The motion to set aside the decree of confirmation and to nullify the sale was based upon suggested irregularities in the procedure appearing on the face of the record. For this reason, we think, the judgment below should be vacated and the cause remanded for further hearing on the appeal from the clerk.

The general rule that an unanswered complaint which has been personally served with summons on the defendant entitles the plaintiff to judgment by default applies equally to actions for the foreclosure of tax liens. *Street v. Hildebrand,* 205 N. C., 208, 171 S. E., 58; *Wake County v. Johnson,* 206 N. C., 478, 174 S. E., 303. And a motion in the cause to set aside the judgment or to vacate subsequent decrees and procedure, on the ground of irregularities, properly presents questions for judicial review. *Buncombe County v. Arbogast,* 205 N. C., 745, 172 S. E., 364. An irregular judgment has been concisely defined as one rendered contrary to the course and practice of the court, McIntosh Proc. & Prac., 736; *Harnett County v. Reardon,* 203 N. C., 267, 165 S. E., 693; though not all irregularities in procedure are fatal. *Street v. McCabe,* 203 N. C., 80 (84), 164 S. E., 329.

It may be noted that the law required the county, in the absence of a bid equalling the amount of the taxes and costs, to bid in the property, and authorized the assignment of its bid to an individual for not less than this amount. Public Laws 1939, ch. 310, secs. 1715, 1717. In confirming the sale and directing execution of deed to the county's transferee the clerk found that the sale was duly advertised and conducted according to law and the court's order, and that the sale was open and fair, and the price bid was the reasonable worth of the land. Subsequently this finding was amended to show that the reasonable worth of the land was $800 or $900. In no other respect were the clerk's findings or decrees modified.

To hold that mere inadequacy of the price bid for real property sold for taxes would be sufficient to avoid the sale and cancel the deed to the purchaser would seriously affect the enforcement of the statutory lien given the taxing authorities for the collection of delinquent taxes, to the detriment of the public revenues. Unless some element of fraud, suppression of bidding, or other unfairness in the sale appears, the result should not be annulled on this ground alone. 26 R. C. L., 396; 61 C. J., 1191. In this case it appears that the taxes on defendant's land have not been paid for eleven years.

Let the cause be remanded for further consideration of the defendant's appeal from the clerk.

Error and remanded.

JAMES A. SMITH v. LEWIS J. WHITLEY AND J. W. NELSON.

(Filed 3 November, 1943.)

1. Negligence § 5—

The fact that defendant has been guilty of negligence, followed by injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established.

2. Negligence §§ 5, 19c: Trial § 22b—

Where plaintiff was injured in an aeroplane crash, the pilot being negligent in not having a license, there is no evidence that this negligence was the proximate cause of the injury, the doctrine of *res ipsa loquitur* does not apply, and judgment as of nonsuit was proper. C. S., 567.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at June Term, 1943, of CABARRUS.

This is an action to recover damages for personal injuries received in an aeroplane crash alleged to have been caused by the negligence of the defendants.

From a judgment as in case of nonsuit entered when the plaintiff had introduced his evidence and rested his case (C. S., 567) the plaintiff appealed, assigning error.

Bernard W. Cruse and B. W. Blackwelder for plaintiff, appellant.

Hartsell & Hartsell for defendants, appellees.

PER CURIAM. The position principally relied upon and urged by the appellant is that there was evidence that the pilot of the crashed aeroplane was piloting the machine and carrying a passenger without the license to carry passengers required by law. While it may be conceded that the pilot of the aeroplane, the defendant Nelson, did not have such a license and was nevertheless carrying the plaintiff as a passenger, which would constitute negligence, there is no evidence in the record that this negligence, the absence of the passenger carrying license, was the proximate cause of the aeroplane crash. In truth, there is no evidence of what caused the crash. The plaintiff, James A. Smith, testified that "the plane went into a spin and crashed and I do not know why." J. W. Nelson, one of the defendants, who was piloting the plane, testified as a

witness for the plaintiff: "I don't know just why the plane crashed; it just came down in a spin with the nose to the ground."

There must be a causal connection between the violation of the law, as the negligence relied upon, and the injury inflicted. *Burke v. Coach Co.*, 198 N. C., 8, 150 S. E., 636; *Jones v. Bagwell,* 207 N. C., 378, 177 S. E., 170. "The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established." *Byrd v. Express Co.,* 139 N. C., 273, 51 S. E., 851; *Carter v. Realty Co., ante,* 188, 25 S. E. (2d), 553. The doctrine of *res ipsa loquitur* does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot has absolutely no control, it being common knowledge that aeroplanes do fall without fault of the pilot. *Rochester Gas & E. Corp. v. Dunlop,* 266 N. Y. S., 469, Annotations 99 A. L. R., 186.

The judgment of the Superior Court is

Affirmed.

W. R. HAMPTON v. NORTH CAROLINA PULP COMPANY.

(Filed 10 November, 1943.)

1. Judgments § 35—

The plea of *res judicata* cannot be presented by demurrer, unless the facts supporting it appear on the face of the complaint. It must be taken by answer. C. S., 519 (2).

2. Judgments § 34: Constitutional Law § 23—

A judgment of a Federal Court will be given full faith and credit in the State court, when pleaded as *res judicata* according to the practice of the Court: but there is no rule which will compel the State court to accept the law as laid down by any other court, State or Federal, where the subject of the controversy, however similar, is different.

3. Courts §§ 9, 11—

Where the jurisdiction of the Federal Court is invoked on the ground of diversity of citizenship, and no federal question is involved, the matters in controversy are determinable by State law.

4. Waters and Watercourses § 13—

The Roanoke River, at the place of controversy, is a navigable stream.

5. Fish and Fisheries § 4: Waters and Watercourses §§ 1, 14—

A riparian proprietor who owns no part of the bed of navigable waters has no several and exclusive fishery therein.

6. Same—

The public has a common right to fish in all navigable waters, provided that right is exercised with due regard for the rights of others.

7. Fish and Fisheries § 5—

Owners of several and exclusive fisheries upstream may maintain an action for wrongful interference with the migratory passage of the fish whereby these fisheries are injured.

8. Fish and Fisheries § 4—

The necessities of a person whose business is taking fish from a common fishery and one, who by reason of his riparian ownership of the bed of the river, has a several and exclusive fishery are precisely the same, and the same principles of law must apply with respect to the migration of fish.

9. Nuisances §§ 1, 5, 6—

The law will not permit a substantial injury to the person or property of another by a nuisance, though public and indictable, to go without individual redress, whether the right of action be referred to the existence of a special damage, or to an invasion of a more particular and more important personal right.

10. Fish and Fisheries § 5: Nuisance § 3—

In an action by plaintiff, a riparian proprietor on a navigable river, against defendant, where the complaint alleges that plaintiff is the owner of a long established fishery from the shores of his property along such stream and that plaintiff has suffered damages thereto by the interference of defendant in polluting the waters of the river with toxic chemicals and other matter deleterious to fish life, discharged into said river as waste from defendant's recently established pulp mill, causing a public nuisance and seriously interrupting the migratory passage of fish, it was error for the court below to sustain a demurrer to the complaint as not stating a cause of action.

APPEAL by plaintiff and defendant from *Bone, J.*, at Chambers in Nashville, N. C., 14 July, 1943. From WASHINGTON.

This action was brought by the plaintiff Hampton to recover damages for an injury to his fishery and business on Roanoke River, which it is alleged was brought about by the wrongful act of the defendant through the discharge of deleterious or noxious substances into the river from its pulp plant located below plaintiff's fishery, near the city of Plymouth.

It is alleged in the complaint that the plaintiff owns certain lands upon the river bank adjacent to the waters of the river, whereupon there has been established a fishery; and that plaintiff and those who preceded him have conducted there a fishery for commercially taking and distributing fish for more than twenty-five years; that during a certain period the defendant operated a plant for the manufacture of bleached and unbleached sulphate pulp, and turned into the waters of Roanoke River opposite its plant a great volume of poisonous, deleterious and objection-

able waste and substances, inimical to the fish inhabiting said waters, to such an extent and in such volume and quantity as to interfere with the free and long established passage, migration and habit of said fish from the ocean on their way to the spawning grounds in the upper reaches of the Roanoke River, and past the properties of the plaintiff, thus to a large extent destroying the fish, and diverting said migratory pilgrimage, so as to seriously damage the business of the plaintiff and the profit from the use of his premises.

The complaint further alleges that an agreement, or contract, was made between the defendant and the North Carolina State Highway Commission, an agent of the State of North Carolina, prior to the erection of the defendant's plant, under which, in consideration of the construction or improvement of a certain road very valuable to the operations of the defendant, and leading to or near the site of its manufacturing plant, defendant would refrain from discharging deleterious or injurious substances from its proposed plant which might destroy or divert the fish, or otherwise interrupt or damage seasonable fishing operations of such persons as might be engaged in fishing, including the plaintiff. That the said agreement was violated, although the road was constructed by the aforesaid agency upon the faith and consideration of defendant's promise.

It is alleged that the discharge of poisonous and deleterious substances from defendant's plant constitutes a wrongful and unlawful trespass and nuisance, destroying the fish inhabiting the waters in front of plaintiff's premises, and greatly damaging the plaintiff and diminishing the usufruct of his property and his fishing business during the period set out, whereby plaintiff was damaged in the sum of $3,000.00.

Plaintiff expressly waives recovery for any sum in excess of $3,000.00 for damages for the designated period, and demands judgment in that amount, and prays for such other and further relief as he may be entitled to receive.

Upon notice, the plaintiff was required to make his complaint more definite by particularizing in certain respects: First, whether the agreement mentioned in the complaint was made orally or in writing; second, that the agreement and documents constituting it be set forth in full; third, in stating at what time the agreement was made; fourth, in stating for what period of time the agreement is claimed to have extended.

In answer to this order the plaintiff amended his complaint in the particulars requested, and appended to the amendment certain communications and documents alleged to have passed between the plaintiff and Honorable Capus M. Waynick, Chairman of the North Carolina Highway Commission, allegedly constituting the agreement referred to.

The defendant then demurred to the complaint upon the following grounds:

The court had no jurisdiction over the subject of the action, inasmuch as an action involving the same subject matter was instituted in this court during the months of March and April, 1941, and was on 7 May, 1941, by order of the clerk of the court, duly removed to the United States District Court for the Eastern District of North Carolina pursuant to the statutes of the United States; and as subsequently thereto, on or about 2 April, 1943, judgment was entered by Honorable I. M. Meekins, Judge for the said United States District Court, dismissing the plaintiff's complaint on the ground that it failed to state a cause of action. The demurrer further points out that as a result of the removal to the United States District Court for the Eastern District of North Carolina, the subject of the action passed from the jurisdiction of the State court into that of the United States District Court, thereby tolling the jurisdiction of the State court; and that, moreover, the judgment of the United States District Court became and is *res judicata* and binding upon the State court.

That it appears on the face of the complaint that there is another action pending between the parties for the same cause; inasmuch as an action involving the same subject matter was instituted as aforesaid in this court during the months of March and April, and was on said 7 May, 1941, duly removed to the United States District Court and the action therein dismissed as aforesaid by an order and judgment of said court entered on 2 April, 1943; and that said United States District Court still has jurisdiction of said action.

That it appears on the face of the complaint, as amended, that the particularized complaint does not state facts sufficient to constitute a cause of action in that:

a. It fails to allege any property right of the plaintiff which was destroyed or injured by defendant.

b. It fails to allege any injury sustained by plaintiff which was not sustained by him in common with all the people of this State.

c. It fails to allege any injury to, or destruction of, any right of plaintiff which was not a right vested in common in all the people of this State.

d. Any alleged contractual rights of plaintiff are based upon a contract which purported to bind the defendant, or its predecessor, to comply with the law of this State, which said contract was therefore without consideration and void.

e. Any contract alleged in said complaint was not made for the benefit of plaintiff, nor was it intended for his benefit.

f. Any contract alleged in said complaint was made by and between the defendant and the State of North Carolina, or an agency thereof, and plaintiff, as an individual citizen of this State, acquired no individual rights thereunder upon which he may sue in this, or any other, court.

g. Any cause of action for the breach of said contract is barred by the statute of limitations.

Treating as a motion in the cause that portion of the demurrer which asks for the dismissal of the action, both for the alleged reason that there is another suit upon the same cause of action pending between the parties in the Federal Court and, further, that the matter in controversy had been settled and become *res judicata* because of a judgment in the Federal Court, the court declined to dismiss the action for either of said causes, inasmuch as the facts relating to them did not appear upon the face of the complaint; but sustained the demurrer to the complaint as not stating a cause of action. From the refusal to dismiss the action for the causes stated, defendant appealed; and from the judgment sustaining the demurrer to the complaint as not stating a cause of action, plaintiff appealed.

Carl L. Bailey and Ehringhaus & Ehringhaus for plaintiff.

Norman & Rodman and J. W. Bailey for defendant.

Whyte, Hirschboeck & McKinnon of counsel for defendant.

DEFENDANT'S APPEAL.

SEAWELL, J. The appeal of the defendant is from the refusal of the trial judge to dismiss the action for want of jurisdiction, on the ground that another action is pending between the same parties with respect to the same cause of action; and on the ground that the present controversy has become *res judicata* because of a final judgment in the cause in the Federal Court. It is not necessary to point out the contradictory nature of these pleas. While the trial judge, finding the facts, noted that the case in the Federal Court referred to by the defendant was still pending on appeal in that Court, he found, and correctly, we think, that a different subject matter was involved. This is sufficient to dispose of the plea of *res judicata* also. This plea, however, could not be presented by demurrer. Since the facts supporting it, if they exist at all, do not appear upon the face of the complaint, the plea must be taken by answer. *Gibson v. Gordon*, 213 N. C., 666, 197 S. E., 135; *Davis v. Warren*, 208 N. C., 174, 179 S. E., 329; *Thorpe v. Parker*, 199 N. C., 451, 154 S. E., 674; *Smith v. Lumber Co.*, 140 N. C., 375, 377, 53 S. E., 233. The necessity of taking this plea by answer may be referred to C. S., 519 (2), since such a plea necessarily involves new matter consti-

tuting a defense. We would not consider it wise, even if our hands were not stayed, to relax a procedure so definitely tending to prevent confusion. A judgment of a Federal Court upon the identical facts, that is, the identical *res* or subject matter of the action, will be given full faith and credit in the State court when pleaded as *res judicata* according to the practice of the court, no matter how mistaken that court may have been in its interpretation of state law; but there is no rule which will compel the State courts to accept the law as laid down by the Federal Court, or indeed by the courts of this State, as *res judicata* where the subject of the controversy, however similar, is different. The plea rests upon the identity of the controverted facts put at issue and determined by the judgment, and not upon the law applied.

On defendant's appeal, the judgment is

Affirmed.

PLAINTIFF'S APPEAL.

The plaintiff appealed from the judgment dismissing the case on the ground that the complaint does not state a cause of action. The court below reached its conclusion upon the theory that the plaintiff had not, by reason of the public nuisance complained of, sustained any injury different in kind or degree from that suffered by members of the general public who had the right to fish in Roanoke River.

We think the whole situation may be better understood by a brief reference to the surroundings and conditions under which the controversy arose, and the nature of the industry affected.

The Roanoke, as it flows from Virginia into North Carolina and thence through the Albemarle Sound—no doubt its prehistoric channel—into the Atlantic Ocean, is one of the great rivers of the State, indeed of all our Southern Atlantic Seaboard. Wide terraces in its upper reaches testify to its former vast extent. It is in large part responsible for the sounds and banks through which it now reaches the ocean, as its sediment was deposited through many thousands of years where the slowing current met the tidal wall. No doubt an oceanographic survey would discover its former channel—like that of the Hudson—many miles out at sea, a monument to its greatness when the world was young. Still, in its lower course, it is broad, majestic, and carries down a volume of water which puts an identifying color on most of Albemarle Sound, and suffuses the Neapolitan blue of Edenton Bay with a pale gold.

We are advised in the quaint language of the complaint that the rock, shad, herring, and other fish "infest" the waters of the Roanoke, and except for the unlawful interference of the defendant, might still be taken in commercial quantities by those, including the plaintiff, who

have established fisheries in connection with their premises adjacent to the river.

Every year, under an instinctive urge, these migratory fish enter the river from the salt waters, ascend the stream to its remote upper reaches and tributaries, seeking conditions more suitable for reproduction and preservation of the life of their young, and there cast their spawn. Having performed this duty, they return down the river to other habitats.

The rivers and sounds of North Carolina have not confined their appeal to mere sportsmen; they have been acclaimed as great storehouses of food for the people of the State; and they form a complex of deep and shallow waters which is extremely favorable to the fishing industry, and important fisheries along the river have made that designation one of fact.

There, in times past, have flourished great fisheries of herring and other migratory fish, remarkable for the length of the seines employed and the quantities of fish brought in at a single haul. While production has diminished through the years, partly through the policy of conservation, those fisheries which still persist have a very important place in the food economy of the State and, in that respect, may be said to constitute an essential industry—a business as distinct and universally recognized as merchandising, husbandry, or any other—and sometimes through large adjacent areas more important. Notwithstanding its vicissitudes, the business itself and those engaged in it should have the same protection of the law that is afforded other businesses, as far as its nature and incidents will permit.

If we are to consider such a business as a distinguishing factor, the rights involved in this litigation are not comparable, either in importance or legal effect, with the public right of user belonging to the general citizenry of the State, the violation of which, if invaded at all, is constructive, if not fictional; or, if actual, yet results only in the minor annoyance and inconvenience to which interference with such a right is ordinarily confined.

The main question is whether, considering the nature of his business and the circumstances attending it, the plaintiff may maintain an action to recover damages for the interference with his fishing business by the pollution of the waters of the river with toxic chemicals and other deleterious matter discharged into the river as waste matter from defendant's pulp mill, which arrest the migration of the fish, or divert to other waters their normal run past plaintiff's riparian property.

The Roanoke, at the places mentioned, is a navigable stream. The plaintiff, a riparian proprietor, owns no part of the bed of the stream, and therefore has not a several and exclusive fishery, as that term is known to the law. As in case of other navigable waters, the public has

a common right to fish in all the waters concerned with this controversy, provided that right is exercised with due regard for the rights of others; *Bell v. Smith,* 171 N. C., 116, 87 S. E., 981; *Columbia Salmon Co. v. Berg,* 5 Alaska, 583; *Hampton v. Columbia Canning Co.,* 3 Alaska, 100; *Stannard v. Hubbard,* 34 Conn., 370; 36 C. J. S., Fish, section 8, notes 43, 44; *Hopkins v. R. R.,* 131 N. C., 463, 42 S. E., 902; *Lewis v. Keeling,* 46 N. C., 299; and subject to the superior right of plaintiff as to the area actually occupied, and being fished.

The plaintiff has, however, an established fishing business, which for more than twenty-five years has been carried on in connection with his riparian lands, above defendant's recently established pulp mill, and in convenient access to the migration of fish past the premises. The effluent waste from the pulp mill, taking the complaint to be true, has destroyed or diverted the run of the fish so as to seriously injure or destroy his business and diminish the value of his riparian property, which value was enhanced because of convenient access to the fish and employment of the premises in that connection.

How far in territorial extent the waste from the mill polluted the waters of the river before it became innocuous by diffusion, if it ever did, does not appear. There is no allegation in the complaint that any person other than the plaintiff has suffered any injury from the nuisance, or any suggestion of that kind other than might be remotely inferred from the assumption that the general right of the public to fish in the waters adjacent to plaintiff's premises has been constructively invaded, but with no consequent injury. See *Morris v. Graham, infra.*

The defendant appellant contends that under these conditions plaintiff cannot maintain his present action, since he complains only of injury from a public nuisance, the invasion of a common right; and, upon the face of his complaint, his injury is not different in kind and degree from that suffered by other members of the general public, all of whom have the right to fish in the river.

To the abstract proposition that a person who suffers no special or peculiar damage from a public nuisance cannot maintain an action to recover damages, authorities uniformly agree; *McManus v. R. R.,* 150 N. C., 655, 656, 64 S. E., 766, and cases cited; although there is authority to the effect that a great difference in the degree of injury will take it out of the rule; 46 C. J., Nuisances, section 312. The application of the rule, however, is attended with such difficulty that it is not unusual to find it stated that each case must be decided on its own merits.

As expressing the rule just stated, also as decisive of the present case, the defendant mainly relies on *Dunn v. Stone,* 4 N. C., 241 (1818). Along with the briefs we are provided with the opinion of *Judge Meekins* leading to the decision on the case above mentioned in the United States

District Court. We have no criticism to make of the opinion of *Judge Meekins*. In that case, however, jurisdiction of the Federal Court was invoked because of diversity of citizenship of the parties, and not because any federal question was involved. The matters in controversy were determinable by State law; *Holyoke Water & Power Co. v. Lyman*, 15 Wall (U. S.), 500, 21 L. Ed., 133; and *Judge Meekins* applied the interpretation of State law as he conceived it to be made by the highest Court in the State—in *Dunn v. Stone, supra*—upon the authority of which the defendant relied in that case, and so relies here.

However, we do not think *Dunn v. Stone, supra*, applicable to the situation presented in the case at bar. We construe that case as resting decision on the ground that defendant in building his mill dam across Neuse River was in the exercise of a lawful right, and the consequence to plaintiff's fishery was necessarily *damnum absque injuria*. It reiterates the familiar principle that one cannot be hindered in the exercise of a lawful right merely because it may consequentially affect another in the exercise of his own right. We are not then put to a choice between two rights lawfully exercised—*e.g.*, the right of manufacture, navigation or commerce on the one hand and the right of fishing on the other. *Hardison v. Handle Co.*, 194 N. C., 351, 139 S. E., 614; *Spruill v. Mfg. Co.*, 180 N. C., 69, 103 S. E., 911; *Lewis v. Keeling*, 46 N. C., 299. It is alleged that as proprietor of a long established fishery on Roanoke River, the plaintiff has a right to maintain his fishery, free from unlawful interference with the passage of fish up the river according to their accustomed habit, and that the defendant has wrongfully and unlawfully interfered with this right to plaintiff's injury and damage. *Land Co. v. Hotel*, 132 N. C., 517, 44 S. E., 39. The wrongful interference was accomplished through the violation of State law—C. S., 1968, which was enacted, in part at least, for the protection of the plaintiff and those similarly situated, and was so recognized by the defendant, when, in consideration of the building of roads and a bridge essential to the operation of the plant and further altering the public highway for its convenience, the defendant agreed to conform to these laws and not to pollute the river by discharging into it noxious waste or matter deleterious to fish life. We deal, therefore, not with a conflict of rights, but with the conflict between the right of the plaintiff to the security of an established business and the wrongful conduct of the defendant in interfering with it.

We do not question the general rule that no individual may recover damages because of injury by public nuisance, unless he has received a special damage or unless the creator of the nuisance has thereby invaded some right which, upon principles of justice and public policy, cannot

be considered merged in the general public right; but exclusion of the plaintiff from the courts for such a reason was error.

The real reason on which the rule denying individual recovery of damages is based—and the only one on which the policy it reflects could be justified—is that a purely public right is of such a nature that ordinarily an interference with it produces no appreciable or substantial damage—or, at most, an inconvenience of no serious nature. To deny private redress, the incidence of infraction must be as uniformly public as the right which is exclusively committed to public protection. For instance, interference with a mere right to travel a highway usually entails no appreciable damage, however much the annoyance or inconvenience; but where by reason of a nuisance, however public, substantial injury is inflicted on the health, life, limb or property of the individual it will be found that another sort of right—more intimate, personal and important—has been invaded, for which the sterile satisfaction of public indictment, or abatement of the nuisance will not afford compensation; neither did the law so intend.

The limitation to be put upon the rule under consideration is thus expressed in 46 C. J., Nuisances, sec. 315 (5):

"It has been said that the true limit, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint, drawing the line, when possible, between the more immediate obstruction or peculiar interference which is ground for special damage and the more remote obstruction or interference which is not, and that, in spite of all the refinements and distinctions which have been made, it is often a mere matter of degree."

In *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95, 103, we have the following:

"The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This, we think, is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and

does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause." This excerpt from *Wesson v. Washburn Iron Co., supra*, is quoted by *Justice Hoke* with approval in *McManus v. R. R., supra*.

Swain v. Chicago, etc., R. R. Co., 252 Ill., 622, 626, 97 N. E., 247, is in accord with this distinction and expresses the view we have given above as to the nature of a purely public right and accentuates the point that the invasion of such a right is often accompanied by the invasion of a right personal and private, apart from any distinction as to damage in kind and degree ensuing from an interruption or obstruction of the so-called public right:

"The true test seems to be whether the injury complained of is the violation of an individual right or merely a hindrance to the plaintiff in the enjoyment of the public right. It is common usage to speak of one's right to travel upon a public highway or of his right to use a navigable stream, but it seems to us that it is not quite accurate to call a privilege which one enjoys in common with every other person a personal right; but whether the conception be expressed, as it most commonly is, by calling it a right or privilege or liberty—which seems more nearly to express the true legal idea—it is certain that the so-called right of everyone stands upon an exact equality."

To such a right, it is concluded, should the rule excluding individual action for injury be confined.

Making a similar distinction as to a public nuisance the consequences of which are merely confined to invasion of a purely public right and those which also invade other rights which are more personal and indefeasible, it is said in *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 76, 48 N. W., 1000:

"If the health or property of a person be injured from such a cause, he may recover, although the health and property of the general public affected by the nuisance be affected in the same manner. The character of the injury would be the same in each case, but the damages sustained by each individual would be distinct from that suffered by the public, and a recovery therefor would be permitted."

From the well considered case of *Morris v. Graham*, 16 Wash., 343, 47 Pac., 752, relating to the business of fishing in a navigable stream and an obstruction interfering with carrying on the business, we quote:

"(The action) is brought in behalf of a class, and the injury complained of is not common to the general public, but peculiarly affects the respondent, and those in the class to which he belongs. The acts complained of constitute a damage and special injury to him, in which the general public do not share. The fact that others would suffer in the

same way, if they were similarly engaged, constitutes no bar to the maintenance of the present action. As is aptly said by *Mr. Justice Beatty,* in *Mill Co. v. Post,* 50 Fed., 429: 'If what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance.' In *Lansing v. Smith,* 4 Wend., 9, *Chancellor Walworth* says: *'Every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the said situation.'* "

The insistence with which we are urged to draw an equation before the law between all injuries sustained from the postulated common right —of the nature and character pointed out—which must in their nature be trivial, strongly suggests an imbalance somewhere in the doctrinal theory or its attempted application. That a man engaged in commercial fishing, wherever prosecuted—having an established trade or business necessary to the public and profitable to himself—may have that industry wiped out and his business utterly destroyed by a series of acts not only wrongful in themselves, but in violation of criminal law, and in such circumstances be denied access to the courts because his injury is no different in kind and degree from that of an angler of the Isaac Walton type, or a denizen of the Great Smoky Mountains who had never heard of the Roanoke River or the fishes that disport themselves therein, or even a person in the common fishery as yet untouched by the nuisance, is a position which the Court would hesitate to take. It brings to point the observation of *Lord Ellenborough* in *Rex v. Dewsnap,* 16 East., 196, quoted in *Reyburn v. Sawyer,* 135 N. C., 328, 47 S. E., 761:

"I did not expect that it would have been disputed at this day, though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influences of it."

Right is an abstract term. It has no satisfactory definition or explanation except in connection with some concrete conception of the thing out of which it grows. It may be a right to do something, to have something, to be something, or even to be let alone. It may refer to a right or privilege to use a highway or other public facility, or to utilize one of the great institutions of nature. But, on the other hand, it may refer to personal liberty, security, health or property. The unquestionably personal and individual rights which pertain to these subjects, wherever invaded by the wrongful acts of another, cannot be disqualified of their significance by crowding them into the general mold of common public rights, for interference with which, since they exist only in a highly

generalized form and point merely to the public convenience, no individual remedy may be had.

Without further entangling the subject in a web of fine distinctions, it all sums up to this: The law will not permit a substantial injury to the person or property of another by a nuisance, though public and indictable, to go without individual redress, whether the right of action be referred to the existence of a special damage, or to an invasion of a more particular and more important personal right. The personal right involved here is the security of an established business. The fact that plaintiff had such established business antedating the nuisance, and that the injury had been done to this, takes him out of the rule and makes his damage special and peculiar. *Reyburn v. Sawyer, supra; Mfg. Co. v. R. R.*, 117 N. C., 579, 23 S. E., 43; *Pedrick v. R. R.*, 143 N. C., 485, 55 S. E., 877; *Viebahn v. Comrs.*, 96 Minn., 276, 104 N. W., 1089.

In the language of *Justice Hoke,* speaking further for the Court in *McManus v. R. R., supra:*

"Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our State is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the Court on the subject."

The Court does not need to be astute in finding such a remedy in the instant case. The plaintiff cannot be denied access to the Court upon the theory that he has suffered no special damage.

Passing such disqualification, the defendant contends that plaintiff has no interest in the migration of the fish such as would give him a right of action for its wrongful interference or diversion, and bases its argument upon the fact that the fish are *ferae naturae* and plaintiff can have no property in them until captured. Plaintiff does not claim any property right in the fish in their wild state; he does claim the right to have the migration continued uninterruptedly to his nets, without the wrongful interference of the defendant. In a different connection, that is, the wrongful interference with the flow of water by an upper riparian owner, *Justice Adams,* in *Smith v. Morganton,* 187 N. C., 801, 802, 123 S. E., 88, thus refers to the permanence of those natural conditions upon which mankind has always depended:

"Furthermore, the right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor."

It is uniformly recognized that the owners of several and exclusive fisheries upstream may maintain an action for wrongful interference with the migratory passage of the fish whereby these fisheries are injured.

No useful distinction can be made out of the circumstance that these rights are usually asserted by the owners of several and exclusive fisheries. The necessity is precisely the same; that is, that the fish come in to the nets. We are sure that the convenient access which plaintiff had from his riparian property to the run of the fish is an advantage of which he cannot be lawfully deprived by the alleged nuisance. It is true that he might obtain access to the fish by going to more distant points where the nuisance had not yet affected the fish, if there were such places, but "if a man's time and money are worth anything," he has received a substantial damage in being driven to this necessity.

The laws of our own State, and those of practically all the states in the Union where fishing is important, provide against pollution of the streams with matter deleterious to fish life, require channels to be kept open, or means to be provided by which migratory fish may ascend the streams. We do not think this is merely to prevent the common shame of the extinction of an interesting type of river fauna in our time, or for the sole benefit of the owners of exclusive fisheries. In fact, perhaps the largest beneficiaries of these laws are those engaged in the business of fishing in common fisheries. The great fisheries on the Columbia River and of Alaska so conducted are so extensive that their products are found at one time or another on every table in the country. Millions of salmon in the open seas near the mouths of these rivers, seeking through nostalgic instinct the sweeter waters in which they were hatched, have given rise to international difficulties and international treaties.

The necessities of a person whose business is taking fish from a common fishery and one who, by reason of his riparian ownership and ownership of the bed of the river, has a several and exclusive fishery are precisely the same, and the same principle of law must apply.

Hitherto, we have been specially considering the injury to plaintiff's business. He alleges, also, that the value of his riparian property has been diminished. The convenience of access to the fish from his adjacent riparian land, especially in view of the fact that it has been so long used in that connection, may reasonably be considered a contributing element in the value of his premises, and we so hold. Analogous principles of law applied in *Mfg. Co. v. R. R., supra,* and *Pedrick v. R. R., supra,* point to this conclusion. We think it is a conclusion to which we might well come independently.

It has been suggested to us that the complaint asserts no cause of action because it is impossible to connect the nuisance and the injury as cause and effect, and the damages sought must necessarily be speculative

and unprovable. It is pointed out that the business itself is subject to severe vicissitudes and that it would be impossible for the plaintiff to prove that his damage was proximately caused by defendant's misconduct, since there are notoriously a multitude of other causes to which it might be attributed. We could only consider a matter of that kind if it appeared upon the face of the complaint that it would be morally and physically impossible for the plaintiff to adduce evidence in proof of his claim or that the damages asked for are necessarily speculative and incapable of legal proof.

Here, we must revert to the physical facts or we may come to conclusions more *ferae* than the fish. While these are classed as animals wild by nature, their habitat in the river is more restricted than that of any other creature man pursues as food. They are confined to the channels of the river; it is not a question of lure which instinct might avoid, but of the length of the net which is stretched in their way and the size of its meshes, against which instinct cannot avail. They are so defenseless against the devices of man that they would long ago have become extinct, except for their amazing fecundity and their cities of refuge in the great deep—and the laws which, in some degree, protect their migrations. The habit of migration is inherent in their nature and its seasonal recurrence may be expected.

The plaintiff here has complained of injury to a going business, and has not asked for prospective damages beyond its interruption or discontinuance; and there is the legal possibility of his showing such damage without resort to evidence which is wholly speculative in character. *Steffan v. Meiselman, ante,* 154, 25 S. E. (2d), 626.

We have been asked to weigh the economic consequences involved in this decision. The defendant would be in better position upon such an argument—if indeed it could have anything to do with the law of the case—if it had not admitted an agreement with a State Department that it would not permit the discharge of waste matter containing any noxious chemical or matter deleterious to fish life into the river, and if it had not repudiated this agreement as unenforceable, or outlawed by expiration of time.

Also, it may not be improper to question whether defendant might not have alleviated or entirely removed the consequences of its violation of the law and the nuisance thus created by more efficient recovery of the reducing chemicals in the effluent waste, or of the cellulose which is the object of its production; or might have prevented the mischief altogether by lagooning the discharge from the mills so that the deleterious substances might never reach the river in quantities sufficient to be harmful. *Arizona Copper Co. v. Gillespie,* 230 U. S., 46, 57 L. Ed., 1385. These are questions, however, which concern economic balances of cost and

profit, and the defendant appears, on the face of the complaint, to have made its choice. The outstanding fact is, taking the complaint to be true, defendant is engaged in a known violation of laws in which the State itself has declared a policy for the conservation of its resources.

We refrain from further discussion of this phase of the case; but it is not amiss to say that a State which deals with its resources on the principle attributed to Louis XIV—*"aprés moi le deluge"*—is headed for economic ruin.

We are constrained to hold that the judgment of the court below sustaining the demurrer was erroneous. It is therefore reversed.

On defendant's appeal,
Judgment affirmed.

On plaintiff's appeal,
Judgment reversed.

N. R. STELL AND WIFE, R. A. STELL, v. FIRST-CITIZENS BANK & TRUST COMPANY, ADMINISTRATOR D. B. N. OF J. B. PERRY; CHARLES P. GREEN, GUARDIAN OF LILLIE M. PERRY; W. H. YARBOROUGH, JR., GUARDIAN AD LITEM OF CATHERINE YOUNG; R. L. YOUNG; BROOKS YOUNG, ANNIE C. YOUNG, R. L. YOUNG, AND WILLIAM YOUNG, MINORS; H. K. PERRY, H. R. PERRY, RAYMOND PERRY, NONIE RICHARDS, BURMA FAUCETTE, MAUDE R. PRIVETTE, INA FOWLER, JOHN PERRY, L. O. PERRY, ADA PHILLIPS, R. C. PERRY, SIDDIE OAKLEY, LINWOOD JOHNSON PERRY, E. C. PERRY, CLARK PERRY, GRADY PERRY; BLAND MITCHELL, TRUSTEE, MRS. UZZIE W. MAY, ADMINISTRATRIX OF J. A. WILLIAMS, TRUSTEE, AND JOHN F. MATTHEWS, EXECUTOR OF W. C. PERRY.

(Filed 10 November, 1943.)

1. Equity § 2—

Laches on the part of claimant is recognized by courts of equity, in proper cases, as an available defense against stale claims. It is generally defined to mean negligent omission for an unreasonable time to assert a right enforceable in equity.

2. Mortgages § 25: Taxation § 42—

A person, under any legal or moral obligation to pay taxes, cannot by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale.

3. Trial § 22f: Appeal and Error § 40e—

Upon a motion for judgment as of nonsuit, C. S., 567, at the close of all the evidence, the court will consider only the evidence which tends to support the plaintiff's claim.

4. Trial § 24: Appeal and Error § 40e—

In a suit by plaintiff, grantor and debtor in a deed of trust on land, against defendants, holders of the debt thereby secured, for an accounting and finding of amount due, upon motion for judgment of nonsuit at the close of all the evidence, which tended to show that plaintiffs rented the lands and, by an arrangement with the holders of the debt, the rents were paid to the said holders of the debt to be applied to the debt and interest and taxes, the said holders of the debt allowing the property to be sold for taxes and becoming the purchaser at the tax sale, it was error for the court to allow the motion, on either the ground of (1) laches or (2) adverse possession under a valid tax deed.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at January Term, 1943, of WAKE. Reversed.

Plaintiffs alleged that they executed two deeds of trust on their land in 1920 and 1921, to secure notes which were held by J. B. Perry, the corporate defendant's intestate, at the time of his death, and that by virtue of payments which had been made thereon the debts secured have been substantially reduced or extinguished. They pray for an accounting and for opportunity to pay the balance found due. J. B. Perry died in 1940, and this action was instituted August, 1941. The personal representatives and heirs at law of J. B. Perry were made parties.

The defendants alleged plaintiffs abandoned and surrendered the land to J. B. Perry in 1926, and that any rights they might have had were lost by laches. Defendants further alleged that J. B. Perry acquired title to the land under tax foreclosure sale and deed in 1932, and they plead seven years' adverse possession thereunder, and also the three and ten years' statutes of limitations.

On the trial the plaintiffs offered evidence tending to show that one of the notes referred to was originally given to the Bank of Youngsville, of which J. B. Perry was president and active head, and that it was assigned to Perry in 1931. The other note was made originally to Perry. Plaintiffs moved off the land in December, 1926, and thereafter rented the land to tenants. At this time the debt had been reduced to $6,100. In 1929 plaintiffs rented the land to one Russell Wall, who paid the rent to plaintiffs for one year, and after that they instructed him to pay the rent to the bank to be credited on the notes, interest and taxes, pursuant to arrangement with the bank. Subsequent to the closing of the bank the rents were paid to J. B. Perry. Plaintiffs personally paid the taxes for 1927, and subsequently the tax notices were sent by them to Wall or to Perry. Plaintiffs never knew Perry had a tax deed until so advised by their counsel in this action. Russell Wall, the plaintiffs' tenant, died in November, 1934, and Roy Wall moved on the land and thereafter paid the rent to J. B. Perry. In 1939 Roy Wall sought to buy the land, and talked to Stell and then to Perry. Stell was willing to

sell and "straighten it up," but Perry said "Stell hasn't got a Chinaman's chance."

It further appeared that in 1931 J. B. Perry took a crop lien from plaintiffs' tenant Russell Wall on crops to be grown on the land which was described in the instrument as "lands owned by N. R. Stell." In 1934 a man who wished to buy some poles from the land was by direction of plaintiff N. R. Stell sent to Perry to pay for them. Perry replied, "The amount you are paying for the poles is just too little to credit the note with." It further appeared in evidence without objection that the land was each year listed for taxation in the name of N. R. Stell, and that the tax list for 1938 shows the land listed in the name of N. R. Stell "by order of J. B. Perry."

Defendants offered evidence tending to show abandonment and surrender of the land to J. B. Perry in 1926, and continuous possession thereafter without any claim by plaintiffs. Defendants also offered tax deed to J. B. Perry, executed in 1932 pursuant to foreclosure sale for unpaid taxes for 1928. It was admitted that the proceedings for foreclosure and sale of the land for taxes were in all respects regular.

At the close of all the evidence defendant's renewed motion for judgment of nonsuit was allowed, and plaintiffs excepted and appealed.

J. G. Mills for plaintiffs.

Yarborough & Yarborough, W. L. Lumpkin, W. Y. Bickett, and Thos. W. Ruffin for defendants.

DEVIN, J. Defendants contend the nonsuit should be sustained upon two grounds: (1) laches on the part of the plaintiffs, and (2) a valid tax deed to the defendants' intestate.

1. Laches on the part of claimants is recognized by courts of equity, in proper cases, as an available defense against stale claims. It is generally defined to mean negligent omission for an unreasonable time to assert a right enforceable in equity. 30 C. J. S., 520; 19 Am. Jur., 338; Black's Law Dictionary. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30 C. J. S., 520. It may be invoked as a defense to the prosecution of a claim cognizable in equity when there has been inexcusable delay in moving to enforce it, on the ground that equity will refuse aid to a stale claim when a party has slept on his rights. *Spiedel v. Henrici,* 120 U. S., 377.

In *Teachey v. Gurley,* 214 N. C., 288, 199 S. E., 83, it was said: "In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will

be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case." Laches operated as a defense in that case for the reason that plaintiffs "waited for approximately six years after the trust was disavowed and after the property had been conveyed by the alleged trustee and until after the lips of the primary beneficiary were closed in death."

When we consider the evidence here in the most favorable light for the plaintiffs, as we must do on a motion for nonsuit, we are unable to concur in the view that as a matter of law plaintiffs have lost their right to the equitable relief sought by reason of laches. Plaintiffs' evidence tends to show that by virtue of an arrangement the rents from the land were to be paid to the holder of the notes secured by the deeds of trust to be applied to the payment of the notes, interest and taxes, and that there was no repudiation of this understanding or denial of plaintiffs' equities, unless Perry's statement to a prospective purchaser of the land, in 1939, that "Stell hasn't got a Chinaman's chance," be so construed. Furthermore, plaintiffs' evidence tends to show repeated acknowledgment of plaintiffs' title by J. B. Perry, in 1931, in 1934, and again in 1938 when he apparently directed the listing of the land for taxation in the name of N. R. Stell as owner. The facts of this case, according to plaintiffs' evidence, are substantially different from those upon which the principle of laches was held to apply in *Teachey v. Gurley, supra.* Nonsuit on this ground cannot be sustained.

2. While it was admitted that the proceedings leading up to the tax foreclosure sale and deed to J. B. Perry were in all respects regular, it also appears that J. B. Perry was the owner of the debt secured by the deeds of trust on the land, and thus was empowered by statute to pay the delinquent taxes and add the cost to his debt, and in case of foreclosure as holder of a lien he was a proper party to whom notice of the foreclosure proceedings was required to be given. *Orange County v. Wilson,* 202 N. C., 424, 163 S. E., 113. Furthermore, plaintiffs' evidence is susceptible of the inference that by an arrangement to which Perry was party, the rents from the plaintiffs' land were received in trust to be applied in part to the payment of taxes. Hence, his purchase of a tax title to the land would be regarded in equity as inuring to the benefit of the trustor, there having been no disavowal of the trust.

It was said in *Smith v. Smith,* 150 N. C., 81, 63 S. E., 177, "It is a well settled rule that a person under any legal or moral obligation to pay the taxes cannot by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale; otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the

taxes." This statement of the law was quoted with approval in *Bailey v. Howell,* 209 N. C., 712, 184 S. E., 476, and was again enunciated in *King v. Lewis,* 221 N. C., 315, 20 S. E. (2d), 305, where it was said the mortgagee's purchase at a tax sale could not be used for the purpose of asserting any right in conflict with the mortgagor's equity of redemption. *Pearce v. Montague,* 209 N. C., 42, 182 S. E., 707; *Cauley v. Sutton,* 150 N. C., 327, 64 S. E., 3; *Brantly v. Kee,* 58 N. C., 332. Nor could possession by Perry under the tax deed be regarded as adverse for the statutory period, since plaintiffs' evidence tends to show the land was continuously occupied by plaintiffs' tenants, at least up to November, 1934. Nor under plaintiffs' evidence would the statutes of limitations begin to run against the plaintiffs in the absence of repudiation of the arrangement for payment of rent, or assumption of other adverse position by Perry.

While it is true the relationship of trustor and secured creditor in a deed of trust is not in all respects the same as that of mortgagor and mortgagee, and is not such as to render presumptively fraudulent purchases by the latter from the former (*Murphy v. Taylor,* 214 N. C., 393, 199 S. E., 382; *Ferguson v. Blanchard,* 220 N. C., 1, 16 S. E. [2d], 414), under the circumstances presented by plaintiffs' evidence in this case, we think the creditor secured by the deeds of trust should not be permitted to acquire adverse title to trustor's land by virtue of tax foreclosure sale and deed when, according to plaintiffs' evidence, he was receiving the rents from the land under arrangement to apply the same in part to the payment of taxes. 19 R. C. L., 398.

The plaintiffs' evidence is susceptible of the inference that as a consequence of the arrangement by which rents were paid to Perry to be applied to certain purposes a trust relationship was thereby created, the incidents and obligations of which a court of equity would recognize and enforce. *Abbitt v. Gregory,* 201 N. C., 577, 160 S. E., 896; *Rousseau v. Call,* 169 N. C., 173, 85 S. E., 414; 65 C. J., 295.

Under the rule, on the question of nonsuit, we have considered only the evidence tending to support plaintiffs' claim. Consideration of all the evidence may determine the essential facts against them. We express no opinion as to that. But we think on this record the plaintiffs were entitled to have their case submitted to the jury.

We conclude that the learned judge was in error in allowing the motion to nonsuit, and that the judgment dismissing the action must be

Reversed.

J. HOLT GARDNER, JESSE H. GARDNER, MELVIN H. GARDNER, DOUGLAS GARDNER, MRS. R. B. BYRD, MRS. R. A. HOLLAND, MRS. ROBT. WOODRUFF, MRS. R. P. ANDREWS, MRS. CARRIE A. GARDNER, MRS. ALDINE EBERT; COPARTNERS, TRADING AS THE GARDNER COMPANY; WILLIAM McKEITHEN, AND MYRTLE WILLIAMS, v. C. J. McDONALD, SHERIFF OF MOORE COUNTY, AND THE BANK OF PINEHURST.

(Filed 10 November, 1943.)

1. Execution § 16—

While much has been written regarding sales of land under execution, each decision must be read and considered in the light of the facts of the case and of the common law or the then current statutory law.

2. Same—

The sheriff sells land by virtue of the power of a writ of *venditioni exponas* or execution, as the case may be, and, when the writ expires by limitation, the power of the sheriff to sell land under it comes to an end.

3. Same—

Where, as in this State, the rule of common law has been changed regarding the time at which an execution should be made returnable, the writ should be made returnable in accordance with the applicatory statute; and, while a failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected.

PETITION to rehear this case reported *ante*.

Seawell & Seawell for plaintiffs, appellees.

W. D. Sabiston, Jr., for defendant, appellant.

WINBORNE, J. On original appeal, one member of the Court not sitting, and the remaining six being evenly divided in opinion as to the correctness of the ruling of the court below holding valid the sale under an execution made returnable "not less than 40 nor more than 60 days from the date" thereof, on a date more than 60 days, but less than 90 days from the issuing of the execution, the ruling stood affirmed as to the disposition of the appeal without becoming a precedent. The case is brought back for the entire membership of the Court to consider the ruling of the court below.

The record discloses that in the trial court, the parties having waived jury trial and agreed for the court to find the facts and to render judgment thereon, the court found facts substantially these:

1. On 12 August, 1929, judgment was rendered in the Superior Court of Moore County in an action therein pending wherein Southern Security and Guaranty Company was plaintiff and Percy L. Gardner and another were defendants, in favor of plaintiff there and against defendants there,

and each of them, jointly and severally, in the sum of $2,000, with interest from a certain date, and judgment was duly and regularly recorded and docketed in the office of clerk of Superior Court of said county.

2. On 13 August, 1932, at request of Southern Security and Guaranty Company plaintiff in the action entitled as set forth in above paragraph, execution issued by the clerk of the Superior Court of Moore County, to the sheriff of Moore County, commanding him to satisfy said judgment out of the personal property of said Percy L. Gardner and his codefendant, within said county, or if sufficient personal property could not be found, then out of the real estate in said county belonging to said defendants on the day when said judgment was so docketed in said county, or at any time thereafter, concluding with these words: "and have you this execution, together with the money, before our said court, at the courthouse in Carthage, not less than 40 nor more than 60 days from the date hereof, and there to render the same to the said plaintiff." The authority as quoted is embraced in a printed form to which there were no additions, subtractions or substitutions made by the clerk.

3. Pursuant to execution above referred to the sheriff of Moore County, "after lawful advertisement as is prescribed by the statutes," and at the place designated, and on 7 November, 1932, offered for sale eight tracts of land, of which Percy L. Gardner, defendant in said judgment, was prior thereto the owner and in possession, when and where Mrs. Ruth W. Gardner became the purchaser at the price of $1,000, which she paid to the sheriff, who thereupon on said date executed and delivered to her a deed for all eight tracts of land—(the deed reciting that two of the tracts were subject to a $3,000 mortgage deed of record). The sheriff "thereupon made the return of the execution as authorized to do as appears from the return found on the back of the execution." The deed from the sheriff to Mrs. Ruth W. Gardner was filed for registration in the office of Register of Deeds on 26 November, 1932, and actually recorded on 29 November, 1932.

4. After the sheriff delivered the deed to Mrs. Ruth W. Gardner she "immediately went into possession and has had control over said tracts of land to the exclusion of all other parties," and subsequent to the filing of her deed for registration and the actual recording of it, she has sold and conveyed certain tracts or portions of tracts of said land and the plaintiffs in this action, other than herself, hold same by *mesne* conveyances and are now in actual possession and have control thereof—she being possessed of those portions not sold.

5. On 26 December, 1932, after the sale under execution and delivery of the sheriff's deed to Mrs. Ruth W. Gardner as above stated, the Bank of Pinehurst obtained a judgment in the Superior Court of Moore

County against Percy L. Gardner, and another, in the sum of $1,950, with interest and cost, subject to certain credit, and same was duly docketed in the office of clerk of the Superior Court of said county.

6. In September, 1942, defendant Bank of Pinehurst, holder and owner of the judgment against Percy L. Gardner, dated 26 December, 1932, as above set forth, had the clerk of the Superior Court of Moore County issue an execution thereon to defendant sheriff of said county, by virtue of which said sheriff made levy upon, and advertised for sale all of the eight tracts embraced within the sheriff's deed to Mrs. Ruth W. Gardner dated 7 November, 1932, and by order of court the sale was enjoined pending hearing of the cause.

7. No question is involved for consideration or determination in this controversy as to homestead of Percy L. Gardner.

The court, upon these facts, concluded as matters of law (a) that the sale on 7 November, 1932, having been made within the period of not less than 40 nor more than 90 days after the issuing of execution, the execution was at that time good in law and the sheriff possessed full authority to sell thereunder, and the sale by him to Mrs. Ruth W. Gardner is valid, and (b) that the deed from the sheriff to Mrs. Ruth W. Gardner vested in her all the right, title and interest of Percy L. Gardner in and to the lands embraced in the deed.

Judgment was entered in accordance therewith and defendant Bank of Pinehurst, its agents, servants, and employees acting for it, were perpetually enjoined from enforcing the sale of said property under execution, from all of which the bank appealed to the Supreme Court, assigning error.

Upon careful review of the authorities, and consideration of pertinent statute, C. S., 672, as amended, we are of opinion that on this record the decision below is correct.

While through the long existence of this Court much has been written regarding sales of land under execution, each decision must be read and considered in the light of the facts of the case and of the common law or the then current statutory law. However, in all these decisions it appears to be a settled principle of law that the sheriff sells land by virtue of the power of a writ of *venditioni exponas* or execution, as the case may have been, and that when the writ expires by limitation the power of the sheriff to sell land under it comes to an end. In the light of this principle, what is the life of the execution?

The statute, C. S., 672, as amended by Public Laws 1927, chapter 110, and by Public Laws 1931, chapter 172, prescribes that "Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not less than forty nor more than ninety days from said date." By this statute the Legislature has

fixed the life of an execution. It begins on the day of the issuance of the execution, and by limitation terminates ninety days from the date of it. It may not be returned in less than forty days but must be returned in ninety days. Hence, under this statute an execution should be made returnable "not less than forty nor more than ninety days" from its date. And while failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected.

It is stated in 33 C. J. S., 218, Execution, section 78, that, where as in this State the rule of common law has been changed regarding the time at which an execution should be made returnable, the writ should be made returnable in accordance with the applicatory statute; that when not made returnable at the proper time, generally such an execution is not void but voidable only; and that an execution ordinarily is not void when a return is directed within a period less than or greater than the period of time fixed by statute.

The case of *Jeffreys v. Hocutt,* 193 N. C., 332, 137 S. E., 177, and other cases cited and relied on by defendant Bank of Pinehurst, are clearly distinguishable in factual situation from the present case. There the executions had expired by statutory limitation and the sales were had thereafter. Verily, the executions, as characterized by *Taylor, C. J.,* in *Barden v. McKinne,* 11 N. C., 279, were "dead in law." What is said by the Court in those decisions must be read in the light of this fact. On the other hand, the sale in question in the present case was had within the statutory life of the execution.

But it is contended by the petitioner, Bank of Pinehurst, that an execution is the judgment creditor's process, and that, as a general rule, it is within his exclusive control, and that in the present case the creditor elected to have it returned in sixty rather than ninety days from date. If it be conceded that the creditor has such right, it would not affect the legality and efficacy of the execution in the hands of the sheriff for the period fixed by the statute, but would only affect the liability of the sheriff for failure to make earlier return. And, even so, who could complain that the sheriff failed to make return within such lesser period? Manifestly, only the judgment creditor. And in the present case the facts are that sheriff sold the land, collected the purchase price and made return to the court, from which, nothing else appearing, it will be presumed that the creditor acquiesced in the sale. Furthermore, if it be conceded that the judgment debtor had a right to object to sale as made, the facts are that prior to the date of sale the debtor was in possession of the land, and that immediately after the sale the purchaser at the sale went into and has since remained in possession, from which, nothing else appearing, it may be inferred that the debtor acquiesced in the sale and surrendered possession. Indeed, as defendant Bank of Pinehurst did

not obtain its judgment until more than a month had elapsed after the sale it was not a party in interest. And, so far as the record shows, it failed to take any steps to enforce its judgment until September, 1942, after the lien of the judgment under which the sale of 7 November, 1932, was made had expired, and at a time when right of purchaser at that sale to be placed *in statu quo* had likely been impaired.

The petition is

Dismissed.

WILSON S. LOCKHART v. KATHERINE LOCKHART.

(Filed 10 November, 1943.)

1. Divorce §§ 2a, 12—

The effect of a judgment of divorce *a mensa et thoro* with alimony is to legalize the separation of the parties, which had theretofore been an abandonment on the part of one of them. It does not sever the marriage tie.

2. Divorce § 2a—

A legal separation for the requisite period of two years is ground for divorce under ch. 100, Public Laws of 1937, Michie's Code, 1659 (a). The separation here contemplated includes a "judicial separation" as well as one brought about by the act of the parties, or one of them.

APPEAL by plaintiff from *Williams, J.*, at June Term, 1943, of WAKE.

Civil action for absolute divorce on the ground of two years' separation.

The complaint, filed 27 January, 1943, alleges:

1. That plaintiff and defendant were married 21 November, 1931, and intermittently lived together as husband and wife until 11 March, 1940, when they separated.

2. That plaintiff and defendant have lived separate and apart for two years and more, next immediately preceding the filing of the complaint, and the plaintiff has been a resident of the State for the requisite period of one year, etc.

The defendant answered, admitted the marriage, and alleged in bar that the separation took place in 1936 as a result of plaintiff's wrongful abandonment of the defendant; that the character of the separation was adjudged in 1940 in a prior action wherein the defendant was granted a divorce *a mensa et thoro* and alimony.

The plaintiff replied, admitted the former proceeding, and pointed out that his present action is for two years' separation beginning since the judgment of 1940.

The court being of opinion that as the parties had not lived together since 1936, the separation began at that time and not in 1940, and accordingly directed a verdict for the defendant. Exception.

Plaintiff appeals, assigning errors.

F. J. Carnage and Thomas W. Ruffin for plaintiff, appellant.

Frank P. Spruill, Jr., for defendant, appellee.

STACY, C. J. The question for decision is whether a judicial separation from bed and board for two years affords ground for divorce under ch. 100, Public Laws 1937. The law answers in the affirmative. Compare *Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641; *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352.

The plaintiff brought an action in 1939 for divorce on the ground of two years' separation. The defendant answered, admitted the separation since 1936, and set up a cross action for a divorce *a mensa et thoro* and alimony, alleging that the plaintiff had wrongfully abandoned the defendant and their minor child. C. S., 1660 and 1665; *Pharr v. Pharr, ante,* 115. In this proceeding, the jury answered the issues in favor of the defendant, and by consent, alimony and counsel fees were fixed in the judgment, which was entered at the February Term, 1940, Wake Superior Court.

The effect of this judgment was to legalize the separation of the parties which theretofore had been an abandonment on the part of the plaintiff. He could not thereafter be charged with desertion. *Weld v. Weld,* 27 Minn., 330, 7 N. W., 267. It did not, however, sever the marriage tie. *Cooke v. Cooke,* 164 N. C., 272, 80 S. E., 178.

The present action is for two years' separation since the 1940 judgment. A legal separation for the requisite period of two years is ground for divorce under ch. 100, Public Laws 1937, which will appear in the General Statutes of 1943 as G. S. 50-6. *Byers v. Byers, ante,* 85; *Lockhart v. Lockhart, ibid.,* 123. The language of the statute is, that marriages may be dissolved and divorces granted "on application of either party, if and when the husband and wife have lived separate and apart for two years." *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549; *Archbell v. Archbell,* 158 N. C., 408, 74 S. E., 327. The separation here contemplated, unrestricted as it is, includes a "judicial separation" as well as one brought about by act of the parties, or one of them. *Cooke v. Cooke, supra.*

Perhaps it should be noted that in the prior proceeding between the parties hereto the defendant filed a cross action for divorce *a mensa* under C. S., 1660, a permissible practice with us, *Cook v. Cook,* 159 N. C., 46,

74 S. E., 639, whereas in *Byers v. Byers, supra,* the defendant there proceeded in an independent action for alimony without divorce under C. S., 1667. The purpose and effect of the two proceedings are not the same. *Shore v. Shore,* 220 N. C., 802, 18 S. E. (2d), 353.

There was error in directing a verdict for the defendant.

New trial.

STATE v. JOHN WILLIE REDFERN.

(Filed 10 November, 1943.)

1. Trial § 29a: Criminal Law § 53a—

Since the charge should be considered contextually, it is not essential that the court charge the jury as to the law in connection with each contention of the parties. The better rule is for the court to give (1) a summary of the evidence; (2) the contention of the parties; and (3) an explanation of the law arising on the facts.

2. Criminal Law §§ 41f, 53a—

On a trial of an indictment for murder, where the court, in giving one of the State's contentions, said that the jury ought to scrutinize the evidence of the defendant because of his interest in the outcome of the verdict, there is no error, since the court, in explaining the law arising on the facts, gave the correct instructions relative to the weight and credibility to be given the testimony of interested witnesses and parties testifying in their own behalf.

APPEAL by defendant from *Burney, J.,* at May Term, 1943, of WAKE.

Criminal prosecution, tried upon indictment charging defendant with the murder of one Zeb Sturdivant. 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.

A. B. Breece and Thomas W. Ruffin for defendant.

DENNY, J. The defendant's first exception is to the following portion of his Honor's charge: "You will remember what he said about that, and he asked him why did he want to shoot him and he said because he was afraid he would shoot him, so the State says you ought to scrutinize the evidence of the defendant because of his interest in the outcome of your verdict in this case; that you ought to be satisfied and beyond a

reasonable doubt that the defendant is guilty of the crime of murder in the first degree and that you ought to so find."

The defendant contends that in giving one of the contentions of the State, to wit, that the jury ought to scrutinize the evidence of the defendant because of his interest in the outcome of the verdict, the Court committed prejudicial error by omitting to add that after they had scrutinized the evidence of the defendant if they found it worthy of belief it would be their duty to give to the defendant's evidence the same weight and credibility of that of any disinterested witness.

This exception cannot be sustained, since the Court, in connection with the explanation and declaration of the law arising on the facts, gave the correct instruction relative to the weight and credibility to be given the testimony of interested witnesses and parties testifying in their own behalf. On this question his Honor charged: ". . . In determining the weight to be given to the testimony of the witnesses you are authorized and it is your duty to consider the relationship of the witnesses to the party, if any is shown, their interest, if any, in the result of the action, their prejudice or bias, if any exists, and taking into consideration such relationship, interest, bias or prejudice in determining what weight you will give to their testimony, but the court charges you that if, after such consideration you find that such witnesses have testified truthfully it will be your duty to give to the testimony of such witness the same weight and credit that you would give to any disinterested or unbiased witness."

Since the charge should be considered contextually. *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821; *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469; *S. v. Henderson,* 218 N. C., 513, 11 S. E. (2d), 462; *S. v. Smith,* 217 N. C., 591, 9 S. E. (2d), 9, it is not essential that the court should charge the jury as to the law in connection with each contention of the parties. In fact, the better rule or practice is for the court to give (1) a summary or recapitulation of the evidence; (2) a statement of the contentions of the parties; and (3) an explanation and declaration of the law arising on the facts.

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

In the trial below, we find

No error.

STATE v. ALBERT BENTLEY.

(Filed 24 November, 1943.)

1. Criminal Law § 54b—

Where all the evidence points to a graver crime and the jury's verdict is for an offense of a lesser degree, although illogical and incongruous, it will not be disturbed, since it is favorable to the accused. C. S., 4639.

2. Assault and Battery § 14: Criminal Law § 53d—

When accused is indicted, under C. S., 4214, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, does not deprive the jury of the statutory authority to consider it.

3. Criminal Law §§ 54b, 56—

The fact that the jury convicted the defendant of *assault with a deadly weapon*, after it had acquitted him in a previous part of the verdict of *assault with a deadly weapon doing serious injury*, does not entitle him to his discharge on his motion in arrest of judgment.

STACY, C. J., concurring.

APPEAL by defendant from *Rousseau, J.*, at August Term, 1943, of CALDWELL.

The defendant was tried at the stated term of Caldwell Superior Court upon a bill of indictment charging as follows:

"The Jurors for the State upon their oath present, That Albert Bentley, late of the County of Caldwell, on the 10th day of April, in the year of our Lord one thousand nine hundred and forty-three, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously did commit an assault with the intent to kill upon one Glenn Adkins with a certain deadly weapon, to wit: a shotgun and did then and there shoot him the said Glenn Adkins in the chest, hand and face thereby severing muscles, flesh, leaders, veins and causing the loss of the sight of one eye, which said felonious assault resulted in serious injury but did not result in death, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The charge is brought under chapter 101, Public Laws of 1919, Michie's Code of 1939, section 4214, and the indictment follows the language of the statute.

The evidence of the State may be summarized as follows:

Glenn Adkins, upon whom the assault was committed, in company with his brother, drove up to defendant's house in the nighttime and parked the car, and then went up to the house and called, asking where Goldie McLean or Goldie Brown lived, and was informed that she lived

next door. Thereupon, witness went up to the indicated house and asked the people there if these folks had come in from work, and having been informed that they had not, he turned around and went back through the yard where the car was parked. Witness called defendant again and asked whether he knew if Goldie Brown or Goldie McLean had come in from work, and defendant replied that he didn't know anything about it and told him to leave. Witness stated that they were leaving the house when defendant reached and got a shotgun and presented it. There was further talk about whether the witness and his brother were going to leave, and when they were 40 or 50 yards from the house, defendant called, the witness turned, and just then defendant fired the gun and four shots went into Adkins' chest and one put out an eye. "The ball is there, but I cannot see out of it." Witness stated that he had never seen Bentley before and had had no cross words with him.

On cross-examination, witness stated that he was in the community looking for Goldie McLean; that he had been indicted for larceny of a middling of meat, but had been acquitted; and one time for driving under the influence of whiskey. He also had a little trouble in West Virginia, where they got him for being drunk.

Monty Adkins stated that he was with his brother Glenn on the night in question, and drove to defendant's house. They had gone to Valmead Cotton Mill and got to talking about seeing Lillie Brown, and turned back and went up there, driving a little while at a time, stopping and talking. They parked the car at the gate, walked up and hollered and inquired for Goldie McLean, and was told that she lived up the hollow. They went up there and asked if Lillie Brown was there, and Goldie McLean hollered and answered from the inside of the house that she had not come back from work. They started back to the car and seeing the light in Bentley's house, asked if Lillie Brown had come back from work. Bentley ordered them off the place and Glenn said they would be glad to go. While they were walking back to the corner of the yard, Bentley threw down a hatchet which he had, took a shotgun and presented it to them.

When the defendant first ordered them out of the yard, they were about fifteen feet from the door. When the shot was fired, witness testified they were about fifty feet away. While they were walking out they turned when defendant hollered, "I will see you fellows in a few minutes." This witness stated he got several shots, and his brother was shot on the knuckles and asked witness to drive.

Witness stated that both he and his brother were married and that they were out looking for women. He had heard some talk of Goldie McLean's reputation, but he was looking for Lillie Brown, who had the same reputation as Goldie McLean. After Mr. Bentley told them the

girl did not stay there, they stopped again and asked for her because they saw the light on. They thought they would find out whether she had come back. Witness had been drinking whiskey, but did not know whether his brother had or not; had no whiskey with them.

The defendant testified that he had just gotten back home from Elizabeth City when the Adkins brothers came up to the premises in a boisterous manner, speaking loudly and cursing, and had previously been running their car up and down the road practically all night. The brothers wanted to know where Lillie Brown lived and were informed that she did not stay there. They then started cursing defendant, who told them to get away, and was told that they would leave "when they got damned good and ready." The brothers then went up to the next house and after about ten minutes, came back and began to beat on the side of the house. It was then daylight, and defendant was sitting in a chair at the door. The Adkins brothers said that they wanted something to eat, wanted breakfast, and were told that defendant had no breakfast. They then began cursing defendant obscenely. Glenn Adkins and his brother stood cursing awhile and then went out into a private road between the two houses, stopped and began cursing again. Defendant got a single-barrel shotgun, went to his room and got shells, and found the brothers, when he returned, walking back up the road toward the house, and defendant told them to come no further. They replied that they would make shoestrings out of Bentley, and then Bentley told them to come no further or he would shoot. They were 30 to 40 yards away when he shot. He stated that he was afraid the two men would come back and knew he could not do anything with them unless he used some kind of weapon. They were pretty drunk. Defendant admitted that he had had trouble in court.

Josephine Seehan corroborated the defendant in the principal features of his testimony.

At the close of the State's evidence and at the close of all the evidence, defendant moved for judgment as of nonsuit, which was denied. The case was submitted to the jury, which rendered its verdict as follows: "That the said Albert Bentley is not guilty of 'an assault with a deadly weapon with the intent to kill,' 'not guilty of an assault with a deadly weapon doing serious injury,' and to the question of the Clerk as to how they did find, they replied: 'Guilty of assault with a deadly weapon.'"

The defendant thereupon, through his counsel, moved the court that he be discharged upon the ground that the issue upon which the jury returned a verdict of guilty was not submitted to it. Motion was overruled, and defendant excepted. Thereupon, the defendant moved in arrest of judgment for the reason that the verdict was insufficient to

support the judgment pronounced. The motion was overruled, and defendant excepted.

Judgment followed that the defendant be confined in the common jail of Caldwell County for six months and assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission.

Whereupon, the defendant appealed, assigning error.

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

W. H. Strickland for defendant, appellant.

SEAWELL, J. Defendant's challenge to the trial draws into the discussion the verdict, the evidence, and a relevant part of the instructions to the jury. It is in their correlation the defendant finds reason for his discharge; and in the same correlation, the State finds cause for his detention.

In some features the case at bar closely resembles *S. v. Gregory, ante,* 415. We refer to it for an analysis of the statute under which the present indictment was brought, and for a discussion of the validity of convictions thereunder of lesser grades of assault than that charged. C. S., 4639; *S. v. Goff,* 205 N. C., 545, 551, 172 S. E., 407; *S. v. Hefner,* 199 N. C., 778, 155 S. E., 879; *S. v. Strickland,* 192 N. C., 253, 134 S. E., 850.

Defendant has addressed no argument to the support of his general demurrer to the evidence, and the exception is presumably abandoned. Rule 28; *In re Will of Beard,* 202 N. C., 661, 163 S. E., 749; *Gray v. Cartwright,* 174 N. C., 49, 93 S. E., 432.

Under the exception to the refusal to discharge the defendant, counsel does, however, argue specially that there was no evidence pointing to the offense of "assault with a deadly weapon" upon which the sentence of the court rested.

If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed. *S. v. Robertson,* 210

N. C., 266, 186 S. E., 247; *S. v. Smith,* 201 N. C., 494, 160 S. E., 577; *S. v. Cox,* 201 N. C., 357, 160 S. E., 358; *S. v. Spain,* 201 N. C., 571, 573, 160 S. E., 834; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605; *S. v. Johnston,* 119 N. C., 883, 26 S. E., 163.

We consider the motion in arrest of judgment. This is predicated upon the instructions to the jury that they might find the defendant "guilty as charged, guilty of assault with a deadly weapon doing serious injury, or acquit." It is argued that this instruction had the effect of resolving the charge into a bill with counts containing the offenses actually listed, and that the omission to charge the jury that they might find the defendant guilty of an assault with a deadly weapon withdrew that offense from their consideration, with the result that the verdict is tantamount to an acquittal. In support of this, counsel cites and quotes *S. v. Thompson,* 95 N. C., 596:

"If upon the trial of an indictment, containing several counts, the jury is directed to confine its investigation to one count only, a general verdict of guilty will be construed as an acquittal on all the counts withdrawn from the consideration of the jury."

There is early precedent for a bill of indictment containing counts, in which various types of assault are separately charged; *S. v. McNeill,* 75 N. C., 15—to which we refer below. However, where the indictment is for a specific statutory crime, as it is here, under C. S., 4214, that practice is not followed and is not recommended. The crimes of which the defendant might be found guilty under the indictment in the case at bar were still before the jury and their warrant for so finding remained in the statute.

If there is an anomaly here, it is brought about by pertinent statutes; and in dealing with it the Superior Court has for a long time been able to discharge its duty and live at peace with the law. Under C. S., 564, the judge must confine himself to the *evidence* in giving his instructions to the jury: "He shall state in a plain and correct manner the evidence given in the case and declare and explain the law rising thereon." Instruction under the statute is the law geared to the facts. In informing the jury as to their duty, we have never held that it is incumbent on the court, under this statute, to go beyond the evidence or advise the jury they may ignore its absence and find the accused guilty of a minor offense, which could only be reached by the process of arbitration. *S. v. Cox, supra; S. v. Spain, supra.* Frankly, however, it seems to be conceded that such is the privilege of the jury under the statutes cited. It is more than questionable whether the court can, by any sort of restriction, withdraw from the jury a power it derives from a positive statute. At any rate, the court has not attempted to do so through the doubtful expedient of rationalizing the law.

The omission of "assault with a deadly weapon" from the catalogue of permissible verdicts did not deprive the jury of the statutory authority to consider it.

The jury, however, not only found the defendant guilty of *assault with a deadly weapon,* but it acquitted him in a previous part of the verdict of *assault with a deadly weapon doing serious injury.* It is contended that there is no specific offense known as "assault with a deadly weapon doing serious injury" and that, therefore, the clause "doing serious injury" must be regarded as surplusage, with the result that the defendant in one part of the verdict stands acquitted of assault with a deadly weapon, while in a later part of the verdict he is found guilty of that offense, which should entitle him to his discharge on his motion in arrest of judgment. The history of legislation on the subject of assaults and precedent based thereon do not support this contention.

Chapter 167, Laws of 1868-69, dealing with punishment of assaults, sets up a scheme somewhat similar to C. S., 4215, by which assaults are classified and punished according to specified aggravations of the offense. That law was repealed by the Laws of 1870-71, whereby, with certain exceptions, the named offenses were reduced from felonies to misdemeanors. *S. v. Smith,* 174 N. C., 804, 93 S. E., 910; *S. v. Tyson, ante,* 492, 494. However, the 1919 statute—C. S., 4215—carries forward the main features of the Laws of 1870-71, classifying assaults with or without aggravation for the purpose of fixing the punishment:

"4215. PUNISHMENT FOR ASSAULT. In all cases of assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill," etc.

In *S. v. McNeill, supra,* the defendant was indicted under the Laws of 1868-69 on a bill containing three counts: The first for an assault with a deadly weapon, with intent to kill; the second, for *an assault with a deadly weapon, with intent to injure;* and the third for a common assault and battery. The court, we think properly, entertained the count for an assault with a deadly weapon, with intent to injure—although we are not aware that this had been set up separately as a statutory offense or that it was so regarded at common law. The point is, no matter whether we consider classification of assaults in the statute defining their punishment as creating, by necessary inference, statutory offenses of a distinct nature—and we do not intend to so decide—or whether the practice has been to submit to the jury along with the basic assault the distinguishing circumstances of aggravation, which we think more likely, we do not

find in the instant case a serious departure from practice in the instructions or the response by the jury.

We are of the opinion that the clause "doing no serious injury" cannot be regarded as surplusage. It was responsive both to the charge of the court and the wording of the statute, and merely amounts to a finding that the assault produced no serious injury. When the proposition was formally presented to the jury on an integral basis, they had to accept it or reject it, and would scarcely undertake to analyze it or "spell it out."

Taken in connection with the evidence and the charge of the court—*S. v. Jones,* 211 N. C., 735, 190 S. E., 733; *S. v. Whitley,* 208 N. C., 661, 664, 182 S. E., 338—we think the verdict is acceptable in law, and its effect is to find the defendant guilty of assault with a deadly weapon —and no more. It is sufficient to sustain the judgment.

We find

No error.

STACY, C. J., concurring: In charges of assault with varying degrees of aggravation, the jury may convict of the assault and acquit, in whole or in part, of the circumstances of aggravation. C. S., 4639; 1 Russell on Crimes, 1030; *Cornelison v. Commonwealth,* 84 Ky., 583, loc. cit. 601, 2 S. W., 235; 6 C. J. S., 915. This is what was done here.

The defendant is charged with an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. This is made a felony by C. S., 4214. *S. v. Clegg,* 214 N. C., 675, 200 S. E., 371; *S. v. Hefner,* 199 N. C., 778, 155 S. E., 879; *S. v. Redditt,* 189 N. C., 176, 126 S. E., 506; 26 Am. Jur., 577-578.

Under this bill and the record in the case, it was permissible to convict the defendant of "a less degree of the same crime charged" therein, *i.e.,* an assault, or assault and battery, accompanied with circumstances of less aggravation than that charged in the bill of indictment. C. S., 4640; *S. v. DeGraffenreid, ante,* 461; *S. v. Burnette,* 213 N. C., 153, 195 S. E., 356; *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296; *S. v. Watkins,* 200 N. C., 692, 158 S. E., 393 (concurring opinion); *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617. These less-aggravated assaults as revealed by the evidence and heretofore recognized by our decision, would seem to be:

1. Assault with deadly weapon with intent to kill. *S. v. Boyden,* 35 N. C., 505; *S. v. Gregory, ante,* 415.

2. Assault with deadly weapon, without intent to kill, but with intent to injure. *S. v. McNeill,* 75 N. C., 15; *S. v. Smith,* 174 N. C., 804, 93 S. E., 910.

3. Assault with deadly weapon. *S. v. High,* 215 N. C., 244, 1 S. E. (2d), 563; *S. v. Elmore,* 212 N. C., 531, 193 S. E., 713; *S. v. Hefner, supra; S. v. Sudderth,* 184 N. C., 753, 114 S. E., 828.

4. Common assault and battery. C. S., 4215; *S. v. McNeill, supra; S. v. Earnest,* 98 N. C., 740, 4 S. E., 495.

5. Simple or common assault. *S. v. Strickland,* 192 N. C., 253, 134 S. E., 850; *S. v. Morgan,* 25 N. C., 186; *S. v. Davis,* 23 N. C., 126.

True it is, that all these less-aggravated assaults are misdemeanors since the repeal of sections 7 and 8 of ch. 167, Laws 1868-69, in which the first two were made punishable by imprisonment in the State's Prison. Ch. 43, Laws 1870-71; C. S., 4171; *S. v. Smith, supra; S. v. McNeill, supra.*

The practice in respect of a several-count bill, separately stated, where one or more counts are withdrawn from the jury's consideration, or the jury returns a verdict of guilty on one count and says nothing about the others, is not to be confused with the practice authorized by C. S., 4640, which permits a conviction of a "less degree of the same crime" when included in a single count. *S. v. Hampton,* 210 N. C., 283, 186 S. E., 251.

The appeal presents no question of jurisdiction or limitation of punishment. C. S., 1481-1436-1437-4215; *S. v. Johnson,* 94 N. C., 863; *S. v. Smith, supra; S. v. Tyson, ante,* 492; *S. v. Ritter,* 199 N. C., 116, 154 S. E., 62.

HAROLD W. DICKENSHEETS AND WIFE, NELLIE B. DICKENSHEETS, AND JAMES A. HUDSON, TRUSTEE, *v.* W. C. TAYLOR AND WIFE, ELIZABETH TAYLOR.

(Filed 24 November, 1943.)

1. Pleadings § 13½—

The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of the allegations of fact contained therein, and ordinary inferences of fact, necessarily deducible therefrom, are also admitted.

2. Pleadings § 3a—

Both the statute, C. S., 535, and the decisions of this Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient.

3. Appeal and Error §§ 37c, 37e—

On appeal from a ruling of the lower court that plaintiffs are entitled to an easement and an injunction against defendants, preventing its ob-

struction, where the facts on which the ruling is based are conflicting and uncertain, the judgment below will be vacated and the cause remanded for further proceedings.

APPEAL by defendants from *Ervin, Jr., Special Judge,* at May Term, 1943, of ROWAN.

Civil action to remove cloud upon title, heard upon demurrer *ore tenus* to complaint and upon motion for mandatory injunction requiring defendants to remove certain obstructions over certain abandoned portion of highway over which plaintiffs claim easement.

Plaintiffs, in complaint as originally filed, summarily stated, allege:

1. That subject to a deed of trust to their co-plaintiff, the plaintiffs Dickensheets are the owners in fee of a certain specifically described lot of land in Rowan County, North Carolina, bounded on the west by the east side of "the right of way limit" of N. C. Highway No. 601, on which it abuts for 201.5 feet, and on the east by the "center line of the Mocksville Road (now abandoned)" on which it abuts for 203 feet, and on the north and south by lands of defendants—"together with the right of ingress, egress and regress" over and upon a specifically described strip of land thirty feet in width lying west of the center line of said abandoned Mocksville Road, that is the western half thereof, and extending from the north line of the Dickensheets' lot, above described, in a southwesterly direction 287 feet more or less to the point of intersection of said abandoned Mocksville Road with the N. C. Highway No. 601.

2. That defendants claim to own in fee simple the strip of land last above described freed of "any right of way or encumbrance" of the plaintiffs. And that defendants based such claim on these facts: (a) That in the year 1923 defendants obtained a deed from M. L. Jackson and wife for a specifically described tract of land containing 2.8 acres, situated about one and a half miles from Salisbury on the new Mocksville Road, calling for and lying west of that road. (b) That subsequently and in the year 1926 defendants conveyed to George Howard and wife a part of the land so acquired by them from M. L. Jackson and wife, which may be described as a parallelogram, calling for and abutting two hundred feet in width on "the west side of the new Mocksville Road," and extending westerly for four hundred feet. (c) That at the time of both these conveyances the State of North Carolina "was keeping open said road" and continued to do so until the late fall of the year 1941, when N. C. Highway No. 601 was opened and the new Mocksville Road, so-called in said conveyances, was abandoned by the State as a public road in so far as maintenance was concerned, by reason of which defendants claim that the strip of land lying between the center line and the west edge of said abandoned highway reverted to them, freed of public

or private right to use it as a highway and that they have the right to close it.

3. That the claims of defendants, as above set forth, are invalid for that: (a) The call for "the west side of the new Mocksville Road," in the deed from defendants to George Howard and wife, carried "the title to the center of the way," thereby vesting in them the fee in and to the strip of land immediately adjoining the lot conveyed to them by said deed from the west edge to the center line of the road; (b) the roadway being then in existence and abutting the property conveyed by said deed, defendants are estopped to deny the existence of an easement or right of way on the part of plaintiffs over the roadway; (c) the abandoned roadway being the only way plaintiffs have for ingress and egress to and from their premises, defendants have no right to obstruct same, and their claims adverse to plaintiffs constitute a cloud upon plaintiffs' title.

And plaintiffs, in amendment to original complaint, and for a second cause of action, briefly stated, allege:

1. That the lot of which plaintiffs Dickensheets are the owners, the same as that described in the original complaint, and upon which they have constructed and now occupy their home, abuts upon the abandoned portion of the Salisbury-Mocksville Highway, which has been a public highway in general and continuous use by the public for more than 20 years next preceding the institution of this action—having been taken over and controlled and hard-surfaced, improved and maintained by the State Highway Commission of North Carolina under Public Laws 1921, chapter 2—and which provided to predecessors in title of plaintiffs, and now provides to them their only means of ingress and egress in and to their said premises.

2. That during the year 1941 the State Highway Commission rerouted the aforesaid Salisbury-Mocksville Highway, the same being N. C. Highway No. 601, at a point 100 or more feet south of plaintiffs' premises and thereafter abandoned, in so far as maintenance by the State is concerned, that section of said highway—a curve approximately 500 feet in length, upon which said premises abut.

3. That since such abandonment of said section by the State Highway Commission plaintiffs have continued to use and enjoy easement therein, said easement providing their only means of ingress and egress in and to their property, but that defendants, without lawful right or authority, have erected barriers, iron posts and barbed wire across and taken possession of a portion of said abandoned highway, by reason of which plaintiffs as well as others having business over and rights in the free and lawful use of said highway have been interrupted in, and prevented from the lawful and proper use of their premises—which unlawful and wrongful conduct upon the part of defendants has worked and continues

to work irreparable "harm and damage" to plaintiffs for which they have no adequate remedy at law—and they pray mandatory injunction.

Defendants, in answer filed, deny: (1) That plaintiffs have properly described the lot which they own, contending that the description calls for the west side and not the center of the road, and that hence they acquired no property right in and to the land covered by the highway. (2) That defendants owned the fee in that portion of the highway from the center line to the west side adjoining the property of plaintiffs, subject to the right of way of the State Highway Commission, and that when same was abandoned by that Commission, it reverted to defendants as owners in fee and entitled to immediate and uninterrupted possession, and that same was no longer subject to the right of ingress, egress and regress either as a private or public road or driveway, and no easement accrued therein to plaintiffs, the public or anyone else, and that plaintiffs have no right therein.

And by way of further answer, defendants, among other things, aver that the front of the lot of plaintiffs adjoins the eastern line of the right of way of the newly constructed and paved U. S. Highway No. 601, from Salisbury to Mocksville, that is, the highway referred to in the complaint as N. C. Highway No. 601, for two hundred feet, the entire width of the lot, and plaintiffs thereby have access to said highway to which an entrance to plaintiffs' lot may be made easily and at a minimum cost, and hence they deny that the abandoned portion of the old Mocksville Road is the only means of ingress and egress open to plaintiffs.

Upon the allegations in the complaint and amended complaint and on motion of plaintiffs an order was entered requiring defendants to appear and show cause why a mandatory injunction should not be granted requiring them to remove all obstructions on that portion of the Mocksville Road which was abandoned by the State Highway and Public Works Commission, successor to State Highway Commission.

Upon hearing on such order the court, finding the facts as to ownership of premises by plaintiff, as to abandonment of the section of the highway, and as to erection of barriers by defendants, as set forth in the complaint and stating (a) that "the plaintiffs have no other means of ingress and egress to and from said premises," and (b) that the conduct of defendants in exercising dominion over the road is continuing and will work irreparable injury to plaintiffs, ordered defendants to remove the obstructions, and restrained them from erecting other obstructions until final determination of the cause.

When the action came on for final hearing in court below, defendants demurred *ore tenus* to the complaint, and same was overruled, and they excepted.

Further upon such final hearing, the parties agreed upon facts substantially these:

1. In the year 1923 defendants obtained a deed from M. L. Jackson and wife for a tract of land containing 2.8 acres, situated about a mile and a half from and outside the limits of the city of Salisbury and calling for and lying west of the center line of the then new Mocksville Highway, a public highway extending from Salisbury in Rowan County to Mocksville in Davie County, which was maintained and improved from time to time by the governing authorities of Rowan County until maintenance thereof was taken over by the State Highway Commission under chapter 2 of Public Laws 1921, and thereafter maintained by the State Highway Commission until the fall of 1941, when a portion of it was abandoned and has not since been maintained by the State Highway and Public Works Commission as hereinafter stated. Altogether, the highway was so maintained for a period of more than 21 years prior to such abandonment.

2. In the year 1926 defendants sold and conveyed to George Howard and wife a lot located about the center and on the concave side of a curve approximately five hundred feet long, in the Mocksville Highway referred to in the above paragraph, and in shape of a parallelogram 200 feet by 400 feet, specifically described as follows: "*Beginning* at a stake on the west side of said new Mocksville Road, a new corner of Dr. W. C. Taylor's property, thence a new line north 82 deg. 30 min. west 400 feet to a stake, Dr. W. C. Taylor's corner; thence north 3½ deg. East 200 feet to a stake, Dr. W. C. Taylor's corner; thence South 82 deg. 30 min. East 400 feet to a stake on the west side of the new Mocksville Road; thence with the west side of the road in a southerly direction 203 feet to the *Beginning*."

3. In the year 1941 the State Highway and Public Works Commission re-routed on a straight course that part of the Mocksville Road, that is U. S. Highway No. 601, in the curve referred to in preceding paragraph, and as a result a part of the land described above in paragraphs one and two of these facts lay east of the new location and west of the Mocksville Road referred to as the new Mocksville Road in the description set out in paragraph two. And the State Highway and Public Works Commission then abandoned and has not since maintained, or exercised any dominion or control over that section of the road within the curve which was eliminated by so straightening the road. The northern terminus of the curve so eliminated was a bridge, which was removed when such abandonment took place, since which time there has been no way to enter said abandoned section from its northern terminus.

4. On 6 February, 1941, the State of North Carolina, acting on behalf of its agency, the State Highway and Public Works Commission, having

prior thereto, acquired title in fee simple to at least that part of the lot of land conveyed by defendants to George Howard and wife, as last described hereinabove in paragraph two, lying between the old and new locations, and that part covered by the right of way of the new route, conveyed to William Harden and wife, and they in turn by deed dated 29 April, 1941, conveyed to plaintiffs, that part of said lot lying between the old and new routes by the following description:

"*Beginning* at a stake on the west side of the old Mocksville Highway, Route U. S. 601, original southeastern corner between Dr. Howard and Dr. W. C. Taylor; thence North 82 deg. 30 minutes West 118 feet to a point where the line intersects the east right of way line of the new Mocksville highway, said right of way line being 50 feet from and parallel to the center line of said new highway; thence in a Northerly direction with the right of way line as it curves, 200 feet to a point where the right of way line intersects the original north property line between Dr. Howard and Dr. W. C. Taylor; thence South 82 deg. 30 min. East, with the original north property line, 110 feet to a stake on the west side of the old Mocksville highway; thence with the west side of said highway as it curves in a southerly direction 203 feet to the *Beginning.*"

5. The "new Mocksville Road," referred to in the deed from defendants to George Howard and wife, is the same as the "old Mocksville Highway" referred to in the deed from William Harden and wife to plaintiffs.

6. "That the premises of the plaintiffs abut upon the premises of the defendants upon the North and South, and on the West abut upon the right of way line of the North Carolina Highway & Public Works Commission, which said right of way is fifty feet in width from the center line of said Highway 601, and is owned in fee by said North Carolina Highway & Public Works Commission."

7. "That the premises of the plaintiffs do not adjoin or abut upon any highway, alley, lane, or public or private way, except the abandoned portion of former highway 601 hereinbefore referred to as the old Mocksville Road."

8. Subsequent to the abandonment by the State Highway and Public Works Commission of the section of the road, as aforesaid, plaintiffs continued to use said abandoned portion as a means of ingress and egress from the south in and to their lot above described—until a short time prior to institution of this action when defendants attempted to take possession of and close same by "erecting barriers, imbedding iron posts and stringing barbed wire thereon . . . in such manner as to enclose said area and to make entry by the plaintiffs into their premises impossible—the defendants claiming that they have the fee to said area, and that plaintiffs have no easement therein."

The court being of opinion that, upon the facts alleged and agreed, plaintiffs are entitled to relief as prayed, adjudged in pertinent part, (1) "That the plaintiffs are entitled to the enjoyment of an easement in the abandoned portion of the Mocksville Road . . . as the only means of ingress, egress and regress to and from their premises abutting upon said abandoned road extending from the point of its intersection with the North Carolina State Highway and Public Works right of way line of North Carolina Highway No. 601, in a general north or northeasterly direction, to the northern boundary of the property of the plaintiff," and (2) that "defendants and their successors in title be, and they are hereby permanently and perpetually restrained and enjoined from in any manner obstructing, by barriers or other means, or interfering with the use and enjoyment of said easement by the plaintiffs and their successors in title."

Defendants appeal to Supreme Court, and assign error.

Linn & Linn for plaintiffs, appellees.

Walter H. Woodson, Jr., and Walter H. Woodson for defendants, appellants.

WINBORNE, J. In the main defendants' challenge to the judgment below presents two questions:

First. Is there error in overruling the demurrer *ore tenus* to the complaint?

"The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted," *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

Both the statute, C. S., 535, and the decisions of this Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369; *Cotton Mills v. Mfg. Co.,* 218 N. C., 560, 11 S. E. (2d), 550.

Applying this principle to complaint and amended complaint, we are unable to say that in no view is a cause of action stated.

Second. Did the court correctly rule that plaintiffs are entitled to the enjoyment of an easement in the abandoned portion of the Mocksville Road "as the only means of ingress, egress and regress to and from their premises abutting upon the said abandoned road"? Upon the record on this appeal it does not appear upon what theory the careful and learned judge based this ruling that this way is the only means of

ingress and egress to and from their premises. In this connection it is to be noted that the agreed facts show that while the State owns in fee simple the right of way for the new location of the Mocksville highway, the description of plaintiffs' lot with respect thereto emanating from the State of North Carolina, acting on behalf of its agency, the State Highway and Public Works Commission, calls for and runs with "the east right of way line of the new Mocksville highway." It is also noted as an agreed fact that "the premises of plaintiffs do not adjoin or abut any highway . . . except the abandoned portion of the former highway 601 . . . the old Mocksville Road."

In the light of these apparently conflicting facts, was the court of opinion, in ruling that plaintiffs are entitled to an easement in the abandoned portion of the road "as the only means of ingress, egress and regress to and from their premises" abutting thereon, that, as a matter of law, the ownership by the State of fee simple title to the adjoining right of way along the west line of plaintiffs' lot prevents access from plaintiffs' lot over the intervening space to the paved portion of the new highway well within the right of way? Or, was the ruling based upon a finding of fact that by reason of the physical relationship of plaintiffs' lot to the paved portion of the new highway a means of ingress and egress over the intervening space is not feasible?

In the absence of information elicited by these questions, and as the agreed facts leave in doubt answers thereto, we are unable to come to a proper decision as to the correctness of the ruling of the trial court. Hence, the judgment below will be vacated, and the cause remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

JOSEPH B. CHESHIRE, JR., TRUSTEE UNDER THE WILL OF B. S. HARRISON, DECEASED, v. W. B. DRAKE AND WIFE, S. ELVA DRAKE.

(Filed 24 November, 1943.)

1. Judgment § 21—

The lien of a judgment, created upon real estate by the provisions of C. S., 614, is for a period of ten years from the date of the rendition of the judgment and such lien ceases to exist at the end of that time, unless suspended in the manner set out in the statute. It is in the interest of public policy that this statute should be strictly construed.

2. Execution § 19—

Where the bid for real estate, offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment upon which the execution issued, is raised and resales

are ordered successively under provision of C. S., 2591, as amended, by which the final sale so ordered takes place on a date after the expiration of said period of ten years, such orders do not have the effect of prolonging the statutory life of lien of the judgment within the provisions and meaning of C. S., 614.

APPEAL by defendants from *Johnson, Jr., Special Judge,* at March Civil Term, 1943, of WAKE.

The following is summary of pertinent portion of case on appeal as stipulated by the parties:

On 22 December, 1932, judgment by confession was duly rendered by clerk of Superior Court of Wake County, North Carolina, against defendants W. B. Drake and wife, S. Elva Drake, in favor of Joseph B. Cheshire, Jr., Trustee under the will of D. B. Harrison, deceased, for $13,307.82, plus interest, and cost.

On 30 September, 1942, at instance of attorney for plaintiff, execution returnable 30 November, 1942, was issued on said judgment against property of W. B. Drake and wife, S. Elva Drake. Pursuant thereto, homestead exemption allotted to S. Elva Drake was confirmed, on her appeal to, and by judge of Superior Court at October Civil Term, 1942, and on 20 October, 1942, the sheriff of Wake County returned said execution "for lack of time in which to advertise."

On 21 October, 1942, at request of attorney for plaintiff, an execution, returnable on or before 21 December, 1942, was issued out of office of clerk of said Superior Court, on said judgment, against the property of defendants W. B. Drake and wife, S. Elva Drake. This execution bears endorsement "Alias execution," though there is nothing in the body of it to show that it is an *alias* execution.

On 22 October, 1942, the sheriff of Wake County purporting to act "under and by virtue of an execution" directed to "him" advertised notice of sale on 24 November, 1942, of "all right, title and interest which said defendants, W. B. Drake and wife, S. Elva Drake, or either of them, now has or at any time at or after the docketing of the judgment in said action had in and to certain specifically described real estate."

On 24 November, 1942, the sheriff reported to clerk of Superior Court of Wake County that at sale held on said date pursuant to execution issued in this cause and to notice of sale, Joseph B. Cheshire, Jr., Trustee, became the last and highest bidder for all four tracts at specified prices.

On 4 December, 1942, upon the bids on the several tracts being raised pursuant to the provisions of C. S., 2591, as amended by Public Laws 1931, chapter 69, Public Laws 1933, chapter 482, Public Laws 1939, chapters 36 and 397, and other amendments, the clerk of Superior Court entered orders rejecting the several bids of J. B. Cheshire, Jr., Trustee,

made when the several lots of land were offered on 24 November, 1942, and "ordered and directed" the sheriff "to re-open the sale of said property and to re-advertise and resell the same as provided by law beginning said resale at the increased bid offered."

On 5 December, 1942, at request of attorney for plaintiff, an execution returnable on or before 14 January, 1943, was issued from office of clerk of Superior Court on said judgment against the property of defendants W. B. Drake and wife, S. Elva Drake. This execution bears endorsement "Alias execution," though there is nothing in the body of the execution to show that it is an *alias* execution.

On same day, 5 December, 1942, the sheriff of Wake County pursuant to the foregoing execution and by virtue of an order of resale made by the clerk of Superior Court of Wake County because of advanced bids made for all of the lots described therein, advertised notice of sale of same property on 22 December, 1942, the bidding on each lot to start at amount of raised bid.

On 22 December, 1942, the sheriff of Wake County reported to the clerk of Superior Court of said county that at sale held on said date, "pursuant to execution issued in this cause," order of Superior Court of Wake County for a resale and notice of resale, Joseph B. Cheshire, Jr., Trustee, became the last and highest bidder for all four of said lots at specified prices. These bids were duly raised on same day, 22 December, 1942, and on same day the clerk made an order of resale.

On 24 December, 1942, the sheriff returned both the executions issued on 21 October, 1942, and on 5 December, 1942, as above recited, with endorsement on each that it is "returned because of insufficient time to resell property as ordered by W. G. Mordecai, C. S. C., Wake County."

Thereafter, on 24 December, 1942, at instance of attorney for plaintiffs, an execution returnable on or before 22 February, 1943, was issued by clerk of Superior Court, on said judgment against property of defendants W. B. Drake and wife, S. Elva Drake. This execution bears endorsement "Pluries execution," though there is nothing in the body of it to show that it is a *pluries* execution.

On the same day, 24 December, 1942, sheriff of Wake County, purporting to act "under and by virtue of an execution directed to" him "from the Superior Court of Wake County in the above entitled action and of an order of resale made by the clerk of the Superior Court of Wake County because of advanced bids made for all of the lots described" therein, advertised notice of sale of same property on 9 January, 1943, the bidding on each lot to start at amount of raised bid.

On 11 January, 1943, the sheriff of Wake County reported to the clerk of Superior Court of said county that at sale held on said date "pursuant to execution issued in this cause, order of the clerk of the Superior

Court of Wake County for a resale of the property, and to notice of resale published and posted as required by law," Joseph B. Cheshire, Jr., Trustee, became the last and highest bidder for all four of said lots at prices specifically mentioned. These bids on the first, second and third lots were raised on 22 January, 1943, and the clerk made an order of resale.

On 25 January, 1943, sheriff of Wake County, purporting to act "under and by virtue of an execution directed to" him "from the Superior Court of Wake County in the above entitled action and of an order of resale made by the clerk of the Superior Court of Wake County because of advanced bids made" on said three lots, advertised notice of sale of same on 9 February, 1943, the bidding on each lot to begin at amount of raised bid.

On 9 February, 1943, the sheriff of Wake County reported to the clerk of Superior Court of said county that at sale held on said date Julian A. Rand became the last and highest bidder for the first lot, and Joseph B. Cheshire, Jr., Trustee, became the last and highest bidder for the second and third lots.

Thereafter, on 19 February, 1943, defendants W. B. Drake and wife, S. Elva Drake, moved before the clerk of Superior Court of Wake County for an order recalling the execution issued herein on 24 December, 1942, returnable 22 February, 1943, and to quash same and the sales and other proceedings thereunder for that among other things, (1) said execution was issued more than ten years after the date of the rendition of the judgment confessed by defendants W. B. Drake and wife, S. Elva Drake, in favor of plaintiff as hereinbefore set forth, and after the lien of said judgment had expired, and (2) said execution and all proceedings thereunder cannot be supported by other earlier executions issued herein because of, among other things, (a) irregularities and insufficiency in their issuance and proceedings thereunder, and (b) the fact that the advertisements thereunder were not only begun before said executions were issued, and were in fact under different and separate executions, and (3) plaintiff has been guilty of laches in pursuing any rights he may have had.

Thereupon, the assistant clerk of Superior Court signed an order on 19 February, 1943, purporting to stay all proceedings with reference to said sales, including the determination of any motion for confirmation pending the hearing and determination of this motion, and until further order of the court.

Upon hearing on the said motion of defendants in support of which they filed affidavit, the clerk of Superior Court, by order dated 7 March, 1943, disallowed the motion, to which defendants excepted and appeal to Superior Court of Wake County. Upon hearing in Superior Court,

the presiding judge, in judgment entered, set forth that the court "finds the following facts," substantially these: (1) That the original sale in absence of the raise of bids, was made in amply sufficient time to have afforded consummation of sale by execution and delivery of deed before lapse of ten years from the date of rendition of the judgment; (2) that the sale was duly raised and the clerk, having then acquired supervisory jurisdiction over the sale, ordered a resale, and that thereafter the lands were duly resold, followed by further and additional raises of bids, orders of resale and sales—all under due orders of the clerk; (3) that while the last resale was conducted more than ten years after the rendition of the judgment, such last resale, as well as all intervening resales, being only a continuation of the original sale, held open for consummation under the provisions of C. S., 2591, as amended, relates back by operation of law to the date of the original sale.

And it is further recited that the court is of opinion (a) in any event, that the clerk's first order of resale, the assistant clerk's order staying further proceedings and this appeal, toll the statute of limitations within the meaning of C. S., 614, and that the lapse of time thereafter and until now does not constitute any part of the ten year lien period of the judgment; (b) that any irregularities of form that may exist in the chain of executions—*alias* or *pluries*—underlying the orders of resale made by the clerk are harmless, for that the orders of resale of the clerk, being in the nature of writs of *venditioni exponas,* were sufficient to support the resales; and (c) that the evidence bearing on other irregularities and laches of plaintiff is insufficient to warrant quashing the sale, and that the sale has been made in substantial compliance with the statutory procedure prescribed in such cases and that defendants' motion should be denied.

To these findings of fact and conclusions of law, and to judgment denying their motion, defendants W. B. Drake and wife, S. Elva Drake, except and appeal to Supreme Court and assign error.

Paul F. Smith for plaintiff, appellee.
Jones & Brassfield for defendants, appellants.

WINBORNE, J. This is the pivotal question on this appeal: Where the bid for real estate offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment, upon which the execution issued, is raised and resales are ordered successively under provisions of C. S., 2591, as amended, by which the final sale so ordered takes place on a date after the expiration of said period of ten years, do such orders have the effect of prolonging

the statutory life of lien of the judgment within the provisions and the meaning of C. S., 614? The answer is No.

The statute, C. S., 2591, as amended by Public Laws 1931, chapter 69, and by Public Laws 1933, chapter 482, applicable to sales (1) in the foreclosure of mortgages or deeds of trust on real estate, (2) by order of court in foreclosure proceedings either in the Superior Court or in actions at law, (3) publicly by an executor, administrator, or administrator with the will annexed, (4) by any person by virtue of the power contained in a will, or (5) "under execution duly issued," provides, in pertinent part, that (a) the sale shall not be deemed to be closed under ten days; (b) that if in ten days from the date of the sale, the sale price be increased as there specified, "the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance"; (c) that when the bid or offer is so raised, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell such real estate; (d) that resales may be had as often as the bid may be raised in compliance with this section; and (e) that "upon final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser." Sales of real estate under executions were brought within the provisions of this act by the amendment contained in chapter 482, Public Laws 1933, which became effective on 13 May, 1933. However, no amendment appears to have been made to C. S., 614, at that or any subsequent time.

The lien of a judgment created upon real estate by the provisions of C. S., 614, is for a period of ten years from the date of the rendition of the judgment. "But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment . . ." There is no other savings clause in the statute and, as stated in *Pipkin v. Adams,* 114 N. C., 201, 19 S. E., 105, this Court has adopted the principle that it is in the interest of public policy that this statute should be strictly construed. See *Spicer v. Gambill,* 93 N. C., 378.

And the uniform holding of this Court is that, under the provisions of C. S., 614, the lien of a judgment ceases to exist at the expiration of ten years—unless that time be suspended in the manner set out in the statute. See *Lupton v. Edmundson,* 220 N. C., 188, 16 S. E. (2d), 840, where the decisions on the subject are assembled. It is well settled, too, as expressed by *Smith, C. J.,* in *Spicer v. Gambill, supra,* that "to preserve the judgment lien the process to enforce and render it effectual

must be completed by a sale within the prescribed time," and "if delayed beyond these limits unless interrupted in the manner pointed out in section 435 of the Code (now C. S., 614), the lien is gone." *Lupton v. Edmundson, supra.* Moreover, while execution is the statutory means provided in this State for the enforcement of a judgment requiring the payment of money, C. S., 663, the decisions bearing upon the subject uniformly hold that the issuance of an execution does not prolong the life of a lien, nor stop the running of the statute of limitation, the bar of which is complete when the ten years have expired. *Lupton v. Edmundson, supra; Barnes v. Fort,* 169 N. C., 431, 86 S. E., 340; *Hyman v. Jones,* 205 N. C., 266, 171 S. E., 103.

In the light of these principles, it is clear that the present case fails to come within the savings clause contained in C. S., 614, by which the statute of limitation is tolled. The record fails to show that plaintiff has been restrained by any injunction, or other order, or by operation of any appeal, or by any statutory prohibition, from proceeding to enforce his rights under the judgment against defendants at any time within ten years from the date of the rendition of the judgment. And the fact that plaintiff elected to wait until more than nine years and nine months from the date of the rendition of the judgment had expired before putting in motion the statutory machinery for the enforcement of the lien of his judgment, and is then confronted with the provisions of C. S., 2591, made applicable in 1933 to sales under execution authorizing resales upon bids being raised, by reason of which final sale is not consummated until after the full ten years have expired, is not a restraint within the meaning of the provisions of C. S., 614. We must construe the statutes as they are written.

The conclusion thus reached makes it unnecessary to pass upon other questions debated, and we do not do so. But for reasons stated, the judgment below is

Reversed.

ALEX B. ANDREWS v. GREAT AMERICAN INSURANCE COMPANY OF NEW YORK.

(Filed 24 November, 1943.)

1. Trial § 27c: Evidence § 15—

Where plaintiff's evidence is positive on the vital question involved upon his direct examination and on cross-examination ambiguous, but not diametrically opposed to that on his examination-in-chief, the defendant is not entitled, on plaintiff's evidence, to a directed verdict.

2. Contracts § 25a: Insurance § 25d—

In an action to recover on an insurance policy for fire damage to an airplane, the court's charge to the jury, that the measure of damages is the difference in the reasonable market value of the airplane immediately before the fire and immediately thereafter, is erroneous, when the policy upon which the action is bottomed prescribes otherwise for the measure of recovery.

APPEAL by defendant from *Burney, J.*, at May Term, 1943, of WAKE.

This is an action to recover on an insurance policy issued by the defendant to the plaintiff for the destruction by fire of a landplane, designated as a Taylorcraft Deluxe B-12, in flight. The jury, upon appropriate issues submitted, found for their verdict that the fire which destroyed the landplane arose out of flight before collision with an object, and that the plaintiff was entitled to recover of the defendant $2,000.00, the full amount covered by the policy.

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

Douglass & Douglass for plaintiff, appellee.

Murray Allen for defendant, appellant.

SCHENCK, J. The policy of insurance involved in this action was originally issued to Alex B. Andrews and Paul F. Mickey, joint owners of the landplane, as their interests may appear, and as originally drawn insures the aircraft only against certain risks of loss or damage while not in flight. While the policy was in effect the plaintiff Andrews acquired the interest of Mickey and became the sole owner of the plane.

There was, however, attached to and made a part of the policy an endorsement, which reads: "The coverage provided by this policy is extended to cover without deductible against the risk of fire, lightning, explosion and self-ignition arising out of flight as herein defined unless such damage is caused by collision with the land, water or other object."

It is admitted in the defendant's answer that the airplane was not being used for any purpose not covered by the policy, and was within the geographical limits provided in said policy and that said plane was practically destroyed by fire. And all the evidence tends to show that the fire originated while the airplane was in flight, as that term is defined in the policy.

The plaintiff contends that under the provisions of the aforesaid endorsement he is entitled to recover for the total destruction of his airplane, since such destruction was caused by fire arising out of flight.

The defendant contends, on the contrary, that the plaintiff is not entitled to recover for the destruction of his airplane, since the fire

which burned it was caused by a collision with a high tension electric wire.

The following issue was submitted: "1. Did the fire which damaged plaintiff's landplane arise out of flight before collision with an object?" The jury answered the issue in the affirmative.

The exceptions most stressed by the defendant, appellant, are those to the refusal of the court, upon proper prayers submitted, to instruct the jury upon all the evidence to answer the issue in the negative, or that if they believed the evidence to answer the issue No. In other words, the defendant contends that it was entitled to a directed verdict on the first issue.

It is the position of the defendant that the plaintiff's evidence fails to establish the fact that the fire which destroyed the airplane occurred before a collision with an object, a high tension electric wire, and the burden of proof being upon the plaintiff the instructions prayed for should have been given. It is the contention of the defendant that the plaintiff's own testimony on direct examination was to the effect that the fire occurred before the collision with the high tension wire, whereas his testimony on cross-examination is diametrically opposed to his direct testimony and is to the effect that the fire occurred after the collision with the high tension electric wire. If the plaintiff's testimony on cross-examination was diametrically opposed to his testimony on direct examination on the vital question as to whether the fire occurred before or after the collision with the high tension wire it might plausibly be argued that the court should instruct the jury to answer the issue in favor of the defendant, since the jury should not find for the plaintiff on an issue upon which he carried the burden when he swears to facts on direct examination making for an affirmative answer to the issue and on cross-examination swears to facts making for a negative answer thereto. It would be otherwise if there was a mere variance between the testimony on direct and on cross-examination, as distinguished from a diametrical contradiction therein on a vital question.

On direct examination the plaintiff testified that at the time the fire originated the plane had not collided with an object, and that after the fire originated the plane came in contact with a high tension wire. The plaintiff's testimony on direct examination was to the effect that the first thing he observed was "a terrific blinding, almost explosive flash, as if I had been struck by lightning or something, and then fire. That was the first thing I noticed before I noticed colliding with anything. The flash occurred and then after that I noticed I was in contact with something."

On cross-examination the plaintiff testified that a month after the accident he made a written statement for the representative of the

defendant company to the effect that "due to a headwind I was delayed in flight and . . . I thought it advisable to find a suitable place to land. It was dusk at the time, and in looking over a possible landing field, the nose of the ship severed a high-tension wire at a height of about 65 feet, which I had been unable to see. The motor and leading edges of both wings burst into flame immediately and I decided to land at once due to the fire"; that that statement "is approximately correct. It may be the cart before the horse."

We do not concur with the contention of the defendant that the testimony of the plaintiff on cross-examination was diametrically opposed to his testimony on direct examination. The plaintiff on cross-examination testifies that the written statement made by him a month after the accident out of court, when he was at home with a broken back, was "approximately correct," and that "it may be the cart before the horse." These words render his testimony susceptible to the interpretation that when he put in the written statement the words "that the nose of the ship severed the high tension wire, . . . and the motor and leading edges of both wings burst into flame immediately" it might have been more accurate to have stated that the motor and both wings burst into flame, and the nose of the ship severed the high tension wire. This would have been so if he meant to imply by the expression "the cart before the horse," that the collision was the cart and the bursting into flame was the horse. It should be borne in mind that it is the sworn testimony on cross-examination and not the written statement made out of court that is to be interpreted.

The testimony of the plaintiff on direct examination being positive to the effect that the flames appeared and then the collision with the wire occurred, and his testimony on cross-examination being at least ambiguous as to which occurred first, the flames or the collision, it cannot be held that the testimony on cross-examination was diametrically opposed to the testimony on direct examination, and thereby support the contention of the defendant that the court should have directed a negative answer to the first issue.

The second issue reads: "2. If so, what amount of damages is plaintiff entitled to recover?" On this issue the court charged the jury in effect that the measure of damages would be the difference in the reasonable market value of the airplane immediately before the fire and the reasonable market value thereof immediately after the fire. This charge is made the basis for exceptive assignments of error which appear in the record and are duly set out in appellant's brief. These assignments of error must be sustained for the reason that the insurance policy upon which this action is bottomed prescribes the measure of recovery for loss of the insured's aircraft. The provision of the policy upon this subject

is as follows: "1. Limitation of Liability and Method of Determining Same—This Company's liability for loss or damage to the aircraft described herein shall not in any event exceed the actual cash value thereof at the time any loss or damage occurs nor what it would then cost to repair or replace the aircraft or parts thereof with other of like kind and quality, nor shall it exceed:

"In the case of a total loss, the amount of insurance on the aircraft involved less depreciation at an annual rate of 20% on new aircraft (*i.e.*, not more than three months old at the time the aircraft attached under this policy) and 15% on used aircraft. In the case of partial loss when repairs are made by the Assured, the actual cost of any parts necessary to effect repairs or replacements plus the actual cost to the Assured of labor plus 50%, without any further allowance for overhead or overtime; when the repairs are made by other than the Assured the actual cost as evidenced by bills rendered to the Assured less any discounts granted to the Assured. In no event shall the liability of this Company for partial loss exceed the amount for which this Company would be liable if the aircraft were a total loss."

There being error in the charge on the measure of damages, the defendant is entitled to a new trial, and it is so ordered.

New trial.

J. A. SALMON, ADMINISTRATOR OF TISHEY SALMON, DECEASED, v. E. T. PEARCE AND HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 24 November, 1943.)

1. Principal and Agent § 7—

Proof of general employment alone is not sufficient to charge an employer with liability for negligence under the doctrine of *respondeat superior*. 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.

2. Same: Evidence §§ 42b, 42d—

Agency having been established either by proof or by admission, the declarations of the agent, made in the course of his employment and in the scope of his agency and while he is engaged in the business, are competent. They must be the extempore utterances of the mind, under circumstances which constitute them part of the *res gestæ*.

3. Principal and Agent §§ 10b, 13a—

In an action for damages by plaintiff against defendants, an insurance agent and his employer, for personal injuries to plaintiff occasioned by his being hit by the automobile of the agent, where the evidence tended

to show that the agent drove on to the next street after the accident, turned around and drove back to the scene of the accident and some ten minutes thereafter stated to a traffic officer that he had been out collecting insurance and was on his way home, and where an insurance collection book furnished by the agent's employer was found in his possession and there was evidence that the employer paid part of his automobile expense, a motion of nonsuit as to the employer was properly granted.

APPEAL by plaintiff from *Williams, J.*, at March Term, 1943, of WAKE. Affirmed.

Civil action to recover damages for wrongful death resulting from pedestrian-automobile collision.

The individual defendant Pearce is regularly employed by the corporate defendant as an insurance agent in its Raleigh branch to solicit and sell insurance and to collect premiums from policyholders. In performing his duties he uses his own car, but the employer contributes $5.00 per week toward the payment of the expense.

At about 7:40 p.m., on 4 September, 1942, Pearce, while traversing the intersection of Peace and Salisbury Streets in Raleigh in his automobile, ran into and struck plaintiff's intestate, inflicting injuries from which she died. There was evidence that he was traveling at an excessive rate of speed and was at the time under the influence of some intoxicant.

At the time of the accident he had on his car and in his possession an insurance or premium collection book furnished by his employer. He lived in the vicinity of the accident.

Pearce did not immediately stop at the scene of the accident, but drove on to Railroad Street, turned around, and drove back to the scene behind a traffic officer. After the officer had cleared the traffic and had helped place the plaintiff's intestate on an ambulance he talked to Pearce—five to ten minutes after he arrived. At that time Pearce stated that he "had been out to make a round of back calls and stopped at the filling station and got a bottle of beer and started home."

"Q. Did he say what the back call for whom he was making?

"A. He said to make a collection that he failed to make on his route; that he was going on his back call to make it."

As stated by another witness, he said: "He had been out collecting insurance and had been at work, and was on his way home and had stopped at Person Street Sandwich Shop to get a bottle of beer."

On objection by the corporate defendant the testimony as to what Pearce said was excluded as to it and admitted as against Pearce only. Plaintiff excepted.

At the conclusion of the evidence for plaintiff the court below entered judgment of nonsuit as to the corporate defendant. Plaintiff excepted, submitted to judgment of voluntary nonsuit as to Pearce, and appealed.

Sam J. Morris and J. M. Templeton for plaintiff, appellant.

T. Lacy Williams for defendant, appellee.

BARNHILL, J. It is apparent from this record that the judgment of nonsuit was bottomed on the conclusion that there was no sufficient evidence offered tending to show that Pearce at the time of the accident was about his master's business, so as to charge the insurance company with liability under the doctrine of *respondeat superior*. In this conclusion we concur.

The evidence tends to show negligence and general employment, and nothing more. There is no evidence that Pearce was, at the time and in respect to the transaction out of which the injury and death arose, engaged in discharging any duty of his employment.

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. *Tribble v. Swinson*, 213 N. C., 550, 196 S. E., 820; *Liverman v. Cline*, 212 N. C., 43, 192 S. E., 809; *Smith v. Moore*, 220 N. C., 165, 16 S. E. (2d), 701, and cases cited; *Grier v. Grier*, 192 N. C., 760, 135 S. E., 852; *Riddle v. Whisnant*, 220 N. C., 131, 16 S. E. (2d), 698; *Robinson v. Sears, Roebuck & Co.*, 216 N. C., 322, 4 S. E. (2d), 889; *Cole v. Funeral Home*, 207 N. C., 271, 176 S. E., 553; *Van Landingham v. Sewing Machine Co.*, 207 N. C., 355, 177 S. E., 126; *McLamb v. Beasley*, 218 N. C., 308, 11 S. E. (2d), 283.

Presence of the premium collection book on the car owned by Pearce and used by him in discharging his duties does not supply the missing link. *Van Landingham v. Sewing Machine Co., supra; Tribble v. Swinson, supra; Creech v. Linen Service Corp.*, 219 N. C., 457, 14 S. E. (2d), 408.

Barrow v. Keel, 213 N. C., 373, 196 S. E., 366, and *Pinnix v. Griffin*, 219 N. C., 35, 12 S. E. (2d), 667, relied on by plaintiff, are factually distinguishable.

Was there, then, error in the exclusion of the evidence relating to statements made by Pearce shortly after the accident?

Agency having been established either by proof or by admission, the declarations of the agent made in the course of his employment and within the scope of his agency and while he is engaged in the business (*dum fervet opus*) are competent as, in that case, they are, as it were, the declarations of the principal. *Brittain v. Westall*, 137 N. C., 30, 49 S. E., 54, and cases cited; *Hunsucker v. Corbitt*, 187 N. C., 496, 122 S. E., 378.

To be competent the statement must be made while the agent is engaged in transacting some authorized business and must be so connected with it as to constitute a part of the *res gestæ*. It must be a part of the business on hand or the pending transaction, as regards which for certain purposes the law identifies the principal and the agent, *Queen v. Ins. Co.*, 177 N. C., 34, 97 S. E., 741; or it must be the extempore utterance of the mind under circumstances and at a time when there has been no sufficient opportunity to plan false or misleading statements —such statement as exhibits the mind's impression of immediate events and is not narrative of past happenings. Tiffany on Agency, p. 252; *Queen v. Ins. Co., supra; Hubbard v. R. R.*, 203 N. C., 675, 166 S. E., 802; *Caulder v. Motor Sales, Inc.*, 221 N. C., 437, 20 S. E. (2d), 338. On this point *Pinnix v. Griffin, supra,* is also authoritative.

Statements of an agent that are nothing more than a narrative of a past occurrence, *Northwestern Union Packet Co. v. Clough,* 22 L. Ed., 406, and which do not characterize or qualify an act presently done within the scope of the agency, *Nance v. R. R.*, 189 N. C., 638, 127 S. E., 635, are, as against the principal, nothing more than hearsay and are incompetent. *Brown v. Montgomery Ward & Co.*, 217 N. C., 368, 8 S. E. (2d), 199; *Caulder v. Motor Sales, Inc., supra.* See also Anno. 76 A. L. R., 1125, 20 Am. Jur., 510, sec. 599; *Winchester and P. Mfg. Co. v. Creary,* 116 U. S., 161, 29 L. Ed., 591.

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

That such declarations are hearsay and inadmissible in evidence is sustained not only by the text writers and decisions of other courts but by many decisions of this Court in addition to those heretofore cited. *Cole v. Funeral Home,* 207 N. C., 271, 176 S. E., 553; *Smith v. R. R.*, 68 N. C., 107; *Rumbough v. Improvement Co.*, 112 N. C., 751, 17 S. E., 536; *Gazzam v. Ins. Co.*, 155 N. C., 330, 71 S. E., 434; *Hubbard v.*

R. R., supra; Parrish v. Mfg. Co., 211 N. C., 7, 188 S. E., 817, and cases cited.

It follows that the testimony as to declarations made by the defendant Pearce was incompetent and inadmissible as against the defendant Insurance Company. These declarations were made some time after the occurrence, after Pearce had left the scene of the accident and returned, after police had arrived at the scene, and after the deceased had been placed on an ambulance. They clearly come under the hearsay rule.

Even if admitted, the statement made tends to show that Pearce had completed his work and was at the time on his way home. *Creech v. Linen Corp., supra; McLamb v. Beasley, supra.*

The judgment below is

Affirmed.

IN THE MATTER OF THE WILL OF HENRY J. WALL, DECEASED.

(Filed 24 November, 1943.)

1. Wills § 16b—

The rule generally followed by the courts, where the probate of duplicate wills has been considered, is that, where the duplicate copy retained by the testator is not produced or its absence satisfactorily accounted for, the other copy may not be admitted to probate.

2. Wills §§ 13, 16b, 22—

The fact that a will was executed in duplicate does not alter the rule that a will left in the custody of the testator, which cannot be found after his death, is presumed to have been intentionally destroyed by him *animo revocandi*. This presumption is of fact and may be rebutted by evidence.

3. Evidence § 54—

A presumption of law is generally indicative of a mandatory deduction which the law directs to be made, in the sense of a rule of law laid down by the court; while a presumption of fact is a deduction from the evidence, a *prima facie* case, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven.

APPEAL by caveators from *Hamilton, Special Judge,* at April Term, 1943, of WAKE. New trial.

This was a proceeding to probate in solemn form the will of Henry J. Wall. Upon the evidence offered there was verdict for propounders, and from judgment sustaining the will, caveators appealed.

Banks Arendell and P. H. Wilson for propounders, appellees.

Jones & Brassfield, William T. Hatch, and A. R. House for caveators, appellants.

DEVIN, J. It was not controverted that the paper writing propounded for probate was executed in manner and form sufficient to establish it as the last will and testament of the decedent. But its validity for that purpose was challenged by the caveators on the ground that the will had been executed in duplicate, one copy of which had been left in the custody of counsel and the other retained in possession by the testator, and that the copy left with counsel had been offered for probate while the duplicate copy which had been retained by the testator himself had not been produced or found. From this, it was contended, the presumption arose that the testator had destroyed it with intent to revoke it as his will, and that the revocation of the duplicate copy in his possession necessarily carried with it the revocation of the copy in the hands of his counsel. From an adverse judgment below the caveators bring the case here for review.

This is the first instance in which questions relating to the probate of a will executed in duplicate have been presented to this Court for decision. The facts were these: The draftsman of the will, Mr. J. W. Bunn, at the suggestion of the testator, caused the will to be typewritten in duplicate—that is, by the use of carbon paper, two identically written papers were prepared. Both papers were signed by the testator and attested by two witnesses, at the same time, thus constituting them duplicate originals. One of the duplicates was left in the custody of Mr. Bunn, and the other duplicate was retained by the testator and carried to his home. Some ten months later the testator died. Mr. Bunn delivered the duplicate copy of the will left in his custody to the clerk for probate. The other duplicate copy which had been retained in possession by the testator was not produced and could not be found.

The rule generally followed by courts where the probate of duplicate wills has been considered is that where the duplicate copy retained by the testator is not produced or its absence satisfactorily accounted for, the other copy may not be admitted to probate as the testator's last will and testament, for the reason that the presumption of revocation would arise from proof of the possession of the paper by the testator before his death and its unaccounted for absence thereafter, and the revocation of the duplicate copy retained by the testator would necessarily constitute a revocation of the copy in the custody of another person. This seems to be the rule adopted by the New York courts. *Crossman et al. v. Crossman et al.*, 95 N. Y., 145; *Roche v. Nason*, 185 N. Y., 128; *In re Schofield's Will*, 129 N. Y. S., 190; *In re Field's Will*, 178 N. Y. S., 778; *In re Moore's Estate*, 244 N. Y. S., 612.

In the last case cited, *In re Moore's Estate, supra*, the will was executed in triplicate. After the testator's death two copies which had been in the custody of others, were offered for probate, but the one

retained by the testator was not found. There being no evidence of its existence at the time of his death, probate of the wills offered was denied. The Court said: "It is a fair presumption that the testator has destroyed his will with intent to revoke it where it was last seen in his possession and cannot be found after his death."

The same reasoning was applied by the Supreme Court of Pennsylvania, *In re Bates,* 286 Pa., 583, 134 Atl., 513, where it was held that the fact that the will was executed in duplicate did not alter the rule that a will left in the custody of the testator which cannot be found after his death is presumed to have been intentionally destroyed *animo revocandi.* It was also said in that case, "had the original been found, or had it been shown to have been lost or accidentally destroyed, there can be no doubt of the admissibility of the duplicate and its being entitled to probate as the testator's will."

In the annotation on this subject in 48 A. L. R., 297, authorities are cited in support of the rule stated that where a testator destroys or is presumed to have destroyed with intent to revoke the copy of his duplicate will retained in his possession, in the absence of proof to the contrary, the duplicate in another's hands will be held revoked. The same principle is stated in 68 C. J., 822, with citation of a number of decisions from different jurisdictions in support.

In *Goodale v. Murray,* 227 Iowa, 843, 126 A. L. R., 1121, it was said, "The rule is practically unquestioned that in the absence of any evidence as to circumstances of destruction, a presumption arises that a will which was in the custody of a testator, and which cannot be found at his death, was destroyed by him with the intention of revoking it." In order to revoke a will there must be both the physical act of destruction or cancellation and the intention that the act have this effect. Both must concur. The presumption, however, that the testator destroyed the paper with the intent to revoke it as his will is not one of law but of fact, and may be rebutted by evidence of facts and circumstances showing that its loss or destruction was not or could not have been due to the act of the testator or that of any other person by his direction and consent.

In *In re Hedgepeth,* 150 N. C., 245, 63 S. E., 1025, where the copy of a lost will was attempted to be probated, it was said, "The will not being found, there is a presumption of fact that it was destroyed by the testator *animo revocandi,*" and that the burden was on the propounder "to show the original will was lost or had been destroyed otherwise than by the testatrix or with her consent or procurement."

In *In re Steinke's Will,* 95 Wis., 121, it was said that if it appeared that the will was last known in the possession of the testatrix and after her death could not be found "a *prima facie* presumption would arise

that she had destroyed it, with the intention of revoking it—a presumption subject to be rebutted by competent evidence." To the same effect is the holding *In the Matter of Johnson's Will,* 40 Conn., 587; *In re Walsh's Estate,* 196 Mich., 42, and *McClellan v. Owens,* 335 Mo., 884. "Whether or not the presumption of revocation is rebutted is a question for the jury. Thornton on Lost Wills, sec. 73, citing cases." *Re Foerster's Estate,* 177 Mich., 574 (585). The rule that the presumption of revocation, which arises from the fact that the duplicate copy of the will retained by the testator cannot be found after death, is a rebuttable one, is illustrated by the case of *Glockner v. Glockner,* 263 Pa., 393, where the lost will was last seen in the possession of the testator, and evidence was offered that it was thereafter physically impossible for him to have destroyed the will or procured its destruction to the time of his death. It was held that the presumption that he destroyed it with intent to revoke it was rebutted, and judgment sustaining the will was affirmed. An even stronger case for the propounder was *Managle v. Parker,* 75 N. H., 139. There the will was executed in duplicate, and the testatrix herself destroyed the copy she had retained. But it was shown that she did so not for the purpose of revocation, but to appease some of her relatives, expressing the intention that the other copy in custody of another should continue to represent her will. Judgment sustaining the will was affirmed. A statement of this principle, as it applies to the probate of a will executed in duplicate, is also found in 2 Greenleaf on Evidence, sec. 682, from which we quote: "If the will was executed in duplicate, and the testator destroys one part, the inference generally is that he intended to revoke the will; but the strength of the presumption will depend much on the circumstances. Thus, if he destroys the only copy in his possession, an intent to revoke is very strongly to be presumed; but if he was possessed of both copies and destroys but one, it is weaker."

What is the nature and effect of the presumption of revocation to which these circumstances give rise? A distinction was drawn by *Walker, J.,* speaking for the Court, in *Cogdell v. R. R.,* 132 N. C., 852, 44 S. E., 618, between a presumption and an inference. This was said in reference to the question whether one whose death was caused by the negligence of another was presumed to have exercised due care, or whether from the instinct of self-preservation an inference to that effect would arise. The Court held in that instance it was a presumption rather than an inference. This distinction is discussed in Annotation in 95 A. L. R., 162, where numerous cases on the subject are collected. However, the term presumption as connotating a presumption of law is generally used as indicative of a mandatory deduction which the law directs to be made, in the sense of a rule of law laid down by the Court,

while a presumption of fact used in the sense of an inference is a deduction from the evidence, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven. *Rose v. Tel. Co.*, 328 Mo., 1009, 81 A. L. R., 400; *Judson v. Bee Hive Auto Service*, 136 Oregon, 1, 74 A. L. R., 944; *Merkel v. Railway Association*, 205 Mo. App., 484; *Indianapolis v. Keeley*, 167 Ind., 516; 1 Greenleaf on Ev., sec. 48 (note).

In the case of *S. v. Davis*, 214 N. C., 787, 1 S. E. (2d), 104, the effect of *prima facie* or presumptive evidence is discussed by *Barnhill, J.*, and in *S. v. Holbrook, post*, 622, it was held in an opinion by *Chief Justice Stacy* that what has been denominated a presumption of fact, when it related to the doctrine of recent possession in the law of larceny, was to be considered merely as an evidential fact or a circumstance, rather than as a presumption which would impose a burden on the defendant. In *Lee v. Pearce*, 68 N. C., 76 (85), *Chief Justice Pearson* classifies the different kinds of presumptions, particularly those arising out of certain fiduciary relations.

In *Managle v. Parker*, 75 N. H., 139 (141), referring to the presumption of revocation of a will arising from its absence at the time of death, it was said: "When it is said that a presumption of intent to revoke arises from the testator's act of destroying that copy of a will executed in duplicate which is within his reach, it is not to be inferred that a presumption *juris et de jure* is meant. The presumption referred to is not an irrebuttable conclusion of law. It is a mere inference of fact."

In Wigmore on Evidence, sec. 2491, we find it said: "The distinction between presumptions 'of law' and presumptions 'of fact' is in truth the difference between things that are in reality presumptions and things that are not presumptions at all," and that "a 'presumption of fact,' in the loose sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact." In *Mockowik v. Railroad*, 196 Mo., 550 (571), *Lamm, J.*, referred to presumptions, when understood in this sense, as "the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." In citing this case Mr. Wigmore adds: "If similes are in order, why not say that presumptions are the pitcher's 'fair balls,' which, unless the batsman hits them, become 'strikes,' and may finally put the batsman out?" 9 Wigmore, 290; *Stumpf v. Montgomery*, 101 Okl., 257.

The fact of possession of the will by the testator before his death and its unexplained absence after his death, nothing else appearing, would raise the presumption of fact that it had been destroyed by the testator with intent to revoke. *Scoggins v. Turner*, 98 N. C., 135. But as soon as the circumstances attendant upon the disappearance of the paper are made to appear, the presumption loses its potency and the issue

becomes one for the jury. The weight to be given a rebuttable presumption of fact was stated in *Gillett v. Traction Co.*, 205 Mich., 410, as follows: "It is now quite generally held by the courts that a rebuttable or *prima facie* presumption has no weight as evidence. It serves to establish a *prima facie* case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, without giving any evidential force to the presumption itself." This language was quoted with approval in *Union Trust Co. v. Car Co.*, 219 Mich., 557, and again by *Brogden, J.*, in *Jeffrey v. Mfg. Co.*, 197 N. C., 724 (727), 150 S. E., 503. *S. v. Boswell*, 194 N. C., 260, 139 S. E., 374. A similar view was expressed by the Supreme Court of Massachusetts in *Clifford v. Taylor*, 204 Mass., 358 (361). See also *Christiansen v. Hilber*, 282 Mich., 403, and *Schaub v. R. R.*, 133 Mo. App., 444. 1 Elliott on Evidence, sec. 91; 1 Jones Law of Evidence in Civil Cases, secs. 9, 10 and 104 (a); 31 C. J. S., 733.

It seems clear, therefore, that whatever presumption arose from the nonproduction of the testator's copy of the will in this case it was a rebuttable one, and that it was for the jury to determine from all the evidence whether or not it had been destroyed by the testator with intent to revoke, the burden of proof being upon the propounder to establish the will and hence to show that its loss or destruction was not by his act or procurement. *In re Hedgepeth*, 150 N. C., 245, 63 S. E., 1025; *Helbig v. Ins. Co.*, 234 Ill., 251 (257); *McClellan v. Owens*, 335 Mo., 884, 95 A. L. R., 711. Any competent evidence to this effect was sufficient to carry the case to the jury.

The caveators, however, complain that the court instructed the jury to answer the issue in favor of the propounder if they found the facts to be as all the evidence tended to show. They contend the court erred in holding that the evidence was so conclusive as to compel a verdict for propounder, if all the evidence were accepted as true. An examination of the evidence set out in the case on appeal shows that the circumstances relating to the loss of the will, briefly stated, were as follows: The testator lived in Wake County on the farm on which he was born. He left surviving seven sons and daughters, several of whom lived in the county. A granddaughter lived in the home with him. The farm on which he lived was by his will devised to be divided between a son Furman Wall and a daughter Hazeline Wall Faulkner, his youngest child. Small bequests were made to his other children. The will was executed in January, 1942. It appeared that some time thereafter the testator gave to Hazeline Wall Faulkner, or her husband, $1,000 for the purchase by them of land in Vance County. The duplicate copy of his will retained by testator was placed by him in the bottom or drawer of a buffet in his kitchen where other valuable papers were kept. This

drawer was locked and he kept the key. On 20 November, 1942, he became sick, and on the 21st was taken to a hospital in Raleigh. He remained there until Sunday, 29 November, when he was brought back home, so weak he had to be lifted out of the automobile into the house, and remained in his bedroom, unable to get up without assistance or to walk. Another room separated his bedroom from the kitchen. His sons and daughters visited him. He was up and about the house a part of the time from Sunday until Wednesday. Growing worse, he was taken back to the hospital Wednesday, 2 December, and died there 3 December. One of the propounders, Hazeline Wall Faulkner, testified she saw the will on Tuesday, 24 November, after her father had been taken to the hospital. It was in the buffet drawer where he kept his papers. She testified she returned to his home Tuesday morning (1 December), about seven o'clock. "He was sitting in a chair and we helped him to bed and he never got out of bed again." After the funeral the house was locked up. Later Furman Wall, son of the decedent, accompanied by two disinterested persons, went to the house to look for the will, and found the buffet unlocked and the will gone. After search it could not be found. The keys to the buffet were gone and were never found.

On the other hand, the caveators' evidence tended to show that in August, 1942, the testator spoke to another attorney and asked what he would charge to write a will. Later, to another witness he spoke about his will as if he contemplated making changes in the disposition of his property. To another he complained of his son Furman who was planning to move away, and of his granddaughter who because of some disagreement had temporarily left him, and said he was going to see they didn't get anything else he had. However, it appeared the son did not move away and the granddaughter returned. Another witness testified he heard the propounder Hazeline Wall Faulkner say after testator's death that he did not leave a will "because he told me he had done away with it." Caveators also introduced without objection a letter to the testator written by Mr. J. W. Bunn, dated 20 October, 1942, referring to the contemplated purchase of land for his daughter Hazeline, suggesting that "if you make such purchase it would change the status of your estate and that you would want to change your will." There was no evidence of any response to this letter. The propounder denied she had made the statement attributed to her.

Without expressing any opinion as to the facts, or the weight of the evidence, we think the trial judge was in error in giving the instruction complained of, and that the questions involved in the issue of *devisavit vel non* were for the jury to determine under appropriate instructions from the court.

New trial.

STATE v. W. W. LOWERY.

(Filed 24 November, 1943.)

1. Automobiles § 32a—

The violation of a traffic law, unintentionally or merely through a want of ordinary care, will not constitute culpable negligence unless the prohibited act is in itself dangerous—*i.e.*, likely under the circumstances to result in death or great bodily harm.

2. Automobiles § 32b—

The violation of statutes, against driving an automobile while intoxicated, C. S., 2621 (286), and against failure to give certain signals, C. S., 2621 (301), if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter, unless a causal relation is shown between the breach of the statute and the death.

3. Automobiles § 32c—

In a criminal prosecution for a felonious slaying, by an automobile collision, where all testimony tended to show no excessive speed on the part of defendant, no clear evidence of a left turn in front of the oncoming car which hit defendant's car causing the death, no failure to give any signal which defendant was under obligation to give, and the only evidence of intoxication of the defendant was by one witness, contrary to that of several others, and where there was no contention by the State that defendant's conduct was such as to sustain a conviction at common law irrespective of the statutes, C. S., 2621 (286), and 2621 (301), motion for judgment of nonsuit should have been allowed.

APPEAL by defendant from *Ervin, Special Judge,* at May Term, 1943, of ROWAN.

Criminal prosecution tried upon indictment charging the defendant with the felonious slaying of one Mrs. A. J. Rohr.

The evidence discloses that the automobile wreck which caused the death of Mrs. Rohr occurred on Highway No. 29, south of Salisbury, N. C., on Saturday night, 17 October, 1942. The highway is forty feet wide with four lanes for traffic.

C. C. Allison, a colored man, testified that he was driving south on this highway about 10:30 or 11:00 o'clock on Saturday night in company with a colored man and woman. That he was operating a 1937 Ford automobile, which belonged to one Sherrill, who was in the car with him. "That as he came over a little rise around the curve he saw the car operated by W. W. Lowery coming north meeting him on his side of the road; and the said car cut across the road right in front of him to the left at a point about twenty feet before he reached the driveway of Mr. Kluttz. He didn't observe any signal from the other car and collided with his car. The cars came to rest on his side of the road." On cross-examination, this witness testified that he had drunk one bottle

of beer about 6:00 o'clock on Saturday and that the other people with him in the car were "feeling pretty good." That he saw the Lowery car for "as much as 300 yards away." That the front wheels of the Lowery car had reached the left shoulder of the highway when he (Allison) hit him.

Arthur Harkey testified that he arrived at the scene of the wreck immediately after it occurred, but did not see the wreck. He also testified, "From the conversation I had with him and the observation of Lowery, he was drinking pretty heavy." His further testimony discloses that the only conversation he had with the defendant was while Lowery was still in the car, under the wheel. Harkey was standing on the right-hand side of the car and asked Lowery about taking them to the doctor. Lowery said none of them were hurt.

The defendant testified: That he left his home about 8:00 o'clock p.m., on Saturday, 17 October, 1942, to go after his sons who were at a corn shucking. He invited M. J. Ford to go with him. According to the evidence, Mr. Ford requested the defendant to ride up the road to a filling station. While at the filling station Mr. Ford was talking with some women, and one of them asked him for a drink. He asked the defendant to take them up the road where they could get something to drink. The defendant further testified: "I had not had any liquor, beer, wine or any intoxicant to drink that day. I slowed down and parked in front of the walkway, which was beyond the driveway. Someone said, 'Back up and pull in the driveway.' I backed up about six feet and started to pull in when this car came over the hill at a high rate of speed and run into me. There wasn't anything coming when I started to back up. I stayed there about fifteen or twenty minutes after the collision. Two cars came up and carried the ladies to the hospital. After we got the women to the hospital me and Allison were there together. He helped me to get my car loose from his and agreed to settle it between us as to damages. I didn't think any of the women were hurt very much. He went off to get a wrecker and I went home. He did not say anything about calling the law. The Negroes and Mr. Ford were present. I did not see Mr. Harkey there. I went straight home from there where I saw my wife and children. . . . I hadn't had anything to drink at the filling station. I did not know the place. I was headed North. I drove past the driveway, parked in front of the walkway and started back to the driveway and backed up about six feet to pull into the driveway. I was not under the influence of intoxicants. I was not there when the officers arrived, I left because me and him came to an agreement."

Patrolman Lassiter testified that in response to a call he went to the scene of the wreck. Mr. Lowery, the defendant, was not there and he

did not see him until two nights later. "Allison was there. He was sober." On cross-examination, he testified: "I smelled alcoholic odor on Allison's breath. That no skid marks were made by either car until after the impact. The front wheels of the Chevrolet appeared to be about the edge of the road on his left crossways of the road, not quite on the shoulder. There was twenty-five or thirty feet of road unblocked on the left going South. It was about 11:00 o'clock and quite a number of people were present, including Allison and Mr. Harkey, neither said anything about Lowery being intoxicated or drinking. Mr. Lowery stated in response to a question by the court (at the preliminary hearing) that he had driven past the driveway and backed up and started back across."

M. J. Ford testified: "That Lowery came to his house about 8:30 and asked him to go with him to the country. They came to Charlie Coughenhour's place. I met four girls down there, Mrs. Kluttz, Mrs. Scarboro, Mrs. Brandon and Mrs. Rohr. I never had met Mrs. Brandon or Mrs. Rohr. Mrs. Brandon asked me for a drink and I did not have one. I suggested that we go up the road and get one. I asked Mr. Lowery to carry us up there, which he did. We drove up in front of the brick house in front of the walkway where they said stop. They told Mr. Lowery to back up and pull in the driveway. Mr. Lowery backed towards the driveway. He had to back out into the road to straighten up. When he started towards the driveway the wreck happened. The front wheels were off the cement. The colored fellow was in the second lane when he got right at us. Instead of going around he pulled back to the outside curb on the right. His radiator hit about the door. He was going fast. Mr. Lowery was sober. I never saw him take a drink of liquor in my life. I was in his presence from 8:30 until the wreck. We stayed at the scene of the wreck twenty-five or thirty minutes. I did not see Mr. Harkey. No one was there when we left."

Mrs. Wilma Scarboro testified: "That she was with Mr. Lowery and the others that night. Mr. Lowery was sober."

Mrs. Ruth Pendix testified: "That she had been in the presence of Mr. Lowery about an hour and was in the car with him at the time; that he was perfectly sober. We drove past the driveway and went to back up. There wasn't a car in sight. We went to turn into the driveway. This car came over the hill and hit us before we could get into the driveway."

C. C. Allison, who testified for the State, admitted that he had been arrested and convicted for drinking. Harkey admitted that he was convicted about five years ago for transporting liquor. That he tried to wreck the sheriff's car and the officers shot the tires down on his car. He paid a fine of $500.00 and the damage to the sheriff's car.

The defendant Lowery admitted that he had been indicted one time for driving while intoxicated.

The defendant's witness Ford admitted he had been indicted twice for drinking.

Harkey and Lowery offered evidence as to their good character in recent years.

Verdict: Guilty of involuntary manslaughter. Judgment: That the defendant be imprisoned in the State's Prison at hard labor for not less than two nor more than three years.

Defendant appeals, assigning errors.

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

C. M. Llewellyn for defendant.

DENNY, J. The defendant excepts and assigns as error the refusal of his Honor to sustain his motion for judgment as of nonsuit.

The State is relying upon the breach of two statutes by the defendant to sustain the judgment below, to wit, section 101, chapter 407, Public Laws of 1937, N. C. Code of 1939 (Michie), section 2621 (286), which makes it unlawful for any person to drive an automobile on the highways of the State while under the influence of intoxicating liquor or narcotic drugs; and section 116 of the same Act, N. C. Code of 1939 (Michie), section 2621 (301), which requires the driver of an automobile upon a highway to give certain signals before starting, stopping or turning said motor vehicle from a direct line of traffic.

The real question presented for our consideration is whether or not the evidence presented on this record is sufficient to show culpable or criminal negligence on the part of the defendant. The violation of the statutes referred to herein, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter unless a causal relation is shown between the breach of the statute and the death of Mrs. Rohr. *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155. The violation of a traffic law unintentionally or merely through a want of ordinary care would not constitute culpable negligence unless the prohibited act was in itself dangerous—*i.e.*, likely under the circumstances to result in death or great bodily harm, *S. v. Stansell,* 203 N. C., 69, 164 S. E., 580, in which case the Court said: "Ordinary negligence is based on the theory that a person charged with negligent conduct should have known the probable consequence of his act; culpable negligence rests on the assumption that he knew the probable consequences but was intentionally, recklessly, or wantonly indifferent to the results. With respect to the breach of a statute enacted in the interest of public safety a basic concept may

involve the distinction between the intentional violation of the statute and the negligent failure to observe its provisions."

There is no evidence that the defendant was driving at an excessive rate of speed. The only evidence that the defendant made a left turn and drove his car in front of the Sherrill car, which was driven by Allison, was the testimony of Allison, and his evidence is not clear as to whether Lowery was approaching on the right or left side of the road. The defendant and two other witnesses testified that defendant's car was driven on the left side of the highway in front of the Kluttz home, and that the defendant was requested to back his car and enter the driveway of the Kluttz home. That at the time he backed his car into the highway, for the purpose of entering the driveway, no car was approaching from the north, but before the defendant could complete the operation the car driven by Allison approached at a high rate of speed and ran into defendant's car. Allison testified he saw the Lowery car for "as much as three hundred yards." If this is correct and the defendant was approaching him or backing his car in the lane of traffic on Allison's right, it was the duty of Allison to operate his car with due caution and circumspection under the circumstances. He testified, however, he did not make any effort to slacken his speed. There is evidence to the effect that the front wheels of the defendant's car were on the shoulder of the highway entering the driveway, at the time of the wreck, and that a distance of twenty-five or thirty feet of the highway on the left going south was unobstructed. One witness testified that Allison was in the second lane until "he got right at us. Instead of going around he pulled back to the outside curb on the right."

Furthermore, if defendant was parked on the left-hand side of the road, and no car was in sight at the time he undertook to back into the road for the purpose of entering the driveway at the Kluttz home, he was under no obligation to give a signal. *Stovall v. Ragland,* 211 N. C., 536, 190 S. E., 899. Moreover, the difficulty in seeing a hand signal at night is pointed out in the case of *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808, in which the Court said: "It is a matter of common knowledge that a hand signal can seldom be seen by the driver of an approaching car under the circumstances here disclosed, because to him the other driver's hand would be in the shadow of his own light."

The only evidence to show a breach of the statute making it unlawful for a person to drive an automobile on the highways of this State under the influence of liquor, was the testimony of the witness, Harkey, to the effect: "From the conversation I had with him and the observation of Lowery, he was drinking pretty heavy." The defendant and four other witnesses testified the defendant was sober and had not had anything to drink. The witness Allison, the driver of the other car involved in the

wreck, admitted he had drunk a bottle of beer earlier in the evening and that his companions in the car were "feeling pretty good." The investigating officer testified: "I smelled alcoholic odor on Allison's breath." Neither Allison nor Harkey informed the investigating officer that Lowery was drinking and both were present while the officer was investigating the accident.

In the case of *S. v. Satterfield, supra,* this Court said: "There is ample evidence of the defendant's disregard of the statute; his failure to obey the law was the negligent omission of a legal duty. *Ledbetter v. English,* 166 N. C., 125. But this was not sufficient within itself to warrant conviction. There are yet to be considered the element of causal relation, and, indeed, of proximate cause; for mere proof of a negligent act does not establish its causal relation to the injury." There is no contention on the part of the State that the conduct of this defendant was such as to sustain a conviction at common law irrespective of the violation of the statutes relied upon, as was the case in *S. v. Huggins,* 214 N. C., 568, 190 S. E., 926; *S. v. Landin,* 209 N. C., 20, 183 S. E., 526; *S. v. Palmer,* 197 N. C., 135, 147 S. E., 817; *S. v. Trott,* 190 N. C., 674, 130 S. E., 627; *S. v. Gray,* 180 N. C., 697, 104 S. E., 647; *S. v. Gash,* 177 N. C., 595, 99 S. E., 337; and *S. v. McIver,* 175 N. C., 761, 94 S. E., 682.

Moreover, as pointed out in *S. v. Cope,* 204 N. C., 28, 167 S. E., 456, there is a difference in negligence which renders one civilly liable in damages and culpable or criminal negligence in the law of crimes. *Stacy, C. J.,* speaking for the Court, in the above case, said: "An unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility. *S. v. Stansell, supra; S. v. Agnew,* 202 N. C., 755, 164 S. E., 578; *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155; *S. v. Tankersley,* 172 N. C., 955, 90 S. E., 781; *S. v. Horton,* 139 N. C., 588, 51 S. E., 945."

We think the evidence as to the failure of the defendant to give a signal as required by the statute, when considered in its most favorable light for the State, is insufficient to show culpable negligence. As to the breach of the other statute upon which the State relies to sustain the trial court, conceding that there is some evidence of the intoxication of the defendant, there is no evidence on this record of reckless driving or other misconduct on the part of the defendant resulting from intoxication which shows such proximate causal relation between the breach of the statute and the death of Mrs. Rohr as is essential to a prosecution for involuntary manslaughter, *S. v. Satterfield, supra.* It is in this respect that this case is distinguishable from other decisions of this

Court involving violations of the statute which makes it unlawful to drive an automobile on the highways of the State while under the influence of intoxicating liquor or narcotic drugs. *S. v. Landin, supra; S. v. Dills,* 204 N. C., 33, 167 S. E., 459; *S. v. Harvell,* 204 N. C., 32, 167 S. E., 459; *S. v. Palmer,* 197 N. C., 135, 147 S. E., 817; *S. v. Leonard,* 195 N. C., 242, 141 S. E., 736; *S. v. Jessup,* 183 N. C., 771, 111 S. E., 523.

The defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

D. M. WARREN, CHAIRMAN: A. C. BOYCE, E. N. ELLIOTT, RALEIGH PEELE AND J. A. WEBB, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS AND BOARD OF EQUALIZATION AND REVIEW OF CHOWAN COUNTY, AND P. S. McMULLAN, TAX SUPERVISOR OF CHOWAN COUNTY, v. A. J. MAXWELL, CHAIRMAN; STANLEY WINBORNE, CHARLES M. JOHNSON, ROBERT G. DEYTON AND HARRY McMULLAN, CONSTITUTING THE NORTH CAROLINA STATE BOARD OF ASSESSMENT, AND MORRIS S. HAWKINS AND L. H. WINDHOLZ, RECEIVERS OF THE NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 24 November, 1943.)

1. Appeal and Error §§ 5, 40f—

Where plaintiffs' cause was heard, in the court below, independently on the merits, and action on demurrers was reserved without prejudice to the defendants, a demurrer *ore tenus*, renewed in this Court, brings both questions up for decision.

2. Mandamus § 2a—

Subject to the right to review in this Court as it may exist under proper procedure, the final action of an administrative board on a matter within its jurisdiction will be held to be conclusive, and will be given effect in a subsequent proceeding involving the same matter.

3. Mandamus §§ 2a, 2b: Appeal and Error § 18—

Mandamus is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction. If there has been error in law, prejudicial to the parties, or the board has exceeded its authority, or has mistaken its power, or has abused its discretion—where the statute provides no appeal—the proper method of review is by *certiorari*.

4. Mandamus §§ 2b, 2c: Taxation § 25—

Mandamus is a proper remedy to compel the North Carolina State Board of Assessment to perform a public duty of a ministerial nature imposed by statute—but not to control them in the exercise of any discretion. The assuming of jurisdiction for assessments over the railroad lines

of common carriers and reporting to the several counties their quotas of valuation thereof may be regarded as ministerial duties.

5. Mandamus § 1—

While *mandamus* is no longer regarded as a high prerogative writ, a peremptory *mandamus* is a writ of enforcement—in the nature of an execution of the judgment of the court—and will not be issued unless petitioner has shown a clear right thereto, the ministerial duty, as well as the neglect or refusal to perform it, must appear.

6. Mandamus § 2c: Taxation § 25—

Where a railroad, under an order of the Interstate Commerce Commission, abandons its operations as a common carrier on a portion of its road, cancels its tariffs over same and thereafter does not operate over such portion of its line, except to haul away the scrap as the roadbed is dismantled and salvaged, it ceases to be vested with a character which would bring it within the jurisdiction of the State Board of Assessment for appraisal and taxation. C. S., 7971 (193), *et seq.*

APPEAL by plaintiffs from *Johnson, Special Judge,* at March Civil Term, 1943, of WAKE.

In this proceeding the plaintiffs sought a peremptory *mandamus* to have the defendant receivers to cause to be listed with the State Board of Assessment, for the year 1941, as a part of the track, roadbed and right of way of the Norfolk Southern Railroad Co., that part of its road running from Edenton, in Chowan County, to Norfolk, Virginia, which lies within the State, and to compel the said Board of Assessment to include the same in determining the pro rata part of the total valuation of the railroad in North Carolina to be apportioned to Chowan County for that year, and to certify such apportionment to the Board of Commissioners of the county.

The complaint, omitting formal parts and the prayer for relief, is as follows:

"1. Plaintiffs, other than P. S. McMullan, constitute the County Commissioners and Board of Equalization and Review of Chowan County, N. C., and plaintiff, P. S. McMullan, is Tax Supervisor of said County. The defendants, A. J. Maxwell, Chairman; Stanley Winborne, Charles M. Johnson, Robert G. Deyton and Harry McMullan, constitute the North Carolina State Board of Assessment and the defendants, Morris S. Hawkins and L. H. Windholz, are duly qualified and acting Receivers of the Norfolk Southern Railroad Company, having been appointed as such by the United States District Court having jurisdiction. The said Norfolk Southern Railroad Company is a corporation incorporated under the laws of the State of Virginia and operating a railroad as a common carrier in the States of Virginia and North Carolina and in the County of Chowan.

"2. Prior to August 2, 1940, the Norfolk Southern Railroad Company operated a railroad as a common carrier over a track, right of way and roadbed extending from Edenton in Chowan County, N. C., northwardly to the northern boundary of the County and on to Suffolk, Va. On said date the Interstate Commerce Commission issued its order effective September 2, 1940, authorizing, but not requiring, the railroad to abandon its operations as a common carrier on said line, and on or about September 21, 1940, the said railroad canceled its tariffs over said line and thereafter did not operate over said line except as hereinafter alleged.

"3. Prior to December 31, 1940, the said railroad contracted to sell and deliver the rails and fastenings on said line as scrap iron and prior to January 1, 1941, began tearing up the rails and fastenings on said line beginning at the Suffolk end and transporting them over the said line in freight cars to Edenton for delivery to the purchaser but on and for some time after January 1, 1941, had not reached the Chowan County line in tearing up the rails and fastenings and that part of the line located in Chowan County including its right of way, rails and roadbed were intact and in substantially the same physical condition it had been in when it was used for the regular operation of trains as a common carrier and was capable of use for operations as a common carrier and was being regularly used for the purpose aforesaid.

"4. The railroad failed to list the right of way, track and roadbed from Edenton to the northern Chowan County line with the State Board of Assessment for taxation for the year 1941 as a part of the railroad line but attempted to list it with the Chowan County authorities as scrap iron. The County authorities refused to accept such listing and filed a petition with the State Board of Assessment requesting that the said Board require the railroad to list the said right of way and roadbed as a part of its line to be included in determining the pro rata part of the total valuation of the railroad in North Carolina to be apportioned to Chowan County.

"5. After a hearing before the State Board of Assessment on August 20, 1941, at which the plaintiffs and the railroad were represented by counsel and in which the facts alleged were admitted to be true by the railroad, the State Board of Assessment entered the following order:

" 'ORDER, that the abandoned track involved in the appeal of the Norfolk Southern Railroad Company *vs.* Chowan County Commissioners be listed for the year 1941 with the local taxing units as "scrap." '

"Plaintiffs have refused to accept such listing and contend that the track, roadbed and right of way in controversy should be listed with the State Board of Assessment as part of the railroad line in North Carolina to be included in determining the pro rata part of the total valuation of the railroad in North Carolina to be apportioned to Chowan County."

Upon a demurrer for misjoinder of parties, it appearing that the receivers had conveyed the railroad property to the Norfolk and Southern Railroad Company, which company was now in operation of the lines of the Norfolk Southern Railroad formerly operated by the receivers, the complaint was amended and the Norfolk and Southern Railroad Company was brought in as party defendant.

It appears from the record that the plaintiff sought the same relief by petition to the State Board of Assessment prior to the institution of this action, had been heard upon the merits, and the State Board of Assessment had denied the petition on the ground that the owners and operating company had obtained permission of the Interstate Commerce Commission to abandon its operations as a common carrier on this line, and the company had thereupon canceled its tariffs, ceased such operations, and was engaged only in collecting, transporting and delivering to the purchaser scrap from the abandoned portion of the road, using its own facilities for that purpose as the road was gradually dismantled.

Since the above facts appear substantially in the complaint, the several defendants demurred thereto as not stating a cause of action; and at the same time answered, setting up the abandonment of the line as a carrying road, and the fact that the offer to list the property within the county for local taxation had been rejected.

The matter came on for a hearing before Hon. Jeff D. Johnson, Jr., Special Judge of the Superior Court, at March Civil Term, 1943, of Wake Superior Court, upon an agreement that the judge might hear and determine the case without the intervention of a jury. Reserving action on the demurrers without prejudice to the defendants, Judge Johnson proceeded to hear the case on the merits.

The evidence tended to show that the receivers of the Norfolk Southern Railroad Company obtained from the Interstate Commerce Commission an order, effective 2 September, 1940, authorizing them to abandon the line running from Edenton to Suffolk, of which the road in controversy is a part; that the receivers thereupon canceled all tariffs and ceased their publication on or about 21 September, 1940, and did not thereafter operate the road as carriers. That the rails had been sold as scrap, and were being torn up from the roadbed, and transported and delivered to the purchaser, the receivers using their own facilities upon the road for this purpose only, as the roadbed was gradually dismantled.

Upon motion of the defendants, made at the conclusion of the plaintiffs' evidence and of all the evidence, judgment was entered that "the plaintiffs be, and they are hereby nonsuited and this action is dismissed." From this judgment the plaintiffs appealed. The members of the State Board of Assessment and other defendants renewed in this Court, *ore tenus,* their demurrer to the complaint as not stating a cause of action.

W. D. Pruden for plaintiffs, appellants.

Attorney-General McMullan and Assistant Attorney-General Patton for State Board of Assessment, appellee.

R. N. Simms and Robt. N. Simms, Jr., for Receivers of Norfolk Southern Railroad Company and for Norfolk Southern Railway Company, defendants, appellees.

SEAWELL, J. The complaint is a model of conciseness and fairness. It was obviously the purpose of the pleader to strip the case of non-essentials and bring the controversy to the real issue—at most a narrow one—upon facts about which there could be no dispute. But the peculiar nature of the remedy sought, in view of the frank statements in the complaint, renders plaintiffs' case vulnerable in two aspects: On the question whether they have the right to be heard at all in the attempted relitigation of a matter already heard by a competent tribunal on the merits; and, if that obstacle is hurdled, whether the status of the railroad line at the taxable date, as described by the plaintiffs, brings it within the jurisdiction of the State Board of Assessment under applicable law. Machinery Act of 1939, ch. 310; Public Laws 1939, sec. 1612, *et seq.;* Michie's Code, 1939, sec. 7971 (193), *et seq.*

While the plaintiffs' cause was heard independently on the merits, and action on the demurrers was reserved without prejudice to the defendants, the demurrer, *ore tenus,* renewed in this Court would bring both these questions up for decision. *Raleigh v. Hatcher,* 220 N. C., 613, 616, 18 S. E. (2d), 207; *Gurganus v. McLawhorn,* 212 N. C., 397, 193 S. E., 844; *Staley v. Park,* 202 N. C., 155, 156, 162 S. E., 202. It is hardly necessary, however, to give the plaintiffs' position two fatal blows—by sustaining both demurrer and judgment on the merits; so we follow the pattern of the trial. It is not amiss to say, however, that *mandamus* is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction. *Pue v. Hood, Comr. of Banks,* 222 N. C., 310, 22 S. E. (2d), 896. If there has been an error in law, prejudicial to the parties, or the board has exceeded its authority, or has mistaken its power, or has abused its discretion—where the statute provides no appeal—the proper method of review is by *certiorari. Belk's Dept. Store, Inc., v. Guilford County,* 222 N. C., 441, 446, 23 S. E. (2d), 897; *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. Subject to the right to review in this Court as it may exist under proper procedure, the final action of the Board will be held to be conclusive, and will be given effect in a subsequent proceeding involving the same matter.

However, on the hearing on the merits, plaintiffs' petition for *mandamus* was properly denied. Speaking now not of the receivers, or representatives of the new company which has taken over the railroad properties for operation, who are not public officers and are not subject to *mandamus* to compel the performance of a private duty, but speaking of the members of the Board of Assessment who are public officers, *mandamus* is a proper remedy to compel the performance of a public duty of a ministerial nature, when this duty has been neglected or declined. There is no doubt that where the right to the writ has not been clouded by previous resort to other remedy, it will issue to compel the State Board of Assessment to perform the ministerial duties imposed upon them by the statute—but not to control them in the exercise of any discretion. The initial step of assuming jurisdiction over the railroad lines of common carriers may be regarded as ministerial, and the duty of reporting to each of the several counties its quota of the total valuation accruing to the mileage within it is of a like character.

But the *mandamus*, while no longer regarded as a high prerogative writ—as was its common law status—*Person v. Watts*, 184 N. C., 499, 505, 115 S. E., 336—will not be issued unless the petitioner has shown a clear legal right to the writ. *Poole v. Board of Examiners*, 221 N. C., 199, 19 S. E. (2d), 635; *Champion v. Board of Health*, 221 N. C., 96, 19 S. E. (2d), 239; *Harris v. Board of Education*, 216 N. C., 147, 4 S. E. (2d), 328; *Raleigh v. Public School System, ante*, 316, 26 S. E. (2d), 591. Certainly it will not issue where upon the face of the petition or upon the facts disclosed in the evidence, the plaintiffs have no right to the relief they seek to obtain by such mandatory means. The ministerial duty, as well as the neglect or refusal to perform it, must clearly appear, since a peremptory *mandamus* is a writ of enforcement—or in the nature of an execution of the judgment of the Court. *Powers v. Asheville*, 203 N. C., 2, 164 S. E., 324; *Cody v. Barrett*, 200 N. C., 43, 156 S. E., 146; *White v. Commissioners of Johnston County*, 217 N. C., 329, 7 S. E. (2d), 825; *Mears v. Board of Education*, 214 N. C., 89, 197 S. E., 752.

We agree with the court below that the evidence may be regarded as showing a definite abandonment of the road with respect to the common carriage of freight and passengers, and that its use in the removal and transportation of scrap material during the process of dismantling and salvage did not vest it with a character which would bring it within the jurisdiction of the State Board of Assessment for appraisal and taxation. We are assured of the correctness of this position on examination of the statute under which the State Board of Assessment exercises its duties, with special attention to the general purpose of the Act, especially the provisions regarding the apportionment of the total taxable

value to the counties in the proportion that the mileage therein sustains to the total length of the road with which it is assessed. Sec. 1613; Michie's Code of 1939, sec. 7971 (194). In such total valuation is included the franchise which, with respect to the abandoned road, no longer exists and which, when the tariffs are canceled, cannot be exercised. Furthermore, the deterioration in value of the road itself, thus separated from its uses, would make the equation demanded by the statute so inequitable as to lead to the conclusion it was not intended by the law.

At various other places we find reference in the statute indicating that the law refers to roads in actual operation; and we have come to the conclusion that a road thus definitely abandoned and retired from the operative system, after a proper order respecting the convenience and necessity of its further operation as a carrying road has been granted for such abandonment, is no longer within the purview of the statute.

The listing of this property is the care of the local authorities. We might say here that the order of the State Board of Assessment that the local boards list the property as "scrap" is not binding upon them in so far as it characterizes the nature of the property. In the listing and the assessment of this property, they are to be guided by the same laws which apply to other property within their respective jurisdictions. It may be well to say, however, that since we consider the road as definitely abandoned as a part of the operating system, and no more to be used as a carrying road, the property is not to be enhanced by attributing to it any element of value arising from that source. Otherwise, the result would simply be to transfer the jurisdiction from the State Board of Assessment to the local boards of appraisal, to be exercised upon similar considerations of value. This would be manifestly improper.

The judgment is

Affirmed.

STATE v. JACK SUDDRETH.

(Filed 24 November, 1943.)

1. Courts, Superior §§ 1b, 1c: Intoxicating Liquor § 9a—

While an appeal from conviction in a Recorder's Court upon a warrant, charging unlawful possession on a certain date of intoxicating liquors for the purpose of sale, was pending in the Superior Court, that Court had jurisdiction to try the defendant on a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence and need not be specified in the indictment. C. S., 4625. And there is no conflict of jurisdiction between the Recorder's Court under C. S., 1567, and the Superior Court under C. S., 1437.

2. Indictment § 12: Appeal and Error § 37b—

If a motion to quash is not made before a plea of not guilty, the motion is addressed to the discretion of the trial court and is not reviewable on appeal.

3. Intoxicating Liquors § 4d—

Where a person has in his possession tax-paid intoxicating liquors in quantity not in excess of one gallon, in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized by ch. 49, Public Laws 1937, nothing else appearing, such possession is not now *prima facie* evidence that such intoxicants are so possessed for the purpose of sale under C. S., 3411 (j).

4. Intoxicating Liquors § 9d—

In a criminal prosecution for the unlawful possession of intoxicating liquors for the purpose of sale, where all the evidence tended to show that accused had concealed in the apartment occupied as a residence by himself and family, above a store operated by him, five pints of tax-paid liquor, the seals on which had not been broken, and a sixth pint was found by officers at the back door of the store, where an unknown person was seen to "set something down," and some empty bottles, apparently wine bottles, were also found in the store, motion of defendant for judgment of nonsuit, C. S., 4643, should have been sustained.

APPEAL by defendant from *Pless, J.*, at 22 February Term, 1943, of CALDWELL.

Defendant was tried and found guilty in Recorder's Court of Caldwell County on 19 January, 1943, upon warrant sworn out 2 January, 1943, charging defendant with unlawful possession on 25 December, 1942, of "a quantity of intoxicating liquors for the purpose of sale." Judgment of the court was that defendant be confined in the common jail of Caldwell County for a period of six months, and assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission, to be suspended upon payment of a fine of $50.00 and costs. Defendant appealed therefrom to Superior Court of Caldwell County.

At February Term, 1943, of Superior Court of Caldwell County, a bill of indictment was found by the grand jury charging defendant in separate counts with (1) "unlawful possession of intoxicating liquors for purpose of sale," (2) unlawful possession of intoxicating liquors for beverage purposes, (3) unlawful transportation of intoxicating liquors, (4) unlawful sale of intoxicating liquors, and (5) unlawful purchase of intoxicating liquors, all on 25 December, 1942. At said term of Superior Court defendant pleaded not guilty and moved to quash the bill of indictment on the ground that as this is a case on appeal from the Recorder's Court, a court with final jurisdiction, it should be tried

on the warrant and not upon a bill of indictment. Motion denied. Exception by defendant.

And on the trial in Superior Court upon the bill of indictment evidence for the State tends to show these facts: Defendant has a store on the ground floor and he, his wife and two children live upstairs over the grocery store in a certain building in Caldwell County. On 20 December, 1942, officers of that county, armed with a warrant therefor, searched the premises of defendant for intoxicating liquor. While searching was going on defendant was downstairs in the grocery department, but he went upstairs while officers were there. His wife and his children were there, his wife upstairs in the living quarters, and two men were downstairs in the store. Five pints of bottled in bond tax-paid liquor, two pints of which were stuck in behind the seat of the settee, two pints in the back or behind the seat of the upholstered chair, and one pint between the mattress and springs of a bed were found upstairs in the living quarters. The seals had not been broken. A sixth pint was found at the back door where one of two men in the store was seen to stoop and "set something down." While the evidence fails to show whether the man set it down, or whether the seal on it was broken, it does show that it too was tax-paid whiskey. The officers saw some empty bottles there, and Officer Goble testified: "I saw some empty bottles. I can't tell whether they were whiskey bottles or not. The ones I saw looked more like wine bottles. I don't know whether he sells wine or not. I smelled of several of the bottles but couldn't tell exactly whether the odor was whiskey or not. It was just a kind of sour smell. . . . The bottles I saw were wine bottles."

Motions for judgment as of nonsuit were overruled. C. S., 4643. Defendant excepted.

The court submitted the case to the jury only upon the count charging defendant with unlawful possession of intoxicating liquors for purpose of sale.

Verdict: Guilty.

Judgment: That defendant pay a fine of $100.00 and costs, and be confined in the common jail of Caldwell County for a period of twelve months and assigned to work under supervision and control of State Highway and Public Works Commission, the sentence being suspended upon conditions named. Defendant moved in arrest of judgment.

Defendant appealed to Supreme Court and assigns error.

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

W. H. Strickland for defendant, appellant.

WINBORNE, J. The record on this appeal fails to support defendant's exceptive assignment to the denial of his motion to quash the bill of indictment for that, while his appeal from a judgment of Recorder's Court upon warrant charging unlawful possession of intoxicating liquor for the purpose of sale on 25 December, 1942, was pending in Superior Court, that court did not have jurisdiction to try him on a bill of indictment, of latter date than the warrant, charging the same offense. The record contains nothing to show that the offenses are the same. There is no admission or finding of fact to this effect, and the fact that both the warrant and the bill of indictment charge that the offense took place on 25 December, 1942, is not sufficient to indicate the identity of offense as a matter of law. Time is not of the essence of the offense, and the exact time need not be specified in the bill of indictment. C. S., 4625; *S. v. Williams,* 219 N. C., 365, 13 S. E. (2d), 617; *S. v. Moore,* 222 N. C., 356, 23 S. E. (2d), 31; *S. v. Trippe,* 222 N. C., 600, 24 S. E. (2d), 340. Hence, the record fails to present conflict of jurisdiction between the Recorder's Court under C. S., 1567, and the Superior Court under C. S., 1437. Furthermore, while the record shows that motion to quash was made "before any evidence was offered," it is not clear that the motion was made before plea of not guilty was entered. If not made before such plea, the motion is addressed to discretion of the trial court, and is not reviewable on appeal. *S. v. Gibson,* 221 N. C., 252, 20 S. E. (2d), 51.

Defendant's challenge to the ruling of the court below in denying his motions for judgment as in case of nonsuit, C. S., 4643, presents for determination two basic questions: First: Where a person, the defendant in this case, has in his possession so-called tax-paid intoxicating liquors in quantity not in excess of one gallon, that is, alcoholic beverages of such quantity "upon which taxes imposed by the laws of Congress of the United States or by the laws of this State" have been paid, in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized under and by virtue of chapter 49, Public Laws 1937, called the Alcoholic Beverage Control Act, nothing else appearing, is such possession now *prima facie* evidence that such intoxicating liquors are possessed by such person for the purpose of being sold?

This is the first time that this question has been so squarely presented to this Court as to require a decision on it. However, we are of opinion and hold that, in so far as applicable to such factual situation, such *prima facie* rule of evidence, prescribed by 3 C. S., 3411 (j), section 10 of the Turlington Act, chapter 1, Public Laws of 1923, is in irreconcilable conflict with the provisions of the Act of the General Assembly of 1937, entitled "An Act to Provide for the Manufacture, Sale and Control

of Alcoholic Beverages in North Carolina," chapter 49, Public Laws 1937, and, to such extent, is repealed thereby.

At the time of the enactment of the 1937 Act, chapter 49, there were certain statutes in effect in this State which are pertinent to be considered in ascertaining what the Legislature intended by the provisions of the Act, from a State-wide standpoint. Section 3379 of Consolidated Statutes declared that it is unlawful for any person to have or keep in possession, for the purpose of sale, any spirituous liquor, and that proof of the possession of more than one gallon of such liquors at any one time shall constitute *prima facie* evidence of the violation of this section. Section 3411 (b) of 3 Consolidated Statutes of 1924, section 1 of the Turlington Act, chapter 1, Public Laws 1923, declared that "no person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article . . ." And, although section 3411 (j) of 3 Consolidated Statutes of 1924, section 10 of the Turlington Act, chapter 1, Public Laws 1923, provided that "it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein," it also provided that "the possession of liquor by any person not legally permitted under this article to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article." The only other provision of the Turlington Act relating to lawful possession pertained to wine for sacramental purposes.

With knowledge of the statutes, and of strict application and liberal construction of the same in the decisions of the courts "to the end that the use of intoxicating liquor as a beverage may be prevented," the State's policy expressly declared in the Turlington Act of 1923, 3 C. S., 3411 (b), the General Assembly of 1937 in enacting chapter 49 of Public Laws of that year, declared: "Section 1. That the purpose and intent of this Act is to establish a system of control of the sale of certain alcoholic beverages in North Carolina, and to provide the administrative features of the same, in such manner as to insure, as far as possible, the proper administration of the sale of certain alcoholic beverages under a uniform system throughout the State." As a part of this system provision is made for the operation of stores in counties coming under the provisions of the Act, at which alcoholic beverages may be bought legally. And in section 14 it is declared that "it shall not be unlawful for any person to transport a quantity of alcoholic beverages not in

excess of one gallon from a county in North Carolina coming under the provisions of this Act to or through another county in North Carolina not coming under the provisions of this Act: *Provided,* said alcoholic beverages are not being transported for the purposes of sale, and *provided further,* that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken . . ." Moreover, in section 22, it is provided that "it shall be unlawful for any person, firm or corporation, to purchase in, or to bring in this State, any alcoholic beverage from any source, except from a county store operated in accordance with this Act, except a person may purchase legally outside of this State and bring into the same for his personal use not more than one gallon of such alcoholic beverage . . ." And in section 27, it is declared that certain laws passed in 1935, not pertinent here, and "all other laws and clauses of laws in conflict herewith to the extent of such conflict are hereby repealed." And in this Act of 1937, chapter 49, no reference is made to the provision of 3 C. S., 3411 (j), as to it not being unlawful to possess liquor in one's private dwelling, etc., as above quoted. And, albeit no express reference is made to the provisions of that part of section 3, C. S., 3411 (j), section 10 of the Turlington Act, Public Laws 1923, chapter 1, relative to the *prima facie* rule of evidence, quoted above, the express provisions of the Act present an irreconcilable conflict therewith. To summarize, the Legislature has said in this Act of 1937, chapter 49, that it is lawful (a) to purchase intoxicating beverages from a county store operated in accordance with the provisions of the act, and (b) if the transportation of such alcoholic beverages be not for purpose of sale, to transport a quantity of same not in excess of one gallon from a county coming under the provisions of the Act to or through another county in North Carolina not coming under the provisions of the Act, and (c) to bring into the State for personal use not more than one gallon of alcoholic beverages purchased legally outside of the State. These provisions are subjective in character, and harmonize with the *prima facie* rule of evidence as to possession of more than one gallon of spirituous liquors as contained in C. S., 3379. But to give general effect to the *prima facie* rule of evidence set out in 3 C. S., 3411 (j), would be to hold that, although the Legislature has by this 1937 Act legalized the sale of alcoholic beverages to a person at authorized stores, and although it has legalized the transportation of such alcoholic beverages by him "to or through" any county in this State, and although it has not repealed that provision of 3 C. S., 3411 (j), which says that it is not unlawful for him to possess intoxicating liquor in his private dwelling while the same is occupied and used by him as his dwelling only, for his personal consumption, and that of his family residing in such dwelling, and his *bona fide* guests when enter-

tained by him therein, the possession of any such intoxicating liquors or alcoholic beverages is "*prima facie* evidence" that such person keeps same "for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions" of the Turlington Act, Public Laws 1923, chapter 1.

To accept this construction is to attribute to the Legislature the intention to make it lawful for a person to purchase, transport and possess in his home for the purposes mentioned, not more than one gallon of intoxicating liquors or alcoholic beverages, and, at the same time, to make the possession of it evidence of his guilt of a criminal offense for which, upon charges being preferred, he may be convicted by a jury and subjected to punishment therefor. We cannot assume that the Legislature had any such inconsistent and conflicting intentions. It is not ours to make the law. That is legislative. It is ours to interpret the law as the Legislature enacts it.

The second basic question: Holding as we do hereinabove on the first basic question, are the facts and circumstances of such possession of such quantity of tax-paid intoxicating liquors as disclosed by the evidence in the record on this appeal, taken in the light most favorable to the State, sufficient to take the case to the jury on the issue arising upon the count charging unlawful possession of intoxicating liquors for the purpose of sale? The answer is No. All the evidence tends to show that defendant and his wife and children lived upstairs in the building where the whiskey was found and there is no evidence that the upstairs room was used for any other purpose. Five pints of the tax-paid liquor were found there. And there is no sufficient evidence to connect defendant with the possession of the other pint found at the back door of the store—the fair inference being that it was put there by another, for whose acts the evidence fails to show defendant to be responsible. In absence of other circumstances, the size of the containers and the manner in which the bottles were kept is not evidence of possession for purpose of sale, and do not justify an inference of guilt.

For reasons stated, the motion of defendant for judgment as in case of nonsuit should have been sustained. Hence, the judgment is

Reversed.

MRS. C. E. HOPKINS v. WALTER J. BARNHARDT.

(Filed 24 November, 1943.)

1. Appeal and Error § 30b: Pleadings § 13½—

Where there is a defect of jurisdiction or the complaint fails to state a cause of action, and such defects appear on the face of the record, this Court will *ex mero motu* dismiss the action.

2. Attorney and Client § 10—

In this jurisdiction *it is held* that attorney's fees may not be taxed as costs.

3. Justices of the Peace § 3—

The jurisdiction of a justice of the peace is limited and special—not general—and he can only exercise the power conferred upon him by the Constitution, Art. IV, sec. 27, and statutes, C. S., 1473. He has no equitable powers.

4. Same—

Neither the Constitution of North Carolina, nor any statutes enacted pursuant thereto, gives jurisdiction to justices of the peace in an action for a penalty plus reasonable attorney's fees to be fixed and awarded by the court.

5. Courts, Superior, § 2d—

On an appeal from a justice of the peace, the jurisdiction of the Superior Court is derivative only and is limited to the powers which the justice of the peace could have exercised.

6. Courts § 9—

The Congress of the United States cannot confer jurisdiction upon a State court or any other court which it has not ordained or established. And Congress did not undertake, by the Emergency Price Control Act of 1942, to confer jurisdiction upon any court for the enforcement of sec. 925 (e) of said Act.

7. Penalties § 2: Parties §§ 1, 2—

In this jurisdiction an action for the collection of a penalty must be brought in the name of the party suing therefor, unless the statute provides otherwise, and the joinder of additional parties is neither necessary nor proper.

APPEAL by defendant from *Rousseau, J.*, at February Term, 1943, of CABARRUS.

Civil action instituted before a justice of the peace, tried *de novo* on appeal to the Superior Court to recover penalty and attorneys' fees by reason of an alleged violation of the Emergency Price Control Act of 1942.

Before the justice of the peace "plaintiff complained of defendant and alleged that defendant overcharged her for sugar and that she was entitled to recover $50.00 penalty plus reasonable attorneys' fees under law regulating same." Defendant failed to appear, and judgment was rendered in favor of plaintiff and against the defendant for $50.00, and Robert H. Irvin and C. M. Llewellyn, attorneys for plaintiff, were each awarded judgment against the defendant for $15.00. Defendant in apt time gave notice of appeal to the Superior Court. On the trial *de novo* in the Superior Court plaintiff offered evidence tending to show that defendant filed with the local rationing board on 9 October, 1942, his ceiling price for sugar as seven cents per pound as of 15 March, 1942, which ceiling price under the law and the General Maximum Price Regulation of the Office of Price Administration became effective 28 April, 1942, and remains unchanged. That plaintiff, through her son on or about 22 August, 1942, purchased from defendant one hundred pounds of sugar for canning purposes at the price of $10.97. Plaintiff offered the sales ticket showing the purchase of the sugar and further testimony tending to show payment therefor out of proceeds from the sale of cotton, which proceeds were turned over to the defendant and credited on plaintiff's account.

From a jury verdict favorable to plaintiff and judgment based thereon in favor of plaintiff for $50.00, and requiring the defendant to pay into the office of the clerk of the Superior Court the sum of $25.00, attorneys' fees for the use and benefit of plaintiff's attorneys, defendant appealed to the Supreme Court, assigning error.

By consent of the parties it was stipulated that Prentiss M. Brown, Administrator, Office of Price Administration, should be made a party plaintiff. This was allowed *pro forma*.

C. M. Llewellyn and John D. Shaw for appellees.

B. W. Blackwelder for appellant.

DENNY, J. The only exception and assignment of error by the defendant is to the refusal of his Honor to enter judgment as of nonsuit upon the ground that plaintiff had not offered sufficient evidence to establish the ceiling price of the defendant on the date of sale of said sugar.

We think a more serious question confronts us on this record, to wit, one of jurisdiction. The court, in accordance with the long established practice, raises the question *ex mero motu*. "When there is a defect of jurisdiction, or the complaint fails to state a cause of action, that is a defect upon the face of the record proper, of which the Supreme Court on appeal will take notice, and when such defects appear the Court will

ex mero motu dismiss the action." McIntosh, N. C. Pleading and Practice, p. 460; *Shepard v. Leonard, ante,* 110, 25 S. E. (2d), 445; *S. v. King,* 222 N. C., 137, 22 S. E. (2d), 445; *Edwards v. McLawhorn,* 218 N. C., 543, 11 S. E. (2d), 562; *McCune v. Mfg. Co.,* 217 N. C., 351, 8 S. E. (2d), 219; *Henderson County v. Smyth,* 216 N. C., 421, 5 S. E. (2d), 136; *Elizabeth City Water & Power Co. v. Elizabeth City,* 188 N. C., 278, 124 S. E., 611; *Cressler v. Asheville,* 138 N. C., 482, 51 S. E., 53; *Norris v. McLam,* 104 N. C., 159, 10 S. E., 140.

We have for determination the question: Does a justice of the peace have jurisdiction in an action where the plaintiff demands a statutory penalty of $50.00, plus attorneys' fees?

The jurisdiction of a justice of the peace in this State is determined by the Constitution and statutes consistent therewith. Art. IV, sec. 27, N. C. Const. This Court so held in the case of *S. v. Jones,* 100 N. C., 438, 6 S. E., 655, where it is said: "The jurisdiction thus conferred and that may be conferred is special—not general—and the officer is limited to the exercise of his authority by the regulations and methods of procedure prescribed by statute, subject to the constitutional provision. That is, a justice of the peace can only exercise the powers conferred upon him by the Constitution and statutes in harmony with it; his jurisdictional authority is not enlarged by principles of law applicable only to courts of general jurisdiction; nor can he adopt methods of procedure, or exercise his authority in cases not strictly allowed by law—he may do only what the statute allows him to do, and his official acts will be upheld, however informal, if they embody the substance of the thing or purpose intended." Since the jurisdiction of a justice of the peace is special—not general—what is the limitation upon the granted powers to adjudicate a claim (1) for a penalty of $50.00, and (2) to fix and award attorneys' fees? It has long been settled in this State that an action to recover a penalty is an action *ex contractu,* and, since justices of the peace have been given jurisdiction in matters of contract not exceeding $200.00 (Art. IV, sec. 27, N. C. Const.; C. S., 1473), it follows that when a penalty demanded does not exceed $200.00 a justice of the peace has jurisdiction. *Katzenstein v. Raleigh and Gaston R. R. Co.,* 84 N. C., 688; *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735. But the power of a justice of the peace to fix and award attorneys' fees is a more serious question. We know of no statute authorizing justices of the peace to fix and award attorneys' fees in any proceeding. Nor can it be held that a justice of the peace has the inherent or equitable power to fix and award such fees. A justice of the peace has no equitable powers, *Moore v. Wolfe,* 122 N. C., 711, 30 S. E., 120, and the inherent powers of a court do not increase its jurisdiction but are limited to such powers as are essential to the existence of the court and necessary to the

orderly and efficient exercise of its jurisdiction. 14 Amer. Jur., Courts, sec. 171, p. 370. Neither can it be held in this jurisdiction that the award of attorneys' fees may be taxed as costs, *Parker v. Realty and Insurance Co.,* 195 N. C., 644, 43 S. E., 254, and the cases there cited. Nor is *Bank v. Lumber Co.,* 128 N. C.,193, 38 S. E., 813, an authority to the contrary, as contended by the appellees.

It must be conceded that courts of competent jurisdiction, in the exercise of chancery powers or by express statute, may make allowance for attorneys' fees in certain cases. The award, however, is not usually made as a penalty or forfeiture, but ordinarily is awarded out of the funds in the custody of the Court or out of the sum recovered as a result of the litigation in which the attorney was employed. *In re Will of Howell,* 204 N. C., 437, 168 S. E., 671, cited with approval in 20 C. J. S., at page 457; *In re Stone,* 176 N. C., 336, 97 S. E., 216.

The appellees contend that the court has express authority to fix and award reasonable attorneys' fees, pursuant to the provisions of the Emergency Price Control Act of 1942, 50 U. S. C. A., sec. 925 (e), the pertinent part of which reads as follows: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or minimum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorneys' fees and costs as determined by the court. . . . Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act." (This Act was approved 30 January, 1942.)

The appellees further contend that when Congress, in the exercise of the powers entrusted to it by the Constitution, enacts legislation, it speaks for all the people and all the States, and such legislation fixing a policy is as binding on a State as if the legislation had emanated from its own legislature, citing *Mondou v. N. Y. N. H. and H. R. Co.,* 223 U. S., 1, 56 L. Ed., 327. It must be noted, however, the subsection upon which appellees rely provides that any suit or action brought under said subsection may be brought in any court of competent jurisdiction. "Congress cannot confer jurisdiction upon a State Court or any other Court which it has not ordained and established." 14 Am. Jur., Courts, sec. 162, p. 365; *Walton v. Pryor,* 276 Ill., 536, 115 N. E., 2, 245 U. S., 675, 62 L. Ed., 542. The Congress in the enactment of the Emergency Price Control Act of 1942, did not undertake to confer jurisdiction upon

any court for the enforcement of the provisions contained in the subsection of the Act under consideration. But, on the contrary, the Congress placed upon the aggrieved party the responsibility of instituting the suit or action in a court of competent jurisdiction.

We are of the opinion, and so hold, that neither the Constitution of North Carolina, nor the statutes enacted pursuant thereto, give jurisdiction to justices of the peace in an action for a penalty plus reasonable attorneys' fees to be fixed and awarded by the court. It follows, therefore, the justice of the peace having been without jurisdiction, the jurisdiction of the Superior Court was derivative only and limited to the powers which the justice of the peace could have exercised. *Wells v. West,* 212 N. C., 656, 194 S. E., 313; *Perry v. Pulley,* 206 N. C., 701, 175 S. E., 89; *Oil & Fertilizer Co. v. Bowen,* 204 N. C., 375, 168 S. E., 211; *Banking & Trust Co. v. Leggett,* 191 N. C., 362, 131 S. E., 752; *Hargrove v. Cox,* 180 N. C., 360, 104 S. E., 757; *Drainage Comrs. v. Sparks,* 179 N. C., 581, 103 S. E., 112; *Cheese Co. v. Pipkin,* 155 N. C., 394, 71 S. E., 442; *Wilson v. Ins. Co.,* 155 N. C., 173, 71 S. E., 79; *Love v. Huffines,* 151 N. C., 378, 66 S. E., 304; *Moore v. Wolfe,* 122 N. C., 711, 30 S. E., 120; *Fertilizer Co. v. Marshburn,* 122 N. C., 411, 29 S. E., 411.

Whether or not a justice of the peace would have jurisdiction of an action for a penalty not in excess of $200.00, under the Emergency Price Control Act of 1942, if no attorney's fee was demanded or awarded is not presented on this record and, therefore, not decided. *Hall v. Chaltis,* 31 Atlantic (2d), 699. Jurisdiction is determined by the amount demanded in good faith, *Tillery v. Benefit Society,* 165 N. C., 262, 80 S. E., 1068, or by the character of the relief sought, *Drainage Commissioners v. Sparks, supra,* and *Canal Co. v. Whitley,* 172 N. C., 100, 90 S. E., 1.

We think it proper to state that in this jurisdiction an action for the collection of a penalty must be brought in the name of the party suing therefor unless the statute provides otherwise, and while joining additional parties plaintiff is harmless error, as judgment may be rendered in favor of the party or parties entitled to recover, the joining of such additional parties is neither necessary nor proper. *Carter v. R. R.,* 126 N. C., 437, 36 S. E., 14; *Burrell v. Hughes,* 116 N. C., 430, 21 S. E., 971; *Maggett v. Roberts,* 108 N. C., 174, 19 S. E., 890; *Middleton v. R. R.,* 95 N. C., 167.

For the reasons stated herein, the action is

Dismissed.

STATE v. GRANT HOLBROOK.

(Filed 24 November, 1943.)

1. Larceny § 9—

Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, C. S., 4250, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving.

2. Larceny § 5—

Possession of the fruits of the crime recently after its commission justifies an inference of guilt, and, though only *prima facie* evidence of guilt, may be controlling unless explained by circumstances or accounted for in some way consistent with innocence.

3. Same—

No criterion is to be found for ascertaining just what possession is to be regarded as "recent" and therefore presumptive in cases of larceny and receiving. The term is a relative one and depends on the circumstances of the case. It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor *by his own act* or, at all events, with his *undoubted concurrence* and so recent and under such circumstances as to give reasonable assurance of guilt.

APPEAL by defendant from *Pless, J.*, at August Term, 1943, of WILKES.

Criminal prosecution tried upon indictment charging the defendant in two counts (1) with the larceny of four Chevrolet Pick-up wheels, four tires and four tubes of the value of $125, the property of Claude Pardue, and (2) with receiving said wheels, tires and tubes, knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

It is in evidence that on the night of 24 April, 1942, four wheels, with tires and tubes, were removed from Claude Pardue's Pick-up truck, which was parked in the driveway of his barn where he kept it.

On 5 May following, or eleven days after the theft, one of the stolen tires, and maybe two, were found on a car in defendant's possession. Later, two more were found in the possession of Rom Billings, who said he bought them from the defendant "about the first of May." The wheels were found by some boys in the woods approximately four miles from Pardue's home, and half way between Pardue's barn and where the defendant was found in possession of one or two of the tires.

The defendant denied removing any auto parts, wheels, tires or tubes, from Pardue's truck. He said that he bought four tires for $50 at a service station from "a guy by the name of Slim," but did not know that they belonged to Pardue or that they had been stolen. He sold two of them to Rom Billings for $45.00.

Verdict: "Guilty of larceny of tires."

Judgment: Imprisonment for not less than 12 nor more than 18 months.

The defendant appeals, assigning errors.

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

Trivette & Holshouser for defendant.

STACY, C. J. The defendant is charged with larceny and receiving. He challenges the sufficiency of the evidence to carry the case to the jury on either count. He was convicted of larceny. Nothing is said in the verdict about the second count. This is tantamount to an acquittal on the charge of receiving. *S. v. Taylor,* 84 N. C., 773; *S. v. Hampton,* 210 N. C., 283, 186 S. E., 251.

The defendant's demurrer to the evidence was properly overruled. The evidence tends to connect him with the theft and permits the inference that he participated therein as principal. *S. v. Williams,* 219 N. C., 365, 13 S. E. (2d), 617; *S. v. Record,* 151 N. C., 695, 65 S. E., 1010; *S. v. Hullen,* 133 N. C., 656, 45 S. E., 513. Recent possession of stolen property has always been considered a circumstance tending to show the guilt of the possessor on his trial upon an indictment for larceny. *S. v. Reagan,* 185 N. C., 710, 117 S. E., 1; *S. v. Neville,* 157 N. C., 591, 72 S. E., 798.

"Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." *Wilson v. U. S.,* 162 U. S., 613, 40 L. Ed., 1090.

The only exception of serious import on the record is the one addressed to the following portion of the charge:

"The State, gentlemen of the jury, relies upon a theory or rule of law to the effect that one who is found in possession of property that has recently been stolen is presumed to be guilty of the theft. That is a presumption of fact and not of law. It is one that may be rebutted, and it is strong or weak as the possession is more or less recent after the taking."

It is conceded that, on the facts presented, authorities may be found seemingly in support of this instruction. *S. v. Riley,* 188 N. C., 72, 123 S. E., 303; *S. v. Patterson,* 78 N. C., 470. Others may be cited seemingly against it. *S. v. Lippard,* 183 N. C., 786, 111 S. E., 722; *S. v. Rights,* 82 N. C., 675.

No criterion is to be found in the books for ascertaining just what possession is to be regarded as "recent" and therefore of presumptive

evidentiary value. *S. v. McRae,* 120 N. C., 608, 27 S. E., 78. The term is a relative one and depends on the circumstances of the case. All agree, however, upon the statement of the rule in respect of "recent possession" of stolen property; and the presumptions arising therefrom—strong, probable, slight or weak, depending on the circumstances—are well understood, *S. v. Jennett,* 88 N. C., 665. "The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission of the offense." *S. v. Patterson,* 78 N. C., 470. "Ordinarily it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused, the *law* does not infer his guilt, but leaves that question to the jury under the consideration of all the circumstances." *S. v. Rights, supra.*

"The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law, and is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. The duty to offer such explanation of his possession as is sufficient to raise in the minds of the jury a reasonable doubt that he stole the property, or the burden of establishing a reasonable doubt as to his guilt, is not placed on the defendant, however recent the possession by him of the stolen goods may have been"—*Schenck, J.,* in *S. v. Baker,* 213 N. C., 524, 196 S. E., 829.

In a number of cases, on the facts presented, possession of the stolen property is regarded as only a circumstance, without presumptive significance, *S. v. McFalls,* 221 N. C., 22, 18 S. E. (2d), 700; and in still others, on the facts appearing, it is held to be inconsequential. *S. v. Cameron, ante,* 449; *S. v. Cannon,* 218 N. C., 466, 11 S. E. (2d), 301.

The facts of the instant case, it seems to us, bring it more nearly under the decision in *S. v. Lippard, supra,* than any other that we have been able to find or the industry of counsel has discovered. There, on facts quite similar, a charge of like import to the one here given, was held to be erroneous. Here, eleven days elapsed between the larceny of the goods and the discovery of a part of them in the possession of the defendant. True, it is manifest that the defendant had the tires six or seven days after the larceny and sold two of them to Rom Billings, but the

circumstances are not such as to exclude "the intervening agency of others." *S. v. Patterson, supra.* There is no evidence as to what became of the tubes, and it does not appear that the defendant ever had possession of the stolen wheels.

The doctrine that there is, or may be, a presumption of guilt from the recent possession of stolen goods is one that should be kept in proper bounds or, in the language of *Lord Hale,* 2 Pleas of the Crown, 289, "It must be very warily pressed." *S. v. Ford,* 175 N. C., 797, 95 S. E., 154. In *S. v. Smith,* 24 N. C., 406, *Gaston, J.,* says "it applies *only* when this possession is of a kind which manifests that the stolen goods have come to the possessor *by his own act* or, at all events, with his *undoubted concurrence";* and, according to *Pearson, C. J.,* in *S. v. Graves,* 72 N. C., 485, it does not arise except when "the fact of guilt must be *self-evident* from the *bare fact* of stolen goods," and per *Hoke, J.,* in *S. v. Anderson,* 162 N. C., 571, 77 S. E., 238, it is only when "he could not have reasonably gotten possession unless he had stolen them himself." Finally, in *S. v. Lippard, supra,* it is said that "in order to its proper application it must be 'manifest that the stolen goods have come to the possession by his own act or with his undoubted concurrence, and it must be so recent and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder is himself the thief.' "

The case put by Hale, where a horse thief was pursued, finding himself pressed, got down, desiring a man in the road to hold his horse till he returned, and the innocent man was taken with the horse, illustrates the necessity of using caution in convictions founded on presumptive evidence. *S. v. Adams,* 2 N. C., 463.

Under the record evidence, it appears that the instruction complained of may have weighed too heavily against the defendant. *S. v. Harrington,* 176 N. C., 716, 99 S. E., 892. It is open to interpretation that the burden was on the defendant to rebut the presumption of his guilt, whereas the presumption arising from the recent possession of stolen property "is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." *S. v. Baker, supra.*

New trial.

YELLOW CAB COMPANY OF CHARLOTTE, INC., v. RICHARD M. SANDERS.

(Filed 24 November, 1943.)

1. Trial § 29b—

When the court undertakes to charge the jury upon a particular phase of the evidence, it must state the law applicable to the respective contentions of each party thereupon.

2. Automobiles § 12c—

If plaintiff's automobile enters the intersection of two streets, at a time when the approaching car of defendant is far enough away to justify a person in believing that, in the exercise of reasonable care and prudence, he may safely pass over the intersection ahead of the oncoming car, the plaintiff has the right of way, and it is the duty of the defendant to reduce his speed and bring his car under control and yield.

APPEAL by plaintiff from *Blackstock, Special Judge,* at September Term, 1943, of MECKLENBURG.

This is an action to recover damages for injury to a yellow taxicab of the plaintiff, driven by one Gainey, inflicted in a collision with an automobile of the defendant driven by himself, alleged to have been proximately caused by the negligence of the defendant, wherein the defendant interposed a plea of contributory negligence in bar of any recovery by the plaintiff. There is also a counter action by the defendant against the plaintiff for damages for injury inflicted on his automobile in the same collision alleged to have been proximately caused by the negligence of the plaintiff.

The jury for their verdict, upon appropriate issues, found that the plaintiff's automobile was damaged by the negligence of the defendant, and that the plaintiff by its own negligence contributed to its damage, and that neither party was entitled to recover.

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

H. C. Jones and Brock Barkley for plaintiff, appellant.
Frank H. Kennedy and Hunter M. Jones for defendant, appellee.

SCHENCK, J. The plaintiff alleged and offered evidence tending to prove that its yellow taxicab, driven by one Gainey, was being driven in a northern direction on Poplar Street in the city of Charlotte, toward the intersection of Poplar Street nad Third Street, that when the cab reached Third Street it was stopped, and the driver looked in both directions, east and west, that he observed only the defendant's automobile approaching from his right, from the east coming westward

toward the intersection; that the defendant's automobile was 125 feet, one-half block from the intersection; that the plaintiff's cab was then driven into the intersection with the view to crossing Third Street, and proceeded two-thirds of the way across Third Street when it was struck by the defendant's automobile on its right side and was hurled to the northwest corner of the intersection; that the plaintiff's taxicab was being driven between 15 and 20 miles per hour and the defendant's automobile was being driven between 25 and 35 miles per hour when they entered the intersection; that the defendant's automobile did not slacken its speed as it approached the intersection.

The defendant alleged and offered evidence tending to prove that his automobile, driven by him in a western direction on Third Street, toward the intersection of Third Street and Poplar Street, and the plaintiff's taxicab, driven in a northern direction on Poplar Street, approached or entered the intersection of said streets at approximately the same time; that the defendant's automobile on Third Street was to the right of the plaintiff's taxicab on Poplar Street; that as the defendant's automobile entered the intersection the plaintiff's cab was speeded up to cross in front of defendant's automobile, and the said automobile collided with said taxicab on its right side.

It will be observed that it is contended by the plaintiff that his taxicab reached the intersection of the two streets an appreciable time before the defendant's automobile reached it, that the defendant's automobile was 125 feet from the intersection when plaintiff's cab reached it, and therefore that the driver of the plaintiff's cab had the right of way in the intersection. While on the contrary, it is contended by the defendant that the two motor vehicles reached the intersection at approximately the same time, and that the defendant's automobile being on the right side of the plaintiff's cab, the driver of the defendant's automobile had the right of way in the intersection.

There appear in the record and are set out in the brief of the plaintiff, appellant, as exceptive assignments of error the following:

"The Court failed to instruct the jury and to explain to the jury the law applicable to plaintiff's evidence and contentions with regard to plaintiff's right to proceed across the intersection; that, while the Court specifically charged the jury with regard to the defendant's right of way if the two cars approached the intersection at approximately the same time, he failed to charge the jury with regard to the plaintiff's right to proceed if its cab entered the intersection when the defendant's car was an appreciable distance away, which is plaintiff's Exception No. 11.

"The Court further failed to instruct the jury as to the law applicable to plaintiff's evidence and contentions with regard to the plaintiff's right

to assume that the defendant would operate his car, in approaching the intersection, in a reasonably prudent and lawful manner; that, while specifically charging the jury that if the two cars reached the intersection at approximately the same time the defendant would have the right to assume plaintiff would observe the law and yield the right of way, the court failed to charge the jury with regard to plaintiff's right to such assumption if plaintiff's cab reached the intersection when the defendant's car was an appreciable distance away or such distance that it reasonably appeared to plaintiff that the crossing could be made in safety, which is plaintiff's Exception No. 12." We are constrained to hold that these exceptive assignments of error are well taken.

On the second issue, addressed to the contributory negligence of the plaintiff, the court instructed the jury that if the plaintiff's taxicab and the defendant's automobile approached the intersection of the two streets, Poplar and Third, at approximately the same time, the defendant's automobile, being on the right of the plaintiff's cab, would have the right of way; but the court nowhere instructed the jury as to the plaintiff's rights if its cab reached the intersection at a time when the defendant's automobile was 125 feet, a half block, away.

The court further instructed the jury that if the two motor vehicles reached the intersection at approximately the same time the driver of the defendant's automobile, being on the right, would have the right to assume that the driver of the plaintiff's cab, being on the left, would yield the right of way, and to act upon that assumption until it became apparent that a collision was about to occur; but the court failed to give such specific instructions extending to the plaintiff similar rights if plaintiff's cab reached the intersection appreciably before the defendant's automobile, 125 feet or a half block ahead thereof.

When the court undertakes to charge the jury upon a particular phase of the evidence, he must state the law applicable to the respective contentions of each party thereupon. *Roberson v. Stokes,* 181 N. C., 59, 106 S. E., 151; *Real Estate Co. v. Moser,* 175 N. C., 255, 95 S. E., 498; *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630.

The statute upon which the defendant relies, C. S., 2621 (302), prescribes the rights of the parties when they approach or enter a highway intersection at "approximately the same time," providing that "the driver of the vehicle on the left shall yield the right of way to the vehicle on the right," but prescribes no rights when the parties approach or enter a highway intersection at appreciably different times, when one of the vehicles enters when the other is an appreciable distance from the intersection. The rule under such circumstances is stated by *Clarkson, J.,* in *Davis v. Long,* 189 N. C., 129, 126 S. E., 321, by quoting

with approval from *Salmon v. Wilson,* 227 Ill. App., 286, as follows: "It (the right-of-way rule) does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection. Under the state of facts in this case plaintiff might reasonably have presumed that defendant would not exceed the speed limits fixed by statute, and that he would be able to cross the intersection before defendant's car reached it."

If the plaintiff's cab entered the intersection of the two streets at a time when the approaching automobile of the defendant was far enough away, so that a person, in the exercise of reasonable care and prudence, would have been justified in believing that he could safely pass over the intersection ahead of the approaching car, the driver of plaintiff's cab had the right of way, *Ward v. Clark,* 179 N. Y. Supp., 466; *Keyes v. Hawley,* 279 Pac., 674, and it was the duty of the defendant, in approaching the intersection occupied by the plaintiff's cab, to decrease his speed, bring his automobile under control, and, if necessary, stop it in order to yield the right of way to the plaintiff's cab, and thereby avoid the collision. If at the time the plaintiff's cab approached and entered the intersection defendant's automobile was a sufficient distance away, when operated at a reasonable and lawful rate of speed, to permit the plaintiff's cab to cross in safety, the driver of plaintiff's cab had the right to assume that the defendant would exercise due caution and approach at a reasonable rate of speed and yield the right of way. The rights of the driver of the plaintiff's cab just delineated are in no way effected by the statute governing the rights of the parties when entering the intersection at approximately the same time.

The court having failed to declare and explain the law applicable to the evidence offered by the plaintiff on the issue of contributory negligence when the law applicable to evidence offered by the defendant on such issue was so declared and explained, there was error which entitles the plaintiff to a new trial, and it is so ordered.

New trial.

L. N. SUDDRETH, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER OWNERS AND OPERATORS OF TAXICABS IN THE CITY OF CHARLOTTE, N. C., WHO DESIRE TO MAKE THEMSELVES A PARTY TO THIS ACTION, v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; WALTER F. ANDERSON, AS CHIEF OF POLICE OF THE CITY OF CHARLOTTE, N. C.; H. H. BAXTER, MAYOR OF THE CITY OF CHARLOTTE; R. W. FLACK, MANAGER OF THE CITY OF CHARLOTTE, AND ALL LAW ENFORCEMENT OFFICERS IN THE SAID CITY OF CHARLOTTE, N. C.

(Filed 24 November, 1943.)

1. Constitutional Law § 8: Municipal Corporations § 36—

The business of carrying passengers for hire is a privilege, the licensing, regulation, and control of which is peculiarly and exclusively a legislative prerogative. So is the power to regulate the use of public roads and streets. The General Assembly in the exercise of this police power may provide for the licensing of taxicabs and regulate their use on public streets, or it may, in its discretion, delegate this authority to the several municipalities. It has adopted the latter course. Public Laws 1943, ch. 639, sec. 2; Michie's Code, sec. 2787, subsecs. (7), (11), and (36); Public-Local Laws 1939, ch. 366, secs. 31, 32.

2. Municipal Corporations §§ 36, 39—

Where the Legislature has vested in a city council the power to regulate, license, and control motor vehicles for hire, the municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business. There is a broad presumption in favor of the validity of an ordinance undertaking to exercise such power, and he who attacks it must show affirmatively that it is not expressly authorized by statute, or that it is unreasonable and oppressive.

3. Constitutional Law § 8: Municipal Corporations § 36—

Municipalities may classify persons according to their business and apply different rules to different classes without violating constitutional rights, State or Federal. The discriminations which invalidate an ordinance are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions.

4. Same—

The fact that operators of taxicabs will suffer pecuniary injury from the enforcement of ordinances regulating such business, or that such operators may be unable to comply with the terms of a regulatory ordinance, and so will be compelled to abandon operation of their vehicles, does not establish the unreasonableness or invalidity of the ordinance.

5. Injunction § 9—

Ordinarily, injunction does not lie to restrain the enforcement of an alleged invalid municipal ordinance.

6. Appeal and Error §§ 2, 4—

Where plaintiff has selected an improper remedy and dismissal will not end the controversy, this Court, in the exercise of its discretion, may

express an opinion on the merits of the exceptive assignments of error and finally decide the matter.

APPEAL by plaintiffs from *Armstrong, J.*, at October Term, 1943, of MECKLENBURG. Affirmed.

Civil action to restrain the enforcement of a city ordinance.

On 8 September, 1943, the governing authorities of the city of Charlotte enacted an ordinance to regulate and control driving of taxicabs and the parking of taxicabs in the city of Charlotte. Section 8 thereof reads as follows:

"Section 8. DEPOT OR TERMINAL REQUIRED. All taxicabs which are operated within the corporate limits of the City of Charlotte, North Carolina, or between said corporate limits to points, not incorporated, within a radius of five miles of said corporate limits, shall have a depot, or terminal, on private property and shall not be permitted to use the public streets except for the purpose of transporting, loading and unloading of passengers and their baggage."

The plaintiff, L. N. Suddreth, a taxicab operator within the city, instituted this action to test the validity of Section 8. One W. E. McQuay, also an owner and operator of a taxicab within Charlotte, intervened as a party plaintiff.

On application of plaintiffs, a temporary restraining order and rule to show cause was issued by Bobbitt, Judge, returnable before the judge presiding in the district. When the cause came on to be heard upon the rule to show cause it was stipulated by the parties "that His Honor, Frank M. Armstrong, Judge, duly assigned and holding the courts in the Fourteenth Judicial District, can hear this case in the absence of a jury, and find the facts, and enter a judgment thereon, and a jury trial is specifically waived."

Pursuant to said stipulation the court heard the evidence, found the facts, and concluded that: (1) the ordinance is valid; (2) the plaintiffs have an adequate and effectual remedy at law; and (3) the damages sustained by plaintiffs are speculative and not irreparable. It thereupon entered judgment dissolving and dismissing the temporary restraining order. Plaintiffs excepted and appealed. Upon appeal being noted further order was entered continuing the temporary injunction until the final hearing in the Supreme Court.

McDougle & Ervin for plaintiffs, appellants.

Tillett & Campbell for defendants, appellees.

BARNHILL, J. The business of carrying passengers for hire is a privilege, the licensing, regulation, and control of which is peculiarly

and exclusively a legislative prerogative. So is the power to regulate the use of public roads and streets. The General Assembly in the exercise of this police power may provide for the licensing of taxicabs and regulate their use on public streets, or it may, in its discretion, delegate this authority to the several municipalities. 37 Am. Jur., 534, sec. 21; Anno. 144 A. L. R., 1120.

It has adopted the latter course. Section 2, chapter 639, Public Laws of 1943, reads as follows:

"That cities and towns shall have the power to license, regulate, and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town."

This power is also conferred on the city of Charlotte, by express provisions contained in its charter. Sec. 31 and sec. 32, subsecs. (2), (7), and (32), ch. 366, Public-Local Laws 1939. See also Michie's N. C. Code of 1939, sec. 2787, subsecs. (7), (11), and (36).

No person has an absolute right to use the streets of a municipality in the operation of power-driven vehicles for hire. Such operation is a privilege which the municipality, under proper legislative authority, may grant or withhold. 37 Am. Jur., 535; *Commonwealth v. Rice,* 158 N. E., 797, 55 A. L. R., 1128; *Bunn v. City of Atlanta,* 19 S. E. (2d), 553; *S. v. Carter,* 205 N. C., 761, 172 S. E., 415; 1 Blashfield Cyc. Auto. L. & P., 67.

Generally, under the powers conferred upon them by their charters, or by general statute, municipal corporations may impose reasonable conditions upon the use of the streets by jitneys, taxicabs, motorbuses, and other motor vehicles operating as common carriers in the transportation of passengers or freight. 1 Blashfield Cyc. Auto. L. & P., 81, sec. 105 (see n. 19 for authorities).

This power exists not only under the licensing authority of the municipality but also under its recognized power to regulate the use of its streets in the interest of public safety and convenience, and it is generally held that a municipality in the exercise of this power may prohibit the use of the streets for private business or other purpose detrimental to the common good. 3 McQuillin Mun. Corp. (2d) Revised, 216, sec. 981; *S. v. Carter, supra;* 1 Blashfield Cyc. Auto. L. & P., 67; *New Orleans v. Calamari,* 91 So., 172, 22 A. L. R., 106; *Henderson v. Bluefield,* 42 A. L. R., 279, Anno. p. 282.

This applies to taxicab stands as well as to any other instances in which an individual is making a private use of highways, a use which would be subversive of the rights of other members of the public. And, "It cannot be doubted that the city council has the authority to abolish

taxicab stands from the streets." *Holmes v. R. R. Commission,* 197 Cal., 627, 242 Pac., 486; *New Orleans v. Calamari,* 22 A. L. R.—Rehearing, p. 112.

"It was never contemplated that the highways should form a part of the capital stock of common carriers engaged in the transportation of persons or property for profit, or that the use of the highways should be donated to them for that purpose.

"Clearly, these companies have no vested or inherent right in the highways, and their unrestrained use thereof is equivalent to an appropriation of public property for private use, and it is within the power of the legislature to prohibit this use or to prescribe the terms upon which it may be exercised." *Rio Bus Lines Co. v. Southern Bus Line Co.*, 272 S. W., 18.

Where the power to regulate, license, and control motor vehicles for hire is vested by the Legislature in the city council, there is a broad presumption in favor of the validity of an ordinance undertaking to exercise such power, and he who attacks it must show affirmatively that it is not expressly authorized by statute or that it is, as applied to him, unreasonable and oppressive. *Star Transp. Co. v. Mason City,* 192 N. W., 873; *New Orleans v. Calamari, supra.*

The municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business, and the courts cannot hold such terms unreasonable, except for discrimination between persons in a like situation. The wisdom and expediency of the regulation rests alone with the lawmaking power. *Lawrence v. Nissen,* 173 N. C., 359, 91 S. E., 1036; *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469.

"The power of a court to declare an ordinance unreasonable and, therefore, void is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed power of the corporation merely. *Coal Float v. Jeffersonville,* 112 Ind., 15, 19. This distinction has been noted and observed in this State. *S. v. Ray,* 131 N. C., 814; *S. v. Thomas,* 118 N. C., 1221, 1225, 1226." *Lawrence v. Nissen, supra.*

Municipalities may classify persons according to their business and may apply different rules to different classes without violating constitutional rights, either under the State or Federal Constitution. The discriminations which invalidate an ordinance are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions.

"It is those restrictions imposed upon one class of persons engaged in a particular business which are not imposed upon others engaged in the

same business and under like conditions, that impair the equal right which all can claim in the enforcement of the laws." *Lawrence v. Nissen, supra; S. v. Kirkpatrick,* 179 N. C., 747, 103 S. E., 65; *Soon Hing v. Crowley,* 113 U. S., 709.

The fact that the operators of jitneys or taxicabs will suffer pecuniary injury from the enforcement of ordinances regulating such business, or that operators of such vehicles may be unable to comply with the terms of a regulatory ordinance, and so will be compelled to abandon operation of their vehicles, has no tendency to establish the unreasonableness or invalidity of the ordinance. *Auto Transit Co. v. City of Ft. Worth,* 182 S. W., 685. The rule is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character. *Grainger v. Douglas Park Jockey Club* (N. Y.), 147 Fed., 513, 8 Ann. Cas., 997; 1 Blashfield Cyc. Auto. L. & P., 86.

The ordinance here challenged applies to all taxicabs alike. It does not prohibit the use of the streets for the purpose of transporting, loading, and unloading of passengers and their baggage. It merely requires taxicab operators to use private property for parking, depot or terminal purposes. It is not subject to successful attack on the grounds that it is an unauthorized or an unreasonable exercise of legislative authority.

Indeed, there is substantial evidence in the record tending to show that taxicab operators have abused and misused the privilege heretofore accorded to them to use the streets for parking purposes. While we do not undertake to pass upon the merits of that controversy, the evidence was sufficient, at least, to warrant and command the attention of the city authorities. They have investigated and have acted to remedy an alleged condition which, if it in fact exists, tends to seriously disturb the peace and general welfare of the city. The discretion was theirs and they have acted within the authority vested in them.

But the appellee insists that injunctive relief is not the proper remedy. We agree. Ordinarily, injunction does not lie to restrain the enforcement of an alleged invalid ordinance. *Thompson v. Lumberton,* 182 N. C., 260, 108 S. E., 722, and cases cited; *Turner v. New Bern, supra; Flemming v. Asheville,* 205 N. C., 765, 172 S. E., 362.

Even so, there are more than one hundred taxi operators directly or indirectly affected by this action. Its dismissal will not end the controversy but, instead, will tend to prolong an unfortunately provocative situation. On the other hand, a decision now is final. Hence, we have exercised our discretionary right to express an opinion on the merits of the exceptive assignments of error as requested by plaintiffs. *Knight v. Little,* 217 N. C., 681, 9 S. E. (2d), 377, and cases cited.

The judgment below is

Affirmed.

ETHEL M. CRONE v. F. NORMAN FISHER AND WIFE, KARLIE KEITH FISHER, TRADING AS FISHER'S SANDWICH COMPANY.

(Filed 24 November, 1943.)

1. Appeal and Error § 29—

Appellant's failure to present argument that there was insufficient evidence to be submitted to the jury of actionable negligence on his (defendant's) part, is tantamount to an admission of sufficient evidence to carry the case to the jury on that issue.

2. Trial § 22f—

On motion to nonsuit the evidence must be considered in the light most favorable to the plaintiff.

3. Negligence § 19b—

A judgment of involuntary nonsuit, on the ground of contributory negligence of the plaintiff, cannot be rendered unless the evidence is so clear on that issue that reasonable minds can draw no other inference.

4. Automobiles §§ 12c, 18g—

In an action for damages for personal injuries to plaintiff by negligence of defendant, where plaintiff's evidence tended to show that she was driving her car, at 20 to 25 miles per hour, south on a city street towards its intersection with another street running east and west, and that defendant's truck was approaching the intersection from the west and was 125 feet distant from the intersection when plaintiff entered same, and said truck, running at 45 miles per hour, struck plaintiff's car, which was within 4 feet of the curb on the south side of the intersection, knocking it 70 feet into a stone wall across the street, motion of nonsuit properly denied. C. S., 567.

5. Automobiles §§ 12c, 18c—

Conceding that plaintiff, in an action for damages for personal injuries from an automobile collision, entered the city street intersection at a speed greater than 20 miles per hour and therefore in violation of the city's ordinance, this would only be *prima facie* evidence of negligence and not negligence *per se*, and could not be held as a matter of law to constitute contributory negligence that would bar plaintiff's recovery.

APPEAL by defendants from *Burney, J.*, at May Term, 1943, of WAKE.

This is a civil action to recover damages for injuries to person and to property incurred in a collision between a Plymouth automobile owned and operated by the plaintiff and a Ford panel delivery truck owned by the defendants and operated in their business by their employee and agent, one Davis, at the intersection of Filmore Street and Jefferson Street in the city of Raleigh on 12 September, 1942, alleged to have been caused by the negligence of the defendants, and wherein the defendants interposed a plea of contributory negligence in bar of any recovery by the plaintiff.

Upon appropriate issues, the jury for their verdict found that the plaintiff was injured and damaged by the negligence of the defendants, that the plaintiff was not guilty of contributory negligence, and that the plaintiff was entitled to recover fixed sums for personal injuries and for damage to her automobile. From judgment for the plaintiff predicated on the verdict, the defendants appealed to the Supreme Court, assigning errors.

Murray Allen, R. Pearson Upchurch and Bunn & Arendell for plaintiff, appellee.

Smith, Leach & Anderson for defendants, appellants.

SCHENCK, J. Both in their oral argument and in their brief filed with the Court the defendants, appellants, present but one question, namely, did the court err in disallowing their motion for judgment as in case of nonsuit and to dismiss the action lodged when the plaintiff had introduced her evidence and rested her case and renewed at the close of all the evidence? C. S., 567.

The charge to the jury is not brought forward in the record and it must therefore be presumed that the court correctly declared and explained the law applicable to the evidence. *Boswell v. Town of Tabor,* 196 N. C., 145, 144 S. E., 701; *Lumber Co. v. Power Co.,* 206 N. C., 515, 174 S. E., 427; *Jernigan v. Jernigan,* 207 N. C., 831, 178 S. E., 587.

The appellants' failure to present the argument that there was insufficient evidence to be submitted to the jury of actionable negligence on the part of the defendants is tantamount to an admission of the existence of sufficient evidence to carry the case to the jury on that issue. Hence, the question is narrowed to the single inquiry: Was the plaintiff, according to her own evidence, guilty of contributory negligence?

Construed in the light most favorable to the plaintiff, as it must be upon a demurrer to the evidence, her testimony as well as her other evidence tends to show that the plaintiff was driving her automobile at a speed between 20 and 25 miles per hour, in a southern direction on Filmore Street, approaching the intersection of said street with Jefferson Street, which ran east and west; before reaching the intersection she looked west up Jefferson Street and saw defendants' truck approaching it; the defendants' truck was 125 feet or more west of the intersection when plaintiff entered it; plaintiff's automobile reached within four feet of the curb on the opposite, the southern, side of Jefferson Street when it was struck by the defendants' truck running at 45 miles per hour, and knocked out of control of the driver, the plaintiff, and precipitated 70 feet into a stone wall on the east side of Filmore Street; the plaintiff's

car reached the intersection of the two streets when the defendants' truck was 125 feet therefrom. "Taking the evidence in the light most favorable to the plaintiff, the issue is one for the jury. Factual adjustments and appraisals are required, the making of which belonged exclusively to them." *Seawell, J.,* in *Groome v. Davis,* 215 N. C., 510, 2 S. E. (2d), 771.

Defendants contend that the plaintiff was negligent in that she violated the provisions of C. S., 2621 (302), by failing to yield the right of way to defendants' truck since said truck was on her right and was therefore entitled to the right of way in the intersection. The defendants fail to take into consideration that the statute upon which they rely provides that the driver of the vehicle on the left shall yield the right of way to the vehicle on the right "when two vehicles approach or enter an intersection and/or junction at approximately the same time." It cannot be held as a matter of law that the plaintiff's automobile and the defendants' truck approached or entered the intersection "at approximately the same time," when the latter was 125 feet away from the intersection when the former was entering it, and when the plaintiff's automobile had crossed within four feet of the opposite curb when the defendants' truck collided therewith.

Defendants further contend that the plaintiff was negligent in that she violated section 38 of the Code of Raleigh, North Carolina, by driving her automobile more than twenty miles per hour through a street intersection. This contention is untenable for the reason that the ordinance invoked provides that "where no special hazard exists, the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and is unlawful: . . . 4. Twenty miles per hour through street intersections." Therefore, conceding that the plaintiff entered the intersection at a greater rate of speed than 20 miles per hour, this would only be *prima facie* evidence of her negligence, and not negligence *per se,* and could not be held as a matter of law to constitute contributory negligence that would bar the plaintiff's recovery. *Barnhill, J.,* in *Woods v. Freeman,* 213 N. C., 314, 195 S. E., 812.

The ordinance invoked, while its phraseology is practically the same as that of the general statute, C. S., 2621 (288) (b), presents the *quære* can a municipality by ordinance prescribe a rule of evidence as is here attempted by providing that any speed in excess on certain limits shall be *prima facie* evidence that such speed is unlawful. However this may be, if the provision is void by reason of lack of authority to ordain it, the result would be to remove one, at least, of the grounds upon which the defendants rely. If the provision is not void this ground of reliance cannot avail the defendants for the reasons heretofore set forth.

"It is a familiar rule that a judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the evidence is so clear on that issue that reasonable minds could draw no other inference. *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 739; *Mulford v. Hotel Co.,* 213 N. C., 603; *Corum v. Tobacco Co.,* 205 N. C., 213, 171 S. E., 78. This rule has nothing to do with the credibility of witnesses. It applies equally to the testimony of the plaintiff as to that of other witnesses; *Tomberlin v. Bachtel,* 211 N. C., 265, 268, 189 S. E., 769; *Matthews v. Cheatham,* 210 N. C., 592, 188 S. E., 87; *Smith v. Coach Line,* 191 N. C., 589, 591, 132 S. E., 567; and he is entitled also to the benefit of the rule that upon the motion to nonsuit the evidence must be considered in the light most favorable to the plaintiff. *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353; *Lynch v. Telephone Co.,* 204 N. C., 252, 167 S. E., 847; *Gilbert v. Wright,* 195 N. C., 165, 141 S. E., 577. *Cole v. Koonce, ante,* 188 (214 N. C.)." *Manheim v. Taxi Corp.,* 214 N. C., 689, 200 S. E., 382.

Upon the record we find

No error.

JOHN M. DUDLEY AND WIFE, MABEL F. DUDLEY; J. L. LUTZ AND WIFE, FANNIE S. LUTZ; W. W. MOORES AND WIFE, KAY M. MOORES; R. W. HICKS AND WIFE, MRS. R. W. HICKS; T. SIMPSON, JR., H. B. CURTIS AND WIFE, ANNIE B. CURTIS; T. E. SPRATT AND WIFE, MABEL N. SPRATT; H. E. REA AND WIFE, EVELYN C. REA; FRANK K. HAYNES; JASPER M. BROWN AND WIFE, MARGARET J. BROWN; J. A. SCHACHNER, JR., AND WIFE, RUBY R. SCHACHNER; LEITH C. BOST; T. C. AUSTIN AND WIFE, LULA B. AUSTIN; MRS. GRACE WASHBURN; J. M. O'NEILL AND WIFE, KATHLEEN C. O'NEILL; H. M. JOYNER AND WIFE, DOROTHY S. JOYNER; WM. L. MANNING AND WIFE, KATHERINE F. MANNING; MIRIAM RUMMEL; M. M. FISHER AND WIFE, MAMIE J. FISHER; T. B. CARR AND WIFE, GEORGIA W. CARR; JAMES P. LANKFORD AND WIFE, MRS. JAMES P. LANKFORD; E. O. FOX AND WIFE, MRS. E. O. FOX; C. D. SHELBY, JR., AND WIFE, LUCY F. SHELBY; G. C. THOMAS, JR., C. W. MOSELEY AND WIFE, MAGGIE MAY E. MOSELEY; FRANK P. LARSON, JR., AND WIFE, VIRGINIA B. LARSON; H. J. NELSON AND WIFE, MRS. H. J. NELSON; J. W. SESSOMS AND WIFE, MAUDE E. SESSOMS; MRS. J. H. OWEN; AND CORA PRICE CULLINGS, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, AND CHARLOTTE PARK AND RECREATION COMMISSION, A CORPORATION.

(Filed 24 November, 1943.)

1. Municipal Corporations §§ 30, 39: Deeds § 16: Injunction § 9—

In the absence of covenants in the deeds or other valid restrictions upon the use of land for a public park, its acquisition and dedication to

that purpose is a matter within the discretion of municipal governing authorities and may not be enjoined by the courts.

2. Municipal Corporations §§ 30, 39: Nuisances § 9—

Where the governing body of a city of 100,000 population, including 30,000 to 40,000 Negroes, purchases a tract of land, adjacent to or near two of its Negro sections, one of 14,000 population and the other of 8,000 population, with the purpose and plan of laying out a park and recreation center for its colored people and building a road and bridge for more convenient access thereto and to other property, on suit to prevent such use of the property, instituted by white residents and property owners of the neighborhood, there is no evidence that the proposed use will constitute a nuisance and motion for a restraining order was properly denied.

APPEAL by plaintiffs from *Armstrong, J.*, at September Term, 1943, of MECKLENBURG. Affirmed.

This was an action to enjoin the Charlotte Park and Recreation Commission from maintaining a recreational park for Negroes on property near the homes of plaintiffs, and to enjoin the city of Charlotte from improving a street and constructing a bridge on adjacent property. Motion to show cause why a restraining order should not issue was heard and the following material facts were found: The plaintiffs are property owners and residents of the section in the city of Charlotte known as "Harding Place." There are no provisions in any of the deeds giving them any rights with respect to the property on which the park is to be located, nor restrictions forbidding its use by Negroes. The park site is adjacent to the section of the city known as "Brooklyn" inhabited by approximately 14,000 Negroes, and in the section near-by known as "Cherry," 8,000 Negroes reside.

The defendant Park and Recreation Commission is a body corporate organized and existing under ch. 51, Private Laws 1927, and amendments thereto. The city of Charlotte has a population of more than 100,000, with Negro population of 30,000 to 40,000. There are now in the city for the use of white persons ten parks, and no public park or recreational facilities for Negroes, except the playground at a Negro school in the section known as "Cherry." It is the intention of the defendant Park Commission to construct and equip the proposed park with proper recreational facilities, including baseball diamond, wading pool, swings, refreshment stands, etc., and to operate it under the supervision of the Commission in a lawful manner. The Commission has dedicated a strip of land 50 feet wide between the used portion of the park and "Harding Place," to be planted with trees and shrubbery, as a screen and barrier. The title to the park site was acquired by deed from the trustees of the Diocese of North Carolina of the Episcopal Church, and the Thompson Orphanage and Training Institution. The

consideration was $2,500, and the additional consideration of an agreement to construct and maintain a farm bridge over a branch on other lands of the Thompson Orphanage for the latter's use in cultivating its lands. The bridge will cost approximately $50, and its maintenance will be negligible.

By another deed the Orphanage trustees conveyed to the city of Charlotte a right of way over its other lands for the construction of a street or road to connect the park with the Negro section of "Cherry." Incorporated in the deed was the condition that in the event this street should be paved, no part of the cost of the improvement should be assessed against the orphanage property. The city, by resolution, has declared its intention to construct a top soil street over this right of way to connect the park with portions of East Stonewall Street and Baldwin Street which are now paved. The conveyance to the Park Commission was made upon condition that the 50-foot strip referred to should not be used for park purposes and be enclosed by a metal fence; that the farm bridge referred to and adequate ditches be constructed. In the event of failure to use the property for park purposes the grantors have option to repurchase.

Upon these findings it was concluded that the proposed park and recreational center for Negroes would not be a nuisance; that the agreement with respect to the farm bridge to be constructed and maintained was within the power of the Park Commission; and that to acquire right of way for the construction of a street connecting the park with other streets in the manner proposed by the city would be a valid exercise of its power.

The motion for restraining order was denied, and plaintiffs excepted and appealed.

Cochran & McCleneghan and W. C. Davis for plaintiffs, appellants.

Tillett & Campbell and Taliaferro & Clarkson for defendants, appellees.

DEVIN, J. The findings of fact made by the court below were based upon the written evidence offered, and we see no reason to disturb them. From these findings the conclusions of law reached by the court and the denial of plaintiffs' motion for a restraining order logically followed.

The contention of plaintiffs that the maintenance of a large recreational park near the property on which they had built their homes would, under the circumstances, constitute a nuisance cannot be sustained. A public park established by lawful municipal authority cannot be held a nuisance *per se* (Public Laws 1923, ch. 83), nor is there any reasonable ground for anticipating that the park in this case will

be so operated as to become one under the facts found by the court. *Atkins v. Durham*, 210 N. C., 295, 186 S. E., 330; *City of Lynchburg v. Peters*, 145 Va., 1, 133 S. E., 674; *Page v. Commonwealth*, 157 Va., 325, 160 S. E., 33; 39 Am. Jur., 289; 38 Am. Jur., 359; 3 McQuillin, sec. 1356.

In the absence of covenants in the deeds or other valid restrictions upon the use of the land for a public park, its acquisition and dedication to that purpose was a matter within the discretion of the governing authorities, and may not be enjoined by the courts. *Messer v. Smathers*, 213 N. C., 183, 195 S. E., 376.

The plaintiffs' objection that the purchase of the land for a park entailed expenditures by the Park Commission for the construction of a bridge on another's property is untenable. The agreement to build the bridge was a part of the consideration for the conveyance, and the cost involved was comparatively small.

Nor was the action of the city of Charlotte in acquiring right of way for a street or road leading to the park beyond its power. It is true there is a condition annexed to the conveyance that in the event this street should be paved the city agrees not to assess grantor's abutting property for any part of the cost, in apparent disregard of the mandatory requirement of sec. 52 of the city charter, but this agreement comes within the exception provided by the 1943 amendment to the charter. Furthermore, it appears that the city has adopted a resolution not to pave or permanently improve this street.

The fact that the deeds to the city and to the Park Commission do not convey unconditional titles in fee does not afford ground for enjoining the completion of the transaction. The city and the Park Commission had power to acquire property for proper municipal purposes by conveyances in whatever form the governing authorities deemed wise, provided there was no reasonable ground to apprehend loss or waste of public funds resulting therefrom.

The action of the city and the Park Commission in entering into the agreements embodied in the conveyances referred to will not be deemed beyond their powers on the ground that the life of the agreements may extend beyond the terms of the present members of defendants' governing boards. These transactions come within the principle stated in *Plant Food Co. v. Charlotte*, 214 N. C., 518, 199 S. E., 712; 3 McQuillin, 952.

We conclude that the ruling of the trial court in denying the motion for a restraining order must be

Affirmed.

H. R. PERRY v. FIRST-CITIZENS BANK & TRUST COMPANY, ADMINISTRATOR D. B. N. OF THE ESTATE OF J. B. PERRY, DECEASED.

(Filed 24 November, 1943.)

1. Executors and Administrators § 21: Limitation of Actions § 15—

Plaintiff sued for distributive share of estate. Defendant, administrator, answering, sets up and pleads debts of plaintiff due the intestate as an offset. Plaintiff, replying, denies the debts and pleads the three-year and ten-year statutes of limitation. On the hearing it was made to appear that the debts of plaintiff, if any, were barred by the statutes of limitation during the lifetime of the intestate. *Held:* The plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant.

2. Executors and Administrators § 21: Pleadings § 10: Equity § 1a—

In an action by plaintiff to recover his distributive share of an estate of which defendant is administrator, where defendant sets up and pleads debts of plaintiff due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff has no application.

APPEAL by plaintiff from *Burney, J.*, at March Term, 1943, of FRANKLIN. Reversed.

Civil action to recover distributive share of decedent's estate.

Defendant's intestate died in July, 1940, leaving certain nieces and nephews as his heirs at law. Plaintiff is a nephew and, as such, is one of the distributees. At the April Term, 1942, the defendant was authorized to make a partial distribution of assets on hand among the distributees. The amount accruing to the plaintiff under said order was $625.00. The defendant having declined to pay plaintiff his share, plaintiff instituted this action for the recovery thereof. In answer to the complaint the defendant sets up and pleads certain alleged debts of plaintiff due defendant's intestate. These include (1) $100.00 note dated 23 July, 1924, due on demand; (2) $750.00 sealed note dated 4 January, 1926, due 1 December, 1926; (3) $23.26, open account charge under date of 14 April, 1926; (4) $87.20, open account charge dated 31 May, 1924; (5) $537.50, fertilizer account for 1930; (6) $954.72, balance due on open account for 1920, 1921, 1922; (7) $170.00, open account charge 14 May, 1926. No payment is shown to have been made on either of said accounts or notes, so as to bring them within the statute of limitations.

Plaintiff, in reply, denied said indebtedness and every part thereof, and pleaded both the three-year and ten-year statutes of limitations.

When the cause came on to be heard the parties waived trial by jury and agreed that the court should hear the evidence, find the facts, and render judgment thereon, either in or out of the county, as of said term.

When the cause came on to be heard the court found the facts as above summarized, concluded that the plea of the statute of limitations is not available to the plaintiff, and rendered judgment that the plaintiff recover nothing. Plaintiff excepted and appealed.

G. M. Beam and Gholson & Gholson for plaintiff, appellant.

W. L. Lumpkin and Yarborough & Yarborough for defendant, appellee.

BARNHILL, J. For the purpose of proving the open accounts pleaded in defense, the defendants offered the merchandise ledger or book of accounts kept by the deceased. There was no other evidence to sustain a finding that these amounts are owing. While plaintiff did not object to the evidence he does except to the finding of fact that the amounts shown on this ledger as being charged to the plaintiff are in fact due and unpaid.

A finding of fact by the court below, when trial by jury has been waived, is binding on this Court when, and only when, such finding is supported by competent legal evidence.

It is to be doubted that the ledger sheets or accounts offered in evidence and admitted without objection constitute legal evidence of the charges therein disclosed. The amounts claimed, with one exception, exceed $60.00, and there was no attempt to comply with the provisions of C. S., 1786 and 1787. Be that as it may, we refrain from decision on that point and pass to the question which is decisive.

When a distributee sues to recover his distributive share of the estate and the administrator pleads by way of offset, under his alleged right of retainer, debts due by the distributee to the estate, is the plea of the statutes of limitations available to the plaintiff?

On this question the courts are sharply divided. Anno. 1 A. L. R., 1007; Anno. 16 A. L. R., 329, 341; Anno. 73 A. L. R., 582. In many courts it is held that a demand of a defendant, whether pleaded by way of setoff, counterclaim, or cross bill, is regarded as an affirmative action, and therefore, unlike a matter of pure defense, is subject to the operation of the statute of limitations, and is unavailable if barred. 16 A. L. R., 328. Other courts hold *contra*.

In most, if not all, the jurisdictions in which it is held that a barred claim is available as an offset, the courts base their decisions upon some provision of a local statute. Anno. 16 A. L. R., 331. The decisions cited and relied on by the defendant come principally from these States.

As, on this point, this is a case of first impression in this jurisdiction, we must decide the question unaided by any uniform line of decisions, choosing the course which the better reason seems to dictate.

Had defendant elected to plead the debt of plaintiff (which he denies) as a counterclaim or by way of cross action and prayed judgment for the full amount, his claim would be barred. This would seem to be clear. His plea here is in effect a plea of setoff. He seeks to establish the debt and to recover so much thereof as may be necessary to cancel the claim of the plaintiff. This is an affirmative defense, under which defendant seeks affirmative relief. There is no sound reason why we should say that this demand for part recovery is not equally subject to the plea of the statute.

The doctrine of equitable setoff does not apply. Defendant asserts a legal claim. The estate is just as much a debtor to him as he is to the estate. Each has a legal right and remedy. And a statute-barred debt is no more recoverable by an estate than by any other creditor. In many instances, as here, such claims are covered by the dust of time and forgotten, although found by the administrator after the death of his intestate.

Furthermore, the right of action of the deceased was barred during his lifetime and long before plaintiff's cause of action arose. Under these circumstances and in the face of a proper plea of the statute, it is not now available either as a counterclaim or as a setoff.

It may be true, as urged by defendant, that to allow plaintiff to recover his full distributive share of the estate while denying the estate the right to deduct his indebtedness would be an injustice to the other heirs and distributees. If so, the injustice was not worked by the law but by the failure of the deceased to collect or attempt to collect his debt before it was barred by the statute, or to put it in such form as that its life would have been extended. If the plaintiff has not paid the claim, as he contends he has and as the law presumes, the deceased no doubt considered it so much water over the dam. At least he took no action to make it otherwise. Such loss as the other distributees may suffer is due to his neglect.

The exception of the plaintiff to the conclusion of the court below that the plea of the statutes of limitations is not available to him is well taken. The judgment of the court below is

Reversed.

TOWN OF APEX, A MUNICIPAL CORPORATION, V. A. J. TEMPLETON AND WIFE, ROBERTA O. TEMPLETON; J. M. TEMPLETON, JR., UNMARRIED; A. J. MAXWELL, COMMISSIONER OF REVENUE; WM. T. JOYNER, ADMINISTRATOR OF LEWIS M. CONNOR; SAM RUFFIN; N. F. TURNER; GURNEY P. HOOD, COMMISSIONER OF BANKS; CALE K. BURGESS, TRUSTEE N. C. AGRICULTURAL CORPORATION; W. A. LUCAS, TRUSTEE CARALEIGH PHOSPHATE CORPORATION; GEO. U. BAUCOM, TRUSTEE, AND J. MILTON MANGUM, TRUSTEE.

(Filed 24 November, 1943.)

1. Pleadings §§ 10, 29—

In a suit by a town against defendants to foreclose a tax lien under C. S., 7990, where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby.

2. Taxation § 40c—

In actions to foreclose liens for delinquent taxes or special assessments, the judgment obtained constitutes a lien *in rem* and the owner of the property is not personally liable for the payment thereof.

APPEAL by defendants A. J. Templeton and J. M. Templeton, Jr., from *Williams, J.*, at June Term, 1943, of WAKE.

Civil action instituted 11 August, 1941, by plaintiff under the provisions of Section 7990 of the Consolidated Statutes of North Carolina, to foreclose a tax lien on certain lands situate in the Town of Apex, and listed in the name of A. J. Templeton and J. M. Templeton, Jr.

The defendants A. J. Templeton and J. M. Templeton, Jr., filed answer and denied that taxes were due as alleged in the complaint, and further set up a counterclaim, based on alleged damages sustained by the defendants by reason of the location of certain water and sewer lines by the plaintiff on the premises of the defendants, and plead such counterclaim against any taxes that might be determined to be due.

At the November Term, 1942, of the Superior Court of Wake County, his Honor, Thompson, J., presiding, the plaintiff through its attorney moved to strike the answer of the defendants, upon the ground that said answer set up only the defense of a counterclaim. The court found as a fact that the suit was for the collection of taxes and no counterclaim should be allowed; and entered an order "that the answer of the defendants, setting up a counterclaim, be and the same is stricken from the record of the court."

Thereafter, the clerk of the Superior Court of Wake County signed a judgment and order of sale.

At the June Term, 1943, of Wake Superior Court, the plaintiff moved to set aside the judgment and order of sale, on the ground that

the Superior Court having taken jurisdiction, the clerk of the Superior Court was without jurisdiction to sign a judgment, and further moved for a judgment upon the complaint. The motion was granted and judgment was signed based on the allegations of the complaint.

Defendants A. J. Templeton and J. M. Templeton, Jr., appeal and assign errors.

P. H. Wilson for plaintiff.

A. J. Templeton and J. M. Templeton for defendants.

DENNY, J. The appealing defendants except and assign as error the refusal of his Honor to submit to the jury the issues of fact arising on the pleadings. His Honor was apparently under the impression that the order entered by Judge Thompson struck out the entire answer or that the answer interposed no defense other than the counterclaim, which was properly stricken out. *Commissioners v. Hall,* 177 N. C., 490, 99 S. E., 372; *Graded School v. McDowell,* 157 N. C., 316, 72 S. E., 1083; *Gatling v. Commissioners of Carteret,* 92 N. C., 536. We think the order entered by Judge Thompson had the effect only of striking the counterclaim from the answer, and that the other defenses were unaffected thereby. The issues raised by the pleadings should have been submitted to the jury. *Burton v. Rosemary Mfg. Co.,* 132 N. C., 17, 43 S. E., 480.

There is another exception on the record worthy of consideration, which challenges the judgment, in that it was rendered against the appealing defendants personally.

Section 1719, ch. 310, Public Laws of 1939, N. C. Code of 1939 (Michie), section 7971 (228), which provides for the foreclosure of tax liens, reads, in part, as follows: "(d) The foreclosure action shall be an action in superior court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage.

"(m) Any judgment in favor of the plaintiff or any defendant taxing unit in an action brought under this section shall order the sale of the property, or so much thereof as may be necessary for the satisfaction of: (1) taxes adjudged to be liens in favor of the plaintiff, other than taxes the amount of which has not been definitely determined, together with interest, penalties and costs thereon; and (2) taxes adjudged to be liens in favor of other taxing units, . . ."

A tax list in the hands of a tax collector is equivalent to an execution and the tax collector, in lieu of selling real estate for the collection of taxes due thereon, may seize personal property belonging to the taxpayer and sell same or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer. Sec. 1713, ch. 310, Public

Laws 1939, N. C. Code of 1939 (Michie), sec. 7971 (222); *Charlotte v. Kavanaugh,* 221 N. C., 259, 20 S. E. (2d.), 97; *Cherokee County v. McClelland,* 179 N. C., 127, 101 S. E., 492; *Peebles v. Taylor,* 121 N. C., 38, 27 S. E., 999; *Davie v. Blackburn,* 117 N. C., 383, 23 S. E., 321; *Wilmington v. Sprunt,* 114 N. C., 310, 19 S. E., 348. But in an action to foreclose a lien for delinquent taxes or special assessments, the judgment obtained in said action constitutes a lien *in rem* and the owner of the property is not personally liable for the payment thereof. C. S. 7990; *Wilkinson v. Boomer,* 217 N. C., 217, 7 S. E. (2d.), 491; *Wadesboro v. Coxe,* 215 N. C., 708, 2 S. E. (2d), 876; *Orange County v. Jenkins,* 200 N. C., 202, 156 S. E., 774; *Pate v. Banks,* 178 N. C., 139, 100 S. E., 251; *Drainage District v. Huffstetler,* 173 N. C., 523, 92 S. E., 368; 61 C. J., Taxation, sec. 1552, p. 1143. It is therefore erroneous to render a personal judgment against the owner or owners of land in an action to foreclose a lien for delinquent taxes.

The remaining exceptions are without merit.

To the end that the issues of fact arising on the pleadings may be submitted to a jury, the defendants are granted a

New trial.

JESSIE M. GODFREY, ADMINISTRATRIX, v. TIDEWATER POWER CO., ET AL.

(Filed 24 November, 1943.)

1. Torts § 6—

One of several defendants, in an action for wrongful death arising out of a joint tort, may have still another joint tort-feasor brought in and made a party defendant for the purpose of enforcing contribution, where plaintiff's right of action against such other tort-feasor, originally subsisting, has been lost by the lapse of time. C. S., 160.

2. Same—

In actions arising out of a joint tort, wherein judgment may be rendered against two or more persons who are jointly and severally liable, and not all of the joint tort-feasors have been made parties, those who are sued may at any time before judgment, upon motion, have the other joint tort-feasors brought in and made parties defendant in order to determine and enforce contribution. Indeed, the right of contribution may be enforced after the liability to the injured party has been extinguished by payment of the judgment and its transfer to a trustee for the benefit of the paying judgment debtor. C. S., 618.

3. Same—

At common law no right of action existed between or among joint tort-feasors who were *in pari delicto,* so that the right necessarily depends upon the terms of the statute. C. S., 618.

GODFREY *v.* POWER CO.

APPEAL by defendant Tidewater Power Company from *Blackstock, Special Judge,* at September Special Term, 1943, of MECKLENBURG.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the negligence, default or wrongful acts of the defendants Tidewater Power Company and two of its agents, one a foreman, the other an employee, when plaintiff's intestate, while working on a substation of the Power Company near the city of New Bern, around the hour of 1:30 a.m., 10 June, 1942, was electrocuted by coming in contact with a wire carrying a high voltage of electricity, which the defendants had previously undertaken to deaden or cut off and had failed to do so.

This action was instituted 28 April, 1943.

In its answer, filed 28 July, 1943, the corporate defendant denied liability and set up a cross-action against the city of New Bern for contribution as a joint tort-feasor in case the answering defendant should be held liable.

At the time of answering, the corporate defendant filed formal motion pursuant to C. S. 618, to make the city of New Bern a party defendant. The clerk denied this motion on the ground that it had not been made within a year of plaintiff's intestate's death, and the cause of action for wrongful death as against the city had therefore been lost. On appeal to the judge the ruling of the clerk was approved.

From the denial of its motion, the Tidewater Power Company appeals, assigning error.

Carswell & Ervin and Helms & Mulliss for plaintiff, appellee.

Robinson & Jones for defendant Power Co., appellant.

STACY, C. J. The question for decision is whether one of several defendants in an action for wrongful death arising out of a joint tort may have still another joint tort-feasor brought in and made a party defendant for the purpose of enforcing contribution, when the plaintiff's right of action against such other tort-feasor, originally subsisting, has been lost by the lapse of time. C. S. 160; *Curlee v. Power Co.,* 205 N. C., 644, 172 S. E., 329. The law answers in the affirmative. 13 Am. Jur., 52; 18 C. J. S., 19.

The pertinent meaning of C. S., 618 is that in an action arising out of a joint tort wherein judgment may be rendered against two or more persons, who are jointly and severally liable, and not all of the joint tort-feasors have been made parties, those who are sued may at any time before judgment, upon motion, have the other joint tort-feasors brought in and made parties defendant in order to determine and

enforce contribution. *Freeman v. Thompson,* 216 N. C., 484, 5 S. E. (2d), 434.

It is true common liability to suit must have existed as a condition precedent to contribution, but it is not essential that it should continue to subsist, or be kept alive, against all of the joint tort-feasors. *DeBrue v. Frank,* 213 Wis., 280, 251 N. W., 494; *Norfolk Southern R. R. Co. v. Gretakis,* 162 Va., 597, 74 S. E., 841; *Consolidated Coach Corp. v. Burge,* 245 Ky., 631, 54 S. W. (2d), 16, 85 A. L. R., 1086. Indeed, the right of contribution may be enforced after liability to the injured person or his representative has been extinguished by the payment of the judgment and its transfer to a trustee for the benefit of the paying judgment debtor. *Hoft v. Mohn,* 215 N. C., 397, 2 S. E. (2d), 23.

In cases where the negligent acts of two or more persons concur in producing a single injury, with or without concert among them, the general rule is that they may be treated as joint tort-feasors and sued separately or together at the election of the injured party or his representative. *Charnock v. Taylor, ante,* 360; *Hipp v. Farrell,* 169 N. C., 551, 86 S. E., 570; *Hough v. R. R.,* 144 N. C., 692, 57 S. E., 469.

At common law no right of action for contribution existed between or among joint tort-feasors who were *in pari delicto. Raulf v. Light Co.,* 176 N. C., 691, 97 S. E., 236. With us the right is statutory, and its use necessarily depends upon the terms of the statute. *Gaffney v. Casualty Co.,* 209 N. C., 515, 184 S. E., 46. The pertinent part of the enactment, as amended in 1929, is, that in all cases in the courts of this State wherein judgment has been, or may be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment, and if the judgment be obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, are made parties defendant, those tort-feasors made parties defendant, and against whom judgment is obtained, may, in an action therefor, enforce contribution from the other tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant. C. S., 618, as amended by ch. 68, Public Laws 1929.

The right to "enforce contribution" in an action like the present comes from this amendment. It is the right of one joint tort-feasor, against whom judgment has been obtained in an action arising out of a joint tort, to recover of the other joint tort-feasors their proportionate part of such judgment. *Hoft v. Mohn, supra.*

The right accrues when judgment is obtained in an action arising out of a joint tort. From this it follows that a contingent or inchoate right to enforce contribution arises to each defendant tort-feasor at the time of the institution of the action to recover on the joint tort. As

long then as the plaintiff's right to recover in such suit remains undetermined, the contingent or inchoate right of each defendant tort-feasor to enforce contribution continues, and, on rendition of judgment in favor of the plaintiff, this right matures into a cause of action. 13 Am. Jur., 51. Thus it is rooted in and springs from the plaintiff's suit and projects itself beyond that suit, but it is not dependent on the plaintiff's continued right to sue all the joint tort-feasors.

The purpose in allowing all joint tort-feasors to be made parties defendant at any time before judgment in the suit to recover on the joint tort is to provide for settlement of the whole controversy in a single action. *Gaffney v. Casualty Co., supra;* 13 Am. Jur., 52.

The fact that a municipality of one county is to be made a party defendant in an action pending in another county has not been overlooked. C. S., 464; *Cecil v. High Point,* 165 N. C., 431, 81 S. E., 616. The question of venue, however, is not presented or decided. *Banks v. Joyner,* 209 N. C., 261, 183 S. E., 273; *Hannon v. Power Co.,* 173 N. C., 520, 92 S. E., 353; McIntosh on Procedure, 267.

Reversed.

J. M. HUNSUCKER, C. A. LEWIS, E. R. BROWN, G. B. WILLIAMS, T. N. SLACK, J. B. HAMMOND, J. H. COCHRAN, E. T. DENNIS, DR. C. E. McMANUS, S. C. STEWART, W. C. LASSITER, AND OTHERS, TAXPAYERS AND CITIZENS OF HEMP, NORTH CAROLINA, v. STANLEY WINBORNE, THAD EURE, AND HARRY McMULLAN, CONSTITUTING AND COMPOSING THE MUNICIPAL BOARD OF CONTROL OF NORTH CAROLINA.

(Filed 1 December, 1943.)

1. Municipal Corporations § 5: Constitutional Law § 4d—

The Municipal Board of Control is a creature of the General Assembly within the provision of Art. II, sec. 29, of the Constitution of North Carolina.

2. Municipal Corporation § 5: Pleadings § 15—

In a civil action to restrain the execution of an order changing the name of a town, C. S., 2779, 2781, 2782, where the complaint contains no allegation that the Board of Municipal Control has failed to observe and follow the requirements of the statutes and no allegation that the said Board has acted capriciously or in bad faith, demurrer to the complaint for failure to state a cause of action was properly sustained, and there was no error in the court's dissolving a restraining order theretofore granted and dismissing the action.

3. Municipal Corporations § 5—

Upon the hearing by the Board of Municipal Control of a petition to change the name of a town, the Board has power to investigate and

determine whether or not the requirements of C. S., 2781, 2782, have been complied with.

4. Appeal and Error § 18—

If the Board of Municipal Control should err in its findings, the error may be corrected by the Superior Court upon a writ of *certiorari*, there being no provision in the statute for an appeal. Unless so reviewed, ordinarily the findings of the Board are conclusive and cannot be collaterally attacked.

5. Same: Fraud § 8—

Conceding the complaint to be a petition for a writ of *certiorari*, C. S., 630, it fails to make a proper showing of merit, upon which alone *certiorari* will issue, for the mere allegation of fraud is insufficient. The law requires that, if fraud be relied upon, all essential facts and elements constituting the fraud must affirmatively appear from the pleading.

APPEAL by plaintiffs from *Burney, J.*, at 10 May Term, 1943, of WAKE.

Civil action instituted 23 April, 1943, to restrain the execution of order changing name of town of Hemp to the name of Robbins—heard upon demurrer to complaint.

Though the order entered on 1 April, 1943, by defendants Municipal Board of Control, acting upon petition filed on 25 January, 1943, changing the name of the town of Hemp to that of Robbins, to become effective at 12:01 a.m., on 1 September, 1943, is not made a part of the complaint of plaintiffs, it is referred to and attacked therein by plaintiffs and is made a constituent part of the case on appeal to this Court, and is treated by the parties as if it were in fact specifically made a part of the complaint, and will be so considered on this appeal.

Summarized, the order sets forth:

1. That on 26 February, 1943, after notice in substantial compliance with the requirements of sec. 2781 of Consolidated Statutes, a fact found by the Board, a hearing upon the petition was held by the Municipal Board of Control, in the hearing room of the Utilities Commission in the city of Raleigh, when and where attorneys representing the petitioners, and attorney representing the persons objecting to the change, and numerous citizens for and against the change appeared, and were heard by statements and arguments. But that at said hearing the question being raised as to whether or not the petition was signed by the required number of resident electors and resident freeholders, an adjournment was taken until Friday, 12 March, 1943, when the hearing would be resumed.

2. That on Friday, 12 March, 1943, on further hearing at same place, the same attorneys representing petitioners and respondents appeared, and the Board heard further statements and arguments from

the interested parties. The Board found (a) "that the petition was signed by many more than a majority of the resident qualified electors and by many more than a majority of the resident freeholders or homesteaders of the town of Hemp"; (b) "that the name 'Hemp' is not a suitable name for a growing and prosperous town . . . and . . . was selected for the town without any particular reason therefor and . . . has no significance but was substituted only a few years ago for the name of 'Elise' by which the town was formerly known"; (c) that "the large majority of the citizens of the town who have requested that the name be changed to Robbins has done so because of the fact that this is the name of the principal owner of the Pinehurst Cloth Mill, which is operated in the town of Hemp," who "has been very generous and public spirited in all of his relationships with the town of Hemp and its people," and "together with the management of the mill, has promoted many enterprises of great civic value to the community and has been largely instrumental in the progress and development of the town"; and (d) that "in the hearings before the Board the persons objecting to the change of the name of the town of Hemp, based their objections largely on the grounds that confusion and inconvenience would grow out of it," pointing out that it would be necessary to change the name of the post office, including the rural routes which would be served by the post office, and the name in railroad tariffs and schedules, bus schedules, etc.; also on the ground that a change at this time during the war period might cause some inconvenience. And the order continues: "The Board having fully considered the petition for the change of the name of the town and all of the objections raised thereto, and it appearing to the Board that the change of the name of the town of Hemp to Robbins is strongly advocated by a large majority of the resident qualified electors and a large majority of the resident freeholders or homesteaders, the Board is of the opinion that the will of the majority of such citizens of the town should be given effect, and that it is for the best interests of the town that its name be changed as requested by them. It is, therefore, ordered that the name of the Town of Hemp shall be changed to the name of Robbins, this change to become effective at 12:01 a.m. on the 1st day of September, 1943."

Plaintiffs, eleven in number, "and others," styled "taxpayers and citizens of Hemp, North Carolina," in their complaint, attack the said order of the Board of Municipal Control, succinctly stated, upon the grounds that signatures of at least fifty persons signing the petition upon which it is based were obtained by fraud, duress, intimidation and threats of certain business interest, Pinehurst Cloth Mill, and its officers, agents and employees, by reason of which the petition lacked the *bona fide* signatures of a majority of the resident qualified electors and

of the resident freeholders or homesteaders of the town, as required by the statute.

The fraud as alleged is in general terms and, stated briefly, is as follows: That the matter of changing the name of the town of Hemp to Robbins was instigated and begun by W. P. Saunders, vice-president of Pinehurst Cloth Mill, for the purpose of creating a monopoly and preventing other businesses locating at the town, and not for the purpose of bettering the community or for best interest of the public at large. That the Pinehurst Cloth Mill, being the owner of fifty houses in the mill village of Hemp, conveyed same to the Hemp Housing Company, a corporation of which Saunders was president, and thereafter these houses valued at $1,000 or more "were presented to workers in the mill with instructions to purchase same" and "could be bought for $3.50 down payment." That all such sales were not in good faith but were made for the fraudulent purpose and intention of qualifying the purchasers as freeholders to sign the petition to change the name of the town. That large sums of money were spent in boosting Karl Robbins, a nonresident, president of said Pinehurst Cloth Mill, and in attempting "to purchase the entire community of Hemp." That the petition was placed in the mill proper and all workers and those receiving money from Mr. Karl Robbins, or the Pinehurst Cloth Mill were ordered and directed to sign, and "said order was accompanied by threats, by intimidation and also by large promises of reward. That the entire matter of changing the name was not one of free will of the people, freeholders and voters, but was one of economic pressure, threats, coercion and intimidation." That "certain names and signatures were placed on the petition which were all written in the same handwriting and were not in truth and in fact signatures of the persons purporting to sign." That "said signatures and all efforts to change the name of the town were obtained by the Pinehurst Cloth Mill, Karl Robbins, President, by the payment of money to employees and others and the said petition represents a fraudulent purchase and not the free will of homesteaders and freeholders in Hemp."

The complaint further alleges: That as the town has bonds outstanding, financial confusion is likely to follow the change of name of the town; that the credit of the town may be injured, and all property owners residing therein, including the plaintiffs, will be irreparably damaged thereby; that the plaintiffs also own property and businesses in connection with which they have spent large sums of money in printing stationery, making advertisements with foreign business firms and with rating bureaus and, as a result, the change of name, most particularly at this time, will result in irreparable damage to the plaintiffs and to their businesses; that for forty years the town of Hemp and the

numerous business firms and industries therein have enjoyed good-will and name and a market has been established for their products, and such good-will will be destroyed, and irreparable damage done by a change in the name of the town; and that on the other hand, as the Pinehurst Cloth Mill ships none of its goods over railroads or other public carriers, a change of name will not affect it with respect to motor and railroad freight rates and bus transportation.

Plaintiffs further allege:

"13. That the Order entered by the Municipal Board of Control of North Carolina is void for the reason that they were not empowered to pass upon an issue of fraud, duress and intimidation, which issue was raised before them by affidavit. That said Board was without jurisdiction to pass upon a matter which must be determined under law in the courts or a court of proper jurisdiction. That said Order is void for that the Board of Municipal Control did not have jurisdiction there not being upon the petition the required number of *bona fide* signatures of voters and freeholders resident of the town of Hemp. And it is further void for that the Order is so indefinite and uncertain in its terms and conditions as to render it void at law."

Upon these allegations plaintiffs say that they are entitled (1) to have the court pass upon the question as to whether the petition "was obtained by the false and fraudulent duress and intimidation and purchase as hereinbefore set forth," (2) to have the Municipal Board of Control restrained from further proceedings or carrying into effect the said order which is alleged to be void; and (3) to have the Mayor and Board of Commissioners of the town of Hemp, their servants, agents, employees, attorneys or any other person from putting said order into effect until this matter is finally determined by the courts, and in these respects plaintiffs pray injunctive relief. And by amendment to complaint plaintiffs further invoke protection in specific sections of the North Carolina Constitution.

Defendants demurred to the complaint for that it fails to state facts sufficient to constitute a cause of action against the defendants in that, among other things, it appears (a) that the Municipal Board of Control has performed all the duties with reference to the petition for changing the name of the town of Hemp which, under the statute, it is permitted to perform, and this suit was instituted after the order changing the name had been signed and filed; (b) that the Municipal Board of Control in hearing the petition for the change of the name of the town of Hemp was charged with the responsibility of ascertaining that the petition was signed by a majority of the resident qualified electors and a majority of the resident freeholders and homesteaders in the town, and, upon challenge as to the sufficiency of the petition by reason of signa-

tures alleged to have been obtained thereon by fraud or otherwise, it was in law the duty of the Board to pass up the same, and its action could be reviewed only upon a writ of *certiorari;* and (3) that the allegations of fraud and duress are general, and lack that particularity required to constitute a cause of action therefor; but, if sufficient in this respect, there is absence of allegation that such fraud was practiced upon enough persons to have invalidated the petition upon which the order of the Board is based.

Upon hearing in the Superior Court the demurrer of defendants was sustained, the restraining order theretofore granted was dissolved and the action was dismissed.

Plaintiffs appeal to Supreme Court and assign error.

H. F. Seawell, Jr., W. D. Siler, and L. R. Varser for plaintiffs, appellants.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for defendants, appellees.

WINBORNE, J. Plaintiffs present for decision on this appeal these two questions:

1. Did the court below commit error in dismissing this action?

2. Are the plaintiffs entitled to a motion in the Supreme Court that this action be remanded to the Superior Court of Wake County to the end that a writ of *certiorari* to Municipal Board of Control be granted to bring up for review the proceeding relating to the change of the name of the town of Hemp to that of Robbins

Each question must be answered in the negative.

In regard to the first question: The Municipal Board of Control is a creature of the General Assembly within the provisions of Article II, section 29, of the Constitution of the State of North Carolina. While this section of the Constitution forbids the General Assembly to pass any local, private, or special act or resolution relating to changing the name of cities, towns and townships, it provides that the General Assembly shall have power to pass general laws regulating such matters. Pursuant thereto the General Assembly of 1917 passed an Act, Public Laws 1917, chapter 136, subchapter II, to provide for the organization of cities, towns and incorporated villages, in section 4 of which the Municipal Board of Control, composed of the Secretary of State, as secretary, the Attorney-General, as chairman, and the Chairman of the Corporation Commission, was created, C. S., 2779, with the power to hear and pass upon petitions for such purpose in accordance with procedure prescribed in sections 1 to 3, both inclusive, which became sections 2780, 2781 and 2782 of Article 13 of chapter 56 of Consolidated Statutes.

And in 1935, section 1 of the 1917 Act, which became section 2779 of Consolidated Statutes, was rewritten and re-enacted, substituting therein the Utilities Commissioner for the Chairman of the Corporation Commission as a member of the Municipal Board of Control, and giving to the Municipal Board of Control the power and privilege of changing the name of any said town or municipal corporation within the bounds of the State of North Carolina—prescribing therefor the procedure prescribed in sections 2781 and 2782 of Consolidated Statutes, Public Laws 1935, chapter 440.

The procedure outlined in these statutes as read to conform to a proceeding for changing the name of a town, pertinent to this appeal, may be briefly stated as follows: (1) The petition, upon which the proceeding is initiated and based, must be signed by a majority of the resident qualified electors and a majority of the resident freeholders or homesteaders of the town. (2) Date and place of hearing shall be fixed and notice thereof given all as prescribed. (3) No formal answer to the petition is required, but any qualified voter or taxpayer of the town may appear at the hearing of such petition, and the matter shall be tried as an issue of fact by the Municipal Board of Control. (4) The Board shall file its findings of fact at the close of the hearing, and if it shall appear that the allegations of the petition are true, that all the requirements of the statute have been substantially complied with, and that the change of the name of the town will better subserve the interest of the town, the Board shall enter an order changing the name as proposed in the petition. (5) Upon the approval of the Board and the recording of the papers as prescribed the change of name is complete.

In the present case there is no allegation that the Municipal Board of Control has failed to observe and follow the requirements of the statute. And there is no allegation that the Board has acted capriciously or in bad faith. *Pue v. Hood, Comr. of Banks*, 222 N. C., 310, 22 S. E. (2d), 896; *Warren v. Maxwell, ante*, 604. The allegation upon which plaintiffs base this action is that the Board has no power to determine whether or not the petition has the *bona fide* signatures of a majority of the resident qualified electors and a majority of the resident freeholders or homesteaders of the town, when challenged by a charge of fraud practiced in obtaining such signatures. It is true that the statute requires the petition to be signed by a majority of such persons as a prerequisite to its sufficiency, but that is a question of fact to be determined by the Municipal Board of Control. The statute creating the Board expressly provides that "if it shall appear," among other things, "that all the requirements of this article have been substantially complied with" the Board shall enter an order changing the name, etc. Manifestly, it could not appear to the Board that all the requirements of the statute had been

substantially complied with unless when the signatures to petition are challenged, it could make investigation and find the facts. And in the present case the Board has investigated and found that the petition is signed in accordance with the requirements of the statute. If the Board erred in so finding, it was an error to be corrected upon review by the Superior Court upon a writ of *certiorari* obtained in apt time and upon proper showing—there being no provision in the statute for an appeal from the Municipal Board of Control to the Superior Court. And unless such review be obtained, the decision of the Board, based upon its findings in regard to the prerequisite sufficiency of the petition, is ordinarily conclusive, and cannot be collaterally attacked. See *Schank v. Asheville*, 154 N. C., 40, 69 S. E., 681; *Asheboro v. Miller*, 220 N. C., 298, 17 S. E. (2d), 105; *Warren v. Maxwell, supra*.

We now come to the second question: This action instituted in the Superior Court is in effect a collateral attack upon the decision of the Municipal Board of Control in changing the name of the town of Hemp to Robbins, with respect to a prerequisite to the petition upon which the Board acted, which may not be maintained. But conceding the complaint to be a petition for writ of *certiorari*, C. S., 630, to review the ruling of the Municipal Board of Control in respect to the sufficiency of the signatures to the petition, it fails to make proper showing of merit, upon which alone *certiorari* will issue. *S. v. Tripp*, 168 N. C., 150, 83 S. E., 630; *Taylor v. Johnson*, 171 N. C., 84, 87 S. E., 981. See also *Pue v. Hood, Comr. of Banks, supra*. The mere allegation in a pleading that an act was induced by fraud is insufficient. "A characterization of 'fraud' without any facts to support it is a mere *brutum fulmen*,"—*Stacy, C. J.*, in *Cotton Mills v. Mfg. Co.*, 218 N. C., 560, 11 S. E. (2d), 550. "The law requires that if fraud be relied upon, all essential facts and elements constituting the fraud must affirmatively appear from the pleading,"—*Brogden, J.*, in *Weaver v. Hampton*, 201 N. C., 798, 161 S. E., 480. "The facts constituting the fraud must be set out with such particularity as to show all the necessary elements of actionable fraud which would entitle the pleader to relief. The facts relied upon to constitute the fraud, as well as the fraudulent intent, must be clearly alleged,"—*Devin, J.*, in *Griggs v. Griggs*, 213 N. C., 624, 177 S. E., 165. See also *Petty v. Ins. Co.*, 210 N. C., 500, 160 S. E., 575. The same rule applies with respect to a charge of duress.

In the present case the allegations of fraud in respect to the signatures to the petition are broadside generalities, which are insufficient in a pleading in court where particularity of facts is necessary.

The judgment below is

Affirmed.

C. C. WILLIAMS, J. ARTHUR STEWART, H. C. STUTTS, D. C. HAMER, G. B. HAMMOND, G. B. WILLIAMS, C. S. LEWIS, E. T. DENNIS, T. N. SLACK, E. R. BROWN, J. M. HUNSUCKER, DR. C. W. McMANUS, S. C. STEWART, W. C. LASSITER AND ALL OTHER TAXPAYERS AND CITIZENS OF HEMP, WHO CARE TO MAKE THEMSELVES PARTIES PLAINTIFF, v. KARL ROBBINS, ALIAS KALAM RABINOWITS; W. P. SAUNDERS (OR SANDERS), E. M. RITTER, A. F. LOWDERMILK, W. N. McDUFFIE, F. H. UPCHURCH AND E. C. McSWAIN, DEFENDANTS.

(Filed 1 December, 1943.)

APPEAL by plaintiffs from *Bobbitt, J.*, at Chambers in Union County, 28 August, 1943. From MOORE.

Civil action instituted 14 August, 1943, to restrain defendants, their servants, agents, employees and attorneys from putting into effect anything that will change the name of the town of Hemp to Robbins.

This action is by the same plaintiffs, relates to the same order of the Municipal Board of Control, and is grounded upon substantially the same alleged facts as in the case of *Hunsucker v. Winborne, ante,* 650, to which reference is here made for facts in these respects. The judgment recites that when the case came on for hearing before judge presiding over and holding courts of the 13th Judicial District, at Chambers, in the courthouse in Monroe, Union County, on 28 August, 1943, to which the hearing had theretofore been continued, and being heard upon notice to show cause why temporary restraining order issued on 14 August, 1943, should not be continued in effect and after "fully hearing the matter, from affidavits of both sides and upon argument of counsel, the court is of opinion that plaintiffs herein are not legally entitled to attack in this cause the order of the Municipal Board of Control . . ., the said order and proceedings relating thereto being set out in the evidence upon the hearing." It further appears that "the court fails to find that the petition filed with the Municipal Board of Control was signed by less than a majority of the *bona fide* resident qualified electors or by less than a majority of the *bona fide* resident freeholders or homesteaders, and the court fails to find that any of the signers of said petition were induced to sign on account of intimidation or fraud." Thereupon it was ordered that the said temporary restraining order be and it is vacated and dissolved. And the hearing upon demurrer of defendants, as well as upon motion of plaintiffs made orally to strike the demurrer, was continued until a hearing may be had at term time in Superior Court of Moore County.

Plaintiffs appeal to Supreme Court and assign error.

H. F. Seawell, Jr., W. D. Siler, and L. R. Varser for plaintiffs, appellants.

U. L. Spence, M. G. Boyette, and J. C. B. Ehringhaus for defendants, appellees.

WINBORNE, J. Plaintiffs present on this appeal these two questions: 1. Are plaintiffs entitled to have the action heard in the courts of Moore County? 2. Should the temporary restraining order and injunction issued be continued to the hearing? For reasons set out in the opinion in *Hunsucker v. Winborne, ante,* 650, each of these questions must be answered in the negative. Hence, the judgment below is

Affirmed.

STATE v. NUNN OXENDINE, ARCHIE RANSOM AND HILTON OXENDINE.

(Filed 1 December, 1943.)

1. Receiving Stolen Goods § 2—

In a criminal prosecution for receiving stolen goods, C. S., 4250, the test of felonious intent is whether the prisoners knew, or must have known, that the goods were stolen, not whether a reasonably prudent person would have suspected strangers calling at a very early morning hour.

2. Receiving Stolen Goods § 6—

Where three defendants bought goods, paying full value, about 2 a.m. from two strangers, who represented that they must dispose promptly of the merchandise from their business because both had been called to the armed forces and one defendant promptly admitted all the facts to the officers while the other two first denied and then admitted the purchase, the State's witness who accompanied the thieves saying on cross-examination that the accused persons had no knowledge of the theft, the element of *scienter* is wanting and demurrer should have been sustained. C. S., 4643.

APPEAL by defendants from *Bobbitt, J.,* at August Term, 1943, of SCOTLAND.

Criminal prosecutions tried upon indictments charging each of the defendants in separate bills with receiving goods and chattels, specifically described and valued, the property of Leo Smith, knowing the same to have been feloniously stolen or taken in violation of C. S., 4250.

By consent, the three cases were consolidated and tried together, as they all grow out of sales made on a single trip, under similar circumstances and in close succession.

The record discloses that on Sunday night, 4 April, 1943, two escaped convicts and one James Williams broke into Leo Smith's store in Scotland County and stole a quantity of merchandise, including flour, sugar, canned goods, cigarettes, tobacco and eggs. They put the property in a stolen Chevrolet automobile and drove a distance of 25 or 30 miles over into Robeson County, first stopping and making a sale at some woman's house, and then arrived at the home of Nunn Oxendine, a tenant farmer, whom Williams knew, about 1:30 or 2:00 a.m. The two convicts who were well dressed in civilian clothes and who were strangers to Oxendine told him that they had been operating a store, but had received their calls to the Army and had to report the following Friday; that they were trying to dispose of their goods and had only a short time in which to peddle them out. Oxendine replied that he did not particularly need anything, but as he had a son in the Army then in Africa, he would be glad to make a small purchase if it would be of help to them. He thereupon purchased four bags of flour, some canned goods, tobacco and eggs, and paid the fair market value, $13 or $14, for the goods.

The thieves then drove on a distance of two or three hundred yards to the home of Archie Ransom, where they saw the defendant Ransom and Hilton Oxendine. The convicts repeated the same story which they had told Nunn Oxendine relative to being merchants and receiving their calls to the Army and trying to dispose of their stock of goods by peddling them out. Here they sold 60 or 75 pounds of sugar, 2 cartons of cigarettes and 5 dozen eggs. Archie Ransom paid $12 for the goods, their fair market value. Hilton Oxendine made no purchase as he had no money, albeit there is evidence to the effect that both made the purchase and Ransom advanced the money.

Later that same day, when the officers came to search for the goods, after arresting the thieves, Nunn Oxendine made no effort to conceal anything. He frankly stated his connection with the purchase. Archie Ransom and Hilton Oxendine first denied the purchase, then later admitted receipt of some of the goods. They denied purchasing any cigarettes, and these were not recovered, if they actually received them.

James Williams who was used by the State as a witness said on cross-examination that the defendnts "didn't know anything about the property being stolen" when they made the purchases.

Verdicts: Guilty as charged as to each defendant.

Judgments: Six months on the roads as to each defendant.

The defendants appeal, assigning as error the refusal to sustain their demurrers to the evidence and to dismiss the actions as in cases of nonsuit.

STATE *v.* OXENDINE.

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

W. S. Britt, T. A. McNeill, and McLean & Stacy for defendants.

STACY, C. J. The question for decision is whether the cases as made can survive the demurrers. Specifically, the question posed is whether the evidence warrants the finding that each of the defendants, with felonious intent, received the respective articles of merchandise, the property of Leo Smith, knowing at the time that the same had been feloniously stolen or taken in violation of C. S., 4250. *S. v. Miller,* 212 N. C., 361, 193 S. E., 388; *S. v. Dail,* 191 N. C., 231, 131 S. E., 573; *S. v. Caveness,* 78 N. C., 484. We are disposed to think the element of *scienter* is wanting. *S. v. Spaulding,* 211 N. C., 63, 188 S. E., 647. Apparently the circumstances are not such as to justify an inference of guilty knowledge on the part of the defendants. *S. v. Stathos,* 208 N. C., 456, 181 S. E., 273; *S. v. Wilson,* 176 N. C., 751, 97 S. E., 496.

The one fact in Nunn Oxendine's case urged as a circumstance to support an inference of *scienter,* is the unusual hour of the night at which the property was brought to his house. *S. v. Gordon,* 105 Minn., 217, 117 N. W., 483, 15 Ann. Cas., 897. In the cases of the other two defendants, the additional fact of their having first denied to the officers that they had purchased any of the merchandise, is also urged as indicating guilty knowledge on their part. *Birdsong v. State,* 120 Ga., 850, 48 S. E., 329. These are the only inculpating circumstances on the record. They may be sufficient to excite suspicion, somewhat strong perhaps, but they apparently leave too much to surmise or assumption to carry the cases to the jury. *S. v. Epps,* 214 N. C., 577, 200 S. E., 20; *S. v. Jones,* 215 N. C., 660, 2 S. E. (2d), 867. The evidence must do more than raise a suspicion or conjecture in regard to the essential facts of the case. *S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285.

The test is whether the defendants knew, or must have known, the goods were stolen, not whether a reasonably prudent person would have suspected strangers calling at 2 or 3 o'clock in the morning. *S. v. Stathos, supra; S. v. Spaulding, supra;* 17 R. C. L., 86. Traveling or visiting at early morning hours is not an unusual occurrence among some portions of our population. Note, 22 L. R. A. (N. S.), 833. Moreover, the story told by the thieves is to be considered in connection with the unusuality of the hour of their call. *S. v. Miller, supra;* 45 Am. Jur., 389. Then, too, it is to be remembered the testimony of the State's witness, James Williams, negatives *scienter* or guilty knowledge on the part of the defendants. It also appears that full value was paid for the goods in each instance.

The aid which the defendants sought to give the thieves (unknown as such at the time) was not in furtherance of the larceny as was the case in *S. v. Rushing,* 69 N. C., 29, but to enable them to dispose of their merchandise before going into the Army a few days hence. Such was the situation as it appeared to the defendants. "The law does not condemn where the heart is free from guilt." *S. v. Morrison,* 207 N. C., 804, 178 S. E., 562.

True it is, the defendants, Archie Ransom and Hilton Oxendine, exhibited some uneasiness when questioned by the officers after the event, but not so with Nunn Oxendine, who freely told of his purchase. Open and frank responses would have served them better, as they doubtless now understand, *S. v. Grass, ante,* 31, but this one circumstance seems hardly sufficient to sustain a conviction as to the equivocating defendants, especially as their equivocation may be ascribed to other causes, *e.g.,* the purchase of the sugar without ration coupons, or their natural fear of the officers. *S. v. Morrison, supra;* 45 Am. Jur., 389; *S. v. Massey,* 86 N. C., 658.

It is conceded that no presumption arises here and no guilty inference is to be drawn from the mere fact of the recent possession of the stolen property by the defendants. *S. v. Best,* 202 N. C., 9, 161 S. E., 535; *S. v. Lowe,* 204 N. C., 572, 169 S. E., 180.

The result is that the motions to dismiss or for judgments of nonsuit will be sustained. C. S., 4643.

Reversed.

GEORGE STRAKA AND WIFE, HELENA STRAKA, v. HOME OWNERS LOAN CORPORATION.

(Filed 1 December, 1943.)

Appeal and Error § 4—

It appearing that the sale sought to be prevented has been by consent consummated and, as authorized by order of court, confirmed and deed to the purchaser executed and delivered, the appeal from the order dissolving the restraining order will be dismissed.

APPEAL by plaintiffs from *Armstrong, J.,* at Chambers, 25 June, 1943. From MOORE. Appeal dismissed.

From an order vacating a temporary restraining order the plaintiffs appealed.

Seawell & Seawell for plaintiffs, appellants.

M. G. Boyette for defendant, appellee.

DEVIN, J. The plaintiffs purchased a house and lot in Southern Pines, North Carolina, from the defendant, and executed deed of trust to a trustee to secure the balance of the purchase price. Default having been made in the payment of the installments of the debt thus secured, the trustee, at the request of the defendant, advertised the property for sale, in accordance with the terms of the deed of trust, for 31 May, 1943. On 28 May, 1943, plaintiffs instituted action for damages against the defendant, alleging that between the time of purchase of the property by plaintiffs and the time of securing possession from the tenant, who, it was claimed, occupied the premises for the defendant, the property was injured by the tenant, and that plaintiffs were entitled to have the damages therefor credited by the defendant on the debt. It was alleged that this would be more than sufficient to liquidate the amount in arrears. Upon this complaint, used as an affidavit, temporary restraining order was issued, restraining the sale. However, it was agreed by the parties that notwithstanding the restraining order the sale of the property should be had as advertised, and that the sale should be reported but not confirmed pending further orders of the court. Accordingly, the sale was made 31 May, the defendant became the purchaser, and report of sale was filed. On 25 June following, Judge Armstrong, before whom the restraining order was made returnable, heard the matter on the pleadings and affidavits and entered order dissolving the temporary restraining order. It was provided in the order that "the sale made on the 31st day of May, 1943, may be confirmed unless the bid is raised as provided by law." No advance bid having been made, or objection noted, on 10 July, 1943, the sale was confirmed, and the trustee directed to execute and deliver deed to the purchaser. Pursuant to this order of confirmation, deed was executed and delivered to the defendant 11 August, 1943, and duly recorded.

It is apparent that the sale sought to be prevented has been by consent consummated, and as authorized by the order of court the sale has been confirmed, and deed to the purchaser executed and delivered. Hence, the appeal from the order dissolving the restraining order will be dismissed. *Rousseau v. Bullis,* 201 N. C., 12, 158 S. E., 553; *Efird v. Commissioners,* 217 N. C., 691, 9 S. E. (2d), 466; *Groves v. McDonald, ante,* 150.

Whether on the merits the plaintiffs can maintain their action against the defendant we need not now determine, as the question presented by the appeal was the correctness of the ruling below in dissolving the temporary restraining order.

Appeal dismissed.

CHARLES A. CANNON AND DAVID H. BLAIR, TRUSTEES UNDER THE WILL OF MARY ELLA CANNON, v. EUGENE T. CANNON, WILLIAM C. CANNON, NORMA LOUISE CANNON, HARRIETT COLTRANE CANNON, MARIAM CANNON HAYES, CHARLES A. CANNON, JR., MARY RUTH CANNON, ADELAIDE CANNON BLAIR, JAY B. DOUGLASS, ADELAIDE DOUGLASS WHITLEY, ALLEN DOUGLASS RUSHTON, ADELAIDE DOUGLASS RUSHTON, DAVID H. BLAIR, JR., MARGARET CANNON HOWELL, MARGARET CARR HOWELL, CLARK HOWELL III, WILLIAM BARRETT HOWELL, NANCY CARR DORMAN, JULIAN CARR FRIENDLY, MARGARET FRIENDLY, MARY ANN CARR SANGER, PAUL WELDON SANGER, JR., JULIAN S. CARR, MARY CANNON HILL, CHARLES G. HILL, NANCY KENT HILL, SUSAN HILL WALKER, SUSANNE WALKER, MARY LEORA WALKER, ELLA CANNON WALKER, JANE HILL SIMPSON, LAURA CANNON MATTES, JULIAN S. CARR, JR., JAMES CARR, NANCY DORMAN, ANN CARR SANGER, CHARLES G. HILL, JR., PEGGY RHEA WHITLEY.

(Filed 15 December, 1943.)

1. Judgments § 32—

The doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

2. Same—

It is a fundamental principle that, in order to support the plea of *res judicata*, the fact or facts, necessary to support relief in the second or subsequent action, must have been definitely comprehended in the issues and judgment in the prior action; or it must have been incumbent, upon the party relying on such facts, to have pleaded them and caused them to be put in issue when an opportunity was afforded him so to do. The doctrine of *res judicata* must be strictly applied.

3. Judgments § 15—

A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world.

4. Judgments §§ 32, 34, 35—

Where testatrix, a resident of this State, by a codicil to her will, gave the residue of her estate to trustees for the benefit of certain persons for life, with remainders over on contingencies, and on the same day this codicil was executed, she revoked certain provisions of a trust deed, theretofore made by her, disposing of other properties and set up, to take effect at her death, a dispositive scheme therefor, identical with that contained in the codicil, for the same persons and upon the same conditions as to title and succession, the construction placed upon this trust deed by the courts of another state is not *res judicata* in an action here to construe the codicil, and there was error in overruling demurrers to pleas setting up *res judicata* as a defense and in refusing a motion to strike.

STACY, C. J., concurring in result.

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

APPEAL by defendants, Laura Cannon Mattes, Ernest R. Alexander, Guardian *ad litem* for minors, and J. Carlyle Rutledge, Guardian *ad litem* for unborn issue, from *Warlick, J.*, at August Term, 1943, of CABARRUS.

This action was brought to have the Court construe the last will and testament of Mary E. Cannon, who died a resident of Cabarrus County, North Carolina, May 4, 1938. The will consists of an original, declared and published 22 June, 1923; a first codicil, made and published 5 January, 1927; and a second codicil, made and published 21 May, 1937. It is the interpretation of the second codicil with which the case is concerned. This codicil revoked substantial provisions of the original will and set up a new scheme of testamentary disposition with respect thereto. After making certain specific bequests, the will, under the second codicil, devised and bequeathed the residue of the decedent's estate to Charles A. Cannon, David H. Blair, and Central Hanover Bank & Trust Company, a New York corporation, as trustees upon specific trusts mentioned below. Subsequently, the Central Hanover Bank & Trust Company declined to qualify, and under the provisions of the will, on 16 September, 1941, plaintiffs Charles A. Cannon and David H. Blair qualified as trustees, and as such are in the present custody and possession of the estate.

The will directs that the trustees take the residuary estate and divide it into five equal shares, set each share apart for the benefit of the beneficiaries named, respectively, and hold and manage the same in trust for them, with power to invest and reinvest; and further provides out of each share an annuity, for the first taker, of 4½% of the value of the share during the lifetime of the annuitant, with remainder over to others upon contingencies which do not concern our immediate inquiry. Since, however, upon failure of sufficient income, the annuity is to be supplemented out of the *corpus,* conflicting interests may appear as between the first takers and the remaindermen.

From the pleadings and by apparent consent of the parties to the controversy, two questions only were posed for answer by the Court: First, what is the accrual date of the annuities established by the will; second, as to which date shall be determined the value of the shares upon which the 4½% annuity is to be computed—the date of the death of the testatrix or the date when the trustees received the trust estate from the executors and divided it into equal shares?

These questions arise out of what is contended to be an ambiguity in Section (G) of the will, which reads as follows:

"Whenever an annuity of four and one-half per centum (4½%) of a share or part of the trust estate is granted under the terms and provisions of this my Will, the said percentage shall be that percentage (*i.e.* 4½%) of the principal of the share or part set aside in trust, computed at the market value thereof at the date of the setting aside of said share or part."

Upon this the appellees contend that the several annuities commence upon the death of the testatrix, Mrs. Cannon, and that the shares are to be appraised or valued as of that date for the purpose of computing the annuities.

Prior to 21 May, 1937, Mrs. Cannon had, by deed or trust agreement, set up a revocable trust, in which, for the purposes of the trust, she conveyed a large part of her estate to The Farmers' Loan and Trust Company, a New York corporation, Charles A. Cannon and David H. Blair, as trustees. This instrument is dated 5 August, 1926. Subsequently, The Farmers' Loan and Trust Company became City Bank Farmers Trust Company, which succeeded in the trust. She reserved a life interest in the trust, and the property of which it was composed was turned over to the trustees at that time. On the same day that Mrs. Cannon made the last codicil to her will—that is, on 21 May, 1937—she revoked certain provisions made in the deed of trust, and therein, with respect to the property conveyed in the trust agreement, she set up a dispositive scheme in form and language identical with that contained in the codicil to the will executed the same day, conveying the property in trust for the benefit of the same takers for life and the same remaindermen, and upon the same conditions affecting the title and succession. With respect to the division of the property, the deed of trust provides:

"2. Upon the death of the donor, the Trustees shall divide the principal of the trust estate into five (5) equal shares and shall dispose of each of such equal shares as follows:"

Thereupon follows the provisions for allotment of shares and computation of the annuities upon their value, and the disposition of the property, as above set out. The corresponding provision in the will is as follows:

"FIFTH: All the rest, residue and remainder of my property and estate of whatsoever kind and wheresoever situate, I give, devise and bequeath to my Trustees, hereinafter named, in trust, nevertheless, to hold, manage, control, invest and reinvest the same and to divide the principal thereof into five (5) equal shares and to dispose of each such equal share as follows:"

Thereupon immediately follows instructions as to allotment of shares to the first takers and computation of the several annuities at 4½% of their value. In this connection, also, the provisions of Section (G) of the will and Section (G) of the trust agreement are pertinent. They are identical in language.

Before the beginning of this action, to wit, on 14 March, 1939, the Trustees under this deed of trust began an action in the Supreme Court of New York in Westchester County, New York (this court corresponds to our Superior Court), against certain defendants constituting the beneficiaries under this deed of trust (who, as stated, are substantially the same as the beneficiaries under the will and like situated under the scheme of disposition of the property set apart under that instrument), the purpose of which action was to have the accounts of the Trustees "judicially settled and allowed"; to have the rights, shares and interests of the respective parties in the property of the trust estate determined and defined; and to have any other "questions which may be raised by any of the parties hereto determined."

Personal service in this proceeding was made upon Mrs. Laura Cannon Mattes, and service by notice of publication was made as to other defendants. The case proceeded to final judgment, rendered 15 July, 1941, in which, *inter alia*, it was determined that the date of accrual of the annuities under the trust deed or agreement was 4 May, 1938—the date of death of Mrs. Cannon, the donor; and that for the purpose of computing said annuities, the shares should be valued as of that date. See paragraph XXI of the judgment, R., p. 133.

In the second defense in the answer of E. T. Cannon to the complaint in the present case, the foregoing judgment is pleaded as an estoppel to all parties and as *res judicata*, determining the date at which the annuities under the will accrued and the date as of which the shares must be valued in computing the annuities, adjudicating that both the valuation of the shares and the commencing of the annuities shall be 4 May, 1938, the date of the death of Mrs. Cannon. The same plea was made in the answers or amended answers of William C. Cannon *et al.*, Margaret Howell *et al.*, and other defendants referred to in the opinion.

To all of these pleas, demurrers were made by J. Carlyle Rutledge, guardian *ad litem*, Ernest R. Alexander, guardian *ad litem*, and Laura Cannon Mattes. In addition to demurring to these defenses, Laura Cannon Mattes also moved that the allegations with respect to this judgment and the paragraphs in which they were set up be stricken from the pleadings. Upon the hearing Judge Warlick overruled all the demurrers, and the demurring defendants appealed, assigning error.

Robinson & Jones for defendant Laura Cannon Mattes, appellant.

Ernest R. Alexander, guardian ad litem for minors, defendant, appellant.

J. Carlyle Rutledge, guardian ad litem for unborn issue of all the family, defendant, appellant.

W. H. Beckerdite for plaintiff Charles A. Cannon and David H. Blair, Trustees, appellees.

E. T. Bost, Jr., for defendants Eugene T. Cannon, William C. Cannon, Mariam Cannon Hayes, Charles A. Cannon, Jr., Mary Ruth Cannon, appellees.

J. G. Korner, Jr., for defendants Adelaide Cannon Blair, J. B. Douglass, Adelaide Douglass Whitley, David H. Blair, Jr., appellees.

Ratcliff, Vaughn, Hudson & Ferrell for defendants Margaret Cannon Howell, Mary Cannon Hill, Charles G. Hill, Susan Hill Walker, Jane Hill Simpson, appellees.

SEAWELL, J. Upon the question presented in the lower court, appellees contend that the annuities commence on the death of the testatrix and that the shares must be valued as of that date for computing such annuities. Of the appellants, Mrs. Laura C. Mattes contends that the annuities commence on the date of the death of Mrs. Cannon, but contends that the valuation of the shares for computation of the annuities must be made on the basis of the market value at the time of the actual division. Other demurring and appealing defendants—the guardian *ad litem* for minor beneficiaries and the guardian *ad litem* for unborn children—have not formally agreed with either of these views, and doubtless when the time comes to answer may insist upon a construction more favorable to the interests they represent; but at present they insist that they should be allowed to present to the court that view of the will which their duty may require, unembarrassed by previous adjudication.

The appellees contend that the identical questions upon which the advice of the court is sought—namely, upon what date the annuities under the will accrue, and as of what date the allotted shares are to be valued for computation of the said annuities—have been judicially determined and settled in the New York proceeding between the same parties and cannot be relitigated. The final judgment in that proceeding is therefore pleaded in bar of the present action. It is with this question alone we are here concerned.

The circumstances under which the doctrine of *res judicata* is invoked are so novel in that connection as to require a brief reference to the conditions requisite to the support of this plea.

A comprehensive statement of the doctrine is found in 30 Am. Jur., Judgments, sec. 161:

"Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."

As the doctrine was originally announced in the English courts, the term "merits" would refer to the "matter directly in question" in the second action, and the issue decided in the first case must be "directly on the point." *Ibid.*, sec. 161. *Johnson Steel Street Rail Co. v. Wharton,* 152 U. S., 252, 38 L. Ed., 429; *Fuquay v. Atl. and Western R. R. Co.,* 199 N. C., 499, 155 S. E., 167; *McElwee v. Blackwell,* 101 N. C., 192, 7 S. E., 893; *Mann v. Mann,* 176 N. C., 353, 97 S. E., 175; *Shuster v. Perkins,* 47 N. C., 217.

Mr. Freeman, in his work on judgments, observes that the only matter essential to making a former judgment on the merits conclusive between the same parties is that the question to be determined in the second action is the same question judicially determined in the first. Freeman on Judgments, Fifth Ed., p. 1418. Elsewhere, he varies the formula by using the word "issue." But both these terms are versatile and inconclusive without reference to the kernel of fact to which they relate. The requirement as to identity of subject matter is satisfied if the issues in the prior action have necessarily determined the facts upon which the right sought to be asserted in the subsequent action depends.

Where the application requires no greater elaboration, it is usually said that there must be an identity of subject matter in the two suits; with a conventional understanding that the use of the doctrinal terms implies the limitations which ordinarily belong to the subject. *Shuster v. Perkins, supra.*

In *Current v. Webb,* 220 N. C., 425, 428, 17 S. E. (2d), 614, cited by appellees, *Justice Devin,* writing the opinion of the Court, refers to the estoppel created by the judicial determination of a fact in the prior action, although not upon identity of subject matter, where that fact is essential to support the right asserted in the subsequent action, quoting from 2 Freeman on Judgments, sec. 670:

"There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court." *Hospital v. Guilford County,* 221 N. C., 308, 20 S. E. (2d), 332; *Harshaw v. Harshaw,* 220 N. C., 145, 16 S. E. (2d),

666; *Leary v. Land Bank,* 215 N. C., 501, 2 S. E. (2d), 570; *Barcliff v. R. R.,* 176 N. C., 39, 96 S. E., 644; *Southerland v. R. R.,* 148 N. C., 442, 62 S. E., 517; *Tait v. West. Md. R. R. Co.,* 289 U. S., 620, 77 L. Ed., 1406.

None of these authorities challenge the fundamental principle that in order to support the plea of *res judicata,* the fact or facts—whether called "subject matter" or otherwise designated—necessary to support relief or recovery in the second or subsequent action must have been definitely comprehended in the issues and judgment in the prior action, and must have been put in issue and judicially determined; or, at least, it must have been incumbent upon the party relying on such facts to have pleaded them and caused them to be put in issue when an opportunity was afforded him to do so in order to render the prior judgment determinative or effective as *res judicata. Bangle v. Webb,* 220 N. C., 423, 17 S. E. (2d), 613; *McMillan v. Teachey,* 167 N. C., 88, 83 S. E., 175.

Certainty with respect to the thing determined is one of the fundamentals of every trial; and when the result of that trial is pleaded as *res judicata* in a subsequent proceeding, it cannot be left to uncertain inference. This is sometimes expressed in the rule that the doctrine of *res judicata* must be strictly applied. *Horn v. Indianapolis Nat. Bank,* 125 Ind., 381, 25 N. E., 558, 30 Am. Jur., 909. The right of a party to litigate his claim will not be defeated by a roving abstraction which does not meet the exigent standard of notice and hearing—his day in court—guaranteed to him by the Constitution. He is entitled to this either at the one time or the other.

We have tried to note the special phases of the doctrine which appellees suggest as applicable to the peculiar circumstances of the case, and have cited the authorities discussing them. But we find the New York proceeding relating to the trust agreement and the present action relating to the will so clearly distinguished, and the matters at issue so essentially different, as to lead us to the conclusion that the plea of *res judicata* or estoppel is not available to the appellees as a defense in this suit.

It is argued that the New York proceeding is an action *in rem.* There is no doubt that in its main features it is of that character. *Cutter v. Trust Co.,* 213 N. C., 686, 197 S. E., 542. If it is wholly of that nature, the effect of the final judgment therein must be confined to the *rem*—and that properly included no more than the administration of that trust and its constituent property. No incidental construction of the trust agreement for the purpose of its administration could have any *in rem* effect on the will or any *in personam* effect on its beneficiaries. Considered within the framework of such a proceeding, a fact found as an inducement to a conclusion with respect to the *rem* would not necessarily

estop a party to another collateral proceeding where the fact is more directly involved, as that would make the judgment *in rem* operate as a judgment *in personam*. *S. ex rel. Gott v. Fidelity & Deposit Co.*, 317 Mo., 1078, 298 S. E., 83, 89 A. L. R., 1102. The annotation quotes *Justice Holmes* in *Becher v. Contoure Laboratories*, 279 U. S., 388, 73 L. Ed., 752, 49 S. Ct., 356: "A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world."

We come here to serious questions challenging the jurisdiction of the New York Court over most of the beneficiaries under the will because of the lack of personal service, the limitations on the representation of minor beneficiaries and unborn children by the guardians *ad litem* appointed by the New York Court, the fact that the trustees of the testamentary trust were not parties to that action, and the question whether a judgment in such a proceeding, so constituted and heard upon such service, could have any *in personam* effect on the parties against whom the estoppel is pleaded. *Smith v. Gordon*, 204 N. C., 695, 169 S. E., 634; *Stevens v. Cecil*, 214 N. C., 217, 199 S. E., 161; *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 565; *Boswell's Lessee v. Otis*, 13 L. Ed., 164, 9 How., 336; *Johnson v. Powers*, 139 U. S., 156, 35 L. Ed., 112; *Overby v. Gordon*, 177 U. S., 214, 44 L. Ed., 741; *Thormann v. Frame*, 176 U. S., 350, 44 L. Ed., 500; *Baker v. Baker*, 242 U. S., 394, 61 L. Ed., 386; *McDonald v. Mabee*, 243 U. S., 90, 61 L. Ed., 608. We do not consider a detailed discussion of these matters necessary to a decision of the case. Whatever label we apply to the New York proceeding or to the case at bar, the significant fact is that the suits relate to the construction of different instruments which have no factual or legal interdependence, respecting the present inquiry, and relate to different trusts and different properties. The beneficiaries under the testamentary trust do not derive from the deed setting up the New York trust any right respecting the property bequeathed and devised to them by the will, or to the manner or method of its administration; and *vice versa*, the beneficiaries under the trust deed, although the same persons, acquire no rights respecting that trust from the will.

The properties put into the trust have no relation to each other except that they have a common donor; they are not complementary—the New York proceeding had nothing to do with the residuary property. The property put into the living trust had been separated and turned over long ago, and the death of Mrs. Cannon merely changed the character and object of its possession. The residuary bequest or devise to the annuitants and their successors in title was the residuum of that property of which Mrs. Cannon still retained the power of testamentary disposition—that remaining after nondeferred legacies and bequests were

paid and other obligations of the estate had been satisfied out of the general property, as to which Mrs. Cannon died wholly testate. The instruments have no mutual references that would justify the theory that the one should be determinative of any provision contained in the other, or that might make a legal comparison necessary to the construction.

Wherever the emphasis is placed in the attempt to find a common *res* for the New York proceeding and the case at bar, the theory of the proponents of the estoppel is that the two instruments, concurrently made, and disposing of all Mrs. Cannon's property, must, *ipso facto,* be construed together; and that this draws them both into the court first acquiring jurisdiction and proceeding to the construction of either instrument, no matter for what purpose; that the appellants had an opportunity to present the will upon the question of construction and failed to do so, and are, therefore, estopped. It does not take into consideration the want of interdependence of the two instruments above pointed out, or the circumstances attending the making of the will and setting up the testamentary trust, of which the Court will take judicial notice, which were wanting in the trust agreement, and the further fact that the trust agreement and the will show significant differences in the language employed with respect to the point at issue here. The construction of the trust agreement was incidental to the administration of that trust, and the facts necessary to the construction of the trust agreement were essentially different from those necessary to be determined in construing the will.

If the two instruments had been executed by different persons, it is clear that no question could arise as to the influence of one instrument upon the other, or of any judgment upon the one having any validity by way of estoppel in an action upon the other.

The appellees contend that their plea is adequately based on the following circumstances: The donor of the trust is the same person, Mrs. Mary E. Cannon; the beneficiaries are identical; the properties are part of the same original estate; the scheme of disposition is identical; the instruments (referring to the codicil and the trust deed) were executed the same day; and with respect to the beneficiaries classed as first takers, both took effect on the death of the testator and donor.

Especially, they insist, taking these facts into consideration, it cannot be supposed that Mrs. Cannon could have a difference of intent as to the time of accrual of the several annuities to the first takers, or as to the appraisal of the shares upon which the annuities are to be computed. The New York proceeding should, therefore, be conclusive upon these questions.

We are not satisfied as to the validity of the major premise. If correct, however, it could only be addressed to the construction of the will,

and falls short of establishing that identity of subject matter which the estoppel requires.

Counsel for the appellees contend that the *"res"* to be considered in comparing the two instruments and appraising the effect of the New York judgment is found in the *words* of Mrs. Cannon. If we should concede, notwithstanding the analysis we have tried to make, that the construction of the trust agreement in the New York proceeding could have anything to do with the construction of the will—merely because of a parity of language—we are confronted with other obstacles growing out of a disparity of the language used at the significant points of comparison, and a substantial difference in attending circumstances and of probable internal reference to these where the language is the same; as, for example, in paragraph (G), relating to the division and valuation of the shares, where the same language is employed in both instruments. In neither case, however, is the language significant except by reference to the events it contemplates.

The trust agreement provides:

"Upon the death of the donor, the Trustees shall divide the principal of the trust estate into five (5) equal shares and shall dispose of each of such equal shares as follows:" (Italics added.)

The will provides:

"FIFTH: All the rest, residue and remainder of my property and estate of whatsoever kind and wheresoever situate, I give, devise and bequeath to my Trustees, hereinafter named, in trust, nevertheless, to hold, manage, control, invest and reinvest the same and to divide the principal thereof into five (5) equal shares and to dispose of each such equal share as follows:"

Thenceforward, the two instruments are identical in the actual disposition of the property.

It is hard to see how there could be any controversy in the New York Court over the construction of the above language as used in the trust agreement. In its strict grammatical sense, it provides for a division of the property into shares upon the death of the donor, the allotment of those shares, and computation of the annuities at that time. In the will, however, it is only by construction—as to which there are arguments *pro* and *con*, which might engage the court below in the conscientious discharge of its duty—that such a result could be reached. It is arguable that the date as of which the shares should be valued for computation of the annuity was not definitely fixed in the will as the date of the death of the testatrix for the reason that the testatrix was confronted by circumstances different from those surrounding her when she created the living trust—that is, she knew an administration by the executors must necessarily precede the receipt of the property by the testamentary

trustees and its division into shares—an administration for which the will provides.

Under the will it is certain that before the trustees of the testamentary trust actually receive the residuary property which they are to administer for the beneficiaries, there must be a preceding administration by the executors under the testate laws, with which the trustees have nothing to do. This is not merely formal. Through it nondeferred legacies and bequests must be satisfied, and debts, taxes, costs of administration and other obligations of the estate must be ascertained and paid; and through that administration must be ascertained the actual residuum to be turned over to the trustees. These are matters which it was not incumbent upon the beneficiaries of the trust to bring to the attention of the Court in the New York proceeding, as they were entirely irrelevant to any issuable matter there dealt with, and if presented at all would have developed not an agreement, but a possible repugnance between the two instruments. It follows that paragraph (G) of the will may be construed—if the lower court should so decide—as postponing the valuation of the shares, both as to time and market value, to the time of the actual division by the trustees when the property constituting the trust has actually come into their hands by the terms of the will.

Arguing against this position, appellees refer to the principle announced in *Trust Co. v. Jones,* 210 N. C., 339, 186 S. E., 335, that "the residue is formed at the death of the testator," with the suggestion, as we understand it, that the division of the property must be referred constructively to that date. This expression as used in *Trust Co. v. Jones, supra,* and like cases, merely presents a legal conception of the residual property as distinct from income received during the administration from property used in paying legacies, debts, and costs of administration, which property never became a part of the residuum. The English rule regarded such income as itself a part of the residuum and required it to be added to the *corpus* to go to the beneficiaries according to the scheme of disposition. In *Trust Co. v. Jones, supra,* the Court adopted the Massachusetts rule, which does not permit the addition of such income to the *corpus,* but requires it to be distributed as income. *Old Colony Trust Co. v. Smith,* 266 Mass., 500, 165 N. E., 657.

The mere legal existence of the residual estate at the time of the death of the testatrix, in this constructive form, with legal means of its actual ascertainment in kind, quantity and value, throws little or no light upon the matter at issue on this appeal.

The law made no division into shares of the property in the testamentary trust upon the death of Mrs. Cannon, although the rights of the respective share takers matured at that time and in fixed proportion. The law does not anticipate the administrative provisions of the

will—and the division into shares is distinctly administrative. The references in the will are clearly to an actual division of the property put into the trust. That property is not left in a common pool of indistinguishable assets of which the annuitants take an unidentified part. It is a matter of separating the various items of which the property is composed into specific parcels of equal value, to be allotted to the respective beneficiaries, once for all, and invested and reinvested for the particular beneficiaries in that line of succession. The division itself may, therefore, well demand the exercise of experience, skill, and sound judgment—a circumstance which no doubt determined the selection of the trustees.

While we have discussed the case at some length, in view of the insistence on the part of the appellees that the benefit of the full latitude recognized by the authorities should be given them in the application of the doctrine of *res judicata,* the case really comes down to a rather narrow compass.

Paragraph (G) of the trust agreement refers to a division of the property into shares, taking place within the administration of that trust; paragraph (G) of the will refers to a similar event taking place within the administration of the testamentary trust. We find no necessary implication in either of these instruments that it was contemplated that these events should take place on the same date, and there is no legal necessity that they should—in fact, there is much argument to the contrary. It is difficult, then, to see that there was any fact in issue or determined in the New York proceeding which should estop, or in legal effect does estop the parties seeking a construction of the will in the present action.

The final construction of the will is for the court below. In arguing the case here, and in the briefs, opposing counsel found it necessary to refer freely to the merits of the case upon the construction itself. On account of the nature of the case, we have found it impossible to avoid such references—to some extent—and still point out the disparity between the matter at issue here and that which was determined in the New York proceeding. Where we have done so, it is only for the purpose of settling the question presented to us on the appeal, and it is not intended to prejudice the cause when heard upon the merits or embarrass the court below in its decision.

There was error in overruling the several demurrers of the appealing defendants and in the refusal to strike these defenses from the record. The judgment of the court below is

Reversed.

STACY, C. J., and WINBORNE and DENNY, JJ., concur in the disposition to be made of the plea of *res judicata,* but do not join in the dicta anent the alleged variant dates between the accrual of the annuities and the ascertainment of their value. To debate the question would be to prejudge it in advance of a decision in the court below. The will is not before us for construction.

MRS. MARION NEBEL v. ARTHUR NEBEL, MARIE NEBEL AND WILLIAM NEBEL.

(Filed 15 December, 1943.)

1. Contribution § 1—

One who is compelled to pay or satisfy the whole, or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others. The doctrine is founded not upon contract, but upon principles of equity.

2. Same—

Where three donees have notice that the U. S. Commissioner of Internal Revenue has assessed against them a large gift tax liability, for the whole of which each is liable, and all file petitions with the Board of Tax Appeals for a redetermination of the deficiency, and pending a hearing, one of the donees secures an adjustment for a very much smaller sum and, after notice to the others, who failed to appear and make defenses, pays the same, the donee so paying the entire assessment is entitled to contribution from the other two.

APPEAL by defendants from *Blackstock, Special Judge,* at 12 April, 1943, Extra Civil Term, of MECKLENBURG.

Civil action to require contribution by transferees to common obligation for gift tax assessment paid by plaintiff.

Plaintiff, in her complaint, alleges in substance: That on 14 March, 1941, the Commissioner of Internal Revenue of the United States issued an official assessment of tax deficiency against her and defendants Arthur Nebel and Marie Nebel and each of them in the amount of $20,111.82, plus interest thereon at the rate of six per cent per annum from 15 March, 1937, until paid—stating that it was determined that during the year 1936 William Nebel had made gifts to plaintiff and said defendants of property having an aggregate value of $142,913.62, on which the tax liability to the Federal Government was $20,111.82, plus interest as above stated, and that the Government, being legally barred from collecting such tax from William Nebel, was assessing the full amount thereof against plaintiff and said defendants and each of them and

would collect the full amount of same from plaintiff or said defendants or any one of them as it was by law and statute empowered to do; that by reason of said assessment plaintiff and defendants Arthur Nebel and Marie Nebel and each of them did become legally liable to the United States Government for the payment of the full amount of said assessment; that plaintiff, at large expense and after diligent and continued effort, obtained the consent of duly constituted authorities of the United States Government that said tax assessment would be dismissed and entirely canceled and terminated upon the payment to the Government of the sum of $6,334.96, plus interest at the rate of six per cent per annum from 15 March, 1937; that said authorities refused to dismiss or cancel said assessment in consideration of payment of any lesser sum; that plaintiff requested and demanded of defendants Arthur Nebel and Marie Nebel and each of them that they contribute to the payment of said sum, but that they and each of them failed and refused to contribute any amount whatever toward payment thereof; that plaintiff, thereupon being compelled to do so by reason of her legal liability under the aforesaid tax assessment, did on 24 March, 1942, pay to the United States Government the sum of $6,334.96, plus interest thereon from 15 March, 1937, in the amount of $1,910.89, or a total of $8,245.85, and did thereby procure the dismissal and cancellation of the aforesaid tax assessment and the discharge of the entire liability thereunder on the part of the plaintiff and said defendants and each of them to the United States Government; that by reason of the matters alleged as above set forth plaintiff is now legally entitled to require the defendants Arthur Nebel and Marie Nebel and each of them to make contribution to her for their respective fair and equitable shares of the common obligation which she alone has discharged, as above set forth; that of the aggregate property received by plaintiff and defendants Arthur Nebel and Marie Nebel during the year 1936 and totaling in value $142,913.62 as determined in the aforesaid tax assessment, plaintiff received property having a value of $59,598.54 or 41.71% thereof, the defendant Arthur Nebel received property having a value of $77,120.28 or 53.96%, and the defendant Marie Nebel received property having a value of $6,194.80 or 4.33%; and that she, the plaintiff, having paid and satisfied the common gift tax liability is entitled to recover of defendant Arthur Nebel 53.96% of the amount she paid, that is, $4,449.46, and of Marie Nebel 4.33% of the amount she paid, that is, $357.05, with interest on the respective amounts from date of payment 24 March, 1942.

Defendants Arthur Nebel and Marie Nebel, in joint answer filed, deny any liability for gift tax for that they aver that they purchased the stock in question from William Nebel in good faith and for a fair and reasonable consideration and, for this reason, are not liable to plaintiff for

any amount she may have paid. They further deny that plaintiff has paid any amount, as alleged, and aver "that any money that was paid was paid by William Nebel, whose primary debt, if any existed, it was," and that plaintiff is not entitled to recover therefor.

Upon the trial the evidence tends to show these facts:

1. In the year 1936 defendant William Nebel, husband of plaintiff, and father of defendant, Arthur Nebel, and father-in-law of defendant, Marie Nebel, wife of Arthur Nebel, transferred to plaintiff certain cash, real estate and shares of common stock in Nebel Knitting Company, and to defendants, Arthur Nebel and Marie Nebel, each, certain cash and shares of common stock in Nebel Knitting Company, and filed with the constituted authority of the United States a gift tax return for the year 1936, but that no assessment was undertaken or made against him for any deficiency therein.

2. On 14 March, 1941, after the statute of limitation had run against the collection from defendant William Nebel of gift tax for the year 1936, the Commissioner of Internal Revenue of the United States, acting under Internal Revenue Statute, Title 26, Chapter 4, relating to gift tax, having determined that the aggregate value of the property so transferred by William Nebel to plaintiff and to defendants, Arthur Nebel and Marie Nebel, valuing the stock received by them at $280.00 per share, exceeded the amount shown on the return filed by William Nebel for the calendar year 1936 by the amount of $142,913.62, composed of $59,589.54 value of property transferred to plaintiff, $77,120.28 of that to defendant Arthur Nebel and $6,194.80 of that to defendant Marie Nebel, showing thereby a tax deficiency, within the meaning of the gift tax statute, in the amount of $20,111.82, gave separate notices by registered mail to plaintiff and to each of defendants Arthur Nebel and Marie Nebel that "there is determined for assessment against you the amount of $20,111.82 plus interest as provided by law, constituting your liability as a transferee of property of William Nebel of Charlotte, North Carolina, for gift tax for the calendar year 1936, as shown in the accompanying statement," which contained itemized valuation of property each had received as so determined—the liability of Marie Nebel being limited to value of property received by her, and advised each of them that within ninety days from the date of the mailing of the letter of notification each may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Defendants Arthur Nebel and Marie Nebel, each through counsel W. Latimer Brown, C. P. A., and plaintiff through her attorneys, W. S. Blakeney *et al.*, respectively, filed such petitions in due time—that of Arthur Nebel being given docket No. 107846, that of Marie Nebel docket No. 107847, and that of plaintiff docket No. 107858—each denying liability, and

alleging that the determination as made is erroneous in various respects, among others, that full value had been paid for the stock transferred, and praying that no tax liability be assessed.

3. Thereafter, under date 5 February, 1942, the Clerk of the United States Board of Tax Appeals gave separate notices, under caption and docket number of each proceeding, that a Division of the United States Board of Tax Appeals would sit in courtroom, United States Post Office, at Greensboro, North Carolina, beginning on 23 March, 1942, for hearing in all proceedings shown on the attached list—called promptly at 10 o'clock A.M.—as indicated, that party notified would be expected to answer the call at that time and be prepared for trial when reached, that no continuance would be granted except for extraordinary cause, that failure to appear would be taken as cause for dismissal in accordance with the Rules of Practice, and that in all other respects the party is expected to be familiar with such rules. The notices in the proceeding of defendants Arthur Nebel and Marie Nebel were addressed to their counsel. The three proceedings appeared on the attached list—hearing calendar—in their numerical order, with name of counsel for petitioner set opposite.

4. In the meantime plaintiff, through her attorneys, having obtained an adjustment by redetermination of values of property transferred in the year 1936 by William Nebel to plaintiff and to defendants Arthur Nebel and Marie Nebel by which same was reduced so that the total gift tax liability therefor was redetermined to be $6,334.96, instead of $20,111.82, and thereupon plaintiff, through her attorneys, stipulated and agreed in writing with Bureau of Internal Revenue (a) that "at law and in equity there is an unpaid liability for Federal gift taxes in the amount of $6,334.96, together with interest thereon as provided by law, due for the taxable year 1936, from this petitioner under Section 526 of the Revenue Act of 1932 as embodied in Section 1025 I. R. C. and under Section 510 of the Revenue Act of 1932 as embodied in Section 1009 I. R. C. as a transferee and a donee of the assets of William Nebel of Charlotte, North Carolina," and (b) "that the Board may enter its decision accordingly." Thereupon, on 13 March, 1943, plaintiff, through her attorneys, notified attorney for Arthur Nebel and Marie Nebel by letter, enclosing paper signed by plaintiff, and advising that the amount in this paper would be $6,334.96, and requested that said defendants sign with plaintiff so that plaintiff could proceed to close the matter with the Government. This the said defendants declined to do. And neither Arthur Nebel nor Marie Nebel nor their counsel appeared at Greensboro on 23 March, 1942, as they were notified to do. And when their proceedings docket Nos. 107846 and 107847 were called, "counsel for respondent moved to continue same until payment of deficiency in gift tax

for the year 1936 had been made in the case of Marion Nebel docket No. 107858, wherein a stipulation of deficiency has been filed with the Board." The motion was allowed. And upon the written stipulation above referred to being filed with the Board of Tax Appeals on 23 March, 1942, decision in accordance therewith was entered by the Board on 27 March, 1942.

Furthermore, plaintiff delivered to Collector of Internal Revenue a check signed by her and on her bank account dated 24 March, 1942, payable to his order for $8,245.85, "In full settlement, deficiency gift tax assessment against Arthur Nebel, Mrs. Marion Nebel and Mrs. Marie Nebel. Tax $6,334.96. Interest through 3-26—$1,910.89. Total, $8,245.85." And same was received by the Collector and deposited to credit of Treasury of the United States on 27 March, 1942.

5. Thereafter, on 14 May, 1942, the Bureau of Internal Revenue, through its counsel, moved to dismiss the proceedings docket Nos. 107846 and 107847, respectively, upon the ground as recited in docket No. 107846, that:

"1. On, to wit, March 14, 1941, deficiency notices were sent by registered mail by the Commissioner to Mrs. Marion Nebel, Mr. Arthur Nebel and Mrs. Marie Nebel, all of Charlotte, North Carolina, asserting liabilities against each of them in the amounts of $20,111.82, $20,111.82, and $11,194.80, respectively, plus interest as provided by law, as transferees of the property of William Nebel on account of gift taxes in the amount of $20,111.82 allegedly due from said William Nebel for the calendar year 1936.

"2. On, to wit, March 27, 1942, pursuant to agreed stipulation in settlement of the entire deficiency in gift tax for 1936 asserted against said William Nebel, plus interest thereon, this Board entered its order and decision in the case of Mrs. Marion Nebel, Docket No. 107,858; 'That there is an unpaid liability at law and in equity on the part of this petitioner for gift tax in the amount of $6,334.96, together with interest thereon as provided by law, for the calendar year 1936, as a transferee and a donee of the assets of William Nebel of Charlotte, North Carolina.'

"3. On, to wit, March 27, 1942, the said amount of $6,334.96 plus interest thereon to the date of payment in the amount of $1,910.89, or a total of $8,245.85, was paid to the Collector of Internal Revenue, Greensboro, North Carolina, by, or on behalf of the said Mrs. Marion Nebel as transferee and donee of William Nebel.

"4. The liability of said William Nebel for gift tax for 1936 as agreed for purpose of settlement, plus interest thereon, having been thus paid and satisfied by said alleged transferee, the respondent does not desire to

prosecute further the case of this petitioner, Arthur Nebel, as transferee and donee of William Nebel on account of the same tax liability."

The grounds for the motion in docket No. 107847 are the same except that they relate to Marie Nebel. These motions were set for hearing on day calendar before a Division of the Board at its Washington office, Constitution Avenue, at 12th Street, Northwest, at 9:30 a.m., on 3 June, 1942, notice of which was addressed to W. Latimer Brown, C. P. A., Johnston Building, Charlotte, North Carolina. On 3 June, 1942, there was no appearance for petitioners. Thereafter, on 12 June, 1942, formal order of dismissal was entered in and under caption of docket No. 107846 and No. 107847, respectively, as follows: "The liability of William Nebel for gift tax for 1936, plus interest thereon, having been paid by Mrs. Marion Nebel as transferee and donee of said William Nebel, and respondent having announced at open hearing on June 3, 1942, that he does not desire to prosecute the appeal of the above petitioner to transferee and donee of William Nebel, it is

"ORDERED: That this proceeding is dismissed for lack of prosecution on the part of the respondent and that there is now no liability at law or in equity on the part of this petitioner as transferee and donee of William Nebel for gift tax for the year 1936."

Defendants, Arthur Nebel and Marie Nebel, by cross-examination, undertook to elicit evidence that the money paid by plaintiff was the money of William Nebel. Further, they offered to show (a) what they paid for the stock, (b) what was the reasonable market value of the stock during the year 1936 and on down to 1940, (c) what William Nebel said to them about paying the tax himself, and (d) that no judgment was ever rendered against them by the Board of Tax Appeals for any gift tax, all of which, except as shown below, was excluded upon objection. And in these respects said defendants tendered issues which were refused. However, Arthur Nebel did testify that after his attorney received the letter of 13 March, 1942, from plaintiff's attorney, he, Arthur Nebel, told William Nebel in presence of Mr. Blakeney that he was not going to pay any gift tax—that it wasn't his liability and he wasn't going to pay it, and that William Nebel said he was was going to pay it anyway—that the tax was going to be paid; and, on cross-examination, he testified "I stated that my father in my presence said the gift tax would be paid if I would transfer certain stock to him; I didn't transfer that stock to him."

The case was submitted to the jury upon these issues, which were answered as shown:

"1. Did the plaintiff pay to the United States Government the sum of $8,245.85 by reason of notice of tax deficiency assessment received

by her from the United States Commissioner of Revenue on or about March 14, 1941, as alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiff pay said sum in discharge of a common obligation of the plaintiff and the defendants, Arthur Nebel and Mrs. Marie Nebel, as alleged in the complaint? Answer: Yes.

"3. What portion, if any, of said sum is the plaintiff entitled to recover of the defendant, Arthur Nebel? Answer: $4,449.46.

"4. What portion, if any, of said sum is the plaintiff entitled to recover of the defendant, Mrs. Marie Nebel? Answer: $447.05."

From judgment for plaintiff upon the verdict, defendants Arthur Nebel and Marie Nebel appeal to the Supreme Court and assign error.

Guthrie, Pierce & Blakeney for plaintiff, appellee.

W. C. Davis and Brock Barkley for defendants, appellants.

WINBORNE, J. The challenge of appealing defendants to the correctness of the judgment below is directed in the main to the refusal of the court to grant their motions, aptly made, for judgment as in case of nonsuit. C. S., 567. Decision in this respect is dependent upon the basic question as to whether appealing defendants are bound by the decision of the Board of Tax Appeals on 27 March, 1942, in the proceeding upon petition of plaintiff in accordance with redetermination of value of property transferred in the year 1936 by William Nebel to plaintiff and to defendants Arthur Nebel and Marie Nebel upon which the gift tax liability was fixed at $6,334.96, instead of $20,111.82, the amount specified in the notice of 14 March, 1931, given by Commissioner of Internal Revenue to plaintiff and to said defendants.

As basis for consideration and clear understanding of this question, it is appropriate to refer to the Gift Tax Act of 1932, Act of Congress 6 June, 1932, Chapter 209, 47 Stat. 245, as amended 10 May, 1934, Chapter 277, in effect in 1936 at the time it is alleged that William Nebel made the gifts in question, in so far as same is pertinent here. The Act imposes a tax upon the transfer of property by gift by any individual during any calendar year beginning with the year 1932. Section 501. If the gift be in property, the value of it at the date of the gift shall be considered the amount of the gift. Section 506. Any individual who within any such year makes any transfer of property by gift shall make a return under oath as prescribed on or before 15 March following the close of the year. Section 507. The tax imposed shall be a lien upon all gifts so made for ten years from the time same are made, and if not paid when due (that is, on or before 15 March following the close of the calendar year, Section 509), the donee of the gift shall be personally liable for such tax to the extent of the value of

such gift. Section 510. The amount of the tax shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed. Section 517. However, as soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax. Section 511. If the Commission determines that there is a deficiency in respect of the tax imposed in the Act, that is, the amount by which the tax imposed by the Act exceeds the amount shown as the tax by the donor upon his return, Section 512, the Commissioner is authorized to send a notice of such deficiency to the donor by registered mail, and within 90 days (increased from 60 to 90 days by amendment 10 May, 1934, Chapter 277, Section 501—48 Stat. 755) after such notice is mailed, the donor may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by the Act and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the donor, nor until the expiration of such 90-day period (amendment 1934, *supra*), nor, if a petition has been filed with the Board, until the decision of the Board has become final. Section 513 as amended in 1934, *supra*. If the donor files a petition with the Board, the entire amount redetermined as a deficiency by the decision of the Board which shall become final shall be assessed and shall be paid upon notice and demand from the Collector. Section 513 (b). And as to transferred assets, the Gift Tax Act provides: That the amount of the liability, at law or in equity, of a transferee or donee of property of donor, in respect of the tax, interest and additions, imposed by the Act, shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by the Act. But the period of limitation for assessment of any such liability of a transferee or donee shall be within one year after the expiration of the three year period for assessment against the donor. Section 526 (a) and (b).

In substantial conformity, these provisions have been brought forward and are embodied in the Internal Revenue Code—Title 26, Chapter 4, Sections 1000-31.

To summarize, the gift tax is assessed upon the aggregate value of the gifts made by the donor within the calendar year, and is the liability of the donor. But if the tax be not paid when due, the donee becomes liable for the whole amount of the tax to the full extent of the value of the gifts received. And if there be more than one donee, the liability for the whole tax is separate, and the Commissioner of Internal Revenue may proceed against any one or all of the donees as he may elect to do.

The Supreme Court of the United States has so held in a case involving similar facts. *Phillips v. Commr. of Internal Revenue,* 283 U. S., 588, 75 L. Ed., 1289.

There a corporation had distributed all of its assets among its stockholders, and then dissolved. Thereafter the Commissioner of Internal Revenue made a deficiency assessment against the corporation for income and profits tax, a part of which was not paid. Thereupon, the Commissioner, acting under statute similar to provisions of Section 513 of Gift Tax Act of 1932, sent notice that he proposed to assess against, and collect from, Phillips the entire remaining amount of the deficiencies. No notice of such deficiencies was sent to any other transferee, and no suit or proceeding was instituted against them. Upon petition by Executors of Phillips for a redetermination, the Board of Tax Appeals held that the estate was liable for the full amount of such deficiencies. The order of the Board was affirmed by the U. S. Circuit Court of Appeals and by the U. S. Supreme Court. *Justice Brandeis,* writing for the Supreme Court, disposed of the question of separate liability in this manner: "One who receives corporate assets upon dissolution is severally liable, to the extent of assets received, for the full payment of taxes of the corporation; and other stockholders and transferees need not be joined. Non-joinder cannot affect or diminish the several liability of the stockholder or transferee sued . . . The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' rights to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders."

Therefore, applying the above principle in the light of the provisions of Section 513 (b) of the Act to the case in hand, the decision of the Board of Tax Appeals, when it became final, fixed the entire gift tax liability of William Nebel for all gifts made in the year 1936 to plaintiff and to appealing defendants, and the payment of it by plaintiff constituted a complete discharge of such tax, and freed appealing defendants of liability, if any, to the Government on account of the property received by them.

In consequence plaintiff seeks equitable contribution. Is she entitled to it? On the facts on this record, we think she is. "The principle of contribution is equality in bearing a common burden. The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them pay-

ment of their respective shares. In other words, when any burden ought, from the relationship of the parties or in respect of property held by them, to be equally borne and each party is *in aequali jure,* contribution is due if one has been compelled to pay more than his share. The doctrine is founded not upon contract, but upon principles of equity." 13 Am. Jur., sec. 3, page 6. See also *Moore v. Moore,* 11 N. C., 358, 15 Am. Dec., 523; *Bunker v. Llewellyn,* 221 N. C., 1, 18 S. E. (2d), 717. The principle here stated is differentiated from that applied in *Godfrey v. Power Co., ante,* 647, where the statutory right of contribution was invoked, rather than equitable contribution as here.

Defendants Arthur Nebel and Marie Nebel knew that in accordance with the notice from the Commissioner there had been determined for assessment against each of them as a transferee of property from William Nebel gift tax liability in the amount of $20,111.82—the liability of Marie Nebel being limited to the value of the property received by her. Each of them had petitioned the Board of Tax Appeals for a redetermination of the deficiency, and proceedings were pending before that Board. A time had been set and a place named for hearings thereon. In the order of the calendar their proceedings would have been called before that of the plaintiff. They had been informed that an adjustment of the values had been worked out by which the Bureau of Internal Revenue had agreed with plaintiff upon a redetermination of the deficiency upon which decision of the Board of Tax Appeals would rest. They were advised as to the terms of such redetermination and were asked to come in and share their part of the burden. They said it was not their burden. Yet, they had been notified by the Clerk of the Board that in accordance with the Rules of Practice of the Board their failure to appear at the time and place set for the hearing would be taken as cause for dismissal of each of their proceedings, and that in all other respects they would be expected to be familiar with such rules. They were thereby specifically charged with knowledge of the rule that in cases where a petition for a redetermination of a deficiency had been filed, decision of the Board dismissing the proceeding "shall be considered as its decision that the deficiency is the amount determined by the Commissioner." Internal Revenue Code Title 26, Section 1117. In like manner they were charged with knowledge of provisions of Section 513 (b) of the Gift Tax Act that "no part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board, which has become final, shall be assessed or be collected by distraint or by proceeding in court with or without assessment." In other words, they had knowledge, constructively, at least, that the decision of the Board upon the proposed redetermination of liability would fix the whole amount of the gift tax. They knew that in such event they

would be relieved of expense of further litigation. In the light of this knowledge, and even though to plaintiff they denied liability, they failed to appear at the time and place named when they had the opportunity to show effectively lack of liability, and by their silence permitted the decision of the Board to be entered as against the plaintiff on 27 March, 1942, and stood by to see plaintiff pay the whole tax—thereby exonerating them of liability to the Government. Under such circumstances they have by their conduct fixed the common liability, and equity will require them to stand to it. "He who is silent when it is his duty to speak will not be permitted by the law to speak when such silence has made it his duty thereafter to remain speechless." *Stacy, C. J.*, in *Sugg v. Credit Corp.*, 196 N. C., 97, 144 S. E., 554.

Appealing defendants contend, however, that they are not bound by the decision of the Board of Tax Appeals on 27 March, 1942; that in so far as they are concerned there has been no determination of a common liability; that the payment of the tax by plaintiff was voluntary; that they have the right to set up in this action all defenses they might have had in the original proceeding to which they were parties before the Board of Tax Appeals. And they rely upon the case of *Phillips v. Parmley,* 302 U. S., 233, 82 L. Ed., 221, in which the stockholder who had to pay the tax deficiencies to which the case of *Phillips v. Commr. of Internal Revenue, supra,* related, sues other stockholders for equitable contribution. In that case the Court held that "The right of a stockholder transferee to contribution arises under the general law and does not differ from that of any other person who has paid more than his fair share of a common burden. The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover, a plaintiff must prove both that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligations. Every defendant may, of course, set up any defense personal to him." This holding must be read in the light of the facts of the case. There the defendants had had no notice of the tax assessment which the Government had made and prosecuted against the plaintiffs alone, and defendants had not had an opportunity to assert any defenses they may have had. Not so here, the defendants had the opportunity at the only time it would have been effective, and they let it pass.

Due consideration has been given to other exceptive assignments and no prejudicial error is found.

In the judgment below we find

No error.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION OF NORTH CAROLINA v. GREAT SOUTHERN TRUCKING COMPANY.

(Filed 15 December, 1943.)

1. Constitutional Law §§ 4c, 17: Courts § 1a: Utilities Com. § 4—

The jurisdiction of the courts over regulations for "public convenience and necessity," made by State administrative bodies, in accordance with statutes, is neither original nor wholly judicial in character, and it is not the intent of such statutes that the public policy of the State shall be fixed by a jury.

2. Courts § 2b: Utilities Com. § 4—

While on appeal from the Utility Commission to the Superior Court the provision of the statute has been interpreted to mean that the trial shall be *de novo*, it also provides that the decision or determination of the Commission "shall be *prima facie* just and reasonable." C. S., 1098.

3. Same—

Where on petition of an interstate trucking company, operating across the State, to the Utilities Commission for the privilege of intrastate business on part of its lines, the Commission finds, on competent evidence, that the present intrastate carriers maintain sufficient schedules to meet the transportation needs of the territory involved in a reasonable manner, on appeal to the Superior Court, there being no showing sufficient to overcome the "*prima facie* just and reasonable" disposition of the matter by the Commission, judgment as of nonsuit was proper.

BARNHILL, J., concurring.

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

SEAWELL, J., dissenting.

APPEAL by Great Southern Trucking Company from *Warlick, J.*, at March Term, 1943, of MECKLENBURG.

Proceeding before North Carolina Utilities Commission.

The record discloses that on 21 April, 1942, the Great Southern Trucking Company filed petition with the Utilities Commission for franchise certificate to operate as motor vehicle carrier between Charlotte and Winston-Salem *via* Mooresville, Statesville and Mocksville, alleging as justification for the license "public convenience and necessity."

Pursuant to publication of notice, the matter came on for hearing before the Commission beginning on 19 May, 1942, at which time Frederickson Motor Express Corporation and Smith Transfer Corporation appeared and interposed objections. They were thereupon made parties protestant to the proceeding. The record fails to disclose the order making them parties or their objections, if in writing. But it appears in the evidence that they are intrastate carriers by truck operating over the proposed route.

In summary, the findings and determination by the Commission, filed 14 July, 1942, follow:

1. That the applicant operates under interstate rights between points in North Carolina, including Charlotte, Mooresville, Statesville and Winston-Salem, and points in Tennessee, South Carolina, Georgia, Florida and Alabama.

2. That it also operates under intrastate rights between Charlotte and Asheville over United States Highway No. 74, between Charlotte and Greensboro over United States Highway No. 29, and between Charlotte and High Point *via* Albemarle and Asheboro.

3. That it urges as justification for the license, here sought, both economy in operation and service to the public by handling at one and the same time and in the same trucks interstate and intrastate shipments to and from points on the proposed route.

4. That witnesses testified in support of the application, and generally to the effect that existing intrastate service over the proposed route is reasonably satisfactory, but that some inconvenience is occasioned by a division of interstate and intrastate shipments between carriers according to their respective operating rights.

5. That Frederickson Motor Express Corporation now operates under intrastate rights between Charlotte and Winston-Salem, with schedules set up by Mooresville and Statesville, and also by Salisbury and High Point.

6. That on 6 May, 1942, "this Commission granted the Lowther Trucking Company motor vehicle franchise rights to transport property between Charlotte and Winston-Salem *via* Mooresville and Mocksville."

7. That the present intrastate carriers have sufficient equipment and maintain sufficient schedules reasonably to meet the transportation needs over the proposed route.

Whereupon it was ordered that the application of the Great Southern Trucking Company be denied.

In apt time, the petitioner filed exceptions to the findings and order of the Commission. These were overruled, and from this final disposition of its petition, the Great Southern Trucking Company gave notice of appeal. The matter was certified to the Superior Court of Mecklenburg County.

At the hearing in the Superior Court, the original protestants, Frederickson Motor Express Corporation and Smith Transfer Corporation, also Piedmont Mountain Freight Lines (successor to Lowther Trucking Company) came in and asked to be made parties to the proceeding. The petitioner objected to the last named protestant being made a party. The motion was allowed as to all three. Exception.

In the main, the evidence offered is similar to that before the Commission, with some additional corroborative testimony. It is not materially different from what was heard by the Commission. Some shippers prefer to use the facilities of the petitioner, while others are satisfied with the services of the present intrastate carriers. For example, the Ford Motor Company, even at additional cost, uses the Great Southern to "pick up" its shipments in Charlotte, which are then turned over to one of the other carriers, if destined to points on the proposed route. On the other hand, an agent of the Piedmont Mountain Freight Lines testified: "We have tried to operate a through truck from Charlotte to Winston-Salem and return, but we are operating such service only when we have a sufficient volume of freight to warrant running that truck. We run that truck on an average of possibly three times a week. We have a trailer unit set aside for that purpose. On the days we do not operate that service, the truck sits in the yard. Our present volume is less than half."

Upon consideration of all the evidence, and on motion of the protestants, the action was dismissed as in case of nonsuit. From this ruling the Great Southern Trucking Company appeals, assigning errors.

Arch T. Allen and Guthrie, Pierce & Blakeney for petitioner, appellant.

Bailey, Lassiter & Wyatt and J. Laurence Jones for protestant, appellee.

STACY, C. J. The question for decision is whether the showing made in the Superior Court suffices to overcome the *"prima facie* just and reasonable" disposition of the matter by the Utilities Commission. The trial court answered in the negative, and we cannot say the result should be disturbed.

The ruling in the court below was on demurrer to the evidence, and as no challenge was interposed to the appeal as such, this latter question, debated on argument, is neither considered nor decided. Its determination seems unnecessary in the view we take of the case.

The scintilla rule is not applicable here. The matter came into the Superior Court on appeal from a determination of the Utilities Commission. This is presumed to be valid, and is not to be disturbed "unless it is made to appear that . . . it is clearly unreasonable and unjust," to quote the language of *Hoke, J.*, in *Corporation Commission v. R. R.*, 170 N. C., 560, 87 S. E., 785. To say that it may be overcome by a mere inference of fact is not only to render it feckless, but also to reduce the *exception* to no real value or significance. *S. v. R. R.*, 161 N. C., 270, 76 S. E., 554. It was not intended that an appeal should be taken

simply to see "how it might strike the Court." *Utilities Com. v. Kinston,* 221 N. C., 359, 20 S. E. (2d), 322. In the recent case of *Utilities Com. v. Coach Co.,* 218 N. C., 233, 10 S. E. (2d), 824, the observation is made that it requires the appellant to "introduce substantial evidence in support of his case, or run the risk of an adverse verdict." Substantial evidence is more than a scintilla or a permissible inference. See *Consolidated Edison Co. v. Nat. L. R. Bd.,* 305 U. S., 197, 83 Law Ed., 126.

The statute provides that on appeal to the Superior Court, "if there are exceptions to any facts" it shall be placed on the civil issue docket, and the trial shall be under the same rules and regulations as are prescribed for the trial of other civil causes, "except" that the decision or determination made by the Commission "shall be *prima facie* just and reasonable." C. S., 1098; McIntosh on Procedure, 819. In other words, the trial is to be under the same rules and regulations applicable in other civil causes, save and except the *prima facie* effect to be given the decision or determination of the Commission.

The provision that on appeal the trial shall be "under the same rules and regulations as are prescribed for the trial of other civil causes," has been interpreted to mean that the trial shall be *de novo. S. v. R. R., supra; Corporation Com. v. Mfg. Co.,* 185 N. C., 17, 116 S. E., 178.

It is to be remembered that what constitutes "public convenience and necessity" is primarily an administrative question with a number of imponderables to be taken into consideration, *e.g.,* whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. Precisely for this reason its determination by the Utilities Commission is made not simply *prima facie* evidence of its validity, but *"prima facie* just and reasonable." It is not the intent of the statute that the public policy of the State should be fixed by a jury. The court's jurisdiction in the premises is neither original nor wholly judicial in character, and so the weight to be given the decision or determination of the Utilities Commission in any given case is made an exception to its usual procedure. *Corp. Com. v. R. R.,* 151 N. C., 447, 66 S. E., 427; *Prentis v. R. R.,* 211 U. S., 210. See *Belk's Department Store v. Guilford County,* 222 N. C., 441, 23 S. E. (2d), 897, where a fruitless effort was made to obtain a judicial review of determination by another administrative agency even in the absence of a presumptive declaration such as we have here.

Nor is it to be overlooked that in 1933, the Commission was given authority to grant or refuse any application for a franchise certificate where the granting of such application would duplicate, in whole or in

part, a previously authorized similar class of service, unless it is shown to the satisfaction of the Commission that the existing operators are not providing sufficient service reasonably to meet the public convenience and necessity, and the existing operators, after thirty days' notice, fail to provide the service required by the Commission. Ch. 440, sec. 1, Public Laws 1933, amending ch. 136, sec. 3, Public Laws 1927.

The petitioner, Great Southern Trucking Company, is a Florida corporation engaged in interstate commerce by truck, operating across the State *via* Charlotte and Winston-Salem, but without the privilege of intrastate business between these two points, which it now seeks. The Commission found that the present intrastate carriers between Charlotte and Winston-Salem, over the proposed route, maintain sufficient schedules to meet the transportation needs in a reasonable manner, and that the facts presented do not warrant the granting of petitioner's application. There is no sufficient evidence on the record to overturn this determination by the Commission or to rebut the presumption that it is just and reasonable.

On the record as presented, the correct result seems to have been reached.

Affirmed.

BARNHILL, J., concurring: The appellant does not challenge the right of defendant to appeal herein. I doubt that the Court should dismiss *ex mero motu*. Hence, on this record, I am in full accord with the majority opinion. At the same time I deem it not amiss to call attention to provisions for appeal from orders of the Utilities Commission. As the Commission acts both as a court under the Utilities Commission Act and as an administrative agency under the Motor Bus Act, the distinctions drawn in the several statutes are important.

The Corporation Commission was created in 1899 and was charged with the duty of supervising railroad, telephone and telegraph, and certain other *quasi*-public corporations, as to rates charged and services rendered. Ch. 164, Public Laws 1899. By various amendments to this Act this supervisory power has been extended to include practically all other public service corporations other than motor bus companies using the public highways.

All the corporations brought under the supervision of the Corporation Commission by this Act, as amended, procure their franchise or license from a governmental agency other than the Commission, and the power of the Commission is limited to the supervision and control over rates charged and services rendered by operating corporations.

The original Act, chapter 164, Public Laws of 1899, provides that *any person affected thereby* may appeal from "all decisions or determi-

nations" of the Commission. This provision is brought forward by reference or otherwise in each of the amendatory Acts, the last of which was chapter 127, Public Laws of 1913. When the Act was codified this provision for appeal was set forth as an independent section (1097) of chapter 21, Consolidated Statutes of 1919.

Considered alone and unrelated to other sections of the same chapter, C. S., 1097, appears to give the right of appeal from all orders and decrees of the Corporation Commission without regard to the subject matter of the order or the source of power under which the Commission acts. It is apparent from the reading of *Utilities Commission v. Coach Co.*, 216 N. C., 325, 4 S. E. (2d), 897, that this fact led to the decision in that case.

But even as codified, this section is a mere part of the composite whole. The other sections of the same chapter are *pari materia*, and must be considered in construing the meaning of its language. When so construed the original provision has not been modified or enlarged. The *party affected* may appeal from any order or decree made by the Commission in relation to "rates charged or services rendered" under the power conferred by the terms of the Act. The power thus conferred relates exclusively to operating public service corporations.

By chapter 134, Public Laws of 1933, the Corporation Commission was abolished and the Utilities Commission was created in its stead. Under the terms of this Act the new Commission was given regulatory and supervisory power over operating public service corporations other than motor bus companies. No power to grant franchises is therein contained. The right of appeal, however, is restated and redefined: "From the decision of said Utilities Commissioner, or the said Utilities Commission, *any party to said proceeding* may appeal to the Superior Court at term as designated in and under the rules of procedure required by section(s) 1097, 1098, 1099, 1100, 1101, 1102, Consolidated Statutes, said appeal to be prosecuted and the said matter and controversy there to be heard and disposed of as is now provided by law, and upon such appeal being taken, it shall be the duty of the Utilities Commission to certify its decision and rulings to the said Superior Court as now provided by law." Sec. 12. Thus only the procedural provisions of the named sections of the Consolidated Statutes are retained.

Neither the Corporation Commission Act nor the Utilities Commission Act vests the Commission with power to grant franchises to motor bus companies. Hence the right of appeal contained in the Corporation Commission Act and redefined in the Utilities Commission Act has no relation to orders or decisions under the Motor Bus Act, except, perhaps, orders concerning rates and services. Sec. 1, ch. 307, Public Laws 1933.

Certainly it does not apply to the discretionary power to grant or to deny a franchise, conferred on the Commission by the Bus Act.

In proceeding under the powers conferred by the Acts heretofore discussed, the Commission deals with rates charged and services rendered by operating corporations. This usually affects property rights. In respect thereto the Utilities Commission is made a court of record. Sec. 9, ch. 134, Public Laws 1933. Hence, provision for appeal from its orders and decrees in regard thereto was to be expected.

When, however, the Commission as an administrative agency of the Legislature comes to act on applications for franchises to operate motor buses, its authority stems from a separate and distinct Act which is not amendatory, and constitutes no part, of the Utilities Commission statute. Under no rule of construction known to me can the provisions of chapter 134, Public Laws of 1933, be said to form a part of this statute. On the contrary, we must look exclusively to this and amendatory acts to ascertain what right of appeal, if any, exists.

The first Act, ch. 50, Public Laws 1925, was revised and re-enacted in 1927. Ch. 136, Public Laws 1927. This statute as amended constitutes our motor bus law and is known as the Bus Act. It contains provision for appeal which is controlling. *"The holder of such certificate"* shall have the right of appeal to the Superior Court. Sec. 8.

This statute was substantially amended in 1937. Ch. 247, Public Laws 1937. The amended Act contains the following: *"Provided the holder of any certificate, franchise, or license whose certificate, franchise, or license is ordered canceled* hereunder shall have the right of appeal to the Superior Court as is now provided by law for appeals from the Commission." Sec. 4.

Thus the *holders* of certificates, franchises, or licenses are given the right to appeal. Applicants for franchises are not. *Expressio unius est exclusio alterius.*

The distinction drawn by the Legislature is logical and sound. Clearly, orders which affect a holder of a certificate or franchise affect rights. On the other hand, the business of carrying passengers and freight for hire by motor vehicles over and along the public highways is a privilege, the licensing of which is peculiarly and exclusively a legislative prerogative. The privilege may be granted or withheld at the will of the General Assembly. It may, in its discretion, create an administrative agency to perform this purely administrative function. This it has elected to do. When the Commission as the agency thus set up passes upon applications for a franchise to use the public roads for commercial purposes it acts as a fact-finding administrative agency of the State. No legal or property right of the applicant is involved. He suffers no injury when and if his application is denied. His only right is to require

the Commission to act in good faith. *Pue v. Hood, Comr. of Banks,* 222 N. C., 310. Even if, "in the judgment of the Commission," public convenience and necessity requires additional service, he cannot demand judgment in his favor. He must still depend upon the grace of the Legislature as administered by the Commission. Secs. 3 (c), 3 (f), ch. 136, Public Laws 1927; sec. 1, ch. 440, Public Laws 1933.

The legislative and judicial branches of government are separate and distinct agencies of government. The granting of franchises is exclusively legislative. It would be most unusual for the Legislature to surrender this prerogative to the courts, even as appellate supervisory agencies. We should not so hold without a clear and unequivocal declaration of such intent to that end. To my mind the contrary intent definitely appears.

Under the express language of the motor bus law the power of the Commission to grant franchises to a passenger or freight carrying corporation involves the exercise of discretion and judgment.

"After such hearing, the Commission may issue the license certificate, or refuse to issue it, or may issue it with modifications and upon such terms and conditions *as in its judgment* the public convenience and necessity may require." Sec. 3 (c), ch. 136, Public Laws 1927.

"The Commission shall not refuse to grant a franchise certificate, upon the original application, to any applicant for the transportation of property solely because of multiplicity of similar operators over such proposed route, but the Commission shall refuse any application for a passenger franchise certificate over a route where there has already been established one or more passenger lines, unless it is *shown to the satisfaction of the Commission* that the existing operations are not providing sufficient service to reasonably meet the public convenience and necessity, and the existing operators, after thirty days notice, fail to provide the service required by the Commission." Sec. 3 (f), ch. 136, Public Laws 1927. The first provision of sec. 3 (f) above quoted was expressly repealed in 1933, and the following was substituted: "The Commission *may refuse* to grant any application for a franchise certificate where the granting of such application would duplicate, in whole or in part, a previously authorized, similar class of service." Sec. 1, ch. 440, Public Laws 1933.

The terms "to the satisfaction of," "as in its judgment," "may issue . . . or refuse to issue" and, "may refuse to grant" clearly import the exercise of discretion and judgment. We have consistently held that the courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable, or arbitrary action, or disregard of law. *Pue v. Hood, Comr. of Banks, supra.*

In any event, conceding *arguendo* the right of appeal, there is no issue of fact to be submitted to a jury. The right to trial by jury applies exclusively to actions in which legal rights are involved. Art. I, sec. 19, N. C. Const.; *Groves v. Ware,* 182 N. C., 553, 109 S. E., 568; *R. R. v. Parker,* 105 N. C., 246, 11 S. E., 328; *McInnish v. Board of Education,* 187 N. C., 494, 122 S. E., 182; *Comrs. v. George,* 182 N. C., 414, 109 S. E., 77; *Hagler v. Highway Commission,* 200 N. C., 733, 158 S. E., 383; *Mountain Timber Co. v. Washington,* 243 U. S., 219, 61 L. Ed., 685; *Andrews v. Pritchett,* 66 N. C., 387; *Cozad v. Johnson,* 171 N. C., 637, 89 S. E., 37; 31 Am. Jur., 557 (see n. 6 for other authorities from U. S. and many state courts). The Constitution, Art. I, sec. 19, guarantees the right to trial by jury only in controversies respecting property, and then only in cases where under the common law the demand that the facts should be found could not have been refused. *R. R. v. Parker, supra.*

If we are to extend the right of appeal to an applicant for license, then the provision that "the order of the Commission shall be deemed *prima facie* reasonable and just" raises the question to be decided on appeal: Is the order in fact unreasonable and unjust? It is upon this basis that the appeal herein is decided. In the absence of any challenge of the right of appeal, I concur.

It may be well to note here that in neither the Utilities Commission Act nor in the Motor Bus Act is there any reference to "trial by jury" or "trial *de novo.*" These terms have been engrafted upon the law by judicial interpretation.

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

SEAWELL, J., dissenting: It is evident that the majority who have determined the issue in this case are not agreed on the right of the applicant to appeal. Conceding this right, my dissent, concisely stated, is from the holding of the majority that the *prima facie* presumption raised by the statute requires any stronger evidence to rebut it than any other presumption, *prima facie* on its face, intended merely to require evidence from the party on whom the burden rests or run the risk of non-persuasion and an adverse finding upon the issue.

If it requires more evidence, the court has no authority, *ipso facto,* to take over at that point and pass upon its weight and sufficiency against the uniform practice of this Court from time immemorial, and, I think, against the plain terms of positive law which we have so long meticulously respected. Even in those cases in which the evidence is required to be "clear, strong and convincing" the power of the court goes

only so far as to authorize an instruction to the jury that the evidence must be of that character to justify the relief demanded.

There is no policy of the State in any danger by submission of the facts to jury trial. The real controversy is over the question of public convenience and necessity, and the policy of the Legislature, as plainly expressed in the statute, is to throw around the Commission the restraint of review, and, as it has in so many similar matters, has chosen to submit the facts bearing on the main issue to the more popular device of trial by jury.

The applicant has not contended here that the ultimate choice of means to remedy the want of adequate public service may not rest with the Utilities Commission after the issue as to the necessity has been determined—whether by removing the restriction in the existing franchise, or granting a franchise to another person or concern, or requiring the respondent to improve or enlarge its facilities used in the particular service, which are now, from the evidence, at the point of saturation. If the plea of "policy" upon which the main opinion seemingly rests has any force, it should be concerned with this alone—the choice of the franchise holder or the means of remedying the condition of such inconvenience if it is found to exist—it should not affect the mode of trial upon the facts as provided in the statute. Decision should not be based on an ideology as to the comparative fitness of the court on the one hand and the jury on the other to deal with the issue presented. It should be referred to the warrant of statutory authority. The Legislature has not designated the court as a policy making agency any more than it has the jury. The policy is made by the Legislature, as expressed in the statute.

I disagree with the majority as to the significance to be attached to the evidence. I must refer to the record itself, as space forbids its reproduction here. In my opinion, it discloses a condition upon which the Commission might well have taken some action. The case comes to us from a section where the wheels of industry turn fast and transportation is an exponent of progress. I think the service is inadequate. From my point of view, upon this question, "convenience" and "necessity" are the same thing. For relief it is not necessary that the public be put on the rugged edge of exigency. This question, to which the whole law is pointed, requires no judicial acumen to decide, and might well be decided by intelligent laymen, and I repeat my conviction that the statute, whatever the form of the issue by which it may be determined, intended to leave it to the jury.

I think the case should have been submitted to the jury on issues addressed to the facts, and with appropriate instructions. Any procedural prerogatives of the Commission could be respected in the judgment.

STATE v. ALEX HARRIS.

(Filed 15 December, 1943.)

1. Criminal Law § 52a—

It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused.

2. Criminal Law § 47—

A motion to consolidate, C. S., 4622, three capital cases *in medias res* pending the taking of testimony on the trial of one of them, is not an assent to a mistrial in order to effect a consolidation.

3. Same—

Order of consolidation in capital cases, C. S., 4622, will be made when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might be threatened by the consolidation.

4. Criminal Law § 29b—

Where homicides are so connected in time and place as to be all parts of one continuous transaction or the same *res gestæ*, evidence of all of such crimes are competent upon the trial of any one of them.

5. Same—

The general rule is that evidence of a distinct, substantive offense is inadmissible to prove another and independent crime; but to this there is the exception that proof of the commission of other like offenses is competent to show the *quo animo*, intent, design, *scienter*, or to make out the *res gestæ*, or to exhibit a chain of circumstantial evidence in respect to the matter on trial, when such crimes are so connected with the offense charged as to throw light on one or more of these questions.

6. Criminal Law § 53a—

The court's charge to the jury must be considered in its entirety and contextually.

7. Criminal Law § 28a—

The accused enters upon a criminal trial with his sanity taken for granted, with the presumption of innocence in his favor, and with the burden on the State to establish his guilt beyond a reasonable doubt; and not until the prosecution has made out a *prima facie* case is it incumbent on him to offer evidence of his defense or take the risk of an adverse verdict.

8. Criminal Law § 5c—

When insanity is interposed as a defense in a criminal prosecution, the burden rests with the defendant, who sets it up, to prove such insanity to the satisfaction of the jury; and where the accused offers evidence of his insanity, the State may seek to rebut it, or to establish defendant's sanity by presumption of law, or by the testimony of witnesses, or both.

9. Criminal Law §§ 5a, 5c—

The test of criminal responsibility, under a plea of insanity, is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation.

10. Criminal Law § 28a—

With us the doctrine of reasonable doubt is applied in favor of the accused, but never against him. Condemnation or conviction requires proof "beyond a reasonable doubt"; mitigation, excuse, or justification "to the satisfaction of the jury," which alone is the judge of its satisfaction.

APPEAL by defendant from *Carr, J.*, at January Term, 1943, of HOKE.

Criminal prosecution tried upon indictment charging the defendant with the murder of Mrs. E. A. Bill.

The record discloses that on Thursday, 27 August, 1942, the defendant entered Bill's Service Station in Hoke County, which is about 2½ miles from Raeford on the Fayetteville Highway, and shot three members of the Bill family, one after the other, in rapid succession, and killed them all. Those killed were Mrs. E. A. Bill, her son, Eugene Bill, and her married daughter, Mrs. Estelle Wilson.

Three separate indictments were returned against the defendant charging him with the several homicides. He was tried on the bill charging him with the murder of Mrs. E. A. Bill.

The defendant's plea was insanity or mental irresponsibility bottomed on the fact that his son, Johnny Harris, had been shot and killed by Eugene Bill at this same service station on the preceding Sunday, 23 August, which had caused the defendant great stress of mind, total loss of sleep, and in the meantime he had taken a number of B-C headache powders, all of which had dethroned his reason and rendered him incapable of knowing what he was doing.

During the examination of the State's first witness, who was describing the scene in the service station as he found it after the shooting, reference was made to the position of the body of Eugene Bill; whereupon the defendant moved that the three indictments be consolidated and tried together. Overruled; exception.

Following this determination, the court at first ruled that the State would not be permitted to show any homicide except the one for which the defendant was then on trial. Later, when it appeared that confessions or statements made by the defendant referred to all the homicides, the court permitted evidence of the other homicides as showing guilty knowledge on the part of the defendant. Exception.

The theory of the prosecution is, that the defendant wiped out the Bill family as a matter of revenge. He told Crawford Wright at Fairmont on the day before the homicides that Mrs. E. A. Bill ought to be

in jail along with her son Eugene for killing his boy; that he had heard she was the one really responsible for his boy's death. Eugene Bill was then out on bail, awaiting trial on a charge of killing Johnny Harris.

According to statements made by the defendant after the shooting, he went into the service station and said to Mrs. Bill, "I understand you had some trouble out here last Sunday." Mrs. Bill replied, "I don't care to discuss that now." About that time Eugene Bill came into the service station and went to the cash register to make some change. The defendant spoke to him and said, "I understand you shot a Harris boy out here Sunday." Eugene replied, "Well, he asked for it and I gave it to him." The defendant then said, "Yes, you asked for it and now I am going to give it to you." Whereupon the defendant shot Eugene and he fell. Mrs. Bill started around the end of the counter and he shot her one time and when she was falling he shot her again. About that time Mrs. Wilson came into the station from a back door and he shot her and she fell. It all happened within a space of a few minutes. The defendant told the sheriff that he had six bullets in his pistol and that he shot everything in sight. Continuing, the sheriff testified: "He said he reckoned he would be electrocuted for it, and he was sorry he had done it. He said the Bill boy had taken the law in his hand and he took the law in his hands, and he guessed they had all gone wrong about it." On the way to jail, he said "I am not drunk and I am not crazy. I didn't do that to try to be a hero or an outlaw, but I did it for love and blood."

Shortly after the homicides, Dr. Matheson examined the bodies and found that Mrs. Bill had been shot three times; Mrs. Wilson, twice, and Eugene Bill once. Death was practically instantaneous in each instance.

After the shooting, the defendant saw Philmore Carpenter, who was working on the highway. He called him and said, "I want you to take my gun and give it to one of my boys."

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.

N. McNair Smith, E. L. Gavin, and Varser, McIntyre & Henry for defendant.

STACY, C. J. We have here for determination, (1) the correctness of the refusal to consolidate the three indictments, (2) the competency of evidence of other crimes to show guilty knowledge, and (3) the adequacy or sufficiency of the charge.

First, in respect of the defendant's motion to consolidate the three indictments for trial, it is to be observed that this came during the progress of the hearing. Had the motion been made *in limine,* a different situation might have arisen, as the court observed at the time. C. S., 4622. However, after the jury had been impaneled and the prosecution had begun to offer its evidence, the court regarded the motion as too late and remarked that it could only be granted by ordering a mistrial and selecting another jury to try the three consolidated cases. The jury had been impaneled to try the issue between the State and the accused on the indictment charging the defendant with the murder of Mrs. E. A. Bill, and none other. No motion for a mistrial was lodged by the defendant.

The manner of selecting a jury in a capital case is quite different from that followed in other cases, and the considerations usually surrounding such a jury are also different. *S. v. Ellis,* 200 N. C., 77, 156 S. E., 157; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused. *S. v. Tyson,* 138 N. C., 627, 50 S. E., 456; *S. v. Cain,* 175 N. C., 825, 95 S. E., 930. Here the accused did not assent to a mistrial in order to effect a consolidation. His motion was to consolidate *in medias res* pending the taking of testimony in the instant case. *S. v. Rice,* 202 N. C., 411, 163 S. E., 112. The trial court was of opinion that the jury, as then selected and impaneled, would not be authorized to try the defendant on the other indictments. For this reason and in its discretion the motion to consolidate was denied. We cannot say there was error in the ruling.

True it is provided by C. S., 4622, that where there are several charges against any person for the same act or for two or more transactions connected together, or for two or more transactions of the same class of offenses, which may be properly joined, the court will order them to be consolidated. *S. v. Combs,* 200 N. C., 671, 158 S. E., 252; *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248; *S. v. Lewis,* 185 N. C., 640, 116 S. E., 259. This means, however, that the order of consolidation will be made in such cases when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might seriously be threatened by the consolidation. *S. v. Rice, supra.* It is rare that we find a consolidation of capital indictments, though there are some, usually by consent, the most recent one being in the case of *S. v. Grass, ante,* 31.

No harm has come to the defendant from the court's ruling on the consolidation of the indictments and apparently no benefit would be derived from a new trial on this account.

Second, as to the competency of the evidence of the other crimes to show *scienter* or guilty knowledge, it may be noted they are all parts of

one continuous transaction or the same *res gestæ.* The defendant must have realized this when he interposed a motion to consolidate the three indictments. The homicides were so connected in time and place as to make the evidence of all competent upon the trial of any one. *S. v. Adams,* 138 N. C., 688, 50 S. E., 765; *S. v. Davis,* 177 N. C., 573, 98 S. E., 785. Indeed, as bearing upon the elements of premeditation and deliberation it was proper to show, and for the jury to consider, the conduct of the defendant, before and after, as well as at the time of, the homicide, and all attendant circumstances. *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Bowser,* 214 N. C., 249, 199 S. E., 31; *S. v. Watson,* 222 N. C., 672, 24 S. E. (2d), 540.

The general rule undoubtedly is, as contended by the defendant, that evidence of a distinct, substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. Adams, supra; S. v. McCall,* 131 N. C., 798, 42 S. E., 894; *S. v. Graham,* 121 N. C., 623, 28 S. E., 409. But to this, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge or *scienter,* or to make out the *res gestæ,* or to exhibit a chain of circumstantial evidence in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. *S. v. Simons,* 178 N. C., 679, 100 S. E., 239; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284. The exception to the rule has been fully discussed by *Walker, J.,* in *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241, and in a valuable note to the case of *People v. Moleneux,* 168 N. Y., 264, as reported in 62 L. R. A., 193-357.

Speaking to the subject in *S. v. Beam,* 184 N. C., 730, 115 S. E., 176, it was said: "The rule against admitting proof of extraneous crimes is subject, however, to certain qualifications or exceptions. In making proof against a defendant it is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constitutive elements of the crime of which the defendant is accused in the case on trial, even though such facts and circumstances may tend to prove that the defendant has committed other crimes. So evidence covering the commission of other offenses is admissible when two or more crimes are so linked in point of time or circumstances that one cannot be fully shown without proving the other. . . . Whenever mental state, *scienter,* or *quo animo* constitutes an ingredient of the offense charged, evidence is admissible of acts, conduct, or declarations of the accused which tend to establish such knowledge, intention, or motive notwithstanding the fact that it may disclose a different crime in law."

In the circumstances disclosed by the record, it would seem that there was no error in admitting the evidence of the other homicides. A new trial could not be predicated on assignments of error based on these exceptions.

Third, as bearing on the adequacy or sufficiency of the charge, the rule that what the court says to the jury must be considered in its entirety and contextually would seem to save it from successful attack. *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360.

The principal infirmity in the charge, so the defendant contends, is that the jury was instructed not to consider the defendant's plea of insanity unless and until they first found him guilty beyond a reasonable doubt of one of the grades of an unlawful homicide, as contained in the bill of indictment, and then the burden would be on the defendant to satisfy the jury of his insanity or mental irresponsibility at the time of the killing in order to escape a conviction.

The court was here dealing with the intensity of proof required of the State to obtain a conviction, and with the *quantum* of proof required of the defendant on his plea of insanity. While somewhat out of the ordinary or usual form, the instruction will do. Its meaning is not difficult of discernment. It seems clear that the order in which the matter was considered had no material bearing on the outcome, since the jury was not satisfied of the defendant's insanity, and was convinced beyond a reasonable doubt of his guilt. *S. v. Hancock,* 151 N. C., 699, 66 S. E., 137.

The defendant entered upon the trial with his sanity taken for granted, with the presumption of innocence in his favor, and with the burden on the State to establish his guilt beyond a reasonable doubt. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846. Not until the prosecution had made out a *prima facie* case was it incumbent on the defendant to offer evidence of his defense or take the risk of an adverse verdict. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; 20 Am. Jur., 159.

The atrocity of the defendant's conduct, as disclosed by the State's evidence, was a circumstance from which opposite conclusions were sought to be drawn; the one that it exhibited a mind fatally bent on mischief; the other that it revealed a diseased mind. The jury seems to have attributed it to the former.

Of course, at the threshold of the case and throughout the hearing, the burden was on the State to establish the guilt of the accused beyond a reasonable doubt. *S. v. DeGraffenreid, ante,* 461; *S. v. Schoolfield,* 184 N. C., 721, 114 S. E., 466. But this did not initially require affirmative proof of the sanity of the accused, which is presumed as his normal condition, and upon which the State is entitled to rely. *S. v. Lewis,* 20 Nev., 333. Soundness of mind is the natural and normal condition of

men, and therefore everyone is presumed to be sane until the contrary is made to appear. *S. v. Clark,* 34 Wash., 485, 76 Pac., 98, 101 Am. St. Rep., 1006.

In this jurisdiction, as well as in many others, when insanity is interposed as a defense in a criminal prosecution, the burden rests with the defendant, who sets it up, to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Cureton,* 218 N. C., 491, 11 S. E. (2d), 469; *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734; *S. v. Jones, ibid.,* 374, 166 S. E., 163; *S. v. Wilson,* 197 N. C., 547, 149 S. E., 845; *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Jones,* 191 N. C., 753, 133 S. E., 81; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154.

It is quite correct to say the burden is on the State to prove beyond a reasonable doubt every essential element of the crime charged, including the necessary intent. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Crook,* 189 N. C., 545, 127 S. E., 579. In undertaking this burden, however, the prosecution may assume, as the law does, that the defendant is sane. The assumption persists until challenged and the contrary is made to appear from circumstances of alleviation, excuse or justification; and it is incumbent on the defendant to show such circumstances to the satisfaction of the jury, unless they arise out of the evidence against him. *S. v. Grainger, post,* 716. If no evidence of insanity be offered, the presumption of sanity prevails. And where the defendant offers evidence of his insanity, the State may seek to rebut it or to establish the defendant's sanity by the presumption of law, or by the testimony of witnesses, or by both.

With us the doctrine of reasonable doubt is applied in favor of the accused, but never against him. *S. v. Payne,* 86 N. C., 609; *S. v. Ellick,* 60 N. C., 450. Condemnation or conviction requires proof "beyond a reasonable doubt"; mitigation, excuse or justification "to the satisfaction of the jury." *S. v. Benson,* 183 N. C., 795, 111 S. E., 809; *S. v. Brittain,* 89 N. C., 481; *S. v. Willis,* 63 N. C., 26; *S. v. Ellick, supra.* "Beyond a reasonable doubt" means "fully satisfied" (*S. v. Sears,* 61 N. C., 146), "entirely convinced" (*S. v. Parker,* 61 N. C., 473), "satisfied to a moral certainty" (*S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625). See *S. v. Charles,* 161 N. C., 286, 76 S. E., 715; *S. v. Schoolfield,* 184 N. C., 721, 114 S. E., 466; *S. v. Dixon,* 149 N. C., 460, 62 S. E., 615; *S. v. Whitson,* 111 N. C., 695, 16 S. E., 332; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308. "To the satisfaction of the jury" means such as satisfies the jury of the truth of the matter. *S. v. Brittain, supra; S. v. Ellick, supra.* "The greater weight of the evidence" may or may not satisfy the jury. *S. v. Prince, ante,* 392. The jury alone is the judge of its satisfaction. See *Williams v. Bldg. & Loan Asso.,* 207 N. C., 362, 177 S. E., 176. One who would shelter himself under a plea of insanity must satisfy the jury

of his inability to distinguish between right and wrong at the time of and in relation to the alleged criminal act. *S. v. Haywood,* 61 N. C., 376; *S. v. Sewell,* 48 N. C., 245.

The test of responsibility is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Potts,* 100 N. C., 457, 6 S. E., 657; *S. v. Brandon,* 53 N. C., 463. He who knows the right and still the wrong pursues is amenable to the criminal law. *S. v. Jenkins,* 208 N. C., 740, 182 S. E., 324. On the other hand, if "the accused should be in such a state of 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," the law does not hold him accountable for his acts, for guilt arises from volition, and not from a diseased mind. *S. v. Brandon, supra; S. v. Haywood, supra; Knights v. State,* 58 Neb., 225, 76 Am. St. Rep., 78, and note.

On the whole, the case seems to have been tried in substantial conformity to the decisions on the subject. No reversible error has been made to appear. The verdict and judgment will be upheld.

No error.

W. A. CORBETT v. HILTON LUMBER COMPANY AND R. A. PARSLEY.

(Filed 15 December, 1943.)

1. Pleadings § 13½—

When the sufficiency of a pleading is challenged by demurrer, the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact necessarily deducible therefrom, are admitted.

2. Same—

Both the statute, C. S., 535, and the decisions of this Court require that pleadings be liberally construed, and every reasonable intendment and presumption taken in favor of the pleader. A pleading must be fatally defective before it will be rejected.

3. Pleadings §§ 15, 16: Corporations § 8—

In a suit against a corporation and its president by the owner of a majority of its capital stock, preferred and common, part of which had not been transferred on its books to plaintiff, where the complaint alleges the wrongful refusal of the corporation by the individual defendant to transfer such stock to plaintiff, that the said president has held a meeting of stockholders, without a quorum present or represented, and at such meeting called all preferred stock at par and that he is attempting to sell and dispose of valuable property of the company, all in violation of the rights of plaintiff and the corporation, a demurrer, on the ground of misjoinder of parties and causes, and on the grounds of no cause of action

stated, was properly overruled and restraining order properly continued to the hearing.

APPEAL by defendants from *Nimocks, Jr., J.,* at Chambers in Fayetteville, N. C., 30 June, 1943. From NEW HANOVER.

Civil action in the main to require transfer on corporate books all of the capital stock of defendant corporation, both common and preferred, owned by plaintiff as represented by certificates duly assigned and to enjoin calling of outstanding preferred stock, and disposition of corporate property.

Plaintiff, in his complaint filed in this action, alleges substantially these facts:

(1) That defendant, Hilton Lumber Company, is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, and is the owner of valuable tracts of standing timber which is of great and increasing value.

(2) That defendant corporation has outstanding eight hundred shares of capital stock of the par value of one hundred dollars each consisting of four hundred shares of common stock and four hundred shares of preferred stock—its duly recorded charter providing that the preferred stock shall have equal voting power with the common stock and that after the payment of dividends of six per cent per annum upon the preferred stock, the surplus profits, if any, shall be used in paying dividends upon the common stock until six per cent shall be paid, after which if there be any surplus profits, they shall be divided pro rata among the stockholders, both common and preferred.

(3) That defendant, R. A. Parsley, who is president of defendant corporation, owns one hundred shares of common stock and one hundred shares of preferred stock and holds one hundred ninety eight shares of common stock as trustee, under a trust created on 11 July, 1928, by W. L. Parsley and wife, Agnes MacRae Parsley, for the benefit of their children, naming them, with authority to vote same. That, though W. L. Parsley, after death of his wife, attempted to revoke the trust, and though the beneficiaries, all of whom are of legal age, have repeatedly requested him so to do, R. A. Parsley as trustee has refused and still refuses to surrender the certificates representing said trust stock and to agree to transfer or sale of said stock and to terminate the trust.

(4) That prior to 5 February, 1943, the remaining three hundred shares of common stock and the remaining one hundred and two shares of preferred stock of defendant corporation, were owned and held by certain persons and in designated proportions, including Ben Willis, who owned one share of the preferred stock, and W. R. Allen, Jr., who owned five shares of the common stock and five shares of the preferred stock;

and prior to 9 February, 1943, plaintiff purchased the whole thereof at the price of three hundred ($300.00) dollars per share and the certificates of stock representing same have been duly assigned, transferred and delivered to plaintiff and he is now the owner of said stock—representing a majority of the outstanding capital stock of defendant corporation.

(5) That in addition to the purchase of the stock as alleged in last preceding paragraph plaintiff and the beneficial owners of the one hundred ninety-eight shares of the common stock to which the said trust agreement relates, as above named, have entered into an agreement under the terms of which said beneficial owners of said stock have agreed to sell and plaintiff has agreed to purchase same at price of three hundred ($300.00) dollars per share and to pay for same upon delivery to him of said stock, free and clear of the trust agreement under which it is now wrongfully held by defendant, R. A. Parsley.

(6) That on 9 February, 1943, defendant, R. A. Parsley, undertook to hold and conduct an annual meeting of the stockholders of defendant corporation; that the only stock represented was that held by said Parsley, individually, and as trustee, and that although a quorum was lacking, and that although said Parsley knew that plaintiff owned a substantial amount of the outstanding stock, if he did know that plaintiff owned a majority, and although he was advised by W. R. Allen, Jr., secretary of defendant corporation, that he, Allen, had prior thereto sold, transferred and delivered all of his stock to plaintiff and was not on the day of the meeting a stockholder in said corporation, said Parsley undertook to organize an annual meeting, and to elect directors, and to call all of the outstanding preferred stock at par, although there is no provision in the charter or by-laws of the corporation defendant providing for redemption of its preferred stock, by reason of all of which said meeting was illegal, and all proceedings and resolutions which may have been adopted at it are void and of no effect, and violative of rights of plaintiff as a stockholder and of rights of beneficiaries under said trust agreement.

(7) That on 10 February, 1943, plaintiff went to office of defendant corporation and presented to the secretary of said corporation certain certificates of stock of said company, both common and preferred, which had been duly and legally assigned, transferred, and delivered to him and demanded that said stock be transferred to him on the books of the corporation; that the secretary referred plaintiff to defendant R. A. Parsley, president of the corporation, and, upon plaintiff exhibiting same to him and demanding that same be transferred to plaintiff on the books of corporation, said Parsley examined the certificates and wrongfully refused and declined to permit such transfer; and that on following day plaintiff again went to office of defendant corporation

with certain additional shares of stock for which he held stock certificates duly and legally assigned, transferred and delivered to him the whole of which amounted to four hundred and two shares of the capital stock of said corporation, and again demanded that said stock be transferred to him on books of the company, but that defendant R. A. Parsley again wrongfully and unlawfully refused to permit such transfer to plaintiff of said stock, all in violation of plaintiff's rights as a stockholder of defendant corporation.

(8) That R. A. Parsley is attempting to sell and dispose of thousands of acres of standing timber belonging to defendant corporation in violation of the rights of plaintiff as a majority stockholder of said corporation, and that he is advised and believes that he has certain equitable rights in the premises which he is entitled to assert for his protection—and prays relief.

A temporary restraining order, as prayed, was granted by judge of Superior Court requiring defendants to appear before the judge holding courts of 8th Judicial District on 8 March, 1943, at time and place named to show cause why the restraining order should not be made permanent or continued to the hearing.

Defendants demurred to the complaint for that it appears upon the face thereof that: (1) There is another action pending between the same parties, or the privies of same parties for the same or a cognate cause of action. (2) There is a defect of parties plaintiff and defendant in that it appears that plaintiff is seeking to set aside and declare void the trust agreement of 11 July, 1928, executed by W. L. Parsley and wife and defendant R. A. Parsley, Trustee, in which agreement the three children of W. L. Parsley and wife are beneficiaries. (3) Several causes of action have been improperly joined in the complaint, in manner specified. (4) And for that the complaint does not state facts sufficient to constitute a cause of action against these defendants, in manner specified.

The parties having agreed that the court might hear the case and enter judgment out of term and out of the county and out of the district, the case was heard upon the demurrer and upon the notice to show cause. The court overruled the demurrer, and, after considering the pleading, the complaint being treated as an affidavit, and affidavits filed, the oral testimony of W. R. Allen, Jr., Ben Willis and others and the argument of counsel for both sides, finds in detail facts in essential respects, as alleged in the complaint.

And the court found these further facts:

(1) That under the constitution and by-laws of defendant corporation (a) the annual meeting of stockholders shall be held on second Tuesday in February at principal office of the company, (b) a majority

of the capital stock represented in person or by legal proxy shall constitute a quorum for the transaction of business, (c) stockholders of record as of the close of business on the day preceding a meeting shall be deemed entitled to representation at said meeting, and (d) notice of time, place and object of meetings of stockholders shall be given by mail, postage prepaid, ten days previous to regular meetings to each stockholder at his residence or place of business as same shall appear on the books of the company.

(2) That notice was given that the annual meeting would be held on Tuesday, 9 February, 1943, for purpose of electing officers and directors of the company, and for the transaction of such other business as may properly come before the meeting.

(3) That at close of business on Monday, 8 February, 1943, R. A. Parsley, individually owned, and as trustee held with authority to vote, a total of 398 shares, "which was less than a majority of the total outstanding capital stock of 800 shares . . ."

(4) That of the 402 shares of capital stock acquired by plaintiff prior to 9 February, 1943, ten shares stood on the books of the company in name of W. R. Allen, Jr., and one share stood in name of Ben Willis, at time of mailing notice of the annual meeting; but that on date set for the meeting Allen informed defendant R. A. Parsley that he, Allen, had sold his shares of stock to plaintiff and was no longer a stockholder, and therefore could not be present and participate in the meeting; that Ben Willis also informed Parsley that he, too, had sold his stock to plaintiff; and that thereupon defendant, Parsley, president of defendant corporation, stated to Allen in substance, that he, Allen, was the secretary of the corporation, was paid for his services as such secretary, and it was his duty to be present at the meeting.

(5) That on the date set for the annual meeting of the stockholders "there were present in the principal office of the Hilton Lumber Company, in Wilmington, N. C.," R. A. Parsley, W. R. Allen, Jr., B. S. Willis and R. A. Parsley, Trustee, "who appeared upon the records of the defendant corporation as stockholders at the close of business on the previous day and owning" the shares of stock as above enumerated.

(6) That "a resolution to retire the preferred stock, at par, that is, at $100.00 per share, and accumulated dividends, was offered by defendant, R. A. Parsley, and the 398 shares of capital stock owned and controlled by him individually, and as trustee, were voted in favor of this resolution," and "no other stock was voted or attempted to be voted for or against said resolutions—Allen and Willis explaining to defendant Parsley that they both had sold their stock to plaintiff, and had no right to vote, and they did not vote on said resolution; that Allen attended the meeting" in pursuance of what he deemed to be his duty as secretary of

the corporation, the president of the corporation having told him that he, Allen, was employed as, and paid to act as, the secretary and, as such, it was his duty to attend the meeting.

(7) That defendant Parsley as president of defendant corporation has agreed to have transferred on the books of the company all the common stock which has been properly and legally assigned and transferred to plaintiff, but still refuses to transfer any of the preferred stock, upon the ground that as he, Parsley contends, all of the preferred stock has been retired in accordance with the resolution which he, Parsley, contends was adopted at the annual meeting on 9 February, 1943, and none is now outstanding.

Upon these findings of fact, the court, briefly stated, ordered, adjudged and decreed that, until the final hearing of this cause, defendants are restrained and enjoined from selling or encumbering any of the timber or other real estate owned by the company and from cancelling or attempting to cancel any of the preferred stock which was outstanding on 9 February, 1943, but dissolved the temporary restraining order in other respect. The court also allowed defendants time in which to answer and retained the cause for further orders and for trial when issues are joined between the parties.

Defendants appeal to Supreme Court and assign error.

Stevens & Burgwin for plaintiff, appellee.

Carr, James & Carr and Rose, Lyon & Rose for defendants, appellants.

WINBORNE, J. Appellants on this appeal bring into question the correctness of the ruling of the trial court in overruling their demurrer, and in continuing the restraining order, as modified, until the final hearing.

When the sufficiency of a pleading is tested upon challenge by demurrer, the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are admitted. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Spake v. Pearlman,* 222 N. C., 62, 21 S. E. (2d), 881; *Dickensheets v. Taylor, ante,* 570.

Both the statute, C. S., 535, and the decisions of this Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369; *Cotton Mills v. Mfg. Co.,* 218 N. C., 560, 11 S. E. (2d), 550; *Dickensheets v. Taylor, supra.*

Furthermore, plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of the same action, or transaction connected with the subject of action. C. S., 507.

Applying these principles to the complaint in hand, we are unable to say that there appears upon the face of the complaint (a) a defect of parties plaintiff and defendant, (b) improper joinder of several causes of action, or (c) insufficient statement of facts to constitute a cause of action—the grounds upon which appellants base their attack upon the ruling of the trial court upon the demurrer.

Reading the complaint in the light of these principles, these facts appear: Plaintiff, having bought a majority of the shares of the capital stock of the defendant corporation, part common and part preferred, has made demand upon officers of the corporation, including R. A. Parsley, as its president, for the transfer of same to him upon the books of the corporation, and his demand has been refused, because, as defendants wrongfully contend, all the preferred stock has been called at par pursuant to a resolution of stockholders in annual meeting, which was illegal and invalid for that, among other things, a quorum for the transaction of business was not present. This brings into question the legality of the stockholders meeting.

While there appear allegations regarding the trust agreement to which neither the plaintiff nor the corporate defendants are parties, but under which defendant Parsley holds certain stock of defendant corporation for benefit of certain persons who are not parties to this action, it is clear that plaintiff is not undertaking to assert any right under this agreement. Rather, it appears the facts alleged are intended to show further reason why a quorum was lacking at the meeting, and to show as grounds for injunctive relief unfairness in calling at par preferred stock worth $300.00 per share.

Moreover, being of opinion that the demurrer was properly overruled, we are of opinion that upon facts found by the court the injunction, as modified, was properly continued to the hearing, pending which we refrain from discussion of the facts.

Affirmed.

STATE v. CLARENCE HILL, WILEY McRAE AND JESSE WATKINS.

(Filed 15 December, 1943.)

1. Perjury § 3—

In a prosecution for perjury, it is required that the falsity of the oath be established by two witnesses, or by one witness and corroborating circumstances.

2. Same—

While the uncorroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as failing to comply with C. S., 564.

APPEAL by defendant Clarence Hill from *Burgwyn, Special Judge,* at 24 May Term, 1943, of GUILFORD.

The defendant Clarence Hill was tried upon a bill of indictment charging him with perjury. It appeared from the oral argument that other defendants were indicted on similar bills, and the causes were consolidated for trial. At the close of the trial, a nonsuit was entered as to Wiley McRae; and Jesse Watkins, also convicted, did not appeal. The present appeal concerns, therefore, only the defendant Clarence Hill.

Hill, a taxicab driver, had been charged with violation of the traffic laws—speeding—and was tried for that offense in the Municipal-County Court of the city of Greensboro. Upon the trial he testified in his own behalf, and out of his testimony there given arose the present charge of perjury.

Upon the trial of the present cause there was evidence that when Hill was tendered as a witness in his own behalf in the former trial, he took the usual oath as a witness, officially administered.

Major F. K. Kuykendall, prosecuting attorney of the Municipal-County Court, then testified that he remembered when Clarence Hill was tried in that court on 31 December, 1942; that Hill was duly sworn before he took the witness stand. Thereupon, Hill swore that he had not been working on 22 December, the day upon which he was allegedly stopped and arrested for speeding; that he did not drive the car described by the officer; and denied that he was speeding. He further swore that he did not haul anyone, and said he was doing Christmas shopping from about 4 o'clock to 8 o'clock.

H. M. Evans testified that he was a police officer of Greensboro on 22 December, and saw Clarence Hill that afternoon. Witness was going north on Summit Avenue when he saw a taxicab ahead of him pass two cars. Witness was making about 40 miles an hour at that time, and

was on an emergency call. Witness continued to follow the cab, which was gaining on him, and increased the speed of the police car to about 45 m.p.h. and got to 4th Street and Summit Avenue; the cab was still gaining on him. Witness was afraid to increase his speed any more because of the heavy fog and sleet, and just followed the cab. At Phillips Avenue the cab turned to the right, and witness also turned to the right. The cab stopped in about two blocks, and witness drew up beside the cab, pulled the side light of the police car, and ran down the window. He saw that it was Clarence Hill driving the cab. He was driving a two-tone Pontiac sedan with the name Silver Streak painted on the side. When witness pulled up beside Hill, two ladies got out of the cab. Witness then told defendant that he was making a charge of speeding against him. Defendant asked witness to give him a break, but witness told him that he should not be speeding that way.

This witness was present on 31 December, 1942, when the speeding case was tried in court, and heard Clarence Hill testify that he was not operating a cab on 22 December; that he had been Christmas shopping during the day and that he did not make any trips to Edgeville at all, and did not see him that day; that he was not the man that witness talked to out there, and did not know anything about the case. He also stated that the taxicab was parked in the parking lot at the cab stand and was not moved at all that day.

Mrs. Bessie Bell testified that on the day mentioned the defendant carried her and a girl companion to their destination near Phillips Street in Greensboro. As they got out of the cab a police car came up beside the cab and turned the lights on defendant, the man in the car saying, "Clarence, I have a charge against you for speeding." After some conversation, they drove away. Later she identified the defendant as the man who carried her home.

R. L. Ferrell, a police officer of the city of Greensboro, testified that on the evening of 22 December, 1942, Evans told him that he had a call on his way out and had stopped Clarence Hill, the defendant, for speeding, and had requested him to come to the police station. Later that night he and Evans went to the taxicab stand to see Hill, and waited about 50 minutes, but Hill was not there.

Miss Chriscoe testified that she was with Mrs. Bell when they were carried home on 22 December by a driver in a 1942 Pontiac.

Clarence Hill, testifying in his own behalf, stated that he operated the Silver Streak Taxicab, and now operated five cabs; also owned an automobile which he used for personal and private use.

He testified that on 22 December, 1942, he went down town and bought a few gifts, and that he stopped work on Sunday night for a few days; that he does have a Pontiac Taxi No. T-21233, and that when he

quit work on Sunday night he parked it back of the cab stand at 256 East Market Street, nearly in front of the Gate City Motor Company's place. The car has two sets of keys, one of which witness kept and the other was kept by Joe Moore, who drove the car some of the time, helping the defendant from Friday through Sunday night, but during the weekdays working only when he felt like it.

Defendant stated that he closed the car and locked it on that Sunday night and did not drive it Monday; that he had sufficient cars to take care of his business without using the Pontiac taxi. The car was there on Tuesday. On Tuesday defendant went down town and bought a few gifts for Christmas and took the red car, his private car, and went home. He came back up the street and went to Garland Watkins' house; from there he came to Market Street and picked up John Harris and went to have a few games of pool. He stayed at the Smoke Shop Pool Room until about 8:30 or quarter of nine, and did not drive the taxi out on Summit Avenue and Phillips Street that night. Defendant testified that he had no conversation with Mr. Evans at all that night—only saw him in the afternoon—and that he did not drive the taxi the next day. After leaving the pool room, he went straight home and so far as he knew, no one came to his home.

The next morning he called the cab office to see if any of the cars had been wrecked, since the evening before the weather was getting bad and cars were slipping about on the streets. He was then informed that nothing had happened except the police were looking for him. He then called police headquarters and was told that he was wanted, and went down there. There he was informed that there was a warrant against him for speeding, and Mr. Evans came in with a citation and asked him to sign it, which he refused to do. Evans then cursed him and told him that he had better sign it "damn quick" or he would go upstairs. Defendant posted a cash bond. Upon his inquiry, he was told that he was driving No. 1 Silver Streak, the Pontiac. Witness then related the circumstances leading to his identification by Mrs. Bell. Witness then repeated his statement that he did not drive the Pontiac automobile on 22 December on Summit Avenue or any other place, carrying Mrs. Bell, Miss Chriscoe, or anyone else. He repeated that he did not talk to Evans on Phillips Street, and stated that he did not know the officers wanted him until Wednesday morning when he went to his office.

Joe Evans testified that he did not know Clarence Hill personally, but that he was at the taxicab stand when Mr. Sheppard and a young woman came, Mrs. Bell. Sheppard called witness to the car and asked him if he was Clarence Hill, and witness answered, No. He asked if he drove for Hill or knew of him, and witness again answered, No, and told him he did not know where he lived.

Wiley McRae testified that the car in question had been parked near his cab stand, and that every time he returned to the lot on that day, that particular 1942 Pontiac cab was there. If the defendant moved the car at all, it was while this witness was making a trip.

A number of witnesses testified to the good character of the defendant.

Evidence not directly pertinent to an understanding of the decision is omitted.

Exceptions to the charge not pertinent to the decision are omitted. Defendant objected and excepted to the charge of the court as not complying with C. S., 564, in explaining the law relating to perjury and applying it to the evidence. This is the only exception discussed in the opinion.

There was a verdict of guilty. Defendant moved to set aside the verdict for errors of law, which motion was denied. The defendant was sentenced to the common jail of Guilford County for six months and assigned to work on the roads. From this judgment the defendant appealed, assigning errors.

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

Hosea Price and H. L. Koontz for defendant Clarence Hill, appellant.

SEAWELL, J. The defendant was convicted of perjury. His appeal challenges the sufficiency of the charge as an explanation of the law relating to that crime and its application to the facts. C. S., 564. In view of the nature of the crime and the restrictions which are thrown around the evidence which must be adduced to procure conviction, we are of the opinion that the objection is well taken. We do not find, on an inspection of the instructions, that the jury was advised that the defendant could not be convicted except upon the testimony of at least two credible witnesses or one such witness and corroborative circumstances. The rule is stated by *Chief Justice Stacy* in *S. v. Rhinehart,* 209 N. C., 150, 154, 183 S. E., 388, as follows:

"In prosecutions for perjury, it is required that the falsity of the oath be established by two witnesses, or by one witness and adminicular circumstances sufficient to turn the scales against the defendant's oath." *S. v. Hawkins,* 115 N. C., 712, 20 S. E., 623; *S. v. Peters,* 107 N. C., 876, 12 S. E., 74; *S. v. Sinodis,* 205 N. C., 602, 172 S. E., 190.

Conceivably, the uncorroborated testimony of one witness might produce in the minds of the jury the satisfaction to a moral certainty of the guilt of the accused; in other words, convince the jury beyond a reasonable doubt of such guilt; but it is not sufficient in law, and the instruction, therefore, that if the jury is so satisfied from the evidence beyond

a reasonable doubt they should return a verdict of guilty, while a satisfactory formula, in most cases, disregards conditions which the law declares essential to conviction of perjury, and therefore is not adequate.

The criminality of perjury is the violation of the sanctity of the oath, which, traditionally with English speaking people, is supposed to afford some security for a truthful statement. If the witness in his solemn adjuration has not the fear of God, a supplemental statute making perjury a felony might induce some fear of the law. However reprehensible and socially disturbing, a man cannot be convicted of crime for merely lying, although it may be a "lie with circumstance" or a "lie direct." But it takes the false testimony to falsify the oath. And, since experience has shown that frailty in that respect may not be confined to the one suspected person, the law, from ancient times, has not been willing to "take one man's word against another" upon a question of veracity, since, roughly speaking, it merely establishes an equilibrium. 41 Am. Jur., p. 37. At one time the law required the testimony of two witnesses; now, in almost every jurisdiction in this country, conviction may be had upon the testimony of one witness, corroborated by circumstances inconsistent with defendant's innocence and directly tending to corroborate the accusing witness. Anno. 111 A. L. R., 825. In many jurisdictions it is required that the evidence corroborating the witness for the prosecution must be of a "strong character," "strongly corroborative." The requirement as to the strength of such evidence is variously expressed. Practically all of the opinions require it to be of direct and independent force. *Cook v. U. S.*, 26 App. D. C., 427, 6 Ann. Cas., 810; *U. S. v. Hall* (D. C.), 44 F., 864, 10 L. R. A., 324; *S. v. Raymond*, 20 Iowa, 582.

We think it sufficient to say that the evidence, that is, the testimony of the witness, taken with the circumstances of corroboration, must convince the jury beyond a reasonable doubt before the accused can be convicted of perjury.

In the instant case the conviction rests almost, if not entirely, upon the evidence of two State's witnesses—Mrs. Bessie Bell and police officer H. M. Evans. Under the evidence, the usefulness of Mrs. Bell's testimony was in identifying the defendant as the man who carried her home in the Pontiac car on the evening he was charged with speeding. Miss Chriscoe, who accompanied Mrs. Bell on that trip, did not identify the defendant. The circumstances attending that identification by Mrs. Bell were before the jury. Let us suppose that the jury may have found Mrs. Bell honestly mistaken in her identification, or that her memory was at fault, or for any other reason discredited and rejected her testimony altogether. Would the mere fact that she was superadded to the panel of witnesses making the necessary two satisfy the law and justify

a conviction for no other reason than that two witnesses are arrayed against the accused, of whom the testimony of only one is received and credited?

We are persuaded the law did not intend merely to out vote the accused in requiring the testimony of two witnesses. The law was intended to afford the defendant a greater protection against the chance of unjust conviction than is ordinarily afforded in prosecuting for crime. It is analogous to prosecutions under C. S., 4339, which requires the sanction of corroboration before conviction.

In this case, of course, we have no opinion as to the defendant's guilt or innocence. We have merely illustrated the application of the law. It is not necessary for the trial court, figuratively speaking, to throw the book at the jury; but a substantial explanation of the law as applied to the evidence is required, and we cannot regard a clear statement of the conditions on which the defendant may be convicted as a matter of subordinate elaboration. Nor can we hold that its inadvertent omission by the able and impartial judge who tried this case as cured by the fact that, numerically speaking, two witnesses were arrayed against the defendant. That belongs to the mechanics, not to the philosophy, of the law.

There are other exceptions in the record upon which we do not pass, since they refer to incidents which may not recur. In failing to explain the law arising upon the evidence, there is error which entitles the defendant to a new trial. It is so ordered.

New trial.

STATE v. WAYMAN GRAINGER.

(Filed 15 December, 1943.)

1. Criminal Law §§ 53e, 53g: Appeal and Error §§ 6a, 6b—

An objection to instructions in a criminal case on the ground that the manner of presenting the State's contentions, and the greater prominence given them, amounted to an expression of opinion, is an exception to the rule that an objection must be made at the time; and it is not a broadside exception, if made with such particularity as to guide the court to the objectionable features.

2. Same—

Where, in a criminal prosecution, there is a numerical preponderance in the statement by the court of the State's contentions, referable naturally to the difference, both in the character and volume, of evidence on the respective sides, there is no cause of legal objection.

3. Criminal Law §§ 48d, 53g—

In a capital case, where the court first admitted evidence that officers found, immediately after the shooting, no weapon on accused but did find a pistol in a building out of which accused came a few minutes before the homicide and into which he went before his arrest, and later the court excluded it, telling the jury not to consider this evidence, there is no error, when giving the contentions of the parties, for the court to say that the State contends that defendant went into such building to prepare himself for the execution of his determination.

4. Homicide § 27b—

While, to show mitigation or such facts as would excuse the homicide altogether, the defendant may avail himself of the State's evidence, and in fact any evidence adduced upon the trial, the court's instruction, that it is incumbent on the defendant to show mitigating circumstances "through his own evidence or the evidence of his witnesses," is not prejudicial error where there is nothing in the State's evidence favorable to defendant in that regard.

5. Homicide §§ 11, 16—

Where an intentional killing is accompanied by the use of a deadly weapon, a rebuttable presumption arises of murder in the second degree, and it is thereupon incumbent on the accused to show mitigating circumstances that will reduce the crime to manslaughter, or such facts as will exonerate him altogether; and self-defense, if established to the satisfaction of the jury, will entitle him to an acquittal.

APPEAL by defendant from *Hamilton, Special Judge,* at February Term, 1943, of COLUMBUS.

The defendant was tried on a bill of indictment charging him with the murder of Harry V. "Fipps," was convicted of murder in the first degree, and sentenced to death by asphyxiation.

The State's evidence tended to show that on the night of the homicide the deceased, with Graham Walker and Wade Clewis, was walking behind the defendant about five steps in the town of Chadbourn. They observed that Grainger was with a colored girl, and Harry Phipps remarked, "Wayman, I am going to tell your wife on you for walking the street with these girls around here."

This girl turned to the left and went down toward a cafe, 50 or 75 yards away.

Grainger said to Phipps, "Harry, if you tell that, you will never tell nothing else; it will be the last thing you ever tell." Phipps told Grainger that he was just kidding, just joking with him. Grainger then "picked up in his walk" and went ahead to Frank Wooten's office, opened the door and went in. Phipps and the other two with him continued up the street and across in the vicinity of the Wooten office, when the defendant came out and called to Phipps. He told him to wait a minute, he

wanted to settle that thing with him. "Harry told him he was only kidding with him, just joking with him." The defendant told him he wanted him to come back there, he wanted to settle it with him, and Phipps refused, stating that if he wanted to settle it with him, he would have to come there. Defendant then exclaimed, "Look out, I'm coming in a God damned big way!" Whereupon, he ran up within three or four steps, snatched the pistol out of his overcoat pocket, and shot Phipps one time. Phipps had nothing in his hand. Phipps whirled and ran to the drug store, and Grainger went back to the Frank Wooten office. When Phipps ran into the drug store, he fell down and shortly thereafter died.

It was developed in the evidence that the party in which Phipps was walking behind Grainger consisted of four men, one weighing over 200, one 170, one 135, and one 145 pounds. Phipps had no weapon.

Robert Boswell, Chief of Police of Chadbourn, was in the drug store when Phipps staggered in in a dying condition. Almost immediately Graham Walker, who had been one of Phipps' companions, ran in and stated that "a Negro had shot him." Thereupon, Boswell, with another policeman, came out of the drug store and arrested Grainger, who was standing in front of Wooten's office. Boswell commanded Grainger to give him the gun, and Grainger replied, "I haven't got one." The policeman said, "Don't lie to me, Negro," "You have just shot a man through the heart." And Grainger replied, "I got nothing but some keys as janitor in Mr. Wooten's place of business." The defendant was then searched and nothing was found upon him but the keys. He was then locked up.

Policeman Wright corroborated Boswell in substantial particulars, including the fact that the defendant denied having a gun.

Lester Lowe, testifying for the State, stated that he had known Wayman Grainger for some time, and that he was employed as janitor by the Waccamaw Bank & Trust Company at Chadbourn; that the office of the bank and Mr. Wooten's insurance office were in the same building on the ground floor. There is a door between the bank and Mr. Wooten's insurance office. That the defendant while janitor of the bank and for Mr. Frank Wooten had a key that would open the door between that office and the bank.

W. H. Bullard testified that he was Deputy Sheriff of Columbus County, and went to Chadbourn on the night of the homicide, and was given some keys by the jailer, which keys were offered in evidence over defendant's objection. When he came into possession of the keys, he went to the office of Mr. Frank Wooten and unlocked the front door of that office with the keys given him, proceeding to the back door of the bank and unlocking that door with another key. From information he

received from Mr. Lowe, an official of the bank, who accompanied him, he went to Mr. Wooten's office and thoroughly searched it, finding nothing, and then went into the bank. Over defendant's exception, witness was permitted to say that he went into the bank and pulled out a drawer in there, and Mr. Lowe picked up a book, and "this gun was laying in there in the drawer." There was a motion by defendant to strike out this statement, which was denied, and defendant excepted. Witness further stated that he picked up the gun and took it out of the drawer, which was admitted over the exception of the defendant. He further stated that he had had the gun ever since, and identified bullets which were in it at that time, and stated that the bullets referred to were all of them.

Thereupon, the defendant moved to strike out all the questions and elicited answers, and thereupon the judge instructed the jury: "You will not consider the testimony of this witness with reference to finding a gun and what it contained, in the bank." The defendant offered evidence tending to contradict that of the State in substantial particulars.

Tamylee Bellamy testified for defendant that on the night of the trouble she was up in front of the post office, near Wooten's office, and heard loud talking, but did not know what was said. She turned around to see what it was all about, and heard Grainger say "there is four of you and only one of me." Then she saw four white men. Grainger said, "Don't come on me." Then they started toward each other. Mr. Phipps had his hands up. Then she heard the shooting.

David Bellamy testified that he had stopped with his wife, Tamylee, and heard them arguing. He saw Wayman standing in front of Wooten's door and heard him say, "I'm a-coming down there," and this man met with him. He had never seen Phipps before, but Wayman stopped before he did, and Mr. Phipps did not stop; and Wayman said, "Don't come on me," and he was coming on him and he backed up. "I don't know how far he backed up; he backed up and he reached his hand in his pocket and shot. When Wayman backed up, Mr. Phipps kept on coming." Further, on cross-examination, this witness said that when Wayman said, "I'm coming down there," and both of them started, he said, "I'll meet you," and that one of the four men was coming ahead meeting him, and the others were coming behind. The man coming ahead was facing Wayman, walking on the street, and they got just about to one another; Wayman stopped and told Mr. Phipps not to come on him and he backed, and Mr. Phipps was coming on him and he shot.

Certain instructions to the jury to which exceptions have been made are noted in the opinion.

At the conclusion of the evidence for the State, and also at the conclusion of all the evidence, the defendant made the following motions:

To dismiss the action in so far as it related to murder in the first degree; a similar motion with regard to the charge of murder in the second degree, and a similar motion with regard to the charge of manslaughter; all of which motions were denied. The defendant excepted.

There was a verdict of murder in the first degree. The defendant moved to set aside the verdict, and the motion was denied, and defendant excepted.

The court entered judgment of death. Whereupon, the defendant appealed to the Supreme Court, and assigned error.

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

Varser, McIntyre & Henry for the defendant, appellant.

SEAWELL, J. We have examined the exceptions with that care which is due from the fact that defendant's appeal is from conviction of a capital crime. However, they are too numerous for separate discussion here. We turn our attention to those which seem to involve the more serious objections.

Perhaps the most important of these is the objection that, in the instructions to the jury, the manner of presenting the State's contentions, and the greater prominence given them, constitute a "summing up" in behalf of the State, amounting to an expression of opinion. *S. v. McDowell,* 129 N. C., 523, 39 S. E., 40; *S. v. Hart,* 186 N. C., 582, 587, 120 S. E., 345; *Withers v. Lane,* 144 N. C., 184, 56 S. E., 855; *Carruthers v. R. R.,* 215 N. C., 675, 678, 2 S. E. (2d), 878.

From its nature an objection of this sort does not fall within the rule ordinarily applying—that objection must be made at the time, or the exception will not lie. Nor is it classed as a broadside exception to the charge if made with such particularity as to guide the court with some certainty to the objectionable features. We would have welcomed more definite references in the instant case, but, since the nature of the objection is fully understood, we have undertaken the necessary analysis and appraisal of the charge in the light of the exception. There is a numerical preponderance in the statement of the State's contentions, referable, naturally, to the difference both in the character and in the volume of evidence on the respective sides. This is not the cause of legal objection. *S. v. Jessup,* 219 N. C., 620, 14 S. E. (2d), 668; *S. v. Cureton,* 218 N. C., 491, 11 S. E. (2d), 469. We have been unable, however, to find in the charge such a departure from the normal and impartial manner of stating the contentions of the parties as would support the pertinent objection—that it constitutes an expression of opinion on the evidence.

There are further objections that in specific instances the expressions of the judge carried with them the force of an expression of opinion, as, for example, that the court repeatedly minimized the importance of the remark originally addressed to Grainger by deceased in reference to telling Grainger's wife he was going with other girls. This contention of the State, that the words were friendly and jocular, was properly brought to the attention of the jury, if the contentions were stated at all, and we find nothing in the manner of the statement that would suggest that the court was giving its own opinion, or any opinion.

Perhaps a more serious challenge to the trial lies in the possibility that the jury may have connected the statement of the State's contention that Grainger went into the Wooten office for the purpose of arming himself with the excluded testimony of Boswell and Wright about a pistol they found in the bank. Reference to the above statement of the case shows that these officers found Grainger unarmed immediately after the shooting; that in company with an officer of the bank and with the aid of keys found upon Grainger, who was janitor of the Wooten office and of the bank, they proceeded through Wooten's office by a connecting door into the bank, where they found a pistol under a book. They were permitted to make this statement, and the pistol was exhibited upon the trial; but subsequently this evidence was stricken out. Later, in the course of his charge, the judge said to the jury:

"And the State contends that you should be satisfied beyond a reasonable doubt that when he went into the office, the real estate office, that he went in there for the purpose of preparing himself and equipping himself, putting in execution a plan that he then had fixed and determined upon."

If this had been necessarily a reference to the evidence withdrawn from the jury, the situation would be somewhat analogous to that in *S. v. Love,* 187 N. C., 32, 121 S. E., 20, where in recapitulating the evidence the judge inadvertently referred to certain evidence which had been withdrawn from consideration of the jury, and a new trial was ordered. But there is no necessary reference here to the stricken evidence. The statement of such a contention, not unreasonable under the circumstances, would certainly have been without fault if its effect was not to bring back into the picture the excluded evidence. Upon careful consideration, we do not regard it as prejudicial.

Inter alia the judge instructed the jury:

"So, Gentlemen, the Court instructs you that if the State has satisfied you from the evidence and beyond a reasonable doubt that the prisoner took the life of the deceased wilfully and unlawfully and intentionally, with malice and with premeditation and deliberation, your verdict would be first degree murder, but if the State has failed to satisfy you of each

and every one of those elements, particularly has failed to satisfy you that the killing resulted from premeditation and deliberation as well as from malice, an intentional, unlawful act, but has satisfied you beyond a reasonable doubt that the killing was done intentionally with a deadly weapon or that the deceased came to his death as a result of a pistol shot fired intentionally by the prisoner, then you would return a verdict of murder in the second degree unless the prisoner, himself, through his evidence or the evidence of his witnesses, has satisfied you, not beyond a reasonable doubt, but has merely satisfied you that at the time there was no malice, as defined and explained by the Court to you; then, if the prisoner has satisfied you of that, you would return a verdict of guilty of manslaughter unless the prisoner has gone further and satisfied you that the killing was in self-defense. And he has the burden of satisfying you of that contention, not beyond a reasonable doubt nor even by the greater weight of the evidence, but merely to satisfy you that the shooting as a result of which death ensued to the deceased, was in self-defense of the prisoner himself."

It will be noticed that the above instruction would make it incumbent on the defendant to show the mitigating circumstances "through his own evidence or the evidence of his witnesses." It is well settled that to show mitigation or such facts as would excuse the homicide altogether, the defendant may avail himself of the State's evidence—in fact, any evidence adduced upon the trial. *Commonwealth v. York* (Mass.), 43 Am. Dec., 373, 384, 394; 20 Am. Jur., p. 157. This, however, is not prejudicial error here—since there is nothing in the State's evidence favorable to the defendant in that regard. *S. v. Wallace,* 203 N. C., 284, 165 S. E., 716; *S. v. Cureton,* 215 N. C., 778, 3 S. E. (2d), 343.

The defendant insists that in this instruction the court not only cast upon him the burden of reducing the crime from murder in the first degree, but limited his plea of self-defense to the crime of manslaughter. The first criticism is untenable upon inspection of the language and its syntax. The last criticism does not take into consideration the fact that the court was dealing with the presumption of second degree murder arising from the intentional use of a deadly weapon—should that be established beyond a reasonable doubt—and was not dealing with the subject of self-defense generally; he did that elsewhere. It is familiar law that where an intentional killing is accomplished by the use of a deadly weapon, a rebuttable presumption arises that the defendant is guilty of murder in the second degree. *S. v. Jones,* 145 N. C., 466, 59 S. E., 353; *S. v. Rowe,* 155 N. C., 437, 71 S. E., 332; *S. v. Debnam,* 222 N. C., 266, 22 S. E. (2d), 562; *S. v. Meares,* 222 N. C., 436, 23 S. E. (2d), 311. And it is thereupon incumbent on the accused to show mitigating circumstances that will reduce the crime to manslaughter, or

such facts as will exonerate him altogether. Self-defense, if established to the satisfaction of the jury, will entitle him to an acquittal.

The formula employed here is in substantial agreement with precedent and, we think, deals with the subject fairly. *S. v. Capps,* 134 N. C., 622, 46 S. E., 730; *S. v. Quick,* 150 N. C., 820, 64 S. E., 427; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 873. In other parts of the charge, dealing with the plea of self-defense directly, the instructions made it clear that the plea of self-defense should be considered upon all charges growing out of the homicide. The court repeatedly stated that defendant had a right to take life in self-defense and fully explained the circumstances under which this might be done, and particularly in the conclusion of his charge he instructed the jury with reference to self-defense:

"If he has satisfied you that the killing was done under those circumstances (referring to self-defense as defined), where he was in danger of losing his own life or suffering great bodily harm or, not being in danger actually felt that he was in danger of receiving death or great bodily harm and that the fear and apprehension on his part was only a reasonable one under the circumstances and that he used no more force than was reasonably necessary under the circumstances as they appeared to him at the time, the burden being upon him, if he has satisfied you of those things, then of course, you would return a verdict of not guilty of anything."

Upon a careful consideration of all the exceptions, and of the whole record, we find nothing which would justify us in disturbing the result of the trial. We find

No error.

G. E. GREEN, ADMINISTRATOR OF N. J. CHRISMON, DECEASED, AND MARTHA GREEN CHRISMON, WIDOW OF SAID N. J. CHRISMON, DECEASED, v. A. F. CHRISMON AND WIFE, LANA CHRISMON; G. T. CHRISMON AND WIFE, LIZZIE CHRISMON; SALLIE APPLE AND HUSBAND, L. A. APPLE; EMMA BROOKS AND HUSBAND, J. W. BROOKS; LIZZIE KERNODLE, WIDOW; RACHEL JANE HALL, WIDOW; AUBREY CHRISMON AND WIFE, MARY CHRISMON; MARVIN CHRISMON AND WIFE, RUTH CHRISMON; BRYANT CHRISMON AND WIFE, OLLIE CHRISMON; IVIE CHRISMON AND WIFE, BEULAH CHRISMON; WILLIE CHRISMON AND WIFE, MAUDE CHRISMON; ANNIE CHRISMON, SINGLE; LORENE CHRISMON, SINGLE; HAROLD KEY AND WIFE, RUTH KEY; ERVIN KEY AND WIFE, VERDIE KEY; LILLIAN KEY POWELL AND HUSBAND, IRVIN POWELL; RUTH HUFFINES AND HUSBAND, FRANK HUFFINES; MADALENE ANDREWS AND HUSBAND, ODELL ANDREWS, ALL OF FULL AGE; EARLINE CHRISMON AND ERNALEE CHRISMON, MINORS UNDER THE AGE OF TWENTY-ONE YEARS.

(Filed 15 December, 1943.)

1. Process § 2—

The rule of the statutes is that, in order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue; and that, if not served within that time, the summons must be returned, with proper notation, and *alias* or *pluries* summons issued and served in accordance with the statute, otherwise the original summons loses its vitality and becomes *functus officio* and void. C. S., 476, 480, 481, 753.

2. Same—

An *alias* or *pluries* summons, C. S., 480, *must* be served within ninety days after the date of issue of the next preceding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. The word "may" in this statute means "must."

3. Process § 3—

Where summons was not served on defendants until after ten days of its issuance, a discontinuance resulting, and a decree made in the cause, based on the invalid service; and subsequently, notice to show cause why such decree should not be confirmed and such service adjudged sufficient was duly served on defendants, and some of them answered, it would appear that all defendants are now in court and the matter may proceed on proper pleas.

APPEAL by G. E. Green, administrator of Martha Green Chrismon, from *Bobbitt, J.*, at May Term, 1943, of GUILFORD. Affirmed.

Plaintiff, administrator of Martha Green Chrismon, filed petition and motion in the cause for confirmation of the judgment previously rendered in a proceeding between the parties, and for adjudication that the service of the summons on the defendants in that proceeding was sufficient.

The facts pertinent to the issue involved may be summarized as follows: In 1940 G. E. Green, administrator of N. J. Chrismon, filed petition to sell land to make assets to pay debts. The heirs of the intestate were made parties defendant. It was admitted that the summons was issued and delivered to plaintiff for service 15 August, 1940, received by the sheriff 21 September, and served on twenty-four of the defendants 23 September, 1940. None of the defendants were served within ten days of issuance of summons. No answer was filed or appearance made except by guardian *ad litem* of two infant defendants. Decree of sale was entered 2 December, 1940, and thereafter sale confirmed and deed delivered 20 January, 1941. The title of the purchaser at the sale, who was Martha Green Chrismon, and that of her administrator and heirs now claiming under her, was thereafter questioned by a prospective purchaser, and thereupon G. E. Green, her administrator and heir, served notice on the defendants to show cause why the original judgment should not be confirmed and the service of summons on them adjudged to have been sufficient. Defendants, answering the motion, alleged that the service was invalid and the order of sale void. From an adverse ruling of the clerk, the defendants appealed to the judge of the Superior Court, who held that the attempted service of the summons on the defendants was a nullity, and that the judgment decreeing the sale was void.

From judgment denying his motion and dismissing his petition, plaintiff, administrator of Martha Green Chrismon, appealed.

Hoyle & Hoyle and Glidewell & Glidewell for plaintiff, appellant.
Sharp & Sharp and Henderson & Henderson for defendants, appellees.

DEVIN, J. Is the service of a summons on the defendant more than ten days after the date on which it is made returnable sufficient to bring the defendant into court, and to render a judgment by default based thereon valid and binding?

The answer to this question must be sought in the statutes regulating procedure, as interpreted by this Court. The matter here brought in question arose in a special proceeding. By C. S., 753, it is required that special proceedings be commenced by summons, and that the manner of service shall be the same as that prescribed for civil actions. It is by this section provided that the summons shall command the defendant to appear and answer the petition within ten days after service. In civil actions the defendant must appear and answer within thirty days after service. Common to both forms of action is the requirement that the summons be returned by the officer to the clerk. In C. S., 476, as amended by ch. 66, Public Laws 1927, is contained this provision: "Summons must be served by the sheriff to whom it is addressed for

service within ten days after the date of issue. . . . and, if not served within ten days after date of the issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served."

Section 480 of Consolidated Statutes regulates what shall be done in case of failure to serve within ten days, as follows: "When the defendant in a civil action or special proceeding is not served with summons within the time in which it is returnable, the plaintiff may sue out an *alias* or *pluries* summons, returnable in the same manner as original process. An *alias* or *pluries* summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses." The use of the word "may" in this statute has been by this Court interpreted to mean "must," if the plaintiff wishes to avoid a discontinuance. *McGuire v. Lumber Co.*, 190 N. C., 806, 131 S. E., 274.

It seems clear that the rule prescribed by these statutes is that in order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue, and that if not served within that time the summons must be returned by the officer to the clerk with proper notation. Then, if the plaintiff wishes to keep his case alive, he must have an *alias* summons issued. In the event of failure of service within the time prescribed, the original summons loses its vitality. It becomes *functus officio*. There is no authority in the statute for the service of that summons on the defendant after the date therein fixed for its return, and if the plaintiff desires the original action continued, he must cause *alias* summons to be issued and served.

In *Hatch v. R. R.*, 183 N. C., 617, 112 S. E., 529, it was said: "After the return day the writ lost its vitality and service thereafter made could not confer upon the court jurisdiction over the defendant so served." While the decision in that case antedated the amendment to the statute now in force, the principle is the same. Manifestly, the court regarded the provision of the statute fixing a definite time for the return of process as mandatory. This statement of the law was quoted with approval in *McGuire v. Lumber Co., supra.*

At the time of the decision in the *McGuire case* referred to (1925), the statute then in force made the summons returnable in not less than ten nor more than twenty days from issuance. The summons in that case was issued 10 July, and made returnable 28 July. It was not served or returned within the time fixed. The Court said: "Therefore, when the plaintiff failed to take any steps, whatever, to sue out an *alias*

summons on the return date, to wit, 28 July, 1925, the sheriff of Swain County, having not returned the process prior to that time showing whether service had been made or not, a discontinuance resulted as is contemplated in C. S., 480, 481."

In *Webster v. Laws,* 86 N. C., 179, referring to a summons issued by a justice of the peace, *Chief Justice Smith,* speaking for the Court, used this language: "The process not having been served, was exhausted on the day fixed for its return, and the action was in law then discontinued. This has been repeatedly decided in this Court."

In *Neely v. Minus,* 196 N. C., 345, 145 S. E., 771, the facts were these: The first summons was issued on 29 January, 1927, and kept alive by *alias* or *pluries* summons. On 1 September, 1927, a summons marked "original" was issued by the clerk and returned "defendant not to be found." Thereafter, 13 September, 1927, a *pluries* summons was issued, and no return made. Thereafter, on 5 October an original summons was issued by the clerk and directed to the sheriff of another county. This was served 8 October. The Court said: "From the record facts as set out, there is a clear discontinuance of the cause between 1 September, 1927, and 5 October, 1927." See also *Gower v. Clayton,* 214 N. C., 309, 199 S. E., 77, where the ruling upon the facts as stated by *Winborne, J.,* was as follows: "Here, while Mrs. W. M. Priddy was named a party defendant to the tax foreclosure suit, she was not served with original summons. The process was not kept alive by *alias* and *pluries* summons as required by statute. C. S., 480. This worked a discontinuance of the action as to her."

In McIntosh Prac. & Proc., 312, 313, the author states the rule as follows: "When a definite return day was named in the summons, it was to be served, and the return should show that it was served, before the return day, since the officer must return it on or before the return day named. After the return day has passed, the summons has lost its vitality, and a service would be invalid; but the defect might be cured by a general appearance. . . . As has been stated above, after the return day the summons in the hands of the officer has lost its vitality, and a service thereafter is invalid . . ." We find the same general rule stated in 50 C. J., 487, as follows: "After the return day, the writ being *functus officio,* service of it is ineffective. So, where service is returnable to a term of court, its service after the appearance term, without an order extending it, is a nullity, as is service not made within an extension of time ordered by the court." And from 42 Am. Jur., 26, we quote: "Service may not be effected before the commencement of the suit, or after the return day. A writ or process which has not been served and under which nothing has been done expires on the return day, and thereafter confers no authority, unless, by virtue of statute or

of some act of the court itself, the right of the officer to serve the same is extended. Where the law requires summons to be served a certain number of days before the return day, a service otherwise made is void and confers no jurisdiction over the defendant."

A similar statement of the rule is found in other jurisdictions. In *Blanton Banking Co. v. Taliaferro,* 262 S. W., 196 (Texas Civil Appeals), it was said: "Plaintiff in error contends that the citation became *functus officio* and void after the return day, and that the service obtained thereunder was void and failed to give the court jurisdiction over defendants, and that the judgment by default rendered against it is a nullity. This contention is correct."

In *Hennoke v. Strack,* 101 S. W. (2d), 743 (Mo.), after giving approval to the principle that the court can obtain jurisdiction only by service of process in the manner prescribed by the statute, in the absence of waiver or voluntary appearance, the Court said: "Service of the writ after the beginning of the term to which it is returnable is no service. The writ in such case is *functus officio,* dead." See also *Brown v. Tomberlin,* 137 Ga., 596, where in the headnote it is said: "Mere service of original petition and process on a defendant, made after appearance term of the court to which it is returnable, is a nullity."

A clear statement of the rule will be found in the case of *Mussina v. Cavazos,* 6 Wall. (U. S.), 355, from which we quote: "The ground of that decision (*Castro v. U. S.,* 3 Wall., 46), and also of the case of *Villabolos v. U. S.,* 6 How., 81, which preceded it, is the general principle, that all writs, which have not been served, and under which nothing has been done, expire on the day to which they were made returnable. They no longer confer any authority; an attempt to act under them is a nullity, and new writs are necessary, if the party wishes to proceed. Hence we have the *alias* writ, and others in numerical succession indefinitely."

Consideration of these statements of the applicable principles of law leads us to the conclusion that the statutes which gave to the court power to adjudicate the cause, and to decree a sale of the land which would divest the title of the defendants, also pointed out the manner in which jurisdiction might be obtained and the procedure by which the defendants should be bound and their title barred, and that unless this were followed, the power of the court to order a valid sale would be lacking. The right of the plaintiff to the relief sought must wait on the orderly procedure by which it is to be judicially determined.

The cases cited by plaintiff may not be held controlling on the facts of this case. In *Nall v. McConnell,* 211 N. C., 258, and *Stafford v. Gallops,* 123 N. C., 19, where judgments were entered within ten days of the service of the summons, it was held that the irregularity was not fatal

as the defendants in those cases had been duly served, and the clerk was not bound to dismiss the action, but should allow the statutory time for appearance.

In *Morrison v. Lewis,* 197 N. C., 79, 147 S. E., 729, the action in Guilford was dismissed on the ground that there was another suit for the same cause between the same parties pending in Surry. It appeared that in the Surry suit the summons, though issued before the one in Guilford, was served after the return date. But it was held that, nothing else appearing, the action was regarded as pending from the time the summons left the clerk's office for the purpose of being served. In that case it was said in the opinion by *Chief Justice Stacy*: "Of course, if the summons be not served on or before the day fixed for its return, a discontinuance of the action results therefrom. *Neely v. Minus,* 196 N. C., 345. And if a discontinuance be worked by failure to serve the summons by the return date, and not until that time, it would seem to follow that the action was pending from the time the summons left the clerk's hands for the purpose of being served."

In *Vick v. Flournoy,* 147 N. C., 209, 60 S. E., 978, it was held that the absence of a seal on a summons to be served out of the county would not be fatal when the defendants were properly served and thus had lawful notice of the action. It was said: "If the officer has acted without it, the absence of a seal is only an irregularity, which may be cured now by having the seal affixed."

While the summons in this case was attempted to be served on the defendants more than thirty days after the date of its issuance and they thus had actual knowledge of the proceeding, this alone may not be held sufficient to bind them. There was neither waiver nor voluntary appearance. The defendants had the right to rely on the invalidity of the service. However, subsequently, notice to show cause why the original decree should not be confirmed and the service of summons adjudged sufficient was duly served on the defendants, and some of them answered. Thus it would seem that all the defendants are now in court. While this would not have the effect of validating the original decree which was rendered without proper service, *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311, it is open to the defendants to set up such defenses, and equally to the plaintiffs to file such pleas as they may be advised are proper in the premises.

As the court below declined to rule on the question of equitable estoppel raised by movant, holding that the only question presented was the sufficiency of the service of the original summons, it is still open to the plaintiffs to show facts which would support such a plea.

On the record the judgment of the Superior Court must be

Affirmed.

MARY WATKINS BAIRD v. MARIA REID BAIRD AND MRS. C. A. BAIRD,
and
CAMPBELL A. BAIRD, JR., v. MARIA REID BAIRD AND MRS. C. A. BAIRD.

(Filed 15 December, 1943.)

1. Courts § 12—

Where an action for damages, resulting from an automobile accident, is tried in the courts of this State, based on alleged negligence occurring in another state, the standard of conduct of the parties must be measured by the *lex loci delicto*, in ascertaining the liability of defendants. The *lex fori* applies to procedure only.

2. Automobiles § 23—

The negligent conduct of the driver of an automobile, who is operating the car with the permission, if not at the request of the owner, who is present and has the legal right to control its operation, is imputable to the owner. The fact that the owner falls asleep and refrains from directing its operation does not change the owner's right or limit liability.

3. Automobiles §§ 9a, 18g—

The mere fact that the driver of an automobile goes to sleep, while driving, is a proper basis for an inference of negligence, sufficient to make out a *prima facie* case and to support a recovery for injuries sustained by another thereby, if no circumstances tending to excuse or justify his conduct are proven.

4. Trial § 29b: Appeal and Error § 6b—

An exception to the court's charge, that it failed to state in a plain and correct manner the evidence and law arising thereon as provided in C. S., 564, is a broadside exception and presents no question for decision.

APPEAL by defendants from *Bobbitt, J.*, at March Term, 1943, of GUILFORD. No error.

Civil actions for damages for personal injuries, consolidated for trial by consent.

The plaintiffs are the sister and brother of the defendant, Maria Reid Baird (the driver of the automobile at the time of the accident), and the daughter and son of the defendant, Mrs. C. A. Baird, the owner of the automobile.

On 15 August, 1941, plaintiff, Mary Watkins Baird, and defendants went from New York to East Orange, N. J., where they were joined by the plaintiff, Campbell A. Baird, Jr. There Mrs. Baird got her automobile, left in East Orange some days before, and invited plaintiffs and Maria Reid Baird to accompany her on an automobile trip to Niagara Falls, New York. They left East Orange late in the afternoon with the male plaintiff driving. He drove until one or two o'clock a.m., when

they stopped for "supper." After eating, the trip was resumed with the *feme* plaintiff at the wheel. A blister on her foot interfered with her operation of the machine. So, shortly after leaving Painted Post, the defendant, Maria Reid Baird, relieved her and drove (approximately 2½ hours) until the accident happened, about 5:30 a.m.

The automobile ran partly off the road and into a telephone pole with such force as to cause considerable damage to the automobile. Each plaintiff suffered certain personal injuries. The automobile left the road, a four-lane highway, at an angle, and when it stopped it was not entirely off the hard surface. At the time, the defendant, Mrs. Baird, asked Maria Reid Baird what happened, and she replied: "I guess I went to sleep," or "I went to sleep." Both plaintiffs were asleep in the car for some time prior to and at the time of the accident. Some twenty or thirty minutes before the accident plaintiff, Mary Watkins Baird, woke up and asked the driver if she was sleepy, and she said that she was not.

In each case issues were submitted to and answered by the jury in favor of plaintiff. From judgments on the verdicts defendants appealed.

Smith, Wharton & Jordan for plaintiffs, appellees.
Sapp & Sapp for defendants, appellants.

BARNHILL, J. The accident occurred in the State of New York. Hence, in ascertaining the liability of defendants, the standard of conduct of the parties must be measured by the law of that State. *Harrison v. R. R.*, 168 N. C., 382, 84 S. E., 519; *Hale v. Hale,* 219 N. C., 191, 13 S. E. (2d), 22; *Russ v. R. R.*, 220 N. C., 715, 18 S. E. (2d), 130. "The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done." *Howard v. Howard,* 200 N. C., 574, 158 S. E., 101. The *lex fori* applies as to procedure only. *Clodfelter v. Wells,* 212 N. C., 823, 195 S. E., 11; *Howard v. Howard, supra.*

"Every owner of a motor vehicle . . . operated upon a public highway shall be liable and responsible for . . . injuries to person or property resulting from negligence in the operation of such motor vehicle . . . in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." Sec. 59, N. Y. Vehicle and Traffic Law, ch. 54, Laws 1929, sec. 59, ch. 71, Consol. Laws.

Maria Reid Baird was operating the automobile with the permission, if not at the request, of the owner. The owner, Mrs. Baird, was present and had the legal right to control its operation. The negligent conduct, if any, of the driver, was imputable to her. The mere fact that she chose to fall asleep in the rear seat and refrained from directing its operation

did not change her rights or limit her liability. *Gochee v. Wagner,* 257 N. Y., 344, 178 N. E., 553; *Cherwein v. Geiter,* 272 N. Y., 165, 5 N. E. (2d), 185.

It is true that the trip began in New Jersey, and the laws of New York have no extra-territorial application. Even so, the accident occurred in New York. So soon as the parties crossed the State line they proceeded under the law of that State.

If a driver of an automobile falls asleep while engaged in the operation of the car and as a result a wreck occurs, is he guilty of such negligence as will support a recovery for injuries sustained by a passenger? No New York decisions discussing or deciding this question have been called to our attention. We have discovered none. But in *Nelson v. Nygren,* 259 N. Y., 71, 181 N. E., 52, the passenger went to sleep and while he was sleeping the accident happened. Upon being sued the owner pleaded the contributory negligence of the passenger. It was held that the issue was properly submitted to the jury. In discussing the question the Court says:

"Who is to answer that question, the court or the jury? We believe it is for the jury to determine. The question of contributory negligence ordinarily is a question of fact. It is only when there is no dispute upon the facts and only one conclusion to be drawn therefrom that it may be decided as a question of law. To decide as a matter of law that if a guest, under circumstances like those in this case, should go to sleep in an automobile, he would be guilty of contributory negligence, would be to disregard realities and situations growing out of modern conditions."

Whatever duty may rest upon a passenger, the duty to keep a careful lookout and to exercise ordinary care in the operation of an automobile rests primarily upon the driver. Ordinarily, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, and it lies within his own control to keep awake or to cease from driving, and so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a *prima facie* case against him for injuries sustained by another while so driving and sufficient for a recovery if no circumstances tending to excuse or justify his conduct are proven. 1 Blashfield Auto. L. & P., p. 466. Usually he has the choice either to keep awake or to cease driving. Whether he is actually negligent in the particular case is usually a question of fact for the jury. 4 Blashfield Auto. L. & P., p. 158.

The approach of sleep, "tired nature's sweet restorer," is usually indicated by certain premonitory symptoms, and does not come upon one unheralded. His negligence, if any, lies in the fact that he does not heed

the indications of its approach or the circumstances which are likely to bring it about. 1 Blashfield Auto. L. & P., 466.

Presumably the driver had been awake since the morning of the preceding day. She had been traveling almost continuously, mostly during the night, for about twelve hours. She had been driving 2½ hours during the early morning. There was reason for her to anticipate a state of drowsiness and the resulting lack of alertness. She admitted that she fell asleep while driving.

If, as against a passenger, such circumstances are sufficient to make out a *prima facie* case on the issue of contributory negligence, *Nelson v. Nygren, supra, a fortiori,* they constitute evidence of negligence on the part of the driver. Hence, the issue of negligence as well as the issue of contributory negligence was properly submitted to the jury.

The court instructed the jury "that the mere fact that the defendant, Maria Reid Baird, went to sleep and lost control of the car, if you find this to be the facts, would not in itself and standing alone make her guilty of negligence." It then charged as follows:

"If the plaintiffs have satisfied you from the evidence and by its greater weight that the defendant, Maria Reid Baird, drove the automobile and went to sleep while driving, and that prior thereto she had driven it under circumstances when she knew or in the exercise of due care should have known that she had become sleepy and drowsy; and if the plaintiffs have further satisfied you from the evidence and by its greater weight that in so doing the defendant, Maria Reid Baird, failed to exercise due care to keep a proper lookout and failed to exercise due care to keep the automobile under proper control, the Court instructs you that such conduct on the part of Maria Reid Baird would constitute negligence. And if the plaintiffs have further satisfied you from the evidence and by its greater weight that such negligence on the part of the defendant, Maria Reid Baird, caused the automobile to leave the highway and strike a telephone pole and was the proximate cause or one of the proximate causes of the injuries to the plaintiffs, the Court instructs you that it would be your duty to answer the first issue in each case YES."

This, we apprehend, is a correct statement of the New York rule. Exception thereto cannot be sustained.

The defendants except "for that his Honor, in charging the jury, did not state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon, as provided by Consolidated Statutes, Section 564." This is a broadside exception and is too general and indefinite to present any question for decision. *S. v. Dilliard, ante,* 446, and cases cited.

We have examined the other exceptive assignments of error. In them we find no cause for disturbing the verdicts and judgments.

As heretofore stated, this decision is bottomed on our understanding of the pertinent New York law. It becomes a precedent on that question, but not on the law of negligence in this State.

No error.

W. R. WILLIAMS, ADMINISTRATOR WITH THE WILL ANNEXED OF OCTAVIA RAND, v. PARKER B. RAND, W. K. RAND, THOMAS R. RAND, MRS. EUGENE C. ANDERSON, MRS. KATHERINE R. BERNHARD, ROBERT LEE RAND, W. R. WILLIAMS, C. L. WILLIAMS, HERBERT K. WILLIAMS, WILLIAM E. RAND, KENAN RAND, E. G. RAND, C. H. RAND, WILLIAM R. RAND, HUBERT RAND AND MRS. LINDA RAND BURTON.

(Filed 15 December, 1943.)

1. Wills § 31—

The cardinal principle in the interpretation of wills is to discover the intent of the testator, looking at the instrument from its four corners, and to give effect to such intent, unless contrary to some rule of law or at variance with public policy.

2. Same—

In construing a will, the entire instrument should be considered; clauses apparently repugnant should be reconciled; and effect given where possible to every clause or phrase and to every word. And words should be given their primary or ordinary meaning.

3. Same—

It is permissible, in order to effect a testator's intention or to ascertain his intention, for the court to transpose words, phrases, or clauses; and the court may disregard or supply punctuation.

4. Same—

Even words, phrases and clauses will be supplied, in the construction of a will, when the sense of the phrase or clause in question, as collected from the context, manifestly requires it.

5. Wills § 34—

By the use in a will of the words: "To my beloved brother, W. K. Rand, Durham, N. C., I bequeath my interest in 'Apt. House,' 125 Bloodworth St., Raleigh, N. C.—also ½ stock in Carolina Power & Light Co. after burial expenses—and putting plot in Oakwood Cemetery in perpetual care, the remainder, if there should be any, to be equally divided among the other brothers and sister (Mrs. Eugene Anderson)," the testatrix clearly intended to give her interest in the apartment house and also ½ of all of her stock in the company named to her brother W.; and the remainder of the stock in said company, if there should be any after burial

expenses and putting the cemetery plot in perpetual care, to be equally divided among her other brothers and sister, Mrs. E. A.

APPEAL by plaintiff from *Burney, J.*, at June Term, 1943, of WAKE.

This is an action brought pursuant to the provisions of the Uniform Declaratory Judgment Act, chapter 102, Public Laws 1931, N. C. Code of 1939 (Michie), section 628 (a), *et seq.*, for the construction of the holograph will of Miss Octavia Rand.

The parties waived a jury trial and agreed that his Honor should hear the evidence, find the facts, and render a declaratory judgment thereon.

The plaintiff appealed from the judgment entered below, and assigned error.

D. B. Teague for plaintiff.
No counsel for defendants.

DENNY, J. The question presented on this record is the proper construction of the first sentence of Miss Rand's holograph will, which reads as follows: "To my beloved brother, W. K. Rand, Durham, N. C., I bequeath my interest in 'Apt. House,' 125 Bloodworth St., Raleigh, N. C.—also ½ stock in Carolina Power & Light Co. after burial expenses—and putting plot in Oakwood Cemetery in perpetual care, the remainder, if there should be any, to be equally divided among the other brothers and sister, (Mrs. Eugene Anderson)." Prior to the death of the testatrix she executed a deed to her brother, W. K. Rand, for her interest in the Apartment House referred to above.

His Honor held that the proper interpretation of the above sentence was "that the said testatrix, Octavia Rand, bequeathed one-half of her stock in Carolina Power & Light Company by her said last will and testament to her brother, W. K. Rand, and the other half of her said stock in Carolina Power & Light Company to her brothers, Parker B. Rand and Thomas R. Rand, and her sister, Mrs. Eugene Anderson, subject to payment of burial expenses and putting plot in Oakwood Cemetery in perpetual care," and entered judgment accordingly.

The plaintiff contends his Honor's interpretation is clearly erroneous and was not an interpretation of the language used in respect to the stock in the Carolina Power & Light Company, but was based upon a transposition of clauses in the will so as to completely change its meaning and rewrite the will.

The plaintiff suggests two constructions of the sentence under consideration, neither of which was adopted by the court below: (1) That Miss Rand, by her will, intended to give to her brother, W. K. Rand, one-half of her stock in Carolina Power & Light Company, after the

payment of her burial expenses and putting plot in Oakwood Cemetery in perpetual care had been provided for therefrom; the remainder, or one-half of her stock in Carolina Power & Light Company, to be equally divided among the other brothers and sister, Mrs. Eugene Anderson. (2) That Miss Rand gave to her brother, W. K. Rand, one-half of her stock in Carolina Power & Light Company, as a trustee, the proceeds thereof to be used by him to pay the burial expenses of the testatrix and in putting plot in Oakwood Cemetery in perpetual care, and the remainder of such half of her stock, if there should be any, to be equally divided among the other brothers and sister, Mrs. Anderson. That as to the other one-half of the stock owned by the testatrix in the Carolina Power & Light Company, she died intestate.

"The cardinal principle in the interpretation of wills is to discover the intent of the testator, looking at the instrument from its four corners, and to give effect to such intent, unless contrary to some rule of law or at variance with public policy." *Heyer v. Bulluck*, 210 N. C., 321, 186 S. E., 356; *Williamson v. Cox*, 218 N. C., 177, 10 S. E. (2d), 662; *Smith v. Mears*, 218 N. C., 193, 12 S. E. (2d), 649; *Culbreth v. Caison*, 220 N. C., 717, 18 S. E. (2d), 136; 28 R. C. L., 211.

In order to adopt the first suggested construction of this will, it would be necessary to strike out or completely ignore the effect of the clause "if there should be any," since this clearly modifies and relates to the words "the remainder." If the other brothers and sister, Mrs. Eugene Anderson, are to receive whatever property is referred to as "the remainder," then such property is subject to deductions for burial expenses and putting plot in Oakwood Cemetery in perpetual care. We think the language used by the testatrix expresses the intention to have "the remainder," first subjected to the charges referred to therein, and the residue of the remainder, if there should be any, to go to these legatees. To hold otherwise would give these legatees a larger bequest than was contemplated by the testatrix.

The second suggested construction is equally untenable. While it appears from the record herein that the testatrix disposed of only a part of her property by the will under consideration, and died intestate as to the other part, in construing a will the presumption against intestacy justifies an interpretation of the present instrument to the effect that the testatrix intended to bequeath all her stock in Carolina Power & Light Company, and we so hold. *Coddington v. Stone*, 217 N. C., 714, 9 S. E. (2d), 420; *West v. Murphy*, 197 N. C., 488, 149 S. E., 731; *Smith v. Creech*, 186 N. C., 187, 119 S. E., 3; *Crouse v. Barham*, 174 N. C., 460, 93 S. E., 979; *Austin v. Austin*, 160 N. C., 367, 76 S. E., 272; *Powell v. Woodcock*, 149 N. C., 235, 62 S. E., 1071. Furthermore, we do not think the language used by the testatrix in her will supports an interpre-

tation to the effect that she intended to create a trust and that her brother, W. K. Rand, as trustee, was to receive and dispose of the property, pay the burial expenses, put the plot in Oakwood Cemetery in perpetual care, and to equally divide the remainder, if there should be any, among the other brothers and sister, Mrs. Eugene Anderson.

In construing a will, the entire instrument should be considered; clauses apparently repugnant should be reconciled; and effect given where possible to every clause or phrase and to every word. "Every part of a will is to be considered in its construction, and no words ought to be rejected if any meaning can possibly be put upon them. Every string should give its sound." *Edens v. Williams,* 7 N. C., 31; *Lee v. Lee,* 216 N. C., 349, 4 S. E. (2d), 880; *Bell v. Thurston,* 214 N. C., 231, 199 S. E., 93; *West v. Murphy, supra; Roberts v. Saunders,* 192 N. C., 191, 134 S. E., 451; *Snow v. Boylston,* 185 N. C., 321, 117 S. E., 14; *Hinson v. Hinson,* 176 N. C., 613, 97 S. E., 465; *Bowden v. Lynch,* 173 N. C., 203, 91 S. E., 957; *Satterwaite v. Wilkinson,* 173 N. C., 38, 91 S. E., 599; *McCallum v. McCallum,* 167 N. C., 311, 83 S. E., 350; *Alexander v. Alexander,* 41 N. C., 231; 28 R. C. L., 217.

It is permissible, in order to effectuate a testator's intention, or to ascertain a testator's intention, for the court to transpose words, phrases or clauses. *Heyer v. Bulluck, supra; Washburn v. Biggerstaff,* 195 N. C., 624, 143 S. E., 210; *Gordon v. Ehringhaus,* 190 N. C., 147, 129 S. E., 187; *Crouse v. Barham,* 174 N. C., 460, 93 S. E., 979; *Baker v. Pender,* 50 N. C., 351.

Likewise, to effectuate the intent of the testator, the court may disregard or supply punctuation. *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892; *Bunn v. Wells,* 94 N. C., 67; *Stoddart v. Golden,* 3 A. L. R., 1060, 178 Pac., 707. Even words, phrases and clauses will be supplied in the construction of a will when the sense of the phrase or clause in question, as collected from the context, manifestly requires it. *Washburn v. Biggerstaff, supra; Gordon v. Ehringhaus, supra; Crouse v. Barham, supra; Howerton v. Henderson,* 88 N. C., 597; *Dew v. Barnes,* 54 N. C., 149; *Sessoms v. Sessoms,* 22 N. C., 453.

Walker, J., speaking for the Court, in the case of *Carroll v. Herring, supra,* said: "The primary object in interpreting all wills is to ascertain what testator desired to be done with his estate, and if it can be found in the language of the document, his intention always controls. It has been said that the cardinal rule of interpretation is that we should seek first and throughout for the testator's intention, as expressed in his will, and in doing so any obscurity or doubt as to the meaning may be cleared up by giving words their primary or ordinary signification, and so moulding the language by repeating, supplying, transferring, or substituting words and sentences, and so arranging them in a reason-

able manner and with proper punctuation as will more clearly disclose the true intent and meaning. 40 Cyc., 1386-1405."

We think his Honor correctly interpreted the intention of the testatrix. The meaning of the sentence under consideration, as constructed by the testatrix, is somewhat obscure, however, if the rules of construction applicable to the transposition of clauses, the supplying of words, and the latitude allowed in punctuation, in the interpretation of a will, are observed, the intent of the testatrix becomes clear. Applying these rules, the expressed intention of the testatrix may be more clearly stated as follows: To my beloved brother, W. K. Rand, Durham, N. C., I bequeath my interest in "Apt. House," 125 Bloodworth St., Raleigh, N. C., also ½ stock in Carolina Power & Light Co., the remainder (of the stock in Carolina Power & Light Company), if there should be any, after burial expenses and putting plot in Oakwood Cemetery in perpetual care, to be equally divided among my other brothers and sister, Mrs. Eugene Anderson.

The judgment of the court below is

Affirmed.

PETE CHASON v. JESSIE MARLEY AND LENA MARLEY.

(Filed 15 December, 1943.)

1. Pleadings § 3a—

The meaning of C. S., 506, is that the complaint shall contain the material, essential, and ultimate facts upon which the right of action is based, and not collateral or evidential facts, which are only to be used to prove and establish the ultimate facts.

2. Pleadings § 29: Specific Performance § 4—

In a suit for the specific performance of a contract to convey land, where the complaint alleges in detail a large number of receipts from defendant to plaintiff, constituting written memoranda of the contract to convey, signed by defendant, there was error in allowing a motion to strike such allegations.

3. Same—

Allegations of a complaint, in a suit for specific performance, detailing large numbers of payments and other matters wholly evidential or repetitious, are properly stricken on motion.

APPEAL by plaintiff from *Johnson, Special Judge,* at August Term, 1943, of ROBESON. Modified and affirmed.

Civil action for specific performance of a contract to convey land, heard on motion to strike allegations in the complaint.

In allegations (1) to (5), inclusive, plaintiff alleges the material, essential, and ultimate facts upon which his cause of action is based. In paragraph (6) he alleges that the defendants accepted payments upon the contract of sale "and executed and delivered to this plaintiff receipts and memorandums, in writing, with respect thereto as follows:" He then lists in detail twenty-three receipts for "principal and interest."

Having alleged in paragraph (5) that he has "paid to the defendants upon the installments upon the aforesaid purchase price of the said lands, together with the interest thereon, and has likewise paid to the defendants the taxes annually levied and assessed against the same, and insurance premiums upon the insurance upon the buildings situated thereon, as will more fully appear hereafter, and has at all times promptly and fully complied with and carried out the terms of the aforesaid contract and agreement on his part," in paragraphs (7) to (15), inclusive, he undertakes to allege in detail the checks paid on installments, insurance premiums and taxes paid, and other evidence relied upon by him to support the allegation that he has in all respects complied with said contract.

In paragraph (17) he alleges his legal right to a decree of specific performance.

The defendants, after answering, appeared and moved to strike paragraphs (6) to (15), inclusive, and paragraph (17). The motion to strike was allowed, and plaintiff excepted and appealed.

F. D. Hackett, Jr., and Varser, McIntyre & Henry for the plaintiff, appellant.

Robert H. Dye for the defendants, appellees.

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

This means that the material, essential, and ultimate facts upon which the right of action is based should be stated, and not collateral or evidential facts, which are only to be used to establish the ultimate facts. The plaintiff should allege all the material facts, the ultimate facts which constitute the cause of action—but not the evidence to prove them. McIntosh P. & P., 389, sec. 379; *Winders v. Hill,* 141 N. C., 694, 54 S. E., 440; *Sams v. Price,* 119 N. C., 572, 26 S. E., 170; *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738; *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794. With few exceptions, only the facts to which the pertinent legal or equitable principles of law are to be applied are to be stated in the complaint. McIntosh P. & P., 388, sec. 379;

Moore v. Hobbs, 79 N. C., 535; *Webb v. Hicks,* 116 N. C., 598, 21 S. E., 672; *Lassiter v. Roper,* 114 N. C., 17, 18 S. E., 946; *Crump v. Mims,* 64 N. C., 767; *Insurance Co. v. Smathers,* 211 N. C., 373, 190 S. E., 484; *Woodley v. Combs,* 210 N. C., 482, 187 S. E., 762; *Poovey v. Hickory,* 210 N. C., 630, 188 S. E., 78.

When a complaint is drawn in accord with the statute and states a cause of action, evidence of the facts alleged is admissible. It does not follow that it is either necessary or proper to allege any and every fact evidence of which will be competent at the hearing.

Measured by these principles of law, we are constrained to hold that the complaint contains many immaterial and redundant allegations which were properly stricken.

Apparently, the careful and painstaking judge below was inadvertent to the language in paragraph (6) which alleges that the checks listed constitute memoranda of the contract to convey. A written memorandum of the contract to convey, signed by the parties sought to be charged, is essential to plaintiff's cause of action. *Lewis v. Murray,* 177 N. C., 17, 97 S. E., 750; *Burriss v. Starr,* 165 N. C., 657, 81 S. E., 929; *Smith v. Joyce,* 214 N. C., 602, 200 S. E., 431. He may allege such as one of the ultimate facts relied upon. This he undertakes to do. The allegation should not be stricken.

This was a motion to strike and not a demurrer. Hence the sufficiency of the instruments alleged in this paragraph as memoranda in writing is not challenged. That is a question to be decided at the hearing.

Paragraph (17) is an allegation of law and fact. In so far as it alleges that the plaintiff is ready, able, and willing to comply with his contract it is repetitious. From the striking of this paragraph plaintiff suffers no harm.

The answer of the defendants is of record. The admissions therein, as they may be explained by the allegations in the complaint, are still available to plaintiff. The order striking allegations in the complaint does not render such allegations incompetent as evidence in explanation of admissions made in the answer.

The judgment below must be modified in accordance with this opinion.

Modified and affirmed.

STATE v. M. W. EPPS AND NELSON EPPS.

(Filed 15 December, 1943.)

1. Criminal Law § 52b—

When defendants in a criminal prosecution, at the close of the State's evidence, move to dismiss and for nonsuit, C. S., 4643, and, after these motions are overruled, introduce evidence but fail to renew such motions at the close of all evidence, the exceptions to the refusal of such motions at the close of the State's evidence are waived.

2. Larceny §§ 1, 8—

Upon a prosecution for larceny of hogs, the evidence tending to show that prosecutor's hogs were left at large and wandered off to the premises of one of defendants, where they were secured by this defendant and taken by both defendants to a near-by town and sold, there is no error in a charge by the court that, if defendants took the hogs with intent to deprive the rightful owner thereof and dishonestly and fraudulently appropriated them to their own use and disposed of them, they would be guilty of larceny.

3. Larceny §§ 5, 8—

Where the evidence, in a prosecution of two persons for larceny of hogs, tended to show that one defendant secured the hogs wandering on his premises, and that he with the second defendant took the hogs to a near-by town and sold them, there is no error in a charge that before any presumption would arise that the second defendant was the thief, that is presumption from possession, the jury must be satisfied beyond a reasonable doubt that the second defendant was in possession of the hogs, and that they were in his custody and subject to his control and disposition.

4. Appeal and Error § 29—

Exceptions not set out in appellant's brief are taken as abandoned. Rule 28.

APPEAL by defendants from *Bone, J.*, at May Term, 1943, of ROBESON.

The defendants were convicted of the larceny of three hogs, the property of Henry Hunt.

The State's evidence tended to show that Henry Hunt owned three hogs, that he left his home on Monday, 25 October, 1942, to attend the funeral of his daughter, leaving the hogs running at large about his home; that upon his return to his home the next day, Tuesday evening, he found his hogs had disappeared; that two weeks later the hogs were located at Rowland, where two of them had been sold to Harmonia King, and one of them to John Thompson; Harmonia King and John Thompson purchased the hogs from M. W. Epps and Nelson Epps, "although M. W. Epps did the talking and transacted the business"; subsequently two of the hogs were returned to Henry Hunt, but the third one was not

so returned as it had been butchered; and the mother of the defendants, in their presence, paid to Henry Hunt $50.00 to "compromise the case."

The defendants' evidence tended to prove that the three hogs of Henry Hunt alleged to have been stolen were running at large, came upon the farm of the defendant, M. W. Epps, and were doing damage to his crops, and after this had been going on for ten or fifteen days, M. W. Epps shut the hogs up for a few days, made inquiry as to whose hogs they were, and not finding this out he carried them to Rowland and sold them to pay for the damage they had done to his crops; that M. W. Epps did not know whose property the hogs were when he sold them; that Nelson Epps, while he went with his brother, M. W. Epps, to Rowland when he sold the hogs, did not know for what purpose M. W. Epps was going until he came to Nelson Epps' home to get him to take him to Rowland; that the hogs were sold at Rowland in broad daylight at 2 o'clock p.m.; that when M. W. Epps learned that the hogs belonged to Henry Hunt he returned to Rowland and paid back to Harmonia King and John Thompson what they had paid him for the hogs, procured the return of two of the hogs to Hunt, and paid Hunt for the hog which had been slaughtered and could not be returned; that M. W. Epps lived on his own farm near the farm of Henry Hunt, and Nelson Epps lived on a farm adjoining the farm of M. W. Epps.

The jury returned a verdict as to both of the defendants of guilty of larceny as charged in the bill of indictment, and from judgment of imprisonment predicated on the verdict the defendants appealed, assigning error.

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

J. E. Carpenter for defendants, appellants.

SCHENCK, J. While there are other exceptions in the record only four are set out in the appellants' brief. Those not so set out in their brief are taken as abandoned by the appellants. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562.

Exceptions Nos. 11 and 12 relate to the refusal of the trial judge to sustain the respective motions to dismiss the action and for judgment of nonsuit lodged by each of the defendants when the State had produced its evidence and rested its case. C. S., 4643. After these motions had been overruled the defendants introduced evidence but did not renew their motions to dismiss the action and for judgment of nonsuit. When the motions were not renewed after all the evidence in the case was concluded the defendants waived their exceptions to the refusal of the motions

made at the close of the State's evidence. *S. v. Chapman,* 221 N. C., 157, and cases there cited.

Exception No. 17, set out in the appellant's brief is to an excerpt from his Honor's charge as follows: "If Henry Hunt owned the three hogs in question and they were left on his premises by him and they got out, or by some means got from his place over to the premises of the defendant, Matthew Epps, and were on his premises, and Matthew Epps seeing them there and having in his mind the intent to take them and to deprive the owner, whoever he might be, of his rightful property and to dishonestly and fraudulently appropriate the hogs to his, Matthew Epps', own use, and with that intent in his mind, took these hogs up and carried them away and disposed of them, he would be guilty of larceny as much so as if he had taken them from the premises of Henry Hunt, because if the hogs got out and wandered over to Matthew Epps' place, they were still constructively in the possession of the owner, Henry Hunt." This exception cannot be sustained. The excerpt to which it is addressed is in substantial accord with the excerpt from the charge in *S. v. Holder,* 188 N. C., 561, which was upheld by this Court, and was as follows: "Where property is lost and a person finds it, then the duty of the finder is to keep the property for the purpose of finding the owner and he must use reasonable means for the purpose of finding the owner. If he keeps it and keeps it intact for the owner, he has a right to do that, but if the property is not abandoned but is left by accident or lost and a person finds it and he takes it with the intention at the time of taking it to steal it, he is just as guilty of larceny as if he had gone in the night-time and stolen it secretly."

Exception No. 18, set out in the appellant's brief, is to an excerpt from his Honor's charge as follows: "Now, the evidence here tends to show that Matthew Epps and Nelson Epps were together down at Harmonia King's and had the hogs, sold them to her; however, Harmonia King testified that Matthew Epps did most of the talking. I do not recall that anybody has quoted any language used or said to have been used by Nelson Epps. Before any presumption would arise that he was the thief, that is, presumption from possession, you would have to be satisfied beyond a reasonable doubt that he was in possession of the hogs; that is to say, that they were in his custody and under his control, and subject to his disposition. If the hogs were stolen by Matthew Epps and Nelson Epps was along with him at the time that he stole them and was with him for the purpose of assisting and aiding and encouraging him in the larceny of the hogs, then he would be equally guilty with Matthew Epps."

The excerpt which the exception assails merely states that before any presumption could arise from the possession, the jury must be satisfied

beyond a reasonable doubt that Nelson Epps was in possessison of the hogs. The charge does not state that the possession alone was sufficient to convict, but, on the contrary, in the preceding paragraph it specifically states that the presumption is merely a presumption of fact and is to be considered together with all the other facts and circumstances in the case in determining the defendants' guilt or innocence. The defendants had no burden placed upon them by the assailed portion of the charge as contended by them. In truth, no mention of burden of proof is made therein. *Brogden, J.*, in *S. v. Whitehurst,* 202 N. C., 631, writes: "Consequently physical presence at the scene of larceny is not deemed to be absolutely essential to conviction if it appears that the defendant actually 'advised and procured the crime' or aided and abetted the commission thereof." *Hoke, J.*, in *S. v. Overcash,* 182 N. C., 889, writes, ". . . as to this offense (larceny) our decisions are to the effect that there can be no accessories, but all who 'aid, abet, advise, or procure the crime are principals.' " Exception No. 18 cannot be sustained.

We have carefully read the evidence in this case and are of the opinion that when read in the light most favorable to the State it is sufficient to carry the case to the jury as to both defendants, even if the exception to the refusal to allow the motion to dismiss the case had not been waived by a failure to renew the motion at the conclusion of all the evidence.

In the trial in the Superior Court, we find

No error.

H. P. BROWN v. THE BOARD OF COMMISSIONERS OF RICHMOND COUNTY, G. C. CADELL, CHAIRMAN; JAMES HAMER, JOHN C. MATHESON, PAUL A. BROWN AND ARTHUR CAPELL, MEMBERS.

(Filed 15 December, 1943.)

1. Constitutional Law § 4d: Courts § 5—

The General Assembly, in the exercise of its permissible authority, may abolish a local court.

2. Constitutional Law § 4d: Public Officers §§ 3, 5, 6—

Upon the ratification of a valid act of the General Assembly, abolishing an elective office, both the duties and emoluments of the office terminate.

3. Constitutional Law § 4d: Municipal Corporations § 5—

There is a specific constitutional prohibition against gifts of public money, and the Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. N. C. Const., Art. I, sec. 7.

4. Municipal Corporations § 5—

The Legislature may impose upon a municipality the payment of claims just in themselves; but the legislative determination that such obligation exists is not conclusive. The municipality may resort to the courts and there prove that no legal or equitable obligation exists against it.

5. Municipal Corporations §§ 5, 8—

A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public, unless by a vote of the majority of the qualified voters therein. N. C. Const., Art. VII, sec. 7.

6. Municipal Corporations § 11d: Public Officers § 5—

Where the members of the governing body of a municipal corporation expend the funds of the municipality for a private purpose, without warrant in law, they become personally liable.

APPEAL by plaintiff from *Olive, Special Judge,* at February Term, 1943, of RICHMOND. Affirmed.

Petition for writ of *mandamus.*

This case was here at the Fall Term, 1942. *Brown v. Comrs. of Richmond,* 222 N. C., 402. The essential facts there appear.

On the hearing below the court found certain facts, concluded that chapter 11, Private Laws 1941, is unconstitutional, and rendered judgment denying a writ of *mandamus* and dismissing the action. Plaintiff excepted and appealed.

W. S. Thomas, Thomas L. Parsons, and George S. Steele, Jr., for plaintiff, appellant.

McLeod & Webb and William G. Pittman for defendants, appellees.

BARNHILL, J. The local court, of which plaintiff was elected presiding judge, was abolished by the General Assembly in 1939. This was a permissible exercise of legislative authority. *Mial v. Ellington,* 134 N. C., 131, 46 S. E., 961; *S. v. Jennette,* 190 N. C., 96, 129 S. E., 184; *Queen v. Comrs. of Haywood,* 193 N. C., 821, 138 S. E., 310; 12 Am. Jur., 53, sec. 420.

Upon the ratification of that Act the office to which plaintiff had been elected became nonexistent. Both the duties and the emoluments of the office terminated. Plaintiff could render no further service and could claim no further compensation as a legal right. *Mial v. Ellington, supra.*

Hence, he has not been deprived of any property without due process of law and has no legal claim for salary accruing after the date the court ceased to exist.

Even so, does the Legislature have authority to require a subordinate branch of the government to pay an individual a sum which it considers morally due? The answer is found in the Constitution.

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

This constitutes a specific constitutional prohibition against gifts of public money, and the Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. 38 Am. Jur., 85 (n. 9 for authorities); Elliott Municipal Corp. (3d), 305, sec. 311; 1 McQuillin Municipal Corp., Revised, 720, 722; *State v. Tappan,* 29 Wisc., 664, 9 Am. Reports, 622; *People v. Bank,* 231 N. Y., 465, 132 N. E., 231. See also *Asbury v. Albemarle,* 162 N. C., 247, 78 S. E., 146. Nor may it lawfully authorize a municipal corporation to pay gifts or gratuities out of public funds. 38 Am. Jur., 91, sec. 399.

It is competent for the Legislature to impose upon a municipality the payment of claims just in themselves for which an equivalent has been received. But this power may not be extended to include the payment of gifts or gratuities out of public funds. 38 Am. Jur., p. 90.

The legislative determination that an obligation exists against a municipality is not conclusive. The municipality may resort to the courts and there prove that no legal or equitable obligation exists against it; for the municipality cannot lawfully make an appropriation of public moneys except to meet a legal and enforceable claim, and can make no payment upon a claim which exists merely by reason of some moral or equitable obligation which a generous, or even a just, individual, dealing with his own moneys, might recognize as worthy of some reward. 38 Am. Jur., 91, sec. 399 (n. 19). See also *Hill v. Stansbury, ante,* 193.

"No county . . . shall contract any debt, nor shall any tax be levied or collected . . . except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Art. VII, sec. 7, N. C. Const.

A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public. 38 Am. Jur., 85, sec. 395 (see n. 9 for authorities). The funds of the municipality are necessarily, directly or indirectly, raised by taxation. Consequently, the expenditure of money by a municipality for private purposes does or may necessarily result in the taking of the property of individuals under the guise of taxation for other than public uses. In such a case it can make no difference that no immediate provision for taxes is made. The use of public funds for private purpose increases the burden of taxation as certainly as if a tax for a private purpose was directly levied. 38 Am. Jur., 86 (see n. 10).

It follows that the Legislature can neither compel nor authorize a municipal corporation to expend any of its funds for a private purpose without a majority vote of the electors of the municipality first obtained.

The inhibition against contracting debts contained in this section of the Constitution is as binding upon the Legislature as upon the municipality, and it cannot do indirectly what the Constitution prohibits. A debt the municipality may not contract cannot be created by legislative act. *R. R. v. Commissioners,* 72 N. C., 486.

The defendant county is under no legal, equitable, or moral obligation to pay the amount demanded. The office held by plaintiff was abolished by the Legislature, and not by the county. Any wrong or injustice he has suffered has been at the hands of the law-making body. If, as he contends, it failed to investigate fully and acted on false and misleading information the resulting loss to plaintiff is not chargeable to the defendants. Any attempt by them to pay the salary which would have accrued had the court not been abolished would constitute a gift or gratuity. In no sense is it a necessary expense.

But, argues the plaintiff, the county is a creature of the Legislature and as such cannot challenge the constitutionality of an act of its creator. This we do not concede. But, even so, the individual defendants are the custodians of county funds. Upon them devolves the duty to raise by taxation the public revenue of the county and to direct its expenditure. It is they the plaintiff would have the court compel to act. If they expend such funds for private purposes without warrant in law they become personally liable. *Hill v. Stansbury, supra.* Surely then the defense is available to them, if not to the county.

The plaintiff has failed to show a clear legal right to the remedy he seeks. Therefore, the judgment below must be

Affirmed.

STATE v. ROBERT RISING.

(Filed 15 December, 1943.)

1. Trial § 4: Criminal Law § 44: Appeal and Error § 37b—

The general rule is that the allowance of a motion for continuance is in the sound discretion of the trial judge and not subject to review in the absence of abuse of discretion.

2. Same—

Where a criminal prosecution is continued to the next regular term and prior thereto called for trial at a special term, there is no error for the court to refuse a continuance to such regular term, on the ground of the

unavoidable absence of a material expert witness for defense, it appearing that the solicitor agreed not to offer evidence on the facts, which it was alleged would be denied by such absent witness.

3. Constitutional Law § 28: Criminal Law § 46—

There is no denial of prisoner's right to confrontation, N. C. Const., Art. I, sec. 11, by the refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, it appearing that the State's solicitor agreed that he would not, and did not offer evidence as to fingerprints.

4. Criminal Law §§ 41g, 52b—

The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. C. S., 4643.

5. Criminal Law § 48e: Appeal and Error § 37b—

The refusal to allow accused to reopen the case and introduce further evidence, after the taking of evidence had been closed and solicitor's argument concluded, was within the sound discretion of the trial judge and not subject to review except for manifest abuses thereof.

6. Trial § 33: Criminal Law § 53g—

Exceptions to the court's statements of the evidence are untenable, where it does not appear in the record that the alleged errors were called to the attention of the court in time to make correction.

APPEAL by defendant from *Burney, J.*, at February Special Term, 1943, of NEW HANOVER.

The defendant was convicted of feloniously breaking and entering the warehouse of the Wilmington Coca-Cola Bottling Works, Inc., with the intent of stealing chattels, money and valuable securities therein, and of the larceny of said personal property of said bottling works, and from judgment of imprisonment predicated on the verdict the defendant appealed, assigning error.

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

W. L. Farmer and W. F. Jones for defendant, appellant.

SCHENCK, J. The bill of indictment upon which the defendant was convicted was found at the January Term, 1943, of the Superior Court of New Hanover County, and charged that the crime was committed on 13 September, 1942. At the January Term, upon the motion of the defendant the case was continued till the next ensuing regular term for the trial of criminal cases, which convened in March, 1943. Thereafter a special term for the trial of criminal cases was called by his Excellency, the Governor, to convene on 22 February, 1943.

At the February Special Term, when the case was called for trial, the defendant lodged a motion for a continuance, which motion was disallowed, and defendant preserved exception, and stressfully presented this exception both in brief and oral argument on his appeal to this Court.

The basis of this motion for continuance was the inability of the defendant to have in court as a witness one Walter C. Dean, an expert in fingerprint reading, who was sick in a hospital in Atlanta, Georgia. It was made to appear that the defendant had arranged to have this witness in court at the regular March Term of court, but was unable to have him present at the February Term. It was further made to appear that it was the purpose of the defendant to use the testimony of the absent witness to contradict evidence which the State would offer tending to show that certain fingerprints found on the safe, out of which the chattels and money were taken, were those of the defendant. However, the record discloses that the solicitor for the State agreed that he would offer no evidence as to fingerprints, if the case were tried at the February Term. In view of this agreement, the court's refusal to allow the motion for continuance cannot be held for error. The general rule is that the allowance of a motion for continuance is in the sound discretion of the trial judge. *S. v. Lippard, ante,* 167. However, the defendant contends that this case falls within an exception to the general rule and is governed by the recent case of *S. v. Farrell, ante,* 321. With this contention we do not concur. Farrell's case is bottomed upon the theory that the defendant was denied his constitutional right of confrontation, which carried with it not only the right to face one's accusers and witnesses with other testimony, but also an opportunity fairly to present one's defense. No such situation is presented by the record in this case. The only purpose for which it appears the expert witness was to be offered was to meet evidence of the State relative to fingerprints found on the safe from which the property was taken. The solicitor's agreement to introduce no evidence as to fingerprints obviated any necessity for the testimony of the absent witness by way of confrontation or of presenting defendant's defense. The exceptive assignments of error relating to the disallowance of the motion for a continuance cannot be sustained.

The defendant contends that the court erred in overruling his motion to dismiss the action duly lodged when the State had produced its evidence and rested its case and renewed when all the evidence was concluded. (C. S., 4643.) This contention is untenable. Two witnesses, who were originally indicted with the defendant and who subsequently tendered a plea of guilty, testified that they, together with the defendant, entered the warehouse, broke open the safe, removed the money therefrom, and divided it among the three. This evidence alone, al-

though the testimony of accomplices, was sufficient to carry the case to the jury, and to sustain the verdict. *S. v. Lippard, supra.*

We have carefully examined the other exceptive assignments of error in the record addressed to the admission and rejection of evidence and find that they are without merit. The refusal of the trial judge to allow the defendant to reopen the case and introduce further evidence after the taking of evidence had been closed and the solicitor had concluded his argument was referred to the sound discretion of the trial judge, to be reviewed, if at all, only in the case of manifest abuse, a condition that is by no means presented in this record. *S. v. Roberts,* 188 N. C., 460, 124 S. E., 833; *S. v. Rash,* 34 N. C., 382.

The exceptive assignments of error addressed to his Honor's charge principally assail the statement of the evidence made by the court. These assignments are untenable for the reason that it does not appear in the record that the alleged errors were called to the attention of the court to enable him to make corrections if error there was. *S. v. Hobbs,* 216 N. C., 14, 3 S. E. (2d), 431; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657. His Honor was careful to tell the jury that it was their duty to consider all the evidence whether it was called to their attention or not, and to disregard what counsel, or even the court, stated the evidence was if such statement was at variance with their recollection thereof—that the jury's recollection of the evidence should guide them in determining the facts.

While the entire charge does not appear in the record, we have carefully examined those excerpts which do appear and we find in them no prejudicial error.

In our opinion the case has been correctly tried and the judgment of the lower court must be affirmed.

No error.

ATLANTIC COAST LINE RAILROAD COMPANY v. CUMBERLAND COUNTY AND R. E. NIMOCKS, TREASURER OF CUMBERLAND COUNTY.

(Filed 15 December, 1943.)

Taxation § 3: Constitutional Law § 4b—

The total tax assessment by a county shall not exceed the constitutional limit for general purposes, except when levied for a special purpose and with the special approval of the General Assembly, by special or general act, N. C. Const., Art. V, sec. 6; and Cumberland County is authorized by the Act of 1923, now C. S., 1297 (8½), to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. Conceding that C. S.,

1297 (28), and C. S., 1335, constitute special approval of the General Assembly for unlimited levy for a special purpose, they are general acts and conflict with the provisions of the later act of 1923.

APPEAL by defendants from *Nimocks, Jr., J.,* at September Term, 1943, of CUMBERLAND.

Civil action for recovery of *ad valorem* taxes alleged to have been assessed illegally and paid under protest.

The action being heard upon the pleadings and exhibits offered, and after argument of counsel, the court finds facts briefly these: (1) Defendant Cumberland County levied *ad valorem* tax for the year 1942 at rate of $1.48 on the one hundred dollars property valuation for designated purposes, including therein these items: (a) For general county fund fifteen cents, (b) for health fund six cents, and (c) for poor fund seventeen cents. (2) Plaintiff, Atlantic Coast Line Railroad Company, a property owner and taxpayer in Cumberland County, paid to tax collector of said county, on 15 January, 1943, all of the *ad valorem* taxes assessed by said county against it, in which payment was included the sum of $2,487.07, representing a levy of twelve cents per hundred dollars valuation in the item of seventeen cents levy for poor fund or poor relief, which sum was paid under protest on the ground that said part of the levy and assessment for the poor fund or poor relief is unconstitutional and void for that it is in excess of the fifteen cents limitation for State and county taxes prescribed by the Constitution of North Carolina, Article V, section 6, and also in excess of the special statutory authority for levying taxes by said county for poor fund or poor relief. And plaintiff duly demanded the refund thereof, and in due time instituted this action to recover same.

The court, being of opinion that defendant Cumberland County has no authority, under any special or general act of the General Assembly of North Carolina to levy an *ad valorem* tax for poor fund or poor relief in excess of five cents on the one hundred dollars valuation, and that the levy of seventeen cents for the year 1942 is unconstitutional and void to the extent of twelve cents per hundred dollars valuation, so adjudged, and rendered judgment in favor of plaintiff and against defendants for the amount of tax paid under protest.

Defendants appeal to the Supreme Court and assign error.

Thomas W. Davis, M. V. Barnhill, Jr., and Rose, Lyon & Rose for plaintiff, appellee.

Robert H. Dye for defendants, appellants.

WINBORNE, J. Concededly five cents of the seventeen cents tax levy for the year 1942 made by defendant Cumberland County for poor fund

or poor relief is valid under C. S., 1297 (8½), *R. R. v. Lenoir County*, 200 N. C., 494, 157 S. E., 610. The question is whether upon the facts of this case the remaining twelve cents of such levy is valid. The ruling of the court below in holding it to be invalid accords with our view.

The Constitution, Article V, section 6, provides in part that: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars valuation of property, except when the county property tax is levied for a special purpose and with special approval of the General Assembly, which may be done by special or general act . . ."

The General Assembly of 1923 passed an Act, now C. S., 1297 (8½), authorizing the boards of commissioners of the various counties in the State to levy annually a tax upon taxable property not to exceed five cents on the one hundred dollars valuation for the purpose of maintaining county homes for the aged and infirm, and other similar institutions —this to be in addition to any tax allowed by any special statute for the enumerated purposes, and in addition to the rate allowed by the Constitution. This Court, speaking of the provisions of this statute, and observing, in the case *R. R. v. Lenoir County, supra*, that the special approval of the General Assembly may be expressed by a special or a general act, N. C. Const., Art. V, section 6, construed the words "county aid and poor relief" to be within the scope of the special purpose indicated in this statute, and held that the purpose so indicated is a special purpose within the contemplation of the constitutional provision. And it is noted that in this statute the General Assembly has placed a limit of five cents for such levy "in addition to any tax allowed by any special statute for the above enumerated purposes," and "in addition to the rate allowed by the Constitution." In other words, in addition to the rate of fifteen cents allowed by the Constitution, Art. V, section 6, as hereinabove quoted, and to any rate allowed by any special statute, the board of commissioners may not levy for such purpose a rate in excess of five cents on the one hundred dollars valuation of property.

Appellants contend, however, that the General Assembly has provided by statutes, C. S., 1297 (28), and C. S., 1335, that the boards of commissioners of the several counties in the State are authorized to provide by taxation for the maintenance, comfort and well ordering of the poor, and that there no limit is placed upon the rate of tax the boards of commissioners may levy for this purpose. Even if it be conceded that these acts constitute special approval of the General Assembly for unlimited levy for special purpose, they are general acts and conflict with the provisions of the later act of 1923. They do not come within the meaning of the clause "in addition to any rate allowed by special statute"

which appears in the later statute. Hence, it is clear that the General Assembly intended to limit to five cents the tax levy for this purpose.

Thus, when this conclusion is applied to the facts of the present case it appears that the county has levied the full fifteen cents allowed by the Constitution for general purposes, and therefore, the levy of seventeen cents is invalid to the extent of twelve cents.

Affirmed.

STATE v. NUMA HILL.

(Filed 15 December, 1943.)

1. Courts § 2a—

Where the agreed case on appeal shows that the action originated in a municipal court and on appeal was tried in the Superior Court, the motion here of the Attorney-General to dismiss the appeal for lack of jurisdiction in the Superior Court is properly denied.

2. Indictment § 15—

In a criminal prosecution in a municipal court for the unlawful (1) barter, sale, exchange, (2) transportation, (3) purchase, receipt, possession (for the purpose of sale) of intoxicating liquors, it appearing (though not in the record) that the phrase "for the purpose of sale" was inserted by amendment of warrant in the Superior Court, after the State had rested its case, conceding that the court erred in permitting such amendment, the error is harmless, as the jury returned a general verdict of guilty as charged—and there were two other counts in the warrant.

APPEAL by defendant from *Olive, Special Judge,* at 23 March, 1943, Term, of GUILFORD.

Criminal prosecution upon warrant issued in municipal court of High Point charging that defendant did on or about 15 May, 1942, unlawfully (1) barter, sell, give away, furnish, deliver, exchange and otherwise dispose of intoxicating liquors, (2) transport and import intoxicating liquors, and (3) purchase, receive, have on hand and possess (for the purpose of sale) intoxicating liquors—"65 pints of Federal tax-paid liquor against the form of the statute," etc. It is noted that while the record does not so show, it is stated that the phrase "for purpose of sale" appearing in the third count above was inserted by amendment in Superior Court after the State had introduced all its evidence and rested its case.

Upon trial in said municipal court, defendant being found guilty, judgment was entered that he be confined in the county jail for six months to be assigned to work on the roads. The record proper on this appeal does not show any appeal entries in the municipal court. Yet in

the agreed case on appeal it is stated that "this action originated in the High Point municipal court and on appeal was tried in the Superior Court of Guilford County." In Superior Court the verdict is that "the jury finds the defendant guilty as charged." The court thereupon pronounced judgment that defendant be confined in the common jail of Guilford County for a period of eight months, to be assigned to work under the supervision of the State Highway and Public Works Commission. Defendant appeals therefrom to Supreme Court, and assigns error.

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

C. N. Cox for defendant, appellant.

WINBORNE, J. The motion of the Attorney-General to dismiss the appeal for lack of jurisdiction in the Superior Court is denied for that it appears in the agreed case on appeal that the action originated in the municipal court of High Point and on appeal was tried in Superior Court.

On the other hand, the question involved and presented on this appeal, as stated in appellant's brief, is whether the court erred in permitting the solicitor to amend the warrant as indicated in the foregoing statement of facts. If it be conceded that the court did err in this respect, the error is harmless because the jury has returned a general verdict of guilty as charged—and there are two counts in the warrant other than that charging unlawful possession of intoxicating liquors for purpose of sale. Moreover, as the charge of the court is not contained in the case on appeal, we must assume that the case was submitted to the jury on the charges laid in the warrant.

No error.

MRS. J. C. (IDA HILL) SMALL v. J. K. DORSETT.

(Filed 12 January, 1944.)

1. Fraud § 1—

To create a right of action for deceit there must be a statement by defendant (a) untrue in fact, (b) known by him to be untrue or made with reckless ignorance as to whether it be true or not, (c) made with intent that the plaintiff shall act upon it, and (d) upon which plaintiff acts to his damage.

2. Fraud § 11—

In an action to recover damages for fraud where plaintiff, a woman 65 years of age and of no business experience and of limited education,

sued defendant, a banker of large financial interests, and plaintiff's evidence tended to show that she consulted defendant, an old and intimate friend, about investing money and he invested her money in 1929 in a note secured by real estate mortgage, over four years past maturity, defendant assuring plaintiff that the note was "as good as gold," that he would look out for its collection and payment of taxes on the property and that the principal could be collected at any time, whereas the property was not worth the debt and defendant did not collect the interest regularly and allowed the realty securing the note to be sold for taxes in 1942, without notice to plaintiff, and plaintiff suffered a heavy loss from the investment, the allowance of motion for nonsuit was error.

3. Limitation of Actions §§ 2e, 3a, 4: Fraud § 11—

Where defendant, a banker of wide financial dealings, invested in a real estate mortgage the money of plaintiff, an elderly woman of no business experience and of limited education and an old friend of defendant, and defendant represented that the investment was "as good as gold" and could be collected at any time, and he also promised to collect the interest and see that taxes were paid on the land, but allowed the land to be sold for taxes, without notice to plaintiff, there is sufficient evidence on the question of fraud to go to the jury in a suit instituted within three years of the discovery of the sale for taxes. C. S., 441 (9).

4. Fraud § 5—

If a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief.

5. Fraud §§ 1, 5—

Where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute, which was designed to prevent fraud, to become an instrument to perpetrate and perpetuate it.

6. Limitation of Actions § 9—

When a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. As long as the relationship continues there is nothing to put the injured party on inquiry and he cannot be said to have failed to use due diligence in detecting the fraud.

7. Fraud §§ 6, 14—

In an action by plaintiff against defendant for fraud in that defendant induced plaintiff to invest in a note, secured by mortgage on realty of inadequate value, the fact that plaintiff marked the note and mortgage "paid in full" upon a sale of the property, in an effort to realize as much as possible out of the security, is not evidence of an estoppel, but goes only to the measure of damages.

8. Same—

After learning of the fraud of defendant, the plaintiff may ratify the contract, keep the consideration and sue defendant for the damages suffered by reason of the fraud.

SMALL *v.* DORSETT.

APPEAL by plaintiff from *Bone, J.*, at May Term, 1943, of FORSYTH.

This is a civil action instituted on 21 October, 1942, to recover damages arising out of fraud alleged to have been perpetrated by the defendant upon the plaintiff.

The plaintiff's evidence tends to show that in the year 1929 the plaintiff received $7,000.00 from a life insurance policy held by her late husband; that the plaintiff lived in Germanton, North Carolina, and the defendant lived at Spencer, North Carolina; that the plaintiff and defendant had been friends and neighbors in the years gone by in Spencer; that in June, 1929, the plaintiff wrote defendant that she had the money and wished to invest it, and asked the defendant's opinion as to depositing it in the Bank of Stokes; that the defendant replied to plaintiff's letter by offering to invest the money for her in paper "as good as gold," paper then held by the bank in Spencer in which the defendant was employed; that as a result of defendant's letter the plaintiff went to Spencer to see the defendant and in the bank in Spencer discussed the loaning of the money with the defendant, and was told by the defendant that if he was allowed to invest the money "he would put it where it was as good as gold"; that the plaintiff returned to her home in Germanton and there received a letter from the defendant under date of 11 June, 1929, enclosing check on the Wachovia Bank & Trust Company, where the plaintiff had the money deposited, made out for $6,915.00 with the statement, "I have two mortgages on good homes in Salisbury, North Carolina. Amount of both mortgages $6,915.00. . . . If you want me to handle your money for you, you can sign the enclosed check and return back to me"; that the plaintiff signed the check and mailed it to the defendant; that the defendant cashed the check and with the funds derived therefrom purchased two notes from the Bank of Spencer, one for $1,500.00 from one Meinus, and one for a balance of $5,415.00 from one John L. Nix and wife, both notes secured by real estate mortgages on real estate in Salisbury, North Carolina; that the principal and interest on the Meinus note was collected in due course, and is not involved in this litigation; that $5,415.00, the balance realized on the check, was invested in the purchase of the Nix note; that the Nix note was dated December 2, 1924, due six months after date, and was therefore more than four years past due at the time of its sale to the plaintiff; that the Nix note was originally for $6,000.00, but had been reduced by partial payment thereon, and was secured by deed of trust in which the defendant was trustee, and was held by the Bank of Spencer; that the note had been given for the balance of $6,800.00 of purchase money for a house and lot in Salisbury sold to Nix and wife by the defendant; that the drawers of the note, the Nixes, began paying $80.00 per month on the note, but such payments had dropped to $36.00 per month prior to the

time defendant invested the plaintiff's money in the note; that the depression of 1929 was at its depth and the officers of the bank, including the defendant, had been instructed to clear the bank of all real estate loans, including the Nix note, prior to the time the sale of this note was made to the plaintiff. The evidence tends further to show that notwithstanding the situation surrounding this note the defendant represented to the plaintiff that the note was one of the best investments in which to put her money, and that it "was as good as gold," and she could get her money out of it any time she wished, as the real estate securing the note would always be there unless destroyed by a cyclone or an earthquake, and, that the defendant represented to the plaintiff that Nix and his wife, the makers of the note, were financially responsible, and that the value of the real estate securing the note was greater than the amount of the note, and that real estate was an advisable investment at that time, and further that the defendant agreed to look after the property, see that the taxes and insurance were kept paid, and generally to handle the investment in an efficient manner, all of which he neglected and failed to do; that from 1929 until the property was sold for taxes in 1942, the defendant continued to represent to the plaintiff that the investment was a good and safe one, and on one occasion when the Nixes failed to make any payments the defendant told plaintiff that this was due to the fact that the Nixes had been sick, which statement was false and known by the defendant to have been false; that on one occasion when plaintiff asked for her money the defendant advised her that the Nixes could obtain an HOLC loan for the major portion of the amount due on the note and pay to her such amount, and execute to her a second mortgage for the balance due her, which second mortgage would be perfectly good, and that this representation was false; that about 1933 the Nixes informed the defendant they could not pay for the property, and the defendant insisted that they stay on in it and pay what they could as rent, and the Nixes stayed on under these circumstances for nine years, and the defendant never communicated this circumstance to the plaintiff; also during this period from 1929 to 1942, at various times the Nixes made certain payments on the note to the defendant which the defendant failed to account for to the plaintiff, the then owner of the note, and on one occasion when the plaintiff made urgent demands for payment of the note, in part or in whole, the defendant paid to the plaintiff the sum of $388.00, which he had withheld from payments made to him by the Nixes, to make it appear that they had paid this total amount on the note at one time, thereby giving the appearance of ability of the Nixes to make such payment upon demand, which ability they never possessed; that such actions on the part of the defendant in withholding many smaller payments and then paying at one time a larger payment

and representing that such larger sum had just been paid upon demand were taken to allay any suspicion on the part of the plaintiff and to forestall any investigation that the plaintiff might otherwise have made; that no repairs were made on the house on the real estate securing the Nix note, and the termites almost destroyed it; that no taxes were paid on the house and lot after 1931, and in 1937 suits were instituted by Rowan County and the City of Salisbury to sell the property on account of nonpayment of taxes, and, although summons in the tax suits were served on the defendant as trustee in the deed of trust on the real estate, he did not advise the plaintiff of such actions until after the property was sold for taxes in 1942.

The evidence further tends to show that in April, 1942, the plaintiff learned for the first time the true facts with respect to the representations made to her by the defendant, and proceeded to redeem the property from the purchaser at the tax sale and to pay off the tax judgments; that the plaintiff realized $1,998.39 from the sale of the house and lot, net to her; that there was due on the principal of the note and the accrued interest at that time the sum of $6,680.82; that the loss to the plaintiff was $4,382.43, and this suit was instituted by her for that amount.

The evidence tends not only to show that the plaintiff and defendant were erstwhile neighbors in Spencer, but they were friends of many years standing, that the plaintiff was a woman 65 years of age with no business experience, and very limited education, while the defendant was a man of long business experience, being a banker, investor and real estate dealer for many years.

It is the contention of the defendant that he did not make false and fraudulent representations to the plaintiff; that even if it should be found to the contrary, the plaintiff had made discovery of all the facts and circumstances alleged as constituting the fraud, more than three years next preceding the institution of this action, and he pleads the three year statute of limitations (C. S., 441 [9]) in bar of the plaintiff's recovery; and that the plaintiff has ratified the acts of the defendant and is thereby estopped to prosecute this action.

When the plaintiff had introduced her evidence and rested her case, the defendant lodged a motion for judgment as in case of nonsuit (C. S., 567), which motion was allowed, and from judgment predicated on such ruling the plaintiff appealed, assigning errors.

Fred S. Hutchins and H. Bryce Parker for plaintiff, appellant.

G. T. Carswell, Joe W. Ervin, W. P. Sandridge, and J. Erle McMichael for defendant, appellee.

SCHENCK, J. The first question which arises on this appeal is: was there sufficient evidence of fraud to survive the demurrer thereto? The answer to this question is in the affirmative.

The evidence is to the effect that the defendant, a banker of experience and a friend of the plaintiff, a woman of no business experience, in response to her request of him for advice as to depositing her money in a certain bank replied that he could invest her money for her so she would realize 6% therefor, that he could and would invest it so it would be "as good as gold," that he would invest it in notes held by the bank and secured by mortgages on real estate worth much more than the amount of the notes, and that plaintiff would receive her interest regularly and could collect the principal at any time she might desire; as a result of these representations the plaintiff placed her money in the hands of the defendant for investment and defendant invested $5,415.00 in a note executed by one John L. Nix and wife, dated 2 December, 1924, due in six months, which was more than four years past due, which investment was not good as gold, and the real estate securing the note was of less value than the amount of the note, and the plaintiff was not paid her interest regularly and was unable to collect the principal when she tried so to do. The evidence is further to the effect that at the time of the sale of this note to the plaintiff in 1929 the national depression was at its full depth, that real estate was of doubtful and uncertain value, and not advisable for investments.

The evidence tends to show further that the plaintiff relied upon the representations made to her by the defendant, and acted upon them by allowing the investment to be made upon the security recommended by the defendant, and that she suffered by such reliance in that she lost heavily upon such investment.

The specific representations made by the defendant to the plaintiff which the evidence tends to show were false, and known by the defendant to be false, were that the investment would be made in securities "as good as gold," that the Nixes, makers of the note, were financially responsible, that the defendant would see to the payment of the taxes upon the property securing the note, that the Nixes could and would secure an HOLC loan to pay plaintiff the larger portion of the note and give her a second mortgage for the balance due thereon; that the property securing the note was of greater value than the amount of the note.

Stacy, C. J., in *Stone v. Milling Co.*, 192 N. C., 585, 135 S. E., 449, writes: "The general conditions under which factual misrepresentations may be made the basis of an action for deceit are stated in Pollock on Torts (12 Ed.), 283, 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 fitted 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.'

"This formula has been approved by us in a number of decisions: *Corley Co. v. Griggs, ante,* 171; *Simpson v. Tobacco Growers,* 190 N. C., 603; *Hollingsworth v. Supreme Council,* 175 N. C., p. 635; *Whitehurst v. Ins. Co.,* 149 N. C., 273."

C. S., 441 (9), reads: "For relief on the ground of fraud . . .; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. . . ." Therefore, the second question which arises is: was there sufficient evidence that the plaintiff did not make discovery of the facts constituting the fraud of the defendant until the three years next preceding the institution of this suit on 21 October, 1942, to be submitted to the jury on an issue relating to the three year statute of limitations pleaded by the defendant? The answer is in the affirmative.

In the first place, the evidence discloses that the relationship, both business and social, existing between the plaintiff and defendant, were such that the plaintiff was justified in having implicit confidence in the defendant—she was a woman 65 years of age without business experience; he was a younger man with wide business experience; they had been close associates, neighbors and friends in the years past. Therefore, when she made inquiries of the defendant as to the collection of the interest or a portion of the principal of the note, and was assured by the defendant that the investment was safe, and the security ample, she was thrown off her guard and led away from the discovery of the actual facts as they existed until she was informed in 1942 of the sale of the property under tax suits instituted in 1937. The evidence tends to show that she was lulled to sleep by the blandishments of the defendant, in whom she placed absolute trust.

"The parties were not at arm's length in reference to these representations and did not have equal opportunities of informing themselves." *May v. Loomis,* 140 N. C., 350 (356), 52 S. E., 728. "The law does not require a prudent man to deal with everyone as a rascal, and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract." *Griffin v. Lumber Co.,* 140 N. C., 514 (518), 53 S. E., 307.

Especially is this so when there exists a fiduciary relationship between the parties. *Abbitt v. Gregory et al.*, 201 N. C., 577, 160 S. E., 896; *Bolich v. Ins. Co.*, 206 N. C., 144, 173 S. E., 320.

The contention advanced by the defendant that the statements made by him to the plaintiff were mere promissory statements and that the representations so made were mere opinions expressed and were therefore not sufficient upon which to bottom an action in fraud is untenable. Bispham's Equity (9 Ed.), sec. 211, is quoted with approval in *McNair v. Finance Co.*, 191 N. C., 710 (717), 133 S. E., 85, as follows: "But if a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief." There is evidence in the record from which the jury might well have inferred and found that the defendant never intended to perform his promise to see that the taxes on the real estate securing the note sold to the plaintiff would be paid, and that the necessary repairs would be made thereon, and that the loan would be handled in an efficient and business-like manner; and that such statements were made at the time of negotiating the loan and continued throughout the years from 1929 to 1942 to prevent any personal investigation by the plaintiff of the true status of the loan and its security.

It is generally held that where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. In *Mask v. Tiller*, 89 N. C., 423, it is written: "It (statute of limitations) ought not, therefore, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation." In *Unitype Co. v. Ashcraft*, 155 N. C., 63, 71 S. E., 61, it is said: ". . . though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury."

In this case the plaintiff testified that she did not actually learn of the deceit of the defendant until 26 March, 1942, when she was first informed of the tax sales. She had constituted the defendant her agent to invest her money and relied implicitly upon him. The law applicable is well stated in 34 Amer. Jur., Limitation of Actions, par. 168, p. 135, as follows: "Where a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. In such a case, so long as the relationship continues unrepudiated, there is nothing to put the injured party on inquiry, and he cannot be said to

have failed to use due diligence in detecting the fraud. . . . Similarly, an agent, sued for fraud, cannot set up that the principal should have suspected him."

It is apparent from the record that there is some evidence, more than a scintilla, that the plaintiff made no discovery of the facts constituting the fraud alleged prior to the three year period next preceding the institution of this action.

The third question here presented arises from the allegation of the defendant that the plaintiff has ratified the acts of the defendant and is thereby estopped to prosecute this action. This allegation, the burden of proof of which rests on the defendant, is not supported by such evidence as to justify the court in holding as a matter of law that such estoppel existed, and, in effect, directing a verdict in favor of the defendant.

It is the contention of the defendant that since the evidence of the plaintiff tended to show that the plaintiff, after she discovered the fraud of the defendant in 1942, marked the note and deed of trust securing it "fully paid and satisfied" when the Nixes sold the real estate, the plaintiff released the security for the note and released the Nixes from further personal liability, and that such action on the part of the plaintiff was in derogation of the defendant's interest.

The action of the plaintiff in marking the note and deed of trust paid and satisfied was taken so as to clear the title and permit the real estate to be sold and thereby enable the plaintiff to realize what she could out of the security. One of the remedies open to a person who has been defrauded is to ratify the contract and keep the consideration received and sue for damages occasioned by the fraud, *Fields v. Brown,* 160 N. C., 295, 76 S. E., 8; *Buick Co. v. Rhodes,* 215 N. C., 595, 2 S. E. (2d), 699. This remedy the evidence tends to show the plaintiff sought in this case. If the real estate was sold for less than its value or if the defendant was injured by the release of the makers of the note and deed of trust, such damage as he suffered therefrom should be adjudicated upon an issue relating to the measure of damage. Certainly the evidence in the instant case, all of which was introduced by the plaintiff, does not justify the court holding as a matter of law that the estoppel plead by the defendant has been established. The burden of proving the estoppel was upon the defendant. The plaintiff, after learning of the fraud of the defendant, could ratify the contract, keep what she received and institute suit against the defendant for such damage as she suffered by reason of such fraud. Her ratification of the contract constituted no bar to her claim for damages on account of the fraud perpetrated upon her, but is in substantiation thereof. *Buick Co. v. Rhodes, supra.* Thus the plaintiff could give away the Nix note, sell it for whatever she could get for it, or do whatsoever she pleased with it, since it was hers, so likewise she

could release the security therefor, and the only complaint that the defendant could be heard to make was that the note, with its security, was worth something and that the plaintiff gave away this value or released it for less than its worth, and thereby increased the liability of the defendant. This question arises, however, only on the issue of damages—and not estoppel.

The judgment of the Superior Court is

Reversed.

JOHN ROD COGGINS, JR., BY JOHN ROD COGGINS, SR., HIS NEXT FRIEND, AND MARSHALL STEWART, JR., BY MARSHALL STEWART, SR., HIS NEXT FRIEND, V. THE BOARD OF EDUCATION OF THE CITY OF DURHAM, A CORPORATION.

(Filed 12 January, 1944.)

1. Schools §§ 3, 6—

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to the pertinent constitutional provisions as to uniformity, sec. 2, Art. IX, and length of term, sec. 3, Art. IX.

2. Schools §§ 6, 7, 8, 27—

The Legislature may delegate to the local school administrative units the power to make such rules and regulations as may be deemed necessary or expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions.

3. Schools §§ 7, 8—

It is generally held that local school authorities have the inherent power to make rules and regulations for the discipline, government, and management of the schools and pupils within their district. With us there is ample statutory authority. G. S., ch. 115.

4. Same—

The findings and conclusions of the local school board, fixing rules and regulations for the government of the schools, are conclusive, unless the board acts corruptly, in bad faith, or in clear abuse of its powers. The court will interfere only when necessary to prevent such action.

5. Same: Constitutional Law § 12—

Membership in secret societies is subject to regulation by school boards and in adopting rules requiring every student to sign a pledge that he is not a member of such organization, will not become a member or support any such society, the penalty for refusal to sign being a denial of the right to participate in extracurricular activities, a school board acts within its authority, where the rules make no attempt to deny those not

signing any instruction afforded by class work or by the required curriculum of the school.

APPEAL by plaintiffs from *Grady, Emergency Judge*, at October Term, 1943, of DURHAM. Affirmed.

Civil action to restrain the enforcement of a rule or resolution adopted by the defendant board relating to conduct of pupils in the public schools of the City of Durham, heard on demurrer.

The action was instituted by plaintiff John Rod Coggins, Jr., and complaint was filed in his behalf. Thereafter, plaintiff Marshall Stewart, Jr., appeared and had himself made party plaintiff, but he filed no pleadings.

The facts as alleged in the complaint are:

The defendant is the governing board of the City of Durham School District. The original plaintiff is a resident of said school district, is a student duly enrolled in the Senior High School under the jurisdiction of the defendant, and intends to enroll and continue his studies during the school year 1943-1944.

On 6 April, 1943, the defendant board adopted a resolution relating to membership of pupils in secret societies and fraternities, to become effective at the opening of the Fall Term, 1943. The resolution, together with a foreword, a copy of the required pledge, and "note to parents," was mailed to the parents residing within said district, including the parents of the plaintiff, as follows:

"FOREWORD

"(By order of the Board of Education of the City of Durham to become effective with the opening of the school year 1943-1944)

"In May, 1941 the Board of Education published resolutions making known its disapproval of membership among high school pupils in fraternities and sororities and appealing for co-operation of both pupils and parents. This action was taken after thoughtful consideration, and it was hoped and believed that all parties interested in the welfare of the school would accede to the request of the Board and that in a reasonable time the problem would be solved. Unfortunately no such result has been attained. On the contrary, the situation has become worse rather than better and as a result many complaints have been heard.

"In consequence of its own investigation and by reason of the urgent requests of large numbers of parents and public-spirited citizens, the Board is now convinced that more effective measures must be adopted in an effort to eradicate from our schools influences that are harmful to the existence and promotion of real democratic ideals and proper social behavior. The Board cannot feel that it has been true to its responsibilities unless it endeavors to guard in every reasonable and legitimate

way against false conceptions of superiority and the setting up of artificial social distinctions.

"The Board has, therefore, worked out a plan designed to eliminate school pupil membership in secret organizations. It is believed that this plan when understood and made effective will have the full approval of the great majority of parents and pupils and will bring about a much more desirable condition in the Junior and Senior High Schools. Under this plan new regulations governing participation in school activities will become operative at the beginning of the school year 1943-1944.

"STUDENT ACTIVITY PLEDGE:

(Here appears a declaration that the signor is not a member or "pledge" of any fraternity or society not approved by the school board; that he will not join any such society or attend the meetings of same or any function sponsored by it; and that he will not contribute funds to or participate in any of the activities of any such organization.)

"NOTE TO PARENTS:

"Failure to sign this pledge will prevent your child from taking part in school activities. A suggestive list of activities (and the list of activities is not at all exhaustive) from which members of fraternities or sororities, or unapproved clubs, and students who fail to sign this pledge are barred, is given on the reverse side of this form.

"Holding any office of Student Body, Homeroom Class or Club.

"Taking part in all intra-mural and inter-scholastic activities or contests, both Athletic and Literary.

"Representing the school or class or any organization in any capacity.

"Serving as Editors or Managers of any school publications, or writing articles therefor.

"Taking part in the Senior play or other dramatic activities.

"Participating in Assembly or Homeroom programs.

"Serving as Cafeteria or Library helper.

"Attending High School dances or socials.

"Serving as Monitors in any capacity.

"Becoming a member of any school-sponsored club, society, or organization.

"Representing the school in Student Government activities.

"I. The specific requirements for a school club or organization to be approved by the Principal are, as follows:

(There is here listed requirements, 8 in number, not material to the decision of this case.)

"II. That a uniform procedure be followed in all schools, the outstanding points of which shall be as follows:

"1. Principals shall explain fully to their faculty members the Board's policy toward secret organizations and enlist their active co-operation in combatting them. At the beginning of the first semester of the session 1943-1944, pledge forms shall be distributed by the Principal to those in charge of homeroom groups in Junior and Senior High Schools who will give the pupils an opportunity to sign the pledge, and shall report to the Principal those who fail to sign. New students enrolling in the schools will be given an opportunity to sign pledges at the time they enter.

"2. Pupils who do not sign the pledge shall be interviewed by the Principal to ascertain why they failed to sign, and to make sure that such pupils understand the regulations of the Board of Education governing eligibility of pupils for participation in school activities, as listed. A list of all pupils signing the pledge and therefore eligible for participation in all school activities shall be furnished to all teachers in the school. Pupils not on this list shall not be eligible to participate in any of the enumerated school activities.

"3. The parents of pupils who refuse to sign shall be interviewed by the Principal with a view to securing their co-operation.

"III. Principals and teachers shall exercise all diligence to see that pupils loyally observe their pledges. If a pupil has deliberately violated the pledge, or misrepresented his status in signing the pledge, he shall be disciplined by suspension from school. An agreement, satisfactory to the school authorities, as to the pupil's future relation with any secret organization must be reached before he may return to school."

The plaintiff is a member of Phi Kappa Delta fraternity, which fraternity comes within the condemnation of the resolution adopted. At the time of the institution of this action plaintiff had not signed the required pledge, and is reluctant to do so.

It is further alleged that the defendant threatens to deprive plaintiff of the right to become a member of the high school football team and to deny him all other extracurricular privileges and advantages guaranteed by the public school laws of the State unless he signs said pledge.

Temporary restraining order was issued. When the rule to show cause came on to be heard the defendant demurred "for that the complaint does not state facts sufficient to constitute a cause of action." The court below entered judgment sustaining the demurrer and dismissing the action. Plaintiffs excepted and appealed.

S. C. Chambers for plaintiffs, appellants.
Fuller, Reade, Umstead & Fuller for defendant, appellee.

BARNHILL, J. The State provides free educational facilities for the children of the State, and each child has a right to attend the schools of

his district. But this is not an absolute right. Schools to be effective and fulfill the purposes for which they are intended must be operated in an orderly manner. Machinery to that end must be provided. Reasonable rules and regulations must be adopted. The right to attend school and claim the benefits afforded by the public school system is the right to attend subject to all lawful rules and regulations prescribed for the government thereof. This is all the plaintiff may claim. 24 R. C. L., 621.

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity, sec. 2, Art. IX, and length of term, sec. 3, Art. IX. *Wilkinson v. Board of Education,* 199 N. C., 669, 155 S. E., 562. It may delegate to local administrative units the power to make such rules and regulations as may be deemed necessary or expedient, and when so delegated it is peculiarly within the province of the adminisrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions. 24 R. C. L., 576.

It is generally held that local school authorities have the inherent power to make rules and regulations for the discipline, government, and management of the schools and pupils within their district. 24 R. C. L., 574. With us there is ample statutory authority.

The school law of the State was revised, codified, and re-enacted in 1923. Ch. 136, Public Laws 1923. This Act, as amended, provides the machinery for the operation of our public school system. See ch. 394, Public Laws 1937, and ch. 358, Public Laws 1939. See also G. S., ch. 115, for recodification.

Each County Board of Education is vested with authority to fix and determine the method of conducting the public schools in its county so as to furnish the most advantageous method of education available to the children attending its public schools. Sec. 31. It may: (1) fix the time of opening and closing schools, sec. 32; (2) determine the length of the school day, sec. 33; (3) enforce the compulsory school law, sec. 34; (4) provide for the teaching of certain subjects in elementary schools, sec. 39; (5) determine the necessity for kindergartens, sec. 40; (6) provide for a training school for each race, sec. 41; (7) make rules and regulations not in conflict with State law for the guidance of the County Superintendent as the enforcement officer, sec. 47; (8) make all just and needful rules and regulations governing the conduct of teachers, principals, and supervisors, sec. 53; (9) provide for the training of teachers, sec. 54. In addition it is given general control and supervision over all matters pertaining to the public schools within its county, sec. 30, and

all powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other officials, are conferred and imposed upon the county board of education. Sec. 29.

What, then, is the present status and authority of the defendant board?

Prior to 1933 it derived its authority from the Act creating the town of Durham public school district, a special charter district, ch. 86, Public Laws 1887. But in 1933 the Legislature adopted a new system of local unit organization of the public schools of the State. Ch. 562, Public Laws 1933. It abolished all special tax and special charter districts and directed the State School Commission to classify each county as an administrative unit, to be divided into convenient school districts. It was further provided that any newly constituted district having a school population of 1,000 or more for the school year 1932-33 in which a special charter school was then being operated should be classified as a city administrative unit, to be dealt with by the State school authorities in all matters of school administration as a county administrative unit. Sec. 4. Admittedly, this provision included the "Durham public school district," which has since operated as a city administrative unit.

The trustees of a special charter district and their successors, by whatever name known, are retained as the governing body of such district. Sec. 4. (See also sec. 5, ch. 455, Public Laws 1935, sec. 5, ch. 394, Public Laws 1937, and sec. 5, ch. 358, Public Laws 1939.) And the general administration and supervision of their district is committed to their care. G. S., 115-8.

Thus the City of Durham unit, for the purposes of administration, is a county unit, and its trustees are vested with all the power and authority within their district conferred upon the county boards of education. This includes the power to make, promulgate, and enforce such rules and regulations as they, in their discretion, deem reasonably necessary for the good management of the schools and the discipline of its pupils. Only thus may they fully exercise the "general control and supervision over all matters pertaining to" the schools committed to their care.

After investigation and thoughtful consideration the defendant board concluded that membership in secret societies known as Greek letter fraternities and sororities was detrimental to the best interests of the schools. They first sought to remedy the condition through the voluntary co-operation of parents. Failing in this and being convinced that "more effective measures" were essential to eradicate from the schools "influences that are harmful to the existence and promotion of real democratic ideals and proper social behavior" and to guard against "false conceptions of superiority and the setting up of artificial social distinctions," it adopted the rule set out in the complaint as Exhibit I.

The rule makes no attempt to deny plaintiff any instruction afforded by class work or by the required curriculum of the school. Nor is he denied the right to participate in extracurricular activities. It is merely made optional with him to determine whether, against the known wishes of the school authorities, he prefers to continue his membership in a secret society and thereby forfeit participation in the privileges afforded by the extracurricular activities of the schools, which, by compliance with the rule, would be available to him. He has now arrived at one of the crossroads of life. He must decide which course he will take, and the choice is his.

Ordinarily, complaints of disaffected pupils of the public schools against rules and regulations promulgated by school boards for the government of the schools raise questions essentially political in nature, and the remedy, if any, is at the ballot box. But the unreasonableness of such a rule is a judicial question, and the courts have the right of review. They will not hesitate to intervene in proper cases. In doing so, however, it will be kept in mind that the local board is the final authority so long as it acts in good faith and refrains from adopting regulations which are clearly arbitrary or unreasonable. It will be remembered also that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship and that the school is an appropriate place to teach that lesson.

If the opinion of court or jury is to be substituted for the judgment and discretion of the board at the will of a disaffected pupil, the government of our schools will be seriously impaired, and the position of school boards in dealing with such cases will be most precarious. The Court, therefore, will not consider whether such rules and regulations are wise or expedient. Nor will it interfere with the exercise of the sound discretion of school trustees in matters confided by law to their discretion.

The findings and conclusion of the local board are conclusive unless it acts corruptly, in bad faith, or in clear abuse of its powers. *Finch v. Fractional School District,* 196 N. W., 532; *State ex rel. Dresser v. District Board,* 135 Wisc., 619, 116 N. W., 232; *Tanton v. McKenney,* 33 A. L. R., 1175. The Court will intervene only when necessary to prevent such action. *Pue v. Hood, Comr. of Banks,* 222 N. C., 310; *Belk's Department Store, Inc., v. Guilford County,* 222 N. C., 441; 47 Am. Jur., 325, 422; 24 R. C. L., 575; *McLeod v. State ex rel. Miles,* 63 A. L. R., 1161; *Pugsley v. Sellmyer,* 30 A. L. R., 1212; *Tanton v. McKenney, supra; Christian v. Jones,* 32 A. L. R., 1340; *Wilson v. Board of Education,* 233 Ill., 464, 15 L. R. A. (N.S.), 1136, 84 N. E., 697, 13 Ann. Cas., 330.

Membership in secret societies is subject to regulation by the board, and in adopting the rule here challenged the defendant acted within the

authority vested in it by law. 24 R. C. L., 629, 56 C. J., sec. 1097 (d), p. 885, 47 Am. Jur., 423; *Wayland v. Board of School Directors,* 43 Wash., 441, 7 L. R. A. (N. S.), 352, 86 Pac., 642; *Wilson v. Board of Education, supra; Favorite v. Board of Education,* 235 Ill., 314, 85 N. E., 402; *University of Michigan v. Waugh,* 105 Miss., 623, L. R. A. (N. S.), 1915-D, 588; *Lee v. Hoffman,* 166 N. W., 565, L. R. A., 1918-C, 933. See also *Graham v. Jones,* 32 A. L. R., 1340; *Pugsley v. Sellmyer, supra; Tanton v. McKenney, supra; McLeod v. State ex rel. Miles, supra; Antell v. Stokes,* 191 N. E., 407 (Mass.); Anno. 134 A. L. R., 1274. It is not unreasonable, and it does not constitute an unlawful discrimination against plaintiff.

Nor does it deprive plaintiff of any right guaranteed by the Fourteenth Amendment to the Federal Constitution. *Waugh v. Board of Trustees,* 237 U. S., 589, 59 L. Ed., 1131.

Plaintiff relies in part on sec. 240, ch. 136, Public Laws 1923. Our conclusion here is not in conflict with the provisions of that section. Persons of school age are entitled to all the privileges and advantages of the public schools of the district in which they reside. Section 240 defines who are "residents" within the meaning of this provision.

The complaint fails to state a cause of action. Certainly no irreparable damage is threatened requiring injunctive relief. It follows that the judgment sustaining the demurrer must be

Affirmed.

STATE v. WILLIAM ELLERBE, ALIAS JAMES INGRAM.

(Filed 12 January, 1944.)

1. Homicide § 11—

One may kill in defense of himself or his family when it is not actually necessary to prevent death or great bodily harm, if he believes it necessary and has reasonable ground for such belief. The reasonableness of the belief or apprehension of defendant must be judged by the jury, from the facts and circumstances as they appeared to defendant at the time of the killing.

2. Same—

In an assault without felonious intent, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow; while, in an assault with felonious intent, the person assaulted is under no obligation to fly, but may stand his ground and kill his adversary, if need be.

3. Criminal Law § 53a—

An erroneous instruction upon a material aspect of a criminal case is not cured by the fact that in other portions of the charge the law is cor-

rectly stated. It is impossible to determine on which of the instructions the jury acted.

4. Homicide § 27f—

Upon a plea of self-defense in a homicide case, the court's instruction to the jury, that the defendant must show that he was free from blame and that the assault or threatened assault was made upon him with a felonious purpose and that he took the life of the person who threatened to assault him, or the person that he had reasonable ground to believe was threatening to assault him, only when it was necessary to save himself from death or great bodily harm, is error.

BARNHILL, J., dissenting.

APPEAL by defendant from *Armstrong, J.*, at April Term, 1943, of RICHMOND.

Criminal prosecution tried upon indictment charging the defendant with the murder of Otis Leak.

Verdict: Guilty of manslaughter. Judgment: Imprisonment in the State's Prison for a term of not less than seven nor more than fifteen years.

The defendant appeals, assigning errors.

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

Jones & Jones for defendant.

DENNY, J. This defendant was at the home of Martha Josephs on the night of 6 January, 1933. Otis Leak had been there and had left to get someone to take him and the defendant on a trip. Leak requested the defendant to remain there until he returned. While the defendant was waiting for Leak's return, Jesse Rogers came up "and appeared like he was drunk." A quarrel ensued and the defendant testified that Rogers said when he left, "That is all right, I will get you, I am going off and will come back and get you." In this he is corroborated by the State's evidence. The defendant left and hunted for Otis Leak but failed to find him. He thereupon returned to the home of Martha Josephs, where he had slept the night before. Martha's house contained two front rooms and a back-shed, which was used as a kitchen. Just prior to the shooting, the defendant and Martha were sitting by the fire in the front room of the house, which room adjoined the kitchen. This room and the kitchen were connected by a "middle door." The defendant was sitting with his back to this door. Martha heard someone in the kitchen and said, "Will, there is somebody in the room." Defendant testified: "I got up and took my pistol out of my pocket, I was right against the door and I could hear him scratching against the door trying to find the knob in

the dark, and Martha spoke and said, 'Who is that?' and nobody said nothing, and I hollered loud enough to hear me might near a block because I was scared and I said, 'Who in the hell is that?' and wouldn't nobody say nothing whatever, and I said 'Whomsoever you is go outside, you come in here and I am going to shoot you,' and about that time he found the knob and began pulling the door open and I reckon he must have cracked it that much (witness measures with hands). And that is when I shot twice through the door. I thought it was Jesse Rogers at the door because he wouldn't answer and I shot because I was scared, I was afraid I would get shot; I was looking for Jesse to come back and kill me as he said he would; I was afraid of Jesse and lots of people in town was; his character was bad for being violent and dangerous."

This evidence appears to be sufficient to entitle the defendant to have his plea of self-defense considered by the jury. *S. v. Kimbrell*, 151 N. C., 702, 66 S. E., 614; *S. v. Johnson*, 166 N. C., 392, 81 S. E., 941. Therefore, it becomes necessary for us to consider the defendant's third exception, which was entered to the following portion of his Honor's charge: "Gentlemen of the jury, the Court instructs you that where a person is without fault and a murderous assault is made upon him, that is, I mean with intent to kill, he is not required to retreat but he may stand his ground and if he kills his assailant and it is necessary to do so in order to save his own life or to protect himself from great bodily harm, it would be excusable homicide and this would be true whether the necessity for the killing be either real or apparent. This is, however, the Court instructs you, to be determined by the jury from the facts as they find them to be from the evidence as they reasonably appeared to the defendant at the time of the alleged killing, and in order, the Court instructs you, to have the benefit of this principle of law the defendant must show that he was free from blame in the matter and that the assault or threatened assault was made upon him with a felonious purpose, and that he took the life of the person who was threatening to assault him or the person that he has reasonable ground to believe was threatening to assault him, only when it was necessary to save himself from death or from great bodily harm."

The exception is well taken and must be sustained. It is apparent the instruction complained of was the result of an inadvertence on the part of the able trial judge. However, after properly charging the law on the plea of self-defense, the court instructed the jury that in order to have the benefit of this principle of law, "the defendant must show that he was free from blame in the matter, and that the assault or threatened assault was made upon him with a felonious purpose, and that he took the life of the person who was threatening to assault him, or the person that he has reasonable ground to believe was threatening to assault him,

only when it was necessary to save himself from death or great bodily harm."

We think the instruction, in the light of the facts and circumstances set forth in this record, is objectionable in two respects. In the first place, the defendant cannot show that the assault or threatened assault was made upon him with a felonious purpose. At most, he can only show that he believed a felonious assault was about to be made upon him. In the second place, he cannot show that it was necessary to kill his supposed assailant to save himself from death or great bodily harm, for he killed Otis Leak, his friend, under the misapprehension that Leak was Jesse Rogers. Therefore, in no event can he show more than that he took the life of the person that he had reasonable ground to believe was about to commit a felonious assault upon him, when it appeared to him to be necessary to save himself from death or great bodily harm.

One may kill in defense of himself when it is not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for such belief. *S. v. Barrett,* 132 N. C., 1005, 43 S. E., 832, in which case the Court said: "There is a marked difference between an actual necessity for killing and that reasonable apprehension of losing life or receiving great bodily harm, which is all that the law requires of the prisoner in order to excuse the killing of his adversary, and it was just this difference that may have caused the jury to decide against the prisoner upon this most important issue in the case."

The distinction referred to above constitutes the crucial point involved on this appeal. *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Holland,* 193 N. C., 713, 138 S. E., 8; *S. v. Bush,* 184 N. C., 778, 114 S. E., 831; *S. v. Johnson,* 184 N. C., 637, 113 S. E., 617.

In the case of *S. v. Nash,* 88 N. C., 618, the defendant "proposed to prove that before he fired, his child, who was sleeping near a window in the house, through which the noise of the bells and horns and firing was heard and the flash of the firing seen, rose up and ran to the witness with blood on her face (caused as he afterwards learned, but did not then know, by her running against the end of a table), and under the impulse of the moment, believing that she had been shot, he got his gun and went to the door, and, seeing the flash of pistols fired as he supposed by the retreating crowd, fired his gun at and into the crowd." The trial court excluded the evidence and the defendant excepted and appealed. In sustaining the exception, this Court said: "We know this has been a much mooted question, but upon an investigation of the authorities, our conclusion is, that a reasonable belief that a felony is in the act of being committed on one, will excuse the killing of the supposed assailant, though no felony was in fact intended. . . . But it may be objected that the defendant acted too rashly; before he resorted to the use of his gun, he should have taken the precaution to ascertain the fact whether his

child had been actually shot. But the doctrine is inconsistent with the principle we have announced. If the defendant had reason to believe and did believe in the danger, he had the right to act as though the danger actually existed, and was imminent. Taking, then, the fact to be, that the trespassers had fired into defendant's house and shot his child, and the firing continued, there was no time for delay. The occasion required prompt action. The next shot might strike him or some other member of his family. Under these circumstances, the law would justify the defendant in firing upon his assailants in defense of himself and his family. But, as we have said, the grounds of belief must be reasonable. The defendant must judge, at the time, of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief."

The reasonableness of the belief or apprehension of the defendant must be judged by the facts and circumstances as they appeared to him at the time of the killing. *S. v. Blackwell,* 162 N. C., 683, 78 S. E., 316, but the jury and not the defendant is to determine the reasonableness of the belief or apprehension upon which he acted, *S. v. Nash, supra; S. v. Kimbrell, supra; S. v. Gray,* 162 N. C., 608, 77 S. E., 833; *S. v. Johnson, supra; S. v. Holland, supra; S. v. Glenn,* 198 N. C., 79, 130 S. E., 663; *S. v. Terrell, supra; S. v. Robinson,* 213 N. C., 273, 195 S. E., 824; *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530; *S. v. Anderson,* 222 N. C., 148, 22 S. E. (2d), 271.

Quoting further from *S. v. Barrett, supra,* the Court said: "In some of the early cases expressions may be found which would seem to indicate that a case of self-defense is not made out unless the defendant can satisfy the jury that he killed the deceased from necessity, but we think the most humane doctrine and the one which commands itself to us as being more in accordance with the enlightened principles of the law is to be found in the more recent decisions of this Court. It is better to hold, as we believe, that the defendant's conduct must be judged by the facts and circumstances as they appeared to him at the time he committed the act, and it should be ascertained by the jury, under the evidence and proper instructions of the court, whether he had a reasonable apprehension that he was about to lose his life or to receive enormous bodily harm. The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon, but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and take his life or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation and to defend himself against what

he supposed to be a threatened attack, even though it may turn out afterwards that he was mistaken, provided always as we have said, the jury find that his apprehension was a reasonable one and that he acted with ordinary firmness."

It is well to keep in mind the distinction between assaults with felonious intent and assaults without such intent when considering the plea of self-defense, as pointed out in the case of *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663, where *Stacy, C. J.,* speaking for the Court, said: "There is a distinction made by the text-writers on criminal law, which seems to be reasonable and supported by authority, between assaults with felonious intent and assaults without such intent. 'In the latter, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow. In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be.' 2 Bishop's Criminal Law, sec. 6333, and cases cited." *S. v. Elmore,* 212 N. C., 531, 193 S. E., 713; *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *S. v. Bryant, supra; S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526.

It is contended on behalf of the State that, taking the charge contextually, there is no prejudicial error. We cannot so hold. An erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated. This is especially applicable in the instant case, because the jury was instructed that, in order for the defendant to have the benefit of the principle of law, that is of self-defense, he must show certain things, some of which he was not required to show under the facts and circumstances disclosed on this record, in order to have the jury consider his evidence on the plea of self-defense. It is impossible to determine on which of the instructions the jury acted. *S. v. Isley,* 221 N. C., 213, 19 S. E. (2d), 875; *S. v. Floyd,* 220 N. C., 530, 17 S. E. (2d), 658; *S. v. Starnes,* 220 N. C., 384, 17 S. E. (2d), 346; *S. v. Mosley, supra; S. v. Johnson* (184 N. C., 637), *supra.*

We deem it unnecessary to discuss the other exceptions.

For the reasons stated, the defendant is entitled to a

New trial.

BARNHILL, J., dissenting: In my opinion, when the charge is considered contextually, no harmful error appears.

The court repeatedly charged that the necessity upon which the right of self-defense rests may be either real or apparent. It is so stated in the excerpt quoted in the majority opinion.

Likewise, it charged that "where a person thinks" he is about to be assaulted and he has reasonable grounds to believe that he is about to suffer death or great bodily harm he has the right to defend himself, even to the extent of taking human life. This was repeated more than once.

But I need not elaborate upon this phase of the case, for, in my opinion, there is a stronger reason why we should conclude that the error in the quoted excerpt is harmless.

There is no evidence of a felonious assault or threatened assault. At most defendant can only show that he believed a felonious assault was about to be made upon him. So concludes the majority opinion.

There is not a particle of evidence which should cause a person, in the exercise of ordinary firmness, to apprehend that it was more dangerous to retreat than to stand his ground and repel the anticipated attack. The defendant merely pyramided his fears—none of which were well founded. He thought it was Jesse Rogers; he thought he was armed and looking for trouble; he thought he was about to make a felonious assault upon him.

Defendant was not in his own home. He was in one room, and his imaginary assailant was in the adjoining room. He had ample opportunity to retreat. I submit, then, that on the facts in this case it was the duty of defendant to retreat and avoid the difficulty he apprehended was about to occur. Being armed for combat, he elected instead to stand his ground and shoot when no occasion for shooting in his own defense had arisen. To my mind there is no other conclusion to be drawn from the evidence. Hence, the submission of the issue to the jury was more favorable to him than he had any right to demand, and any error in the charge in that respect is harmless.

The law of self-defense is not fashioned to suit the needs of the person who is armed and looking for trouble. Nor does it protect the cowardly or unusually apprehensive person. It should not avail the defendant here.

In the final analysis this is just a case where too many men were attempting to visit the same woman at the same time. Defendant was the first on the ground and apparently the favored one. He caused the first interloper to leave, and he shot the second. He should pay the penalty of the law.

I vote to affirm.

JOHN SPURGEON SNIPES AND WILLIAM HENRY SNIPES, v. ESTATES ADMINISTRATION, INC., ADMINISTRATOR OF MOSES SHAPIRO, DECEASED, A. SHAPIRO, M. SOSNIK AND S. SOSNIK.

(Filed 12 January, 1944.)

1. Parties §§ 10, 11: Appeal and Error § 3a—

An appeal lies from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant.

2. Parties §§ 10, 11: Pleadings § 21—

Over an objection the court has no authority to correct a pending action, which cannot be maintained, into a new and independent action by admitting a party who is solely interested as plaintiff. It is not permissible, except by consent, to change the character of the action by the substitution of one that is entirely different.

3. Executors and Administrators §§ 8, 9—

The law does not rest the title to the property of a person who dies intestate in his next of kin, but in his administrator. If the administrator dies before completion of the administration, the title to such property does not rest in *his* administrator, but in the administrator *de bonis non* of the first intestate, and so on indefinitely, until the estate is settled.

4. Descent and Distribution § 11½: Executors and Administrators § 27—

The next of kin of an intestate have a cause of action for their distributive shares against the administrator of the intestate, which cause of action does not survive, on the death of such administrator, against *his* administrator, but against the administrator *de bonis non* of the first intestate.

5. Same—

Upon the death of an administrator, the better procedure is for the next of kin to bring an action for an accounting against *his* administrator, only after the administrator *de bonis non* of the first intestate has refused to do so. However, should the administrator *de bonis non* fail to bring such action, the next of kin may bring the same and the court will make the administrator *de bonis non* a party defendant and refuse to dismiss the action. This Court may remand such a case for the making of necessary parties.

APPEAL by defendants from *Dixon, Special Judge,* at June Term, 1943, of FORSYTH.

The plaintiffs allege they are the sons of Bruce Snipes, a resident of Forsyth County, who died intestate in 1924.

Moses Shapiro was appointed administrator of the estate of Bruce Snipes on 7 May, 1929.

In 1932, Moses Shapiro, administrator of the estate of Bruce Snipes, deceased, instituted a proceeding in the Superior Court before the Clerk entitled as follows: "Moses Shapiro, Administrator of Bruce Snipes,

deceased, *v.* James W. Snipes, *et als.*" The defendants in the proceeding included the brothers and sisters of Bruce Snipes, deceased, and others, including these plaintiffs. It is alleged that at the time of the institution of the proceeding, John Spurgeon Snipes was 13 years of age, and was residing in Oxford, N. C., and that William Henry Snipes at the time said proceeding was instituted was 11 years of age and resided at Newton, N. C., and that said administrator knew, or could have ascertained by the slightest inquiry from the other defendants, of their whereabouts. A guardian *ad litem* was appointed for these minors, but no summons was served upon either of them, personally or by publication, as required by law. Thereafter an issue as to whether or not these plaintiffs were the sons of Bruce Snipes, deceased, was submitted to a jury and answered in the negative. Whereupon the administrator proceeded to pay substantially all of the assets of the estate of Bruce Snipes, deceased, to his brothers and sisters.

On October 27, 1939, J. M. Wells, Jr., was appointed administrator *d. b. n.* of Bruce Snipes, deceased, Moses Shapiro having died some time prior thereto.

It is further alleged that this action was instituted promptly by these plaintiffs against the administrator of the estate of Moses Shapiro, deceased, and the bondsmen of Moses Shapiro as administrator of Bruce Snipes, deceased, after they ascertained that Bruce Snipes had left an estate.

The plaintiffs seek to have the judgment adjudging them not the children of Bruce Snipes vacated and set aside and that they be adjudged the legitimate sons of Bruce Snipes and entitled to his estate, and for judgment against Estates Administration, Inc., administrator of Moses Shapiro, deceased, and the bondsmen of Moses Shapiro, administrator of Bruce Snipes, deceased, namely, A. Shapiro, M. Sosnik and S. Sosnik, for the sum of $4,618.13, together with interest at the rate of 6% from 1 January, 1932.

The defendants appeal from the refusal of his Honor to dismiss the action on the ground that it should have been instituted by J. M. Wells, Jr., administrator *d. b. n.* of the estate of Bruce Snipes, deceased, and upon the further ground that his Honor granted the motion of the plaintiffs to make J. M. Wells, Jr., administrator *d. b. n.* of the estate of Bruce Snipes, deceased, a party defendant.

Dallace McLennan and W. P. Sandridge for plaintiffs.
Ratcliff, Vaughn, Hudson & Ferrell for defendants.

DENNY, J. It must be conceded that the plaintiffs cannot maintain this action if the court erred in making J. M. Wells, Jr., administrator *d. b. n.* of the estate of Bruce Snipes, deceased, a party defendant. If

the allegations of the complaint are true, and the administrator *d. b. n.* had knowledge of the facts alleged, it was his duty to have brought an action for the relief sought herein. However, it does not appear from the record that the administrator *d. b. n.* of the estate of Bruce Snipes, deceased, was consulted prior to the institution of this action. He was requested by the plaintiffs to bring an action for the relief sought herein, after this action was instituted, but he declined to do so, whereupon he was made a party defendant in the pending action.

Under our decisions an appeal lies from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant. *Rollins v. Rollins,* 76 N. C., 264; *Stephenson v. Peebles,* 77 N. C., 364; *Lytle v. Burgin,* 82 N. C., 301; *Keathly v. Branch,* 84 N. C., 202; *Merrill v. Merrill,* 92 N. C., 657; *Jones v. Asheville,* 116 N. C., 817, 21 S. E., 691.

It has been held, as stated in the case of *Street v. McCabe,* 203 N. C., 80, 164 S. E., 329, that "Whenever objection is made the court has no authority to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff. It is not permissible, except by consent, to change the character of the action by the substitution of one that is entirely different. *Merrill v. Merrill, supra; Clendenin v. Turner,* 96 N. C., 416; *Hall v. R. R.,* 146 N. C., 345; *Bennett v. R. R.,* 159 N. C., 345; *Reynolds v. Cotton Mills,* 177 N. C., 412; *Jones v. Vanstory,* 200 N. C., 582."

The appellant contends that the making of the administrator *d. b. n.* of the estate of Bruce Snipes, deceased, a party defendant, converts the pending action into a new one and that under the decision of *Merrill v. Merrill, supra,* the action must be dismissed. We cannot so hold. In the *Merrill case, supra,* J. R. Merrill died intestate in 1866, and John Merrill was duly appointed administrator of his estate. In 1873, the next of kin of J. R. Merrill instituted an action against John Merrill, administrator of the estate of J. R. Merrill, deceased, for the purpose of obtaining an account and settlement of the estate. Repeated orders of reference were entered, reports made, and each in its order set aside. John Merrill died in 1881. Perry Merrill was duly appointed administrator of the estate of John Merrill, deceased, and named defendant in the action. Afterwards, at the Fall Term, 1883, by consent of all parties, the action was again referred. On 24 August, 1884, Edward Shipman was duly appointed administrator *d. b. n.* of the estate of J. R. Merrill, deceased, and thereafter applied to the court to be made a party plaintiff in the pending action. The request was granted and the defendant appealed. The Court said: "It appears from the record, that the plaintiffs, the next-of-kin of J. R. Merrill, deceased, had a cause of action against the administrator of his estate, John Merrill, but when the latter

died, pending the proceeding and before he had completed his administration, their cause of action against him did not survive against the administrator of his estate, the present defendant. The defendant, as administrator, held and was charged with any assets in his hands belonging to the estate of J. R. Merrill, not for his next-of-kin, but solely for the administrator *de bonis non* of his estate. It is well settled upon principle and authority, that the law does not vest the title to the property of a person who dies intestate in his next-of-kin, but in his administrator. If the administrator should die before he had completed the administration, the title to such property does not vest in his administrator, but in the administrator *de bonis non* of the first intestate, and so on indefinitely, until the estate in the hands of the first, or some subsequent administrator *de bonis non,* shall be completely settled and distributed according to law. The next-of-kin of the intestate, cannot proceed against the administrator of his deceased administrator for a settlement and their distributive shares; they must go against the administrator *de bonis non* of the intestate whose distributees they are, and plainly, because the title to the assets, in whatever shape to be distributed, is in him. To this effect, without exception, are all the decisions upon this subject in this State, as well those decided before, as those decided after the adoption of The Code method of procedure, blending law and equity." The Court further held that: "The next-of-kin plaintiffs . . . had a cause of action at the time the action began against his intestate, who was the administrator under whom they claim as distributees; when he died, their cause of action did not survive against *his* administrator, but against the administrator *de bonis non* of the intestate under whom they claim. This action did not necessarily abate—they might have made the administrator *de bonis non* a party defendant; indeed, they ought to have done so, as he was the only person whom they could then properly sue—the law vested the title to the assets in him, and to him they must look for their distributive shares." Therefore, it is apparent that the action would not have been dismissed if the administrator *d. b. n.* of the estate of J. R. Merrill had been made a party defendant instead of having been made a party plaintiff. Consequently, under the facts disclosed on this record and in view of the character of the relief sought, it is proper but not mandatory that the administrator *d. b. n.* shall bring the action, but it is necessary for him to be a party to the action, either as the plaintiff or as a party defendant, in order to prevent a dismissal thereof. *Wilson v. Pearson,* 102 N. C., 290, 9 S. E., 707; *Hardy v. Miles,* 91 N. C., 131; *Lansdell v. Winstead,* 76 N. C., 366. The better, and more orderly, procedure is for the next of kin to bring such action only after the administrator *d. b. n.* has refused to do so. However, we are not advertent to any case, and the appellants cited none, where this Court had dismissed an action of

this character brought by the next of kin, for lack of necessary parties, where the administrator *d. b. n.* was named a party defendant.

In the case of *Hardy v. Miles, supra,* the action was brought in the identical manner adopted by these plaintiffs, for the purpose of securing a distributive share of the estate of William Miles, deceased, and to vacate and set aside a decree against the plaintiff, entered in a proceeding in the course of the administration of the estate, to which the plaintiff alleged he was not a party. The defendant in the action was the administrator of the deceased executor of the last will and testament of William Miles, deceased, who appealed from an adverse verdict. This Court held: "The plaintiff's action cannot be sustained with the present parties. We hold that the administrator *de bonis non, cum testamento annexo,* of William Miles, deceased, is a necessary party. But, so voluminous is the record in the case, . . . to save the parties the repetition of the trouble and vexation they have already encountered, we are of the opinion it is just and proper that the case should be remanded that amendments should be made, so as to make the administrator *d. b. n.* of William Miles a party to the action. . . . But in *Murphy v. Harrison,* 65 N. C., 246, it is held that where the administrator refuses to bring an action to surcharge and falsify an account, by which the estate of his intestate has been injured, the legatees or next of kin may bring the action; but in doing so, they must make the administrator or executor a party defendant. This case would seem to come within the principle decided in that case. There, the administrator refused to act, and he could not be made a party plaintiff without his consent, and yet the plaintiffs, the next of kin, had a right to have the account surcharged and falsified. Here, there is no administrator *d. b. n.* joined in the action, whether because there was none, or, if one, he refused to act, does not appear; but the plaintiff has sustained a wrong which the law would not be true to itself if it did not furnish him a remedy to redress. . . . Our conclusion is that the cause should be remanded to the Superior Court that the administrator *de bonis non, cum testamento annexo,* of William Miles, if there be one, may be made a party defendant; and if not, that he may be made a party when appointed."

In the instant case the court below has done what this Court said was necessary to be done in the above case, in respect to parties, in order to maintain the action.

In the case of *Tulburt v. Hollar,* 102 N. C., 406, 9 S. E., 430, cited in appellant's brief, it appears that the administrator *d. b. n.* of the intestate of the deceased administrator was not a party to the action. While the Court said it was not necessary to determine the question, it did state, relative to an action by the next of kin against the administrator of a deceased administrator, that the action cannot be maintained by the next of kin, distributees or creditors. The case did not, however, pass

upon whether or not the action might have been maintained if the administrator *d. b. n.* of the estate of J. N. Tulburt, deceased, had been made a party defendant. It will be noted that in the case of *Lansdell v. Winstead, supra,* and cited with approval in *Ham v. Kornegay,* 85 N. C., 119, it is said: "The rule is inflexible that the next of kin cannot call for an account and distribution of an intestate's estate without having an administrator before the Court."

In the present action, if the relief sought is obtained, the assets of the estate of Bruce Snipes, deceased, will not be recovered by these plaintiffs directly, but said assets will belong to J. M. Wells, Jr., administrator *d. b. n.* of said estate and administered by him as provided by law, and the plaintiffs will receive from said administrator their distributive share of said estate.

Where the ends of justice require it, the Court may remand a cause to the end that a necessary party or parties may be brought in, in order to maintain the action. *Cheshire v. First Presbyterian Church,* 221 N. C., 205, 19 S. E. (2d), 855; *Hardy v. Miles, supra.*

We have carefully considered all the cases cited by both the appellants and the appellees in their excellent briefs, and we are of the opinion that, on the facts disclosed in this record, the order of the court below refusing to dismiss the action and granting plaintiffs' motion to make J. M. Wells, Jr., administrator *d. b. n.* of the estate of Bruce Snipes, deceased, a party defendant, should be

Affirmed.

W. L. ROTHROCK, TRADING AS PIEDMONT SHEET METAL COMPANY, v. J. A. NAYLOR, W. L. ROTHROCK AND J. T. BOYER, TRUSTEES FOR BONIN REALTY COMPANY, AND E. F. STRICKLAND.

(Filed 12 January, 1944.)

1. Partnership § 1—

A partnership is a combination by two or more persons of their property, effects, labor, or skill in a common business or venture, and under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business.

2. Partnership § 2—

While an agreement to share profits is one of the tests of a partnership, an agreement to receive part of the profits for services and attention, as a means only of ascertaining the compensation, does not create a partnership.

3. Same—

When the facts are undisputed, what constitutes a partnership is a question of law.

4. Same—

Where the owner of certain city lots agreed with a contractor to furnish all labor and material, carry protective insurance, and build a house on each lot according to written specifications in each case, upon the payment by the owner of named sums at certain stages of construction and should the houses, or any of them, be sold within four months after completion, the owner to receive a named sum for each lot, the balance in each case going to the contractor, but on a failure to sell within the four months period, the owner to pay a specified amount in full for each house, there is no evidence of a partnership.

APPEAL by plaintiff from *Gwyn, J.*, at April Term, 1943, of FORSYTH.

Civil action to recover on contract for heating systems installed in houses constructed under agreement between Bonin Realty Company and defendant E. F. Strickland.

In the trial court the evidence introduced by plaintiff tends to show these facts:

1. On 17 June, 1941, defendant Dr. E. F. Strickland, being the owner of five certain lots of land, numbers 7, 8, 9, 10 and 11 on the north side of Westover Avenue in Winston-Salem, North Carolina, entered into five separate agreements with Bonin Realty Company for the construction of "a five-room frame residence" on each of these lots. By the terms of each of these agreements, Bonin Realty Company, called "the contractor," agreed with Dr. Strickland, called "the owner," (a) "to build for the owner" such residence, (b) to furnish all materials and perform all the work shown on the drawings and described in the specifications of the owner, which are attached to and made a part of the contract, (c) to do everything required by the contract, specifications, and drawings, and to commence work immediately and to complete same as soon as possible, consistent with good workmanship, (d) to carry workmen's compensation insurance and public liability insurance, which it represents it is carrying, and (e) to pay all social security and unemployment taxes which may be assessed in connection with the work. And in each agreement Art. IV is identical except as to certain figures. This Article as it appears in the agreement relating to lot No. 7 and the house to be erected thereon reads as follows:

"ARTICLE IV. That it is the understanding and intent of both parties that the house and lot shall be sold for an approximate price of $4,700.00; and that the owner shall receive as his portion of the sale price the sum of $975 for the lot, and the contractor shall receive the balance of the sale price for the construction of the residence. In the event that the house is not sold within four months after completion, the Owner shall pay to the Contractor the sum of $3,750.00. During construction the Owner agrees to pay to the Contractor as follows: $900.00 when the roof has been put on, $900.00 when the house is plastered, and $900 when the standing trim and floors have been installed."

In Article IV of each of the other four agreements, as in the above quotation, an approximate sale price is specified, and it is provided therein (a) "that the owner shall receive as his portion of the sale price the sum of $975.00 for the lot, and the contractor shall receive the balance of the sale price for the construction of the residence"; (b) that in the event that the house is not sold within four months after completion, the owner shall pay to the contractor a specified sum of money; and (c) that during construction the owner agrees to pay to contractor a specified sum of money, "when the roof has been put on," a like amount "when the house is plastered" and a like amount "when the standing trim and floors have been installed."

2. Between 11 September, 1941, and 17 January, 1942, separate sale agreements were entered between Bonin Realty Company and purchasers for the sale of the said lots of defendant Strickland, and the house constructed thereon, at approximately the sale prices specified in the respective agreements pertaining thereto between Bonin Realty Company and E. F. Strickland; and pursuant thereto the defendant E. F. Strickland and his wife executed deeds to the respective purchasers. Four checks from Bonin Realty Company payable to E. F. Strickland, bearing dates between 1 November, 1941, and 6 February, 1942, for approximately the amount Strickland was to receive for the lot, plus the total of amounts advanced during construction under the agreements relating to lots 7, 9, 10 and 11, and drawn on First National Bank of Winston-Salem, N. C., were endorsed by Strickland.

3. On 13 June, 1941, plaintiff, as dealer, proposed in writing to "Bonin Realty Company (name of purchaser)" to install in dwellings No. L-7, L-8, L-9, L-10 and L-11 for Dr. E. F. Strickland, under construction on Westover Drive, Winston-Salem, N. C., certain heating systems in accordance with certain specifications and stipulations for "the net cash purchase price" of $1,900.00 payable when the work is completed. This proposal was accepted in name of "Bonin Realty Company, W. L. Bonin, Pres." After the contract was so signed, the heating systems were all completed and put in operation by plaintiff. The job on lot No. 7 was begun on 10 July, 1941, and completed on 26 January, 1942, that on lot No. 8 was finished on 10 January, 1942, and those on lots numbers 9, 10 and 11 were completed in fall of 1941, and plaintiff has not been paid anything on any of the jobs. Demand for payment was made and refused.

4. Notice and claim of lien against lot No. 7 for $375.00 with interest thereon from 27 January, 1942, reciting that the labor was performed and materials were furnished beginning 10 July, 1941, and finished on 27 January, 1942, was filed in office of clerk of Superior Court of Forsyth County, date not shown, under this caption, "W. L. Rothrock,

trading as Piedmont Sheet Metal Company, claimant, *v.* Bonin Realty Company, and E. F. Strickland, owners."

5. Bonin Realty Corporation is a corporation and has made an assignment for the benefit of its creditors.

6. The reasonable market value of each of the five lots in question prior to the construction of the houses thereon, 17 June, 1941, and after sewer and water had been run to the lots, was from $325 to $350.

Furthermore, in the absence of the jury, plaintiff, W. L. Rothrock, under examination by his attorney, testified: That about 1 July, 1942, he had a conversation, probably an hour, with Dr. Strickland at his home, the substance of which was this: "I approached Dr. Strickland in a friendly way and told him that I was out there to see if he could convince me that I shouldn't sue him for $1,900.00 that was due in the installation of five heating plants that I had installed over on Westover Drive. And Dr. Strickland told me that he had nothing to cover up; that he had a contract with Bonin Realty Company to build five houses, and that he had paid him in full for the construction of the houses, and also mentioned that he had loaned Bonin Realty Company moneys—he didn't state how much money, . . . and that as far as he was concerned he owed Bonin Realty Company nothing." And, continuing, "I told Dr. Strickland that Bonin had told me before this contract was written . . . that these houses were being built for speculation, and that I had asked Bonin if it was on the same basis as the previous five houses and he told me that it was," and that "Dr. Strickland said that he had a contract—the way I understood Dr. Strickland was that he had a contract with Bonin on the first house or houses that was built, and the other houses were built under that same contract." Then on being asked "When you told Dr. Strickland that Bonin had told you that they were being built for speculation, did Dr. Strickland deny it?" the witness began to answer by saying "he didn't deny that the houses were being built . . .," but upon objection being sustained on the ground that the witness had stated what Dr. Strickland said, and that whether what he said was a denial is not for the witness to say, the witness proceeded no further in answering the question. Then continuing the examination the witness was asked by his attorney why he said "for Dr. E. F. Strickland" in the contract, and why he "struck out 'I' down there and inserted 'we,'" and in answer thereto said, "I didn't know what the setup was. I knew that there was something there I couldn't understand. I knew that Dr. Strickland had title to the lots. Bonin had made the statement that the houses were being built for speculation, and I tried to draw a contract tying the two parties together. I didn't have an attorney to draw the contract. I was just using my own judgment, trying to draw a contract that would tie the two parties together and also that would give me the privilege at a later date of filing a lien against the property."

Thereupon, upon inquiry by the court, the witness stated that he did not talk with Dr. Strickland before he furnished the materials. The court then ruled that the conversation the witness had with Bonin Realty Company and what Bonin said about speculation would not be competent repeated by him to the defendant, Dr. Strickland, unless Dr. Strickland admitted it or gave such an answer as to indicate his assent to the proposition. And further as to testimony as to reason why witness put "for Dr. Strickland" in contract and why he put "I" for "we" in there, the court ruled that the witness "by himself can't fix the contract for Dr. Strickland, that will bind Dr. Strickland, and whatever language he wrote merely indicates his notion of the relationship and his notion is not evidence to establish the fact"—and informed counsel, "If you have evidence otherwise to go to the jury upon the question of partnership, it will go . . ." To these rulings the plaintiff excepted.

Thereupon, the jury returned to the courtroom and the trial proceeded. And the court stated to counsel for plaintiff that they need not go into the phase of the testimony which the court ruled out, but that they might proceed to ask questions on the rest of it—that he didn't want to be misunderstood; that part of the evidence was thought to be competent, and part incompetent. Whereupon no questions were asked, and attorney for plaintiff announced "That is all from Mr. Rothrock, your honor."

From judgment as of nonsuit at close of his evidence, plaintiff appeals to Supreme Court and assigns error.

Joe W. Johnson and Wm. H. Boyer for plaintiff, appellant.
Ingle, Rucker & Ingle for defendant, appellee.

WINBORNE, J. This is the determinative question on this appeal: Is the evidence offered by plaintiff taken in the light most favorable to him, as we must do in considering a motion for judgment as in case of nonsuit, sufficient to take the case to the jury upon an issue as to the existence of a partnership between Bonin Realty Company and defendant E. F. Strickland in respect to the construction of the houses and sale of the houses and lots on which the houses were constructed? Careful consideration of the evidence leads to the conclusion that the court below properly ruled in the negative.

"To make a partnership, two or more persons should combine their 'property, effects, labor, or skill' in a common business or venture, and under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business." This is definition given in opinion by *Hoke, J.*, in case of *Gorham v. Cotton*, 174 N. C., 727, 94 S. E., 450, as containing the

substantive features of definitions of the term as approved and applied in numerous cases in this State, as in *Fertilizer Co. v. Reams,* 105 N. C., 283, 11 S. E., 467, and *Mauney v. Coit,* 86 N. C., 464.

However, the principle is well established in this State that "while an agreement to share profits, as such, is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership." *Kootz v. Tuvian,* 118 N. C., 393, 24 S. E., 776. See also *Mauney v. Coit, supra; Fertilizer Co. v. Reams,* 105 N. C., 283, 11 S. E., 467; *Lance v. Butler,* 135 N. C., 419, 47 S. E., 488; *Trust Co. v. Ins. Co.,* 173 N. C., 558, 92 S. E., 706; *Gurganus v. Mfg. Co.,* 189 N. C., 202, 126 S. E., 423; *Wilkinson v. Coppersmith,* 218 N. C., 173, 10 S. E. (2d), 670.

Moreover, "when the facts are undisputed, what constitutes a partnership is a question of law . . ." *Webb v. Hicks,* 123 N. C., 244, 31 S. E., 479; *Bolch v. Shuford,* 195 N. C., 660, 143 S. E., 218.

In the light of these principles the written agreements between E. F. Strickland, the owner, and Bonin Realty Company, the contractor, fail to reveal the elements essential to constitute a partnership. Rather, it is manifest that in substance and in form these agreements create the relationship of owner and independent contractor. The Realty Company agreed to furnish all the materials and to perform all the labor for the construction of the several houses in accordance with plans and specifications which in each instance are made a part of the agreement, and, in any event, it is to receive therefor from Strickland, the owner, a specified sum of money—the owner agreeing to make partial payments on the contract price at certain stages of the construction. The provisions for payment on contract as the work progressed are such as are found in building contracts, and are wholly consistent with independent relationship between the parties. But out of the provisions relating to the sale of the houses and lots after the houses shall have been constructed, it is contended that there is profit sharing from which the jury may find a partnership arrangement existed. It is apparent, however, that any increased amount the Realty Company would receive and did receive over and above the fixed stipulated sum for constructing the houses was by way of compensation for selling the houses and lots. If in each instance the house and lot had not been sold within four months the Realty Company would have received from Strickland, the owner, the fixed stipulated sum for constructing the house. And in this connection if the Realty Company made a profit in constructing the house there is no provision for the owner to share it, nor is there any provision by which the owner is to bear any loss the Realty Company might have sustained.

Moreover, there is no provision by which the Realty Company would share in any profit the owner might make in any sale made by the owner if the house and lot had not been sold within four months, or by which it would bear any loss the owner might sustain in such sale.

Furthermore, while the plaintiff offered evidence tending to show the value of the lots before the houses were built on them, there is no evidence as to what the owner paid for them. But if the owner realized a profit from the sale of the lots there is no provision for the Realty Company to share it. The owner agreed to limit his interest in the sales price to $975 for the lot. This he received, plus the return of the money advanced on the contract price. It is therefore manifest that independent relationship permeated all phases of the transactions. And as the facts are undisputed, the evidence presents a question of law for the court.

It is contended, however, that the excluded testimony tends to show an admission by silence of a partnership arrangement between the Realty Company and Strickland. With this we are unable to agree. The excluded testimony is not inconsistent with the terms of the written agreement between the parties introduced in evidence by the plaintiff. But granting that the building of the houses and the sale of the houses and lots were speculative ventures, the contract fails to show that a partnership existed.

The judgment below is

Affirmed.

J. B. CURLEE v. W. S. SCALES.

(Filed 12 January, 1944.)

1. Appeal and Error §§ 24, 29—

On appeal an argument unsupported by exception and an exception, without argument or citation of authority, present no questions for the Court's decision.

2. Pleadings §§ 16a, 21—

In an action to renew a judgment, where an amendment to the complaint is allowed and made without objection, alleging an error, by inadvertence and mistake, in the face of the judgment as to its date and asking that the judgment be amended to speak the truth, such amendment constitutes an additional cause of action, and there is no demurrable misjoinder of causes.

3. Trial § 19—

It is the prerogative of the court to supervise and control the introduction of testimony, and when a question arises as to whether evidence was offered and admitted, it is the duty of the judge to decide.

4. Trial § 30—

Where the court in its charge submits to the jury for their consideration facts material to the issue, which were no part of the evidence offered, there is prejudicial error.

APPEAL by defendant from *Phillips, J.*, at September Term, 1943, of FORSYTH. New trial.

Civil action to renew judgment, instituted 2 November, 1942.

In an action *ex delicto* instituted in the Forsyth County Court, compromise judgment in the sum of $100.00 was entered in favor of plaintiff and against defendant. This judgment recites "This cause coming on to be heard . . . at the April 10, 1932, Term of Forsyth County Court . . ." It was recorded in the Minute Docket as written and docketed on the Judgment Docket. Thereafter, the "2" in "1932" as it appeared on the Judgment Docket was erased and "3" was inserted in lieu thereof so as to make it recite that it was entered in April, 1933.

In his complaint herein plaintiff alleges that the judgment was rendered April 10, 1933. At the trial, by permission of the court, he amended his complaint by adding an allegation as follows:

"That the figures '1932' appearing in the face of the judgment were by inadvertence and mistake, and should have been '1933'; wherefore, the plaintiff prays that the judgment be amended to speak the truth."

Defendant did not except to the order allowing the amendment. Instead he answered, pleading the ten-year statute of limitations. He then demurred *ore tenus* "for that the original action was instituted for the purpose of reviving a judgment, and the amendment to the complaint set up a new and independent cause of action based upon reforming a judgment, and for that there is a misjoinder of causes of action." The demurrer was overruled and defendant excepted.

During the trial plaintiff offered in evidence "Civil Minute Docket of the Forsyth County Court, No. 53, page 590, as follows: (Here the original judgment is copied as originally rendered, reciting it was entered at the April 10 Term, 1932.)"

He also offered "on page 591, the signature of 'Oscar O. Efird.' Judge Presiding."

There was evidence (to some of which exception was duly entered) tending to show that the original judgment was rendered in April, 1933.

At the conclusion of the evidence issues were submitted to and answered by the jury as follows:

"1. Was the date 'April 10, 1932,' as appears in a certain judgment entitled 'J. B. Curlee *v.* W. S. Scales,' recorded in Minute Docket No. 53, at page 590, in the records of the Office of the Clerk of the Superior Court of Forsyth County, an error; and should the correct date be 'April 10, 1933,' as alleged by the plaintiff? Answer: 'Yes.'

"2. Is the plaintiff's alleged cause of action barred by the ten-year statute of limitations, as alleged by the defendant? Answer: 'No.'"

From judgment on the verdict defendant appealed.

Fred S. Hutchins and H. Bryce Parker for plaintiff, appellee.

W. Avery Jones for defendant, appellant.

BARNHILL, J. The questions primarily stressed on the argument here do not arise on this record.

There was no exception to the order of the court permitting an amendment of the complaint. Hence, the authority of the court to permit an amendment setting up a new cause of action after the action on the judgment as entered is clearly barred by the statute of limitations is not challenged.

The defendant brings forward his exception to the order overruling the demurrer, but under this exception he discusses the authority of the court to allow the amendment. Thus, we have an argument unsupported by exception and an exception without argument or citation of authority. No question for decision is presented. In any event there is no misjoinder of causes of action. The exception, as it appears in the record, cannot be sustained.

Nor do we now decide the merit of defendant's plea of the statute of limitations. The exception to the ruling of the court in denying the motion to nonsuit entered at the conclusion of all the evidence is not brought forward either in the assignments of error or in the brief. Supreme Court Rules of Practice 19 (3), 21 and 28, Annotated in 221 N. C., 544, *et seq.*

In its charge the court instructed the jury in part as follows:

"As the Court has stated to you heretofore, the Minute Docket No. 53, at page 590, is headed at the top of the page, 'Thursday, April 13, 1933.' Page 591 is 'Thursday, April 13, 1933.' Page 589 is dated 'Thursday, April 13, 1933.' 588 is 'Thursday, April 13, 1933,' and on back through 587, 'Wednesday, April 12, 1933.' 586 is 'Wednesday, April 12, 1933.' And 585, 'Wednesday, April 12, 1933.'"

Counsel for the defendant called the court's attention to the fact that the additional pages of the Minute Docket referred to were not offered in evidence and excepted. The following then appears in the record:

"THE COURT: If the Court is in error, the Court will correct it. The Court understood the whole book was introduced and particularly was attention called to page 590.

"MR. PARRISH: That is what I intended to do, whether the record shows that or not. I introduced it and called the Court's attention to a particular page.

"That is the recollection of the Court, gentlemen. If that is not the case, you will not consider anything but Page 590. If only Page 590 was introduced, you will not consider, and will strike from your minds, anything the Court has said about anything appearing on the other pages in the record. You will remember what the evidence is on that point. You will take your recollection and not that of the Court."

The court charged further as follows:

"The plaintiff further insists and contends that the notation on the Civil Judgment Docket No. 62, at page 184, refers to Minute Docket 52, at page 590, for the recording of this judgment, even though there might be a '2' scratched out and a '3' put over it; that you should find that the handwriting of 'April 10, 1933,' is all in the same handwriting, and that if there was an erasure, it was done by the Clerk at the time he made it; that the Clerk evidently made the notation from the face of the judgment, and then he found later or at that time that the judgment was wrong on its face, and he changed it to the right date, because the Minute Docket showed that the judgment was rendered on Thursday, April 13, 1933, instead of 1932, and that the Clerk, or whoever did it in his office, did it at the time he made this notation; that it wasn't changed later. The plaintiff insists and contends that both show old writing and the same handwriting in the two figures in the '19' and the two figures in the '33.'"

The record fails to disclose that the pages of the Minute Docket to which the court referred, other than pages 590 and 591, were in evidence. Nor was there any testimony tending to show at what time, by whom, or in whose handwriting the alteration on the Minute Docket was made.

Thus it appears that the court in its charge submitted to the jury for their consideration facts material to the issue which were no part of the evidence offered. This constitutes prejudicial error. *S. v. Love,* 187 N. C., 32, 121 S. E., 20; *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83; *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473.

The further charge of the court leaving it to the jury to decide whether the whole Judgment Docket was tendered and admitted does not render the error harmless.

While the court in its charge reviews the testimony, the recollection of the jury is controlling and is to guide them in arriving at their verdict. This rule, however, applies only to testimony admitted in evidence and submitted to the jury for their consideration.

On the other hand, it is the prerogative of the court to supervise and control the introduction of testimony, and when a question arises as to whether evidence was offered and admitted it is the duty of the judge to decide. Then in his charge he must confine his review of the testimony to "the evidence given in the case."

Here material facts were called to the attention of the jury, supported by the statement of the court, as well as of counsel, that it was under the impression that they were introduced in evidence. They were not withdrawn but were to be rejected and not considered only in the event the jury did not so recall. This was not a statement *"in a plain and correct manner"* of *"the evidence given in the case."* C. S., 564. In this state of the record it is impossible to say to what extent, if any, they influenced the verdict.

As the cause of action to reform or amend the judgment is joined with another cause of action in which other and additional relief is sought, we cannot adopt the suggestion of plaintiff that the motion to amend be treated as a motion in the original cause. It was not so dealt with in the court below. Instead, it was treated as a first cause of action stated in the complaint, and an issue based thereon was submitted to the jury.

As the questions presented by the exceptions to the exclusion of testimony may not again arise, we refrain from any discussion thereof.

The indicated errors in the charge entitle the defendant to a new trial. It is so ordered.

New trial.

CHARLES S. THOMPSON v. ERNEST P. DAVIS AND WIFE, EVA W. DAVIS, AND J. M. McKENZIE.

(Filed 12 January, 1944.)

1. Frauds, Statute of, § 12: Trusts § 1b—

The section of the English statute of frauds relating to parol trusts has not been enacted in North Carolina and our present statute, G. S., 22-2, has no application to such trusts and does not prohibit their establishment by parol evidence. And such proof is not a violation of the rule prohibiting parol evidence to contradict, alter or explain a written instrument.

2. Trusts § 1b: Husband and Wife § 12a—

The fact that the title is an estate by the entireties presents no obstacle to the enforcement of the equity of a parol trust, if properly shown to exist.

3. Trusts § 1b—

While the evidence to establish a parol trust must be clear, strong and convincing, it is the province of the jury to say whether it is of that nature.

4. Same—

Where plaintiff and two of defendants, in forming a partnership, agreed to purchase a certain lot for that purpose, title to be taken in the name

of the partners, and plaintiff paid approximately one-third of the down payment to one of defendants, who with the other defendant was to take care of the balance, until the earnings of the partnership should suffice for the deferred payments, and the defendant to whom the money was paid took title to the property in himself and his wife, without the knowledge of the other partners, there is evidence of a parol trust and motion for judgment as of nonsuit was properly overruled.

5. Pleadings § 21—

The allowance or denial of a motion to amend an answer, made after the time for answering had expired, is in the discretion of the court.

6. Trusts § 1b: Partnership § 3—

In a suit to impress realty with a parol trust in favor of a partnership, there is no reversible error in the admission of evidence of the partnership affairs, occurring after a reference for an accounting, showing that profits were used to enhance the value of the realty in question and that rents from such realty went into the partnership fund.

7. Trial § 31—

The use of the formula "the evidence tends to show" is not an expression of opinion upon the evidence in violation of C. S., 564.

8. Trusts § 1b—

In a suit to impress realty with a parol trust for the benefit of a partnership, where proper instructions have been given, there is no error in the submission of the issue, "Do defendants (naming them) hold the legal title to the property described in the complaint as trustees for the partners (naming them)?"

APPEAL by defendants Davis from *Burney, J.*, at August Civil Term, 1943, of NEW HANOVER.

Rountree & Rountree and Aaron Goldberg for plaintiff, appellee.
W. L. Farmer and W. F. Jones for defendants Davis, appellants.

SEAWELL, J. The plaintiff brought this action to wind up the affairs of a partnership and to establish and enforce a parol trust with respect to certain lands held by defendants E. P. Davis and his wife, Eva W. Davis, by an absolute or fee simple deed of bargain and sale. Matters relating to the partnership and partnership accounting were referred, and are not involved in this appeal. The issue as to the parol trust went to the jury, and the present appeal is concerned with this phase of the case alone. The record is voluminous, and to conserve space we must content ourselves with summarizing such portions of the proceedings and of the evidence as may be pertinent to the exceptions considered.

The plaintiff was successful in the court below; and the exceptions of the appealing defendants raise the following questions for our decision: Was the trial court justified in overruling defendants' demurrer to the

complaint as not stating a cause of action with respect to the alleged parol trust? Did the court commit error in overruling defendants' demurrer to the evidence and motions for judgment as of nonsuit? Was there error in refusing to grant defendants' motion for leave to amend their answer so as to set up a plea of estoppel against the plaintiff arising out of the alleged rental by the partnership of the premises in controversy? Was evidence concerning partnership matters improperly admitted? Was the judge's charge offensive to C. S., 564, in expressing an opinion, or prejudicial in dealing generally with the subject of parol trusts, or in its expressions with reference to fraud? Was the issue submitted to the jury proper?

These we consider in order. But since the defendants, in addition to a general denial, have challenged plaintiff's whole case by a plea of the statute of frauds, it will shorten the discussion and save repetition if we try to remove some misconceptions—if they appear to exist—as to the circumstances under which a parol trust with respect to lands may be asserted in our jurisdiction.

The seventh section of the English Statute of Frauds (Stat. 29, Car. II, c. 3, s. 7), relating to the creation of parol trusts and the manner in which they shall be evidenced or manifested, has not been enacted in North Carolina. *Peele v. LeRoy,* 222 N. C., 123, 22 S. E. (2d), 244; *Brogden v. Gibson,* 165 N. C., 16, 80 S. E., 966; *Jones v. Jones,* 164 N. C., 320, 80 S. E., 430; *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028; *Riggs v. Swann,* 59 N. C., 118; *Shelton v. Shelton,* 58 N. C., 292. Our present statute, G. S., 22-2; C. S., 988 (Rev., 976, Code, ss. 1554, 1743; 1819, ch. 1016), has no application to such trusts, and does not prohibit their establishment by parol evidence. Speaking to the contrary suggestion, *Justice Hoke,* in delivering the opinion for the Court in *Jones v. Jones, supra,* at p. 325 quotes with approval *Chief Justice Pearson* in *Shelton v. Shelton, supra,* as follows:

"'It was suggested on the argument that a declaration of trust falls within the operation of the Act of 1819, Rev. Code, ch. 50, sec. 11, "All contracts to sell or convey land or any interest in or concerning land shall be in writing." The construction of this statute is fully discussed in *Hargrave v. King,* 40 N. C., 430; *Cloninger v. Summit,* 55 N. C., 513. A bare perusal of the statute will suffice to show that it cannot, by any rule of construction, be made to include a declaration of trusts, so as to supply the place of the section of the English statute of frauds in regard to a parol declaration of trusts, which our Legislature has omitted to re-enact.'"

Parol evidence introduced to establish such a trust does not violate the rule of evidence prohibiting the admission of parol evidence to contradict, alter or explain a written instrument, since such is not its

purpose or effect. Dealing with this contention, we find in *Shelton v. Shelton, supra*—repeatedly cited in this connection, the following:

"It was also suggested that a verbal declaration of trust cannot be proved without violating the rule of evidence, 'A written instrument shall not be altered, added to, or explained by parol.' The reply is, if this position be true, the English statute in respect to the declaration of trusts was uncalled for, and the doctrine of verbal declaration of trusts would not have obtained at common law. The truth is, neither the declaration nor the implication of a trust has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title at law, and is not altered, added to, or explained by the trust, which is an incident attached to it, in equity, as affecting the conscience of the party who holds the legal title." The qualification that such a trust cannot be thus established in favor of the grantor without an allegation of fraud or mistake stands upon a different footing and has no application to the facts in the case at bar.

It has been frequently stated that in properly constituted cases indicating the propriety of equitable relief in declaring and enforcing a parol trust, the formal deed by which the legal title is held is regarded as a feoffment not inconsistent with the trust sought to be established. *Jones v. Jones, supra; Anderson v. Harrington,* 163 N. C., 140, 79 S. E., 426; *Rowland v. Rowland,* 93 N. C., 214; Laws of 1715, ch. 7, sec. 2; Rev., sec. 979; C. S., 3308; G. S., 47-17. The statutes have varied somewhat in the course of codification and re-enactment, but the policy of interpretation has remained substantially the same. When an equity of the sort attempted to be asserted here supervenes, the holder of the deed by bargain and sale is considered vested merely with the naked legal title with respect to the trust when properly proven. *Creech v. Creech,* 222 N. C., 656, 663, 24 S. E. (2d), 642; 26 R. C. L., Trusts, sec. 73.

The fact that the defendant E. P. Davis took title to himself and wife, Eva W. Davis, presents no obstacle to the enforcement of the equity, if properly shown to exist. Under the evidence in the case, the jury might infer that the defendant Davis paid for the property partly with the money obtained from the plaintiff, Thompson; and in that event, the interest of his wife under the deed would be presumed to be a gift from the husband, and her position as a beneficial holder of an interest in the property would not be tenable. *Carter v. Oxendine,* 193 N. C., 478, 137 S. E., 424.

In view of these precedents, we examine the complaint and the evidence.

THE COMPLAINT. Condensing the text, it is alleged in the complaint that the plaintiff Thompson, J. M. McKenzie, and the defendant Davis, in the process of forming a partnership to operate a parking lot near

the North Carolina Shipbuilding Company's plant in Wilmington, North Carolina, agreed amongst themselves, in consideration of the forming of such partnership, to purchase for the partnership a convenient lot from B. B. Cameron, Jr., which is described in the complaint, the title thereto to be held by the partners in common. The execution of the plan was entrusted to the defendant Davis. The terms of purchase required a down payment, the business of the partnership to take care of deferred payments as they became due. The plaintiff, it is alleged, contributed his quota of the down payment before the property was purchased. But, it is further alleged, in violation of the agreement and with intent to defraud plaintiff and the other partner out of their interest in the property, defendant fraudulently procured the title to be made to himself and wife, and, repudiating the agreement, attempts to hold the property as his own to the exclusion of any interest therein the plaintiff may have. Formal parts of the complaint show no defect.

In our opinion, the complaint sufficiently states a cause of action and the demurrer was properly overruled.

THE EVIDENCE. Upon the motions for judgment of nonsuit, it is necessary to consider in this case only the showing made by the plaintiff. Plaintiff's evidence followed closely the allegations of the complaint. It tended to show that plaintiff Thompson, McKenzie, and the defendant Davis were forming a partnership to operate a parking lot, and mutually agreed to purchase the Cameron lot, near the Shipbuilding Company's plant, for the benefit of the partnership, the title to be taken in the name of the three partners, Thompson, McKenzie, and Davis; that Thompson paid $325 in cash to Davis to be applied on the down payment of purchase price, and that this cash payment was used, or paid to Fonvielle, the seller's agent, on the purchase price. This constituted almost—within a few dollars—one-third of the down payment—and the balance was to be taken care of by Davis until the earnings of the partnership were sufficient to satisfy the deferred payments. The plaintiff had trusted the transaction to Davis, who had been made manager of the partnership, and had never seen the deed. (The deed was dated 1 August, 1942, and is upon its face a deed of bargain and sale executed to E. P. Davis and wife, Eva W. Davis as grantees.) Having found out his name was not in the deed, he went to Davis seven or eight times, demanding that a conveyance be made to him for his part, or a change made in the title, and Davis refused. Finally, through dissatisfaction with Davis and his management of the partnership, plaintiff and McKenzie took over the management and continued therein until the present action was brought. Plaintiff was substantially corroborated by McKenzie in essentials as to the agreement and payments made on the purchase price.

Defendants' evidence sharply contradicted that of plaintiff, but on the whole evidence, these contradictions were for consideration of the jury. We are reminded that evidence to establish a parol trust must be "clear, strong and convincing." But whether it is of that nature, it is the province of the jury to say. *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 45; *Hendren v. Hendren,* 153 N. C., 505, 69 S. E., 506. There is no exception to any failure of the court to properly instruct the jury in this respect. The evidence was properly submitted to the jury.

MOTION FOR LEAVE TO AMEND. The defendants moved to amend their answer so as to set up a plea of estoppel. The theory of estoppel appears to be based on a provision in the partnership agreement relating to rent: "Second: All profits which may accrue to said partnership after deduction of the sum of Two Hundred ($200.00) Dollars as a monthly rental," etc. The plaintiff testified that this referred to the two hundred dollars to be paid out of earnings on the purchase price of the property, and was so understood.

The record discloses that this motion was made after the time to answer had expired—in fact, when the case was called for trial. At that time it had become a matter of discretion with the court, and we cannot say the discretion was abused. *Wilmington v. McDonald,* 133 N. C., 548, 45 S. E., 864; C. S., 545; *Commissioners v. Blair,* 76 N. C., 136; *Goodwin v. Fertilizer Works,* 121 N. C., 91, 28 S. E., 192; McIntosh, Practice and Procedure, pp. 512 and 513, and cited cases.

The evidence on which defendant relied is equivocal, arising out of a factual situation entirely different from that before the Court in *Hare v. Weil,* 213 N. C., 484, 196 S. E., 869, and *Wolfe v. Land Bank,* 219 N. C., 313, 13 S. E. (2d), 533, and the defendants had full benefit on the issue of such inferences as the jury might draw from the conduct of the plaintiff as a member of the partnership. There is no evidence on the part of the plaintiff that he, or other members of the partnership, had ever paid Davis any rent on the property or had agreed so to do. The provision cited in the partnership agreement does not go so far. Moreover, the receiver later appointed, who used the property as that of the partnership, testified that no demand had been made on him for rent. It is in evidence, however, that rentals of buildings erected on the property were paid into the partnership funds. At any rate, the trial judge, we think, properly declined to permit the amendment when the case was called for trial.

THE ADMISSION OF EVIDENCE. The exception here is to the admission of evidence relating to the conduct of the partnership, when the partnership affairs, and partnership accounting, had been referred. It was practically impossible to avoid some reference to the partnership affairs. Some latitude in this respect was allowed on both sides of the contro-

versy. Included in this class of exceptions was evidence tending to show that earnings of the partnership were used to enhance the value of the lot, and that rentals from buildings erected on the lot were turned into the partnership fund, which was certainly competent as showing the dealings of the parties with the property in controversy. We are not prepared to say that the admission of evidence as to partnership matters, to the extent shown in the record, is so prejudicial as to justify a rehearing.

THE JUDGE'S CHARGE. The use of the convenient formula "the evidence tends to show" is not considered expression of an opinion upon the evidence in violation of the prohibition of C. S., 564. *S. v. Harris,* 213 N. C., 648, 197 S. E., 142.

Objection is made to the observations of the judge on the general subject of parol trusts and the method of their creation; and more particularly his use of the term "fraud" and his explanation of fraud in connection with the creation of such trusts. It is impossible here to set down *in extenso* the charge of the judge upon a subject which must necessarily comprehend a large part of the instructions and demand a frank treatment of the evidence. Suffice it to say that we cannot see that the court strayed too far from his immediate subject in presenting the law of the case, especially in view of the breadth of discussion here. And we cannot find that he has exceeded the language of judicial decision in discussing the question of fraud. *Gorrell v. Alspaugh,* 120 N. C., 362, 27 S. E., 85; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775.

THE ISSUE. The issue submitted was: "Do the defendants, Ernest P. Davis and wife, Eva W. Davis, hold the legal title to the property described in the complaint as Trustees for Charles S. Thompson, J. M. McKenzie and Ernest P. Davis?" The defendants contend that it presents to the jury a mere question of law. That might be true in the absence of proper instructions. The suggestion is without merit where proper instructions have been given. The issue in this form is not unusual, and we do not find it objectionable. *Henley v. Holt,* 221 N. C., 274, 20 S. E. (2d), 62. See *Russell v. Wade,* 146 N. C., 116, 118, 59 S. E., 345. See also *Clinard v. Kernersville,* 217 N. C., 686, 9 S. E. (2d), 381.

The exceptions do not disclose any error justifying interference with the result of the trial.

No error.

J. T. LOCKE, INDIVIDUALLY AND ON BEHALF OF THE OTHER HEIRS AT LAW OF FANNIE T. SPAULDING, DECEASED, v. E. R. MERRICK, TRUSTEE, NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY, L. J. SPAULDING, ADMINISTRATOR OF FANNIE T. SPAULDING, DECEASED, J. S. STEWART, MARY ELIZABETH (PEGGY) SPAULDING, A MINOR, C. V. JONES, GUARDIAN AD LITEM OF MARY ELIZABETH (PEGGY) SPAULDING, AND GENEVA THOMPSON ET AL., BLOOD RELATIONS OF FANNIE T. SPAULDING, DECEASED.

(Filed 12 January, 1944.)

1. Adoption § 3—

The abandonment of a child by its parents is commonly specified by statute as a ground for dispensing with their consent to its adoption. In such case adoption will be allowed not only without the consent of the parents, but even against their opposition. This was our law in 1923. N. C. C. S., 1919, sec. 182, *et seq.*

2. Adoption §§ 3, 9—

In an adoption proceeding in 1923, where the court found that the parents of a minor child had abandoned such child and the evidence on which the finding was made does not appear in the record, there is a presumption that it was sufficient to sustain the finding.

3. Adoption § 9—

Adoption proceedings are conclusive as to persons who were parties thereto, and as to their privies, notwithstanding a defect as to a party who would be entitled to disregard them as not binding on him, but who does not complain of his nonjoinder.

4. Adoption § 10—

The right of adoption is not only beneficial to those immediately concerned, but likewise to the public, and construction of the statute should not be narrow or technical, but rather fair and reasonable, where all material provisions of the statute have been complied with.

APPEAL by plaintiffs from *Thompson, J.*, at April Term, 1943, of DURHAM. Affirmed.

This is a civil action instituted 12 September, 1942, by the plaintiff, J. T. Locke, for himself and others similarly situated, as the nearest collateral blood relations of Fannie T. Spaulding, who died intestate 3 July, 1942, without lineal descendants, against E. R. Merrick, Trustee in a deed of trust executed 11 June, 1937, by Fannie T. Spaulding and her husband, L. J. Spaulding, to secure a note for $17,758.82 due the North Carolina Mutual Life Insurance Company, and L. J. Spaulding, Administrator of Fannie T. Spaulding, to obtain a restraining order against the consummation of the sale of the real estate upon which said deed of trust was given and of which Fannie T. Spaulding died seized and possessed, and for which J. S. Stewart had become the highest bidder at a foreclosure sale, which said sale had not been affirmed, pending

the determination of the owners of the equity of redemption in said real estate.

The defendant, L. J. Spaulding, Administrator of Fannie T. Spaulding, filed answer denying the claims of the plaintiffs, J. T. Locke and the other collateral blood relations of Fannie T. Spaulding, deceased, and alleging that one Mary Elizabeth (Peggy) Spaulding was an adopted child of Fannie T. Spaulding, deceased, and as such was the owner of the equity of redemption in the real estate involved in this action.

Upon hearing, the temporary restraining order was continued until the final hearing, and upon petition and motion of the defendant Spaulding, Administrator, Mary Elizabeth (Peggy) Spaulding, the alleged adopted child, and the collateral blood relations other than J. T. Locke, were made parties defendant to this action. A guardian *ad litem*, C. V. Jones, was appointed for the minor, Mary Elizabeth (Peggy) Spaulding, who filed answer asserting exclusive ownership in his ward of the equity of redemption in the real estate involved.

When the case came on for final hearing, jury trial was waived, and it was agreed by the parties litigant that the judge might find the facts and enter his conclusions of law upon the facts so found.

It was admitted in the record that the plaintiffs, J. T. Locke and others similarly situated, were the nearest blood relations of Fannie T. Spaulding, deceased, who never had a child born alive, and that the said Fannie T. Spaulding died intestate, seized and possessed of the real estate involved in this case, subject to the indebtedness against such property represented by a note held by the North Carolina Mutual Life Insurance Company secured by deed of trust thereon to E. R. Merrick, Trustee.

After hearing the evidence offered by the plaintiffs and by the defendant, the court found the facts and adjudicated upon such findings that Mary Elizabeth (Peggy) Spaulding was the legally adopted child of Fannie T. Spaulding, deceased, and as such is the sole owner of the real estate involved in this controversy; and that the plaintiffs J. T. Locke and the other blood relations of the said Fannie T. Spaulding have no interest or estate in such property.

To some of the facts found by the court, and to the conclusions of law reached by the court, and to the judgment that the plaintiffs have no interest in the estate of Fannie T. Spaulding, deceased, entered by the court, the plaintiffs objected, preserved exceptions, and appealed to the Supreme Court.

R. O. Everett for the plaintiffs, appellants.

Claude V. Jones, Attorney and Guardian ad Litem of Mary Elizabeth (Peggy) Spaulding, appellee.

SCHENCK, J. The decision of this case depends upon whether the proceedings involving the adoption of Mary Elizabeth (Peggy) Spaulding held in New Hanover County in May, 1923, were valid. If such proceedings were valid, the judgment of the Superior Court that the plaintiffs have no interest in the estate of Fannie T. Spaulding, deceased, was correct, and should be affirmed; if such proceedings were not valid, the judgment of the Superior Court was in error, and should be reversed.

In determining the validity of the adoption proceedings in 1923, it should be noted that the parents of the child were not made parties thereto, and that their consent to the adoption does not appear therein. However, it is alleged in the petition "that the father and the mother of the said child have abandoned the said child, and the Recorder of the County of New Hanover ordered said child in the custody of the Clerk of the Superior Court, who delivered the custody of the child to Mrs. Maggie Price, of the Salvation Army, and that the said child now has no legal or testamentary guardian"; and that Mrs. Maggie Price, with whom said child now resides, consents to such adoption; also it is found in the order of the clerk granting the letters of adoption "that Mary Elizabeth Spaulding is an abandoned child, . . . and that the parents of said child have abandoned the said child . . . and that Mrs. Maggie Price, with whom said child resides, consents thereto" (to the adoption). The plaintiffs contend that the failure to make the parents of the child a party to the proceedings or to obtain their consent to the adoption, is fatal to their validity. Such is not the law, the law being that the obtaining of the consent of the parents to the adoption is necessary, except where the child has been abandoned by the parents, in which situation it is well settled that the obtaining of such consent to the adoption is not required.

In 1 Amer. Jur., Adoption of Children, par. 42, p. 643, it is said: "Abandonment of a child by its parents is commonly specified by statute as a ground for dispensing with their consent to its adoption. In such case, adoption will be allowed not only without the consent of the parents, but even against their opposition." Therefore, the finding of fact by the clerk in 1923 that the parents, whose names were unknown, had abandoned the child would seem sufficient evidence for the judge of the Superior Court to find as a fact in the case at bar that the parents of the child had abandoned the child, which fact would support the conclusion of law that the adoption proceedings were valid. While the evidence upon which the petitioners alleged and the clerk found that the parents had abandoned the child does not appear in the record, it is proper to observe that the law did not require that this evidence be preserved, or even reduced to writing, and since the evidence is not in the record it is presumed that it was sufficient to sustain the findings. Hence, since the findings were made in 1923, and since the parents of the child

were then, and still are twenty years thereafter, unknown, such findings by the clerk were sufficient evidence to support the finding by the judge, to whom the findings of fact by agreement were referred, that the parents had abandoned the child.

The record of the adoption proceedings of 1923, which was introduced in evidence in the case at bar, likewise reveals that the petition therein alleged that "Mary Elizabeth Spaulding is . . . at present in the custody and charge of Mrs. Maggie Price, a member of the Salvation Army," and further that "to which adoption Mrs. Maggie Price, with whom the said child now resides, consents," and the order granting the letters of adoption finds as a fact "that Mrs. Maggie Price with whom said child resides, consents thereto" (to the adoption), it would seem that these facts found in 1923 would constitute sufficient evidence to support the finding of the court in the case at bar that the consent to the adoption was given by Mrs. Maggie Price, the person having charge of the child and with whom such child resided.

We are of the opinion that the law governing adoptions in this State in 1923 has been substantially complied with in this case. It is found in ch. 2, secs. 182, *et seq.*, Consolidated Statutes of North Carolina of 1919.

The petition which was introduced in evidence sets forth the name and age of the child, the name of the person having charge of the child, that the child has no estate and the adoption is sought for the life of the child; the person having charge of such child was made a party of record in the proceeding; and with the consent of the person who had charge of the child and with whom the child resided, the court allowed such adoption by an order granting letters of adoption; the record further discloses that the parents of the child were unknown and had willfully abandoned said child.

The adoption proceeding in 1923 was instituted by Louis J. Spaulding and wife, Fannie T. Spaulding, against Mrs. Maggie Price. Neither Louis J. Spaulding and Fannie T. Spaulding, nor those claiming under them, can be heard to attack such proceedings, since they were parties thereto, and especially is this so since the only defect in the adoption proceedings which the plaintiffs in the case at bar assert is that the proceedings could not be binding upon the parents of the child, who made no complaint against the adoption proceedings.

"The more approved rule, however, is that adoption proceedings are conclusive as to persons who were parties thereto, and as to their privies, notwithstanding a defect as to a party who would be entitled to disregard them as not binding upon him, but who does not complain of his nonjoinder. As has been very pertinently pointed out, no rights of the parent and the child would be impaired by giving force and effect to the

contract of adoption and permitting the child to succeed to the state of the adoptive parent as the adopted child of the latter." 1 Amer. Jur., Adoption of Children, par. 45, pp. 647-8.

What was said by the United States Circuit Court of Appeals for the 7th Circuit upholding the legality of an adoption proceeding, under the Illinois statute, in the case of *Carter Oil Company v. Norman,* 131 F. 2d, at page 451, is applicable to the case at bar. It is there written: "An adoption proceeding, it is true, is statutory, and jurisdiction of the subject matter and of the person is each a prerequisite to the validity of a decree of adoption. *Hook v. Wright,* 329 Ill., 299, 160 N. E., 579, and the record of the proceeding must show a substantial compliance with the statute to give the court jurisdiction in exercising the statutory powers conferred, yet, in the consideration of defendant's contention, it is well to remember that since the right of adoption is not only beneficial to those immediately concerned but likewise to the public, construction of the statute should not be narrow or technical nor compliance therewith examined with a judicial microscope in order that every slight defect may be magnified—rather, the construction ought to be fair and reasonable, so as not to defeat the act or the beneficial results where all material provisions of the statute have been complied with. *McConnell v. McConnell,* 345 Ill., 70, 177 N. E., 692. Much more does this principle apply where the parties to the adoption proceedings are not objecting, the inquiry in such case being narrowed to the jurisdiction of the subject matter. *Ashlock v. Ashlock,* 360 Ill., 115, 195 N. E., 657."

In the case at bar the record discloses that the names of the parents of the child were unknown in 1923, and are still unknown, and for that reason their names could not be set out in the petition, and no summons or other process could be served upon them. As a matter of fact, not only was the identity of the parents of the child unknown at the time the proceedings were instituted, but it was not known whether the child was a white or colored child. It was, however, later disclosed that the child was colored.

It cannot be held that the parents of the child must be made parties to the proceedings, or the consent of the parents must be obtained in order to give validity to the proceedings, when it appears from the record that the parents were and are still unknown, and that the child had been abandoned, and that the party to whom the custody of the child has been committed by the clerk, and with whom the child resided, had consented to the adoption.

The judgment of the Superior Court is

Affirmed.

STATE v. ANDREW WILSON FARRELL.

(Filed 12 January, 1944.)

1. Criminal Law §§ 16, 17—

A plea to an indictment is not a matter of form, but of substance, and in a capital case the arraignment should appear of record.

2. Same—

It is not the practice in this jurisdiction to require a prisoner to plead more than once to a single indictment, even where there is more than one trial. A second arraignment and plea *is held* to be immaterial.

3. Criminal Law §§ 30, 34a, 41f—

There is a distinction between the statement made by a prisoner on his preliminary examination before a magistrate under C. S., 4561, and his testimony given under C. S., 1799, as a witness on the trial of the cause. On the former, he is to be advised of his rights, the examination is not under oath, and, should it be taken contrary to the statute, it may not be used against him at the trial. On the latter, the accused, at his own request, but not otherwise, is competent but not compellable to testify and his testimony thus given is under oath and may be used at any subsequent stage of the prosecution.

4. Constitutional Law § 29: Criminal Law §§ 30, 34a—

The constitutional inhibition against self-incrimination, Art. I, sec. 11, is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions.

5. Criminal Law § 41f—

When the accused in a criminal prosecution avails himself of the privilege of testifying in his own behalf, he assumes the status of any other witness, with all the advantages and disadvantages that status may entail: but his failure to take the stand creates no presumption against him and is not a proper subject for comment before the jury.

6. Criminal Law § 53a—

The court's charge to the jury is to be considered in its entirety and contextually.

7. Criminal Law §§ 2, 5c—

Evidence, which shows no more than a temporary lapse of moral perception, is insufficient to excuse a crime as distinguished from reducing it to a lower grade, where some specific intent is required, *e.g.*, premeditation and deliberation.

APPEAL by defendant from *Grady, Emergency Judge,* at September Criminal Term, 1943, of DURHAM.

Criminal prosecution tried upon indictment charging the defendant with rape.

The record discloses that on the morning of 23 March, 1943, the defendant went to the Edgemont School in the city of Durham and falsely represented to the principal that his stepdaughter, a child eight years of age, was needed at home on account of the illness of her mother, when in reality the mother of the child was away at the time. The defendant took his stepdaughter home, made her drink some whiskey, and then ravished her.

The defendant was immediately arrested and placed in jail. The grand jury, then in session, promptly returned a true bill, and counsel was appointed to represent him. He was arraigned at the March Term, 1943, Durham Superior Court, and tried at the March-April Special Term, 1943. The defendant interposed a plea of insanity or mental irresponsibility at the time of the alleged offense. He took the stand and testified in his own behalf. From an adverse verdict and sentence of death, he appealed to the Supreme Court, and was awarded a new trial, case reported *ante,* 321.

On the second trial at the September Term, 1943, Durham Superior Court, the prosecution offered evidence sufficient to make out its case and rested. The defendant then offered a number of witnesses in support of his plea of insanity or mental irresponsibility, but did not again take the stand or become a witness in his own behalf. In rebuttal, and over objection, the solicitor offered the defendant's testimony taken at the former trial, in which he stated "I am not in a position to deny it. . . . I done these things. . . . I know that now I face the chair or gas chamber. . . . I do beg for mercy from everybody and God Almighty especially. . . . I have no recollection whatever of having committed this crime. . . . Got off from work about 7:00 a.m.; went home and had a few drinks. . . . I was drinking pretty heavy. . . . About 9:30 or 10:00 a.m. went to some pool parlor, I am not positive which one, and bought a chaser. . . . I start in on the bottle of whiskey that I have and I don't know then what happened." Exception.

The jury rejected the defendant's plea of insanity or mental irresponsibility, despite the substantial evidence offered in his behalf.

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.

R. H. Sykes and Powell & Lewis for defendant.

STACY, C. J. We have here for determination, (1) the sufficiency of the arraignment, (2) the competency of the defendant's testimony taken

at the former trial as evidence against him, and (3) the correctness of the charge.

First, in respect of the sufficiency of the arraignment, it will be noted that a true bill was found by the grand jury at the March Term, 1943, Durham Superior Court, at which term the defendant was duly arraigned and entered a plea of not guilty. He was thereafter tried at the March-April Special Term, 1943, Durham Superior Court, and convicted. From this conviction he appealed to the Supreme Court and was granted a new trial, case reported *ante,* 321.

The case was again called at the September Term, 1943, Durham Superior Court, and the record recites, "the defendant . . . and his counsel, . . . being present in open court and announcing their readiness for trial enters a plea of not guilty." There was no suggestion that the defendant should be rearraigned. He had already been arraigned at the March Term, 1943, and entered his plea of not guilty. It is not the practice in this jurisdiction to require a prisoner to plead more than once to a single indictment. Indeed, in *S. v. Watson,* 209 N. C., 229, 183 S. E., 286, the defendant there questioned the propriety of a second arraignment, which was held to be immaterial. So, here, the defendant's nonexceptive assignment of error to the sufficiency of the arraignment must be dismissed as pointless. It was obviously made out of the abundance of caution.

True, it has been said that a plea to the indictment is not a matter of form, but of substance, *S. v. Cunningham,* 94 N. C., 824, and that in capital cases, the arraignment should appear of record. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *Johnson v. United States,* 225 U. S., 405. Here it does appear that the defendant was duly arraigned and entered a plea of not guilty at the March Term, 1943. His second trial was on the same bill. No new or additional bill was returned by the grand jury. The assignment of error based on this part of the record cannot be sustained. *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186.

Second, as to the competency of the defendant's testimony taken at the former trial, which was offered by the State after the defendant had closed his case without himself going on the witness stand, it is to be noted the defendant testified on the original hearing at his own request and under the advice of counsel. He was not compelled to testify either at the former trial or at the present trial, albeit "at his own request, but not otherwise," and without prejudice if he failed to avail himself of the privilege, he was competent to testify at either or both trials. C. S., 1799; *S. v. Dee,* 214 N. C., 509, 199 S. E., 730; *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101.

There is a distinction to be observed between the statement made by a prisoner on his preliminary examination before a magistrate under C. S.,

4561, and his testimony given under C. S., 1799, as a witness on the trial of the cause. *S. v. Hawkins,* 115 N. C., 712, 20 S. E., 623. On the former, he is to be advised of his rights, and such examination is not to be on oath. On the latter, the accused, at his own request, but not otherwise, is competent but not compellable to testify, and, of course, his testimony thus given is received under the sanction of an oath. 20 Am. Jur., 473.

It has been held in a number of cases that where the examining magistrate takes the preliminary statement of a prisoner under the compulsion of an oath, contrary to the provisions of C. S., 4561, and without the advice of counsel, such statement may not be used against him on the trial, because, being thus induced, it is deemed to be involuntary. *S. v. King,* 162 N. C., 580, 77 S. E., 301; *S. v. Vaughan,* 156 N. C., 615, 71 S. E., 1089; *S. v. Parker,* 132 N. C., 1014, 43 S. E., 830; *S. v. Young,* 60 N. C., 126; *S. v. Matthews,* 66 N. C., 106; *S. v. Broughton,* 29 N. C., 96, 45 Am. Dec., 507. The reasons in support of this position are fully set forth in *S. v. Parker, supra; S. v. Broughton, supra;* and *People v. McMahon,* 15 N. Y., 384. But these cases have no application to the testimony of a defendant given voluntarily as a witness in his own behalf under C. S., 1799. *S. v. Hawkins, supra; Henze v. State,* 154 Md., 332.

The constitutional inhibition against compulsory self-incrimination, Art. I, sec. 11, is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. *S. v. Luquire,* 191 N. C., 479, 132 S. E., 162. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. *S. v. Melton,* 120 N. C., 591, 26 S. E., 933; 16 C. J., 630. The test in every case is whether the "admission" was voluntary. *Henze v. State, supra.*

To say that the testimony of the accused on the former trial is deemed to be involuntary, because given under the sanction of an oath, would seem to carry the presumption too far. If this were so, it could with equal plausibility be contended that the first jury before whom the defendant testified should not consider his testimony, because involuntary. *S. v. Eddings,* 70 Mo., 545, 36 Am. Rep., 496. On the contrary, the defendant offered himself as a witness on the former trial for the very purpose of having the jury consider his testimony in determining his guilt or innocence. What he said then may be used at any subsequent stage of the prosecution. *S. v. Simpson,* 133 N. C., 676, 45 S. E., 567; *People v. Arnold,* 43 Mich., 303, 38 Am. Rep., 182; 1 Thompson on Trials, sec. 647; 16 C. J., 569.

Speaking to the subject in *Bess v. Commonwealth,* 118 Ky., 858, it was said: "A defendant cannot be made to give evidence against him-

self. A failure to testify for himself cannot be commented on or used against him on his trial. When he does become a witness for himself, he occupies the position of any other witness introduced on the trial. To prove on the last trial what he said voluntarily in giving his evidence on the former trial is not making him give evidence against himself, nor is it commenting upon his failure to testify for himself. To admit such evidence is not violative of the Constitution, which protects one from being forced to give evidence against himself, nor of the law which protects him from being prejudiced by having failed to testify for himself. Neither the organic nor statutory law was intended to relieve the accused of the incriminating effect of voluntary statements which he may have made out of court or in court, when he voluntarily went upon the witness stand in his own behalf."

To like effect is the decision in *Miller v. People,* 216 Ill., 309, where, as stated in the first headnote (which accurately digests the opinion), it was held: "Admissions and statements made by the accused when testifying as a witness in his own behalf on a former trial may be proven by the People on a subsequent trial, although the accused does not testify on the latter trial."

There is no compulsion resting on a defendant to testify in a criminal prosecution. He is at liberty to take the stand in his own behalf or not, just as he may elect or be advised, and his failure to testify creates no presumption against him and is not a proper subject for comment by counsel in arguing the case to the jury. *S. v. Tucker, supra.* When he chooses to avail himself of the privilege, however, he assumes the status of a witness, with all the advantages and disadvantages that status may entail. *S. v. Griffin,* 201 N. C., 541, 160 S. E., 826. Of course, it is proper for the jury to consider that he is the defendant in the case and on trial for the crime charged. *S. v. Dee, supra.* The statements or admissions made by him while so testifying are in nowise privileged, but may lawfully be offered in evidence on any subsequent trial for the consideration of the jury in passing upon his guilt or innocence. *S. v. Simmons,* 78 Kan., 852; *S. v. Kimes,* 152 Iowa, 240; *Mackmasters v. State,* 83 Miss., 1; *Henze v. State, supra.* The exception addressed to the admission of the evidence is not sustained.

Third, as bearing on the correctness of the charge, the rule that what the court says to the jury is to be considered in its entirety and contextually would seem to save it from successful challenge. *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360.

The exception stressfully urged as valid is the one addressed to the instruction that "there is no evidence to justify the jury in finding the defendant insane so far as the drinking habit is concerned." *S. v. Hairston,* 222 N. C., 455, 24 S. E. (2d), 342. The only evidence on this

point is that contained in the defendant's testimony taken on the former trial, which discloses that he "had a few drinks," or was "drinking pretty heavy," at the time and did not know what happened or had no recollection of having committed the crime. Another witness testified that he went home with the defendant around 8 o'clock in the morning "and they drank about a quart of whiskey." The principal of the school said the defendant called for the little girl about 11 o'clock; "that he seemed normal and although I got within three feet of him and talked with him, I did not detect the odor of alcohol." This, at most, shows no more than a temporary lapse of moral perception which was held in *S. v. Sewell,* 48 N. C., 245, and again in *S. v. Potts,* 100 N. C., 457, 6 S. E., 657, to be insufficient to excuse a crime as distinguished from reducing it to a lower grade where some specific intent is required, *e.g.,* premeditation and deliberation. *S. v. Alston,* 214 N. C., 93, 197 S. E., 719. Here, no contention was made in respect of "a less degree of the same crime," C. S., 4640, or that the less-aggravated assaults included in the bill should be submitted to the jury, C. S., 4639, as all the evidence shows carnal knowledge and abuse of a female child under the age of twelve years. C. S., 4204. *S. v. Hairston, supra; S. v. Jackson,* 199 N. C., 321, 154 S. E., 402. Indeed, the unnaturalness of the defendant's conduct and the enormity of his crime were urged as circumstances in support of his plea of insanity or mental irresponsibility, which the jury rejected. *S. v. Alex Harris, ante,* 697.

A searching investigation of the entire record leaves us with the impression that the case has been tried in substantial conformity to the decisions on the subject and that the result accords with the law's command. The conclusion, therefore, is that the verdict and judgment should be upheld. It is so ordered.

No error.

FLORENCE OLLIE BENTON v. UNITED BANK BUILDING COMPANY AND UNITED CIGAR-WHELAN STORES CORPORATION.

(Filed 12 January, 1944.)

1. Negligence § 3—

Generally there is no duty resting on defendant to warn plaintiff of a dangerous condition, provided the dangerous condition is obvious.

2. Negligence §§ 4b, 19a—

In an action for damages allegedly caused by negligence of defendants, where plaintiff's evidence tends to show that the store of one defendant was in the building of the other defendant and opened off the lobby of the building through a plate glass door by a step down, that there was no

lack of light, either in the lobby or store, that plaintiff fell and was injured as she went through the door from the lobby into the store, although she could have seen the step down had she taken time to look as she opened the door, a motion for judgment of nonsuit was properly allowed. C. S., 567.

APPEAL by plaintiff from *Bobbitt, J.,* at March Term, 1943, of GUILFORD.

This is an action by the plaintiff to recover damages for personal injuries alleged to have been proximately caused by the negligence of the defendants.

It is alleged and there was evidence tending to prove that the defendant building company owned a large twelve-story bank building on the northeast corner of Elm and Washington Streets in the city of Greensboro, and that the defendant stores corporation leased from its co-defendant a storeroom in said bank building located on the ground floor and in the northwest corner of said building and operated a cigar store therein; that there was a door opening from the inside of the main entrance lobby of the building to the storeroom; that there was a difference in the elevation of the floor of the main entrance lobby and the floor of the storeroom, that of the storeroom being six inches lower than that of the lobby; that there was a step down from the lobby to the storeroom immediately at the door leading from the lobby to the storeroom; that the plaintiff, intending to enter the cigar store from the lobby for the purpose of purchasing a watch wrist band, approached the door, pushed it open and stepped into the cigar store, and as she stepped in she fell to the floor, from which fall she received injuries.

It is alleged and contended by the plaintiff that the defendants were actionably negligent in that they failed to properly light the step down from the lobby to the storeroom and failed to give the plaintiff and the public proper warning of the existing conditions surrounding said step down. The defendants deny these allegations, and plead in bar of plaintiff's recovery her contributory negligence in failing to exercise due care in the use of the step down in entering the storeroom.

When the plaintiff had introduced her evidence and rested her case the defendants lodged motions for judgments as in case of nonsuit (C. S., 567), which motions were allowed, and from judgments, predicated on this ruling, dismissing the action, the plaintiff appealed, assigning error.

Herbert S. Falk for plaintiff, appellant.

Frank P. Hobgood and Benj. T. Ward for United Bank Building Company, appellee.

Sapp & Sapp for United Cigar-Whelan Stores Corporation, appellee.

SCHENCK, J. It is not contended that the construction of the floor level of the storeroom six inches below the floor level of the main lobby of the building, from which the door led to the storeroom, constituted negligence. The negligence stressed in the brief being confined to the allegations of failure to adequately light the step down immediately at the door between the lobby and the storeroom, and the failure to give warning or notice of such step down, which the plaintiff in her brief denominates as a "stumbling block."

Such light as was in the storeroom from the sun was diffused light, since such light could enter only from the two doors opening onto the west and the north side of the room and the sun had not reached its zenith at the time of the plaintiff's fall, about 11 or 11:30 o'clock a.m. The storeroom was lighted by six overhead or ceiling lamps with underslung globes, each of which was of 200 watts, one of which lights was about six feet from the door between the lobby and the storeroom and another about 15 feet from that door. There were no windows in the storeroom to admit sun light. The floors of the lobby and of the storeroom were of different material, different in color and different in construction. There was no obstruction to the entrance into the storeroom through the door between it and the lobby. There was no defect in the lighting in the lobby, it being in all respects similar to that in the storeroom. If there were decorations (the evidence is in conflict) on the doors on the west and north side of the storeroom, such decorations could have cast no shadows from the sun into the storeroom owing to the position of the sun in the sky at that time of day with reference to the location of the building.

The plaintiff's testimony is to the effect that she entered the storeroom from the lobby to purchase a watch wrist band, and stated, "When you have your mind on shopping, it is quite different. I had my mind on shopping," she "could see the floor through the door"; she "was looking directly in front," she "could see clearly into the store"; plaintiff further testified that if she had taken the time, opened the door and looked she could have seen the step down; that she did not have the time to look after she opened the door before she stepped, but that "no one was rushing me . . . I had my own time to go through the door"; that she was looking directly in front of her through the plate glass door; the evidence tends to show that the door between the storeroom and the lobby was a heavy one with a clear plate glass panel in it which extended from 12 inches above the floor to within a few inches of the top thereof, and had on it a latch which had to be thrown to open the door, as well as an air-check to make it close; that one was required to stop to open the door before entering it.

When the record is examined it appears that there is no evidence of lack of light either in the storeroom or in the lobby. The storeroom was 18 by 20 feet and was lighted by six overhead incandescent lamps each carrying 200 watts of electric current. The lobby was similarly lighted. The plaintiff is therefore relegated to her contention that shadows from the decorations on the two doors opening on the west and north side of the store, respectively, obscured the step down and thereby caused her not to see it and to fall. This contention is untenable for the reason that it was a physical impossibility for the diffused light of the sun through the glass panels of these two doors to have cast shadows from any decorations on the doors to the step down over which the plaintiff entered the storeroom—especially in view of the abundance of artificial light therein.

The evidence discloses that there was no sign or other warning at the step down at the door through which the plaintiff entered the storeroom, and it is stressfully urged by the plaintiff that this was negligence, or at least evidence of negligence on the part of the defendants. The plaintiff predicates this contention upon the assumption that the existence of different levels between the two floors, necessitating the step down, created a dangerous condition or "stumbling block" of which it was the duty of the defendants to give warning. This may have been a sound position if the danger had been a latent one, of which the defendants knew, or should have known, and of which the plaintiff, or the public, was not fixed with knowledge; but such is not the situation in this case. The plaintiff's testimony is to the effect that she could have seen the step down if she had taken time between the opening of the door and her first step into the storeroom to look, but that she did not take the time, although there was no reason to hurry. It was only necessary to avoid injury from it to take time to see it. The plaintiff, although not rushed, failed to take the time to see the condition, and was injured. There is no duty to give warning of the obvious. Was this difference in the levels of the two floors obvious? The plaintiff's testimony presages an affirmative answer. She says: "I stepped forward, and before I had time to examine anything, I fell. I did not have time to look down. I was looking directly in front of me. No one was rushing me. No one took hold of me or pushed me. No one was in front pulling me. Sure I had my own time to go through the door." And further, "In answer to your question if I had taken time, opened the door, looked, could I have seen this step down, my answer is, if I had thought there was any reason, I guess I could have. . . ."

Any danger incident to the difference in the levels of the two floors necessitating the step down being obvious to one who looked, there was no duty resting upon the defendants to give notice thereof. The law

imposes no duty upon one to give notice of a dangerous condition to another who has eyes to see and an unobstructed view of such condition, but fails to take time to see such danger. Generally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees. Where a condition of premises is obvious to any ordinarily intelligent person, generally there is no duty on the part of the owner of the premises to warn of that condition. *Sterns v. Highland Hotel Co.*, 307 Mass., 90, 29 N. E. (2d), 721. There is no duty resting on the defendant to warn the plaintiff of a dangerous condition provided the dangerous condition is obvious. *Mulkern v. Eastern S. S. Lines*, 307 Mass., 609, 29 N. E. (2d), 919.

The case at bar is distinguished from *Mulford v. Hotel Co.*, 213 N. C., 603, 197 S. E., 169, in that in the latter case the plaintiff "came out of a brilliantly lighted room into a dimly lighted basement, and it may be inferred that her eyes had not become accustomed to the difference in illumination when she encountered the step," whereas in the instant case the lobby and the storeroom were equally and adequately illuminated; in the *Mulford case, supra,* it appeared that "the floors were uniformly colored and so were the walls," whereas in the instant case the floor of the lobby was of marble parallelograms 10 x 20 inches in size and of reddish tint, while the floor of the storeroom was of small white hexagonal tiles one inch by one inch in size and laid in dark cement. Both the coloring and shape of the tiles in the two floors were in strong contrast. In the *Mulford case, supra,* the defendant's negligence was admitted, but in the instant case the defendant's negligence is denied, and we are constrained to hold that it has not been made to appear by the evidence.

Since we are of the opinion, and so hold, that the judgments of nonsuit were properly entered for the lack of sufficient evidence to be submitted to the jury on an issue relating to the defendant's actionable negligence, the other assignments of error become immaterial and call for no animadversion from this Court. *Callahan v. Roberts*, 212 N. C., 223, 193 S. E., 265.

The judgment of the Superior Court is

Affirmed.

MAMIE E. WINSTEAD, ELLA BENNETT, EDDIE BLACK, MACK BLACK, MINNIE BLACK, LONNIE BLACK, MILDRED BLACK, MAMIE MIXON, ELLA MAY PAUL, ELSIE MERCER, JIM EBORN, ALTON EBORN, BOBBY EBORN, JULIA EBORN, CLAUDE WOOLARD, HOWARD WOOLARD, CHARLIE WOOLARD, LOLA WOOLARD WHITLEY, LILLIAN TETTERTON, CASSIE SAWYER, v. JAMES T. WOOLARD AND WIFE, SADIE M. WOOLARD, AND L. A. SQUIRES, COMMISSIONER OF THE SINKING FUND OF THE CITY OF WASHINGTON, AND J. S. BENNER, SINKING FUND COMMISSIONER OF BEAUFORT COUNTY.

(Filed 12 January, 1944.)

1. Deeds §§ 4, 8—

A deed of gift of an estate of any nature, if not proven in due form and registered within two years after the making of it, is void. C. S., 3315.

2. Same—

Between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void *ab initio* and title vests in the grantor.

3. Estates § 9a: Adverse Possession § 1—

When grantors in a deed of gift reserve a life estate in themselves, the grantee acquires no right of possession during the life of either of the grantors.

4. Adverse Possession § 1—

Where two parties are in possession of land, the possession in law follows the title.

5. Adverse Possession § 17—

A party, entering into possession of land, is presumed in law to enter under and in pursuance of his right, no matter what may have been his motive for the entry.

6. Adverse Possession § 4a—

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession for twenty years, receiving rents and profits and claiming the land as his own from which actual ouster would be presumed.

APPEAL by plaintiffs from *Thompson, J.*, at October Term, 1943, of BEAUFORT.

Civil action to be let into possession of certain lands as tenants in common with defendant James T. Woolard, who pleads sole seizin by reason of (1) alleged valid deed, (2) by possession under color for seven years, G. S., 1-38, formerly C. S., 428, and (3) by adverse possession for twenty years—G. S., 1-40, formerly C. S., 430.

The parties, having waived jury trial and agreed that the court should find the facts and render judgment thereon, the court, after hearing the testimony and argument of counsel, finds facts summarily stated as follows:

1. On 22 January, 1909, Kalite Woolard, then owner in fee and in possession of that certain tract of land described in the complaint, and his wife, Martha E. Woolard, executed and delivered to their son, the defendant James T. Woolard, a deed of gift conveying said land, reserving "for themselves an estate for the term of their natural lives" in the same, which deed of gift was registered on 16 November, 1918, in office of Register of Deeds of Beaufort County, North Carolina.

2. From the date of the execution of said deed until the death of Kalite Woolard in 1925, Martha E. Woolard having predeceased him, "the said Kalite Woolard and the said James T. Woolard were in exclusive adverse possession of the said tract of land."

3. Since the death of Kalite Woolard "the said James T. Woolard, claiming to own the land by virtue of the foregoing deed, has been in open, notorious, exclusive and adverse possession of said tract of land, living in the house on said land, cultivating crops thereon, and listing it for taxes, executing the deeds of trust set out in the record, and several chattel mortgages."

The petitioners are lineal descendants of Kalite Woolard, deceased, and instituted this action on 15 October, 1942.

Upon the foregoing facts, the court, being of opinion that plaintiffs are not tenants with defendants James T. Woolard *et al.*, in and to said land, entered judgment that plaintiffs take nothing by this action and that defendants go without day and recover their costs. Plaintiffs appeal therefrom to Supreme Court and assign error.

H. S. Ward for plaintiffs, appellants.

E. A. Daniel for defendants, appellees.

WINBORNE, J. Appellants in the characteristic original style of their eminent counsel, state this as the question presented on this appeal: "Father of six children made deed of gift to one, reserving life estate; registered nine years after execution; father and grantee in exclusive and joint possession until father's death less than twenty years before the beginning of this action by other five children to be declared tenants in common." And speaking thereto *arguendo* their counsel says:

"Plaintiffs have been told that a deed of gift must be registered within two years from its execution and upon failure of such registration within such time, is void. C. S., 3315, and *Booth v. Hairston,* 193 N. C., 279.

"They have been told, and are here contending, that it takes twenty years adverse possession by a tenant in common to oust the co-tenants, and that seventeen years will not do it. *Gilchrist v. Middleton,* 107 N. C., 663; *Roscoe v. Lumber Co.,* 124 N. C., 42; *Conkey v. Lumber Co.,* 126 N. C., 499.

"They contend here that the deed of gift was void after January 22, 1911, and that when Kalite Woolard, their father, died, this land descended to them and their brother, J. T., the grantee in common . . ."

The statute and decisions cited indicate that plaintiffs "have been told" the law aright, which, when applied to facts in hand, as comprehensively recited in question involved, lends support to their contentions.

A deed of gift of an estate of any nature if not proven in due form and registered within two years after the making of it, is void. G. S., 47-26, formerly C. S., 3315. *Booth v. Hairston,* 193 N. C., 278, 136 S. E., 879; *S. c.,* 195 N. C., 8, 141 S. E., 480; *Reeves v. Miller,* 209 N. C., 362, 183 S. E., 294; *Allen v. Allen,* 209 N. C., 744, 184 S. E., 485; *Cutts v. McGhee,* 221 N. C., 465, 20 S. E. (2d), 376.

And the Court has held that as between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void *ab initio* and title vests in the grantors. *Booth v. Hairston, supra.* But in the case in hand the grantors in the deed of gift in question, having reserved to themselves life estates, which in law included the right of possession, the grantee in the deed of gift, as a matter of law, acquired no right to possession of the land during the life of either of the grantors. And even though the court has found as a fact that from the date of the deed until the death of Kalite Woolard, the surviving grantor, said Kalite Woolard, and James T. Woolard, the grantee, defendant in this action, were in exclusive adverse possession of the said land, the title to the land and right to possession of it, as a matter of law, were in Kalite Woolard. Where two parties are in possession of land, the possession in law follows the title. *Gadsby v. Dyer,* 91 N. C., 311. See also *Ward v. Farmer,* 92 N. C., 93; *Nixon v. Williams,* 95 N. C., 103. Therefore defendant, James T. Woolard, as grantee in the deed of gift, as a matter of law, had no possession of the land prior to the death of Kalite Woolard. And the deed of gift not having been registered within two years after the making of it, and the title to the remainder after life estates having thereupon revested in Kalite Woolard, he died seized of the land. Hence, upon his death the title descended to his heirs at law, the plaintiffs and defendant, James T. Woolard, as tenants in common, and the possession followed the title. The possession which said defendant had after the death of his father, Kalite Woolard, was, as a matter of law, as a tenant

in common with the other heirs at law and not by virtue of the void deed of gift. "Where a party entitled to possession of land enters thereon, he is presumed in law to enter under and in pursuance of his right, no matter what may have been the motive for the entry, and he is at once clothed with every right he can have by virtue of his title which could be asserted by entry," headnote on *Nixon v. Williams, supra.* In that case *Merrimon, J.,* speaking for the Court, said the party so entering "could not repudiate her right as the owner of the inheritance, and agree to become a trespasser, or to be in possession of some other than her real title. In that respect, the law determined her condition and relation to the land," citing *Gadsby v. Dyer, supra; Gaylord v. Respass,* 92 N. C., 553. Moreover, in *Page v. Branch,* 97 N. C., 97, 1 S. E., 625, it is said: "One tenant in common cannot make his possession adverse to his co-tenant except by actual ouster, as he is presumed to hold by his true title." To the same effect are these cases: *Hampton v. Wheeler,* 99 N. C., 222, 6 S. E., 236; *Ferguson v. Wright,* 113 N. C., 537, 18 S. E., 691; *Shannon v. Lamb,* 126 N. C., 38, 35 S. E., 232; *Tharpe v. Holcomb,* 126 N. C., 365, 35 S. E., 608; *Hardee v. Weathington,* 130 N. C., 91, 40 S. E., 855. And it is a well settled and long established principle of law in this State that the possession of one tenant in common is in law the possession of all his co-tenants unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and profits and claiming the land as his own from which actual ouster would be presumed. See *Ward v. Farmer,* 92 N. C., 93. Among other pertinent cases are these: *Cloud v. Webb,* 14 N. C., 317; *S. c.,* 15 N. C., 289; *Black v. Lindsay,* 44 N. C., 467; *Linker v. Benson,* 67 N. C., 150; *Covington v. Stewart,* 77 N. C., 148; *Neely v. Neely,* 79 N. C., 478; *Caldwell v. Neely,* 81 N. C., 114; *Gaylord v. Respass, supra; Hicks v. Bullock,* 96 N. C., 164, 1 S. E., 629; *Page v. Branch, supra; Breeden v. McLaurin,* 98 N. C., 307, 4 S. E., 136; *Gilchrist v. Middleton, supra; Roscoe v. Lumber Co., supra; Hardee v. Weathington, supra; Woodlief v. Woodlief,* 136 N. C., 133, 48 S. E., 583; *Bullin v. Hancock,* 138 N. C., 198, 50 S. E., 621; *Rhea v. Craig,* 141 N. C., 602, 54 S. E., 408; *Boggan v. Somers,* 152 N. C., 390, 67 S. E., 965; *McKeel v. Holloman,* 163 N. C., 132, 79 S. E., 445; *Lee v. Parker,* 171 N. C., 144, 88 S. E., 217; *Lester v. Harward,* 173 N. C., 83, 91 S. E., 698; *Crews v. Crews,* 192 N. C., 679, 135 S. E., 784; *Stephens v. Clark,* 211 N. C., 84, 189 S. E., 191; *Cox v. Wright,* 218 N. C., 342, 11 S. E. (2d), 158.

Upon the facts found we do not have before us a case of actual ouster, and adverse possession under color of title within the meaning of the statute, G. S., 1-38, formerly C. S., 428. It is true defendants contend that James T. Woolard has had adverse possession of the land under

color of the deed of gift, but upon the facts found his contention is not supported in law. Upon such facts the law put him in possession of the land as a tenant in common with plaintiffs. And under the well settled principle that the possession of one tenant in common is in law the possession of all, the ouster of plaintiffs as tenants in common of the land in question will not be presumed from an exclusive use of the common property and appropriation by said defendant of the rents and profits for a less period than twenty years. See cases of *Cloud v. Webb* and others, *supra,* also *Ward v. Farmer, supra; Bullin v. Hancock, supra; Adderholt v. Lowman,* 179 N. C., 547, 103 S. E., 1; *Bradford v. Bank,* 182 N. C., 225, 108 S. E., 750.

Less than twenty years elapsed between the death of Kalite Woolard and the institution of this action. Hence, defendant James T. Woolard has failed to ripen title as against his co-tenants the plaintiffs, and they are entitled to be let into possession with him.

The judgment below is

Reversed.

L. M. GERRINGER v. WALTER GERRINGER AND WIFE, LILLIAN GERRINGER; LENA BARBER AND HUSBAND, CYRUS BARBER.

(Filed 12 January, 1944.)

1. Parent and Child § 3: Fraud § 11—

The mere relation of parent and child, without any evidence of intimate or fiduciary relationship, does not raise a presumption of fraud or of undue influence.

2. Fraud § 11: Deeds §§ 2c, 17d—

Where in consideration of an agreement by his son and daughter to support him, plaintiff executed a fee simple deed, conveying all of his real estate to such son and daughter and about a year thereafter changed his mind and wanted his land back, there is no evidence of fraud or undue influence and motion for judgment as of nonsuit was properly allowed.

APPEAL from *Thompson, J.,* at May Term, 1943, of ALAMANCE.

This action was instituted 11 April, 1942, to set aside a fee simple deed executed by the plaintiff on 20 September, 1940, to Mrs. Lena Barber and Walter Gerringer, two of plaintiff's children. Plaintiff alleges that the defendants obtained the execution of the deed by undue influence.

The pertinent facts are as follows: Plaintiff's wife died in 1940, shortly thereafter Mrs. Lena Barber and Walter Gerringer arranged with the Welfare Department of the county for a woman and her fifteen-year-old son to move into plaintiff's home. Plaintiff testified that Mrs. Lena

Barber and Walter Gerringer suggested that he marry this woman. He asked her to marry him and she consented. She entered his home on Monday and he married her on the following Saturday. On the day before his marriage, his son Walter, one of the defendants, and Cyrus Barber, the husband of his daughter, Lena, also a defendant, took him to a lawyer's office in Reidsville, N. C., where the deed referred to above was prepared and executed. The deed names a consideration of Ten Dollars and other valuable considerations, and was filed for registration in the office of the Register of Deeds for Alamance County on the same day it was executed. On this same date the plaintiff executed a will in which he bequeathed to Mrs. Lena Barber and Walter Gerringer, substantially all of his personal property. A separate agreement for support, in consideration of the execution of the deed, was entered into by and between L. M. Gerringer, Walter Gerringer and Mrs. Lena Barber, of even date with the deed and will. The plaintiff had made a previous will, which was in the possession of Mr. John Garrison. After leaving the lawyer's office in Reidsville, they drove to Mr. Garrison's home, and Mr. Garrison, at the request of the plaintiff, burned the former will.

The defendants paid off a mortgage on the premises conveyed to them, securing an indebtedness of $200.00, incurred by the plaintiff in connection with the funeral expenses of his first wife.

The plaintiff's second marriage was a failure. His wife left him five weeks after the marriage, and he has not seen her since and knows nothing of her whereabouts.

Plaintiff requested his son, Will, and his wife, who had lived with him for many years, to leave his home after he married the second time, and they did so. After his wife left him, his daughter, Lena, offered to take him in her home, but he refused to live with her. She then offered to move in with him and take care of him. He refused to permit her to do so, because he said "He would not live with her husband, Cyrus Barber." He likewise declined to live with his son Walter; in fact, he testified, "I didn't want to live with nary one of them," and "I told them both to leave there."

On the question of undue influence, the plaintiff testified: Lena and Walter had begged him for some time prior to the execution of the deed, to give them his property and promised if he would do so they would take care of him, and that he would not have to work any more, but that they had failed to do anything for him. He testified that he knew he was executing a deed and conveying all his property to Walter and Lena, and that the reason he did so was because he thought he was going to be taken care of. "I don't know as anybody ever made me do anything I did not want to do. Hasn't anybody made me sign the deed, just persuaded me to sign it. I decided I wanted to do it if they would have

done what they said they would. I reckon I did sign the deed because I wanted to. . . . If I had felt like I do now I would never have signed that deed. . . . Yes, I want the land back. . . . As to when I decided that I didn't want them to have this land, well, I decided as soon as they quit coming to see me. I don't remember how long it was; it was after the deed was made. . . . That was a right smart little bit. I reckon it was a year."

On cross-examination plaintiff admitted that the only objection he had to this transaction was that they (Lena and Walter) had failed to support him as they promised to do.

Plaintiff is eighty-two years of age and can neither read nor write; however, he has operated a store for thirty-five years, buys his merchandise from the wholesale houses, pays cash for it, and sells for cash. He knows how to add figures and to handle money. In 1940 plaintiff was suffering from rheumatism and high blood pressure, but he continued to operate his store and still continues to do so.

At the close of plaintiff's evidence, defendants moved for judgment as of nonsuit. Motion allowed. Plaintiff appealed, assigning error.

Thos. C. Carter, W. D. Barrett, of Long, Long & Barrett, for plaintiff.
Glidewell & Glidewell for defendants.

DENNY, J. This is an action to set aside a deed. The plaintiff is relying upon the exercise of undue influence upon him by the defendants in procuring the execution of said instrument.

There is no evidence in this record that the plaintiff lacked sufficient mental capacity to execute a deed on 20 September, 1940, or that he was easily influenced by reason of his mental condition. The plaintiff did testify that he was persuaded by Lena, his daughter, and Walter, his son, to make the deed; that Lena came to see him often and begged him to convey his property to them and that Walter came occasionally, and both agreed to take care of him if he would convey his property to them.

The sum and substance, however, of plaintiff's testimony amounts to this: In consideration of an agreement on the part of his son, Walter, and his daughter, Lena, to support him; which agreement is in writing and purports to have been signed by the parties, the plaintiff executed a fee simple deed, conveying all his real estate to said son and daughter. About one year thereafter, the plaintiff changed his mind and decided he wanted to recover his land, because, according to his version, he was not getting the support he had been promised. It will be noted that there is no evidence that the deed is not exactly like the plaintiff intended it to be at the time of its execution. Furthermore, plaintiff's only objection to this transaction, according to his testimony, is that he is not receiving

the support he had been promised, which was the consideration for transferring his property. But plaintiff admits that after the execution of the deed, and after his wife left him, his daughter, Lena, offered to take him in her home, but he refused to live with her. She then offered to move in with him and take care of him, he also rejected that offer. He likewise declined to live with his son, Walter.

It is contended by the plaintiff that the separate agreement for support was not signed by him and that he knew nothing of its existence until after the institution of this action, and that this purported agreement in itself is evidence of fraud. We cannot so hold, since there is no conflict between the provisions for the support of the plaintiff as contained in the written instrument, and the oral testimony of the plaintiff as to his agreement for support by these defendants at the time of the execution of the deed.

Plaintiff further urges that under the principles laid down in the case of *McNeill v. McNeill, ante,* 178, 25 S. E. (2d), 615, he is entitled to have the jury pass upon the question of fraud or undue influence; that the intimate relationship which existed between the parties raises a presumption of fraud or undue influence. The contention is untenable. The relationship of the parties in the instant case is not similar to the relationship of the parties in the *McNeill case, supra.* Here we are dealing with a parent and his children, without any evidence of intimate or fiduciary relationship. There a fiduciary relationship was involved. The mere relation of parent and child does not raise a presumption of undue influence. *In re Craven,* 169 N. C., 561, 86 S. E., 587.

A careful consideration of all the evidence on this record, bearing on the question of fraud or undue influence, when considered in the light most favorable to the plaintiff, is insufficient to warrant the submission of an issue thereon to the jury. *Myatt v. Myatt,* 149 N. C., 137, 62 S. E., 887; *In re Craven, supra; Owens v. Rothrock,* 198 N. C., 594, 152 S. E., 681.

Plaintiff's remedy, if any, appears to be, not in equity, but in a court of law for breach of contract. *Hinsdale v. Phillips,* 199 N. C., 563, 155 S. E., 238.

The judgment of the court below is

Affirmed.

ROSA LEE HEDGEPATH, ADMINISTRATRIX OF CHARLES LEE HEDGEPATH, v. CITY OF DURHAM.

(Filed 12 January, 1944.)

1. Negligence § 4d—

The doctrine of attractive nuisance is that one is negligent in maintaining an agency or condition, which he knows, or reasonably should know, to be dangerous to children of tender years, at a place where he knows or reasonably should know such children are likely to resort or to be attracted by such agency or condition, unless he exercises ordinary care for the protection of such children.

2. Negligence §§ 4d, 19a—

In an action to recover damages for the alleged wrongful death of plaintiff's intestate, a child of ten, against a city, the child having been drowned in a pond, created by a stopped drain under a fill of the city's street, causing rain water to accumulate, there being a total absence of evidence that defendant had any knowledge that plaintiff's intestate or any other children, at any time previous to the accident, played in the pond, and of any allurement of the pond, a motion for judgment of nonsuit was properly allowed.

APPEAL by plaintiff from *Olive, Special Judge,* at April Term, 1943, of DURHAM. Affirmed.

This action was instituted for the alleged wrongful death on 22 May, 1942, of the plaintiff's intestate, Charles Lee Hedgepath, a child of ten years of age.

The evidence tends to show that the defendant, City of Durham, in the grading of Lee Street, constructed a fill across a wet weather branch, and placed under the fill a pipe through which to drain the water; that a rain came and the pipe, because stopped up, was insufficient to carry the water off as fast as it came into the wet weather branch, and as a result there formed on the south side of Lee Street on an adjoining vacant lot a pool or pond of water, which in places reached a depth of 12 or 15 feet; that the plaintiff's intestate, and four other children went to the pool to settle a discussion which arose as to who could better swim, the intestate or his companion, Eddie Dyer; that when the boys reached the pool the intestate, Charles Lee Hedgepath, took off his clothes and dived into the water, and the water being over his head and he not being able to swim, was drowned.

The action of the plaintiff is bottomed upon the theory that the defendant maintained an attractive nuisance that lured children, including the plaintiff's intestate, an immature child, and failed to exercise due care to protect such children from the dangers incident thereto, and that this failure to exercise due care was negligence that proximately caused the death of said intestate.

Upon the plaintiff resting her case, the defendant moved the court to dismiss the action and for judgment as in case of nonsuit, and upon the close of all the evidence renewed its motion theretofore made, which was allowed (C. S., 567), and from judgment predicated on such ruling the plaintiff appealed, assigning errors.

R. M. Gantt for plaintiff, appellant.
Claude V. Jones for defendant, appellee.

SCHENCK, J. In 38 Am. Jur., Negligence (subhead Attractive Nuisances), par. 142, it is written: "While the doctrine has been variously stated, the courts which accept it generally are in substantial accord with the proposition that one who maintains upon his premises a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which may reasonably be expected to attract children of tender years to the premises, is under a duty to exercise reasonable care to protect them against the dangers of the attraction. Within the limitations herein considered, the doctrine is for the benefit of a meddling, as well as of a trespassing, child. The result of such doctrine is that one is negligent in maintaining an agency which he knows, or reasonably should know, to be dangerous to children of tender years, at a place where he knows, or reasonably should know, children of tender years are likely to resort, or to which they are likely to be attracted by the agency, unless he exercises ordinary care for the protection of such indiscreet and youthful persons." In par. 145, on the same subject at p. 811, it is written: "If the place or appliance cannot be said to possess a quality calculated to attract children generally, it must be shown that to the defendant's knowledge the injured child or others were in the habit of using it. Knowledge of the presence of children is shown by proof that children were in the habit of playing on or about the offending appliance or place. On the other hand, many instrumentalities do not in their character suggest, or impute knowledge, that children will make use of them to their injury, in which cases the doctrine of attractive nuisance does not apply."

Such being the law, we are impelled to hold that the action of the trial judge in sustaining the demurrer to the evidence was proper.

There is no evidence in the record which shows, or tends to show, that the defendant had any knowledge that the plaintiff's intestate ever at any previous time played or attempted to swim at or in the pool or pond of water in which he was drowned, or that any other children or child ever played or swam therein; indeed there is no evidence that any children or child ever, at any other time than on the fateful day of 22 May, 1942,

played or swam in the pool or pond. There is a total absence of any evidence that the defendant had any knowledge of any use being made by children of the pool as a place to play or swim, or for any other purpose, and of any allurement of such pool. In the absence of such evidence of such knowledge and of such allurement, the case of the plaintiff must fail.

In *Kramer v. R. R.*, 127 N. C., 328, 37 S. E., 468, which was an action to recover for the alleged wrongful death of the plaintiff's intestate, a child nine years of age, wherein it was alleged the intestate was injured and killed by the falling upon him of crossties which had been piled on the public highway and upon which the intestate had crawled or climbed, it is written: ". . . before they (the jury) could say that the intestate's injury and death were caused by the negligence of the defendant, they should inquire whether or not the defendant knew that the pile of crossties in the street was a common resort of little boys of tender years in that neighborhood to play, and the burden was on the plaintiff to show that the railroad company knew that fact, and that, if the defendant did not know it, then they should answer the issue as to the defendant's negligence, 'No.' That was a correct instruction."

The cases cited and relied upon by the plaintiff, appellant, *Brannon v. Sprinkle,* 207 N. C., 398, 177 S. E., 114; *Kramer v. R. R.,* 127 N. C., 328, 37 S. E., 468; *Ferrell v. Cotton Mills,* 157 N. C., 528, 73 S. E., 142; *Starling v. Cotton Mills,* 171 N. C., 222, 88 S. E., 242; *Barnett v. Mills,* 167 N. C., 576, 83 S. E., 826; *Comer v. Winston-Salem,* 178 N. C., 383, 100 S. E., 619; *Cummings v. Dunning,* 210 N. C., 156, 185 S. E., 653, all differ from the case at bar in that in each of those cases it appears that the defendant had notice of the use as a play place of the alleged attractive nuisance by the plaintiff's intestate, a child, and/or by other children of such use being made thereof. In the case from which this class of cases takes its name, as the "turntable cases" (*Sioux City and Pacific R. R. Co., Plff. in Error, v. Stout, by his next friend,* 17 Wall., 657), it appears that children were known by the railroad company to play on the turntable. *Brannon v. Sprinkle, supra.*

The judgment of the Superior Court is

Affirmed.

THE BANK OF ASHE AND FEDERAL DEPOSIT INSURANCE CORPORATION, v. LESTER M. STURGILL, VICTOR CLARK, E. L. CHILDERS, C. E. WELCH, JOHN GOSS, AND OLIVER HAM.

(Filed 12 January, 1944.)

1. Pleadings §§ 21, 22—

In order to facilitate the determination of causes on their merits, in the furtherance of justice, the courts have wide powers with respect to amendments to pleadings. Amendments, which are permitted in order to conform the pleading to the proof, are limited to those which do not change substantially the claim or defense. C. S., 547.

2. Same—

Amendments to pleadings may be allowed after a referee's report has been filed; but after exceptions are allowed to a referee's report and the cause ordered to stand for trial on the issues of fact raised by the exceptions, no amendments should be allowed except such as are pertinent to the issues of fact defined by the court's allowance of exceptions.

APPEAL by defendants from *Gwyn, J.*, at April Term, 1943, of ASHE. Affirmed.

Motion by plaintiff Federal Deposit Insurance Corporation to amend its reply. This was allowed, and defendants excepted and appealed.

Francis C. Brown, James M. Kane, Arthur C. Bernard, R. A. Doughton, Ira T. Johnston, Fred S. Hutchins, and H. Bryce Parker for plaintiffs, appellees.

Bowie & Bowie for defendants, appellants.

DEVIN, J. The question involved in this appeal may be better understood by a brief statement in chronological order of the events leading up to the ruling complained of.

In 1927 the Bank of Ashe took over the assets and assumed the liabilities of the Bank of Lansing. The defendants, who were stockholders and directors of the Bank of Lansing, executed an agreement to indemnify the Bank of Ashe from loss. 27 March, 1933, a statement of the liquidation of the Lansing Bank showed a loss to the Bank of Ashe of approximately $12,000, and the defendants executed to the Bank of Ashe their promissory notes in that amount due 30 December, 1933. Subsequently, action on the notes was instituted by plaintiff Bank in 1934, voluntary nonsuit taken in 1935, and this action begun in 1936. The defendants denied liability and set up several defenses, and thereafter at May Term, 1938, the cause was referred to R. F. Crouse, referee. In June, 1938, the Federal Deposit Insurance Corporation, which before the beginning of this litigation had insured the deposits of the Bank of

Ashe, made a loan to the Bank to pay its creditors, and as security therefor acquired by assignment certain of its assets, including the notes sued on. In 1939 by consent the Federal Deposit Insurance Corporation was made a party plaintiff and adopted the complaint and reply, and also filed a separate reply, which the defendants answered. 12 July, 1940, the referee filed his report in which he found the facts in favor of the defendants, and concluded that they were not liable on the notes. Plaintiffs filed exceptions, and these were heard by Judge Pless at October Term, 1940. Certain exceptions to the findings of fact were allowed, and, the defendants having preserved right to trial by jury thereon, the cause was ordered to stand for trial in the Superior Court on the issues of fact raised by the exceptions allowed. These related to defendants' claims, (1) that the notes sued on were executed in reliance upon the false representation of the cashier of the Bank of Ashe that there were sufficient assets of the Lansing Bank to discharge the notes; that the notes were executed on condition that they be discharged in that manner, and would only be used for the purpose of opening the Bank; that the liquidation of the Lansing Bank had not been completed; and that the notes were not executed in settlement of an ascertained loss in the liquidation of Bank of Lansing; (2) that the Bank of Ashe failed to exercise diligence in collecting assets of the Lansing Bank, resulting in substantial loss; and (3) that by the exercise of diligence a sufficient amount could have been collected from assets and stockholders' liability to have discharged all the liabilities of the Bank of Lansing.

At April Term, 1943, plaintiff Federal Deposit Insurance Corporation moved to amend its reply by alleging that the defendants were estopped to set up as a defense to this action transactions and agreements between the parties prior to the execution of the notes; that the notes were executed as evidence of an ascertained indebtedness by the defendants to the Bank of Ashe, and were accepted and carried on the books of the Bank as valid obligations, and, without notice of any claim of infirmity, were so considered by the Commissioner of Banks, who thereupon permitted the Bank of Ashe to reopen its doors after the banking holiday of 1933, and upon the faith of said notes certified the solvency of the Bank to the plaintiff Federal Deposit Insurance Corporation; that the moving plaintiff, without notice of any contention that the notes were invalid by reason of a private agreement between defendant and officers of the Bank, or that the notes were not based on valid consideration, insured the Bank's deposits, and thereafter made loans to the Bank to pay its depositors and creditors; that defendants should not now be permitted to plead as a defense a secret agreement in which they had participated, and as to which they kept silent, thereby inducing the plaintiff to insure the Bank's deposits with resultant loss. The

plaintiff's amendment further set up that the defendants as parties to an agreement which contemplated the concealment of the actual transaction and consequent false entries on the books of the Bank are estopped to plead the agreement as a defense to this action; and further that defendants' pleas are contrary to Federal policy.

The amendment was allowed by the court below as a matter of discretion. In order to facilitate the determination of causes on their merits, in the furtherance of justice, the courts have wide powers with respect to amendments, and this is recognized by our statute. C. S., 547; McIntosh, 512. Amendments to pleadings may be allowed after referee's report has been filed, *Hardware Co. v. Banking Co.*, 169 N. C., 744, 86 S. E., 706; *Moore v. Westbrook*, 156 N. C., 482, 72 S. E., 842, or even after verdict, *Patterson v. Lumber Co.*, 175 N. C., 90, 94 S. E., 692. So liberal has been the practice in this respect within this jurisdiction that *Chief Justice Pearson* once remarked that it seemed as if "Anything could be amended at any time." *Garrett v. Trotter*, 65 N. C., 430. However, the amendments which are permitted in order to conform the pleading to the proof are limited by the statute to those which do not "change substantially the claim or defense." The introduction of a new element into a cause at issue which substantially changes its character should not be permitted, and in this case at this stage of the litigation no amendments should be allowed except such as are pertinent to the issuable facts defined by the court's allowance of exceptions to the referee's report. Measured by these rules, we are unable to say that the allowance of the amendment objected to was beyond the power and discretion of the court. The amendment set up a plea which was pointed to the particular issues now set down for trial.

By the proposed addition to its pleadings the moving plaintiff seeks to invoke as applicable here the principles of equitable estoppel which were considered by the Supreme Court of the United States in the recent cases of *D'Oench v. Federal Deposit Insurance Corp.*, 315 U. S., 447 (1942), and *Deitrick v. Greaney*, 309 U. S., 190. The same principles as applied to banks and their creditors were considered in *Bangor Trust Co. v. Christine*, 297 Pa., 64; *Mount Vernon Trust Co. v. Bergoff*, 272 N. Y., 192; *Bay Parkway National Bank v. Shalom*, 270 N. Y., 172; *Denny v. Fishter*, 238 Ky., 127.

We think the allowance of the amendment was within the discretion of the trial court, and the order to that effect is

Affirmed.

STATE v. MRS. GENE CAMPBELL.

(Filed 12 January, 1944.)

1. Statutes §§ 5a, 8—

It is not the policy of the criminal law to make a person charged with crime the victim of ambiguities. Statutes levying taxes and statutes creating criminal offenses are subject to strict construction.

2. Same—

Public Laws 1939, ch. 188, is regulatory, involving police power as well as taxing power, and the words, "tourist camp, cabin camp, tourist home, *roadhouse*, public dance hall, or other similar establishment," in sec. 1, are qualified by the words "where travelers, transient guests, or other persons are or may be lodged for pay," so that to convict a person of operating a "roadhouse" and impose the penalties of sec. 13, it must be shown that such person lodged or offered to lodge transient guests.

APPEAL of defendant from *Thompson, J.*, at June Criminal Term, 1943, of DURHAM.

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

R. M. Gantt for the defendant, appellant.

SEAWELL, J. The defendant was tried and convicted in the recorder's court of Durham County upon a warrant charging "that Mrs. Gene Campbell, on or about the 17th day of April, 1943, with force and arms, at and in the County aforesaid, and within Durham County, did wilfully, maliciously and unlawfully Operating a road house without securing a proper license as is required by law against the statute in such cases made and provided, and against the peace and dignity of the State."

Upon her appeal to the Superior Court of Durham County, where the case was tried *de novo*, she was again convicted, and from the sentence appealed to this Court. Only her exception to the ruling of the court below overruling her demurrer to the evidence and motion for judgment as of nonsuit is involved in the appeal. The question presented is primarily one of statutory construction of certain sections of chapter 188, Public Laws of 1939, which the State contends are applicable to the business shown to have been conducted by defendant, and which the defendant insists should be otherwise construed.

Section 1 of the Act cited reads as follows:

"Every person, firm or corporation engaged in the business of operating outside the corporate limits of any city or town in this State a tourist camp, cabin camp, tourist home, road house, public dance hall, or any other similar establishment by whatever name called, where

travelers, transient guests, or other persons are or may be lodged for pay or compensation, shall, before engaging in such business, apply for and obtain from the Board of County Commissioners of the county in which such business is to be carried on a license for the privilege of engaging in such business and shall pay for such license an annual tax in the amount of two dollars ($2.00)."

Section 13, having reference to this business, reads as follows:

"It shall be unlawful for any person, firm or corporation to engage in such business without first obtaining a license therefor. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court."

It is admitted that defendant did not have a license under the provisions of this statute. The only question is whether the activities in which she was actually engaged bring her within the description of the business upon which the statute imposes a tax and for which it requires a license.

The facts upon which the conviction rests are substantially as follows:

Defendant has a home on the Oxford-Durham Highway, with seven or eight rooms on the second floor, where she has some roomers and boarders. She also feeds people—runs a sort of lunch counter and sells bottled drinks, candies and sandwiches. On the first floor she has a room which contains a lunch counter which extends about one-half the length of the room, entered by a door facing towards the highway. Back of the lunch counter and in front of the room are two booths with a table in each, seating around four people. North of the booths is an open, clear space about 20 feet long and 8 or 10 feet wide. In the room where the lunch counter is located, there is a music box, operated by putting a coin in the slot. On two occasions, the officers testified, they saw some dancing—at one time just one couple and at another two or three couples —probably two soldiers dancing with two girls and a civilian with another girl—"that sort of dancing might have taken place at any other place where food was served, at a filling station or anyone's home." There was not room for more than three or four couples to dance, and the people the officers saw dancing looked crowded.

There was no evidence that defendant had ever lodged or offered to lodge transient guests.

The State contends that the term "roadhouse" is a term very generally understood in common parlance, and must be understood in its popular meaning, citing *U. S. v. Boasberg,* 283 Fed., 305, 306 (E. D. La., 1922): "The phrase 'roadhouse' has a well known meaning, indicating a certain kind of restaurant."; and quoting the definition given in 54 C. J., p. 849: "ROADHOUSE. A certain kind of restaurant." The defendant contends,

however, that the term is further modified and described in the statute, and that the definition thus given has become the dictionary of the law. After naming, in parallel construction, "tourist camp, cabin camp, tourist home, *road house,* public dance hall, or any other similar establishment by whatever name called," there is added the qualification "where travelers, transient guests, or other persons are or may be lodged for pay or compensation." The defendant contends that this phrase is an essential part of the description of a "road house" to which the statute applies. Without attempting to too nicely balance the reasonings *pro* and *con,* we believe the grammatical construction and syntax of the section, and particularly the punctuation by which the modifying clause is set off—often as necessary to the spelling of the sentence as letters are to the spelling of the words—are more favorable to the view taken by counsel for the defendant and should be adopted as the construction intended.

We are also inclined to that view because we can see no economic or social policy reasonably requiring a distinction between a roadhouse and "other similar place" with respect to the particular qualification added. Moreover, a perusal of the whole chapter (Public Laws of 1939, ch. 188) convinces us that the law is regulatory, involving the police power as well as the taxing power of the State. In fact, section 6 requires persons occupying any room at the roadhouse to register, and if traveling by motor vehicle, to register the license tag of the motor vehicle; and section 7 provides for the punishment for any man or woman found occupying the same room in any establishment within the meaning of the Act for any immoral purpose, or for falsely registering as husband and wife. It seems reasonably clear, upon an inspection of the whole Act, that it was aimed at establishments where transient lodgings might be had by tourists and travelers.

It might be conceded that the question is debatable, but it is not the policy of the criminal law to make a person charged with crime the victim of ambiguities. Statutes levying taxes and statutes creating criminal offenses are subject to strict construction. *S. v. Crawford,* 198 N. C., 522, 152 S. E., 504; *S. v. Heath,* 199 N. C., 135, 153 S. E., 855; 87 A. L. R., 37; *S. v. Briggs,* 203 N. C., 158, 165 S. E., 339; *Commonwealth v. Lorrilard Co.,* 136 Va., 258; *Columbia Gas Light Co. v. Mobley,* 137 S. C., 107, 137 S. E., 211; *Fuller v. S. C. Tax Com.,* 128 S. C., 14, 121 S. E., 478.

The motion of defendant for judgment of nonsuit should have been allowed. The judgment to the contrary is

Reversed.

JOHN STONE, JR., SUBSTITUTED PLAINTIFF FOR MOSES GRIMES, v. AMELIA GUION, CICERO GUION AND BUDDY GUION.

(Filed 12 January, 1944.)

1. Ejectment § 15: Execution § 24—

Where plaintiff sued in ejectment three defendants, wife, husband and son, and at the close of the trial plaintiff was nonsuited as to the father and son, and no appeal taken, and on a subsequent trial plaintiff recovered judgment against the wife, and upon issuance of a writ of possession, the wife moved to vacate the writ on the ground that she disclaims title to the property and is living on the land in the home of her husband by reason of her marital rights, an order allowing the motion was proper.

2. Ejectment § 9a—

No person in possession of the premises claiming title thereto prior to, or at the time of, the commencement of the action can be dispossessed unless he was made a party to the suit so as to be bound by the judgment.

3. Husband and Wife § 1—

Neither husband nor wife, without lawful cause, so long as the marital relation exists, can exclude the other from the home they have established by mutual and voluntary choice.

APPEAL by plaintiff from *Carr, J.*, at April Term, 1943, of ROBESON.

This action has been before this Court twice previously, *Grimes v. Guion,* 220 N. C., 676, 18 S. E. (2d), 170, and *Stone, Substituted Plaintiff, v. Guion,* 222 N. C., 548, 23 S. E. (2d), 907.

The action was brought originally against Amelia Guion, Cicero Guion and Buddy Guion, and the complaint alleged the defendants were in the unlawful and wrongful possession of the land described therein. Amelia Guion filed an answer and pleaded *sole seizin* of the land in controversy. Cicero Guion, her husband, and Buddy Guion, her son, filed a separate answer and denied they were in the unlawful and wrongful possession of said land. At the close of plaintiff's evidence in the trial below, Cicero and Buddy Guion moved for judgment as of nonsuit as to them. The motion was granted and no appeal was taken from said judgment.

The second appeal involved a review of the trial below, wherein the plaintiff John Stone, Jr., was adjudged the owner and entitled to the immediate possession of the tract of land in controversy and the defendant, Amelia Guion, was adjudged to be in the unlawful possession thereof. No error was found in said trial. Thereafter a writ of possession was issued and served on Amelia Guion by the Sheriff of Robeson County, to eject her from the land and put the plaintiff, Stone, in possession. Amelia Guion moved to vacate the writ of possession on the ground that she disclaimed any further title to the property, in view

of the Supreme Court's decision, and that she was now living in the home upon the land with her husband by reason of her marital rights. Whereupon, his Honor entered an order allowing defendant's motion to recall the execution issued against her and concluding therein as a matter of law upon the facts found that the defendant, Amelia Guion, having disclaimed title to the land in controversy, has a lawful right to remain in the home and domicile of her husband, Cicero Guion, situated upon the said land, until such time as the said Cicero Guion voluntarily surrenders the possession thereof or has been ejected therefrom by due process of law.

The plaintiff appeals from the foregoing order to the Supreme Court and assigns error.

F. D. Hackett and James R. Nance for plaintiff.

L. J. Britt and McLean & Stacy for defendant.

DENNY, J. The plaintiff contends that Cicero Guion, husband of Amelia Guion, and her son, Buddy Guion, are bound by the judgment herein and may be dispossessed under the writ of possession issued pursuant thereto. This contention is based upon the general rule that "After recovery of a judgment in favor of the plaintiff in an action of ejectment the defendant and all those in privity with him may be dispossessed under the writ of possession issued thereon, and that all persons acquiring possession from and under the defendant during the pendency of the action are privies within the meaning of the rule. The parties defendant, their families, servants and tenants at sufferance are, of course, bound by the court's order in ejectment and may be dispossessed." 18 Am. Jur., sec. 142, p. 113. The rule does not apply in the instant case. There is no privy in estate shown on this record to exist between Amelia Guion and her husband, Cicero Guion, or between her and her son, Buddy Guion. *Shew v. Call,* 119 N. C., 450, 26 S. E., 33. Quoting further from the above section of Am. Jur.: "While the general rule is, as stated, that the defendant and all those in privity with him and who enter under, and acquire an interest in the premises from or through, him subsequent to the commencement of the action are bound by the judgment therein and are liable to be dispossessed thereunder, the converse of this rule is also equally well settled—namely, that no person in possession of the premises claiming title thereto prior to, or at the time of, the commencement of the action can be dispossessed unless he was made a party to the suit so as to be bound by the judgment."

The plaintiff, having alleged that Amelia Guion, Cicero Guion and Buddy Guion were in the unlawful and wrongful possession of the land

he sought to recover, the burden was upon him to show unlawful and wrongful possession. This he failed to do in so far as Cicero Guion and Buddy Guion were concerned, in the opinion of the trial judge, which failure resulted in a judgment of involuntary nonsuit as to them. When the judgment of nonsuit was entered, the plaintiff did not appeal nor move to make Cicero Guion a party defendant, as the husband of Amelia Guion, but elected to proceed against Amelia Guion alone. Hence, neither Cicero Guion nor Buddy Guion was a party to the action when the final judgment was rendered. Therefore, the plaintiff is not entitled to an execution against Cicero Guion or Buddy Guion under and by virtue of the judgment rendered in this action.

In view of the status of the parties, and the disclaimer of title to the land in controversy by Amelia Guion, we think the ruling of the court below is correct.

On the facts as disclosed on this record, the filing of the disclaimer of title is tantamount to a voluntary dispossession and an ouster of Amelia Guion of all claim of right. A physical eviction of Amelia Guion from the premises would accomplish nothing more, since she has the legal right to live in the home and domicile of her husband, Cicero Guion, who resides in a house situate on the land in controversy. "Neither husband nor wife, without lawful cause, so long as the marital relation exists, can exclude the other from the home they have established by mutual and voluntary choice." 27 Am. Jur., 201; *Kelley v. Kelley,* 74 A. L. R., 135, 153 Atl., 314, see Annotation 74 A. L. R., 138, citing *Hancock v. Davis,* 179 N. C., 282, 102 S. E., 269, and *Kornegay v. Price,* 178 N. C., 441, 100 S. E., 883.

The character of the possession of Cicero Guion and Buddy Guion is not presented for determination on this record.

The judgment of the court below is

Affirmed.

IN THE MATTER OF SHELBY FAYE PREVATT AND JAMES WADE PREVATT, INFANTS.

(Filed 12 January, 1944.)

1. Clerks of Superior Court § 7—

Where the Juvenile Court has by proper proceeding acquired jurisdiction of the parties and of the subject matter of children whose custody is subject to controversy, its adjudication for the welfare of the children must be held effective and binding on the parties, subject to review on appeal. C. S., 5039, 5058.

2. Same—

While the record does not disclose that a written petition to the Juvenile Court was originally filed by appellant, C. S., 5043, he may not now be heard to complain of irregularity in this respect, since the proceeding was instituted at his instance, and he was personally present at the hearing. C. S., 490.

3. Same: Habeas Corpus § 8—

Original jurisdiction has been conferred upon the Juvenile Court to find a child delinquent or neglected, C. S., 5039, but this statute does not repeal C. S., 2241, and is not inconsistent therewith. The Superior Court as such has exclusive jurisdiction, by writ of *habeas corpus*, to hear and determine the custody of children of parents separated but not divorced.

APPEAL by movant, Herbert Prevatt, from *Nimocks, J.*, at October Term, 1943, of ROBESON. Affirmed.

The hearing below was upon motion of Herbert Prevatt, father of the above named infants, to vacate an order of the Juvenile Judge relative to their custody. It was alleged the order was void for want of jurisdiction.

The pertinent facts were these. Herbert Prevatt and his wife, Elizabeth Prevatt, the parents of the infants Shelby Faye and James Wade Prevatt, are living separate from each other though not divorced. The children are aged five and two years, respectively. Upon the complaint of Herbert Prevatt to the Juvenile Judge that the children were neglected, and that their custody was subject to controversy, a juvenile warrant was issued and the children were brought back from Mecklenburg County, where they had been temporarily taken by their mother. A hearing was had by the Juvenile Judge, all the parties interested being present in person and with counsel, and an order was made providing for the disposition of the children. Subsequently, 7 October, 1943, the order was signed continuing these arrangements. No objection was made. The order is as follows: "This cause coming on to be heard before the undersigned Juvenile Judge, and being heard, and it appearing to the court that the said Shelby Faye Prevatt and James Wade Prevatt, minor children of Herbert Prevatt and Elizabeth Prevatt, who are husband and wife, and living in the state of separation, are now and have been for some time residing in separate homes, that is, Shelby Faye Prevatt living in the home of J. E. Kinlaw and wife, Sallie Kinlaw, father and mother of Elizabeth Prevatt, and James Wade Prevatt living in the home of R. L. Lamb and Myrtie Lamb, and the court finds that such arrangement, subject to the qualifications hereinafter named, is to the best interest of said infant children; it is, therefore, ordered, adjudged and decreed by the court that the said Shelby Faye Prevatt shall continue to live in the home of J. E. Kinlaw and wife, Sallie Kinlaw, in

the custody of Elizabeth Prevatt, mother of said child, and that the said James Wade Prevatt shall continue to live in the home of R. L. Lamb and wife, Myrtie Lamb, in the custody of Herbert Prevatt, father of said child. It is further ordered that the said infant children shall be allowed to visit each other weekly. (Here followed provisions for the interchange of visits between the children.) This matter is retained for further orders."

Thereafter R. L. Lamb refused to comply with the order, and motion was made by Elizabeth Prevatt that he be attached for contempt. Thereupon Herbert Prevatt moved the Juvenile Court to vacate the order of 7 October on the ground that the Juvenile Judge did not have jurisdiction to make the order. This motion was denied and movant appealed to the judge of the Superior Court. In the Superior Court, upon consideration of the record and the testimony of the Juvenile Judge, it was held that the Juvenile Judge had jurisdiction over the parties and the matters in controversy, and that the order of 7 October was valid and binding.

The movant, Herbert Prevatt, appealed.

L. J. Britt and McLean & Stacy for Elizabeth Prevatt, appellee.

F. D. Hackett, Jr., and Varser, McIntyre & Henry for Herbert Prevatt, appellant.

DEVIN, J. The statute creating Juvenile Courts in North Carolina as separate parts of the Superior Court contains these provisions: "The Superior Courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age, residing in or being at the time within their respective districts: 1. Who is delinquent. . . .; 2. Who is neglected . . .; 3. Who is dependent upon public support, or who is destitute, homeless or abandoned, or whose custody is subject to controversy." C. S., 5039; *S. v. Burnett,* 179 N. C., 735, 102 S. E., 711. While the act confers general jurisdiction upon the Superior Court, it will be understood that the term "court" when used in this statute without modification refers to the Juvenile Court which is therein created as a separate but not independent part of the Superior Court. C. S., 5041; *In re Hamilton,* 182 N. C., 44, 108 S. E., 385. Juvenile Courts were created and organized for the purpose of administering this law, and for the original hearing and determination of matters and causes within its scope, and as such were empowered to "make such orders and decrees therein as the right and justice of the case may require" (*S. v. Burnett, supra*), with right of appeal. C. S., 5058; *In re Hamilton, supra; In re Coston,* 187 N. C., 509, 122 S. E., 183; *S. v. Ferguson,* 191 N. C., 668, 132 S. E., 664; *Winner v. Brice,* 212 N. C., 294, 193 S. E., 400.

Here the controverted matter of custody of his two children was originally presented to the Juvenile Court by the appellant, Herbert Prevatt. In consequence, a plenary hearing was had in that court at which all the parties were present in person, and apparently with the consent of the appellant arrangements were ordered for the temporary custody and disposition of the children. No objection to the plan devised by the Juvenile Judge was made by anyone, until later when R. L. Lamb, brother-in-law of the appellant, signified his refusal to comply.

We are unable to concur in the view of the appellant that the entire proceeding was a nullity. When the custody of children is controverted by parents who are living apart, and the matter is brought by them before that branch of the Superior Court created for the purpose of handling matters involving child welfare, and an order is made placing the children in homes deemed suitable and advantageous for them, the order is reviewable on appeal, but may not be disregarded as void and of no effect. *Winner v. Brice, supra.* Having invoked the action of the Juvenile Court, the appellant's motion to vacate a proper order of the court whose aid he has sought should not be allowed, unless it be made to appear that the court had no jurisdiction in the premises.

While the record does not disclose that a written petition to the Juvenile Court was originally filed by the appellant (C. S., 5043), he may not now be heard to complain of irregularity in this respect, since the proceeding was instituted at his instance, and he was personally present in court for the hearing which he had invoked. C. S., 490; *Burton v. Smith,* 191 N. C., 599, 132 S. E., 605. All the interested parties referred to in the order, as well as the children, were present before the court and were bound by its order, if in law the court had jurisdiction of the subject matter.

Unquestionably, if either of the parents had proceeded in accord with C. S., 2241, by writ of *habeas corpus* to determine the custody of the children, jurisdiction for that purpose would have appertained to that court, to the exclusion of the Juvenile Court. *In re Hamilton,* 182 N. C., 44, 108 S. E., 385; *Clegg v. Clegg,* 186 N. C., 28, 118 S. E., 824; *In re TenHoppen,* 202 N. C., 223, 162 S. E., 619; *McEachern v. McEachern,* 210 N. C., 98, 185 S. E., 684. But that is not our case. Here as in *Winner v. Brice, supra,* the matter was originally brought before the Juvenile Court. Relief was sought in that forum. The parties were present and voluntarily submitted themselves to the jurisdiction of that court with respect to a matter which was within the scope of its power.

While it was said in *S. v. Ferguson,* 191 N. C., 668, that the Superior Court, as distinguished from the Juvenile Court, had no jurisdiction to adjudge a child delinquent or neglected, the original jurisdiction in those respects having been conferred on the Juvenile Court by C. S., 5039, it

will be observed that this statute does not repeal C. S., 2241, and is not inconsistent therewith. No limitation is placed by this statute upon the jurisdiction previously conferred upon the Superior Court by C. S., 2241, to issue writs of *habeas corpus* and to hear and determine the custody of children of parents separated but not divorced. *Clegg v. Clegg, supra.* But where the Juvenile Court has by proper proceeding acquired jurisdiction of the parties and of the subject matter of children "whose custody is subject to controversy," its adjudication for the welfare of the children must be held effective and binding for that purpose. This is subject, however, to the right of the Superior Court judge to adjudicate the custody of children who come within the purview of C. S., 2241, when the matter is properly presented.

We conclude that the ruling of the court below was correct, and that the judgment should be

Affirmed.

NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, AND W. L. TOTTEN, ASSIGNEE, v. J. H. AYCOCK.

(Filed 12 January, 1944.)

Process § 3—

Where a clerk of the Superior Court received and docketed summons and complaint in a civil action, affixed the seal of court to the summons and sent the papers with necessary fees to the sheriff of another county for service, and the papers were properly served and returned to the clerk issuing same, who then signed the summons, upon motion of defendant to dismiss upon special appearance, the court has power, in its discretion, to allow the summons to be amended by affixing thereto the signature of the clerk. C. S., 547; G. S., 1-163.

APPEAL by defendant from *Carr, J.*, at November Civil Term, 1943, of DURHAM.

Civil action to recover upon judgment, heard upon motion to dismiss entered upon special appearance.

Plaintiffs in their complaint filed allege that on 2 October, 1933, plaintiff North Carolina Joint Stock Land Bank of Durham obtained a certain judgment against defendant J. H. Aycock in Superior Court of Durham County, North Carolina, which was duly docketed, and thereafter on 23 December, 1942, duly assigned to plaintiff W. L. Totten, and that there is a specified balance due thereon for which defendant is indebted to plaintiff, and which judgment "is not barred by the statute of limitation."

Defendant entered a special appearance on 21 October, 1943, and moved to dismiss the action for that the court has no jurisdiction over

person of defendant "for want of proper service of summons" in that although the original summons in this case bears date 30 September, 1943, and shows that when it was received on 1 October, 1943, and served 5 October, 1943, by sheriff of Johnston County, it had not then been signed by clerk of Superior Court of Durham County and was not signed by the clerk until 7 October, 1943. Upon hearing the motion of defendant, affidavits filed and oral evidence taken, the court finds these facts:

"1. This is an action to renew a judgment bearing date of October 2, 1933.

"2. On the 30th day of September, 1943, the plaintiff, Totten, filed the pleadings in this action in the office of the Clerk of the Superior Court of Durham County and requested that summons be issued; that on said date the Assistant Clerk of the Superior Court of Durham County docketed this action on the summons docket and sent by mail the summons which appears in the record, bearing date of September 30, 1943, to the Sheriff of Johnston County, together with a copy of the same and a copy of the complaint in this action; that said original summons at the time it was transmitted by said Assistant Clerk of the Superior Court of Durham County to the Sheriff of Johnston County was in every respect complete except that it did not contain the signature of the Clerk or of the Assistant Clerk or anyone in the Clerk's office on the blank line at the bottom prepared for such signature, the said signature having been inadvertently omitted; that it did have affixed thereto the seal of the Clerk of the Superior Court of Durham County; that the said Assistant Clerk enclosed in the letter transmitting said summons to the Sheriff of Johnston County a check drawn and signed by said Assistant Clerk and payable to said sheriff for the service fees due said sheriff.

"3. That the said sheriff served said summons upon the defendant on the 5th day of October, 1943; and, upon discovering after he had got back to his office that the original summons was not signed by the Clerk, he did not complete his return on the same and sent the said summons back to said Clerk for signature.

"4. That the said Assistant Clerk of the Superior Court of Durham County signed said summons on the appropriate line on the 6th day of October, 1943, and returned it to the said sheriff, who then completed his return on the back of the summons and returned it to the said Clerk's office.

"5. That plaintiffs, at the hearing on the defendant's motion, did not file any written motion for permission to amend the summons by directing that the same be signed by the Clerk; but there was a discussion of the right to have said summons so amended, and before judgment was

entered the plaintiffs requested that the Court order the said summons so amended and direct the Clerk to sign the same, which request the Court treated as a motion by the plaintiffs to have said summons so amended."

The court also made further findings which are not necessary to decision on this appeal. Upon these findings "the court in its discretion allows the plaintiff's motion to amend the summons and orders that the act of "the Assistant Clerk of the Superior Court in affixing his signature to the summons on the 6th day of October, 1943, be approved and said act of said Assistant Clerk of the Superior Court is hereby ratified by the Court, and it is ordered that said signature shall be valid for all intents and purposes as though it had been affixed on the date of the issuance of said summons. The motion of the defendant to dismiss the action is, therefore, denied. The defendant is allowed thirty (30) days from the date of this order within which to answer, demur or file such other pleadings as he may desire to file."

Defendant appealed therefrom to the Supreme Court and assigned error.

Bennett & McDonald for plaintiff, appellee.

Leon G. Stevens for defendant, appellant.

WINBORNE, J. The sole question presented for decision is whether the court had the power, in its discretion, and under facts of record, to allow the summons to be amended by affixing thereto the signature of the clerk. The applicable statute and the decisions of this Court answer "Yes." G. S., 1-163, formerly C. S., 547, and *Henderson v. Graham,* 84 N. C., 496; *Jackson v. McLean,* 90 N. C., 64; *Hooker v. Forbes,* 202 N. C., 364, 162 S. E., 903. Compare *Redmond v. Mullenax,* 113 N. C., 505, 18 S. E., 708.

While plaintiff alleges in the complaint that the judgment sued on is not barred by the statute of limitations, there is yet no plea of such statute, and the question is not now before the Court. Any debate, therefore, as to whether the amendment relates to date of summons or to date of amendment would be *dicta,* and no decision is made on the subject.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA, ON RELATION OF NORTH CAROLINA UTILITIES COMMISSION, v. ATLANTIC COAST LINE RAILROAD COMPANY AND WESTERN UNION TELEGRAPH COMPANY (THE TOWN OF JONESBORO, NORTH CAROLINA, E. M. O'CONNELL & SONS, AVENT & THOMAS, MANN'S HARDWARE HOUSE, LEE DRUG STORE, J. W. YARBOROUGH, JONESBORO FOOD COMPANY, JONESBORO FEED & SEED STORE, RIVES & MOSES, COX SERVICE STATION, W. M. ARNOLD, AND W. H. CAMPBELL & SON, INTERVENERS).

(Filed 12 January, 1944.)

Appeal and Error § 2—

No appeal lies from a refusal by the Superior Court to dismiss an order or proceeding properly certified to it by the Utilities Commission, as such an appeal is premature and fragmentary.

APPEAL by Atlantic Coast Line Railroad Company and Western Union Telegraph Company, from *Williams, J.*, in Chambers, at Sanford, N. C., 20 November, 1943. From LEE.

Proceeding before the North Carolina Utilities Commission.

The Atlantic Coast Line Railroad Company filed a petition with the North Carolina Utilities Commission for permission to close the agency at Jonesboro, N. C. The Western Union Telegraph Company filed a similar petition and agreed to be bound by the rulings of the Commission on the petition of the railroad.

At the hearing before the Utilities Commission on 18 August, 1943, permission for the town of Jonesboro and others to intervene was granted, and the answer and interplea of the interveners were filed and made a part of the record in the proceeding.

Evidence was introduced by the Railroad Company in support of its petition and by the interveners, as shippers and receivers of freight, protesting the closing of the agency.

The Utilities Commission issued an order on 16 October, 1943, authorizing the Atlantic Coast Line Railroad Company and the Western Union Telegraph Company to close their agencies at Jonesboro. The interveners, in apt time, filed exceptions, which exceptions were overruled by the Commission on 27 October, 1943. The interveners appealed and the record of the proceedings before the North Carolina Utilities Commission was duly certified to the Superior Court of Lee County, as provided by law.

On 3 November, 1943, the interveners made a motion before his Honor, Williams, J., holding the courts of the Fourth Judicial District, requesting an order of *supersedeas*. The motion was granted and the order signed.

The Atlantic Coast Line Railroad Company, pursuant to notice, moved before his Honor, Williams, J., at Chambers, 20 November, 1943, to set

aside the order of *supersedeas* entered on 3 November, 1943, and to dismiss the appeal of the interveners. Motion denied. From the refusal of his Honor to dismiss the appeal, the defendants, Atlantic Coast Line Railroad Company and the Western Union Telegraph Company, excepted and appealed to the Supreme Court.

Thos. W. Davis, Rose, Lyon & Rose, Murray Allen, and Teague & Williams for Atlantic Coast Line Railroad Company and Western Union Telegraph Company, appellants.

J. G. Edwards and K. R. Hoyle for Town of Jonesboro et al., interveners, appellees.

DENNY, J. The intervening appellees move to dismiss this appeal on the ground that it is premature and fragmentary, being from an order which is not a final judgment. No appeal lies from a refusal to dismiss an order or a proceeding. *Johnson v. Pilot Life Ins. Co.*, 215 N. C., 120, 1 S. E. (2d), 381; *Stewart v. Craven*, 205 N. C., 439, 171 S. E., 609; *S. v. Harnett County Trust Co.*, 193 N. C., 834, 136 S. E., 732; *Goldsboro v. Holmes*, 183 N. C., 203, 111 S. E., 1; *Capps v. R. R.*, 182 N. C., 758, 108 S. E., 300; *Farr v. Lumber Co.*, 182 N. C., 725, 109 S. E., 383; *Bradshaw v. Bank*, 172 N. C., 632, 90 S. E., 749; *Durham Fertilizer Co. v. Marshburn*, 122 N. C., 411, 29 S. E., 411.

The reasons why such an appeal is not permitted are discussed fully in the case of *Johnson v. Ins. Co., supra.*

We are precluded from a consideration of the question presented on the record since the order appealed from was interlocutory, not final, and affects no substantial right which may not be preserved by the exception entered and considered on appeal from the final judgment, should said judgment be adverse to the appellants.

The appeal must be dismissed.

Appeal dismissed.

BESS A. SIMMONS v. CLARENCE W. SIMMONS.

(Filed 12 January, 1944.)

1. Divorce § 13—

A judgment for subsistence, entered in an action for alimony without divorce, C. S., 1667, survives a judgment for absolute divorce obtained under the two year separation statute, C. S., 1663.

2. Appeal and Error §§ 2, 4—

In contempt proceedings by a wife against her husband for failure to make alimony payments, where there was a judgment for the wife and

the husband paid all amounts in arrears upon his arrest by the sheriff, no appeal lies.

APPEAL by defendant from *Phillips, J.*, at June Term, 1943, of FORSYTH.

Contempt proceeding to enforce judgment for subsistence.

The operative facts follow:

1. On 9 July, 1941, the plaintiff instituted this action for alimony without divorce or for subsistence and counsel fees under C. S., 1667. Complaint and notice of hearing for allowance were duly served with the summons. The defendant filed no answer.

2. The amounts having been agreed upon, judgment was submitted and signed 15 July, 1941, awarding alimony, counsel fees, and giving to the plaintiff, as her sole and separate property, certain household goods, etc. The judgment shows on its face that it was intended as a final settlement between the parties, and it was so regarded at the time. *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955. Nothing was left for future determination. *Inter alia,* it recites: "This judgment shall remain in full force and effect pending further orders of the court and its binding effect upon the defendant shall not be impaired by any judgment of absolute divorce which may hereafter be entered in any suit instituted by the defendant against the plaintiff for an absolute divorce on the grounds of two years' separation."

3. Thereafter, on 13 March, 1942, the defendant instituted an action against the plaintiff for divorce on the ground of two years' separation, and obtained judgment thereon on 21 September, 1942.

4. The defendant continued to make payments of alimony under the judgment herein until 16 January, 1943, when he refused to make any further payments.

5. Contempt proceeding was instituted and at the June Term, 1943, Forsyth Superior Court, the defendant was adjudged in willful contempt and ordered confined in jail until he paid the alimony installments due under the judgment of 15 July, 1941.

6. When taken into custody by the sheriff, the defendant paid to the plaintiff all amounts in arrears, and was discharged. He was adjudged still liable for future installments under the judgment of 15 July, 1941.

The defendant appeals, assigning errors.

Womble, Carlyle, Martin & Sandridge for plaintiff, appellee.

Fred S. Hutchins and H. Bryce Parker for defendant, appellant.

STACY, C. J. The question sought to be presented is whether the judgment for subsistence entered herein on 15 July, 1941, can survive the

judgment of absolute divorce obtained by the defendant on 21 September, 1942, under the two-years' separation statute. C. S., 1663. The cases of *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278; *S. c.,* 213 N. C., 634, 197 S. E., 157; *Edmundson v. Edmundson,* 222 N. C., 181, 22 S. E. (2d), 576; and *Howell v. Howell,* 206 N. C., 672, 174 S. E., 921, would seem to require an affirmative answer. The defendant's effort to differentiate these decisions because of alleged dissimilar fact situations was unsuccessful in the court below, and we are disposed to take the same view of the matter.

On the present record, however, it may be doubted whether the appeal can be maintained, since the contempt proceeding was brought to a close when the defendant paid all amounts in arrears, and the rule against him was discharged. Of course, the declaration that defendant would still be liable for future installments under the original judgment adds nothing to its effectiveness. It expresses an obvious conclusion or corollary, perhaps, albeit the only question before the court was the defendant's alleged willful refusal to pay the past-due installments. When these were paid the end sought by the contempt proceeding was reached.

Appeal dismissed.

ABEL WARREN ET AL. v. ATLANTIC COAST LINE RAILROAD CO.

(Filed 12 January, 1944.)

Courts § 2b: Utilities Commission § 4—

As a general rule, where a matter is committed to an administrative agency, one, who fails to exhaust the remedies provided before such agency and by appeal, will not be heard in equity to challenge the validity of its orders.

APPEAL by plaintiff from *Stevens, J.,* in Chambers at Jacksonville, 2 December, 1943. From SAMPSON.

Civil action to restrain substitution of intrastate mixed train service for intrastate passenger service between Wilmington and Fayetteville as allowed by order of Utilities Commission.

By written petition dated 31 July, 1943, the defendant sought permission from the Utilities Commission, for military reasons, to divert the use of the equipment in trains 57-56 operating between Wilmington and Fayetteville to trains 46-45 operating between Wilmington and Rocky Mount. This was denied by the Commission on 10 September, 1943, and the defendant was ordered to show cause why additional passenger service should not be installed between Wilmington and Rocky Mount.

Thereafter, and while the order to show cause was still pending, the defendant applied for a modification of the order of 10 September, 1943, requesting that mixed train service, during the war period and for six months thereafter, be authorized and substituted for the passenger service, trains 57-56, maintained between Wilmington and Fayetteville.

A hearing was ordered on this application for modification of prior orders, and all interested parties were notified of the hearing.

Two counties, Sampson and Cumberland, a number of municipalities along the line involved, the Fayetteville Chamber of Commerce and two individuals, claiming to represent 40,000 citizens in the territory affected, intervened and were made parties to the proceeding. The interveners were represented by the same counsel who now appear for the plaintiff in the present action.

At the hearing before the Utilities Commission on the petition for modification of order, the plaintiff herein, Abel Warren, testified as a witness in behalf of himself and the interveners.

On 17 November, 1943, the application of the defendant to substitute mixed train service for the then existing passenger service between Wilmington and Fayetteville, for a limited period, was allowed by the Commission with certain restrictions and limitations. To this order, the interveners filed exceptions, which had not been acted upon at the time of the institution of the present suit.

The gravamen of the complaint filed herein is that the order of the Utilities Commission of 17 November, 1943, was without authority in that the prior order of 10 September settled the matter and became *res judicata*. See *A. C. L. R. R. v. U. S.*, 211 U. S., 210, 53 L. Ed., 150; *"Railroad Connection Case,"* 137 N. C., 1, 49 S. E., 191. Plaintiff also alleges that he has no adequate remedy at law and that he represents 40,000 citizens in the area affected.

The temporary restraining order was dissolved on the return hearing, and from this ruling the plaintiff appeals, assigning error.

Butler & Butler, W. C. Downing, and Robert H. Dye for plaintiff, appellant.

Murray Allen and Thomas W. Davis for defendant, appellee.

STACY, C. J. The matter here sought to be litigated is pending before the Utilities Commission, with adequate remedy of appeal by any affected party. C. S., 1097. Even if it be conceded that equity might intervene in certain circumstances, 43 Am. Jur., 720, the present showing is not sufficient to invoke its aid.

As a general rule, where a matter is committed to an administrative agency, one who fails to exhaust the remedies provided before such

agency will not be heard in equity to challenge the validity of its orders. *Garysburg Mfg. Co. v. Comrs. of Pender County,* 196 N. C., 744, 147 S. E., 284; *Mfg. Co. v. Comrs.,* 189 N. C., 99, 126 S. E., 114; *Sykes v. Jenny Wren Co.,* 64 App. D. C., 379, 78 F. (2d), 729; *Switchman's Union of N. A. v. Nat. Mediation Bd.,* ..... U. S., ..., 88 Law Ed., Adv. Op. 89.

It is not contended that the order of the Utilities Commission is *ultra vires,* as was the case in *S. v. Scott,* 182 N. C., 865, 109 S. E., 789, cited and relied upon by the plaintiff. Nor is it alleged that the Commission acted arbitrarily or invaded any of plaintiff's constitutional rights. 28 Am. Jur., 242. If erroneous or unreasonable, the remedy is by appeal.

In *Chicago v. O'Connell,* 278 Ill., 591, 116 N. E., 210, it was said: "The statutory method of reviewing the reasonableness of orders of the Commission is exclusive." See *Utilities Com. v. Great Southern Trucking Co., ante,* 687.

Plaintiff has shown no ground for equitable relief. The temporary restraining order was properly dissolved.

Affirmed.

IN RE NATHAN YELTON: ADVISORY OPINION.

(Filed 12 January, 1944.)

1. Public Officers § 4b—

Under ch. 121, Public Laws 1941, any State official may be given a leave of absence to accept a temporary officer's commission in the United States Army or Navy, as prescribed in the said Act, without perforce vacating his civil office and without violation of the provisions of N. C. Constitution, Art. XIV, sec. 7.

2. Same—

Under Art. XIV, sec. 7, N. C. Constitution, which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. The acceptance of a second office, which is forbidden or incompatible with the office already held, operates *ipso facto* to vacate the first.

3. Same—

Where the second office is temporary, or the appointment thereto does not require continuous public service, no constitutional offense is incurred by its acceptance.

4. Same—

Historically the "militia" or "militiamen" have been held to comprehend every temporary citizen-soldier, who in time of war or emergency, forsakes his civil pursuits to enter for the duration the active military service of his country.

5. Constitutional Law § 3a—

A constitution should not receive a technical construction as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government, and not defeat them.

ON 29 December, 1943, the following letter was received from His Excellency, J. Melville Broughton, Governor of the State of North Carolina:

29 December, 1943.

HONORABLE W. P. STACY,
Chief Justice;
HONORABLE MICHAEL SCHENCK,
HONORABLE W. A. DEVIN,
HONORABLE M. V. BARNHILL,
HONORABLE J. WALLACE WINBORNE,
HONORABLE A. A. F. SEAWELL,
HONORABLE E. B. DENNY,
Associate Justices.

RALEIGH, NORTH CAROLINA.

MY DEAR SIRS:

A question of great public concern has arisen in the connection with the performance of my duties as Governor of North Carolina, upon which I desire to request the opinion of the Chief Justice and Associate Justices of the Supreme Court of North Carolina.

The question presented is one which affects numerous public officials who have accepted or will accept commissions in the Armed Forces of the United States and who are going into active service as Officers therein.

Honorable Nathan Yelton was heretofore appointed as Comptroller by the State Board of Education, with the approval of the Governor as Director of the Budget, under the provisions of Article 8 of Section IX of the Constitution of this State, and was engaged in the performance of his duties as such at the time he accepted a commission as a Captain in the United States Army and has now been assigned for work with the Allied Military Governments and entered upon the performance of his duties on the 27th day of December, 1943.

Captain Yelton's appointment was made by the President of the United States by authority of H. J. RES. 199, PUBLIC LAW NO. 252, SEVENTY-SEVENTH CONGRESS OF THE UNITED STATES, JOINT RESOLUTION SEPT. 22, 1941, 55 STAT. 728, 10 U. S. C. A. SECTION 484, the material parts thereof reading:

"During the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe. . . . Provided, That any appointment made under the provisions of this Act, may be vacated at any time by the President and, if not sooner vacated, shall continue during the present emergency and six months thereafter: Provided further, that any person appointed as an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officers' Reserve Corps of the same grade and length of active service: . . ."

Captain Yelton has applied to me as Governor of the State of North Carolina for a leave of absence, on account of entering into military service, under the provisions of Chapter 121 of the Public Laws of 1941, and, as Governor of North Carolina, it is my desire and purpose to grant the leave of absence as requested for the duration of the existing state of war, or until Captain Yelton has been discharged from military service, if I can legally do so. The compensation of Captain Yelton as Comptroller terminated upon his entering active duty as a Captain in the United States Army and the leave of absence if granted will be granted without pay. If this leave of absence can be lawfully granted by me as Governor, it is my purpose, under the authority of Chapter 121 of the Public Laws of 1941, to appoint an acting official as substitute for Captain Yelton for the period of his leave of absence, such appointee to have all the authority, duties, perquisites and emoluments of his principal.

I am in doubt as to whether or not I have the power to grant this leave of absence on account of the question as to whether or not Captain Yelton, in accepting a commission as an Officer in the United States Army, has thereby vacated his office as Comptroller of the State Board of Education by reason of the inhibition against double office holding contained in Article XIV, Section 7 of the Constitution of the State of North Carolina, and, whether or not, under such circumstances, a leave of absence to this official could be granted, or whether or not it would be necessary that his office be treated as vacant and a successor appointed as provided in Section 8 of Article IX of the Constitution.

It may be stated that this same question here presented as to Captain Yelton applies to many other public officials in the State on account of

such officials accepting commissions as Officers in the Armed Forces of the United States.

On account of the paramount importance and emergency of this question, I am constrained to request an opinion of the Chief Justice and Associate Justices in order that the appropriate action may be taken by me with respect to the pending application of leave of absence for Captain Yelton.

I am advised by the Attorney-General that the question presented has not been decided by our Court. I hand you herewith the letter from the Attorney-General, together with a memorandum of authorities presented to me therewith.

Respectfully yours,

J. MELVILLE BROUGHTON,
Governor.

29 December, 1943.

SUBJECT: Leave of Absence; Comptroller, State Board of Education; Double Office Holding; Acceptance of a Commission as Captain in the United States Army.

GOVERNOR J. MELVILLE BROUGHTON,
RALEIGH, NORTH CAROLINA.

DEAR GOVERNOR BROUGHTON:

I have your letter of December 27, in which you advise that Honorable Nathan Yelton, Comptroller of the State Board of Education, has accepted a commission as Captain in the United States Army and has been assigned for special work with the Allied Military Governments, having entered upon his duties as such on December 27, 1943. You state that this presents the question as to whether or not Captain Yelton can be granted a leave of absence, and also, whether or not it will be possible for the State Board of Education, with the approval of the Governor, to name an Acting Comptroller, or whether his acceptance of a commission terminates his tenure of office, making it necessary to appoint or elect his successor for the unexpired portion of the term of his appointment.

I have today conferred with you about the subject of your letter and advised you that, in my opinion, no satisfactory answer could be secured to this question except through the medium of the opinion of the Chief Justice and Associate Justices of the Supreme Court of North Carolina. The identical question has not been presented under the circumstances

of this case to our Court. I am enclosing herewith a copy of the memorandum on this subject from which you will observe that some of the courts of other states have held that the acceptance of a commission of the character accepted by Captain Yelton would prevent him from holding the office under the authority of the State, while in other jurisdictions, the courts have reached a contrary conclusion.

The nearest approach to this question in our State is found *In the Matter of J. G. Martin,* 60 N. C., 153, in which, at the request of Governor Zebulon B. Vance, an opinion of the Justices was rendered, in which it was held that the acceptance of the office of Brigadier General under the Confederate States vacated the office of Adjutant General of North Carolina held by the person accepting the Confederate States' office. This case, however, was decided on the basis of incompatibility of the two offices, although the constitutional provision then existing was substantially similar to Article XIV, Section 7, of our Constitution.

On account of the great importance and emergency of this question, I feel confident that the Chief Justice and Associate Justices of the Supreme Court, at your request, would be willing to render you their advisory opinion, and I recommend this course.

Respectfully yours,

HARRY MCMULLAN,
Attorney-General.

HM/e

RALEIGH, N. C., 12 January, 1944.

To His Excellency: J. MELVILLE BROUGHTON,
Governor of North Carolina:

Your request for an advisory opinion in the matter of Nathan Yelton poses the question whether the comptroller of the State Board of Education may be granted a leave of absence under ch. 121, Public Laws 1941, he having accepted a temporary captaincy in the United States Army, and still retain his present position. Also involved is the broader question whether, in like circumstances, any State official may be given a leave of absence to accept a temporary officer's commission in the United States Army or Navy without perforce vacating his civil office.

The question is an important one and ought to be settled in the interest of continued, efficient, orderly government. Its solution lies in harmonizing the statute law with the Constitution, if this can be done.

I. THE MEANING OF CH. 121, PUBLIC LAWS 1941:

The following pertinent provisions of ch. 121, Public Laws 1941, are clear and explicit: "Section 1. Any elective or appointive State official

may obtain leave of absence from his duties for military or naval service, protracted illness, or other reason satisfactory to the Governor, for such period as the Governor may designate. Such leave shall be obtained only upon application by the official and with the consent of the Governor. The official shall receive no salary during the period of leave. . . . The period of leave may be extended upon application to and with the approval of the Governor if the reason for the original leave still exists, and it may be shortened if the said reason shall unexpectedly terminate: Provided, that no leave or extension thereof shall operate to extend the term of office of any official beyond the period for which he was elected or appointed. If, by reason of the length of the period of absence or the nature of the duties of the official, the Governor deems it necessary, the Governor may appoint any citizen of the State, without regard to residence or district, as acting official or substitute for the period of the official's leave of absence, such appointee to have all the authority, duties, perquisites, and emoluments of his principal."

(Sections 2 and 3 contain similar provisions in respect of county and municipal officials.)

Thus it will be seen the General Assembly has spoken on the subject, and, to the extent of its legislative authority, has taken care of the situation. There would be no question of your right to grant the comptroller a leave of absence, and to appoint a substitute or acting official in his stead, during his absence, if he were going into the Army as a private and not as an officer. *Critchlow v. Monson,* 102 Utah, 378, 131 P. (2d), 794. The constitutional question which has occasioned your request for an advisory opinion arises only by reason of his acceptance of a temporary officer's commission. It is conceded that the acceptance of a second office which is forbidden or incompatible with the office already held operates *ipso facto* to vacate the first. *Barnhill v. Thompson,* 122 N. C., 493, 29 S. E., 720; *Whitehead v. Pittman,* 165 N. C., 89, 80 S. E., 976; *In re Martin,* 60 N. C., 153; Annotation 53 A. L. R., 595.

II. THE EFFECT OF ART. XIV, SEC. 7, OF THE CONSTITUTION:

The Constitution, Art. XIV, sec. 7, provides: "No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes."

Under this section, which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not per-

missible for one person to hold two offices at the same time. *Groves v. Barden,* 169 N. C., 8, 84 S. E., 1042; *Harris v. Watson,* 201 N. C., 661, 161 S. E., 215; *Brigman v. Baley,* 213 N. C., 119, 195 S. E., 617; *In re Barnes,* 212 N. C., 735, 194 S. E., 499; *Doyle v. Raleigh,* 89 N. C., 133. It has been said, however, that where the second office is temporary, or the appointment thereto does not "require continuous public service," no constitutional offense is thereby incurred. *Grimes v. Holmes,* 207 N. C., 293, 176 S. E., 746; *S. v. Wood,* 175 N. C., 809, 95 S. E., 1050; *S. v. Smith,* 145 N. C., 476, 59 S. E., 649. Such would seem to be the case here.

Furthermore, it will be noted that "officers in the militia" are expressly excluded from the operation of this section. As all able-bodied male citizens of the State, between the ages of 21 and 40 years, who are citizens of the United States and who are not averse to bearing arms from religious scruples, are liable to duty in the militia, Const., Art. XII, it was evidently deemed unjust to single out State officials and require them to forfeit their offices if they accepted commissions in the militia while on active military duty in defense of the commonwealth. So it was provided that the inhibition against double office-holding should "not extend to officers in the militia." And while this designation, strictly speaking, may or may not reach as far as "temporary appointments as officers in the Army during the present emergency," the reason for the limitation of the operation of the section would seem to require that it "not extend to" such temporary officers in the Army. Certainly the spirit of the Constitution would envisage that it fall short of such operation. "The meaning of a constitution is to be found, not in a slavish adherence to the letter, which sometimes killeth, but in the discovery of its spirit, which giveth life." *Opinions of the Justices,* 204 N. C., p. 813, 172 S. E., 474. If need be, the letter gives way to promote the equity of the spirit. An inhibition or prohibition usually extends no farther than the reason on which it is founded. *Cessante ratione, cessat ipsa lex.*

"Historically the 'militia' or 'militiamen' have been held to comprehend every temporary citizen-soldier who in time of war or emergency forsakes his civil pursuits to enter for the duration the active military service of his country"—*Douglas, J.,* in *S. v. Grayston,* 349 Mo., 700, 163 S. W. (2d), 335.

It will also be observed that the official on leave is to receive no salary during the period of his absence. Nor is he expected to perform any of the duties of his office while on leave. Thus, neither the spirit nor the reason for the constitutional inhibition against double office-holding is to be offended. "The reason of the law is more potent in its interpretation than the language used to express it. Reason is its soul; language

its outward form." *Warrenton v. Warren County,* 215 N. C., 342, loc. cit. 348, 2 S. E. (2d), 463.

Moreover, the services in the Army of the officer on leave are to be temporary and not permanent. This saves the case from incompatibility, *In re Martin, supra,* which would undoubtedly result, if the services contemplated were those of the professional, permanent soldier, as distinguished from those of the temporary citizen-soldier. *S. v. Grayston, supra;* Annotations 26 A. L. R., 142, and 132 A. L. R., 254.

The instant provision was never intended to discourage public officials from assuming military leadership in time of emergency. *Critchlow v. Monson, supra.* Officers in the militia are liable to be called out to suppress riots or insurrection, "and to repel invasion." Const., Art. XII, sec. 3. Temporary officers in the Army are likewise subject to military duty "to repel invasion" during a war emergency. To say that one may serve as a private in the Army during war time and hold his State position, but if he accept a temporary officer's commission he must renounce his civil office, would be to impose an unequal sacrifice on State officials who seek promotion in the Army.

It was the purpose of the proviso in this section to permit public officials to serve as officers in the militia without forfeiting their civil office, and it is reasonable to suppose that as the interdiction in the first part of the section was not intended to extend to civil officers serving as officers in the militia, for precisely the same reason it was not intended to extend to civil officers holding temporary commissions in the Army during a war emergency, as they both fall in the same category. Both would be temporarily engaged in bearing arms in defense of the commonwealth and in like positions. To declare otherwise would be to say that an unwarranted discrimination inheres in the Constitution, whereas the pervading principle of the organic law is equality of treatment. The thesis of the Constitution is that all similarly situated are entitled to like treatment from the government they support and defend. *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316. Equality and fair play are implicit in the Constitution. Such is its theme. "A constitution should not receive a technical construction as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government, and not defeat them"—*Brown, J.,* in *Jenkins v. Board of Elections,* 180 N. C., 169, 85 S. E., 289.

Substantially the same question as here presented has arisen in a number of the States having constitutional provisions in respect of dual office-holding, quite similar to ours, and yet with sufficient variations perhaps to render them distinguishable. At any rate, opposite conclusions have been reached in the different States with variant reasons assigned therefor. On the one side may be listed the States of Pennsyl-

vania, *Commonwealth v. Smith,* 343 Pa., 446, 2 Atl. (2d), 440; Arizona, *Perkins v. Manning,* 59 Ariz., 60, 122 P. (2d), 857; and Illinois, *Fekete v. East St. Louis,* 315 Ill., 58, 145 N. E., 692, 40 A. L. R., 650. On the other, may be designated the States of Florida, *Re Advisory Opinion,* 150 Fla., 556, 8 So. (2d), 26, 140 A. L. R., 1481; California, *McCoy v. Los Angeles County,* 18 Cal. (2d), 193, 114 P. (2d), 569; Missouri, *S. v. Grayston, supra;* Utah, *Critchlow v. Monson, supra;* Texas, *Carpenter v. Sheppard,* 135 Tex., 413, 145 S. W. (2d), 562; and West Virginia, *S. ex rel. Thomas v. Wysong,* ..... W. Va., ..., 24 S. E. (2d), 463 (decided 23 February, 1943). Most of the recent cases have been collected in Annotation 140 A. L. R., 1499. Thus, in its final analysis, we are left to apply our own Constitution to the facts in hand, and to say what it means. The authorities elsewhere, while enlightening, are not controlling.

Accordingly, you are advised that the question first above propounded is answered in the affirmative.

Respectfully,

WALTER P. STACY,
Chief Justice;
MICHAEL SCHENCK,
W. A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,
EMERY B. DENNY,
Associate Justices.

PINEHURST WAREHOUSES, INC., v. A. BURKER & COMPANY, INC.

(Filed 5 May, 1943.)

APPEAL by defendant from *Warlick, J.,* at November Term, 1942, of RICHMOND. No error.

Civil action on account for merchandise delivered by plaintiff to one S. H. Cochran in which plaintiff alleges that the merchandise was sold to or on the credit of defendant. The president of defendant instructed the agent of the defendant to "tell Britt to go ahead and let him have it, we'll work it out somehow." Defendant denies that any instructions were so given and pleads the statute of frauds.

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

W. H. Leland McKeithan and Jones & Jones for plaintiff, appellee.
Fred W. Bynum for defendant, appellant.

PER CURIAM. The only material assignment of error in the record is directed to the refusal of the court below to dismiss as of nonsuit. The Court, *Schenck, J.*, not sitting, being evenly divided on the merits of this assignment of error, which involves the force and effect of the instructions given plaintiff, the judgment of the Superior Court is affirmed in accord with the usual practice in such cases, and stands as the decision in this case without becoming a precedent. *Howard v. Coach Co.*, 216 N. C., 799, 4 S. E. (2d), 449; *Pafford v. Construction Co.*, 218 N. C., 782, 11 S. E. (2d), 548; *Smith v. Furniture Co.*, 221 N. C., 536, 19 S. E. (2d), 17.

No error.

J. HOLT GARDNER, JESSE H. GARDNER, MELVIN H. GARDNER, DOUGLAS GARDNER, MRS. R. B. BYRD, MRS. R. A. HOLLAND, MRS. ROBT. WOODRUFF, MRS. R. P. ANDREWS, MRS. CARRIE A. GARDNER, MRS. ALDINE EBERT; CO-PARTNERS, TRADING AS THE GARDNER COMPANY; WILLIAM McKEITHAN, AND MYRTLE WILLIAMS, V. C. J. McDONALD, SHERIFF OF MOORE COUNTY, AND THE BANK OF PINEHURST.

(Filed 5 May, 1943.)

APPEAL by defendant Bank of Pinehurst from *Warlick, J.*, at December Term, 1942, of MOORE.

Civil action to enjoin sale of land under execution.

These facts present the controversy:

Plaintiffs claim title to land in question by virtue of deed from the sheriff of Moore County pursuant to sale held on 7 November, 1932, under an execution issued out of the Superior Court of said county on 13 August, 1932, upon a judgment of Southern Security and Guaranty Company against R. H. Scarboro and Percy L. Gardner, and returnable "not less than 40 nor more than 60 days from the date" thereof—the sale having been held after the expiration of 60 days.

Thereafter, on 26 December, 1932, defendant Bank obtained a judgment in the Superior Court of said county against Percy L. Gardner *et al.*, and in September, 1942, had execution issued thereon, pursuant to which the sheriff of Moore County advertised the land in question for sale for the purpose of satisfying the execution.

Thereupon this action was instituted and temporary restraining order issued. Upon hearing, the parties having waived jury trial and agreed

for court to find the facts and to enter judgment thereon, the court found facts of which the above is brief summary, and held as a matter of law that, under the provisions of C. S., 672, as amended by chapter 172, Public Laws 1931, concerning return of executions, the sale on 7 November, 1932, as made under the execution of 13 August, 1932, under which plaintiff claims, is valid. From judgment in accordance therewith, and permanently restraining defendants from selling the property under the execution upon the judgment of 26 December, 1932, defendant Bank appeals to the Supreme Court and assigns error.

Seawell & Seawell for plaintiffs, appellees.

W. D. Sabiston, Jr., for defendant Bank of Pinehurst, appellant.

PER CURIAM. One member of the Court, *Schenck, J.*, not sitting, and the remaining six being evenly divided in opinion as to the correctness of the ruling of the court below, the judgment of the Superior Court stands affirmed as the disposition of this appeal, without becoming a precedent, accordant with the usual practice in such cases. *Howard v. Coach Co.*, 216 N. C., 799, 4 S. E. (2d), 449; *Elmore v. General Amusements*, 221 N. C., 535, 19 S. E. (2d), 5.

Affirmed.

S. E. MESSNER v. F. S. ROYSTER GUANO COMPANY.

(Filed 19 May, 1943.)

APPEAL by plaintiff from *Hamilton, Special Judge*, at November Extra Term, 1942, of MECKLENBURG. No error.

This was an action to recover damages for negligently discharging water charged with chemicals on plaintiff's land. On issues submitted the jury answered the first issue in favor of defendant, as follows: "1. Did the defendant negligently operate its plant so as to discharge harmful chemical substances upon property of the plaintiff through artificial drains, and thereby damage plaintiff's property during the years 1940 and 1941, as alleged in the complaint? Answer: No." From judgment on the verdict, plaintiff appealed.

W. T. Shore for plaintiff.

Robinson & Jones for defendant.

PER CURIAM. Plaintiff's action was bottomed on negligence. The allegation in the complaint was that on account of the negligent operation of defendant's plant and of the artificial drains for the discharge of water, chemical substances giving off offensive odors were caused to flow on plaintiff's land, lessening its value. The first issue, submitted without objection, and answered in the negative, was determinative of the cause of action alleged. No issue was tendered as to nuisance. Trespass was not alleged. Plaintiff brought forward in his assignments of error several exceptions to the judge's charge. From an examination of the record we are left with the impression that none of the exceptions are sufficient to warrant a new trial. On the facts, the jury has decided against the plaintiff, and the result will not be disturbed.

No error.

MRS. JAMES ERWIN WHICHARD, ADMINISTRATRIX OF THE ESTATE OF JAMES ERWIN WHICHARD, DECEASED, v. M. P. LIPE, TRADING AS LIPE MOTOR LINES.

(Filed 19 May, 1943.)

APPEAL by defendant from *Bobbitt, J.*, at 4 January, 1943, Civil Term, of GUILFORD.

Gold, McAnally & Gold for plaintiff, appellee.

J. L. Murphy and Sapp & Sapp for defendant, appellant.

PER CURIAM. The plaintiff brought an action against the defendant to recover damages for the injury and death of her intestate brought about by the alleged negligence of the defendant. In the court below the defendant made a motion for judgment as of nonsuit, which was declined. The plaintiff made a recovery, and the defendant appealed to this Court, where the judgment of the court below declining the nonsuit was reversed and action dismissed. *Whichard v. Lipe,* 221 N. C., 53, 19 S. E. (2d), 14. Soon thereafter the plaintiff renewed the action, and again recovered in the court below. The defendant appealed, assigning various errors.

Upon a hearing of the case, the Court was evenly divided in opinion, *Schenck, J.*, not sitting. According to the practice of the Court, the judgment of the court below is affirmed; and the decision thereof does not become a precedent. *Elmore v. Amusements,* 221 N. C., 535, 19 S. E. (2d), 5; *Outlaw v. Asheville,* 215 N. C., 790, 1 S. E. (2d), 559.

Affirmed.

WILLIAM MONROE BLYTHE, EMPLOYEE, v. R. C. WELBORN, DOING BUSINESS AS R. C. WELBORN CONSTRUCTION COMPANY, EMPLOYER, AND BITUMINOUS CASUALTY CORPORATION, CARRIER.

(Filed 19 May, 1943.)

APPEAL by defendants from *Bobbitt, J.*, at February Term, 1943, of GUILFORD.

Roberson, Haworth & Reese for plaintiff.

Sapp & Sapp for defendants.

PER CURIAM. 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.

There is evidence to support the findings of fact by the Commission, upon which the liability of the defendants is declared, and we find no error in the conclusions of law, or in the judgment of the court below affirming the award. *Eller v. Leather Co.*, 222 N. C., 23, 21 S. E. (2d), 809; *Blevins v. Teer*, 220 N. C., 135, 16 S. E., (2d), 659; *Beach McLean*, 219 N. C., 521, 14 S. E. (2d), 515.

The judgment is

Affirmed.

NORMAN McWILLIAMS v. LUTHER McWILLIAMS, ARCHER McWILLIAMS, J. B. McWILLIAMS, MILTON McWILLIAMS, AND MILTON McWILLIAMS AND RETHA COFIELD, EXECUTORS OF THE ESTATE OF BETTIE McWILLIAMS.

(Filed 29 September, 1943.)

APPEAL by plaintiff from *Williams, J.*, at June Term, 1943, of HALIFAX. Affirmed.

P. H. Bell for plaintiff.

A. W. Andleton for defendants.

PER CURIAM. The question presented by this appeal is whether a fund on deposit in a local bank passed under the will of Bettie McWilliams, or was undevised property for distribution under the statute among her next of kin. An examination of the language in which the will was expressed leads us to the conclusion that the residuary clause

was sufficiently broad to include the fund in question, and that it passed in accordance with the twentieth item of the will to the persons therein named, in the proportions designated. There are no facts in the record to overcome the presumption that the testatrix intended to dispose of her entire estate. *Case v. Biberstein*, 207 N. C., 514, 177 S. E., 802; *Gordon v. Ehringhaus*, 190 N. C., 147, 129 S. E., 187.

Judgment affirmed.

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

(Filed 29 September, 1943.)

APPEAL by plaintiffs from *Frizzelle, J.*, at November-December Term, 1942, of HALIFAX. No error.

Civil action to vacate foreclosure deed.

Appropriate issues were submitted to the jury and answered in favor of the defendant. From judgment thereon plaintiffs appealed.

Keel & Keel for plaintiffs, appellants.

Wade H. Dickens for defendant, appellee.

PER CURIAM. This case was here on a former appeal. See *Hawkins v. Land Bank*, 221 N. C., 73, 18 S. E. (2d), 823, where the essential facts are stated. This appeal should have been docketed at the Spring Term. Rule 5, 221 N. C., 546. Be that as it may, the jury has decided the controverted facts in favor of the defendant. The exceptive assignments of error relied upon by the plaintiffs are without substantial merit. The judgment entered must be sustained.

No error.

STATE v. CLYDE GRASS.

(Filed 3 November, 1943.)

APPEAL by defendant from *Warlick, J.*, at August Term, 1943, of CABARRUS.

Motion by State to dismiss appeal.

At the October Term, 1942, Cabarrus Superior Court, the defendant was tried upon indictments charging him with two homicides, which resulted in convictions and sentences, one of them death. The defendant appealed. The judgments were upheld in an opinion filed 7 April, 1943, reported *ante*, 31.

Thereafter, at the August Term, Cabarrus Superior Court, the next succeeding term following affirmance of judgments on appeal, the defendant lodged a motion for a new trial on the ground that one of the jurors, prior to the trial, had been heard to say "the defendant should have the death penalty." The motion was heard and denied, from which ruling the defendant again gave notice of appeal.

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

A. A. Tarlton and J. F. Sossomon for defendant.

PER CURIAM. The motion to dismiss the appeal must be allowed on authority of *S. v. Davis*, 203 N. C., 327, 166 S. E., 297, and *S. v. Lea*, *ibid.*, 316, 166 S. E., 292.

Judgment affirmed;

Appeal dismissed.

UNIVERSAL C. I. T. CREDIT CORPORATION v. REID MOTOR COMPANY AND CHARLES E. GOODMAN.

(Filed 3 November, 1943.)

APPEAL by defendant Goodman from *Burgwyn, Special Judge*, at June Term, 1943, of CABARRUS. Appeal dismissed.

C. M. Llewellyn for plaintiff, appellee.

W. S. Bogle for defendant, appellant.

PER CURIAM. The motion of plaintiff, appellee, to dismiss the appeal, for that the record and case on appeal fail to show summons or organiza-

tion of the court, must be allowed. Rule 19; *Brown v. Johnson*, 207 N. C., 807, 178 S. E., 570. Nor are there stipulations to cure the omissions in the record.

However, we have examined the record as presented, and find no error in the trial. The evidence was sufficient to carry the case to the jury, and to support the verdict in favor of the plaintiff on the determinative issues submitted. The charge of the court was free from error.

Appeal dismissed.

JESSIE S. MORTON v. WHITE PARKS MILLS COMPANY, A CORPORATION.

(Filed 3 November, 1943.)

APPEAL by plaintiff from *Burgwyn, Special Judge*, at June Term, 1943, CABARRUS. Affirmed.

Civil action to recover wages and liquidated damages due under the terms of the Fair Labor Standards Act of 1938. Sec. 52, Stat. 1060, U. S. Code, Title 29.

There was a judgment of nonsuit in the court below, and plaintiff appealed.

Bernard W. Cruse for plaintiff, appellant.

Hartsell & Hartsell for defendant, appellee.

PER CURIAM. The decision of this case turns upon the status of plaintiff as an employee of defendant. The facts appearing on this record disclose that he is an "executive" as defined by the Administrator of the Fair Labor Standards Act. *Pye v. Atlantic Co., ante*, 92, is in point. On authority of that decision the judgment below is

Affirmed.

STATE v. R. J. JACKSON.

(Filed 3 November, 1943.)

APPEAL by defendant from *Harris, J.*, at May-June Term, 1943, of ONSLOW.

The defendant was tried and convicted in Superior Court upon a warrant issued in the County Criminal Court of Onslow, charging a

violation of the prohibition laws of the State. The defendant was also tried and convicted in the court below upon a similar warrant charging the unlawful sale of beer on or about 9 May, 1943, between the hours of 11:30 o'clock p.m., Saturday night, and 7:00 o'clock a.m., Monday morning. Defendant appealed both cases to the Supreme Court, being cases Nos. 362 and 363.

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

J. A. Jones for defendant.

PER CURIAM. The defendant was not tried upon either warrant in the County Criminal Court; hence the defendant challenged the jurisdiction of the Superior Court. However, when the respective cases were called in the County Criminal Court, the defendant demanded a trial by jury; whereupon the cases were transferred to the Superior Court. This procedure, upon a request for a jury trial by the State or defendant, being mandatory under the provisions of chapter 303, Public Laws of 1941, it is now conceded by the defendant that the procedure was proper and that the judgment in each case should be affirmed.

The judgment rendered below in each case is

Affirmed.

STATE v. OSROW CUMMINGS.

(Filed 15 December, 1943.)

APPEAL by defendant from *Nimocks, J.*, at September Term, 1943, of ROBESON.

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

F. D. Hackett for the defendant, appellant.

PER CURIAM. The defendant was convicted of an assault on a female, Lilly May Deese, and appealed to this Court, assigning error.

We have given careful attention to the exceptions presented on the appeal, and do not find any of sufficient merit to justify interference with the result of the trial. The exceptions, while carefully prepared and ably presented, involve no novel principles of law, and we have deemed it unnecessary to write an opinion.

We find

No error.

STATE v. TOM CASE.

(Filed 15 December, 1943.)

APPEAL by defendant from *Olive, Special Judge,* at March Term, 1943, of GUILFORD.

Criminal prosecution tried upon indictment charging defendant with the murder of one A. C. Swain.

Verdict: Guilty of manslaughter. Judgment: Imprisonment in the State's Prison for a term of not less than five nor more than seven years.

The defendant appeals, assigning errors.

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

Geo. A. Younce and Clyde Shreve for defendant.

PER CURIAM. The assignments of error set out in the record are without substantial merit, and the result of the trial below will not be disturbed.

No error.

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. Affirmed December 20, 1943.

Lightner v. Boone, 222 N. C., 205. Affirmed June 7, 1943.

S. v. Lippard, 223 N. C., 167. Petition for *certiorari* denied October 11, 1943.

S. v. Herndon, 223 N. C., 208. Petition for *certiorari* denied October 11, 1943.

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gave directions for such recital, see *McNeill v. McNeill*, 178; *aliunde* to make description fit deed, weight and credibility for jury, see *Peel v. Calais*, 368: refusal to admit competent, which when considered with all evidence fails to make out case, harmless, see *Gibbs v. Russ*, 349; in ejectment that party is or has been in possession admissible, see *Duckett v. Lyda*, 356; of insolvency under bankruptcy act not sufficient on facts here, see *Sample v. Jackson*, 335; province of court to supervise and control introduction of, see *Curlee v. Scales*, 788; evidence to establish parol trust, see *Thompson v. Davis*, 792; to establish parol trust must be clear, strong and convincing, *ibid.*; what competent as to partnership affairs in suit to establish parol trust, *ibid.*; criminal prosecution for seduction testimony of prosecutrix alone, not sufficient, but supporting evidence may be circumstantial, see *S. v. Smith*, 199; character evidence goes to weight and credibility, see *S. v. Auston*, 203; *S. v. Redfern*, 561; *S. v. Farrell*, 804; *S. v. McKinnon*, 160; where accused testifies he assumes position of any other witness, *ibid.*; in criminal prosecution for use of property for prostitution evidence of general reputation and circumstantial evidence, proper, see *S. v. Herndon*, 208; testimony given without objection motion to strike discretionary and not reviewable, *ibid.*; where testimony was withdrawn and jury instructed not to consider same, no error, see *S. v. Vicks*, 384; in criminal case charge proper that duty of jury to scrutinize testimony of defendant and after such scrutiny if defendant is believed to give his evidence same weight as disinterested witness, see *S. v. McKinnon*, 160; evidence of relatives, parties in interest and defendants received with caution but when that is done, if believed, jury should give their testimony same weight as that of disinterested witness, *ibid.*; admissible only for attacking credibility of witness, admitted generally without objection, no error in court's failure to restrict it, *ibid.*; objections to, must be made at time questions are asked and when answers are given, otherwise waived, see *S. v. Hunt*, 173; motion to strike, no objection in apt time, discretionary and not subject to review except for abuse, *ibid.*; distinction between preliminary examination of accused and his voluntary testimony on trial, see *S. v. Farrell*, 804; rule against self-incrimination is directed against compulsion, not voluntary admissions or confessions, *ibid.*; showing no more than temporary lapse in moral perception not sufficient to excuse crime, *ibid.*

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Neill v. McNeill, 178; *Small v. Dorsett*, 754; *Gerringer v. Gerringer*, 818; by grantor or grantee in deed used for color of title, see *Farabow v. Perry*, 21; false representations of one partner for his benefit ascertained in time by those dealt with, will not afford defense to suit by partner defrauded, see *Pappas v. Crist*, 265.

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Winston, 421; joinder of infants, see *Park, Inc., v. Brinn*, 502; funds of infants in hands of clerk, see *S. v. Sawyer*, 102; transfer of funds to other states, *ibid.*; funds of, in hands of courts, see *S. v. Sawyer*, 102; on or near traveled street or highway auto driver must exercise what care, see *Yokeley v. Kearns*, 196; court will not permit issue of *devisavit vel non* to be determined by consent where some are infants, see *Butler v. Winston*, 421; though served, must be represented by guardian, otherwise judgment not binding, see *Park, Inc., v. Brinn*, 502; where record shows unknown party without evidence and findings that he left no minor heirs, such heirs not bound by judgment, *ibid.*; liability for injury to, from attractive nuisances, see *Hedgepath v. Durham*, 822; welfare of, subject to jurisdiction of juvenile courts, see *In re Prevatt*, 833; criminal assault on, see *S. v. Tyson*, 492.

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and thereafter if they find defendant telling truth to give his evidence same weight as evidence of disinterested witness, *ibid.;* upon plea of self-defense defendant is entitled to have law as applied to facts explained to jury, see *S. v. Miller*, 184; judge should constantly observe cold neutrality of impartiality, see *S. v. Auston*, 203; in homicide where defendant offered no evidence and states evidence without mitigating circumstances, see *S. v. Davis*, 381; instructions in prosecution for rape as to duty to return verdict of guilty, see *S. v. Vicks*, 384; on less degree of crime charged not necessary where no evidence of such degree, see *S. v. Gregory*, 415; erroneous charge as presupposing and intentional killing with deadly weapon, not cured by verdict of second degree murder, see *S. v. DeGraffenreid*, 461; court not required to charge on subordinate features in absence of request, see *S. v. Cameron*, 464; court's charge on contentions of State and defendant not subject to exception where no unfairness appears, *ibid.;* charge in libel and slander case complying with C. S., 564, see *Gillis v. Tea Co.*, 470; in assault prosecution failure to charge assault with deadly weapon in permissible verdicts does not deprive jury of right to consider, see *S. v. Bentley*, 563; on prosecution for perjury and if jury satisfied with evidence of one witness they should return verdict of guilty, erroneous, see *S. v. Hill*, 711; where instructions giving greater prominence to State's case may amount to expression of opinion and exception thereto, not broadside if made with particularity as to guide the court, see *S. v. Grainger*, 716; in capital case as to State's contention of defendant's conduct not improper, *ibid.;* in homicide that defendant must show mitigating circumstances by his own evidence, not prejudicial where no such circumstances in State's evidence, *ibid.;* erroneous, on material aspect of criminal case not cured by correct statement of law in other portions of charge, see *S. v. Ellerbe*, 770; on self-defense erroneous for court to state that defendant must show that he was free from blame when, *ibid.*.

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Joinder—Of causes in proceeding to condemn land for public purpose breach of contract may not be joined, see *Dalton v. Highway Com.*, 406.

Joint Tort-feasor—Common law recognized no right of contribution between, see *Charnock v. Taylor*, 360; our statute does not create contribution between, when *lex loci delicti* gives none, *ibid.*; liability of joint tort-feasors is joint and several, *ibid.*; enforcing contribution where plaintiff's right of action lost by lapse of time or extinguished by payment of judgment, see *Godfrey v. Power Co.*, 647; no contribution among, at common law, *ibid.*

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Jurisdiction—Want of, over subject matter, parties or *res* renders judgment void, see *S. v. Sawyer*, 102; Superior Court acts without, Supreme Court acquires none on appeal, see *Shepard v. Leonard*, 110; special judge holding court in one county has no jurisdiction in matter pending in adjoining county, *ibid.*

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Less Degree of Crime—Where no evidence of, court not required to charge on, see *S. v. Gregory*, 415; where all evidence tends to show greater crime, court is not required to instruct on less degree of crime, see *S. v. Smith*, 457; when permissible to convict of less degree of same crime when there is evidence to support milder verdict, defendant entitled to have different views presented to jury, see *S. v. DeGraffenreid*, 461; verdict not disturbed on conviction of less degree of same crime, evidence being of greater degree, *S. v. Bentley*, 563.

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Limitation of Actions—Applicability to sovereign, see *Raleigh v. Bank*, 286; on note under seal, ten years, see *Lee v. Chamblee*, 146; against surety on note under seal, three years, *ibid.*; paving assessment, ten years, see *Raleigh v. Bank*, 286; for fraud, see *Small v. Dorsett*, 754; accrual of right of action and time from which statute begins; in general, see *Small v. Dorsett*, 754; fiduciary relationships, *ibid.*; pleadings, see *Perry v. Trust Co.*, 642; burden of proof, see *Lee v. Chamblee*, 146.

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Marital Rights—Neither husband nor wife may exclude the other from their home, see *Stone v. Guion*, 831.

Mental Capacity—Presumption of, in executing deed, see *Davis v. Davis*, 36; presumption of continuous mental capacity, *ibid.*; recitals in deeds and wills evidence of, only where jury satisfied that grantor or testator gave directions for such recital, see *McNeill v. McNeill*, 178.

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Motions—In cause, action in Superior Court always subject to, see *Shepard v. Leonard*, 110; motion to strike, testimony given without objection, discretionary and not reviewable, see *S. v. Herndon*, 208; motion in arrest of judgment originally made in Supreme Court granted only when fatal error or defect appears on face of record, see *S. v. McKeon*, 404; motion to strike affirmative allegations, see *S. v. Watson*, 437; motion in arrest of judgment not allowed on conviction of assault with deadly weapon after acquittal of assault doing serious injury, see *S. v. Bentley*, 563; motion to quash not made before plea of not guilty, discretionary, see *S. v. Suddreth*, 610.

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Murder—See Homicide; degrees of, see *S. v. Burrage*, 129; killing not intentional, *ibid.*; evidence sufficient which shows deceased shot by pistol of one defendant fell at shot and died shortly thereafter, see *S. v. McKinnon*, 160.

Navigable Waters—Roanoke River as such, see *Hampton v. Pulp Co.*, 535; public has right of fishery in, *ibid.*

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Stadiem, 49; sufficiency of evidence and nonsuit on issue of negligence, see *Steffan v. Meiselman*, 154; *Hiatt v. Ritter*, 262; *Gibbs v. Russ*, 349; *Morrison v. Cannon Mills Co.*, 387; *Salmon v. Pearce*, 587; *Benton v. Building Co.*, 809; *Hedgepath v. Durham*, 822; on issue of contributory negligence, see *Ross v. Greyhound Corp.*, 239; *Bailey v. R. R.*, 244; *Crone v. Fisher*, 635; *res ipsa loquitur*, see *Smith v. Whitley*, 534; instructions, see *Ross v. Greyhound Corp.*, 239; landlord liable to tenant for malicious misuse of his own property and instrumentalities thereon, see *Steffan v. Meiselman*, 154; gross and malicious in tort warrant recovery of profits where ascertainable, *ibid.*; Workmen's Compensation Act deals with risk of employment including negligence in field of industrial accident only, see *Barber v. Minges*, 213; not necessarily culpable by unintentional violation of traffic law unless act dangerous in itself, see *S. v. Lowery*, 598; failure to present argument that there was insufficient evidence of, tantamount to admission of sufficient evidence, see *Crone v. Fisher*, 635; violation of city speed ordinance *prima facie* only and not negligence *per se*, *ibid.*; in another state upon trial here governed by *lex loci delicto*, procedure by *lex fori*, see *Baird v. Baird*, 730; fact that driver of automobile falls asleep sufficient to make out *prima facie* case of, *ibid.*

New Trial—Motion for discretionary and not reviewable, see *S. v. McKinnon*, 160.

Next Friend—Suit by, court will not make decree where next friend or his attorney has adverse interest, see *Butler v. Winston*, 421; cannot consent to judgment without investigation and approval of court, *ibid.*

Next of Kin—Title of deceased person does not rest in, see *Snipes v. Estates Admr.*, 776; has right of action for distributive share against administrator but not against administrator's administrator, *ibid.*

Night Driving—Care necessary for, see *Allen v. Bottling Co.*, 118.

Nonresident—Service of process on, see *Propst v. Trucking Co.*, 490; service by publication valid only in *in rem* proceedings, except for divorce, see *Southern Mills v. Armstrong*, 495; substituted service on, only where property within jurisdiction, *ibid.*

Nonsuit—After all evidence of both sides, see *Gregory v. Ins. Co.*, 124; test sufficiency of evidence and is always question of law, see *Ward v. Smith*, 141; property denied where landlord deliberately allowed defective plumbing on premises, see *Steffan v. Meiselman*, 154; judgment of, proper where tenant injured on stairway by misjudging her step and falling, see *Carter v. Realty Co.*, 188; in taxpayer's suit against county commissioners and treasurer for excess salary paid treasurer, no bad faith nonsuit proper as to commissioners, see *Hill v. Stansbury*, 193; where small child near highway, attempting to cross, automobile does not use extra care, nonsuit improper, see *Yokeley v. Kearns*, 196; in caveat to will motion for, or request for directed verdict, will be disallowed, see *In re Will of Evans*, 206; evidence taken in light most favorable to plaintiff, he is entitled to benefit of every inference, see *Wingler v. Miller*, 15; *Ross v. Greyhound Corp.*, 239; proper where plaintiff's evidence shows that his own negligence was proximate cause and plaintiff's negligence need not be sole proximate cause, see *Bailey v. R. R.*, 244; motion for, after evidence of both sides offered, defendant's evidence unless favorable to plaintiff, not considered except when not in conflict it may be used to clarify or explain, see *Pappas v. Crist*, 265; where defendant in auto accident confronted with sudden emergency, injury to guest passenger properly nonsuited, see *O'Kelly v. Barbee*, 282; where only evidence sustains is incompetent but admitted, on appeal from re-

fusal to nonsuit trial court will not be overruled, see *Gibbs v. Russ*, 349; in ejectment both parties having same source of title where description relied on by defendants does not identify *locus in quo* as land conveyed them, nonsuit error see *Peel v. Calais*, 368; proper where plaintiff injured in delivering dangerous substance by truck, see *Morrison v. Cannon Mills Co.*, 387; erroneous in action on insurance policy by mortgagee on question of sole ownership, see *Bank v. Ins. Co.*, 390; charge of larceny is slanderous and actionable *per se*, see *Gillis v. Tea Co.*, 470; motion for, after all evidence court considers only that favorable to plaintiff, see *Stell v. Trust Co.*, 550; principal not responsible for personal injuries by agent or negligent operation of automobile, see *Salmon v. Pearce*, 587; evidence in light most favorable to plaintiff, see *Crone v. Fisher*, 635; involuntary on ground of contributory negligence cannot be rendered unless evidence so clear as to leave no other inference, *ibid.*; collision at street intersection denial of nonsuit proper on evidence, *ibid.*; motion for, properly overruled where evidence of parol trust for benefit of partnership, see *Thompson v. Davis*, 792; properly allowed in suit for negligence where step down at entrance of store, see *Benton v. Building Co.*, 809; properly allowed where agreement for support of parent made in consideration of deed to children, see *Gerringer v. Gerringer*, 818; properly allowed in attractive nuisance case where child drowned in temporary pond in city caused by stopped drain, see *Hedgepath v. Durham*, 822; in criminal prosecutions, evidence most favorable to State, see *S. v. McKinnon*, 160; denied where any evidence tending to prove fact in issue, see *S. v. Boyd*, 79; where complete defense established by State case motion to be allowed, *ibid.*; on motion for, at close of defendant's evidence all evidence tending to sustain conviction must be considered, see *S. v. McKinnon*, 160; for use of property for prostitution, evidence sufficient, see *S. v. Herndon*, 208; prosecution for seduction where circumstantial evidence supports prosecutrix, nonsuit improper, see *S. v. Smith*, 199; prosecution for felonious slaying by automobile nonsuited where no causal relation shown between drunken driving and death, see *S. v. Lowery*, 598; proper in indictment for possession of intoxicating liquors under facts of this case, see *S. v. Suddreth*, 610; failure to renew motion at end of all evidence waives first motion, see *S. v. Epps*, 741; evidence of accomplice sufficient to justify refusal of motion for, see *S. v. Rising*, 747.

North Carolina Workmen's Compensation Act—See *Barber v. Minges*, 213; *Branham v. Panel Co.*, 233.

Note—Under seal, suit on *prima facie* case, see *Lee v. Chamblee*, 146; action on note secured by chattel mortgage against makers of note and possessor or chattel, chief relief collection of debt, see *Chevrolet Co., Inc., v. Cahoon*, 375; suit on promissory, which appears on face as personal transaction between partners, see *Ripple v. Stevenson*, 284; parties may agree for payment in certain manner, *i.e.*, out of particular fund, by foreclosure of collateral, from rents collected which may be proven by parol, *ibid.*

Nuisances—Nuisance, interfering with migration of fish, see *Hampton v. Pulp Co.*, 535; pollution of streams, *ibid.*; actions for damages, acts and conditions constituting public nuisance as to streams, *ibid.*; improper use of public places, see *Dudley v. Charlotte*, 638.

Nunc Pro Tunc—See *Shepard v. Leonard*, 110; *Butler v. Winston*, 421.

Officers' Commission in Army and Navy—May be accepted by public officer without violating Constitution, see *In re Yelton*, 845.

Offset—Suit by distributee against administrator offset pleaded by administrator, plea of statute of limita-

tions available to distributee, see *Perry v. Trust Co.*, 642.

Ordinance—Presumption in favor of validity, see *Suddreth v. Charlotte*, 630; not necessarily invalid on account of pecuniary injury imposed on those regulated thereunder, *ibid.*; injunction will not lie to restrain enforcement of invalid ordinance, *ibid.*; violation of ordinance against speed *prima facie* only not negligence *per se*, see *Crone v. Fisher*, 635.

Parent and Child—Conveyance by parent to child in consideration of support, see *Gerringer v. Gerringer*, 818.

Parking—On highway, see *Allen v. Bottling Co.*, 118.

Parks—Land for, may be acquired and used by city in absence of covenants or restrictions in deeds to contrary, see *Dudley v. Charlotte*, 638; no evidence in this case use of lands acquired for, will constitute a nuisance, *ibid.*

Parol Evidence—Agreement of parties to pay note in certain manner provable by parol, see *Ripple v. Stevenson*, 284.

Parties—Necessary in suit for penalty, see *Hopkins v. Barnhardt*, 617; joinder of additional parties; substitution of parties, see *Snipes v. Estates Admr.*, 776; failure of party to testify, standing alone, is nothing except when case is such that calls for explanation, see *McNeill v. McNeill*, 178; trustee in mortgage necessary and proper, in foreclosure, see *Smith v. Bank*, 249; agreements between, in probate matters do not bind court but do bind parties thereto, see *S. v. Griggs*, 279; agreement not to sue, or to withdraw defense or to waive objection to forum, binding and court may sanction, *ibid.*; who have been served, bound by the judgment, see *Park, Inc., v. Brinn*, 502; adoption proceeding is conclusive on parties and privies, see *Locke v. Merrick*, 799.

Partition—Partition by exchange of deeds, see *Duckett v. Lyda*, 356.

Partnership—Defined, see *Rothrock v. Naylor*, 782; evidence and proof of the relationship, see *Gibbs v. Russ*, 349; *Rothrock v. Naylor*, 782; firm property and business, see *Thompson v. Davis*, 792; actions between partners, see *Ripple v. Stevenson*, 284; *Thompson v. Davis*, 792; representation of firm by partner, see *Pappas v. Crist*, 265; actions against partnerships, see *Gibbs v. Russ*, 349; evidence of personal conversation with deceased partner, see *Wingler v. Miller*, 15; parol trust to establish, when title taken in name of one partner and wife, see *Thompson v. Davis*, 792; in suit to establish parol trust what evidence of partnership affairs, *ibid.*

Passenger—On bus asked by driver to alight to allow others to get off, and injured, nonsuit denied, see *Ross v. Greyhound Corp.*, 239; may not recover for injury where defendant confronted with emergency, see *O'Kelly v. Barbee*, 282; transporting for hire, regulation of, prerogative of Legislature and may be delegated to municipality, see *Suddreth v. Charlotte*, 630.

Penalties—Actions, see *Hopkins v. Barnhardt*, 617; justice of the peace has no jurisdiction in action for penalty plus attorney's fees, *ibid.*

Pendente Lite—Alimony, see *Phillips v. Phillips*, 276.

Perjury—Prosecution and punishment, see *S. v. Hill*, 711.

Permanent Employment—Implies contract for indefinite general hiring, see *Malever v. Jewelry Co.*, 148.

Personal Services—Rendered in compliance with oral contract to give or devise land will support an action for services rendered, see *Daughtry v. Daughtry*, 528.

Photograph—As evidence in suit for auto collision incompetent where not shown to be true representation of wreck nor how witness would have used same, see *Woods v. Roadway Express, Inc.*, 269.

Plea in Bar—Effect on action and reference, see *Leach v. Quinn*, 27; not to be overthrown by demurrer, see

Byers v. Byers, 85; in face of, party in wrong cannot obtain divorce, see *Pharr v. Pharr*, 115; former jeopardy as plea in bar, see *S. v. Davis*, 54.

Pleadings—Need not negative defense in advance, see *Byers v. Byers*, 85; liberally construed, *Dickensheets v. Taylor*, 570; *Corbett v. Lumber Co.*, 704; contents in general, see *Chason v. Marley*, 738; counterclaims, setoffs, and cross complaints, see *Perry v. Trust Co.*, 642; *Apex v. Templeton*, 645; demurrer, in general, see *Ins. Co. v. Stadiem*, 49; *Dickensheets v. Taylor*, 570; *Corbett v. Lumber Co.*, 704; *Byers v. Byers*, 85; *Pharr v. Pharr*, 115; *Richardson v. Storage Co.*, 344; *Hopkins v. Barnhardt*, 617; for failure of complaint to state cause of action, see *Charlotte v. Cole*, 106; *Richardson v. Storage Co.*, 344; *Hat Co. v. Chizik*, 371; *Texas Co. v. Holton*, 497; *Hunsucker v. Winborne*, 650; *Corbett v. Lumber Co.*, 704; for misjoinder of parties and causes, see *Southern Mills, Inc., v. Yarn Co.*, 479; *Corbett v. Lumber Co.*, 704; *Curlee v. Scales*, 788; office and effect of demurrer, see *Southern Mills, Inc., v. Yarn Co.*, 479; amendment before trial: amendment by trial court, see *Byers v. Byers*, 85; *Pharr v. Pharr*, 115; *Propst v. Trucking Co.*, 490; *Snipes v. Estates Admr.*, 776; *Curlee v. Scales*, 788; *Thompson v. Davis*, 792; *Bank v. Sturgill*, 825; judgment on pleadings, see *Lockhart v. Lockhart*, 123; motions to strike, see *Apex v. Templeton*, 645; *Chason v. Marley*, 738; to supply lost pleading or paper, see *Park, Inc., v. Brinn*, 502.

"Polar Star"—In construction of will, see *Miller v. Trust Co.*, 1.

Police Power—Licensing and control of taxicabs is a, see *Suddreth v. Charlotte*, 630; regulation and use of public streets and roads; *ibid.*; regulation of tourist camps, etc., is exercise of, see *S. v. Campbell*, 828.

Possession—No person in, can be dispossessed by judgment in ejectment unless a party, see *Stone v. Guion*, 831; of implements for housebreaking, effect, see *S. v. Boyd*, 79; recent, of fruits of crime justifies inference of guilty, see *S. v. Holbrook*, 622; recent possession, defined, *ibid.*; larceny, presumption from possession, see *S. v. Epps*, 741; possession of intoxicants, see *S. v. Suddreth*, 610.

Prejudicial Error—Is denial of substantial right and appealable, see *Gillis v. Tea Co.*, 470.

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claiming land, see *Winstead v. Woolard*, 814; none of fraud or undue influence from mere relation of parent and child, see *Gerringer v. Gerringer*, 818; where record fails to show plea by defendant to indictment, presumption for regularity, see *S. v. McKinnon*, 160; of sufficient findings support ruling where no findings made, see *S. v. Griggs*, 279; of murder in second degree from use of deadly weapon and burden on defendant to show manslaughter, see *S. v. Davis*, 381; *S. v. Prince*, 392; on plea of not guilty raises presumption of innocence, see *S. v. Davis*, 381; on appeal that jury obeyed instructions, see *S. v. Vicks*, 384; on plea of guilty that offense committed in county alleged in indictment, see *S. v. McKeon*, 404; of guilt from recent possession of stolen goods, see *S. v. Holbrook*, 622; *S. v. Epps*, 741; upon admission of proof of intentional killing with deadly weapon, or unlawful killing and malice, see *S. v. DeGraffenreid*, 461; steps necessary to invoke aid or legal presumptions of murder and manslaughter must first be taken by State, *ibid.*; of innocence and sanity is for accused, see *S. v. Harris*, 697; where intentional killing with deadly weapon and mitigating circumstances as excuse, see *S. v. Grainger*, 716.

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Witnesses—Failure to give opportunity to secure material, see *S. v. Utley*, 39; credibility of defendant in criminal action as witness, see *S. v. McKinnon*, 160; accused person who testifies occupies same position as other witness as to privileges and liability to impeachment, *ibid.*; evidence attacking credibility of, admitted generally without objection, no error in the court's failure to restrict it, *ibid.*; cross-examination of State's witness by solicitor in discretion of court, see *S. v. Vicks*, 384; to refresh memory may examine record prepared by him, or under his supervision or by another in his presence, see *S. v. Smith*, 457; failure of party to suit to testify counts for nothing except where explanation called for, see *McNeill v. McNeill*, 178.

Workmen's Compensation Act — See *Barber v. Minges*, 213; *Branham v. Panel Co.*, 233.

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ANALYTICAL INDEX.

ABANDONMENT.

§ 1. Defined.

Abandonment is the giving up of a thing absolutely, without reference to any particular person or purpose, and includes both the intention to relinquish the property and the act by which this intention is executed. There can be no abandonment in favor of an individual or for a consideration. *Oxford Orphanage v. Kittrell*, 427.

ACTIONS.

§ 4. Civil Actions Based Upon Unlawful Act.

No civil rights can inure to one out of his own violation of the criminal law. *Byers v. Byers*, 85.

The courts are open for the determination of rights and the redress of grievances, but not for the rewarding of wrongs. *Ibid.*

ADOPTION.

§ 3. Consent of Natural Parents.

The abandonment of a child by its parents is commonly a ground for dispensing with their consent to its adoption, which may be even against their opposition. *Locke v. Merrick*, 799.

In an adoption proceeding in 1923, where the court found that the parents of a minor child had abandoned such child and the evidence does not appear in the record, there is a presumption that it was sufficient to sustain the finding. *Ibid.*

§ 9. Conclusiveness and Effect of Final Decree.

In an adoption proceeding in 1923, where the court found that the parents of a minor child had abandoned such child and the evidence does not appear in the record, there is a presumption that it was sufficient to sustain the finding. *Locke v. Merrick*, 799.

Adoption proceedings are conclusive as to persons who were parties thereto, and their privies, notwithstanding a defect as to a party who does not complain of his nonjoinder. *Ibid.*

§ 10. Rights and Liabilities of Parents and Child in General.

The right of adoption is not only beneficial to those immediately concerned, but likewise to the public, and construction of the statutes should not be narrow or technical. *Locke v. Merrick*, 799.

ADVERSE POSSESSION.

§ 1. Nature and Requisites of Title by Adverse Possession, in General.

When grantors in a deed of gift reserve a life estate in themselves, the grantee acquires no right of possession during the life of either of the grantors. *Winstead v. Woolard*, 814.

Where two parties are in possession of land, the possession in law follows the title. *Ibid.*

§ 2. Presumption of Title Out of State.

In actions involving title to real property, where the State is not a party, other than in trials of protested entries laid for the purpose of obtaining

ADVERSE POSSESSION—*Continued.*

grants, the title is conclusively presumed to be out of the State. C. S., 426. *Ward v. Smith*, 141.

§ 3. Actual, Hostile and Exclusive Possession in General.

Possession, to be adverse, must be actual, open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership and of an intention to exercise dominion against all other claimants. Such possession must be continuous, though not necessarily unceasing, for the statutory period. *Vance v. Guy*, 409.

Where plaintiff's evidence tends to show his actual possession of a part of a 375-acre tract of land and his continuous operation of three or four mines thereon, the question becomes one not of extent of possession but of its character, and a charge to the jury, that plaintiff's possession would depend upon the size of his operations, was error. *Ibid.*

§ 4a. Hostile Character of Possession as Affected by Relationship Between Tenants in Common.

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession for twenty years, receiving rents and profits and claiming the land as his own from which actual ouster would be presumed. *Winstead v. Woollard*, 814.

§ 4f. As Between Widow and Heirs.

Possession of a widow, to whom no dower has been assigned, is not adverse to the heirs at law of her husband. *Farabow v. Perry*, 21.

A widow, in possession of lands of which her husband died seized and possessed and in which she is entitled to dower which was never set apart to her, cannot perfect title to the premises in herself by claiming adverse possession under color of title for seven years, where it appears she mortgaged the premises, and purchased at her own mortgage sale to obtain a deed on which to rely as color of title. *Ibid.*

§ 4h. As Between Mortgagor and Mortgagee.

In a suit by plaintiff, grantor and debtor in a deed of trust on land, against defendants, holders of the debt, for an accounting, upon motion for nonsuit at the close of all the evidence, which tended to show that plaintiff rented the lands and the rents were paid to the said holders of the debt to be applied to the debt and interest and taxes, the said holders of the debt allowing the property to be sold for taxes and becoming the purchaser at the tax sale, it was error for the court to allow the motion, on the ground of (1) laches or (2) adverse possession under a valid tax deed. *Stell v. Trust Co.*, 550.

§ 5. Necessity of Claim Under Known and Visible Lines and Boundaries.

Where one enters into possession of land, under a deed purporting to convey the land by definite lines and boundaries, without reservation or exception, his deed constitutes colorable title to the entire interest and estate in the land. *Vance v. Guy*, 409.

§ 6. Continuity of Possession.

Possession, to be adverse, must be actual, open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership and of an intention to exercise dominion against all other claimants.

ADVERSE POSSESSION—*Continued.*

Such possession must be continuous, though not necessarily unceasing, for the statutory period. *Vance v. Guy*, 409.

§ 9a. What Constitutes Color of Title.

A widow, in possession of lands of which her husband died seized and possessed and in which she is entitled to dower which was never set apart to her, cannot perfect title to the premises in herself by claiming adverse possession under color of title for seven years. *Farabow v. Perry*, 21.

While a deed will give color of title so as to permit a plea of the statute of limitations by the grantee, even though the grantor is chargeable with fraud, if the grantee accepts the deed in good faith without knowledge of the fraud, actual fraud is neither sanctioned nor cured by the statute of limitations. *Ibid.*

Where one enters into possession of land, under a deed purporting to convey the land by definite lines and boundaries, without reservation or exception, his deed constitutes colorable title to the entire interest and estate in the land. *Vance v. Guy*, 409.

A deed which is inoperative because the land intended to be conveyed is incapable of identification, from the description therein, is inoperative as color of title. *Thomas v. Hipp*, 515.

§ 9b. Presumptive Possession to Outermost Boundaries of Deed.

Where one enters into possession of land, under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed. *Vance v. Guy*, 409.

§§ 13b, 13c. Time Necessary to Ripen Title by Adverse Possession Between Individuals With and Without Color of Title.

In actions between individual litigants, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title. C. S., 428 and 430. *Ward v. Smith*, 141.

§ 17. Presumptions and Burden of Proof.

If the life tenant purchases the property at a sale to satisfy an encumbrance, he cannot hold such property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner. *Farabow v. Perry*, 21.

The presumption, that one in possession of the surface of land has also possession of the minerals, does not apply when these rights have been segregated. *Vance v. Guy*, 409.

The party asserting title by adverse possession must carry the burden on that issue. *Thomas v. Hipp*, 515.

A party, entering into possession of land, is presumed in law to enter under and in pursuance of his right, no matter what may have been his motive for the entry. *Winstead v. Woolard*, 814.

§§ 19, 20. Sufficiency of Evidence, Nonsuit and Directed Verdict—Instructions.

Where plaintiff's evidence tends to show his actual possession of a part of a 375-acre tract of land and his continuous operation of three or four mines thereon, the question becomes one not of extent of possession but of its charac-

ADVERSE POSSESSION—*Continued.*

ter, and a charge to the jury, that plaintiff's possession would depend upon the size of his operations, was error. *Vance v. Guy*, 409.

APPEAL AND ERROR.

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2. Judgments appealable. Duplin County v. Ezzell, 531; Suddreth v. Charlotte, 630; Utilities Com. v. R. R., 840; Simmons v. Simmons, 841.

3a. Parties who may appeal. Snipes v. Estates Admr., Inc., 776.

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§ 1. Nature and Grounds of Appellant Jurisdiction of Supreme Court in General.

If the Superior Court acts without jurisdiction, on appeal the Supreme Court acquires no jurisdiction and will, *ex mero motu*, dismiss the case. *Shepard v. Leonard*, 110.

An appeal is for the purpose of correcting alleged errors of law apparent on the face of the record. *S. v. McKeon*, 404.

APPEAL AND ERROR—*Continued.*

§ 2. Judgments Appealable.

An irregular judgment is one rendered contrary to the course and practice of the court, and a motion in the cause to set aside a judgment or to vacate subsequent decrees and procedure, on the ground of irregularities, properly presents questions for judicial review. *Duplin County v. Exzell*, 531.

Where plaintiff has selected an improper remedy and dismissal will not end the controversy, this Court, in the exercise of its discretion, may express an opinion on the merits of the exceptive assignments of error and finally decide the matter. *Suddreth v. Charlotte*, 630.

No appeal lies from a refusal by the Superior Court to dismiss an order or proceeding properly certified to it by the Utilities Commission, as such an appeal is premature and fragmentary. *Utilities Com. v. R. R.*, 840.

In contempt proceedings by a wife against her husband for failure to make alimony payments, where there was a judgment for the wife and the husband paid all amounts in arrears upon his arrest by the sheriff, no appeal lies. *Simmons v. Simmons*, 841.

§ 3a. Parties Who May Appeal.

An appeal lies from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant. *Snipes v. Estates Administration, Inc.*, 776.

§ 4. Academic Questions and Advisory Opinions.

In a civil action by a school principal against the school committee to declare rights under a contract as High School Principal and to enjoin its breach, where plaintiff alleged that, for the school year 1942-43, he gave due, legal notice that his contract was still in force and accepted it for the coming year, and a temporary restraining order was issued, and heard on 22 September, 1942, whereupon the order was dissolved and the action dismissed. *Held:* (1) The dissolution of the restraining order was proper; (2) The dismissal of the action was error. *Groves v. McDonald*, 150.

Where plaintiff has selected an improper remedy and dismissal will not end the controversy, this Court, in the exercise of its discretion, may express an opinion on the merits of the exceptive assignments of error and finally decide the matter. *Suddreth v. Charlotte*, 630.

It appearing that the sale sought to be prevented has been by consent consummated and, as authorized by order of court, confirmed and deed to the purchaser executed and delivered, the appeal from the order dissolving the restraining order will be dismissed. *Straka v. Loan Corp.*, 662.

In contempt proceedings by a wife against her husband for failure to make alimony payments, where there was a judgment for the wife and the husband paid all amounts in arrears upon his arrest by the sheriff, no appeal lies. *Simmons v. Simmons*, 841.

§ 5. Motions in Supreme Court.

On a motion in arrest of judgment, made originally in the Supreme Court, it is appropriate to grant the relief, when, and only when, some fatal error or defect appears on the face of the record proper. *S. v. McKeon*, 404.

Where plaintiffs' cause was heard, in the court below, independently on the merits, and action on demurrers was reserved without prejudice to the defendants, a demurrer *ore tenus*, renewed in this Court, brings both questions up for decision. *Warren v. Maxwell*, 604.

APPEAL AND ERROR—*Continued.*

§ 6a. Time of Taking Objections and Exceptions in General.

An objection to instructions in a criminal case on the ground that the manner of presenting the State's contentions, and the greater prominence given them, amounted to an expression of opinion, is an exception to the rule that an objection must be made at the time. *S. v. Grainger*, 716.

§ 6b. Form and Sufficiency of Exceptions in General.

Broadside exceptions will not be considered. The assignment must particularize and point out specifically wherein the court failed to charge the law arising on the evidence. *S. v. Dilliard*, 446.

An objection to instructions in a criminal case on the ground that the manner of presenting the State's contentions, and the greater prominence given them, amounted to an expression of opinion, is an exception to the rule that an objection must be made at the time; and it is not a broadside exception, if made with such particularity as to guide the court to the objectionable features. *S. v. Grainger*, 716.

Where, in a criminal prosecution, there is a numerical preponderance in the statement by the court of the State's contentions, referable naturally to the difference, both in the character and volume, of evidence on the respective sides, there is no cause of legal objection. *Ibid.*

An exception to the court's charge, that it failed to state in a plain and correct manner the evidence and law arising thereon as provided in C. S., 564, is a broadside exception and presents no question for decision. *Baird v. Baird*, 730.

§ 18. Certiorari.

Where a person has been adjudged incompetent, under C. S., 2285, and a trustee of his property appointed, and thereafter, upon petition before the clerk under C. S., 2287, by the person so adjudged incompetent, after his trustee or guardian has been made a party as required by ch. 145, Public Laws 1941, he is found competent by a jury and is so adjudged by the clerk, the Superior Court has power to review the matter, on proper showing for *certiorari* by the trustee or guardian, and it would seem that the procedure provided in C. S., 2285, on appeal might appropriately be followed on such review. *In re Jeffress*, 273.

Mandamus is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction. If there has been error in law, prejudicial to the parties, or the board has exceeded its authority, or has mistaken its power, or has abused its discretion—where the statute provides no appeal—the proper method of review is by *certiorari*. *Warren v. Maxwell*, 604.

If the Board of Municipal Control should err in its findings, the error may be corrected by the Superior Court upon a writ of *certiorari*, there being no provision in the statute for an appeal. Unless so reviewed, ordinarily the findings of the Board are conclusive and cannot be collaterally attacked. *Hunsucker v. Winborne*, 650.

Conceding the complaint to be a petition for a writ of *certiorari*, C. S., 630, it fails to make a proper showing of merit, upon which alone *certiorari* will issue, for the mere allegation of fraud is insufficient. *Ibid.*

§ 23. Form and Requisites of Assignments of Error.

Broadside exceptions will not be considered. The assignment must particularize and point out specifically wherein the court failed to charge the law arising on the evidence. *S. v. Dilliard*, 446.

APPEAL AND ERROR—*Continued.*

§ 24. Necessity of Exceptions to Support Assignments of Error.

On appeal an argument unsupported by exception and an exception, without argument or citation of authority, present no questions for the Court's decision. *Curlee v. Scales*, 788.

§ 29. Abandonment of Exceptions by Failure to Discuss Same in Brief.

Exceptions referred to in defendants' brief as "formal exceptions" and as to which no argument is made and no authority cited are deemed abandoned. Rule 28 of Rules of Practice in the Supreme Court. *S. v. Hunt*, 173; *Wingler v. Miller* 15.

Exceptions not argued or referred to in appellant's brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562. *S. v. Smith*, 457.

Exceptions not discussed in appellant's brief are deemed abandoned. Rule 28. *Gillis v. Tea Co.*, 470.

Appellant's failure to present argument that there was insufficient evidence to be submitted to the jury of actionable negligence on his (defendant's) part, is tantamount to an admission of sufficient evidence to carry the case to the jury on that issue. *Crone v. Fisher*, 635.

Exceptions not set out in appellant's brief are taken as abandoned. Rule 28. *S. v. Epps*, 741.

On appeal an argument unsupported by exception and an exception, without argument or citation of authority, present no questions for the Court's decision. *Curlee v. Scales*, 788.

§ 30b. Jurisdiction and Hearings of Motions to Dismiss in the Supreme Court.

If the Superior Court acts without jurisdiction, on appeal the Supreme Court acquires no jurisdiction and will, *ex mero motu*, dismiss the case. *Shepard v. Leonard*, 110.

Where there is a defect of jurisdiction or the complaint fails to state a cause of action, and such defects appear on the face of the record, this Court will *ex mero motu* dismiss the action. *Hopkins v. Barnhardt*, 617.

§ 37b. Matters Reviewable—in Discretion of Lower Court.

A motion to amend pleading is discretionary with the trial court and is not reviewable on appeal. C. S., 547. *Pharr v. Pharr*, 115.

Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal. *S. v. Farrell*, 321.

The allowance or denial of a motion to set aside the verdict, on the ground of an excessive recovery, is within the sound discretion of the trial judge. *Francis v. Francis*, 401.

If any pleadings, summons, affidavit, or order is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original, C. S., 544; and the judgment of the trial court permitting lost pleadings, etc., to be substituted, is not reviewable. *Park, Inc., v. Brinn*, 502.

If a motion to quash is not made before a plea of not guilty, the motion is addressed to the discretion of the trial court and is not reviewable on appeal. *S. v. Suddreth*, 610.

The general rule is that the allowance of a motion for continuance is in the sound discretion of the trial judge and not subject to review in the absence of abuse of discretion. *S. v. Rising*, 747.

Where a criminal prosecution is continued to the next regular term and prior thereto called for trial at a special term, there is no error for the court to refuse a continuance to such regular term, on the ground of the unavoidable absence of a material expert witness for defense, it appearing that the solicitor agreed not to offer evidence on the facts, which it was alleged would be denied by such absent witness. *Ibid.*

The refusal to allow accused to reopen the case and introduce further evidence, after the taking of evidence had been closed and solicitor's argument concluded, was within the sound discretion of the trial judge and not subject to review except for manifest abuses thereof. *Ibid.*

§ 37c. Matters Reviewable in Injunctive Proceedings.

In appeals from an order granting or denying injunctive relief the findings of fact made by the court below are not conclusive. This Court may review the evidence and determine the questions of fact, as well as of law. *Smith v. Bank*, 249.

On appeal from a ruling of the lower court that plaintiffs are entitled to an easement and an injunction against defendant's preventing its obstruction, where the facts on which the ruling is based are conflicting and uncertain, the judgment below will be vacated and the cause remanded for further proceedings. *Dickensheets v. Taylor*, 570.

§ 37e. Findings of Facts.

Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. C. S., 569. *Fish v. Hanson*, 143.

On a consent reference the findings of fact by the referee, approved by the judge, are conclusive on appeal if there is competent evidence to support the findings. *Harrison v. Darden*, 364.

Upon failure to bring up the evidence on appeal, there is a presumption that the findings of a referee are supported by the evidence. *Ibid.*

On appeal from a ruling of the lower court that plaintiffs are entitled to an easement and an injunction against defendants, preventing its obstruction, where the facts on which the ruling is based are conflicting and uncertain, the judgment below will be vacated and the cause remanded for further proceedings. *Dickensheets v. Taylor*, 570.

§ 38. Presumptions and Burden of Showing Error.

Upon filing a caveat to a will the burden of showing reversible error is upon caveators, and verdict and judgment will not be set aside for harmless error or for mere error and no more. *In re Will of Cooper*, 34.

Where the court, at the time testimony is withdrawn, definitely instructs the jury not to consider same, there is a presumption on appeal that the jury obeyed such instruction, unless prejudice appears or is shown by appellant, on whom the burden rests. *S. v. Vicks*, 384.

§ 39a. Prejudicial and Harmless Error in General.

The burden is on the appellant, not only to show error, but prejudicial error. *Gibbs v. Russ*, 349.

It is only when the court's ruling on some material matter is prejudicial, amounting to the denial of a substantial right, that a new trial will be granted. *Gillis v. Tea Co.*, 470.

APPEAL AND ERROR—*Continued.*

§ 39d. Harmless Error in Admission or Exclusion of Evidence.

A refusal to admit competent evidence, which, when considered with all the other evidence, fails to make out a case for the jury, is harmless error. *Gibbs v. Russ*, 349.

§ 39e. Harmless and Prejudicial Error in Instructions.

Errors in the court's charge, on an issue answered in favor of the party who makes the exceptive assignments of error, are harmless. To be reversible, the error must be material and prejudicial to appellant's rights. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 269.

§ 39f. Harmless and Prejudicial Error in Form or Number of Issues.

Where a stipulation is entered into by counsel for plaintiffs and defendants that only one issue may be submitted to the jury and the parties waive the submitting of any other issue, on appeal the Court's consideration is limited to those exceptions and assignments of error bearing on the single issue submitted by consent. *Wingler v. Miller*, 15.

§ 39g. Burden of Proof.

The burden is on the appellant, not only to show error, but prejudicial error. *Gibbs v. Russ*, 349.

§ 40a. Review of Exceptions to Judgment on Signing of Judgment or to Findings.

The only exception, being to the judgment below, presents the question whether error appears on the face of the record; and the judgment being an essential part of the record, the Court will take notice of errors appearing in it, correct them and enter such judgment upon the facts established as in law ought to be rendered. *Smith v. Smith*, 433.

§ 40e. Review of Judgment on Motion to Nonsuit.

On motion for judgment of nonsuit the evidence is taken in the light most favorable to plaintiffs, who are entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Wingler v. Miller*, 15.

In considering a motion for nonsuit after all the evidence of both sides, the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff. *Gregory v. Ins. Co.*, 124; *Pappas v. Crist*, 265; *Stell v. Trust Co.*, 550.

A motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and support a recovery. The question thus presented is a question of law and is always to be decided by the court. C. S., 567. *Ward v. Smith*, 141.

Where the only evidence to sustain the cause of action alleged by plaintiff is incompetent, but erroneously admitted, and an appeal is taken by defendant from the refusal of judgment of nonsuit thereon, this Court will not overrule the trial court and grant the nonsuit. *Gibbs v. Russ*, 349.

When the only defendants, who have any interest adverse to the plaintiff, move for judgment of nonsuit, C. S., 567, which is granted, objection and exception thereto, upon the theory that only some of defendants lodged the motion, are untenable. *Daughtry v. Daughtry*, 528.

APPEAL AND ERROR—*Continued.*

In a suit by plaintiff, grantor and debtor in a deed of trust on land, against defendants, holders of the debt, for an accounting, upon motion for nonsuit at the close of all the evidence, which tended to show that plaintiff rented the lands and the rents were paid to the said holders of the debt to be applied to the debt and interest and taxes, the said holders of the debt allowing the property to be sold for taxes and becoming the purchaser at the tax sale, it was error for the court to allow the motion, on the ground of (1) laches or (2) adverse possession under a valid tax deed. *Stell v. Trust Co.*, 550.

§ 40f. Review of Judgments Upon Demurrers.

Where plaintiffs' cause was heard, in the court below, independently on the merits, and action on demurrers was reserved without prejudice to the defendants, a demurrer *ore tenus*, renewed in this Court, brings both questions up for decision. *Warren v. Maxwell*, 604.

§ 40g. Review of Constitutional Questions.

Constitutional rights are not to be granted or withheld in the court's discretion. When a motion for continuance, in a criminal case, is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *S. v. Farrell*, 321.

§ 43. Determination of Petition to Rehear.

Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former hearing, and no new facts appear, no new authorities cited, and no new positions assumed. Rule 44, Rules of Practice in the Supreme Court, 221 N. C., p. 570. *Montgomery v. Blades*, 331.

§ 49b. Stare Decisis.

Expressions in an opinion are to be interpreted in connection with the factual situation under review. *Byers v. Byers*, 85.

ASSAULT AND BATTERY.

§§ 7a, 7c. Elements and Degrees of Criminal Assault—in General.

Where in a trial of an indictment, Michie's Code, sec. 4214, defendant is convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's Prison, there is error, as the offense is at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the court as provided by C. S., 4215. *S. v. Gregory*, 415.

§ 8. Warrant and Indictment.

In an indictment, under Michie's Code, sec. 4214, it is not necessary to describe the injury further than in the words of the statute. *S. v. Gregory*, 415.

§ 14. Verdict and Judgment.

In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea, the accepted plea is for a misdemeanor under C. S., 4215, and judgment that defendant be confined to the State's Prison for not less than eight nor more than ten years, is a violation of N. C. Const., Art. I, sec. 14, and C. S., 4173. *S. v. Tyson*, 492.

ASSAULT AND BATTERY—*Continued.*

When accused is indicted, under C. S., 4214, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, does not deprive the jury of the statutory authority to consider it. *S. v. Bentley*, 563.

ATTORNEY AND CLIENT.

§ 10. Compensation of Attorney—Lien and Collection.

In this jurisdiction *it is held* that attorney's fees may not be taxed as costs. *Hopkins v. Barnhardt*, 617.

AUTOMOBILES.

III. Operation and Law of the Road.

9a. Attention to road and proper lookout. Allen v. Bottling Co., 118; Baird v. Baird, 730.
9d. Sudden emergency. O'Kelly v. Barbee, 282; Russell v. Cutshall, 353.
12b. In approaching and passing children on highway. Yokeley v. Kearns, 196.
12c. Speed at intersections. Anderson v. Petroleum Carrier Corp., 254; Cab Co. v. Sanders, 626; Crone v. Fisher, 635.
14. Stopping, parking and parking lights. Allen v. Bottling Co., 118.
18c. Contributory negligence. Allen v. Bottling Co., 118; Anderson v. Petroleum Carrier Corp., 254; Crone v. Fisher, 635.
18d. Concurring and intervening negligence. Ross v. Greyhound Corp., 239.
18g. Sufficiency of evidence and nonsuit. Allen v. Bottling Co., 118; Yokeley v. Kearns, 196; Ross v. Greyhound Corp., 239; Anderson v. Petroleum Carrier Corp., 254; Gibbs v. Russ, 349; Russell v. Cutshall, 353; Crone v. Fisher, 635; Baird v. Baird, 730.
18h. Instructions. Ross v. Greyhound Corp., 239.

V. Liability of Owner for Driver's Negligence.

23. In general. Baird v. Baird, 729.
24a. Agents and employees in general. Russell v. Cutshall, 353.
24b. Scope of employment and furtherance of master's business. Ibid.
24c. Competency and sufficiency of evidence. Gibbs v. Russ, 349; Russell v. Cutshall, 353.

VII. Criminal Responsibility.

32a. Culpable negligence in operation in general. S. v. Lowery, 598.
32b. Proximate cause and intervening and concurrent negligence. Ibid.
32e. Sufficiency of evidence and nonsuit. Ibid.

§ 9a. Attention to Road and Proper Lookout.

Curves on the road and darkness are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." Sec. 105, ch. 407, Public Laws 1937, C. S., 2621 (290). He must operate his automobile at night so as to be able to stop within the radius of his lights. *Allen v. Bottling Co.*, 118.

The mere fact that the driver of an automobile goes to sleep, while driving, is a proper basis for an inference of negligence, sufficient to make out a *prima facie* case and to support a recovery for injuries sustained by another thereby, if no circumstances tending to excuse or justify his conduct are proven. *Baird v. Baird*, 730.

§ 9d. Sudden Emergency.

Where plaintiff, a guest passenger, and defendant were driving, at night on a paved road in defendant's car, when suddenly the lights on the car went out and defendant, as he was slowing down to stop, asked plaintiff to open the door and look out and warn him of danger, which plaintiff did, and in response to such warning defendant cut his wheels back on the pavement so suddenly that plaintiff was thrown from the car and was injured, defendant was con-

fronted with an emergency and motion for judgment as of nonsuit properly allowed. O'Kelly v. Barbee, 282.

In the case of an urgent emergency an employee at times may act so as to bind his employer without previous authority. *Russell v. Cutshall*, 353.

§ 12b. Operation and Law of Road in Approaching and Passing Children on Highway.

When one drives an automobile on a public street and sees, or by the exercise of due care should see, small children on or near the traveled portion of the street and apparently intending to cross, it is his duty to use proper care with respect to speed and control of his car, the giving of timely warning and the maintenance of vigilant outlook, to avoid injury, recognizing the likelihood of their running into or across the street. *Yokeley v. Kearns*, 196.

§ 12c. Speed at Intersections.

In an action to recover for wrongful death caused by an automobile collision, where plaintiff's evidence tended to show that her intestate (on the subservient road) driving his own car and the truck of defendant (on the dominant road) were approaching the highway junction, which was well marked on all sides by signs showing its character and danger, both vehicles apparently going at a greater speed than prudence demanded and neither driver slowing down for the intersection, and plaintiff's intestate failing to yield and being killed by the consequent collision, motion for judgment as of nonsuit was properly allowed. *Anderson v. Petroleum Carrier Corp.*, 254.

If plaintiff's automobile enters the intersection of two streets, at a time when the approaching car of defendant is far enough away to justify a person in believing that he may safely pass over the intersection ahead of the oncoming car, the plaintiff has the right of way, and it is the duty of the defendant to reduce his speed and bring his car under control and yield. *Cab Co. v. Sanders*, 626.

Conceding that plaintiff, in an action for damages for personal injuries from an automobile collision, entered the city street intersection at a speed greater than 20 miles per hour and therefore in violation of the city's ordinance, this would only be *prima facie* evidence of negligence and not negligence *per se*, and could not be held as a matter of law to constitute contributory negligence that would bar plaintiff's recovery. *Crone v. Fisher*, 635.

§ 14. Stopping, Parking and Parking Lights.

Parking on a paved highway at night, without flares or other warning, is negligence. Ch. 407, Public Laws 1937, secs. 97 and 123. C. S., 2621 (283), 2621 (308). *Allen v. Bottling Co.*, 118.

§ 18c. Contributory Negligence.

In an action to recover damages from an automobile collision, where defendant's truck was parked at night on the right side of a 22-foot paved highway, in the middle of a four-tenths of a mile straight-away, with left wheels two feet on the concrete and without parking lights on rear but there were reflectors, and plaintiff's intestate ran on the right shoulder striking the truck on the right rear with such force that he and a passenger were killed, the contributory negligence of plaintiff's intestate was such that judgment of nonsuit sustained. *Allen v. Bottling Co.*, 118.

In an action to recover for wrongful death caused by an automobile collision, where plaintiff's evidence tended to show that her intestate (on the subservi-

ent road) driving his own car and the truck of defendant (on the dominant road) were approaching the highway junction, which was well marked on all sides by signs showing its character and danger, both vehicles apparently going at a greater speed than prudence demanded and neither driver slowing down for the intersection, and plaintiff's intestate failing to yield and being killed by the consequent collision, motion for judgment as of nonsuit was properly allowed. *Anderson v. Petroleum Carrier Corp.*, 254.

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§ 18d. Concurring and Intervening Negligence.

In an action to recover damages for personal injuries to plaintiff, a passenger on defendant's bus, where the evidence tended to show that the driver stopped his crowded bus at night on the left-hand side of the highway, in front of a filling station which was used as a bus stop, and requested plaintiff, who was near the door, to alight so that another passenger could get off, which plaintiff did, stepping into the highway where he was struck and injured by another automobile coming from the opposite direction, driven by one intoxicated, a motion for judgment as of nonsuit was properly denied. *Ross v. Greyhound Corp.*, 239.

§ 18g. Sufficiency of Evidence and Nonsuit.

In an action to recover damages from an automobile collision, where defendant's truck was parked at night on the right side of a 22-foot paved highway, in the middle of a four-tenths of a mile straight-away, with left wheels two feet on the concrete and without parking lights on rear but there were reflectors, and plaintiff's intestate, after applying his brakes and leaving skid marks on the pavement for 100 to 190 feet, ran on the right shoulder striking the truck on the right rear with such force that he and a passenger were killed, the contributory negligence of plaintiff's intestate was such that judgment of nonsuit sustained. *Allen v. Bottling Co.*, 118.

In an action for damages based on negligence, resulting in the death of plaintiff's intestate, a small boy under eight years of age, where plaintiff's evidence tended to show that his intestate was struck with great force by defendant's automobile and killed, in the middle of a 39-foot city street, free from other traffic, as he attempted to cross the street, that the horn was not sounded, that the car traveled (carrying the boy's body) 126 feet before stopping, and the owner was heard to say at the scene of the accident, "I told the driver to slow up," a judgment as of nonsuit was reversible error. *Yokeley v. Kearns*, 196.

In an action to recover damages for personal injuries to plaintiff, a passenger on defendant's bus, where the evidence tended to show that the driver stopped his crowded bus at night on the left-hand side of the highway, in front of a filling station which was used as a bus stop, and requested plaintiff, who was near the door, to alight so that another passenger could get off, which plaintiff did, stepping into the highway where he was struck and injured by another automobile coming from the opposite direction, driven by one intoxicated, a motion for judgment as of nonsuit was properly denied. *Ross v. Greyhound Corp.*, 239.

AUTOMOBILES—*Continued.*

In an action to recover for wrongful death caused by an automobile collision, where plaintiff's evidence tended to show that her intestate (on the subservient road) driving his own car and the truck of defendant (on the dominant road) were approaching the highway junction, which was well marked on all sides by signs showing its character and danger, both vehicles apparently going at a greater speed than prudence demanded and neither driver slowing down for the intersection, and plaintiff's intestate failing to yield and being killed by the consequent collision, motion for judgment as of nonsuit was properly allowed. *Anderson v. Petroleum Carrier Corp.*, 254.

In an action to recover damages for personal injuries to plaintiff caused by the alleged negligent operation by one of defendants of a truck, jointly owned by both defendants, where all of plaintiff's evidence, admitted and rejected, taken in its most favorable light, tends to show that the other defendant had no interest in, and received no benefit from the operation of the truck at the time in question, such evidence is insufficient to establish the relation between the defendants of principal and agent or that of partnership and judgment of nonsuit, as to the defendant not operating the truck at the time of the accident, sustained. *Gibbs v. Russ*, 349.

In an action for damages for personal injuries to plaintiff, a minor, who was invited or permitted by corporate defendants' driver to ride on the running board of its truck, such injuries being allegedly caused by the negligence of the driver, where there is no evidence that the driver was acting in the apparent scope of his authority or that such an emergency existed as would authorize the driver to employ assistance, disregarding the question of contributory negligence, the plaintiff was a trespasser as far as the corporate defendant was concerned, and judgment of nonsuit as to it was proper. *Russell v. Cutshall*, 353.

In an action for damages for personal injuries to plaintiff by negligence of defendant, where plaintiff's evidence tended to show that she was driving her car, at 20 to 25 miles per hour, south on a city street towards its intersection with another street running east and west, and that defendant's truck was approaching the intersection from the west and was 125 feet distant from the intersection when plaintiff entered same, and said truck, running at 45 miles per hour, struck plaintiff's car, which was within 4 feet of the curb on the south side of the intersection, knocking it 70 feet into a stone wall across the street, motion of nonsuit properly denied. C. S., 567. *Crone v. Fisher*, 635.

The mere fact that the driver of an automobile goes to sleep, while driving, is a proper basis for an inference of negligence, sufficient to make out a *prima facie* case and to support a recovery for injuries sustained by another thereby, if no circumstances tending to excuse or justify his conduct are proven. *Baird v. Baird*, 730.

§ 18h. Instructions.

Where a passenger on a public bus alights, on the highway, at the request of the bus driver, so that another passenger could get out, and is injured by an automobile, coming from the opposite direction and driven by one who is intoxicated, it is reversible error for the court, in its charge to the jury, to compare these facts to a case where a horse is left unhitched in the street, and is frightened by a stranger and runs away, causing damage. *Ross v. Greyhound Corp.*, 239.

§ 23. Liability of Owner for Driver's Negligence in General.

The negligent conduct of the driver of an automobile, who is operating the car with the permission, if not at the request of the owner, who is present

and has the legal right to control its operation, is imputable to the owner. The fact that the owner falls asleep and refrains from directing its operation does not change the owner's right or limit liability. *Baird v. Baird*, 730.

§ 24a. Agents and Employees—in General.

Ordinarily, one who is engaged to operate a motor vehicle has no implied authority to invite or permit third persons to ride; and the employer is not liable for personal injuries sustained by the invitee while in such machine, except, perhaps, when willfully and maliciously inflicted. The particular nature of the employment, or the circumstances at the time, or acquiescence on the part of the employer may create an exception to this rule. *Russell v. Cutshall*, 353.

In the case of an urgent emergency an employee at times may act so as to bind his employer without previous authority. *Ibid.*

§ 24b. Scope of Employment and Furtherance of Master's Business.

Ordinarily, one who is engaged to operate a motor vehicle has no implied authority, by virtue of his employment, to invite or permit third persons to ride; and the employer is not liable for personal injuries sustained by the invitee while in such machine, except, perhaps, when willfully and maliciously inflicted. *Russell v. Cutshall*, 353.

§ 24c. Competency and Sufficiency of Evidence.

In an action to recover damages for personal injuries to plaintiff caused by the alleged negligent operation by one of defendants of a truck, jointly owned by both defendants, where all of plaintiff's evidence, admitted and rejected, taken in its most favorable light, tends to show that the other defendant had no interest in, and received no benefit from the operation of the truck at the time in question, such evidence is insufficient to establish the relation between the defendants of principal and agent or that of partnership. *Gibbs v. Russ*, 349.

The mere ownership of an interest in an automobile does not make the owner of such interest liable for injuries caused by the automobile; nor is a partnership liable for an injury done by such vehicle owned by it if the driver, even though a partner, be not acting within the scope of the business and authority of the partnership. *Ibid.*

In an action for damages for personal injuries to plaintiff, a minor, who was invited or permitted by corporate defendants' driver to ride on the running board of its truck, such injuries being allegedly caused by the negligence of the driver, where there is no evidence that the driver was acting in the apparent scope of his authority or that such an emergency existed as would authorize the driver to employ assistance, the plaintiff was a trespasser, and judgment of nonsuit as to it was proper. *Russell v. Cutshall*, 353.

§ 32a. Culpable Negligence in Operation—in General.

The violation of a traffic law, unintentionally or merely through a want of ordinary care, will not constitute culpable negligence unless the prohibited act is in itself dangerous—*i.e.*, likely under the circumstances to result in death or great bodily harm. *S. v. Lowery*, 598.

§ 32b. Proximate Cause and Intervening and Concurrent Negligence.

The violation of statutes, against driving an automobile while intoxicated, C. S., 2621 (286), and against failure to give certain signals, C. S., 2621 (301), if conceded, is not sufficient to sustain a prosecution for involuntary man-

AUTOMOBILES—*Continued.*

slaughter, unless a causal relation is shown between the breach of the statute and the death. *S. v. Lowery*, 598.

§ 32e. Sufficiency of Evidence and Nonsuit.

In a criminal prosecution for a felonious slaying, by an automobile collision, where all testimony tended to show no excessive speed, no clear evidence of a left turn in front of the oncoming car which hit defendant's car causing the death, no failure to give any signal which defendant was under obligation to give, and the only evidence of intoxication of the defendant was by one witness, contrary to that of several others, and where there was no contention by the State that defendant's conduct was such as to sustain a conviction at common law irrespective of the statutes, C. S., 2621 (286), and 2621 (301), motion for judgment of nonsuit should have been allowed. *S. v. Lowery*, 598.

BAIL.

§ 4. Liabilities on Bail Bonds.

Upon judgment *nisi*, in a criminal prosecution, against defendant and his appearance bond and *sci. fa.* served on his surety and upon return at a subsequent term judgment absolute entered against defendant and surety, where subsequently defendants moved to set aside the judgment for surprise and excusable neglect, C. S., 600, for that the case did not appear on the calendar, with no allegation or evidence of any meritorious defense, their motion was properly denied. *S. v. O'Connor*, 469.

BANKRUPTCY.

§ 3½. Insolvency.

In a suit by plaintiff, judgment debtor, against defendant, judgment creditor, to enjoin a sale under execution on the judgment, which was taken and docketed within four months of the bankruptcy of plaintiff, who alleges insolvency at the time of docketing, evidence that plaintiff was unable to meet his obligations as they currently became due, supported by the petition and schedules in bankruptcy, is insufficient to show insolvency under the Bankruptcy Act of 1898, and judgment of nonsuit affirmed. *Sample v. Jackson*, 335.

Petition, schedules and adjudication in bankruptcy under the Act of 1898, in a proceeding filed almost four months after the docketing of a judgment against the bankrupt, under attack on account of the alleged insolvency of the bankrupt at the time of docketing, are not evidence of such insolvency. *Ibid.*

§ 7. Claims and Priorities.

In a suit by plaintiff, judgment debtor, against defendant, judgment creditor, to enjoin a sale under execution on the judgment, which was taken and docketed within four months by the bankruptcy of plaintiff, who alleges insolvency at the time of docketing, evidence that plaintiff was unable to meet his obligations as they currently became due, supported by the petition and schedules in bankruptcy, is insufficient to show insolvency under the Bankruptcy Act of 1898, and judgment of nonsuit affirmed. *Sample v. Jackson*, 335.

§ 9. Debts Discharged.

Where the maker of a note and mortgage is discharged in bankruptcy, such maker is no longer personally liable on the note and mortgage, which however remains a lien upon the land. *Smith v. Bank*, 249.

BANKS AND BANKING.

§ 8a. Duties and Liabilities in Paying Checks.

The payee of an unaccepted, uncertified check has no right of action against the bank upon which the check is drawn, for he is in no position to allege a breach of legal duty and no action at law can be maintained except there is shown to have been a failure in the performance of some legal duty. C. S., 3171. *Ins. Co. v. Stadiem*, 49.

The drawer of a check on a bank may maintain an action against the bank for breach of contract to honor his check. *Ibid.*

Where complaint, in an action for damages, alleges that a bank negligently refused to pay a check, given on it by a policyholder to an insurance company in payment of a policy premium, and induced the company by careless misrepresentations to decline to pay the policy, in consequence of which the company suffered damages in litigation over the policy, a demurrer was properly sustained, as the proximate cause of the company's loss was not the negligence of the bank but the independent act of the company in refusing to pay the insurance. *Ibid.*

BETTERMENTS.

§ 1. Nature and Requisites of Claim of Betterments—in General.

One, who in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. C. S., 699. *Rogers v. Timberlake*, 59.

§ 3. Color of Title of Party Claiming.

Where defendant acquired the legal title to certain lands (originally belonging to plaintiff) at a foreclosure sale and subject to an agreement to hold the land in trust for the plaintiff and to reconvey to plaintiff upon the payment of a sum certain on or before a given date, he (defendant) is not entitled to the value of improvements placed upon the land by him while holding same upon such trust. *Rogers v. Timberlake*, 59.

A deed executed to defendant, pursuant to judgment in a suit to foreclose a tax certificate to which plaintiff and defendant were both parties, constitutes color of title in a subsequent action between the same parties involving betterments. *Harrison v. Darden*, 364.

In order to entitle a defendant to compensation for the enhanced value of land due to permanent improvements placed thereon by him, it must appear that he held the land in good faith, under color of title believed by him to be good, and that he had reasonable ground for such belief. *Ibid.*

§ 4. Good Faith in Making Improvements.

Where defendant acquired the legal title to certain lands (originally belonging to plaintiff) at a foreclosure sale and subject to an agreement to hold the land in trust for the plaintiff and to reconvey to plaintiff upon the payment of a sum certain on or before a given date, he (defendant) is not entitled to the value of improvements placed upon the land by him while holding same upon such trust. *Rogers v. Timberlake*, 59.

In order to entitle a defendant to compensation for the enhanced value of land due to permanent improvements placed thereon by him, it must appear that he held the land in good faith, under color of title believed by him to be good, and that he had reasonable ground for such belief. *Harrison v. Darden*, 364.

BETTERMENTS—*Continued.*

§ 7. Assessment of Value of Improvements.

Under C. S., 700, in an action involving betterments, rents and rental values of the lands, which were obtained by defendants solely by reason of the improvements put on the lands by themselves, cannot be used to offset compensation to defendants for these improvements. *Harrison v. Darden*, 364.

There is nothing in ch. 47, C. S., known as the Torrens Law, which prevents the courts from proceeding to determine the value of improvements claimed by defendants, who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party and ascertained by a consent reference. *Ibid.*

BILLS AND NOTES.

§ 10a. Makers and Persons Primarily Liable.

The drawer of a check on a bank may maintain an action against the bank for breach of contract to honor his check. *Ins. Co. v. Stadiem*, 49.

§ 10d. Purchasers and Holders in Due Course.

The payee of an unaccepted, uncertified check has no right of action against the bank upon which the check is drawn, for he is in no position to allege a breach of legal duty. C. S., 3171. *Ins. Co. v. Stadiem*, 49.

§ 23. Parties.

It is permissible to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety. *Lee v. Chamblee*, 146.

§ 26. Competency and Relevancy of Evidence.

It is permissible to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety. *Lee v. Chamblee*, 146.

§ 27. Sufficiency of Evidence, Nonsuit, and Directed Verdict.

Where complaint, in an action for damages, alleges that a bank negligently refused to pay a check, given on it by a policyholder to an insurance company in payment of a policy premium, and induced the company by careless misrepresentations to decline to pay the policy, in consequence of which the company suffered damages in litigation over the policy, a demurrer was properly sustained. *Ins. Co. v. Stadiem*, 49.

In a suit on a note, which appears to be under seal with defendant and another as joint makers or joint obligors, plaintiff makes out a *prima facie* case by offering the note, and motion for nonsuit should have been denied. *Lee v. Chamblee*, 146.

BOUNDARIES.

§ 1. General Rules.

What constitutes the dividing line between adjoining landowners is a matter of law, but the true location of the line must be settled by the jury under correct instructions based upon competent evidence. *Thomas v. Hipp*, 515.

§ 3a. Definiteness of Description and Admissibility of Parol Evidence.

It is presumed that a grantor in a deed intended to convey something, and the deed will be upheld unless the description is so vague or contradictory that it cannot be ascertained what thing in particular is meant. *Duckett v. Lyda*, 356.

BOUNDARIES—*Continued.*

Every deed of conveyance must set forth a subject matter, either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers. The description must identify the land or furnish the means of identifying, under the maxim *id certum est quod certum reddi potest*, the *locus in quo*. *Peel v. Calais*, 368; *Duckett v. Lyda*, 356.

§ 3c. Parol Evidence.

When the description is not sufficient in itself to denote the land conveyed, resort may be had to extrinsic evidence. But evidence *dehors* the deed is admitted to "fit the description to the thing" only when it tends to explain, locate, or make certain some call or descriptive term used in the deed. *Duckett v. Lyda*, 356.

When resort is had to evidence *aliunde* to make the description in a deed complete, the weight and credibility of the evidence thus offered is for the jury. *Peel v. Calais*, 368.

§ 9. Evidence.

A junior deed is incompetent to locate a corner or line in a senior instrument. *Thomas v. Hipp*, 515.

§ 10. Issues and Burden of Proof.

In a processioning proceeding to establish the true boundary line between adjoining landowners, the burden of proof is on plaintiff and it is error for the trial court, in the absence of an agreement by the parties that one of two designated lines is the true line, to charge the jury to answer the issue in favor of that one of such lines as they find is supported by the greater weight of the evidence. *Thomas v. Hipp*, 515.

§ 11. Instructions.

In a processioning proceeding to establish the true boundary line between adjoining landowners, the burden of proof is on plaintiff and it is error for the trial court, in the absence of an agreement by the parties that one of two designated lines is the true line, to charge the jury to answer the issue in favor of that one of such lines as they find is supported by the greater weight of the evidence. *Thomas v. Hipp*, 515.

What constitutes the dividing line between adjoining landowners is a matter of law, but the true location of the line must be settled by the jury under correct instructions based upon competent evidence. *Ibid.*

BURGLARY AND UNLAWFUL BREAKING.

§ 1c. Breaking and Entering Otherwise Than Burglariously.

Felonious intent is an essential element of felonious breaking and entry with intent to steal. C. S., 4235. It must be alleged and proved and the felonious intent proven must be the felonious intent alleged, which, in this case, is the "intent to steal." The same is true as to larceny. *S. v. Friddle*, 258.

§ 1e. Possession of Implements for Burglary.

Upon indictment under C. S., 4236, the burden is upon the State to show: (1) that the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. *S. v. Boyd*, 79.

BURGLARY AND UNLAWFUL BREAKING—*Continued.*

§ 7. Presumptions and Burden of Proof.

Upon indictment under C. S., 4236, the burden is upon the State to show: (1) that the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. *S. v. Boyd*, 79.

§ 9. Sufficiency of Evidence.

In the trial of an indictment for the possession of implements of housebreaking, where the State's evidence fails to show that any of the implements were for the express purpose of housebreaking and fails to show that any of them were implements enumerated in the statute, C. S., 4236, except perhaps a "bit," and shows that all of the tools or implements, except pistols, were in common use in lawful and ordinary occupations, without any circumstances inferring that the implements were for burglarious purposes, motion of nonsuit should have been granted. *S. v. Boyd*, 79.

§ 10. Instructions.

In a prosecution for felonious breaking and entering with intent to steal and for larceny, where defendants contend and offer evidence to prove that they broke into a store and removed a large quantity of sugar, having the day before fully paid therefor to the clerk of the owner, who had prearranged, with the approval of the owner, that defendants should stage the apparent crime to enable the owner to escape ration penalties, a charge that, if a person breaks and enters and takes away property of another, with the consent of his employee, that would not relieve him of all the elements of breaking and entering, and if they broke and entered, with the consent of the clerk and against the will of the owner, they would be guilty, is reversible error. *S. v. Friddle*, 258.

CERTIORARI.

(See Appeal and Error § 18.)

CLERKS OF THE SUPERIOR COURT.

§ 4. Probate Jurisdiction.

While the clerk of the Superior Court has exclusive original jurisdiction as to matters of probate and the judge has no power therein unless the matter is brought before him by appeal, the Superior Court in term is by statute constituted a forum for the settlement of controversies over estates. C. S., 135. *S. v. Griggs*, 279.

§ 7. Jurisdiction and Powers as Judge of Juvenile Court.

Where the Juvenile Court has by proper proceeding acquired jurisdiction of the parties and of the subject matter of children whose custody is subject to controversy, its adjudication for the welfare of the children must be held effective and binding on the parties, subject to review on appeal. C. S., 5039, 5058. *In re Prevatt*, 833.

While the record does not disclose that a written petition to the Juvenile Court was originally filed by appellant, C. S., 5043, he may not now be heard to complain of irregularity in this respect, since the proceeding was instituted at his instance, and he was personally present at the hearing. C. S., 490. *Ibid.*

Original jurisdiction has been conferred upon the Juvenile Court to find a child delinquent or neglected, C. S., 5039, but this statute does not repeal C. S.,

2241, and is not inconsistent therewith. The Superior Court as such has exclusive jurisdiction, by writ of *habeas corpus*, to hear and determine the custody of children of parents separated but not divorced. *Ibid.*

§ 18. Power and Duty to Receive Money Paid Into Court.

In this jurisdiction the liability of the clerk of the Superior Court for the safety of funds of infants, placed in his hands by virtue of his office, is that of an insurer. *S. v. Sawyer*, 102.

A public officer is not as a rule relieved from liability for the loss of public moneys in his charge where the loss is due to fire, burglary, theft, or embezzlement by subordinates, however careful and prudent he may have been. Under this rule liability would attach where the clerk is the victim of a forgery. *Ibid.*

§ 23b. Action Against, by Individual.

Our statutes provide two separate and distinct remedies against clerks of the Superior Courts—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the officer, C. S., 354; and one in behalf of the new clerk against his predecessor in office to recover possession of records, books, papers and money in the hands of the outgoing clerk by virtue or under color of his office. C. S., 943. *S. v. Watson*, 437.

Authority for an individual to sue an officer for money wrongfully detained, C. S., 354, and C. S., 357, allowing damages at twelve per cent on any such recovery, relate to the same subject matter, are part of one and the same statute, and must be construed together. *Ibid.*

§ 23c. By succession.

Our statutes provide two separate and distinct remedies against clerks of the Superior Courts—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the officer, C. S., 354; and one in behalf of the new clerk against his predecessor in office to recover possession of records, books, papers and money in the hands of the outgoing clerk by virtue or under color of his office. C. S., 943. *S. v. Watson*, 437.

Whether or not the clerk is entitled to the benefits of C. S., 357, in a suit against his predecessor, is not now decided: but, granting that he is not so entitled, the law allows interest by way of damages on money wrongfully detained. *Ibid.*

§ 23d. Removal.

A judgment of a court of competent jurisdiction, removing a clerk of the Superior Court from office, creates a vacancy in the office of clerk, and, when no appeal is taken, is conclusive. *S. v. Watson*, 437.

§ 23e. Parties and Pleadings.

In an action by a clerk of the Superior Court against his predecessor in office for the recovery of records, money, etc., in the hands of the outgoing clerk by virtue or under color of his office, C. S., 943, an order, making the county a party plaintiff, was improvidently entered, and allegations in the answer, asserting a cross action and further defense against the county, were properly stricken. And it follows that related allegations in the reply, by way of answer to such cross action and further defense, should have been stricken also. *S. v. Watson*, 437.

CLERKS OF THE SUPERIOR COURT—*Continued.*

In an action by the clerk of the Superior Court against his predecessor in office, for possession of records, books and funds under C. S., 943, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegation to like effect, there was error in allowing a motion to strike such affirmative allegations. *Ibid.*

§ 23g. Judgment.

A judgment of a court of competent jurisdiction, removing a clerk of the Superior Court from office, creates a vacancy in the office of clerk, and, when no appeal is taken, is conclusive. *S. v. Watson*, 437.

CONSPIRACY.

§ 3. Nature and Element of Crime.

The charge of conspiracy to violate the law and the charge of the consummation of the conspiracy by an actual violation of the law are charges of separate offenses, and a conviction of one cannot be successfully pleaded as former jeopardy on an indictment for the other. *S. v. Lippard*, 167.

CONSTITUTIONAL LAW.

II. Construction of Constitution in General.

3a. General rules of construction. In re Yelton, 845.

III. Governmental Branches and Powers.

4a. *In general.* Shepard v. Leonard, 110; Raleigh v. Bank, 286.

4b. Taxing power. Raleigh v. Bank, 286; Raleigh v. Public School System, 316; R. R. v. Cumberland County, 750.

4c. Delegation of power. Utilities Com. v. Trucking Co., 687.

4d. In regard to counties, cities and officers. Raleigh v. Bank, 286; Hunsucker v. Winborne, 650; Brown v. Comrs. of Richmond, 744.

6a. Judicial power in general. Shepard v. Leonard, 110.

IV. Police Power of State.

8. Regulation of trades and professions. Suddreth v. Charlotte, 630.

V. Personal, Civil, and Political Rights, Privileges, Immunities and Class Legislation.

12. Monopolies and exclusive emoluments and privileges. Coggins v. Board of Education, 763; Brown v. Comrs., 745.

VI. Due Process of Law: Law of Land.

17. Right to jury trial. Chesson v. Container Co., 378; Utilities Com. v. Trucking Co., 687.

IX. Full Faith and Credit to Foreign Judgments.

23. Nature and scope of mandate. Hat Co. v. Chizik, 371; Hampton v. Pulp Co., 535.

XI. Constitutional Guarantees in Trial of Persons Accused of Crime.

28. Right to confront accusers and witnesses. S. v. Utley, 39; S. v. Farrell, 321; S. v. Rising, 747.

29. Right not to incriminate self. S. v. Farrell, 804.

33. Due process of law. Ibid.

§ 3a. General Rules of Construction.

A constitution should not receive a technical construction as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government, and not defeat them. *In re Yelton: Advisory Opinion*, 845.

§ 4a. Governmental Branches and Powers in General.

Under Art. IV, sec. 11, of the N. C. Constitution the power and authority of special and emergency judges is defined and limited by the words "in the courts which they are appointed to hold"; and the General Assembly is without power to grant such judges jurisdiction in excess of this definite limitation.

It does not authorize the Legislature to confer "in chambers" or "vacation" jurisdiction on special judges, assigned to hold a designated term of court. *Shepard v. Leonard*, 110.

The Legislature may set a time lock even for the sovereign; and the maxim *nullum tempus occurrit regi* is not applicable to statutes which impose a limitation upon the exercise of powers granted municipalities for the enforcement of statutory liens of assessments for public improvements. *Raleigh v. Bank*, 286.

§ 4b. Taxing Power.

There is no provision of the N. C. Constitution directly forbidding the Legislature to pass any law releasing or remitting taxes. *Raleigh v. Bank*, 286.

While the Constitution of North Carolina provides that property belonging to the State or to municipal corporations shall be exempt from taxation (Art. V, sec. 5), assessments on public school property for special benefits thereto, caused by the improvement of the street on which it abuts, are not embraced within the prohibition. *Raleigh v. Public School System*, 316.

The total tax assessment by a county shall not exceed the constitutional limit for general purposes, except when levied for a special purpose and with the special approval of the General Assembly, by special or general act. N. C. Const., Art. V, sec. 6; and Cumberland County is authorized by the Act of 1923, now C. S., 1297 (8½), to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. Conceding that C. S., 1297 (28), and C. S., 1335, constitute special approval of the General Assembly for unlimited levy for a special purpose, they are general acts and conflict with the provisions of the later act of 1923. *R. R. v. Cumberland County*, 750.

§ 4c. Delegation of Power.

The jurisdiction of the courts over regulations for "public convenience and necessity," made by State administrative bodies, in accordance with statutes, is neither original nor wholly judicial in character, and it is not the intent of such statutes that the public policy of the State shall be fixed by a jury. *Utilities Commission v. Trucking Co.*, 687.

§ 4d. In Regard to Counties, Cities and Officers.

The Legislature may set a time lock even for the sovereign; and the maxim *nullum tempus occurrit regi* is not applicable to statutes which impose a limitation upon the exercise of powers granted municipalities for the enforcement of statutory liens of assessments for public improvements. *Raleigh v. Bank*, 286.

The Municipal Board of Control is a creature of the General Assembly within the provisions of Art. II, sec. 29, of the Constitution of North Carolina. *Hunsucker v. Winborne*, 650.

The General Assembly, in the exercise of its permissible authority, may abolish a local court. *Brown v. Comrs. of Richmond County*, 744.

Upon the ratification of a valid act of the General Assembly, abolishing an elective office, both the duties and emoluments of the office terminate. *Ibid.*

There is a specific constitutional prohibition against gifts of public money, and the Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. N. C. Const., Art. I, sec. 7. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

§ 6a. Judicial Power in General.

Under Art. IV, sec. 11, of the N. C. Constitution the power and authority of special and emergency judges is defined and limited by the words "in the courts which they are appointed to hold"; and the General Assembly is without power to grant such judges jurisdiction in excess of this definite limitation. It does not authorize the Legislature to confer "in chambers" or "vacation" jurisdiction on special judges, assigned to hold a designated term of court. *Shepard v. Leonard*, 110.

§ 8. Police Power of State—Regulation of Trades and Professions.

The business of carrying passengers for hire is a privilege, the licensing, regulation, and control of which is peculiarly and exclusively a legislative prerogative. So is the power to regulate the use of public roads and streets. The General Assembly in the exercise of this police power may provide for the licensing of taxicabs and regulate their use on public streets, or it may, in its discretion, delegate this authority to the several municipalities. It has adopted the latter course. Public Laws 1943, ch. 639, sec. 2; Michie's Code, sec. 2787, subsecs. (7), (11), and (36); Public-Local Laws 1939, ch. 366, secs. 31, 32. *Suddreth v. Charlotte*, 630.

Municipalities may classify persons according to their business and apply different rules to different classes without violating constitutional rights, State or Federal. The discriminations which invalidate an ordinance are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. *Ibid.*

The fact that operators of taxicabs will suffer pecuniary injury from the enforcement of ordinances regulating such business, or that such operators may be unable to comply with the terms of a regulatory ordinance, and so will be compelled to abandon operation of their vehicles, does not establish the unreasonableness or invalidity of the ordinance. *Ibid.*

§ 12. Monopolies and Exclusive Emoluments and Privileges.

Membership in secret societies is subject to regulation by school boards and in adopting rules requiring every student to sign a pledge that he is not a member of such organization, will not become a member or support any such society, the penalty for refusal to sign being a denial of the right to participate in extracurricular activities, a school board acts within its authority, where the rules make no attempt to deny those not signing any instruction afforded by class work or by the required curriculum of the school. *Coggins v. Board of Education*, 763.

There is a specific constitutional prohibition against gifts of public money, and the Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. N. C. Const., Art. I, sec. 7. *Brown v. Comrs. of Richmond County*, 745.

§ 17. Right to Jury Trial.

While the ancient mode of trial by jury has been preserved in our present Constitution, Art. I, sec. 19, the right in civil cases may be waived (Art. IV, sec. 13), and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. *Chesson v. Container Co.*, 378.

In reference cases the trial by jury is restricted by the statute (C. S., 573) to the written evidence taken before the referee, which sufficiently complies with the constitutional mandate, if the testimony is taken under oath in the manner prescribed by law, with opportunity to cross-examine. *Ibid.*

The jurisdiction of the courts over regulations for "public convenience and necessity," made by State administrative bodies, in accordance with statutes, is neither original nor wholly judicial in character, and it is not the intent of such statutes that the public policy of the State shall be fixed by a jury. *Utilities Commission v. Trucking Co.*, 687.

§ 23. Full Faith and Credit to Foreign Judgments—Nature and Scope of Mandate.

Under Art. IV, sec. 1, of the Constitution of the United States a judgment of a court of another state, when properly authenticated, is entitled in the courts of this State to be given full faith and credit. *Hat Co., Inc., v. Chizik*, 371.

A judgment of a Federal Court will be given full faith and credit in the State court, when pleaded as *res judicata* according to the practice of the Court; but there is no rule which will compel the State court to accept the law as laid down by any other court, State or Federal, where the subject of the controversy, however similar, is different. *Hampton v. Pulp Co.*, 535.

§ 28. Constitutional Guarantees in Trial of Persons Accused of Crime—Right to Confront Accusers and Witnesses.

The constitutional right of the accused in a criminal prosecution, to be informed of the accusation against him and to confront his accusers and witnesses with other testimony, carries with it also the opportunity fairly to present one's defense. *S. v. Utley*, 39.

In a prosecution for murder, where accused moved for a continuance on account of the absence of material witnesses, stating what the witnesses' testimony would be, and the solicitor admitted that the witnesses would testify as stated and the court denied the motion for continuance, specifically and in detail instructing the jury to consider that the witnesses had so testified and to give this evidence consideration just as if the witnesses had been present in court and testified for defendant, there is no denial of defendant's constitutional right. *Ibid.*

Constitutional rights are not to be granted or withheld in the court's discretion. When a motion for continuance, in a criminal case, is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *S. v. Farrell*, 321.

The right to have counsel, as well as the right to face one's accusers and witnesses with other testimony, is guaranteed by both the N. C. and U. S. Constitutions, and together they include the opportunity fairly to prepare and present one's defense. *Ibid.*

In a criminal prosecution for a capital offense, in a county 150 miles from where the prisoner was born and spent most of his life, upon a plea of insanity made by counsel and motion for time to prepare the defense, an order requiring the case to be tried within three and one-half days, exclusive of Sunday, was a violation of due process of law, regardless of the merits of the case. *Ibid.*

There is no denial of prisoner's right to confrontation, N. C. Const., Art. I, sec. 11, by the refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, it appearing that the State's solicitor

agreed that he would not, and did not offer evidence as to fingerprints. *S. v. Rising*, 747.

§ 29. Right Not to Incriminate Self.

The constitutional inhibition against self-incrimination, Art. I, sec. 11, is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. *S. v. Farrell*, 804.

§ 33. Due Process of Law.

Constitutional rights are not to be granted or withheld in the court's discretion. When a motion for continuance, in a criminal case, is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *S. v. Farrell*, 321.

In a criminal prosecution for a capital offense, in a county 150 miles from where the prisoner was born and spent most of his life, upon a plea of insanity made by counsel and motion for time to prepare the defense, an order requiring the case to be tried within three and one-half days, exclusive of Sunday, was a violation of due process of law, regardless of the merits of the case. *Ibid.*

CONTRACTS.

§ 1. Nature and Essentials in General.

There must be a substantial agreement of the parties upon the subject matter of the treaty to constitute a contract—a meeting of the minds. *Richardson v. Storage Co.*, 344.

§ 4. Acceptance.

Acceptance must be unqualified and in the terms of the offer, without material conditions not included or implied in the offer; otherwise, such purported acceptance constitutes a counter-proposal which the other party is not bound to accept. *Richardson v. Storage Co.*, 344; *Newbern v. Pugh*, 348.

The acceptance of an offer to sell property, based upon the condition that plaintiffs' attorneys shall first pass upon the title, is not an unqualified acceptance of the offer and does not bind the defendant. *Ibid.*

§ 5. Consideration.

Where certain family relationships exist, the performance of valuable services by one member of the family for another, within the unity of the family, is presumed to have been rendered pursuant to a moral or legal obligation and without expectation of compensation; but this is a presumption which may be overcome by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other. *Francis v. Francis*, 401.

The rule, that services within the family unity are presumed to be gratuitous, is not recognized in this State to such an extent as to raise the presumption against a daughter-in-law or a son-in-law. *Ibid.*

§ 6. Form and Requisites of Agreement or Instrument.

Where a contract is in several writings and not in a single document, the Court will not be astute to detect immaterial differences which might defeat

CONTRACTS—*Continued.*

the contract, but will try to give each writing a reasonable interpretation according to the intention of the parties. *Richardson v. Storage Co.*, 344.

§ 7c. Contracts Ousting Jurisdiction of Courts.

An agreement not to sue, or to withdraw a defense, or to waive an objection in another forum, is binding when based upon a valuable consideration of mutual promises, and the court is not without jurisdiction to sanction it. *S. v. Griggs*, 279.

§ 8. General Rules of Construction.

Great liberality is allowed in construing releases. The intent is to be sought from the whole and every part of the instrument; and where general words are used, if it appears by other clauses of the instrument, or other documents, definitely referred to, that it was the intent of the parties to limit the discharge to particular claims only, courts, in construing it, will so limit it. *Supply Co. v. Burgess*, 97.

It is permissible for the parties to agree that a note shall be paid only in a certain manner, *i.e.*, out of a particular fund, by the foreclosure of collateral, or from rents collected, etc. And this part of the agreement may be shown, though it rests in parol. *Ripple v. Stevenson*, 284.

Where a contract is in several writings and not in a single document, the Court will not be astute to detect immaterial differences which might defeat the contract, but will try to give each writing a reasonable interpretation according to the intention of the parties. *Richardson v. Storage Co.*, 344.

Where there is no ambiguity in the instruments upon which plaintiffs rely as a contract, they are subject to constructions by the court, without the aid of a jury, in passing upon defendant's demurrer. *Ibid.*

§ 11a. Conditions—In General.

Acceptance must be unqualified and in the terms of the offer, without material conditions not included or implied in the offer; otherwise, such purported acceptance constitutes a counter-proposal which the other party is not bound to accept. *Richardson v. Storage Co.*, 344.

§ 11b. Conditions Precedent.

The acceptance of an offer to sell property, based upon the condition that plaintiffs' attorneys shall first pass upon the title, is not an unqualified acceptance of the offer and does not bind the defendant. *Richardson v. Storage Co.*, 344.

§§ 11d, 12. Conditions Subsequent: Modification and Abandonment—in General.

Where plaintiff "traded" defendant an old automobile in October, 1941, taking in part a due bill for $175 as a credit on a new car, defendant advising plaintiff that after 1 January, 1942, he probably would not be able to deliver a new car, whereupon the parties agreed that defendant should not be liable for any delay or failure to make delivery, such agreement is a valid contract and plaintiff cannot recover the face of the due bill, since Rationing Order No. 2-A, "freezing" the sale of new cars. *Shelton v. Motor Co.*, 63.

§ 16. Performance or Breach—in General.

The execution, delivery and recording by the owners of a long term lease on premises, which they had contracted to lease to plaintiff, is such a renuncia-

CONTRACTS—*Continued.*

tion of their agreement as to give plaintiff the right to treat it as a present breach and sue at once for damages. *Pappas v. Crist*, 265.

It is permissible for the parties to agree that a note shall be paid only in a certain manner, *i.e.*, out of a particular fund, by the foreclosure of collateral, or from rents collected, etc. And this part of the agreement may be shown, though it rests in parol. *Ripple v. Stevenson*, 284.

§ 17. Substantial Performance.

Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, as contrasted with a temporary job, terminable in good faith at the will of either party. *Malever v. Jewelry Co.*, 148.

§ 23. Sufficiency and Nonsuit.

In an action to recover wages while out of work, where plaintiff's evidence tended to show that he gave up a steady job to accept an offer from defendant for permanent employment in a new store, without further agreement as to duration of time, no business usage or other circumstance being shown, and defendant discharging plaintiff upon closing his new store after eight weeks, judgment of nonsuit was properly allowed. *Malever v. Jewelry Co.*, 148.

The execution, delivery and recording by the owners of a long term lease on premises, which they had contracted to lease to plaintiff, is such a renunciation of their agreement as to give plaintiff the right to treat it as a present breach and sue at once for damages. *Pappas v. Crist*, 265.

§ 25a. Forfeitures and Penalties Under Terms of the Instrument.

In an action to recover on an insurance policy for fire damage to an airplane, the court's charge to the jury, that the measure of damages is the difference in the reasonable market value of the airplane immediately before the fire and immediately thereafter, is erroneous, when the policy upon which the action is bottomed prescribes otherwise for the measure of recovery. *Andrews v. Ins. Co.*, 583.

CONTRIBUTIONS.

§ 1. Nature and Grounds of Remedy.

One who is compelled to pay or satisfy the whole, or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others. The doctrine is founded not upon contract, but upon principles of equity. *Nebel v. Nebel*, 676.

Where three donees have notice that the U. S. Commissioner of Internal Revenue has assessed against them a large gift tax liability, for the whole of which each is liable, and all file petitions with the Board of Tax Appeals for a redetermination of the deficiency, and pending a hearing, one of the donees secures an adjustment for a very much smaller sum and, after notice to the others, who failed to appear and make defenses, pays the same, the donee so paying the entire assessment is entitled to contribution from the other two. *Ibid.*

CORPORATIONS.

§ 8. Rights and Liabilities of Stockholders in General.

In a suit against a corporation and its president by the owner of a majority of its capital stock, where the complaint alleges the wrongful refusal of the

CORPORATIONS—*Continued.*

corporation by the individual defendant to transfer such stock, that the president held a meeting of stockholders, without a quorum, and at such meeting called all preferred stock at par and that he is attempting to sell valuable property of the company, all in violation of the rights of plaintiff and the corporation, a demurrer, on the ground of misjoinder of parties and causes, and on the grounds of no cause of action stated, was properly overruled and restraining order properly continued to the hearing. *Corbett v. Lumber Co.*, 704.

§ 20. Representation of Corporation by Officers and Agents.

In the case of an urgent emergency an employee at times may act so as to bind his employer without previous authority. *Russell v. Cutshall*, 353.

The designation "manager" implies general power and permits a reasonable inference that such manager is vested with the general conduct and control of his employer's business in and around the premises, and his acts are, when committed in the line of his duty and in the scope of his employment, those of his principal. *Gillis v. Tea Co.*, 470.

§ 25a. Liability of Corporation for Torts.

In an action for slander, where plaintiff's evidence tended to show in its most favorable light that one of two defendants, who was manager of his codefendant's store, while acting in the scope of his employment on the store premises, falsely charged in a loud voice, in the presence of others, that plaintiff had stolen a package from the said store, a case of actionable wrong is made out. *Gillis v. Tea Co.*, 470.

The designation "manager" implies general power and permits a reasonable inference that such manager is vested with the general conduct and control of his employer's business in and around the premises, and his acts are, when committed in the line of his duty and in the scope of his employment, those of his principal. *Ibid.*

When the servant is engaged in the work of his master, doing that which he is employed or directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question. And this principle is applicable to actions for slander. *Ibid.*

Private instructions by employers to employees not to commit torts will not relieve the employer from liability for such acts committed by an employee within the scope of his authority and in the line of his duty, in an effort to preserve and safeguard his master's property. The master is liable even if the particular act, committed under such circumstances, was in violation of direct and positive instructions. *Ibid.*

COURTS.

§ 1a. Jurisdiction of Courts in General.

The instant a court perceives that it is exercising, or about to exercise, a forbidden or ungranted power, it ought to stay its action, for such action will be a nullity. *Shepard v. Leonard*, 110.

Wisdom or impolicy of legislation is not a judicial question. The province of this Court ends when it interprets the legal effect of legislative enactments. *Raleigh v. Bank*, 286.

COURTS—*Continued.*

§ 1a. Jurisdiction of Superior Courts in General.

If the Superior Court acts without jurisdiction, on appeal the Supreme Court acquires no jurisdiction and will, *ex mero motu*, dismiss the case. *Shepard v. Leonard*, 110.

The jurisdiction of the courts over regulations for "public convenience and necessity," made by State administrative bodies, in accordance with statutes, is neither original nor wholly judicial in character, and it is not the intent of such statutes that the public policy of the State shall be fixed by a jury. *Utilities Commission v. Trucking Co.*, 687.

§§ 1b, 1c. Exclusive Original Jurisdiction of Superior Courts: Concurrent Original Jurisdiction.

While the clerk of the Superior Court has exclusive original jurisdiction as to matters of probate and the judge has no power therein unless the matter is brought before him by appeal, the Superior Court in term is by statute constituted a forum for the settlement of controversies over estates. C. S., 135. *S. v. Griggs*, 279.

While an appeal from conviction in a Recorder's Court upon a warrant charging unlawful possession of intoxicating liquors for sale, was pending in the Superior Court, that court had jurisdiction to try the defendant on a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence. C. S., 4625. And there is no conflict of jurisdiction between the Recorder's Court under C. S., 1567, and the Superior Court under C. S., 1437. *S. v. Suddreth*, 610.

§ 2a. Appeals from County, Municipal and Recorders' Courts.

Where the agreed case on appeal shows that the action originated in a municipal court and on appeal was tried in the Superior Court, the motion here of the Attorney-General to dismiss the appeal for lack of jurisdiction in the Superior Court is properly denied. *S. v. Hill*, 753.

§ 2b. Appeals from State Commissions.

While on appeal from the Utility Commission to the Superior Court the provision of the statute has been interpreted to mean that the trial shall be *de novo*, it also provides that the decision or determination of the Commission "shall be *prima facie* just and reasonable." C. S., 1098. *Utilities Commission v. Trucking Co.*, 687.

Where on petition of an interstate trucking company, operating across the State, the Utilities Commission for the privilege of intrastate business on part of its lines, the Commission finds, on competent evidence, that the present intrastate carriers maintain sufficient schedules to meet the transportation needs of the territory involved, on appeal to the Superior Court, there being no showing sufficient to overcome the "*prima facie* just and reasonable" disposition of the matter by the Commission, judgment as of nonsuit was proper. *Ibid.*

As a general rule, where a matter is committed to an administrative agency, one, who fails to exhaust the remedies provided before such agency and by appeal, will not be heard in equity to challenge the validity of its orders. *Warren v. R. R.*, 843.

§ 2c. Appeals from Clerks of Court.

In order to entitle the judge of the Superior Court to review a ruling of the clerk in a matter in which the latter has original jurisdiction, an appeal must

COURTS—*Continued.*

be taken within ten days after the entry of the order or judgment of the clerk, upon due notice in writing to be served upon the appellee and a copy of which shall be filed with the clerk. *Muse v. Edwards*, 153.

§ 2d. Appeals from Justices of the Peace.

On appeal to the Superior Court from a judgment of a justice of the peace, defendants are entitled to a trial *de novo*, even when they are called and fail to appear. *Poster Corp. v. Davidson*, 212.

On an appeal from a justice of the peace, the jurisdiction of the Superior Court is derivative only and is limited to the powers which the justice of the peace could have exercised. *Hopkins v. Barnhardt*, 617.

§ 5. County, Municipal and Recorders' Courts: Establishment and Terms.

The General Assembly, in the exercise of its permissible authority, may abolish a local court. *Brown v. Comrs. of Richmond County*, 744.

§ 9. Jurisdiction of State and Federal Courts: In General.

Where the jurisdiction of the Federal Court is invoked on the ground of diversity of citizenship, and no federal question is involved, the matters in controversy are determinable by State law. *Hampton v. Pulp Co.*, 535.

The Congress of the United States cannot confer jurisdiction upon a State court or any other court which it has not ordained or established. And Congress did not undertake, by the Emergency Price Control Act of 1942, to confer jurisdiction upon any court for the enforcement of sec. 925 (e) of said Act. *Hopkins v. Barnhardt*, 617.

§ 11. Administration and Application of Laws of This and Other States: In General.

The *lex loci*, or law of the *situs*, determines the substantive rights of the parties, and the *lex fori* governs in matters of remedy and procedure. *Charnock v. Taylor*, 360.

Under the common law there is no right of action by one joint tort-feasor to enforce contribution from another, and Tennessee follows the common law. *Ibid.*

C. S., 1749, requires our courts to take judicial notice of the laws of Tennessee. *Ibid.*

Where the jurisdiction of the Federal Court is invoked on the ground of diversity of citizenship, and no federal question is involved, the matters in controversy are determinable by State law. *Hampton v. Pulp Co.*, 535.

§ 12. Comity.

Where an action for damages, resulting from an automobile accident, is tried in the courts of this State, based on alleged negligence occurring in another state, the standard of conduct of the parties must be measured by the *lex loci delicto*, in ascertaining the liability of defendants. The *lex fori* applies to procedure only. *Baird v. Baird*, 730.

§ 13. Transitory Causes of Action in Tort.

If there is no right of action in the sovereignty where the alleged tort occurred, there is none anywhere. *Charnock v. Taylor*, 360.

It was not the purpose and it is not the effect of C. S., 618, to create a cause of action in contribution between joint tort-feasors when the *lex loci delicto* gives none. *Ibid.*

CRIMINAL LAW.

I. Nature and Elements of Crime.

2. Intent, willfulness. S. v. Farrell, 804.

II. Capacity to Commit and Responsibility for Crime.

5a. Mental capacity in general. S. v. Harris, 697.
5c. Evidence and burden of proving mental incapacity. S. v. Harris, 697; S. v. Farrell, 804.

IV. Jurisdiction and Venue.

14. Venue. S. v. McKeon, 404.

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53f. Requests for instructions. S. v. Friddle, 258; S. v. Cameron, 464.
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§ 2. Nature and Elements of Crime: Intent, Willfulness.

Evidence, which shows no more than a temporary lapse of moral perception, is *insufficient to excuse* a crime as distinguished from reducing it to a lower grade, where some specific intent is required, *e.g.*, premeditation and deliberation. *S. v. Farrell*, 804.

CRIMINAL LAW—*Continued.*

§ 5a. Mental Capacity in General.

The test of criminal responsibility, under a plea of insanity, is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Harris*, 697.

§ 5c. Evidence and Burden of Proving Mental Incapacity.

When insanity is interposed as a defense in a criminal prosecution, the burden rests with the defendant, who sets it up, to prove such insanity to the satisfaction of the jury; and where the accused offers evidence of his insanity, the State may seek to rebut it, or to establish defendant's sanity by presumption of law, or by the testimony of witnesses, or both. *S. v. Harris*, 697.

Evidence, which shows no more than a temporary lapse of moral perception, is insufficient to excuse a crime as distinguished from reducing it to a lower grade, where some specific intent is required, *e.g.*, premeditation and deliberation. *S. v. Farrell*, 804.

§ 14. Venue.

Where there is no challenge to the indictment prior to a plea of guilty, under C. S., 4606, the offense is deemed to have been committed in the county alleged in the indictment. *S. v. McKeon*, 404.

§ 16. Arraignment.

A plea to an indictment is not a matter of form, but of substance, and in a capital case the arraignment should appear of record. *S. v. Farrell*, 804.

It is not the practice in this jurisdiction to require a prisoner to plead more than once to a single indictment, even where there is more than one trial. A second arraignment and plea *is held* to be immaterial. *Ibid.*

§§ 17, 18. Plea of Guilty and Nolo Contendere: Plea of Not Guilty.

Where there is no affirmative statement in the record that the defendants did or did not enter a plea to the bill of indictment, the presumption is in favor of regularity and objection thereto will not be sustained, and certainly where the record shows that the court charged the jury that the defendants and each of them pleaded not guilty to the bill of indictment. *S. v. McKinnon*, 160.

In a criminal prosecution, where defendant entered a plea of guilty and thereafter appealed, on "an agreed case on appeal" wherein it was stated that the offense was committed in a county other than the county appearing in the indictment, this discrepancy will be disregarded, first, because it is at variance with the record, and second, because of its immateriality. *S. v. McKeon*, 404.

A plea to an indictment is not a matter of form, but of substance, and in a capital case the arraignment should appear of record. *S. v. Farrell*, 804.

It is not the practice in this jurisdiction to require a prisoner to plead more than once to a single indictment, even where there is more than one trial. A second arraignment and plea *is held* to be immaterial. *Ibid.*

§ 20. Pleas in Abatement.

Where there is no challenge to the indictment prior to a plea of guilty, under C. S., 4606, the offense is deemed to have been committed in the county alleged in the indictment. *S. v. McKeon*, 404.

§ 21. Time and Necessity for Plea.

A plea of former jeopardy is a plea in bar to the prosecution and not a plea to the indictment. It poses an inquiry, not into the conduct of the defendant,

but as to what action the court has taken on a former occasion. *S. v. Davis*, 54.

§ 23. Same Offense.

The plea of former jeopardy, to be good, must be grounded on the "same offense," both in law and in fact. *S. v. Davis*, 54.

A conviction under a Federal Act is no bar to a prosecution for violating a State statute, though the two indictments are founded on identically the same state of facts. *Ibid.*

Where the same act violates two State statutes, a prosecution for the one is not a bar to a subsequent prosecution for the other. *Ibid.*

A plea of former jeopardy, based upon a conviction, or plea of guilty, on a warrant charging operating a gambling house, is not good upon an indictment, charging (1) maintaining a public nuisance, (2) carrying on a lottery, (3) sale of lottery tickets, and (4) operation of gambling devices, even where the several offenses arise out of the same transaction. *Ibid.*

The charge of conspiracy to violate the law and the charge of the consummation of the conspiracy by an actual violation of the law are charges of separate offenses, and a conviction of one cannot be successfully pleaded as former jeopardy on an indictment for the other. *S. v. Lippard*, 167.

Offenses are not the same, on a plea of former jeopardy, if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other, although some of the same acts may be necessary to be proven in the trial of each. *Ibid.*

§ 27. Procedure and Determination of Plea.

A plea of former jeopardy is a plea in bar to the prosecution and not a plea to the indictment. It poses an inquiry, not into the conduct of the defendant, but as to what action the court has taken on a former occasion. *S. v. Davis*, 54.

A defendant is deemed to have abandoned his plea of former jeopardy by not tendering and requesting the court to submit to the jury the issue arising thereon. *Ibid.*

The form of issue usually submitted on a plea of former jeopardy is: "Has the defendant been formerly convicted (or acquitted) of the offense wherewith he now stands charged?" *Ibid.*

§ 28a. Presumptions and Burden of Proof.

The accused enters upon a criminal trial with his sanity taken for granted, with the presumption of innocence in his favor, and with the burden on the State to establish his guilt beyond a reasonable doubt; and not until the prosecution has made out a *prima facie* case is it incumbent on him to offer evidence of his defense or take the risk of an adverse verdict. *S. v. Harris*, 697.

With us the doctrine of reasonable doubt is applied in favor of the accused, but never against him. Condemnation or conviction requires proof "beyond a reasonable doubt"; mitigation, excuse, or justification "to the satisfaction of the jury," which alone is the judge of its satisfaction. *Ibid.*

§ 29b. Evidence of Guilt of Other Offenses.

Where homicides are so connected in time and place as to be all parts of one continuous transaction or the same *res gestæ*, evidence of all of such crimes are competent upon the trial of any one of them. *S. v. Harris*, 697.

CRIMINAL LAW—*Continued.*

The general rule is that evidence of a distinct, substantive offense is inadmissible to prove another and independent crime; but to this there is the exception that proof of the commission of other like offenses is competent to show the *quo animo*, intent, design, *scienter*, or to make out the *res gestæ*, or to exhibit a chain of circumstantial evidence in respect to the matter on trial, when such crimes are so connected with the offense charged as to throw light on one or more of these questions. *Ibid.*

§ 30. Evidence and Record at Former Trial or Proceedings.

There is a distinction between the statement made by a prisoner on his preliminary examination before a magistrate under C. S., 4561, and his testimony given under C. S., 1799, as a witness on the trial of the cause. On the former, he is to be advised of his rights, the examination is not under oath, and, should it be taken contrary to the statute, it may not be used against him. On the latter, the accused, at his own request, but not otherwise, is competent but not compellable to testify and his testimony thus given is under oath and may be used at any subsequent stage of the prosecution. *S. v. Farrell*, 804.

The constitutional inhibition against self-incrimination, Art. I, sec. 11, is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. *Ibid.*

§ 33. Confessions.

The competency of an alleged confession is a preliminary question for the trial court. *S. v. Grass*, 31.

Confessions are to be taken as *prima facie* voluntary, and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary. *Ibid.*

In a prosecution for murder, where defendant confessed shortly after the homicide to officers, one of whom was the coroner, such confession is not inadmissible because defendant was not advised of his rights under C. S., 4561, the provisions of which are applicable only to preliminary judicial examinations. *Ibid.*

When a confession is admitted in evidence and thereafter defendant testifies that he was drunk when the confession was made to officers, which the officers deny, a verdict of guilty will not be disturbed, no request having been made to strike or withdraw the confession from the consideration of the jury. *Ibid.*

§ 34a. Admissions and Declarations in General.

There is a distinction between the statement made by a prisoner on his preliminary examination before a magistrate under C. S., 4561, and his testimony given under C. S., 1799, as a witness on the trial of the cause. On the former, he is to be advised of his rights, the examination is not under oath, and, should it be taken contrary to the statute, it may not be used against him at the trial. On the latter, the accused, at his own request, but not otherwise,, is competent but not compellable to testify and his testimony thus given is under oath and may be used at any subsequent stage of the prosecution. *S. v. Farrell*, 804.

The constitutional inhibition against self-incrimination, Art. I, sec. 11, is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 41b. Cross-Examination of Witnesses.

Permission for the solicitor to cross-examine a State's witness, in a criminal prosecution, is within the sound discretion of the court. *S. v. Vicks*, 384.

§ 41d. Evidence Competent for Purpose of Impeaching Witness.

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. Rule 21, Rules of Practice in the Supreme Court. *S. v. McKinnon*, 160.

§ 41f. Credibility of Defendant.

A charge, in a criminal case, that it is the duty of the jury "to look into and very carefully scrutinize" the testimony of defendants, is not reversible error, where the court immediately adds that the law is based on common sense and reason and, after such scrutiny, if "you find that a defendant is telling the truth, then it is your duty to give his or her evidence the same weight and credibility as you would that of a disinterested witness." *S. v. McKinnon*, 160.

The testimony of relatives, or parties interested in the case and defendants, should be received with caution and scrutinized with care; but when this is done, the jury should give such testimony the weight the jury considers it entitled to, and, if the jury believes the witness, it should give his evidence the same weight as that of any other credible witness. *Ibid.*

An accused person, who avails himself of the statute, C. S., 1799, to become a competent witness, occupies the same position with any other witness, is entitled to the same privileges, receives the same protection, and is equally liable to be impeached or discredited. *Ibid.*

In a criminal prosecution, where the defendant went upon the stand in his own behalf and there was evidence offered by the State of the good character of some of its witnesses and of the bad character of defendant, a charge that such character evidence is corroborative evidence, going to the weight and credibility of the testimony of those witnesses, is not error. *S. v. Auston*, 203.

Inconsistency between the testimony given by a prosecuting witness on the trial and her previous statement is a matter affecting her credibility only, and does not warrant the withdrawal of the case from the jury. *S. v. Baxley*, 210.

On a trial of an indictment for murder, where the court, in giving one of the State's contentions, said that the jury ought to scrutinize the evidence of the defendant because of his interest in the outcome of the verdict, there is no error, since the court, in explaining the law arising on the facts, gave the correct instructions relative to the weight and credibility to be given the testimony of interested witnesses and parties testifying in their own behalf. *S. v. Redfern*, 561.

When the accused in a criminal prosecution avails himself of the privilege of testifying in his own behalf, he assumes the status of any other witness, with all the advantages and disadvantages that status may entail; but his failure to take the stand creates no presumption against him and is not a proper subject for comment before the jury. *S. v. Farrell*, 804.

§ 41g. Competency and Credibility of Convicts, Accomplices, and Co-defendants.

The evidence of an accomplice, who testifies against defendants in a criminal prosecution, cannot be assailed by the defense on the ground that such

witness was induced to so testify by hope or fear. Such objection is available to the witness only. *S. v. Lippard*, 167.

While the unsupported testimony of an accomplice should be received with caution, if it produces convincing proof of guilt, it is sufficient to sustain a conviction. *Ibid.*

The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. C. S., 4643. *S. v. Rising*, 747.

§ 41i. Credibility of Other Interested Parties.

On the trial of a criminal action, an instruction to the effect that the jury should scrutinize the testimony of near relations of defendant, in the light of their interest in the verdict, was proper; but it was error to omit the qualifying instruction to the effect that, if after such scrutiny they believe such testimony, it should be given the same weight and credence as the testimony of any other witness. *S. v. Davis*, 57.

The testimony of relatives, or parties interested in the case and defendants, should be received with caution and scrutinized with care: but, when this is done, the jury should give such testimony the weight the jury considers it entitled to, and, if the jury believes the witness, it should give his evidence the same weight as that of any other credible witness. *S. v. McKinnon*, 160.

§ 44. Time of Trial and Continuance.

In a prosecution for murder, where accused moved for a continuance on account of the absence of material witnesses, stating what the witnesses' testimony would be, and the solicitor admitted that the witnesses would testify as stated and the court denied the motion for continuance, specifically and in detail instructing the jury to consider that the witnesses had so testified and to give this evidence consideration just as if the witnesses had been present in court and testified for defendant, there is no denial of defendant's constitutional right. *S. v. Utley*, 39.

Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal. *S. v. Utley*, 39; *S. v. Farrell*, 321; *S. v. Rising*, 747.

Where a criminal prosecution is continued to the next regular term and prior thereto called for trial at a special term, there is no error for the court to refuse a continuance to such regular term, on the ground of the unavoidable absence of a material expert witness for defense, it appearing that the solicitor agreed not to offer evidence on the facts, which it was alleged would be denied by such absent witness. *S. v. Rising*, 747.

§ 46. Right of Defendant to Be Present During Trial and Confront Accusers.

The right to have counsel, as well as the right to face one's accusers and witnesses with other testimony, is guaranteed by both the N. C. and U. S. Constitutions, and together they include the opportunity fairly to prepare and present one's defense and form an integral part of a fair trial. *S. v. Farrell*, 321.

There is no denial of prisoner's right to confrontation, N. C. Const., Art. I, sec. 11, by the refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, it appearing that the State's solicitor agreed that he would not, and did not offer evidence as to fingerprints. *S. v. Rising*, 747.

CRIMINAL LAW—*Continued.*

§ 47. Consolidation of Indictment for Trial.

A motion to consolidate, C. S., 4622, three capital cases *in medias res* pending the taking of testimony on the trial of one of them, is not an assent to a mistrial in order to effect a consolidation. *S. v. Harris*, 697.

Order of consolidation in capital cases, C. S., 4622, will be made when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might be threatened by the consolidation. *Ibid.*

§ 48c. Admission of Evidence.

Where the court sustains an objection to a question asked a defense witness, in a criminal case, and the record fails to show what the witness would have answered, no error is shown and the ruling must be sustained. *S. v. Utley*, 39.

In a criminal prosecution objections to the evidence of State's witness must be made to questions at the time they are asked and to answers when given. Objections not so taken in apt time are waived. *S. v. Hunt*, 173.

A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling, unless abuse of discretion appears, is not subject to review on appeal. *Ibid.*

§ 48d. Withdrawal of Evidence.

In a capital case, where the court first admitted evidence that officers found, immediately after the shooting, no weapon on accused but did find a pistol in a building out of which accused came a few minutes before the homicide and into which he went before his arrest, and later the court excluded it, telling the jury not to consider this evidence, there is no error, when giving the contentions of the parties, for the court to say that the State contends that defendant went into such building to prepare himself for the execution of his determination. *S. v. Grainger*, 716.

§ 48e. Reopening for Additional Evidence.

The refusal to allow accused to reopen the case and introduce further evidence, after the taking of evidence had been closed and solicitor's argument concluded, was within the sound discretion of the trial judge and not subject to review except for manifest abuses thereof. *S. v. Rising*, 747.

§ 50a. Expression of Opinion by Court During Trial.

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate the statute (C. S., 564) prohibiting the judge from expressing an opinion as to whether a fact has been sufficiently proven, since this statute relates only to the expression of opinion during the trial of the case. *S. v. Lippard*, 167.

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. C. S., 564. *S. v. Auston*, 203.

§ 50b. Private Prosecution.

The trial judge is vested with the discretion to permit private counsel to appear, with the Solicitor for the State, in a criminal prosecution, even after the trial has been entered upon and some of the jurors selected. *S. v. Lippard*, 167.

CRIMINAL LAW—*Continued.*

§ 52a. Province of Court and Jury, in General.

It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused. *S. v. Harris*, 697.

§ 52b. Nonsuit.

Upon a motion for nonsuit under C. S., 4643, if there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case should be submitted to the jury. But where there is merely a suspicion or conjecture in regard to the charge in the indictment, the motion should be allowed. *S. v. Boyd*, 79.

Where a complete defense is established by the State's case, on a criminal indictment, the defendant should be allowed to avail himself of a motion for nonsuit under C. S., 4643. *Ibid.*

Upon motion to nonsuit in a criminal case, the evidence must be considered in the light most favorable to the State, which is entitled to all reasonable inferences therefrom. *S. v. Gray*, 120; *S. v. Herndon*, 208.

Upon a motion for judgment as of nonsuit at the close of the State's evidence and renewed by defendant after the close of his own evidence, all the evidence upon the whole record, tending to sustain a conviction, will be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *S. v. McKinnon*, 160.

When defendants in a criminal prosecution, at the close of the State's evidence, move to dismiss and for nonsuit, C. S., 4643, and, after these motions are overruled, introduce evidence but fail to renew such motions at the close of all evidence, the exceptions to the refusal of such motions at the close of the State's evidence are waived. *S. v. Epps*, 741.

The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. C. S., 4643. *S. v. Rising*, 747.

§ 53a. Form and Sufficiency of Instructions: In General.

A charge is to be construed contextually and not by detaching clauses from their appropriate setting. *S. v. Utley*, 39; *S. v. Hunt*, 173; *S. v. Vicks*, 384; *S. v. Harris*, 697; *S. v. Farrell*, 804.

The judge, in his charge to the jury, should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witness and the weight of the evidence. C. S., 564. *S. v. Friddle*, 258.

The court is not required to charge on a subordinate feature of the case in the absence of a request therefor at the proper time. *S. v. Cameron*, 464.

Since the charge should be considered contextually, it is not essential that the court charge the jury as to the law in connection with each contention of the parties. The better rule is for the court to give (1) a summary of the evidence; (2) the contention of the parties; and (3) an explanation of the law arising on the facts. *S. v. Redfern*, 561.

On a trial of an indictment for murder, where the court, in giving one of the State's contentions, said that the jury ought to scrutinize the evidence of the defendant because of his interest in the outcome of the verdict, there is no error, since the court, in explaining the law arising on the facts, gave the correct instructions relative to the weight and credibility to be given the testimony of interested witnesses and parties testifying in their own behalf. *Ibid.*

CRIMINAL LAW—*Continued.*

An erroneous instruction upon a material aspect of a criminal case is not cured by the fact that in other portions of the charge the law is correctly stated. It is impossible to determine on which of the instructions the jury acted. *S. v. Ellerbe*, 770.

§ 53b. Applicability to Counts and Evidence.

It is not mandatory on the trial judge to charge the jury relative to the reception of testimony of relatives, or parties interested and defendants, though it is permissible to do so. *S. v. McKinnon*, 160.

§ 53d. On Less Degrees of Crime Charged.

Where the court charged the jury that they might convict defendants of rape, or of the lesser degrees thereof, as they should find from the evidence, failing to state, as to one defendant, that they might also find him "not guilty," and the court thereafter recalled the jury and again clearly instructed the jury that they might find defendants "not guilty," no prejudicial error is made to appear. *S. v. Hunt*, 173.

Where there is no evidence of a less degree of the crime charged, the court is not required to instruct the jury that they may convict of a less grade of the same offense. *S. v. Gregory*, 415.

When accused is indicted, under C. S., 4214, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, does not deprive the jury of the statutory authority to consider it. *S. v. Bentley*, 563.

§ 53c. Expression of Opinion as to Weight and Sufficiency of Evidence.

In a criminal prosecution, where the defendant went upon the stand in his own behalf and there was evidence offered by the State of the good character of some of its witnesses and of the bad character of defendant, a charge that such character evidence is corroborative evidence, going to the weight and credibility of the testimony of those witnesses, is not error. *S. v. Auston*, 203.

While an accused person who avails himself of C. S., 1799, and takes the stand in his own behalf assumes the position of a witness and subjects himself to all the disadvantages of that position, a charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended. *Ibid.*

The trial court shall not intimate or give an opinion to the jury whether a fact has been fully or sufficiently proved, this being the true province of the jury. *S. v. DeGraffenreid*, 461.

An objection to instructions in a criminal case on the ground that the manner of presenting the State's contentions, and the greater prominence given them, amounted to an expression of opinion, is an exception to the rule that an objection must be made at the time; and it is not a broadside exception, if made with such particularity as to guide the court to the objectionable features. *S. v. Grainger*, 716.

Where, in a criminal prosecution, there is a numerical preponderance in the statement by the court of the State's contentions, referable naturally to the difference, both in the character and volume, of evidence on the respective sides, there is no cause of legal objection. *Ibid.*

§ 53f. Requests for Instructions.

Where the evidence and law arising thereon, in a criminal prosecution, relate to a material, substantive feature of the case, no special prayer for instruc-

tions is required, and a failure to properly instruct thereon is error. *S. v. Friddle*, 258.

The court is not required to charge on a subordinate feature of the case in the absence of a request therefor at the proper time. *S. v. Cameron*, 464.

§ 53g. Contentions, Objections and Exceptions to Instructions.

On a criminal prosecution, objections to the court's statement of the contentions of the State and the defendant, in its charge to the jury, will not be sustained, where no unfairness appears therein and the contentions as stated were predicated on reasonable deductions from the evidence. *S. v. Cameron*, 464.

While the judge was stating the contentions of the parties in a criminal case, objection was made by defendant that a certain witness did not testify as stated by the court and the court at once instructed the jury that they were to be governed by their own recollection of what the witness said, there is no reversible error. *Ibid.*

An objection to instructions in a criminal case on the ground that the manner of presenting the State's contentions, and the greater prominence given them, amounted to an expression of opinion, is an exception to the rule that an objection must be made at the time; and it is not a broadside exception, if made with such particularity as to guide the court to the objectionable features. *S. v. Grainger*, 716.

Where, in a criminal prosecution, there is a numerical preponderance in the statement by the court of the State's contentions, referable naturally to the difference, both in the character and volume, of evidence on the respective sides, there is no cause of legal objection. *Ibid.*

In a capital case, where the court first admitted evidence that officers found, immediately after the shooting, no weapon on accused but did find a pistol in a building out of which accused came a few minutes before the homicide and into which he went before his arrest, and later the court excluded it, telling the jury not to consider this evidence, there is no error, when giving the contentions of the parties, for the court to say that the State contends that defendant went into such building to prepare himself for the execution of his determination. *Ibid.*

Exceptions to the court's statements of the evidence are untenable, where it does not appear in the record that the alleged errors were called to the attention of the court in time to make correction. *S. v. Rising*, 747.

§ 54b. Form, Sufficiency, and Effect of Verdict.

Where all the evidence points to a graver crime and the jury's verdict is for an offense of a lesser degree, although illogical and incongruous, it will not be disturbed, since it is favorable to the accused. C. S., 4639. *S. v. Bentley*, 563.

The fact that the jury convicted the defendant of *assault with a deadly weapon*, after it had acquitted him in a previous part of the verdict of *assault with a deadly weapon doing serious injury*, does not entitle him to his discharge on his motion in arrest of judgment. *Ibid.*

§ 54c. Rendition and Acceptance of Verdict and Power of Court to Have Jury Redeliberate.

Upon the trial on an indictment charging the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, C. S., 4226, 4227, there was a verdict of guilty,

and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered: and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby. *S. v. Dilliard*, 446.

§ 55. Jurisdiction of Court to Hear and Determine Motions After Verdict.

A motion to set aside a verdict and grant a new trial is addressed to the discretion of the court and its refusal is not reviewable on appeal. *S. v. McKinnon*, 160.

§ 56. Motions in Arrest of Judgment.

A verdict of a jury is not vulnerable to a motion in arrest of judgment because of defects in the indictment, unless the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which defendant is found guilty. *S. v. Gregory*, 415.

An indictment must be liberally construed upon a motion in arrest of judgment for defects therein. *Ibid.*

A motion in arrest of judgment must be based on some matter which appears, or for the omission of some matter which ought to appear, on the face of the record, creating a vital defect in some phase of the proceeding. *S. v. Dilliard*, 446.

The fact that the jury convicted the defendant of *assault with a deadly weapon*, after it had acquitted him in a previous part of the verdict of *assault with a deadly weapon doing serious injury*, does not entitle him to his discharge on his motion in arrest of judgment. *S. v. Bentley*, 563.

§ 65. Validity and Attack.

Where, in a prosecution for murder, the indictment, evidence and verdict correctly described the person killed as "Cora Lee Utley," which is the correct name, while the judgment in the case reads "one Carrie Lee Utley," this discrepancy comes within the rule of *idem sonans* and is not a fatal variance. *S. v. Utley*, 39.

§ 77b. Form and Requisites of Transcript.

In a criminal prosecution, where defendant entered a plea of guilty and thereafter appealed, on "an agreed case on appeal" wherein it was stated that the offense was committed in a county other than the county appearing in the indictment, this discrepancy will be disregarded, first, because it is at variance with the record, and second, because of its immateriality. *S. v. McKeon*, 404.

§ 77c. Matters Not Appearing of Record.

Where there is no affirmative statement in the record that the defendants did or did not enter a plea to the bill of indictment, the presumption is in favor of regularity and objection thereto will not be sustained, and certainly where the record shows that the court charged the jury that the defendants and each of them pleaded not guilty to the bill of indictment. *S. v. McKinnon*, 160.

§ 80. Prosecution of Appeals and Dismissal.

In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the court, the motion of the Attorney-General to docket and dismiss, under Rule 17, is allowed. *S. v. Poole*, 394.

DAMAGES.

§§ 2, 6, 7. Direct and Remote Injury or Loss: Aggravation and Mitigation of Damages: Grounds and Conditions Precedent to Recovery of Punitive Damages.

In tort actions, the act being malicious or accompanied by gross negligence, recovery of profits or damages for their loss are allowable, where they are ascertainable with a fair degree of certainty; since, unlike a case arising out of contract, it is not a question whether the consequences were within the legal contemplation of the parties, the question is whether the consequences were the natural and probable result of the wrongful act. *Steffan v. Meiselman*, 154.

DEDICATION.

§§ 1, 4, 5. Nature and Requisites—in general: Titles and Rights Acquired: Right to Revoke Dedication.

When the owner of land has it subdivided and platted into lots, streets, and alleys, and sells and conveys the lots or any of them with reference to the plat, he thereby dedicates the streets and alleys, and all of them, to the use of the purchasers and those claiming under them, and to the public, and it is not necessary for such streets and alleys to be opened or accepted by the governing body of the town or city if they are within the limits of a municipality. *Broocks v. Muirhead*, 227.

Where lands have been surveyed and platted and sold, showing lots, streets, squares, parks and alleys, the original owner and those claiming under him, with knowledge of the facts, or with notice thereof, either express or constructive, are estopped to repudiate the implied representation that such streets and alleys, parks and places will be kept open for public use, although not presently opened or accepted or used by the public. *Ibid.*

If streets or alleyways in a subdivision of lands be obstructed there is created thereby a public nuisance, and each purchaser, or owner of property therein can, by injunction or other proper proceeding, have the nuisance abated, as there is in all such cases an irrebuttable presumption of law that such owner has suffered peculiar loss or injury. *Ibid.*

DEEDS.

§ 2a. Competency of Grantor.

The law presumes every person sane in the absence of evidence to the contrary. Likewise, after a person is found to be mentally incompetent there is a presumption that the mental incapacity continues. *Davis v. Davis*, 36.

Where a plaintiff sues to cancel his deed and alleges and offers evidence of mental incapacity to make the deed, it is necessary in order to maintain the action to allege and prove a restoration of his mental capacity. *Ibid.*

Mental capacity required for the valid execution of a deed is the ability to understand the nature of the act in which the party is engaged and its scope and effect, or its nature and consequence; not that he should be able to act wisely or discreetly, nor to drive a hard bargain. *Ibid.*

If the plaintiff is mentally competent to assert his rights and protect his interest at the present time, and there has been no change in his mental capacity since he executed the deed in question, he is estopped from challenging the validity thereof. *Ibid.*

Provisions of a will, and recitals in other writings, may be considered by a jury, in connection with other evidence, as bearing on the issue of mental capacity and undue influence. *McNeill v. McNeill*, 178.

§ 2c. Undue Influence.

A grantor in a deed, except in cases of fraud, mistake, or undue influence, will not be permitted to contradict the terms of his written deed. *Davis v. Davis*, 36.

In certain known and definite fiduciary relations, if there be dealing between the parties, on complaint of the party in the power of the other, the relation of itself raises a presumption of fraud as a matter of law, which annuls the act unless such presumption be rebutted. Among these relations are (1) trustee and *cestui que trust;* (2) attorney and client; (3) mortgagor and mortgagee; (4) guardian and ward; and (5) principal and agent. *McNeill v. McNeill*, 178.

In an action to set aside deeds and issue of *devisavit vel non*, consolidated and tried together, where the evidence showed that, at the time of the execution of the instruments in suit, the grantee in the deeds and the executor and principal beneficiary in the will was the agent of grantor and testatrix and was in full charge of her business affairs, it was reversible error for the court to fail to charge that such circumstances create a strong suspicion of fraud and undue influence and the law casts upon such grantee and principal beneficiary the burden of removing such suspicion. *Ibid.*

Where in consideration of an agreement by his son and daughter to support him, plaintiff executed a fee simple deed, conveying all of his real estate to such son and daughter and about a year thereafter changed his mind and wanted his land back, there is no evidence of fraud or undue influence. *Gerringer v. Gerringer*, 818.

§§ 4, 8. Consideration: Registration as Notice.

A deed of gift of an estate of any nature, if not proven in due form and registered within two years after the making of it, is void. C. S., 3315. *Winstead v. Woolard*, 814.

Between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void *ab initio* and title vests in the grantor. *Ibid.*

§§ 11, 12. General Rules of Construction: Property Conveyed.

It is presumed that a grantor in a deed intended to convey something, and the deed will be upheld unless the description is so vague or contradictory that it cannot be ascertained what thing in particular is meant. *Duckett v. Lyda*, 356.

Every deed of conveyance must set forth a subject matter, either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers. The description must identify the land or furnish the means of identifying, under the maxim *id certum est quod certum reddi potest*, the *locus in quo*. *Ibid.; Peel v. Calais*, 368.

When the description is not sufficient in itself to denote the land conveyed, resort may be had to extrinsic evidence. But evidence *dehors* the deed is admitted to "fit the description to the thing" only when it tends to explain, locate, or make certain some call or descriptive term used in the deed. *Duckett v. Lyda*, 356.

§ 13a. Estates Created by Construction of the Instruments.

In construing a clause in a deed providing for support and maintenance, its legal effect must be determined by a construction of the entire instrument. A collateral agreement, not appearing in the deed, in the absence of fraud or

DEEDS—*Continued.*

mistake which would warrant a reformation of the instrument, will not support an equitable lien on the premises conveyed for the enforcement of the collateral agreement. *Higgins v. Higgins*, 453.

§ 14b. Conditions Concurrent and Subsequent.

A clause in a conveyance will not be construed as a condition subsequent unless it expresses, in apt and appropriate language, the intention of the parties to that effect, and a mere expression of the motive inducing the grant, or a statement of the purpose for which the property is to be used, is not sufficient to create such condition. *Oxford Orphanage v. Kittrell*, 427.

§ 16. Restrictions.

In the absence of covenants in the deeds or other valid restrictions upon the use of land for a public park, its acquisition and dedication to that purpose is a matter within the discretion of municipal governing authorities and may not be enjoined by the courts. *Dudley v. Charlotte*, 638.

§ 17d. Agreements to Support Grantee.

In construing a clause in a deed providing for support and maintenance, its legal effect must be determined by a construction of the entire instrument. A collateral agreement, not appearing in the deed, in the absence of fraud or mistake which would warrant a reformation of the instrument, will not support an equitable lien on the premises conveyed for the enforcement of the collateral agreement. *Higgins v. Higgins*, 453.

The grantee, in a deed containing a covenant for support and maintenance, has a right to convey the land and to transfer the charge to his grantee, who would take with notice of the provisions in the original deed. *Ibid.*

Where plaintiff's conveyance of lands contained a provision that grantee would keep grantor in sickness and old age and grantee conveyed the lands in fee, receiving in exchange therefor other lands in fee to himself and wife by the entireties without covenant for support, which, after the death of the husband, the wife, one of defendants, conveyed to the other defendants, reserving a life estate to herself and plaintiff, with provision that one of grantees is to give reasonable amount of aid to plaintiff in sickness and old age, on suit for breach of covenant for support of plaintiff and verdict for plaintiff on all issues, it was error for the court to hold that plaintiff is entitled to an equitable lien upon the lands of defendants. *Ibid.*

Where, in consideration of an agreement by his son and daughter to support him, plaintiff executed a fee simple deed, conveying all of his real estate to such son and daughter and about a year thereafter changed his mind and wanted his land back, there is no evidence of fraud or undue influence and motion for judgment as of nonsuit was properly allowed. *Gerringer v. Gerringer*, 818.

DESCENT AND DISTRIBUTION.

§ 11½. Rights and Liabilities of Heirs and Distributees in General.

The next of kin of an intestate have a cause of action for their distributive shares against the administrator of the intestate, which cause of action does not survive, on the death of such administrator, against *his* administrator, but against the administrator *de bonis non* of the first intestate. *Snipes v. Estates Administration, Inc.*, 776.

Upon the death of a administrator, the better procedure is for the next of kin to bring an action for an accounting against *his* administrator, only after

the administrator *de bonis non* of the first intestate has refused to do so. However, should the administrator *de bonis non* fail to bring such action, the next of kin may bring the same and the court will make the administrator *de bonis non* a party defendant and refuse to dismiss the action. This Court may remand such a case for the making of necessary parties. *Ibid.*

DIVORCE.

§ 1. Grounds for Divorce from Bed and Board.

The effect of a judgment of divorce *a mensa et thoro* with alimony is to legalize the separation of the parties, which had theretofore been an abandonment on the part of one of them. It does not sever the marriage tie. *Lockhart v. Lockhart*, 559.

§ 2a. Separation as Grounds for Absolute Divorce.

Notwithstanding the broad language of the separation statute, a husband may not ground an action for divorce on his own criminal conduct towards his wife. A full review of recent divorce and separation statutes and decisions thereon. *Byers v. Byers*, 85.

An action for divorce may not be maintained on the ground that the husband and wife have lived separate and apart for two years, when it is shown and pleaded in bar that such separation was the result of plaintiff's wrongful abandonment of his wife and their children, and his offering of such indignities to defendant's person as to render her condition intolerable and life burdensome. *Ibid.*

The party in the wrong, in the face of a plea in bar based on such wrong, cannot obtain a divorce under ch. 100, Public Laws 1937. C. S., 1659 (a). *Pharr v. Pharr*, 115.

A legal separation for the requisite period of two years is ground for divorce under ch. 100, Public Laws of 1937, Michie's Code, 1659 (a). The separation here contemplated includes a "judicial separation" as well as one brought about by the act of the parties, or one of them. *Lockhart v. Lockhart*, 559.

§ 5. Pleadings.

In an action for alimony without divorce, C. S., 1667, as in an action for divorce *a mensa et thoro* by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegations is fatal and demurrer properly sustained. *Howell v. Howell*, 62.

Recrimination is recognized in this jurisdiction, and under that doctrine the defendant, in an action for a divorce, may set up as a defense in bar that plaintiff was guilty of misconduct which in itself would be a ground for divorce. *Pharr v. Pharr*, 115.

In an action for divorce, where defendant by answer and further defense pleads in bar plaintiff's unlawful and wrongful abandonment and nonsupport of defendant, his wife, and also recrimination, either plea, if sustained, is sufficient to prevent plaintiff from obtaining a divorce. *Ibid.*

In an action for divorce on the grounds of two years separation, Public Laws 1937, ch. 100, C. S., 1659 (a), where complaint alleges sufficient facts and defendant in her answer sets up a divorce *a mensa* with alimony granted her on the grounds of abandonment, to which plaintiff replied without admission

DIVORCE—*Continued.*

of wrongful or unlawful conduct on his part, a judgment for defendant on the pleadings is erroneous, as there are issues of fact raised to be tried by a jury. *Lockhart v. Lockhart*, 123.

Condonation, in an action between husband and wife, is a specific affirmative defense to be alleged and proven by the party insisting upon it, and is not required to be negatived by the opposing party. *Phillips v. Phillips*, 276.

§ 11. Alimony Pendente Lite.

An order for support, either *pendente lite* or under C. S., 1667, without more, will not perforce defeat an action for divorce under ch. 100, Public Laws 1937. Such an order is not final and may be modified or set aside on a showing of changed conditions. C. S., 1666. *Byers v. Byers*, 85.

Under C. S., 1667, authorizing an action for alimony without divorce, subsistence and counsel fees *pendente lite* may now be allowed. *Phillips v. Phillips*, 276.

The allowance of subsistence and counsel fees *pendente lite* is in the discretion of the trial court, who is not required to make formal findings of fact upon such a motion, unless the charge of adultery is made against the wife; and the court's ruling will not be disturbed in the absence of abuse of discretion. *Ibid.*

§ 12. Alimony Upon Divorce from Bed and Board.

In an action for alimony without divorce, C. S., 1667, as in an action for divorce *a mensa et thoro* by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegations is fatal and demurrer properly sustained. *Howell v. Howell*, 62.

The effect of a judgment of divorce *a mensa et thoro* with alimony is to legalize the separation of the parties, which had theretofore been an abandonment on the part of one of them. It does not sever the marriage tie. *Lockhart v. Lockhart*, 559.

§ 13. Alimony Without Divorce.

In an action for alimony without divorce, C. S., 1667, as in an action for divorce *a mensa et thoro* by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegation is fatal and demurrer properly sustained. *Howell v. Howell*, 62.

An order for support, either *pendente lite* or under C. S., 1667, without more, will not perforce defeat an action for divorce under ch. 100, Public Laws 1937. Such an order is not final and may be modified or set aside on a showing of changed conditions. C. S., 1666. *Byers v. Byers*, 85.

Under C. S., 1667, authorizing an action for alimony without divorce, subsistence and counsel fees *pendente lite* may now be allowed. *Phillips v. Phillips*, 276.

Although the plaintiff does not ask for divorce in a suit under C. S., 1667, she must charge and prove such injurious conduct on the part of the husband as would entitle her to a divorce *a mensa et thoro* at least. *Ibid.*

A judgment for subsistence, entered in an action for alimony without divorce, C. S., 1667, survives a judgment for absolute divorce obtained under the two year separation statute. C. S., 1663. *Simmons v. Simmons*, 841.

DOWER.

§ 7. Objections to Assessments and Reassessments.

Where a part of a hotel building, including certain furniture and fixtures which were adjudged part of and a necessary incident to the realty, was allotted to and accepted by the widow, in the settlement of her husband's estate, as realty and as her dower, such furniture and fixtures must be considered a part of the realty in adjusting a division, between the widow and heir, of fire insurance collected for a loss on the property. *Smith v. Smith*, 433.

EJECTMENT.

§ 9a. Nature and Essentials of Right of Action.

No person in possession of the premises claiming title thereto prior to, or at the time of, the commencement of the action can be dispossessed unless he was made a party to the suit so as to be bound by the judgment. *Stone v. Guion*, 831.

§ 14. Competency and Relevancy of Evidence.

In ejectment evidence that a party is or has been in possession, or went into possession of the premises is admissible. *Duckett v. Lyda*, 356.

§ 15. Sufficiency of Evidence.

When resort is had to evidence *aliunde* to make the description in a deed complete, the weight and credibility of the evidence thus offered is for the jury. *Peel v. Calais*, 368.

In a petition for partition, converted into an action in ejectment by defendants' plea of sole seizin, where a common source of title is admitted and the description, in the deed relied upon by defendants, does not sufficiently identify the *locus in quo* as a part of the land conveyed, without resort to evidence *dehors* the deed of defendant, a judgment of nonsuit as to plaintiff is erroneous. *Ibid.*

Where plaintiff sued in ejectment three defendants, wife, husband and son, and at the close of the trial plaintiff was nonsuited as to the father and son, and no appeal taken, and on a subsequent trial plaintiff recovered judgment against the wife, and upon issuance of a writ of possession the wife moved to vacate the writ on the ground that she disclaims title to the property and is living on the land in the home of her husband by reason of her marital rights, an order allowing the motion was proper. *Stone v. Guion*, 831.

EMINENT DOMAIN.

§§ 6, 14. Delegation to State Boards and Commissions: Petition and Service.

The special proceeding, provided by C. S., 3846 (bb) and 1716, is to furnish a procedure to condemn land for a public purpose and to fix compensation for the taking thereof and does not in any way authorize an action for breach of contract. *Dalton v. Highway Commission*, 406.

EQUITABLE LIEN.

§ 1. Nature: In General (Express or Implied).

Where plaintiff's conveyance of lands contained a provision that grantee would keep grantor in sickness and old age and grantee conveyed the lands in fee, receiving in exchange therefor other lands in fee to himself and wife by the entireties without covenant for support, which, after the death of the husband, the wife, one of defendants, conveyed to the other defendants, reserving a life estate to herself and plaintiff, with provision that one of grantees is to give reasonable amount of aid to plaintiff in sickness and old age, on suit for breach of covenant for support of plaintiff and verdict for plaintiff on all issues, it was error for the court to hold that plaintiff is entitled to an equitable lien upon the lands of defendants. *Higgins v. Higgins*, 453.

EQUITY.

§ 1a. He Who Seeks Equity Must Do Equity.

In an action by plaintiff to recover his distributive share of an estate of which defendant is administrator, where defendant sets up and pleads debts of plaintiff due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff has no application. *Perry v. Trust Co.*, 642.

§ 1d. Party Will Not Be Allowed to Benefit by His Own Wrong.

No civil rights can inure to one out of his own violation of the criminal law. *Byers v. Byers*, 85.

The courts are open for the determination of rights and the redress of grievances, but not for the rewarding of wrongs—one *in flagrante delicto* is not permitted to recover. *Ibid.*

§ 2. Laches.

Any knowledge of a fact, the truth of which may be ascertained by proper inquiry, puts the party on notice and deprives him of his equity. *Butler v. Winston*, 421.

Laches on the part of claimant is recognized by courts of equity, in proper cases, as an available defense against stale claims. It is generally defined to mean negligent omission for an unreasonable time to assert a right enforceable in equity. *Stell v. Trust Co.*, 550.

In a suit by plaintiff, grantor and debtor in a deed of trust on land, against defendants, holders of the debt, for an accounting, upon motion for nonsuit at the close of all the evidence, which tended to show that plaintiffs rented the lands and the rents were paid to the said holders of the debt to be applied to the debt and interest and taxes, the said holders of the debt allowing the property to be sold for taxes and becoming the purchaser at the tax sale, it was error for the court to allow the motion, on the ground of (1) laches or (2) adverse possession under a valid tax deed. *Ibid.*

ESTATES.

§ 1. Nature and Incidents of Estates in General.

When rights to the minerals in land have been, by deed or reservation, severed from the surface rights, two distinct estates are created, and the estate in the mineral interests is subject to the ordinary rules of law governing the title to real property. *Vance v. Guy*, 409.

§ 4. Merger of Estates.

Where the equitable and legal estate in land becomes vested in one and the same person at one and the same time and in one and the same right, the two estates are merged and the lesser estates are absorbed in the fee simple thus created. *Smith v. Bank*, 249.

Where one who has an equitable title acquires the legal title, so that the same becomes united in the same person, the former is merged in the latter. *Ibid.*

As a gneral rule, where a purchaser of land subject to a mortgage takes an assignment of the mortgage, the debt secured by the mortgage is extinguished. *Ibid.*

§ 6. Estates Upon Condition.

Where testator devised realty to his wife and another for life, remainder to plaintiff, a charitable corporation, to apply, after paying upkeep, to its maintenance, but should plaintiff refuse this gift or reject it, then to testator's heirs, and life tenants, now dead, allowed the property to deteriorate and some burned, all without action for waste by plaintiff, who has sold and leased some of the property and contracted to sell the remainder, there is no forfeiture, abandonment, refusal or rejection of the property. The gift is a fee simple remainder, subject to reverter upon a failure to accept or a rejection after acceptance. *Oxford Orphanage v. Kittrell*, 427.

A clause in a conveyance will not be construed as a condition subsequent unless it expresses, in apt and appropriate language, the intention of the parties to that effect, and a mere expression of the motive inducing the grant, or a statement of the purpose for which the property is to be used, is not sufficient to create such condition. *Ibid.*

§ 9a. Termination of Life Estates and Vesting of Remainder.

Cross remainders are implied in a will where there is a gift for life on in tail to two or more persons as tenants in common, followed by a gift over of all property at once. Cross executory limitations apply to personal property like cross remainders to realty and both prevent a chasm or hiatus in the limitation. *Trust Co. v. Miller*, 1.

Where real and personal property is left by will in trust for two grandchildren until they reach the age of 35 years, when the principal is to be given them, with the provision that should they not live and not have bodily heirs the property shall go to other named persons, upon the death of one of the grandchildren, without issue and before reaching 35 years of age, his part of the trust goes to the surviving grandchild under terms of the will. *Ibid.*

If the life tenant purchases the property at a sale to satisfy an encumbrance, he cannot hold such property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner. Dower is a life estate. *Farabow v. Perry*, 21.

Where testator devised realty to his wife and another for life, remainder to plaintiff, a charitable corporation, to apply, after paying upkeep, to its maintenance, but should plaintiff refuse this gift or reject it, then to testator's heirs, and life tenants, now dead, allowed the property to deteriorate and some burned, all without action for waste by plaintiff, who has sold and leased some of the property and contracted to sell the remainder, there is no forfeiture, abandonment, refusal or rejection of the property. The gift is a fee

simple remainder, subject to reverter upon a failure to accept or a rejection after acceptance. *Oxford Orphanage v. Kittrell*, 427.

When grantors in a deed of gift reserve a life estate in themselves, the grantee acquires no right of possession during the life of either of the grantors. *Winstead v. Woolard*, 814.

§ 9c. Waste.

Where testator devised realty to his wife and another for life, remainder to plaintiff, a charitable corporation, to apply, after paying upkeep, to its maintenance, but should plaintiff refuse this gift or reject it, then to testator's heirs, and life tenants, now dead, allowed the property to deteriorate and some burned, all without action for waste by plaintiff, who has sold and leased some of the property and contracted to sell the remainder, there is no forfeiture, abandonment, refusal or rejection of the property. The gift is a fee simple remainder, subject to reverter upon a failure to accept or a rejection after acceptance. *Oxford Orphanage v. Kittrell*, 427.

A remainderman has a right to proceed against the life tenant for waste, but this right is optional. *Ibid.*

§ 9e. Proceeds of Fire Insurance Policies.

Where a part of a hotel building, including certain furniture and fixtures which were adjudged part of and a necessary incident to the realty, was allotted to and accepted by the widow, in the settlement of her husband's estate, as realty and as her dower, such furniture and fixtures must be considered a part of the realty in adjusting a division, between the widow and heir, of fire insurance collected for a loss on the property. *Smith v. Smith*, 433.

§ 11. Procedure to Sell Estate for Reinvestment.

In a proceeding under C. S., 1744, to sell all the contingent interest in certain lands of minors and unborn children, the petitioners, who were represented by a guardian, where judgment of sale was signed on the day before the guardian's appointment, such judgment is void. *Butler v. Winston*, 421.

In a proceeding, under C. S., 1744, to sell real property in which there is a contingent interest, the plaintiff must be a person having a vested interest in the property to be sold and the sale must be passed upon by the judge of the Superior Court at term. The contingent interest alone cannot be sold. *Ibid.*

ESTOPPEL.

§ 1. Creation and Operation.

If the plaintiff is mentally competent to assert his rights and protect his interest at the present time, and there has been no change in his mental capacity since he executed the deed in question, he is estopped from challenging the validity thereof. *Davis v. Davis*, 36.

§ 3. Nature and Essentials.

Where lands have been surveyed and platted and sold, showing lots, streets, squares, parks and alleys, the original owner and those claiming under him, with knowledge of the facts, or with notice thereof, either express or constructive, are estopped to repudiate the implied representation that such streets and alleys, parks and places will be kept open for public use, although not presently opened or accepted or used by the public. *Broocks v. Muirhead*, 227.

ESTOPPEL—*Continued.*

Where a judgment is void and that fact appears from the record, it cannot be pleaded as an estoppel, and is subject to collateral attack, and will be treated as a nullity. *Butler v. Winston*, 421.

§ 4. Operation and Effect.

Where a judgment is void and that fact appears from the record, it cannot be pleaded as an estoppel, and is subject to collateral attack, and will be treated as a nullity. *Butler v. Winston*, 421.

§§ 6h, 10. Knowledge: Person Estopped.

Any knowledge of a fact, the truth of which may be ascertained by proper inquiry, puts the party on notice and deprives him of his equity. *Butler v. Winston*, 421.

EVIDENCE.

§ 3. Notice of Judicial, Legislative, and Executive Acts of Officers and Agencies of Other States.

C. S., 1749, requires our courts to take judicial notice of the laws of Tennessee. *Charnock v. Taylor*, 360.

§ 15. Credibility of Witness in General.

Inconsistent statements of a witness on his examination-in-chief and on cross-examination go to his credibility and not necessarily to the competency of his evidence. *S. v. Herndon*, 208.

Discrepancies and contradictions in plaintiff's evidence (here whether or not suit was brought within the time specified in an insurance policy) are for the jury, and not for the court. *Bank v. Ins. Co.*, 390.

Where plaintiff's evidence is positive on the vital question involved upon his direct examination and on cross-examination ambiguous, but not diametrically opposed to that on his examination-in-chief, the defendant is not entitled, on plaintiff's evidence, to a directed verdict. *Andrews v. Ins. Co.*, 583.

§ 18. Evidence Competent to Corroborate Witness.

In a criminal prosecution for conspiracy to violate the liquor laws, where a witness testified for the State that he was employed by defendants to haul liquor from Baltimore to Charlotte and that it was agreed that the money to pay for the liquor would be sent witness from Charlotte by telegraph in the name of one Carling, it was competent for the Charlotte superintendent of the telegraph company to testify that large sums were so sent to witness. *S. v. Lippard*, 167.

§ 19. Evidence Competent to Impeach or Discredit Witness.

Where, in an action for wrongful death by automobile collision, an occupant of the car, driven by plaintiff's intestate, was thrown out of the car by the impact, evidence that such person stated that she told plaintiff's intestate that the collision "was going to happen, that he was driving in and out of traffic, and running past cars," was competent to contradict a denial by such person, while on the stand, that she made such statements. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 269.

§ 22. Cross-examination.

Permission for the solicitor to cross-examine a State's witness, in a criminal prosecution, is within the sound discretion of the court. *S. v. Vicks*, 384.

EVIDENCE—*Continued.*

§ 25. Facts in Issue and Relevant to Issues.

It is not required that evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions. *Farmers Federation, Inc., v. Morris*, 467.

§ 27. General Rules.

In a criminal prosecution for performing an operation on a pregnant woman, evidence of prosecutrix that she was told by a third person about the operation defendant gave, in explanation of her visit to defendant, is not hearsay and is competent. *S. v. Dilliard*, 446.

§ 28. Circumstantial Evidence.

In a suit by distributees to recover from administrators and surviving partner money found on the person of intestate and claimed by his partner, the following evidence was not prejudicial to defendants: (1) Of the surgeon who found the money on deceased's person when he entered the hospital, that it was done up in different packages and some of it looked like it had been carried for a long time; (2) of a sister, one of plaintiffs, that decedent carried packages everywhere he went. "They were all around. I never saw what was in them. I don't read and write"; (3) of the other plaintiff, that decedent carried large sums of money on his person for years and that she saw $4,000 in his possession not long before his death; (4) of one plaintiff, a sister, and a justice of the peace, that plaintiffs and decedent owned a boundary of timber which was sold for $2,600 cash, which the justice of the peace saw paid to decedent, and the sister (witness) received $600 for her share—this does not violate the provisions of C. S., 1795. *Wingler v. Miller*, 15.

In an action to recover for wrongful death from an automobile collision, there was no error in the court's exclusion of testimony of the father of plaintiff's intestate, driver of one of the cars, that he saw his son's dead body, in the funeral home and saw a wound on his left arm, in an attempt to show that intestate had his left arm held out as a signal for a left turn at the time of the accident. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 269.

§ 29. Evidence at Former Trial or Proceedings.

In a trial before a referee, where by written stipulation counsel on both sides agreed, in lieu of offering oral evidence, that the stenographer's transcript of the sworn testimony of the witnesses at a previous trial of the case in the Superior Court, together with exhibits, should constitute the evidence before the court, there was no error, when this evidence was subsequently offered before a jury, for the court to decline to rule on the objections interposed when the evidence was originally offered, it appearing from the record that the only objections originally interposed were to testimony which was competent. *Chesson v. Container Co.*, 378.

The accuracy and authenticity of the record not being questioned, a mimeographed transcript of the case on appeal in a criminal prosecution, as agreed to by counsel, where no countercase served and no exceptions filed, constitutes the case on appeal, and it is competent as evidence, on a subsequent trial of the same case, to impeach a witness who repudiates his former testimony. Conversely, it would have been competent to corroborate a witness. *S. v. DeGraffenreid*, 461.

EVIDENCE—*Continued.*

§ 30a. Demonstrative Evidence: Photographs.

In an action for damages resulting from an automobile collision, there is no error in the court's refusal to allow a witness to use a photograph to explain his testimony, when the photograph is not shown to be a true representation of the wreck, and the record does not show how the witness would have so used the photograph. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 269.

§ 32. Transactions or Communications With Decedent.

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, is clearly inadmissible under C. S., 1795. *Wingler v. Miller*, 15.

In a suit by distributees to recover from administrators and surviving partner money found on the person of intestate and claimed by his partner, the evidence of one plaintiff, a sister, and a justice of the peace, that plaintiffs and decedent owned a boundary of timber which was sold for $2,600 cash, which the justice of the peace saw paid to decedent, and the sister (witness) received $600 for her share—does not violate the provisions of C. S., 1795. *Ibid.*

§ 33½. Court Records.

The accuracy and authenticity of the record not being questioned, a mimeographed transcript of the case on appeal in a criminal prosecution, as agreed to by counsel, where no countercase served and no exceptions filed, constitutes the case on appeal, and it is competent as evidence, on a subsequent trial of the same case, to impeach a witness who repudiates his former testimony. Conversely, it would have been competent to corroborate a witness. *S. v. DeGraffenreid*, 461.

On application to substitute a copy for a lost original *alias* summons, it is competent for a deputy sheriff to testify that he remembers making service of such *alias* summons as indicated on the copy thereof. *Park, Inc., v. Brinn*, 502.

§ 34. Governmental Acts and Documents of Other States.

A will, duly proven and allowed in New York according to our statute, C. S., 4152, when it appears that an exemplified copy thereof so showing has been recorded here in the county where the land lies, is admissible in evidence in the courts of this State, as a link in a chain of title. *Vance v. Guy*, 409.

§ 36. Accounts, Ledgers, and Records and Private Writings.

The superintendent of a telegraph company may testify that money orders of his company introduced in evidence are the original records kept in the office of his company and of which he has charge, even where the witness did not personally make such records. *S. v. Lippard*, 167.

It is proper for the court to allow a witness, solely for the purpose of refreshing his memory, to examine a record or statement (1) prepared by him; (2) prepared under his supervision; or (3) made by another in his presence. *S. v. Smith*, 457.

§ 41. Hearsay Evidence in General.

In a criminal prosecution for performing an operation on a pregnant woman, evidence of prosecutrix that she was told by a third person about the operation

defendant gave, in explanation of her visit to defendant, is not hearsay and is competent. *S. v. Dilliard*, 446.

§§ 42b, 42d. Admissions, Res Gestæ: By Agent.

Where, in an action for wrongful death by automobile collision, an occupant of the car, driven by plaintiff's intestate, was thrown out of the car by the impact, evidence that such person stated that she told plaintiff's intestate that the collision "was going to happen, that he was driving in and out of traffic, and running past cars," when it was made to appear that such statements were almost contemporaneous with the collision, is competent as *pars res gestæ*. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 269.

Agency having been established either by proof or by admission, the declarations of the agent, made in the course of his employment and in the scope of his agency and while he is engaged in the business, are competent. They must be the extempore utterances of the mind, under circumstances which constitute them part of the *res gestæ*. *Salmon v. Pearce*, 587.

§ 47. Subjects of Expert Testimony.

Expert testimony is admissible where it relates to matters requiring expert skill or knowledge in the medical field, about which a person of ordinary experience would not be capable of forming a satisfactory conclusion, unaided from one learned in the medical profession. *S. v. Dilliard*, 446.

§ 48a. Subjects in Exclusive Province of Experts, in General.

In a prosecution for homicide, where a witness is tendered by the State and found by the court to be an expert in chemistry and toxicology, and the witness testifies that an analysis made by him of stains, on the clothing worn by the defendant on the night of the murder, showed the presence of human blood, an exception thereto, on the ground that the witness is not an expert hematologist, cannot be sustained. *S. v. Smith*, 457.

§ 51. Competency and Qualification of Experts.

The competency of a witness as an expert is properly addressed to the sound discretion of the trial judge. *S. v. Smith*, 457.

§ 52. Examination of Experts.

Where a medical expert witness merely expresses his professional opinion upon an assumed finding of facts, and the facts assumed are supported by the testimony previously offered, such evidence is competent. *S. v. Dilliard*, 446.

§ 54. Presumptions.

A presumption of law is generally indicative of a mandatory deduction which the law directs to be made, in the sense of a rule of law laid down by the court; while a presumption of fact is a deduction from the evidence, a *prima facie* case, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven. *In re Will of Wall*, 591.

§ 57. Failure of Party to Testify.

A failure to testify, standing alone, ordinarily counts for naught against a party; but, when the case is such as to call for an explanation, the failure of the party, who should make such explanation, to go upon the stand may be used against him. *McNeill v. McNeill*, 178.

EXECUTION.

§ 16. Time and Conduct of Sale and Preliminary Proceedings.

While much has been written regarding sales of land under execution, each decision must be read and considered in the light of the facts of the case and of the common law or the then current statutory law. *Gardner v. McDonald*, 555.

The sheriff sells land by virtue of the power of a writ of *venditioni exponas* or execution, as the case may be, and, when the writ expires by limitation, the power of the sheriff to sell land under it comes to an end. *Ibid.*

Where, as in this State, the rule of common law has been changed regarding the time at which an execution should be made returnable, the writ should be made returnable in accordance with the applicatory statute; and, while a failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected. *Ibid.*

§ 19. Resales.

Where the bid for real estate, offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment upon which the execution issued, is raised and resales are ordered successively under provision of C. S., 2591, as amended, by which the final sale so ordered takes place on a date after the expiration of said period of ten years, such orders do not have the effect of prolonging the statutory life of lien of the judgment within the provisions and meaning of C. S., 614. *Cheshire v. Drake*, 577.

§ 24. Procedure.

Where plaintiff sued in ejectment three defendants, wife, husband and son, and at the close of the trial plaintiff was nonsuited as to the father and son, and no appeal taken, and on a subsequent trial plaintiff recovered judgment against the wife, and upon issuance of a writ of possession, the wife moved to vacate the writ on the ground that she disclaims title to the property and is living on the land in the home of her husband by reason of her marital rights, an order allowing the motion was proper. *Stone v. Guion*, 831.

EXECUTORS AND ADMINISTRATORS.

§§ 8, 9. Title and Right to Possession of Assets of Estate: Control and Management in General.

The law does not rest the title to the property of a person who dies intestate in his next of kin, but in his administrator. If the administrator dies before completion of the administration, the title to such property does not rest in *his* administrator, but in the administrator *de bonis non* of the first intestate, and so on indefinitely, until the estate is settled. *Snipes v. Estates Administration, Inc.*, 776.

§ 15d. Claims for Personal Services Rendered to Deceased.

Where certain family relationships exist, the performance of valuable services by one member of the family for another, within the unity of the family, is presumed to have been rendered pursuant to a moral or legal obligation and without expectation of compensation; but this is a presumption which may be overcome by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other. *Francis v. Francis*, 401.

The rule, that services within the family unity are presumed to be gratuitous, is not recognized in this State to such an extent as to raise the presumption against a daughter-in-law or a son-in-law. *Ibid.*

Where personal services have been rendered in compliance with an oral contract to give or devise real estate and such contract is void by reason of the statute of frauds, the party injured by the breach thereof may maintain an action on implied *assumpsit* or *quantum meruit* for the value of the services rendered. *Daughtry v. Daughtry*, 528.

§ 20½. Distribution of Estate in General.

In an action by distributees of decedent against his administrators and surviving partner for recovery of money found on decedent's person in his last illness and claimed by his partner, where the evidence tended to show that decedent for many years had carried large sums of money on his person and over six thousand dollars was found on his person at the hospital just before his death, that he had three bank accounts, including the partnership account, motion for judgment of nonsuit was properly denied. *Wingler v. Miller*, 15.

§ 21. Offsets Against Amounts Due from Estates.

Plaintiff sued for distributive share of estate. Defendant, administrator, answering, sets up and pleads debts of plaintiff due the intestate as an offset. Plaintiff, replying, denies the debts and pleads the three-year and ten-year statutes of limitation. On the hearing it was made to appear that the debts of plaintiff, if any, were barred by the statutes of limitation during the lifetime of the intestate. *Held:* The plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. *Perry v. Trust Co.*, 642.

In an action by plaintiff to recover his distributive share of an estate of which defendant is administrator, where defendant sets up and pleads debts of plaintiff due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff has no application. *Ibid.*

§ 24. Distribution of Estate Under Family Agreements.

Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes, or controversies, when approved by the court, are valid and binding. *Fish v. Hanson*, 143.

Where testator died in May, 1933, leaving specific legacies to his daughters and debts totaling substantially the value of the estate, with residuum to be held in trust and income paid to his widow for life, then to go to the daughters, and all parties agreed to delay the settlement of the estate, collect the income, sell assets as advisable, and use income and proceeds of sales to pay debts and specific legacies, the daughters agreeing not to demand their legacies before the estate was worked out satisfactorily, a family agreement results and the widow is not entitled to receive from the residuum the income used in part to settle the debts. *Ibid.*

§ 26. Final Account and Settlement.

While the clerk of the Superior Court is not necessarily bound by an agreement of the parties to approve an account and is free to exercise his own judgment on matters of probate as long as they are before him, the agreement does bind the parties who signed it, in the absence of mistake or fraud or other inequitable conduct. *S. v. Griggs*, 279.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 27. Proceedings to Force Accounting.

While the clerk of the Superior Court has exclusive original jurisdiction as to matters of probate and the judge has no power therein unless the matter is brought before him by appeal, the Superior Court in term is by statute constituted a forum for the settlement of controversies over estates. C. S., 135. *S. v. Griggs*, 279.

The next of kin of an intestate have a cause of action for their distributive shares against the administrator of the intestate, which cause of action does not survive, on the death of such administrator, against *his* administrator, but against the administrator *de bonis non* of the first intestate. *Snipes v. Estates Administration, Inc.*, 776.

Upon the death of an administrator, the better procedure is for the next of kin to bring an action for an accounting against *his* administrator, only after the administrator *de bonis non* of the first intestate has refused to do so. However, should the administrator *de bonis non* fail to bring such action, the next of kin may bring the same and the court will make the administrator *de bonis non* a party defendant and refuse to dismiss the action. This Court may remand such a case for the making of necessary parties. *Ibid.*

§§ 31, 33b. Actions to Surcharge and Falsify Account: Proceedings to Enforce Liabilities.

The Superior Courts have original, concurrent jurisdiction with the probate courts in actions against executors, administrators, collectors and guardians, to order an account to be taken and to adjudge application and distribution of funds ascertained, or to grant other relief, as the nature of the case may require. C. S., 135. *Casualty Co. v. Lawing*, 8.

FIDUCIARIES.

§ 2. Duties and Liabilities.

In certain known and definite fiduciary relations, if there be dealing between the parties, on complaint of the party in the power of the other, the relation of itself raises a presumption of fraud as a matter of law, which annuls the act unless such presumption be rebutted. Among these relations are (1) trustee and *cestui que trust;* (2) attorney and client; (3) mortgagor and mortgagee; (4) guardian and ward; and (5) principal and agent. *McNeill v. McNeill*, 178.

FISH AND FISHERIES.

§ 4. Rights to Fish: Private and Public.

A riparian proprietor who owns no part of the bed of navigable waters has no several and exclusive fishery therein. *Hampton v. Pulp Co.*, 535.

The necessities of a person whose business is taking fish from a common fishery and one, who by reason of his riparian ownership of the bed of the river, has a several and exclusive fishery are precisely the same, and the same principles of law must apply with respect to the migration of fish. *Ibid.*

The public has a common right to fish in all navigable waters, provided that right is exercised with due regard for the rights of others. *Ibid.*

§ 5. Action for Interference With Fish and Fisheries.

Owners of several and exclusive fisheries upstream may maintain an action for wrongful interference with the migratory passage of the fish whereby these fisheries are injured. *Hampton v. Pulp Co.*, 535.

FISH AND FISHERIES—*Continued.*

In an action by plaintiff, a riparian proprietor on a navigable river, against defendant, where the complaint alleges that plaintiff is the owner of a long established fishery from the shores of his property along such stream and that plaintiff has suffered damages thereto by the interference of defendant in polluting the waters of the river with matter deleterious to fish life, discharged as waste from defendant's recently established mill, causing a public nuisance and seriously interrupting the migratory passage of fish, it was error for the court below to sustain a demurrer to the complaint as not stating a cause of action. *Ibid.*

FRAUD.

§ 1. In General.

Where one of two innocent persons must suffer loss by the fraud of a third person, he who first reposes the confidence must bear the loss. *S. v. Sawyer*, 102.

To create a right of action for deceit there must be a statement by defendant (a) untrue in fact, (b) known by him to be untrue or made with reckless ignorance as to whether it be true or not, (c) made with intent that the plaintiff shall act upon it, and (d) upon which plaintiff acts to his damage. *Small v. Dorsett*, 754.

Where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute, which was designed to prevent fraud, to become an instrument to perpetrate and perpetuate it. *Ibid.*

§ 5. Deception and Reliance Upon Misrepresentation.

If a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief. *Small v. Dorsett*, 754.

Where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute, which was designed to prevent fraud, to become an instrument to perpetrate and perpetuate it. *Ibid.*

§ 6. Damage.

In an action by plaintiff against defendant for fraud in that defendant induced plaintiff to invest in a note, secured by mortgage on realty of inadequate value, the fact that plaintiff marked the note and mortgage "paid in full" upon a sale of the property, in an effort to realize as much as possible out of the security, is not evidence of an estoppel, but goes only to the measure of damages. *Small v. Dorsett*, 754.

After learning of the fraud of defendant, the plaintiff may ratify the contract, keep the consideration and sue defendant for the damages suffered by reason of the fraud. *Ibid.*

§ 8. Pleadings.

Conceding the complaint to be a petition for a writ of *certiorari*, C. S., 630, it fails to make a proper showing of merit, upon which alone *certiorari* will issue, for the mere allegation of fraud is insufficient. The law requires that, if fraud is relied upon, all essential facts and elements constituting the fraud must affirmatively appear from the pleading. *Hunsucker v. Winborne*, 650.

FRAUD—*Continued.*

§ 11. Sufficiency of Evidence.

In an action by plaintiffs to have a tax deed to the *feme* defendant Harrelson set aside as fraudulent or to have grantee declared a trustee, where the evidence tended to show that the Harrelsons were plaintiffs' rental agents and as such allowed the property to be sold for taxes and *feme* defendant bought same at tax sale and sold parts thereof to the other defendants, one of them paying a consideration and the others none, judgment of nonsuit was proper as to the purchaser who paid a consideration, and improper as to all other defendants. *Sellers v. Harrelson*, 138.

In certain known and definite fiduciary relations, if there be dealing between the parties, on complaint of the party in the power of the other, the relation of itself raises a presumption of fraud as a matter of law, which annuls the act unless such presumption be rebutted. Among these relations are (1) trustee and *cestui que trust;* (2) attorney and client; (3) mortgagor and mortgagee; (4) guardian and ward; and (5) principal and agent. *McNeill v. McNeill*, 178.

Where defendant, a banker of wide financial dealings, invested in a real estate mortgage the money of plaintiff, an elderly woman of no business experience and of limited education and an old friend of defendant, and defendant represented that the investment was "as good as gold" and could be collected at any time, and he also promised to collect the interest and see that taxes were paid on the land, but allowed the land to be sold for taxes, without notice to plaintiff, there is sufficient evidence on the question of fraud to go to the jury in a suit instituted within three years of the discovery of the sale for taxes. C. S., 441 (9). *Small v. Dorsett*, 754.

The mere relation of parent and child, without any evidence of intimate or fiduciary relationship, does not raise a presumption of fraud or of undue influence. *Gerringer v. Gerringer*, 818.

Where in consideration of an agreement by his son and daughter to support him, plaintiff executed a fee simple deed, conveying all of his real estate to such son and daughter and about a year thereafter changed his mind and wanted his land back, there is no evidence of fraud or undue influence and motion for judgment as of nonsuit was properly allowed. *Ibid.*

FRAUDS, STATUTE OF.

§§ 2, 5, 7. Sufficiency of Writing: Application: Evidence.

Whether a promise is an original one, not coming within the statute of frauds, or a collateral one, required by the statute to be in writing, is to be determined from the circumstances of its making, the situation of the parties, and the objects sought to be accomplished. Where the intent is doubtful the solution usually lies in summoning the aid of a jury. *Farmers Federation, Inc., v. Morris*, 467.

In respect of the character of a promise, whether or not it is original or collateral under the statute of frauds, it is competent to show that the defendant had a personal, immediate and pecuniary interest in the transaction, and for this purpose it is proper to inquire about his entire connection with the person for whom the debt was made. *Ibid.*

§ 9. Application in General.

An oral contract to give or devise real estate is void by reason of the statute of frauds, C. S., 988, and no action for a breach thereof can be maintained. *Daughtry v. Daughtry*, 528.

FRAUDS, STATUTE OF—*Continued.*

Where personal services have been rendered in compliance with an oral contract to give or devise real estate and such contract is void by reason of the statute of frauds, the party injured by the breach thereof may maintain an action on implied *assumpsit* or *quantum meruit* for the value of the services rendered. *Ibid.*

§ 12. Parol Trusts.

The section of the English statute of frauds relating to parol trusts has not been enacted in North Carolina and our present statute, G. S., 22-2, has no application to such trusts and does not prohibit their establishment by parol evidence. And such proof is not a violation of the rule prohibiting parol evidence to contradict, alter or explain a written instrument. *Thompson v. Davis*, 792.

GIFTS.

§ 2. Operation and Effect.

A deed of gift of an estate of any nature, if not proven in due form and registered within two years after the making of it, is void. C. S., 3315. *Winstead v. Woolard*, 814.

Between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void *ab initio* and title vests in the grantor. *Ibid.*

GUARDIAN AND WARD.

§ 6. Hearings.

Where a person has been adjudged incompetent, under C. S., 2285, and a trustee of his property appointed, and thereafter, upon petition before the clerk under C. S., 2287, by the person so adjudged incompetent, after his trustee or guardian has been made a party as required by ch. 145, Public Laws 1941, he is found competent by a jury and is so adjudged by the clerk, the Superior Court has power to review the matter, on proper showing for *certiorari* by the trustee or guardian, and it would seem that the procedure provided in C. S., 2285, on appeal might appropriately be followed on such review. *In re Jeffress*, 273.

§ 7. Execution of Bond and Order of Appointment.

In a proceeding under C. S., 1744, to sell all the contingent interest in certain lands of minors and unborn children, the petitioners, who were represented by a guardian, where judgment of sale was signed on the day before the guardian's appointment, such judgment is void. *Butler v. Winston*, 421.

§ 18. Actions Which May Be Instituted by Guardian.

The policy of the law will not permit an issue of *devisavit vel non* to be determined by the consent of the parties thereto, where some of them are infants. *Butler v. Winston*, 421.

In the case of infant parties, the next friend, guardian *ad litem*, or guardian cannot consent to a judgment against the infant, without an investigation and approval by the court. *Ibid.*

§§ 23, 24. Nature and Extent of Liability in General: Bonds and Sureties Liable.

As a general rule, the surety on a guardian's bond is a creditor of his principal from the date of its execution, although no default occurs until long afterwards. *Casualty Co. v. Lawing*, 8.

GUARDIAN AND WARD—*Continued.*

§ 25. Actions on Bonds.

The Superior Courts have original, concurrent jurisdiction with the probate courts in actions against executors, administrators, collectors and guardians, to order an account to be taken and to adjudge application and distribution of funds ascertained, or to grant other relief, as the nature of the case may require. C. S., 135. *Casualty Co. v. Lawing*, 8.

Where a guardian uses the guardianship funds to improve and keep up property in which she is interested along with the wards, contributing nothing from her own funds but taking her share of the rents, and violates her obligations as guardian in other respects, the surety on the guardian bond can maintain an action in the Superior Court to terminate the guardianship, to enforce the liability of the guardian in exoneration of the surety, and to surcharge and correct the guardian's accounts. *Ibid.*

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Children.

Original jurisdiction has been conferred upon the Juvenile Court to find a child delinquent or neglected, C. S., 5039, but this statute does not repeal C. S., 2241, and is not inconsistent therewith. The Superior Court as such has exclusive jurisdiction, by writ of *habeas corpus*, to hear and determine the custody of children of parents separated but not divorced. *In re Prevatt*, 833.

HIGHWAYS.

§ 6. Public Roads in General.

The term *highway* is the generic name for all public ways, including roads, streets, railroads, bridges, canals, navigable rivers; and *roads* and *streets* include all highways by land. *Parsons v. Wright*, 520.

§ 7. Roads and Highways Constituting Part of State System.

Cartways are an auxiliary part of the public road system and they are designated *quasi*-public roads, and the condemnation of private property for such use has been sustained upon the ground that it is a valid exercise of the power of eminent domain. *Parsons v. Wright*, 520.

General statutes of the State, in regard to public highways, do not apply to the streets and alleys of an incorporated town or city, and the county authorities have no power or authority over such streets and alleys. *Ibid.*

§ 13. Nature and Right to Establish.

A *quasi*-public way located in a rural section is, under our statute, a cartway. When it is within the corporate limits of a town or city it is an alley. Location determines the name, but the essential characteristics are the same. *Parsons v. Wright*, 520.

§ 14. Establishment and Maintenance.

The law relating to cartways, Public Laws 1931, ch. 448, was not intended to withdraw from cities and towns any part of their exclusive control over their streets, and other public ways, and confers no jurisdiction on the clerk of the Superior Court to establish an alley within an incorporated town. *Parsons v. Wright*, 520.

HOMICIDE.

§ 1. Elements of and Distinction Between Degrees of Homicides.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Utley*, 39; *S. v. Burrage*, 129.

When the intentional use of a deadly weapon, in an unlawful manner, is admitted or proven and, as a result of such unlawful use, an innocent bystander is killed, nothing else appearing, it is murder. *S. v. Davis*, 381.

§§ 4b, 5. Malice: Murder in Second Degree in General.

The intentional use of a deadly weapon in a homicide imports malice and raises a rebuttable presumption of murder in the second degree, placing the burden upon the defendant to show such circumstances as may reduce the crime to manslaughter, or entitle him to an acquittal. *S. v. Davis*, 381; *S. v. Prince*, 392.

§§ 6a, 6b. Unlawful Killing of Human Being: With Malice.

The intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. And upon proof or admission of an intentional killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it. *S. v. Utley*, 39; *S. v. Burrage*, 129.

§ 11. Self-defense.

In a prosecution for homicide, where defendants are on their own premises, they are under no obligation to retreat, and if assaulted, they have the right to stand their ground and return blow for blow, or shot for shot, in their own necessary self-defense; and they are under no duty to "quit the combat" or give notice that they have abandoned the fight thus thrust upon them. They are entitled to have the law of self-defense, as applied to these facts, explained to the jury. *S. v. Miller*, 184.

Where an intentional killing is accompanied by the use of a deadly weapon, a rebuttable presumption arises of murder in the second degree, and it is thereupon incumbent on the accused to show mitigating circumstances that will reduce the crime to manslaughter, or such facts as will exonerate him altogether; and self-defense, if established to the satisfaction of the jury, will entitle him to an acquittal. *S. v. Grainger*, 716.

One may kill in defense of himself or his family when it is not actually necessary to prevent death or great bodily harm, if he believes it necessary and has reasonable ground for such belief. The reasonableness of the belief or apprehension of defendant must be judged by the jury, from the facts and circumstances as they appeared to defendant at the time of the killing. *S. v. Ellerbe*, 770.

In an assault without felonious intent, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow; while, in an assault with felonious intent, the person assaulted is under no obligation to fly, but may stand his ground and kill his adversary, if need be. *Ibid.*

HOMICIDE—*Continued.*

§ 14. Requisites and Sufficiency of Indictment.

A bill of indictment, drawn in the statutory form as required by C. S., 4614, includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect. *S. v. Smith*, 457.

C. S., 4200, does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth. *Ibid.*

§ 16. Presumptions and Burden of Proof.

The intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. And upon proof or admission of an intentional killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it. *S. v. Utley*, 39; *S. v. Burrage*, 129; *S. v. Davis*, 381; *S. v. Prince*, 392.

When the intentional use of a deadly weapon, in an unlawful manner, is admitted or proven and, as a result of such unlawful use, an innocent bystander is killed, nothing else appearing, it is murder. *S. v. Davis*, 381.

Where no admission is made or presumption raised, calling for an explanation or reply on the part of the defendant, the plea of not guilty challenges the credibility of the evidence, even if uncontradicted, since there is a presumption of innocence which can only be overcome by a verdict of the jury. *Ibid.*

In a homicide case, where proofs or admissions have raised a presumption of murder in the second degree, the law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury—the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident or misadventure. *S. v. Prince*, 392.

At the threshold of a criminal prosecution for homicide, the burden is on the State to establish the guilt of the accused beyond a reasonable doubt; hence, the intermediate steps necessary to invoke the aid of the legal presumptions of murder and manslaughter must first be taken by the prosecution. *S. v. DeGraffenreid*, 461.

Upon admission or proof of an intentional killing of a human being with a deadly weapon, the law raises two presumptions against the slayer, first, that the killing was unlawful, and, second, that it was done with malice: and an unlawful killing with malice is murder in the second degree. But the jury alone may determine whether an intentional killing has been established, where no admission of the fact is made. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

In a prosecution for murder, where the record does not disclose the testimony of any witness to the effect that deceased came to his death as a result of a pistol shot fired by defendants, but does disclose that deceased was shot with a pistol by one defendant, aided and abetted by the other defendant, that only one shot was fired within a few feet from deceased, who fell at the shot, blood pouring from his mouth and nose, and that shortly thereafter he died with only one wound in his body, motion for nonsuit was properly denied. *S. v. McKinnon*, 160.

Where no admission is made or presumption raised, calling for an explanation or reply on the part of the defendant, the plea of not guilty challenges the

credibility of the evidence, even if uncontradicted, since there is a presumption of innocence which can only be overcome by a verdict of the jury. *S. v. Davis*, 381.

When the intentional use of a deadly weapon, in an unlawful manner, is admitted or proven and, as a result of such unlawful use, an innocent bystander is killed, nothing else appearing, it is murder. *Ibid.*

§ 27a. Form and Sufficiency of Instructions in General.

In a prosecution for murder a charge to the jury in these words, "and if you find that in shooting and killing the deceased he (accused) did so with premeditation and deliberation, that would constitute murder in the first degree," is not reversible error, when it appears from the charge in its entirety that the court properly instructed the jury in respect to the burden of proof and repeated the instruction several times. *S. v. Grass*, 31.

In a homicide case, where the defendant offered no evidence and the State's evidence showed an intentional and unlawful killing with a deadly weapon, without mitigating circumstances which would reduce the offense to manslaughter or entitle defendant to an acquittal, there is no error in a charge that, if the jury believe the testimony and find the facts, beyond a reasonable doubt, to be as all the witnesses testified, it is their duty to bring in a verdict of murder in the second degree. *S. v. Davis*, 381.

In a homicide case, where proofs or admissions have raised a presumption of murder in the second degree, the law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury—the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident or misadventure; and a charge that proof "to the satisfaction of the jury" requires a stronger intensity and higher degree of proof than what is described as proof "by the greater weight of the evidence" is erroneous and entitles defendant to a new trial. *S. v. Prince*, 392.

§ 27b. On Presumptions and Burden of Proof.

In a prosecution for murder, where the killing is not denied and where defendant pleaded self-defense and took the stand and testified that he was attacked by deceased, the court's charge as follows was not erroneous—"to create manslaughter the defendant, and not the State, has the burden of showing there was no malice: and if he would be entirely absolved, he must go further and establish that the killing was not unlawful, that is, that it was done in self-defense." *S. v. Utley*, 39.

While, to show mitigation or such facts as would excuse the homicide altogether, the defendant may avail himself of the State's evidence, and in fact any evidence adduced upon the trial, the court's instruction, that it is incumbent on the defendant to show mitigating circumstances "through his own evidence or the evidence of his witnesses," is not prejudicial error where there is nothing in the State's evidence favorable to defendant in that regard. *S. v. Grainger*, 716.

§ 27c. On Question of Murder in First Degree.

In a prosecution for murder a charge to the jury in these words, "and if you find that in shooting and killing the deceased he (accused) did so with premeditation and deliberation, that would constitute murder in the first degree," is not reversible error, when it appears from the charge in its entirety

that the court properly instructed the jury in respect to the burden of proof and repeated the instruction several times. *S. v. Grass*, 31.

§ 27d. On Question of Murder in Second Degree.

On trial under an indictment for murder, where defendant contends and offers evidence tending to show that he did not intend to kill deceased but that she was shot in a struggle over a pistol in his hand, a failure to instruct the jury that the presumption of murder in the second degree only arises upon an admission, or proof of the fact, of an intentional killing with a deadly weapon is prejudicial error. *S. v. Burrage*, 129.

In a homicide case, where the defendant offered no evidence and the State's evidence showed an intentional and unlawful killing with a deadly weapon, without mitigating circumstances which would reduce the offense to manslaughter or entitle defendant to an acquittal, there is no error in a charge that, if the jury believe the testimony and find the facts, beyond a reasonable doubt, to be as all the witnesses testified, it is their duty to bring in a verdict of murder in the second degree. *S. v. Davis*, 381.

In a homicide case, where proofs or admissions have raised a presumption of murder in the second degree, the law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury—the legal provocation that will rob the crime of malice and thus reduce it to manslaughter. *S. v. Prince*, 392.

§ 27e. On Question of Manslaughter.

In a homicide case a charge that, if the jury is satisfied that the killing was without malice but the prisoner fails to satisfy them that the killing was not unlawful, it would be their duty to return a verdict of manslaughter, is erroneous as presupposing an intentional killing with a deadly weapon. And a verdict of murder in the second degree will not cure the error. *S. v. DeGraffenreid*, 461.

§ 27f. On Question of Defenses.

Where, in a prosecution for murder, the Millers, father and son, defendants, and the deceased Grimsleys, father and son, engaged in a fight and both sides retired from the field, and the defendants' evidence tends to show that thereafter while the two defendants were at work in or near the barn on their own premises, they were murderously assaulted with firearms by the Grimsleys and in their self-defense shot and killed both Grimsleys, it was reversible error for the court to charge the jury that self-defense would not be available to the defendants, if they provoked the fight by language or conduct towards the Grimsleys which was calculated or intended to bring about the difficulty, unless they had abandoned the fight and given their adversaries notice thereof. *S. v. Miller*, 184.

Upon a plea of self-defense in a homicide case, the court's instruction to the jury, that the defendant must show that he was free from blame and that the assault or threatened assault was made upon him with a felonious purpose and that he took the life of the person who threatened to assault him, or the person that he had reasonable ground to believe was threatening to assault him, only when it was necessary to save himself from death or great bodily harm, is error. *S. v. Ellerbe*, 770.

HOMICIDE—*Continued.*

§ 27h. Form and Sufficiency of Issues and Instruction on Less Degrees of Crime Charged.

Where all the evidence tends to show that the murder was committed in the perpetration of a robbery, the trial court is not required to instruct the jury on defendant's guilt of a lesser degree of the crime. *S. v. Smith*, 457.

On the trial of a criminal prosecution, when under the indictment it is permissible to convict the defendant of "a less degree of the same crime" (C. S., 4640), and there is evidence tending to support the milder verdict, the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in respect to the lesser offense is not cured by a verdict convicting defendant of a higher offense charged in the indictment. *S. v. DeGraffenreid*, 461.

§ 28. Verdict.

In a homicide case a charge that, if the jury is satisfied that the killing was without malice but the prisoner fails to satisfy them that the killing was not unlawful, it would be their duty to return a verdict of manslaughter, is erroneous as presupposing an intentional killing with a deadly weapon. And a verdict of murder in the second degree will not cure the error. *S. v. DeGraffenreid*, 461.

HUSBAND AND WIFE.

§ 1. Mutual Rights and Duties in General.

Neither husband nor wife, without lawful cause, so long as the marital relation exists, can exclude the other from the home they have established by mutual and voluntary choice. *Stone v. Guion*, 831.

§ 11. Creation of Estates by Entirety.

An exchange of deeds by tenants in common, where the purpose is clearly partition, does not create or confer upon the parties any new or different title; and where a husband, in such a partition, is made a joint grantee with his wife he acquires no title. *Duckett v. Lyda*, 356.

§ 12a. Nature and Incidents.

The fact that the title is an estate by the entireties presents no obstacle to the enforcement of the equity of a parol trust, if properly shown to exist. *Thompson v. Davis*, 792.

§§ 33, 34. Pleadings: Evidence.

Connivance of the husband in the adultery of his wife constitutes a defense to an action for criminal conversation, and equally so to an action for the alienation of her affections. *Barker v. Dowdy*, 151.

In an action for damages by the husband against defendant for criminal conversation and alienation of his wife's affections, where the complaint alleges facts sufficient to constitute a cause of action, but admits that for six months plaintiff continued to live with his wife, protested and pleaded with her to live properly, which she refused, and alleges further that she is now living with defendant in adultery, a demurrer to the complaint was properly overruled. *Ibid.*

§§ 38, 40. Pleadings: Instructions.

Connivance of the husband in the adultery of his wife constitutes a defense to an action for criminal conversation, and equally so to an action for the alienation of her affections. *Barker v. Dowdy*, 151.

HUSBAND AND WIFE—*Continued.*

In an action for damages by the husband against defendant for criminal conversation and alienation of his wife's affections, where the complaint alleges facts sufficient to constitute a cause of action, but admits that for six months plaintiff continued to live with his wife, protested and pleaded with her to live properly, which she refused, and alleges further that she is now living with defendant in adultery on his farm, a demurrer to the complaint was properly overruled. *Ibid.*

INDICTMENT.

§ 7. Formal Requisites.

The purpose of an indictment is twofold: first, to make clear the offense charged so that the investigation may be so confined, that proper procedure may be followed and applicable law invoked; second, to put defendant on reasonable notice so that he may make his defense. *S. v. Gregory*, 415.

§ 9. Charge of Crime.

Where there is no challenge to the indictment prior to a plea of guilty, under C. S., 4606, the offense is deemed to have been committed in the county alleged in the indictment. *S. v. McKeon*, 404.

As a general rule, an indictment is sufficient when it charges the offense in the language of the statute. *S. v. Gregory*, 415.

In an indictment, under Michie's Code, sec. 4214, it is not necessary to describe the injury further than in the words of the statute. *Ibid.*

§ 11. Definiteness and Sufficiency in General.

On the trial of an indictment for carnal knowledge of a female under 16 years of age, C. S., 4209, time is not of the essence of the offense and a variance between allegation and proof as to the date is not material, the statute of limitations not being involved. *S. v. Baxley*, 210.

§ 12. Time of Making Motion to Quash.

If a motion to quash is not made before a plea of not guilty, the motion is addressed to the discretion of the trial court and is not reviewable on appeal. *S. v. Suddreth*, 610.

§ 15. Right to Amend.

In a criminal prosecution in a municipal court for the unlawful (1) barter, sale, exchange, (2) transportation, (3) purchase, receipt, possession (for the purpose of sale) of intoxicating liquors, it appearing (though not in the record) that the phrase "for the purpose of sale" was inserted by amendment of warrant in the Superior Court, after the State has rested its case, conceding that the court erred in permitting such amendment, the error is harmless, as the jury returned a general verdict of guilty as charged—and there were two other counts in the warrant. *S. v. Hill*, 753.

§ 18. Motions and Hearings.

The granting or denial of motions for bills of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof. *S. v. Lippard*, 167.

§ 24. Necessity of Allegation in Indictment to Support Proof.

On the trial of an indictment for carnal knowledge of a female under 16 years of age, C. S., 4209, time is not of the essence of the offense and a vari-

INDICTMENT—*Continued.*

ance between allegation and proof as to the date is not material, the statute of limitations not being involved. *S. v. Baxley*, 210.

INFANTS.

§ 1. Supervision and Protection of Courts of Equity.

The Court will never make a decree when one of the parties sues by a next friend, who has, or may have, an interest in the suit opposed to that of the infant. And even the next friend's attorney must be equally disinterested. A mere colorable, adverse interest is a sufficient disqualification for either. *Butler v. Winston*, 421.

§ 10. Appointment of Next Friend.

The appointment of a guardian *ad litem* is to protect the interest of the infant defendant at every stage of the proceeding, and the court will not approve an order appointing a guardian *nunc pro tunc*. *Butler v. Winston*, 421.

In a proceeding under C. S., 1744, to sell all the contingent interest in certain lands of minors and unborn children, the petitioners, who were represented by a guardian, where judgment of sale was signed on the day before the guardian's appointment, such judgment is void. *Ibid.*

§ 12. Appointment of Guardian Ad Litem.

The appointment of a guardian *ad litem* is to protect the interest of the infant defendant at every stage of the proceeding, and the court will not approve an order appointing a guardian *nunc pro tunc*. *Butler v. Winston*, 421.

In a proceeding under C. S., 1744, to sell all the contingent interest in certain lands of minors and unborn children, the petitioners, who were represented by a guardian, where judgment of sale was signed on the day before the guardian's appointment, such judgment is void. *Ibid.*

In a suit to enforce a tax lien (C. S., 7987) by foreclosure (C. S., 7990), where the affidavit, orders and notices appear sufficient in form to constitute service by publication upon all persons named therein, both adult and minors, their heirs and assigns, known and unknown, C. S., 484 (3) and (7), yet, minors, if any, must be represented by guardian, or guardian *ad litem*, otherwise such minors are not bound by the judgments in the action. C. S., 451, 452, 453, and Machinery Act of 1939, ch. 310, Art. XVII, sec. 1719 (e). *Park, Inc. v. Brinn*, 502.

Where the record in a tax foreclosure proceeding shows an unknown party in interest, without evidence and finding that he left no minor heirs and no other heirs not before the court, the judgment confirming the sale and deed to the purchaser are invalid as to the interest of any minor heirs of such party. *Ibid.*

§ 14. Duties and Liabilities of Guardian Ad Litem.

The Court will never make a decree when one of the parties sues by a next friend, who has, or may have, an interest in the suit opposed to that of the infant. And even the next friend's attorney must be equally disinterested. A mere colorable, adverse interest is a sufficient disqualification for either. *Butler v. Winston*, 421.

In the case of infant parties, the next friend, guardian *ad litem* or guardian cannot consent to a judgment against the infant, without an investigation and approval by the court. *Ibid.*

INFANTS—*Continued.*

§ 15. Joinder of Infants.

In a suit to enforce a tax lien (C. S., 7987) by foreclosure (C. S., 7990), where the affidavit, orders and notices appear sufficient in form to constitute service by publication upon all persons named therein, both adult and minors, their heirs and assigns, known and unknown, C. S., 484 (3) and (7), yet, minors, if any, must be represented by guardian, or guardian *ad litem*, otherwise such minors are not bound by the judgments in the action. C. S., 451, 452, 453, and Machinery Act of 1939, ch. 310, Art. XVII, sec. 1719 (e). *Park, Inc. v. Brinn*, 502.

Where the record in a tax foreclosure proceeding shows an unknown party in interest, without evidence and finding that he left no minor heirs and no other heirs not before the court, the judgment confirming the sale and deed to the purchaser are invalid as to the interest of any minor heirs of such party. *Ibid.*

§ 16. Funds of Infants in Hands of Clerk.

In this jurisdiction the liability of the clerk of the Superior Court for the safety of funds of infants, placed in his hands by virtue of his office, is that of an insurer. *S. v. Sawyer*, 102.

§ 17. Transfer of Funds to Other States.

In order to authorize the transfer of the funds of an infant domiciled in this State to a guardian in another state, the petition and proceeding prescribed by C. S., 2195, are jurisdictional; and an order, by the judge of the Superior Court or clerk, for its transfer otherwise is void. *S. v. Sawyer*, 102.

INJUNCTION.

§ 9. Ordinances.

Ordinarily, injunction does not lie to restrain the enforcement of an alleged invalid municipal ordinance. *Suddreth v. Charlotte*, 630.

In the absence of covenants in the deeds or other valid restrictions upon the use of land for a public park, its acquisition and dedication to that purpose is a matter within the discretion of municipal governing authorities and may not be enjoined by the courts. *Dudley v. Charlotte*, 638.

§ 11. Continuance, Modification and Dissolution.

If a plaintiff, applying for injunctive relief as the main remedy sought in the action, has shown probable cause for supposing that he will be able to maintain his primary equity and there is reasonable apprehension of irreparable loss unless it remains in force, or if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's rights until the controversy can be determined, the injunction will be continued to the hearing. *Smith v. Bank*, 249.

INSANE PERSONS.

§§ 11, 12. Validity of Contracts and Conveyances: Attack for Setting Aside.

The law presumes every person sane in the absence of evidence to the contrary. Likewise, after a person is found to be mentally incompetent there is a presumption that the mental incapacity continues. *Davis v. Davis*, 36.

Where a plaintiff sues to cancel his deed and alleges and offers evidence of mental incapacity to make the deed, it is necessary in order to maintain the action to allege and prove a restoration of his mental capacity. *Ibid.*

INSANE PERSONS—*Continued.*

Mental capacity required for the valid execution of a deed is the ability to understand the nature of the act in which the party is engaged and its scope and effect, or its nature and consequence; not that he should be able to act wisely or discreetly, nor to drive a hard bargain, but that he should be in such possession of his faculties as to know at least what he is doing. *Ibid.*

§ 15. Representation of Incompetent.

In the case of infant parties, the next friend, guardian *ad litem* or guardian cannot consent to a judgment against the infant without an investigation and approval by the court. *Butler v. Winston*, 421.

§§ 17, 18. Hearing: Review.

Where a person has been adjudged incompetent, under C. S., 2285, and a trustee of his property appointed, and thereafter, upon petition before the clerk under C. S., 2287, by the person so adjudged incompetent, after his trustee or guardian has been made a party as required by ch. 145, Public Laws 1941, he is found competent by a jury and is so adjudged by the clerk, the Superior Court has power to review the matter, on proper showing for *certiorari* by the trustee or guardian, and it would seem that the procedure provided in C. S., 2285, on appeal might appropriately be followed on such review. *In re Jeffress*, 273.

INSURANCE.

§§ 21, 22d. Mortgagee Clauses: Avoidance for Breach of Representation of Warranty of Sole Ownership.

In an action by plaintiff to recover on a fire insurance policy, with loss payable clause to plaintiff, as mortgagee, and resisted under provision making policy void for failure to give ownership, when other than sole and unconditional, where the existence of another mortgage at the time of issuance of policy does not affirmatively appear, judgment of nonsuit was erroneous. *Bank v. Ins. Co.*, 390.

Under fire insurance policy providing that policy shall be void for failure to give ownership, when other than sole and unconditional, the existence of an undisclosed mortgage on the insured property would seem to vitiate the policy or relieve the company from liability thereunder, except as to any lien, mortgage, or other encumbrance specifically set forth therein as required by the policy. *Ibid.*

§ 24d. Persons Entitled to Payment.

Where a part of a hotel building, including certain furniture and fixtures which were adjudged part of and a necessary incident to the realty, was allotted to and accepted by the widow, in the settlement of her husband's estate, as realty and as her dower, such furniture and fixtures must be considered a part of the realty in adjusting a division, between the widow and heir, of fire insurance collected for a loss on the property. *Smith v. Smith*, 433.

§ 25c. Evidence and Burden of Proof.

Discrepancies and contradictions in plaintiff's evidence (here whether or not suit was brought within the time specified in an insurance policy) are for the jury, and not for the court. *Bank v. Ins. Co.*, 390.

§ 25d. Trial.

In an action to recover on an insurance policy for fire damage to an airplane, the court's charge to the jury, that the measure of damages is the

INSURANCE—*Continued.*

difference in the reasonable market value of the airplane immediately before the fire and immediately thereafter, is erroneous, when the policy upon which the action is bottomed prescribes otherwise for the measure of recovery. *Andrews v. Ins. Co.*, 583.

§ 32c. Cancellation of Certificates Under Group Insurance.

Where, under contract sued on, insurance on life of insured ceased when his employment by the Johnston Manufacturing Company terminated, with proviso that if, at such termination, insured was wholly disabled and prevented by disease from engaging in employment for wage or profit, the insurance would remain in force, and the evidence of plaintiff tended to show that insured was engaged in the same occupation, with reasonable continuity, for a considerable period, after the termination of the service and to within a few days of his death, defendant's motion for nonsuit at close of all the evidence was properly allowed. *Gregory v. Ins. Co.*, 124.

§ 32d. Rights of Parties Upon Cancellation.

In an action to recover under the terms of a life insurance policy, where plaintiff also alleges a wrongful cancellation of the policy, such allegation is an additional cause of action and, defendant admitting the cancellation, it was error for the trial court to refuse to submit an issue on the question of such cancellation. *Abrams v. Ins. Co.*, 500.

INTEREST.

§ 2. Time and Computation.

Annuities, under C. S., 1791, must be computed at four and one-half per cent and not at six per cent. *Smith v. Smith*, 433.

INTOXICATING LIQUORS.

§ 2. Construction and Operation of Statutes.

The Alcoholic Beverage Control Acts have not modified C. S., 3411 (b), in such a manner as to permit the purchase or sale of intoxicating liquors in Mecklenburg County, which has not authorized the establishment of A.B.C. stores. *S. v. Gray*, 120.

The different provisions of Public Laws of 1939, ch. 158, relative to granting license for the sale of beer and wine, are *pari materia* and must be read together as one connected whole. *McCotter v. Reel*, 486.

And "on premises" license to sell beer is not available, as a matter of right, to any citizen who may qualify under the provisions of sec. 511, Public Laws 1939, ch. 158. Compulsory issuance thereof is in any event limited to the businesses enumerated in sec. 509. *Ibid.*

In applying to a board of town commissioners for an "on premises" license to sell beer, petitioner seeks the right to engage in a business regulated by statutes, which prescribe certain conditions precedent thereto and require the governing body of the municipality to determine the facts upon which issuance of the license depends. Where this body considers the application and denies the license, the presumption is that it found facts sufficient to support its conclusions, and judgment, denying a writ of *mandamus* and dismissing the action, should be entered. *Ibid.*

INTOXICATING LIQUORS—*Continued.*

§ 4d. Presumptions from Possession.

Where a person has in his possession tax-paid intoxicating liquors in quantity not in excess of one gallon, in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized by ch. 49, Public Laws 1937, nothing else appearing, such possession is not now *prima facie* evidence that such intoxicants are so possessed for the purpose of sale under C. S., 3411 (j). *S. v. Suddreth*, 610.

§ 6a. Sale and Purchase in General.

The acceptance by accused of liquor from one indebted to him, in part payment of the debt, constitutes, in Mecklenburg County, an unlawful purchase sufficient to support a verdict of guilty. *S. v. Gray*, 120.

§ 9a. Indictment.

While an appeal from conviction in a Recorder's Court upon a warrant, charging unlawful possession on a certain date of intoxicating liquors for the purpose of sale, was pending in the Superior Court, that Court had jurisdiction to try the defendant on a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence and need not be specified in the indictment. C. S., 4625. *S. v. Suddreth*, 610.

§ 9d. Sufficiency of Evidence.

The acceptance by accused of liquor from one indebted to him, in part payment of the debt, constitutes, in Mecklenburg County, an unlawful purchase sufficient to support a verdict of guilty. *S. v. Gray*, 120.

In a criminal prosecution for the unlawful possession of intoxicating liquors for the purpose of sale, where all the evidence tended to show that accused had concealed in the apartment occupied as a residence by himself and family, above a store operated by him, five pints of tax-paid liquor, the seals on which had not been broken, and a sixth pint was found by officers at the back door of the store, where an unknown person was seen to "set something down," and some empty bottles, apparently wine bottles, were also found in the store, motion of defendant for judgment of nonsuit, C. S., 4643, should have been sustained. *S. v. Suddreth*, 610.

JUDGES.

§ 2a. Rights, Powers and Duties of Regular Judge.

An order of the judge as to a matter within his jurisdiction, even though erroneous in law, is binding on the clerk, and he is bound to obey or render himself liable to attachment for contempt. But this principle does not apply where the judge's order is void for lack of jurisdiction over the subject matter, or the parties, or the *res*. *S. v. Sawyer*, 102.

Civil actions, pending on the civil issue docket of the Superior Courts, are always subject to motion in the cause, and these motions may be made in some instances in term or out of term. When made in term the presiding judge, whether regular or special, has jurisdiction, sec. 5, ch. 51, Public Laws 1941. *Shepard v. Leonard*, 110.

A regular judge of the Superior Court, except by consent or unless authorized by statute, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending. *Ibid.*

JUDGES—*Continued.*

§ 2b. Special and Emergency Judges.

Where a special judge is commissioned to hold a designated term of Superior Court in a particular county, he has no jurisdiction to enter an order in a cause pending in an adjoining county within the same judicial district. *Shepard v. Leonard*, 110.

Under Art. IV, sec. 11, of the N. C. Constitution the power and authority of special and emergency judges is defined and limited by the words "in the courts which they are appointed to hold"; and the General Assembly is without power to grant such judges jurisdiction in excess of this definite limitation. It does not authorize the Legislature to confer "in chambers" or "vacation" jurisdiction on special judges, assigned to hold a designated term of court. *Ibid.*

Civil actions, pending on the civil issue docket of the Superior Courts, are always subject to motion in the cause, and these motions may be made in some instances in term or out of term. When made in term the presiding judge, whether regular or special, has jurisdiction, sec. 5, ch. 51, Public Laws 1941. *Ibid.*

Once having acquired jurisdiction at term a special or emergency judge, by consent, may hear the matter out of term *nunc pro tunc*. *Ibid.*

JUDGMENTS.

§§ 1, 4. Nature and Essentials: Attack and Setting Aside.

A consent judgment is the contract of the parties, entered upon the records with the approval and sanction of a court of competent jurisdiction, and such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud, or mistake, and in order to vacate such a judgment an independent action must be instituted. *S. v. Griggs*, 279.

§ 8½. Judgments by Default: In General.

The general rule that an unanswered complaint, which has been served with summons on defendant, entitles the plaintiff to judgment by default, applies to actions for foreclosure of tax liens. *Duplin County v. Ezzell*, 531.

§ 15. Operation and Effect.

A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world. *Cannon v. Cannon*, 664.

§§ 20, 21. Land Upon Which Lien Attaches: Life of Lien.

The lien of a judgment, created upon real estate by the provisions of C. S., 614, is for a period of ten years from the date of the rendition of the judgment, and such lien ceases to exist at the end of that time unless suspended in the manner set out in the statute. It is in the interest of public policy that this statute should be strictly construed. *Cheshire v. Drake*, 577.

§ 22a. Parties.

Those claiming through the purchaser of lands, title to which is affected by a void judgment, take subject to the infirmities in the title of their predecessors. *Butler v. Winston*, 421.

Where a judgment is void and that fact appears from the record, it cannot be pleaded as an estoppel, and is subject to collateral attack, and will be treated as a nullity. *Ibid.*

JUDGMENTS—*Continued.*

§ 22b. Procedure: Direct and Collateral Attack.

Where a judgment is void and that fact appears from the record, it cannot be pleaded as an estoppel, and is subject to collateral attack, and will be treated as a nullity. *Butler v. Winston*, 421.

Those claiming through the purchaser of lands, title to which is affected by a void judgment, take subject to the infirmities in the title of their predecessors. *Ibid.*

§ 22e. Attack for Surprise and Excusable Neglect.

Upon judgment *nisi*, in a criminal prosecution, against defendant and his appearance bond and *sci. fa.* served on his surety and upon return at a subsequent term judgment absolute entered against defendant and surety, where subsequently defendants moved to set aside the judgment for surprise and excusable neglect, C. S., 600, for that the case did not appear on the calendar, with no allegation or evidence of any meritorious defense, their motion was properly denied. *S. v. O'Connor*, 469.

§ 22g. For Irregularity.

An irregular judgment is one rendered contrary to the course and practice of the court, and a motion in the cause to set aside a judgment or to vacate subsequent decrees and procedure, on the ground of irregularities, properly presents questions for judicial review, though not all irregularities in procedure are fatal. *Duplin County v. Ezzell*, 531.

§ 22h. For Want of Jurisdiction.

An order of the judge as to a matter within his jurisdiction, even though erroneous in law, is binding on the clerk, and he is bound to obey or render himself liable to attachment for contempt. But this principle does not apply where the judge's order is void for lack of jurisdiction over the subject matter, or the parties, or the *res*. *S. v. Sawyer*, 102.

§ 29. Parties Concluded.

A judgment of a court of competent jurisdiction, removing a clerk of the Superior Court from office, creates a vacancy in the office of clerk, and, when no appeal is taken, is conclusive. *S. v. Watson*, 437.

Parties to a tax foreclosure suit, who have been served, are bound by the judgment therein without regard to: (1) the authority, or want thereof, in an attorney who receipted for their share of proceeds of sale on the judgment docket; or (2) to the validity of a deed to one holding title from purchaser in such tax suit, by a married woman (a party) without the joinder of her husband. *Park, Inc. v. Brinn*, 502.

§ 32. As Bar to Subsequent Action: In General.

There is sufficient identity between two causes to support the plea of *res judicata*, unless the allegations and proof in the second show some substantial element for the support of plaintiff's case which was wanting at the former hearing. *Sample v. Jackson*, 335.

The doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. *Cannon v. Cannon*, 664.

JUDGMENTS—*Continued.*

§ 34. Judgments of Federal Courts and of Other States.

A judgment of a Federal Court will be given full faith and credit in the State court, when pleaded as *res judicata* according to the practice of the Court: but there is no rule which will compel the State court to accept the law as laid down by any other court, State or Federal, where the subject of the controversy, however similar, is different. *Hampton v. Pulp Co.*, 535.

Where testatrix, a resident of this State, by a codicil to her will, gave the residue of her estate to trustees for the benefit of certain persons for life, with remainders over on contingencies, and on the same day this codicil was executed, she revoked certain provisions of a trust deed, theretofore made by her, disposing of other properties and set up, to take effect at her death, a dispositive scheme therefor, identical with that contained in the codicil, for the same persons and upon the same conditions as to title and succession, the construction placed upon this trust deed by the courts of another state is not *res judicata* in an action here to construe the codicil. *Cannon v. Cannon*, 664.

§ 35. Plea of Bar, Hearings and Determination.

The plea of *res judicata* cannot be presented by demurrer, unless the facts supporting it appear on the face of the complaint. It must be taken by answer. C. S., 519 (2). *Hampton v. Pulp Co.*, 535.

Where testatrix, a resident of this State, by a codicil to her will, gave the residue of her estate to trustees for the benefit of certain persons for life, with remainders over on contingencies, and on the same day this codicil was executed, she revoked certain provisions of a trust deed, theretofore made by her, disposing of other properties and set up, to take effect at her death, a dispositive scheme therefor, identical with that contained in the codicil, for the same persons and upon the same conditions as to title and succession, the construction placed upon this trust deed by the courts of another state is not *res judicata* in an action here to construe the codicil, and there was error in overruling demurrers to pleas setting up *res judicata* as a defense and in refusing a motion to strike. *Cannon v. Cannon*, 664.

§ 40. Foreign Judgments.

Under Art. IV, sec. 1, of the Constitution of the United States a judgment of a court of another state, when properly authenticated, is entitled in the courts of this State to be given full faith and credit. *Hat Co., Inc. v. Chizik*, 371.

In an action in this State, based on a judgment rendered by a court of the State of New York, defendant has a right to interpose proper defenses, for example: (1) he may defeat recovery by proof of fraud practiced in obtaining the judgment, which may have prevented an adverse trial; (2) or show want of jurisdiction of person or subject matter; (3) or plead a counterclaim of payments since rendition. *Ibid.*

Where plaintiff brought an action in this State against defendant, based on a judgment of a New York court, and defendant by answer alleged as defense and counterclaim (1) false representations of plaintiff relating to the merits of the subject matter and made anterior to the New York judgment; (2) and an unliquidated claim for damages arising out of an independent tort, plaintiff's demurrer *ore tenus* to such answer, defense and counterclaim was properly allowed. *Ibid.*

JUDICIAL SALES.

§§ 6, 7. Validity and Attack: Title and Rights of Purchaser.

In the absence of fraud, or the knowledge of fraud, one who purchases at a judicial sale, or who purchases from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter, and that the judgment on its face authorized the sale. *Park, Inc. v. Brinn*, 502.

JUSTICES OF THE PEACE.

§ 3. Civil Jurisdiction.

The jurisdiction of a justice of the peace is limited and special—not general—and he can only exercise the power conferred upon him by the Constitution, Art. IV, sec. 27, and statutes, C. S., 1473. He has no equitable powers. *Hopkins v. Barnhardt*, 617.

Neither the Constitution of North Carolina, nor any statutes enacted pursuant thereto, gives jurisdiction to justices of the peace in an action for a penalty plus reasonable attorney's fees to be fixed and awarded by the court. *Ibid.*

JUVENILE COURT.

(See Clerks of Superior Court, sec. 7.)

LABORERS' AND MATERIALMEN'S LIENS.

§ 4. Proceedings to Perfect, in General.

Where a statute required that every purchaser of baled cotton should pay the county cotton weigher ten cents for every bale bought or weighed within the county, giving the weigher a lien for his fee and making a willful and wanton failure to settle with or report to the weigher an indictable offense, the remedies are exclusive and no action for a debt is created. *Moose v. Barrett*, 524.

LANDLORD AND TENANT.

§ 10. Duty to Repair Premises.

It is the duty of the owner of an apartment house to keep that part of the premises, of which he retains control for the use of all the tenants, in a reasonably safe condition. *Carter v. Realty Co.*, 188.

§ 11. Liability for Injuries from Defective or Unsafe Conditions.

A landlord is liable in damages to his tenant, as well as to others, for his negligent or malicious use of his own property and the instrumentalities thereupon under his control; and such liability is in no wise affected or alleviated by the rule that a landlord is not liable for damages occasioned by the conditions of the demised premises or by his failure to repair the same. *Steffan v. Meiselman*, 154.

The landlord is not liable for injuries received by a tenant through failure of the landlord to light a common passageway, or to supply railings or guards, when the condition was the same at the time of the letting. *Carter v. Realty Co.*, 188.

In an action against a landlord to recover damages for personal injuries, where plaintiff's evidence tended to show that she was injured in defendants' apartment house, where she lived as a tenant, by misjudging her step and

falling on a badly lighted, common stairway without railing or guard, which she was in the habit of using, judgment of nonsuit was properly allowed. *Ibid.*

§ 14. Rights and Liabilities of Parties.

In an action between plaintiff and defendant for the recovery of premises leased by defendant to an oil company, which transferred and assigned the lease, without warranty, covenant, or assurance of possession, to plaintiff, an amended complaint against the oil company, which was made a party, containing an allegtion that the company's president told the other defendant that the lease had not been assigned, without any allegation of collusion, is demurrable as not stating a cause of action. *Texas Co. v. Holton*, 497.

LARCENY.

§ 1. Elements of the Crime.

Larceny is the felonious taking and carrying away of the goods and property of another, with the intent to deprive the owner of the use thereof and with a view to some advantage to the taker. *S. v. Cameron*, 449.

Upon a prosecution for larceny of hogs, the evidence tending to show that prosecutor's hogs wandered off to the premises of one of defendants, where they were secured by this defendant and taken by both defendants to a near-by town and sold, there is no error in a charge by the court that, if defendants took the hogs with intent to deprive the rightful owner thereof and dishonestly and fraudulently appropriated them to their own use and disposed of them, they would be guilty of larceny. *S. v. Epps*, 741.

§ 5. Presumptions and Burden of Proof.

Where nearly eight months intervene between the alleged theft and the stolen property being found in the possession of defendants, there is no presumption of fact of guilt of defendants under the doctrine of recent possession. *S. v. Cameron*, 449.

Possession of the fruits of the crime recently after its commission justifies an inference of guilt, and, though only *prima facie* evidence of guilt, may be controlling unless explained by circumstances or accounted for in some way consistent with innocence. *S. v. Holbrook*, 622.

No criterion is to be found for ascertaining just what possession is to be regarded as "recent" and therefore presumptive in cases of larceny and receiving. The term is a relative one and depends on the circumstances of the case. It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor *by his own act* or, at all events, with his *undoubted concurrence* and so recent and under such circumstances as to give reasonable assurance of guilt. *Ibid.*

Where the evidence, in a prosecution of two persons for larceny of hogs, tended to show that one defendant secured the hogs wandering on his premises, and that he with the second defendant took the hogs to a near-by town and sold them, there is no error in a charge that before any presumption would arise that the second defendant was the thief, that is presumption from possession, the jury must be satisfied beyond a reasonable doubt that the second defendant was in possession of the hogs, and that they were in his custody and subject to his control and disposition. *S. v. Epps*, 741.

§ 7. Sufficiency of Evidence and Nonsuit.

In a criminal prosecution for larceny and receiving of a bicycle, where the evidence tended to show that the bicycle was taken in the night from a parked

truck, and was found near the same place about eight months thereafter in the possession of defendants, who made contradictory and false statements about how they came by it, there is not sufficient evidence to convict and a motion for nonsuit should have been granted. C. S., 4643. *S. v. Cameron*, 449.

In a prosecution for larceny, where the State's evidence showed that defendant and a companion entered the filling station of prosecutor who, after making change for defendant, laid his pocketbook on the counter and went out with the companion to service his car, leaving defendant who followed shortly and drove off with his companion, when prosecutor missed his pocketbook and reported to the sheriff, who arrested defendant next day, finding on his person eighty-six dollars in bills, three of which were identified as having been in the pocketbook when it disappeared, motion for nonsuit and prayers for peremptory instructions in favor of defendant were properly refused. *S. v. Cameron*, 464.

§ 8. Instructions.

Upon a prosecution for larceny of hogs, the evidence tending to show that prosecutor's hogs wandered off to the premises of one of defendants, where they were secured by this defendant and taken by both defendants to a near-by town and sold, there is no error in a charge by the court that, if defendants took the hogs with intent to deprive the rightful owner thereof and dishonestly and fraudulently appropriated them to their own use and disposed of them, they would be guilty of larceny. *S. v. Epps*, 741.

Where the evidence, in a prosecution of two persons for larceny of hogs, tended to show that one defendant secured the hogs wandering on his premises, and that he with the second defendant took the hogs to a near-by town and sold them, there is no error in a charge that before any presumption would arise that the second defendant was the thief, that is presumption from possession, the jury must be satisfied beyond a reasonable doubt that the second defendant was in possession of the hogs, and that they were in his custody and subject to his control and disposition. *Ibid.*

§ 9. Verdict.

Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, C. S., 4250, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving. *S. v. Holbrook*, 622.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

Words, spoken in the presence and hearing of others, containing the imputation of the commission of the crime of larceny, are slanderous and actionable *per se*. *Gillis v. Tea Co.*, 470.

§ 5. Publication.

Words, spoken in the presence and hearing of others, containing the imputation of the commission of the crime of larceny, are slanderous and actionable *per se*. *Gillis v. Tea Co.*, 470.

The author of a defamation, whether it be libel or slander, is liable for damages caused by, or resulting directly and proximately from, any secondary publication or repetition which is the natural and probable consequence of his act. *Ibid.*

LIBEL AND SLANDER—*Continued.*

§ 13. Sufficiency of Evidence and Nonsuit.

In an action for slander, where plaintiff's evidence tended to show in its most favorable light that one of two defendants, who was manager of his codefendant's store, while acting in the scope of his employment on the store premises, falsely charged in a loud voice, in the presence of others, that plaintiff had stolen a package from the said store, a case of actionable wrong is made out, and motion for judgment of nonsuit was properly denied. *Gillis v. Tea Co.*, 470.

§ 14. Instructions.

In an action for damages for slander, where in his charge to the jury the trial judge properly and fairly stated the evidence pertinent to the issues, and the contentions of the parties, in compliance with C. S., 564, and it appearing that the jury sufficiently understood the elements of actionable defamation necessary to be found before any liability could attach to defendants, there was no error in the court's failure to give a more elaborate definition of slander. *Gillis v. Tea Co.*, 470.

§ 16. Damages.

The author of a defamation, whether it be libel or slander, is liable for damages caused by, or resulting directly and proximately from, any secondary publication or repetition which is the natural and probable consequence of his act. *Gillis v. Tea Co.*, 470.

LIMITATIONS OF ACTIONS.

§ 1b. Applicability to Sovereign.

The Legislature may set a time lock even for the sovereign; and the maxim *nullum tempus occurrit regi* is not applicable to statutes which impose a limitation upon the exercise of powers granted municipalities for the enforcement of statutory liens of assessments for public improvements. *Raleigh v. Bank* 286.

§ 2a. Actions Barred in Ten Years.

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, C. S., 441, as sealed instruments against principals are not barred until lapse of ten years. C. S., 437. *Lee v. Chamblee*, 146.

In a suit under C. S., 7990, to foreclose a statutory lien on abutting property, given a city for street improvements, all installments of the amounts assessed therefor, which are ten years overdue when action is brought, are barred by the statute of limitations under C. S., 2717 (a), now N. C. Code, 1943, secs. 160-93, and no part of the proceeds of sale can be applied to the payment of such installments. *Raleigh v. Bank*, 286.

§ 2b. Actions Barred in Seven Years.

While a deed will give color of title so as to permit a plea of the statute of limitations by the grantee, even though the grantor is chargeable with fraud, if the grantee accepts the deed in good faith without knowledge of the fraud, actual fraud is neither sanctioned nor cured by the statute of limitations. *Farabow v. Perry*, 21.

LIMITATIONS OF ACTIONS—*Continued.*

A widow, in possession of lands of which her husband died seized and possessed and in which she is entitled to dower which was never set apart to her, cannot perfect title to the premises in herself by claiming adverse possession under color of title for seven years, where it appears she mortgaged the premises, intentionally defaulted, and purchased the property at her own mortgage sale in order to obtain a deed on which to rely as color of title. *Ibid.*

§ 2e. Actions Barred in Three Years.

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, C. S., 441, as sealed instruments against principals are not barred until lapse of ten years. C. S., 437. *Lee v. Chamblee*, 146.

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

Where defendant, a banker, invested in a real estate mortgage the money of plaintiff, an elderly woman of no business experience and an old friend of defendant, and defendant represented that the investment could be collected at any time, and he also promised to collect the interest and see that taxes were paid on the land, but allowed the land to be sold for taxes, without notice to plaintiff, there is sufficient evidence on the question of fraud to go to the jury in a suit instituted within three years of the discovery of the sale for taxes. C. S., 441 (9). *Small v. Dorsett*, 754.

§§ 3a, 4. Accrual of Right of Action and Time from Which Statute Begins: In General.

Where defendant, a banker, invested in a real estate mortgage the money of plaintiff, an elderly woman of no business experience, an old friend of defendant, and defendant represented that the investment could be collected at any time, and he also promised to collect the interest and see that taxes were paid on the land, but allowed the land to be sold for taxes, without notice to plaintiff, there is sufficient evidence on the question of fraud to go to the jury in a suit instituted within three years of the discovery of the sale for taxes. C. S., 441 (9). *Small v. Dorsett*, 754.

§ 9. Fiduciary Relationships.

When a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. As long as the relationship continues there is nothing to put the injured party on inquiry and he cannot be said to have failed to use due diligence in detecting the fraud. *Small v. Dorsett*, 754.

§ 15. Pleadings.

Plaintiff sued for distributive share of estate. Defendant, administrator, answering, sets up and pleads debts of plaintiff due the intestate as an offset. Plaintiff, replying, denies the debts and pleads the three-year and ten-year statutes of limitation. On the hearing it was made to appear that the debts of plaintiff, if any, were barred by the statutes of limitation during the lifetime of the intestate. *Held:* The plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. *Perry v. Trust Co.*, 642.

LIMITATIONS OF ACTIONS—*Continued.*

§ 16. Burden of Proof.

The plea of the statute of limitations casts upon plaintiff the burden of showing that the suit was commenced within the requisite time from the accrual of the cause of action, or that otherwise it is not barred. *Lee v. Chamblee*, 146.

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, C. S., 441, as sealed instruments against principals are not barred until lapse of ten years. C. S., 437. *Ibid.*

MANDAMUS.

§ 1. Nature and Grounds of Writ, in General.

Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have the clear legal right to demand it, and the parties to be coerced must be under legal obligation to perform the act sought to be enforced. *Raleigh v. Public School System*, 316.

While *mandamus* is no longer regarded as a high prerogative writ, a peremptory *mandamus* is a writ of enforcement—in the nature of an execution of the judgment of the court—and will not be issued unless petitioner has shown a clear right thereto, the ministerial duty, as well as the neglect or refusal to perform it, must appear. *Warren v. Maxwell*, 604.

§ 2a. Ministerial or Legal Duty.

Subject to the right to review in this Court as it may exist under proper procedure, the final action of an administrative board on a matter within its jurisdiction will be held to be conclusive, and will be given effect in a subsequent proceeding involving the same matter. *Warren v. Maxwell*, 604.

Mandamus is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction. If there has been error in law, prejudicial to the parties, or the board has exceeded its authority, or has mistaken its power, or has abused its discretion —where the statute provides no appeal—the proper method of review is by *certiorari*. *Ibid.*

§ 2b. Discretionary Duty.

Mandamus is a proper remedy to compel the North Carolina State Board of Assessment to perform a public duty of a ministerial nature imposed by statute—but not to control them in the exercise of any discretion. The assuming of jurisdiction for assessments over the railroad lines of common carriers and reporting to the several counties their quotas of valuation thereof may be regarded as ministerial duties. *Warren v. Maxwell*, 604.

§ 2c. To Compel Levy of Tax.

In the absence of allegation and proof that funds are available, *mandamus* lies to compel the proper school authorities to raise funds by taxation with which to pay a valid assessment for street improvements, as it would be against public policy to enforce collection of the assessment by foreclosure. *Raleigh v. Public School System*, 316.

Mandamus is a proper remedy to compel the North Carolina State Board of Assessment to perform a public duty of a ministerial nature imposed by statute

MANDAMUS—*Continued.*

—but not to control them in the exercise of any discretion. The assuming of jurisdiction for assessments over the railroad lines of common carriers and reporting to the several counties their quotas of valuation thereof may be regarded as ministerial duties. *Warren v. Maxwell*, 604.

Where a railroad, under an order of the Interstate Commerce Commission, abandons its operations as a common carrier on a portion of its road, cancels its tariffs over same and thereafter does not operate over such portion of its line, except to haul away the scrap as the roadbed is dismantled and salvaged, it ceases to be vested with a character which would bring it within the jurisdiction of the State Board of Assessment for appraisal and taxation. C. S., 7971 (193), *et seq. Ibid.*

§ 4. Procedure.

A *mandamus*, or mandatory injunction, can only operate *in personam;* and in an action under C. S., 1178, to compel the directors of a domestic corporation to pay dividends, so far as substituted service of process on nonresident directors is relied upon, the proceeding is a nullity. *Southern Mills, Inc., v. Armstrong*, 495.

MASTER AND SERVANT.

§§ 1, 7a. Creation of Relationship: Termination, in General.

Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, as contrasted with a temporary job, terminable in good faith at the will of either party. *Malever v. Jewelry Co.*, 148.

In an action to recover wages while out of work, where plaintiff's evidence tended to show that he gave up a steady job to accept an offer from defendant for permanent employment in a new store, without further agreement as to duration of time, no business usage or other circumstance being shown, and defendant discharging plaintiff upon closing his new store after eight weeks, judgment of nonsuit was properly allowed. *Ibid.*

§ 21b. Course of Employment, Scope of Authority.

The designation "manager" implies general power and permits a reasonable inference that such manager is vested with the general conduct and control of his employer's business in and around the premises, and his acts are, when committed in the line of his duty and in the scope of his employment, those of his principal. *Gillis v. Tea Co.*, 470.

When the servant is engaged in the work of his master, doing that which he is employed or directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question. And this principle is applicable to actions for slander. *Ibid.*

Private instructions by employers to employees not to commit torts will not relieve the employer from liability for such acts committed by an employee within the scope of his authority and in the line of his duty, in an effort to preserve and safeguard his master's property. The master is liable even if the particular act, committed under such circumstances, was in violation of direct and positive instructions. *Ibid.*

§ 37. Nature and Construction of Compensation Act, in General.

The N. C. Workmen's Compensation Act, C. S., 8081 (h), *et seq.*, deals with the incidents and risks of the contract of employment, in which is included the

MANDAMUS—*Continued.*

negligence of the employer in that relation. It has no application outside the field of industrial accident: and does not intend, by its general terms, to take away common law or other rights which pertain to the parties as members of the general public, disconnected with the employment. *Barber v. Minges*, 213.

Expressions in the N. C. Workmen's Compensation Act, C. S., 8081 (r), regarding the surrender of the right to maintain common law or statutory actions against the employer, are not absolute. They must be construed within the framework of the Act, and as qualified by its subject and purposes. *Ibid.*

The general purpose of the Workmen's Compensation Act, in respect to compensation for disability, is to substitute, for common law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. *Branham v. Panel Co.*, 233.

§ 40a. Injuries Compensable: In General.

The general purpose of the Workmen's Compensation Act, in respect to compensation for disability, is to substitute, for common law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. *Branham v. Panel Co.*, 233.

Disability, under the Workmen's Compensation Act, is measured by the capacity or incapacity of the employee to earn the wages he was receiving at the time of the injury, by the same or any other employment. And the fact that the same wages are paid by the employer, because of long service, does not alter the rule. *Ibid.*

Compensation for disfigurement is not required by the Act. Its allowance or disallowance is within the legal discretion of the Industrial Commission. *Ibid.*

Disfigurement, under the Workmen's Compensation Act, must be evidenced by an outward observable blemish, scar or mutilation, and it must be so permanent and serious as to hamper or handicap the person in his earning or in securing employment. *Ibid.*

§ 40b. Diseases.

In dealing with certain unscheduled occupational diseases, this Court has held common law actions to be excluded by the Workmen's Compensation Act; but in these cases the condition admittedly and allegedly arose out of the employment. *Barber v. Minges*, 213.

§ 40e. Whether Accident "Arises Out of Employment."

The N. C. Workmen's Compensation Act, C. S., 8081 (h), *et seq.*, deals with the incidents and risks of the contract of employment, in which is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common law or other rights which pertain to the parties as members of the general public, disconnected with the employment. *Barber v. Minges*, 213.

§ 40f. Whether Accident "Arises in Course of Employment."

In dealing with certain unscheduled occupational diseases, this Court has held common law actions to be excluded by the Workmen's Compensation Act; but in these cases the condition admittedly and allegedly arose out of the employment. *Barber v. Minges*, 213.

The relation of master and servant is not invoked when the employee attends a good will picnic at the invitation of the employer, where the employee did

no work and was not paid for attendance, nor penalized for nonattendance, nor ordered to go. *Ibid.*

§ 46a. Nature and Functions of Industrial Commission in General.

The Industrial Commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration. *Barber v. Minges*, 213.

§ 47. Notice and Filing of Claim.

C. S., 8081 (ff) (b), does not require the plaintiff to file a claim with the Industrial Commission, as a court of first instance, before bringing an action in the Superior Court. *Barber v. Minges*, 213.

§ 53a. Form and Rendition of Award.

Where the Industrial Commission finds a general partial disability, in adjudging the rights and liabilities of the parties, the Commission may direct compensation at the statutory rate, whenever it is shown, within 300 weeks of the accident, that claimant is earning less than his former wages, due to the injury. By so doing the Commission retains jurisdiction for future adjustments and does not exceed its authority. *Branham v. Panel Co.*, 233.

§ 63. Construction of Wage and Hour Act.

In dealing with a Federal law it is incumbent upon the State courts to apply the rules of construction obtaining in the Federal jurisdiction. *Horton v. Wilson & Co.*, 71.

§ 65. Employees Within Wage and Hour Act.

Under the Federal Fair Labor Standards Act, to enable an employee to recover, it is not necessary that all of plaintiff's efforts be directed to the interstate commerce side of defendant's business. It is sufficient if they directly aid in that enterprise. *Horton v. Wilson & Co.*, 71.

An employee is "engaged in commerce," under the Federal Fair Labor Standards Act, if his services—not too remotely, but substantially and directly—aid in such commerce. If the business is such as to occupy the channels of interstate commerce, any employee, who is a necessary part of carrying on that business, is within its terms. *Ibid.*

In an action by plaintiff to recover from defendant wages and damages, under the Federal Fair Labor Standards Act of 1938, where the evidence showed that defendant is engaged in the distribution and sale of food products over a large portion of the United States, that its Raleigh branch received these products mostly for outside the State, stored them locally, sold and distributed same only within the State, that plaintiff was "Cashier" and later "Office Manager" of the branch, the services of plaintiff have a reasonable and substantial connection with the commerce of defendant as defined in the Act and bring plaintiff within its terms. *Ibid.*

In an action by plaintiff to recover from defendant wages and damages, under the Federal Fair Labor Standards Act of 1938, where plaintiff's evidence showed that he was in the management of a recognized department of defendant's establishment, that he directed the work of others, whom he hired and fired and exercised substantial discretionary powers, without sufficient evidence that his manual and clerical duties exceeded 20 per cent of his work week hours, such services bring plaintiff within the exemptive provisions of

MANDAMUS—*Continued.*

sec. 13, as defined by administrative regulation, and he is not entitled to recover. *Pye v. Atlantic Co.*, 92.

MINERALS AND MINES.

§ 2. Title.

When rights to the minerals in land have been, by deed or reservation, severed from the surface rights, two distinct estates are created, and the estate in the mineral interests is subject to the ordinary rules of law governing the title to real property. *Vance v. Guy*, 409.

§ 3. Possession.

The presumption, that one in possession of the surface of land has also possession of the minerals, does not apply when these rights have been segregated. *Vance v. Guy*, 409.

MORTGAGES.

§ 13b. Substitution of Trustees.

In a proceeding for the removal of a trustee and the appointment of a substitute trustee, under C. S., 2583, all interested persons referred to in the statute include only the trustor, trustee, or trustees and all of the *cestuis que trustent*, whose interests are secured by the deed of trust in which the trustee or trustees are sought to be removed and another substituted. *Thompson v. Scott, Comr. of Agriculture*, 340.

The statutes, providing for the removal and substitution of trustees in deeds of trust, which are in effect at the time of the execution of such instruments, become a part thereof, as fully as if incorporated therein. *Ibid.*

Where a trustee is substituted in accordance with the method expressed in a deed of trust, no proceedings are necessary under C. S., 2583; and a deed made by the substitute trustee passes the title to the purchaser at a foreclosure sale. *Ibid.*

§ 18. Trustees.

A notice, from the trustee in a mortgage or deed of trust to a person authorized by him to advertise a sale of the property thereunder, to withhold or discontinue publication of the notice of sale, withdraws from such person any authority to advertise or sell the property. *Smith v. Bank*, 249.

§ 21. Rights of Parties Upon Assignment.

As a general rule, where a purchaser of land subject to a mortgage takes an assignment of the mortgage, the debt secured by the mortgage is extinguished. *Smith v. Bank*, 249.

§ 25. Acquisition of Title by Mortgagee Through Tax Foreclosure of Purchase from Third Person.

A person, under any legal or moral obligation to pay taxes, cannot by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. *Stell v. Trust Co.*, 550.

§ 27. Payment and Satisfaction.

As a general rule, where a purchaser of land subject to a mortgage takes an assignment of the mortgage, the debt secured by the mortgage is extinguished. *Smith v. Bank*, 249.

MORTGAGES—*Continued.*

§ 31b. Parties in Action to Foreclose.

A trustee in a mortgage or deed of trust is a proper and necessary party to an action to foreclose or to enjoin foreclosure. *Smith v. Bank*, 249.

§ 32b. Advertisement and Notice.

A notice, from the trustee in a mortgage or deed of trust to a person authorized by him to advertise a sale of the property thereunder, to withhold or discontinue publication of the notice of sale, withdraws from such person any authority to advertise or sell the property. *Smith v. Bank*, 249.

§ 36. Deficiency and Personal Liability.

Where the maker of a note and mortgage is discharged in bankruptcy, such maker is no longer personally liable on the note and mortgage, which, however, remains a lien upon the land. *Smith v. Bank*, 249.

MUNICIPAL CORPORATIONS.

§ 5. Powers and Functions in General: Legislative Control and Supervision.

When a municipal corporation is established, it takes control of the territory and affairs over which it is given authority, to the exclusion of all other governmental agencies. The authorities of counties, embracing such cities or towns, are precluded from exercising the same power within the same territory. *Parsons v. Wright*, 520.

The Municipal Board of Control is a creature of the General Assembly within the provisions of Art. II, sec. 29, of the Constitution of North Carolina. *Hunsucker v. Winborne*, 650.

In a civil action to restrain the execution of an order changing the name of a town, C. S., 2779, 2781, 2782, where the complaint contains no allegation that the Board of Municipal Control has failed to observe and follow the requirements of the statutes and no allegation that the said Board has acted capriciously or in bad faith, demurrer to the complaint for failure to state a cause of action was properly sustained, and there was no error in the courts' dissolving a restraining order theretofore granted and dismissing the action. *Ibid.*

Upon the hearing by the Board of Municipal Control of a petition to change the name of a town, the Board has power to investigate and determine whether or not the requirements of C. S., 2781, 2782, have been complied with. *Ibid.*

There is a specific constitutional prohibition against gifts of public money, and the Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. N. C. Const., Art. I, sec. 7. *Brown v. Comrs. of Richmond County*, 744.

The Legislature may impose upon a municipality the payment of claims just in themselves; but the legislative determination that such obligation exists is not conclusive. The municipality may resort to the courts and there prove that no legal or equitable obligation exists against it. *Ibid.*

A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public, unless by a vote of the majority of the qualified voters therein. N. C. Const., Art. VII, sec. 7. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 8. Private Powers.

A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public, unless by a vote of the majority of the qualified voters therein. N. C. Const., Art. VII, sec. 7. *Brown v. Comrs. of Richmond County*, 744.

§ 11d. Civil Liability for Acts and Omissions.

Where the members of the governing body of a municipal corporation expend the funds of the municipality for a private purpose, without warrant in law, they become personally liable. *Brown v. Comrs. of Richmond County*, 744.

§ 14. Defects or Obstructions in Streets and Sidewalks.

When the owner of land has it subdivided and platted into lots, streets, and alleys, and sells and conveys the lots or any of them with reference to the plat, he thereby dedicates the streets and alleys, and all of them, to the use of the purchasers and those claiming under them, and to the public, and it is not necessary for such streets and alleys to be opened or accepted by the governing body of the town or city if they are within the limits of a municipality. *Broocks v. Muirhead*, 227.

If streets or alleyways in a subdivision of lands be obstructed there is created thereby a public nuisance, and each purchaser, or owner of property therein can, by injunction or other proper proceeding, have the nuisance abated, as there is in all such cases an irrebuttable presumption of law that such owner has suffered peculiar loss or injury. *Ibid.*

§ 29. Municipal Franchises: Streets.

Where lands have been surveyed and platted and sold, showing lots, streets, squares, parks and alleys, the original owner and those claiming under him, with knowledge of the facts, or with notice thereof, either express or constructive, are estopped to repudiate the implied representation that such streets and alleys, parks and places will be kept open for public use, although not presently opened or accepted or used by the public. *Broocks v. Muirhead*, 227.

General statutes of the State, in regard to public highways, do not apply to the streets and alleys of an incorporated town or city, and the county authorities have no power or authority over such streets and alleys. *Parsons v. Wright*, 520.

§ 30. Power to Make Improvements.

In the absence of covenants in the deeds or other valid restrictions upon the use of land for a public park, its acquisition and dedication to that purpose is a matter within the discretion of municipal governing authorities and may not be enjoined by the courts. *Dudley v. Charlotte*, 638.

Where the governing body of a city of 100,000 population, including 30,000 to 40,000 Negroes, purchases a tract of land, adjacent to or near two of its Negro sections, with the purpose and plan of laying out a park and recreation center for its colored people and building a road and bridge for more convenient access thereto and to other property, on suit to prevent such use of the property, instituted by white residents of the neighborhood, there is no evidence that the proposed use will constitute a nuisance and motion for a restraining order was properly denied. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 34. Nature of Lien, Priorities and Enforcement.

In a suit under C. S., 7990, to foreclose a statutory lien on abutting property, given a city for street improvements, all installments of the amounts assessed therefor, which are ten years overdue when action is brought, are barred by the statute of limitations under C. S., 2717 (a), now N. C. Code, 1943, secs. 160-93, and no part of the proceeds of sale can be applied to the payment of such installments. *Raleigh v. Bank*, 286.

The Legislature may set a time lock even for the sovereign; and the maxim *nullum tempus occurrit regi* is not applicable to statutes which impose a limitation upon the exercise of powers granted municipalities for the enforcement of statutory liens of assessments for public improvements. *Ibid.*

Local assessments may be a species of tax, but they are not taxes as generally understood in constitutional restrictions and exemptions. *Ibid.*

Lands owned by "The School Committee of Raleigh Township, Wake County," and used exclusively for public school purposes, are liable for assessment for street improvements made by the city of Raleigh under Art. 9, ch. 56, of the Consolidated Statutes. *Raleigh v. Public School System*, 316.

§ 36. Nature and Extent of Municipal Police Power in General.

The business of carrying passengers for hire is a privilege, the licensing, regulation, and control of which is peculiarly and exclusively a legislative prerogative. So is the power to regulate the use of public roads and streets. The General Assembly in the exercise of this police power may provide for the licensing of taxicabs and regulate their use on public streets, or it may, in its discretion, delegate this authority to the several municipalities. *Suddreth v. Charlotte*, 630.

Where the Legislature has vested in a city council the power to regulate, license, and control motor vehicles for hire, the municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business. There is a broad presumption in favor of the validity of an ordinance undertaking to exercise such power. *Ibid.*

Municipalities may classify persons according to their business and apply different rules to different classes without violating constitutional rights, State or Federal. The discriminations which invalidate an ordinance are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. *Ibid.*

The fact that operators of taxicabs will suffer pecuniary injury from the enforcement of ordinances regulating such business, or that such operators may be unable to comply with the terms of a regulatory ordinance, and so will be compelled to abandon operation of their vehicles, does not establish the unreasonableness or invalidity of the ordinance. *Ibid.*

§ 39. Regulations Relating to Public Safety and Health.

Where the Legislature has vested in a city council the power to regulate, license, and control motor vehicles for hire, the municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business. *Suddreth v. Charlotte*, 630.

In the absence of covenants in the deeds or other valid restrictions upon the use of land for a public park, its acquisition and dedication to that purpose is a matter within the discretion of municipal governing authorities and may not be enjoined by the courts. *Dudley v. Charlotte*, 638.

MUNICIPAL CORPORATIONS—*Continued.*

Where the governing body of a city of 100,000, including 30,000 to 40,000 Negroes, purchases a tract of land, adjacent to or near two of its Negro sections, with the purpose and plan of laying out a park and recreation center for its colored people and building a road and bridge for more convenient access thereto and to other property, on suit to prevent such use of the property, instituted by white residents, there is no evidence that the proposed use will constitute a nuisance and motion for a restraining order was properly denied. *Ibid.*

NEGLIGENCE.

§ 1a. In General.

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, which is a requisite for actionable negligence. *Hiatt v. Ritter*, 262.

§ 3. Dangerous Substances, Machinery and Instrumentalities.

Generally there is no duty resting on defendant to warn plaintiff of a dangerous condition, provided the dangerous condition is obvious. *Benton v. Building Co.*, 809.

§ 4b. Invitees and Licensees.

In an action for damages allegedly caused by negligence of defendants, where plaintiff's evidence tends to show that the store of one defendant was in the building of the other defendant and opened off the lobby of the building through a plate glass door by a step down, that there was no lack of light, either in the lobby or store, that plaintiff fell and was injured as she went through the door from the lobby into the store, although she could have seen the step down had she taken time to look as she opened the door, a motion for judgment of nonsuit was properly allowed. C. S., 567. *Benton v. Building Co.*, 409.

§ 4d. Attractive Nuisance.

The doctrine of attractive nuisance is that one is negligent in maintaining an agency or condition, which he knows, or reasonably should know, to be dangerous to children of tender years, at a place where he knows or reasonably should know such children are likely to resort or to be attracted by such agency or condition, unless he exercises ordinary care for the protection of such children. *Hedgepath v. Durham*, 822.

In an action to recover damages for the alleged wrongful death of plaintiff's intestate, a child of ten, against a city, the child having been drowned in a pond, created by a stopped drain under a fill of the city's street, causing rain water to accumulate, there being a total absence of evidence that defendant had any knowledge that plaintiff's intestate or any other children, at any time previous to the accident, played in the pond, a motion for judgment of nonsuit was properly allowed. *Ibid.*

§ 5. Proximate Cause: In General.

Proximate cause requires a continuous and unbroken sequence of events, and where the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the second wrong as the proximate cause, and not to the first, or more remote cause. *Ins. Co. v. Stadiem*, 49.

NEGLIGENCE—*Continued.*

By proximate cause is not meant necessarily the last act of cause, or nearest act to the injury, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. *Rattley v. Powell*, 134.

The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable, unless the connection of cause and effect is established, and the negligent act of the defendant must be the proximate cause of the injury. *Carter v. Realty Co.*, 188; *Smith v. Whitley*, 534.

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, which is a requisite for actionable negligence. *Hiatt v. Ritter*, 262.

In an action to recover damages against defendant by plaintiff, who was an employee of a transportation company engaged in delivering caustic soda, a dangerous substance, by truck to defendant's mills, where plaintiff, knowing the absence of help and of proper appliances for safety, was injured while attempting alone to disconnect the hose from the truck to the tank. *Held:* (1) Defendant owed no duty to plaintiff to furnish a safe place, suitable appliances, and sufficient help; and (2) plaintiff on his own evidence, was guilty of contributory negligence; and (3) judgment of nonsuit was proper. C. S., 567. *Morrison v. Cannon Mills Co.*, 387.

Where plaintiff was injured in an aeroplane crash, the pilot being negligent in not having a license, there is no evidence that this negligence was the proximate cause of the injury, the doctrine of *res ipsa loquitur* does not apply, and judgment as of nonsuit was proper. C. S., 567. *Smith v. Whitley*, 534.

§ 6. Concurrent Negligence.

When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable. *Rattley v. Powell*, 134.

The plaintiffs' negligence need not be the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendant; but he may not recover, when his negligence concurs with the negligence of the defendant in proximately producing the injury. *Bailey v. R. R.* and *King v. R. R.*, 244.

§ 7. Intervening Negligence.

Intervening negligence to have the effect of "insulating" the original negligence, where it is found to exist, must totally supersede that negligence in causal effect. *Rattley v. Powell*, 134.

It is error for the court to instruct the jury that, in order to break the sequence of proximate causation or, in other words, to supersede the original negligence as proximate cause, the intervening negligence must be palpable or gross. *Ibid.*

The real test is that of foreseeability of the intervening act as a reasonable consequence of the original negligence. If the intervening act or conduct is found to be reasonably foreseeable as a consequence of the original negligence, it will not serve the purpose of insulation. *Ibid.*

§ 10. Last Clear Chance.

In order to invoke the "last clear chance" doctrine, plaintiff must plead and prove that defendant, after perceiving the danger, and in time to avoid it, negligently refused to do so. *Bailey v. R. R.* and *King v. R. R.*, 244.

NEGLIGENCE—*Continued.*

In an action against a railroad to recover damages for personal injuries to plaintiff, a licensee, the doctrine of last clear chance does not apply unless such licensee is apparently in a helpless condition upon the railroad track, since otherwise the engineer has the right to expect, up to the moment of impact, that he will leave the track in time to avoid the injury. *Battle v. R. R.*, 395.

In an action for the negligent injury by defendant of plaintiff, who drove a tractor, to which were attached plows, on the railroad track of defendant, where it stalled and plaintiff remained on the track in an attempt to get the tractor and plows across, after he had seen defendant's train approaching, until injured, judgment of nonsuit was proper. *Wilson v. R. R.*, 407.

§ 16. Pleadings.

In an action by a city, for contribution as joint tort-feasors, against defendants, property owners in such city, alleging that a judgment was taken against the city, for injuries sustained by a pedestrian stumbling on a protruding iron stake on the property of defendants and very near, but not on, the city sidewalk, a demurrer to the complaint should have been sustained, as it discloses no actionable negligence against the city to which the conduct of defendants could have contributed. *Charlotte v. Cole*, 106.

§ 19a. Sufficiency of Evidence and Nonsuit: On Issue of Negligence.

Where complaint, in an action for damages, alleges that a bank negligently refused to pay a check, given on it by a policyholder to an insurance company in payment of a policy premium, and induced the company by careless misrepresentations to decline to pay the policy, in consequence of which the company suffered damages in litigation over the policy, a demurrer was properly sustained, as the proximate cause of the company's loss was not the negligence of the bank but the independent act of the company in refusing to pay the insurance. *Ins. Co. v. Stadiem*, 49.

In an action by plaintiff against defendant to recover compensatory and punitive damages to a restaurant business conducted by plaintiff on the ground floor of defendant's building, where the evidence of plaintiff tended to show that defendant allowed his toilet, immediately above plaintiff's restaurant, to leak so badly that plaintiff's fixtures were damaged, his food and business were ruined, defendant over a period of months, knowingly and deliberately, allowing the defective toilet to become worse and intentionally refusing to remedy same, a motion for judgment of nonsuit was properly denied. *Steffan v. Meiselman*, 154.

In an action for recovery of damages for personal injuries, where plaintiff's evidence tended to show that plaintiff, a patron of defendant's swimming pool, jumped into the water from the side of an ordinary slide board, which he knew how to use, instead of sliding down same to the sandy place at its bottom made for landing, and in so doing struck and injured his foot on the sharp end of a bolt supporting the slide board, motion for judgment of nonsuit should have been allowed. *Hiatt v. Ritter*, 262.

The mere ownership of an interest in an automobile does not make the owner of such interest liable for injuries caused by the automobile; nor is a partnership liable for an injury done by such vehicle owned by it if the driver, even though a partner, be not acting within the scope of the business and authority of the partnership. *Gibbs v. Russ*, 349.

In an action to recover damages against defendant by plaintiff, who was an employee of a transportation company engaged in delivering caustic soda, a dangerous substance, by truck to defendant's mills, where plaintiff, knowing

the absence of help and of proper appliances for safety, was injured while attempting alone to disconnect the hose from the truck to the tank. *Held:* (1) Defendant owed no duty to plaintiff to furnish a safe place, suitable appliances, and sufficient help; and (2) plaintiff on his own evidence, was guilty of contributory negligence; and (3) judgment of nonsuit was proper. C. S., 567. *Morrison v. Cannon Mills Co.*, 387.

Proof of general employment alone is not sufficient to charge an employer with liability for negligence under the doctrine of *respondeat superior*. 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. *Salmon v. Pearce*, 587.

In an action for damages allegedly caused by negligence of defendants, where plaintiff's evidence tends to show that the store of one defendant was in the building of the other defendant and opened off the lobby of the building through a plate glass door by a step down, that there was no lack of light, either in the lobby or store, that plaintiff fell and was injured as she went through the door from the lobby into the store, although she could have seen the step down had she taken time to look as she opened the door, a motion for judgment of nonsuit was properly allowed. C. S., 567. *Benton v. Building Co.*, 809.

In an action to recover damages for the alleged wrongful death of plaintiff's intestate, a child of ten, against a city, the child having been drowned in a pond, created by a stopped drain under a fill of the city's street, causing rain water to accumulate, there being a total absence of evidence that defendant had any knowledge that plaintiff's intestate or any other children, at any time previous to the accident, played in the pond, a motion for judgment of nonsuit was properly allowed. *Hedgepath v. Durham*, 822.

§ 19b. On Issue of Contributory Negligence.

In an action to recover damages for personal injuries to plaintiff, a passenger on defendant's bus, where the evidence tended to show that the driver stopped his crowded bus at night on the left-hand side of the highway, in front of a filling station which was used as a bus stop, and requested plaintiff to alight so that another passenger could get off, which plaintiff did, stepping into the highway where he was struck and injured by another automobile coming from the opposite direction, driven by one intoxicated, a motion for judgment as of nonsuit was properly denied. *Ross v. Greyhound Corp.*, 239.

It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them. *Bailey v. R. R.* and *King v. R. R.*, 244.

In an action against a railroad for the wrongful death of plaintiffs' intestates, where the plaintiffs' evidence tends to show that such intestates drove their car upon a railroad track, at a city grade crossing, ahead of an oncoming train, by collision with which both were killed, when, in the exercise of due care, they could have seen the train and avoided the collision, the plaintiffs are barred by the contributory negligence of their intestates, and motions of nonsuit were properly allowed. *Ibid.*

A judgment of involuntary nonsuit, on the ground of contributory negligence of the plaintiff, cannot be rendered unless the evidence is so clear on that issue that reasonable minds can draw no other inference. *Crone v. Fisher*, 635.

NEGLIGENCE—*Continued.*

§ 19c. Res Ipsa Loquitur.

Where plaintiff was injured in an aeroplane crash, the pilot being negligent in not having a license, there is no evidence that this negligence was the proximate cause of the injury, the doctrine of *res ipsa loquitur* does not apply, and judgment as of nonsuit was proper. C. S., 567. *Smith v. Whitley*, 534.

§ 20. Instructions.

Where a passenger on a public bus alights, on the highway, at the request of the bus driver, so that another passenger could get out, and is injured by an automobile, coming from the opposite direction and driven by one who is intoxicated, it is reversible error for the court, in its charge to the jury, to compare these facts to a case where a horse is left unhitched in the street, and is frightened by a stranger and runs away, causing damage—the facts in the illustration are not similar to the facts of this case. *Ross v. Greyhound Corp.*, 239.

NUISANCES.

§ 1. Private Nuisance: In General.

The law will not permit a substantial injury to the person or property of another by a nuisance, though public and indictable, to go without individual redress, whether the right of action be referred to the existence of a special damage, or to an invasion of a more particular and more important personal right. *Hampton v. Pulp Co.*, 535.

§ 3. Pollution of Streams.

In an action by plaintiff, a riparian proprietor on a navigable river, against defendant, where the complaint alleges that plaintiff is the owner of a long established fishery from the shores of his property along such stream and that plaintiff has suffered damages thereto by the interference of defendant in polluting the waters of the river with matter deleterious to fish life, discharged as waste from defendant's recently established mill, causing a public nuisance and seriously interrupting the migratory passage of fish, it was error for the court below to sustain a demurrer to the complaint as not stating a cause of action. *Hampton v. Pulp Co.*, 535.

§§ 5, 6. Actions for Damages: Acts and Conditions Constituting Public Nuisance in General.

The law will not permit a substantial injury to the person or property of another by a nuisance, though public and indictable, to go without individual redress, whether the right of action be referred to the existence of a special damage, or to an invasion of a more particular and more important personal right. *Hampton v. Pulp Co.*, 535.

§ 9. Improper Use of Public Places.

Where the governing body of a city of 100,000, including 30,000 to 40,000 Negroes, purchases a tract of land, adjacent to or near two of its Negro sections, with the purpose and plan of laying out a park and recreation center for its colored people and building a road and bridge for more convenient access thereto and to other property, on suit to prevent such use of the property, instituted by white residents of the neighborhood, there is no evidence that the proposed use will constitute a nuisance and motion for a restraining order was properly denied. *Dudley v. Charlotte*, 638.

PARENT AND CHILD.

§ 3. Civil Rights and Liabilities of Parent to Child in General.

The mere relation of parent and child, without any evidence of intimate or fiduciary relationship, does not raise a presumption of fraud or of undue influence. *Gerringer v. Gerringer*, 818.

PARTIES.

§§ 1, 2. Necessary Parties.

In this jurisdiction an action for the collection of a penalty must be brought in the name of the party suing therefor, unless the statute provides otherwise, and the joinder of additional parties is neither necessary nor proper. *Hopkins v. Barnhardt*, 617.

§§ 10, 11. Joinder of Additional Parties: Substitution of Parties.

An appeal lies from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant. *Snipes v. Estates Administration, Inc.*, 776.

Over an objection the court has no authority to correct a pending action, which cannot be maintained, into a new and independent action by admitting a party who is solely interested as plaintiff. It is not permissible, except by consent, to change the character of the action by the substitution of one that is entirely different. *Ibid.*

PARTITION.

§ 10. Partition by 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 new or different title; and where a husband, in such a partition, is made a joint grantee with his wife he acquires no title. *Duckett v. Lyda*, 356.

PARTNERSHIP.

§ 1. Creation and Existence.

A partnership is a combination by two or more persons of their property, effects, labor, or skill in a common business or venture, and under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business. *Rothrock v. Naylor*, 782.

§ 2. Evidence and Proof of the Relationship.

In an action to recover damages for personal injuries to plaintiff caused by the alleged negligent operation by one of defendants of a truck, jointly owned by both defendants, where all of plaintiff's evidence, taken in its most favorable light, tends to show that the other defendant had no interest in, and received no benefit from the operation of the truck at the time in question, such evidence is insufficient to establish the relation between the defendants of principal and agent or that of partnership. *Gibbs v. Russ*, 349.

While an agreement to share profits is one of the tests of a partnership, an agreement to receive part of the profits for services and attention, as a means only of ascertaining the compensation, does not create a partnership. *Rothrock v. Naylor*, 782.

When the facts are undisputed, what constitutes a partnership is a question of law. *Ibid.*

PARTNERSHIP—*Continued.*

Where the owner of certain city lots agreed with a contractor to furnish all labor and material, carry insurance, and build a house on each lot according to specifications upon the payment by the owner of named sums at certain stages of construction and should the houses, or any of them, be sold within four months after completion, the owner to receive a named sum for each lot, the balance in each case going to the contractor, but on a failure to sell within the four month period, the owner to pay a specified amount in full for each house, there is no evidence of a partnership. *Ibid.*

§ 3. Firm Property and Business.

In a suit to impress realty with a parol trust in favor of a partnership, there is no reversible error in the admission of evidence of the partnership affairs, occurring after a reference for an accounting, showing that profits were used to enhance the value of the realty in question and that rents from such realty went into the partnership fund. *Thompson v. Davis*, 792.

§ 5. Actions Between Partners.

In an action by one partner against the other on a promissory note, which appears on its face to be a personal transaction between the parties, which the plaintiff's evidence confirms, a motion for nonsuit was properly denied. *Ripple v. Stevenson*, 284.

Where plaintiff and two of defendants, in forming a partnership, agreed to purchase a certain lot, title to be taken in the name of the partners, and plaintiff paid approximately one-third of the down payment to one of defendants, who with the other defendant was to take care of the balance, and the defendant to whom the money was paid took title to the property in himself and his wife, without the knowledge of the other partners, there is evidence of a parol trust and motion for judgment as of nonsuit was properly overruled. *Thompson v. Davis*, 792.

§ 6. Representation of Firm by Partner.

False representations of one partner, for his own benefit and in fraud of the rights of his co-partner, ascertained in time by those with whom he dealt, will not afford a valid ground for defense to a suit by the partner so defrauded. *Pappas v. Crist*, 265.

§ 8. Actions Against Partnerships.

The mere ownership of an interest in an automobile does not make the owner of such interest liable for injuries caused by the automobile; nor is a partnership liable for an injury done by such vehicle owned by it if the driver, even though a partner, be not acting within the scope of the business and authority of the partnership. *Gibbs v. Russ*, 349.

PENALTIES.

§ 2. Actions.

In this jurisdiction an action for the collection of a penalty must be brought in the name of the party suing therefor, unless the statute provides otherwise, and the joinder of additional parties is neither necessary nor proper. *Hopkins v. Barnhardt*, 617.

PERJURY.

§ 3. Prosecution and Punishment.

In a prosecution for perjury, it is required that the falsity of the oath be established by two witnesses, or by one witness and corroborating circumstances. *S. v. Hill*, 711.

While the uncorroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as failing to comply with C. S., 564. *Ibid.*

PLEADINGS.

§ 3a. Statement of Cause in General.

A plaintiff is not held bound to anticipate and negative in advance all grounds of defense to the action he brings, and petitions for divorce do not constitute an exception to the general rule. *Byers v. Byers*, 85.

Both the statute, C. S., 535, and the decisions of this Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Dickensheets v. Taylor*, 570; *Corbett v. Lumber Co.*, 704.

The meaning of C. S., 506, is that the complaint shall contain the material, essential, and ultimate facts upon which the right of action is based, and not collateral or evidential facts, which are only to be used to prove and establish the ultimate facts. *Chason v. Marley*, 738.

§ 10. Counterclaims, Setoffs, and Cross Complaints.

In an action by plaintiff to recover his distributive share of an estate of which defendant is administrator, where defendant sets up and pleads debts of plaintiff due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff has no application. *Perry v. Trust Co.*, 642.

In a suit by a town against defendants to foreclose a tax lien under C. S., 7990, where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby. *Apex v. Templeton*, 645.

§ 13½. Demurrer: In General.

Demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. C. S., 511 (6). *Ins. Co. v. Stadiem*, 49; *Dickensheets v. Taylor*, 570; *Corbett v. Lumber Co.*, 704.

A plea in bar is not to be overthrown by demurrer, if good in any respect or to any extent. *Byers v. Byers*, 85.

Where a general demurrer is filed to a pleading as a whole, if any count therein is good and states a cause of action, the demurrer should be overruled. *Pharr v. Pharr*, 115.

Where there is no ambiguity in the instruments upon which plaintiffs rely as a contract, they are subject to constructions by the court, without the aid of a jury, in passing upon defendant's demurrer. *Richardson v. Storage Co.*, 344.

PLEADINGS—*Continued.*

Where there is a defect of jurisdiction or the complaint fails to state a cause of action, and such defects appear on the face of the record, this Court will *ex mero motu* dismiss the action. *Hopkins v. Barnhardt*, 617.

Both the statute, C. S., 535, and the decisions of this Court require that pleadings be liberally construed, and every reasonable intendment and presumption taken in favor of the pleader. A pleading must be fatally defective before it will be rejected. *Dickensheets v. Taylor*, 570; *Corbett v. Lumber Co.*, 704.

§ 15. For Failure of Complaint to State Cause of Action.

In an action by a city, for contribution as joint tort-feasors, against defendants, alleging that a judgment was taken against the city, for injuries sustained by a pedestrian stumbling on a stake on the property of defendants very near, but not on, the city sidewalk, a demurrer to the complaint should have been sustained, as it discloses no actionable negligence against the city. *Charlotte v. Cole*, 106.

Where there is no ambiguity in the instruments upon which plaintiffs rely as a contract, they are subject to constructions by the court, without the aid of a jury, in passing upon defendant's demurrer. *Richardson v. Storage Co.*, 344.

Where plaintiff brought an action in this State against defendant, based on a judgment of a New York court, and defendant by answer alleged as defense and counterclaim (1) false representations of plaintiff relating to the merits of the subject matter and made anterior to the New York judgment; (2) and an unliquidated claim for damages arising out of an independent tort, plaintiff's demurrer *ore tenus* was properly allowed. *Hat Co., Inc., v. Chizik*, 371.

In an action between plaintiff and defendant for the recovery of premises leased by defendant to an oil company, which transferred and assigned the lease, without warranty, covenant, or assurance of possession, to plaintiff, an amended complaint against the oil company, which was made a party, containing an allegation that the company's president told the other defendant that the lease had not been assigned, without any allegation of collusion, is demurrable as not stating a cause of action. *Texas Co. v. Holton*, 497.

In a civil action to restrain the execution of an order changing the name of a town, C. S., 2779, 2781, 2782, where the complaint contains no allegation that the Board of Municipal Control has failed to observe and follow the requirements of the statutes and no allegation that the said Board has acted capriciously or in bad faith, demurrer to the complaint for failure to state a cause of action was properly sustained. *Hunsucker v. Winborne*, 650.

In a suit against a corporation and its president by the owner of a majority of its capital stock, where the complaint alleges the wrongful refusal of the corporation by the individual defendant to transfer such stock, that the said president held a meeting of stockholders, without a quorum, and at such meeting called all preferred stock at par and that he is attempting to sell valuable property of the company, all in violation of the rights of plaintiff and the corporation, a demurrer, on the ground of misjoinder of parties and causes, and on the grounds of no cause of action stated, was properly overruled. *Corbett v. Lumber Co.*, 704.

§ 16a. For Misjoinder of Parties and Causes.

If the defect in the pleading, upon demurrer under C. S., 507, relates merely to misjoinder of actions, the court will, under C. S., 516, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated; but where there is a misjoinder both of

causes and of parties, this procedure cannot be followed. *Southern Mills, Inc., v. Yarn Co.*, 479.

Where plaintiff, in a suit against two corporate defendants, joins a cause of action based upon an alleged breach of contract by one of the defendants only, with a cause of action against the other defendant to compel an audit of its affairs, under C. S., 1146, and also, in the same complaint, asserts another cause of action against the first defendant for fraud and deceit, judgment of the court below, overruling defendants' demurrers, is reversed and the action dismissed. *Ibid.*

Upon the dismissal of an action for misjoinder of parties and causes, appeals from all preliminary orders such as for an audit of the books of one of the defendants, C. S., 1146, are dismissed. *Ibid.*

In a suit against a corporation and its president by the owner of a majority of its capital stock, where the complaint alleges the wrongful refusal of the corporation by the individual defendant to transfer such stock, that the said president held a meeting of stockholders, without a quorum, and at such meeting called all preferred stock at par and that he is attempting to sell valuable property of the company, all in violation of the rights of plaintiff and the corporation, a demurrer, on the ground of misjoinder of parties and causes, and on the grounds of no cause of action stated, was properly overruled. *Corbett v. Lumber Co.*, 704.

In an action to renew a judgment, where an amendment to the complaint is allowed and made without objection, alleging an error, by inadvertence and mistake, in the face of the judgment as to its date and asking that the judgment be amended to speak the truth, such amendment constitutes an additional cause of action, and there is no demurrable misjoinder of causes. *Curlee v. Scales*, 788.

§ 20. Office and Effect of Demurrer.

Upon the dismissal of an action for misjoinder of parties and causes, appeals from all preliminary orders such as for an audit of the books of one of the defendants, C. S., 1146, are dismissed. *Southern Mills, Inc., v. Yarn Co.*, 479.

§§ 21, 22. Amendment Before Trial: Amendment by Trial Court.

A discretionary ruling on a motion to amend pleadings is not reviewable on appeal. C. S., 547. *Byers v. Byers*, 85; *Pharr v. Pharr*, 115.

In a civil action, where summons is issued and served and complaint filed against defendant under an erroneous name, and such defendant, on special appearance, moves to dismiss for want of jurisdiction on that ground, and plaintiff files a motion to amend summons and complaint to conform to the defendant's true name, there is no error in allowing the motion to correct the mistake. *Propst v. Trucking Co.*, 490.

Over an objection the court has no authority to correct a pending action, which cannot be maintained, into a new and independent action by admitting a party who is solely interested as plaintiff. It is not permissible, except by consent, to change the character of the action by the substitution of one that is entirely different. *Snipes v. Estates Administration*, 776.

In an action renew a judgment, where an amendment to the complaint is allowed and made without objection, alleging an error, by inadvertence and mistake, in the face of the judgment as to its date and asking that the judgment be amended to speak the truth, such amendment constitutes an additional cause of action, and there is no demurrable misjoinder of causes. *Curlee v. Scales*, 788.

PLEADINGS—*Continued.*

The allowance or denial of a motion to amend an answer, made after the time for answering had expired, is in the discretion of the court. *Thompson v. Davis*, 792.

In order to facilitate the determination of causes on their merits, in the furtherance of justice, the courts have wide powers with respect to amendments to pleadings. Amendments, which are permitted in order to conform the pleading to the proof, are limited to those which do not change substantially the claim or defense. C. S., 547. *Bank v. Sturgill*, 825.

Amendments to pleadings may be allowed after a referee's report has been filed; but after exceptions are allowed to a referee's report and the cause ordered to stand for trial on the issues of fact raised by the exceptions, no amendments should be allowed except such as are pertinent to the issues of fact defined by the court's allowance of exceptions. *Ibid.*

§ 28. Judgment on the Pleadings.

A judgment on the pleadings, in favor of the defendant on an affirmative defense, can be approved only when the allegations of fact in plaintiff's pleadings and relevant inferences of fact deducible therefrom, construed liberally in his favor, fail in all material respects to make out a case. *Lockhart v. Lockhart*, 123.

§ 29. Motions to Strike.

In a suit by a town against defendants to foreclose a tax lien under C. S., 7990, where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby. *Apex v. Templeton*, 645.

In a suit for the specific performance of a contract to convey land, where the complaint alleges in detail a large number of receipts from defendant to plaintiff, constituting written memoranda of the contract to convey, signed by defendant, there was error in allowing a motion to strike such allegations. *Chason v. Marley*, 738.

Allegations of a complaint, in a suit for specific performance, detailing large numbers of payments and other matters wholly evidential or repetitious, are properly stricken on motion. *Ibid.*

§ 29½. To Supply Lost Pleading or Paper.

If any pleadings, summons, affidavit, or order is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original, C. S., 544; and the judgment of the trial court permitting lost pleadings, etc., to be substituted, is not reviewable. *Park, Inc., v. Brinn*, 502.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

Proof of general employment alone is not sufficient to charge an employer with liability for negligence under the doctrine of *respondeat superior*. 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. *Salmon v. Pearce*, 587.

Agency having been established either by proof or by admission, the declarations of the agent, made in the course of his employment and in the scope of his agency and while he is engaged in the business, are competent. They must be the extempore utterances of the mind, under circumstances which constitute them part of the *res gestæ*. *Ibid.*

PRINCIPAL AND AGENT—*Continued.*

§ 8a. Powers and Authority of Agent as to Liability of Principal.

In the case of an urgent emergency an employee at times may act so as to bind his employer without previous authority. *Russell v. Cutshall*, 353.

§§ 10b, 13a. Liability of Agent: Order of Proof and Necessity of Proof of Agency.

In an action for damages by plaintiff against defendants, an insurance agent and his employer, for personal injuries to plaintiff by the automobile of the agent, where the evidence tended to show that the agent drove on after the accident, turned around and drove back to the scene of the accident and some ten minutes thereafter stated to a traffic officer that he had been out collecting insurance and was on his way home, and where an insurance collection book furnished by the employer was found in his possession and that the employer paid part of his automobile expense, a motion of nonsuit as to the employer was properly granted. *Salmon v. Pearce*, 587.

PRINCIPAL AND SURETY.

§§ 7, 8, 9. Bonds for Public and Private Construction: Compromise and Settlement.

Where a surety for a construction contract completes the contract upon default by the principal and one, who has furnished materials to both principal and surety for the work, executes to the surety a full release and discharge of all claims against both surety and principal, excepting, as to principal only, certain definite items, this release constitutes a compromise between surety and materialman, which does not affect the liability of the principal for the excluded items. *Electric Supply Co. v. Burgess*, 97.

Great liberality is allowed in construing releases. The intent is to be sought from the whole and every part of the instrument; and where general words are used, if it appears by other clauses of the instrument, or other documents, definitely referred to, that it was the intent of the parties to limit the discharge to particular claims only, courts, in construing it, will so limit it. *Ibid.*

§ 17. Parties and Pleadings.

Where the complaint alleges that defendant, a sheriff, in procuring a search warrant for plaintiff's premises and a warrant for his arrest, acted corruptly and with malice, wantonly, falsely, without probable cause and without regard for the public interest, and out of hate and revenge, it was error for the court below to sustain a demurrer *ore tenus*. As defendant surety company is the sheriff's bondsman and liable for his misconduct, C. S., 354, it was likewise error in sustaining the demurrer filed by it. *S. v. Swanson*, 442.

§ 17½. Evidence.

It is permissible to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety. *Lee v. Chamblee*, 146.

§ 20. Summary Proceedings on Bonds.

In this jurisdiction the liability of the clerk of the Superior Court for the safety of funds of infants, placed in his hands by virtue of his office, is that of an insurer. *S. v. Sawyer*, 102.

A public officer is not as a rule relieved from liability for the loss of public moneys in his charge where the loss is due to fire, burglary, theft, or embezzlement by subordinates, however careful and prudent he may have been. Under

this rule liability would attach where the clerk is the victim of a forgery. *Ibid.*

Where the complaint alleges that defendant, a sheriff, in procuring a search warrant for plaintiff's premises and a warrant for his arrest, acted corruptly and with malice, wantonly, falsely, without probable cause and without regard for the public interest, and out of hate and revenge, it was error for the court below to sustain a demurrer *ore tenus*. As defendant surety company is the sheriff's bondsman and liable for his misconduct, C. S., 354, there was likewise error in sustaining the demurrer filed by it. *S. v. Swanson*, 442.

PROCESS.

§ 1. Form and Requisites.

Due service of process is necessary to subject a party to the jurisdiction of the court. Only personal service was recognized at common law, and when substituted service is authorized by statute it is *strictissimi juris*. *Southern Mills, Inc., v. Armstrong*, 495.

§ 2. Issuance and Time of Service.

In a civil action, the delivery of summons and copy of complaint to the sheriff for service fixes the beginning of the action as of that date. *Raleigh v. Bank*, 286.

The rule of the statutes is that, in order to bring a defendant into court and hold him bound by its decree, in the absence of waiver of voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue; and that, if not served within that time, the summons must be returned, with proper notation, and *alias* or *pluries* summons issued and served in accordance with the statute, otherwise the original summons loses its validity and becomes *functus officio* and void. C. S., 476, 480, 481, 753. *Green v. Chrismon*, 724.

An *alias* or *pluries* summons, C. S., 480, *must* be served within ninety days after the date of issue of the next preceding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. The word "may" in this statute means "must." *Ibid.*

§ 3. Defective Process and Amendment.

In a civil action, where summons is issued and served and complaint filed against defendant under an erroneous name, and such defendant, on special appearance, moves to dismiss for want of jurisdiction on that ground, and plaintiff files a motion to amend summons and complaint to conform to the defendant's true name, there is no error in allowing the motion. *Propst v. Trucking Co.*, 490.

Where summons was not served on defendants until after ten days of its issuance, a discontinuance resulting, and a decree made in the cause, based on the invalid service; and subsequently, notice to show cause why such decree should not be confirmed and such service adjudged sufficient was duly served on defendants, and some of them answered, it would appear that all defendants are now in court and the matter may proceed on proper pleas. *Green v. Chrismon*, 724.

Where a clerk of the Superior Court received and docketed summons and complaint, affixed the seal of court to the summons and sent the papers with necessary fees to the sheriff of another county for service, and the papers were served and returned to the clerk, who then signed the summons, upon motion

PROCESS—*Continued.*

of defendant to dismiss upon special appearance, the court has power, in its discretion, to allow the summons to be amended by affixing thereto the signature of the clerk. C. S., 547; G. S., 1-163. *Land Bank v. Aycock*, 837.

§ 5. Service by Publication.

Service of process upon a nonresident individual by publication is valid only in proceedings *in rem* or *quasi in rem* (except in actions for divorce), and any judgment predicated thereupon can have no efficacy *in personam*. *Southern Mills, Inc., v. Armstrong*, 495.

To make valid substituted service under C. S., 484, the nonresident defendant not only must have property in the State, but the subject of the suit must be within the jurisdiction, or under the control of the court by attachment, restraining order, or otherwise. *Ibid.*

A *mandamus*, or mandatory injunction, can only operate *in personam;* and an action under C. S., 1178, to compel the directors of a domestic corporation to pay dividends, so far as substituted service of process on nonresident directors is relied upon, the proceeding is a nullity. *Ibid.*

§§ 8, 10. Service on Nonresident Automobile Owners: Proof of Service.

When service of process on a nonresident, through the Commissioner of Motor Vehicles, as provided in ch. 75, Public Laws 1929, as amended by ch. 36, Public Laws 1941, is sought, it is essential that the sheriff's return show that such service was made as specifically required by these statutes, and that copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. *Propst v. Trucking Co.*, 490.

§ 11. Defective Service.

A *mandamus*, or mandatory injunction, can only operate *in personam;* and in an action under C. S., 1178, to compel the directors of a domestic corporation to pay dividends, so far as substituted service of process on nonresident directors is relied upon, the proceeding is a nullity. *Southern Mills, Inc., v. Armstrong*, 495.

§ 12. Alias and Pluries.

On objection to the original summons for that it fails to show that it was received by the sheriff, where it appears from the judgment roll that a summons, called an *alias*, was later issued and served, the persons so served are in court and bound by the judgment therein. *Park, Inc., v. Brinn*, 502.

The rule of the statutes is that, in order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue; and that, if not served within that time, the summons must be returned, with proper notation, and *alias* or *pluries* summons issued and served in accordance with the statute, otherwise the original summons loses its validity and becomes *functus officio* and void. C. S., 476, 480, 481, 753. *Green v. Chrismon*, 724.

An *alias* or *pluries* summons, C. S., 480, *must* be served within ninety days after the date of issue of the next preceding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. The word "may" in this statute means "must." *Ibid.*

PROSTITUTION.

§ 5c. Sufficiency of Evidence.

In a criminal prosecution for permitting property to be used for prostitution, C. S., 4358, where the State's evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant's wife was one of the operators of the place of ill fame and that its general reputation was bad, motion for judgment as of nonsuit properly denied. *S. v. Herndon*, 208.

On an indictment for permitting property to be used for prostitution or assignation, evidence of the house and its inmates for chastity is competent and knowledge thereof may be proven by circumstantial evidence. The owner *may not shut his eyes and close his ears to that which is patent and notorious* to the community. *Ibid.*

PUBLIC AMUSEMENTS.

§ 2. Duties to Patrons and Public.

The proprietor of a place of public amusement impliedly warrants that the premises, appliances and amusement devices are safe for the purposes for which they are designed, but he does not contract against unknown defects not discoverable by ordinary or reasonable means. *Hiatt v. Ritter*, 262.

The proprietor of a bathing establishment owes to his customers a duty to exercise reasonable care to maintain the premises in a safe condition; but he does not insure his patrons from accident; and his duty to patrons is satisfied when he uses reasonable care to maintain the premises in a safe condition for their proper use by the patrons. *Ibid.*

In an action for recovery of damages for personal injuries, where plaintiff's evidence tended to show that plaintiff, a patron of defendant's swimming pool, jumped into the water from the side of an ordinary slide board, which he knew how to use, instead of sliding down same to the sandy place at its bottom made for landing, and in so doing struck and injured his foot on the sharp end of a bolt supporting the slide board, motion for judgment of nonsuit should have been allowed. *Ibid.*

PUBLIC OFFICERS.

§ 3. Nature of Title or Rights in Public Office.

Upon the ratification of a valid act of the General Assembly, abolishing an elective office, both the duties and emoluments of the office terminate. *Brown v. Comrs. of Richmond County*, 744.

§ 4b. Rule That Person May Not Hold But One Office at One Time.

Under ch. 121, Public Laws 1941, any State official may be given a leave of absence to accept a temporary officer's commission in the United States Army or Navy, as prescribed in the said Act, without perforce vacating his civil office and without violation of the provisions of N. C. Constitution, Art. XIV, sec. 7. *In re Yelton: Advisory Opinion*, 845.

Under Art. XIV, sec. 7, N. C. Constitution, which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. The acceptance of a second office, which is forbidden or incompatible with the office already held, operates *ipso facto* to vacate the first. *Ibid.*

Where the second office is temporary, or the appointment thereto does not require continuous public service, no constitutional offense is incurred by its acceptance. *Ibid.*

PUBLIC OFFICERS—*Continued.*

Historically the "militia" or "militiamen" have been held to comprehend every temporary citizen-soldier, who in time of war or emergency, forsakes his civil pursuits to enter for the duration the active military service of his country. *Ibid.*

§ 5. Duties, Authority and Compensation.

A person, accepting a public office with a fixed salary, is bound to perform the duties of the office for the salary; and he cannot claim additional compensation even though the salary is inadequate; nor is the case altered by subsequent statutes or ordinances increasing his duties and not his salary. He takes the office *cum onere*. *Hill v. Stansbury*, 193.

Upon the ratification of a valid act of the General Assembly, abolishing an elective office, both the duties and emoluments of the office terminate. *Brown v. Comrs. of Richmond County*, 744.

Where the members of the governing body of a municipal corporation expend the funds of the municipality for a private purpose, without warrant in law, they become personally liable. *Ibid.*

§ 6. Tenure and Removal.

Upon the ratification of a valid act of the General Assembly, abolishing an elective office, both the duties and emoluments of the office terminate. *Brown v. Comrs. of Richmond County*, 744.

§§ 7a, 7b. Liability to State or Public in General: For Malfeasance, Misfeasance or Nonfeasance.

In a civil action by taxpayers against county commissioners and the treasurer of the county to recover moneys paid to such treasurer in excess of his salary as fixed by law, where the evidence tended to show that the county treasurer's salary was fixed at $1,800 a year in 1927, and that in 1931, the commissioners designated the treasurer to receive tax prepayments and allowed him $1,200 per year additional, and again in 1939 allowed him $240 more per annum, both without legislative authority, judgment of nonsuit as to the commissioners was properly allowed under C. S., 3206, there being no evidence of bad faith, etc., while such judgment as to the county treasurer is reversed. *Hill v. Stansbury*, 193.

While public officers, acting in a judicial or *quasi*-judicial capacity, are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of judgment, even though such judgment be erroneous: however, when public officers in such cases, instead of acting in an honest exercise of their judgment, act corruptly or of malice, such officers are liable to an individual for damages suffered by reason of such corrupt and malicious conduct. *S. v. Swanson*, 442.

Where the complaint alleges that defendant, a sheriff, in procuring a search warrant for plaintiff's premises and a warrant for his arrest upon a charge of violating the prohibition laws, acted corruptly and with malice, wantonly, falsely, without probable cause and without regard for the public interest, and out of hate and revenge, it was error for the court below to sustain a demurrer *ore tenus*. As defendant surety company is the sheriff's bondsman and liable for his misconduct, C. S., 354, it follows that there was likewise error in sustaining the demurrer filed by it. *Ibid.*

§§ 7c, 8. For Withholding Public Funds: Civil Liability to Individuals.

A public officer is not as a rule relieved from liability for the loss of public moneys in his charge where the loss is due to fire, burglary, theft, or embezzle-

PUBLIC OFFICERS—*Continued.*

ment by subordinates, however careful and prudent he may have been. Under this rule liability would attach where the clerk is the victim of a forgery. *S. v. Sawyer*, 102.

In a civil action by taxpayers against county commissioners and the treasurer of the county to recover moneys paid to such treasurer in excess of his salary as fixed by law, where the evidence tended to show that the county treasurer's salary was fixed at $1,800 a year in 1927, and that in 1931, the commissioners designated the county treasurer to receive tax prepayments and allowed him $1,200 per year additional, and again in 1939 allowed him $240 more per annum, both without legislative authority, judgment of nonsuit as to the commissioners was properly allowed under C. S., 3206, there being no evidence of bad faith, etc., while such judgment as to the county treasurer is reversed. *Hill v. Stansbury*, 193.

Our statutes provide two separate and distinct remedies against clerks of the Superior Courts—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the officer, C. S., 354; and one in behalf of the new clerk against his predecessor in office to recover possession of records, books, papers and money in the hands of the outgoing clerk by virtue or under color of his office. C. S., 943. *S. v. Watson*, 437.

RAILROADS.

§ 9. Accidents at Crossings.

A railroad crossing is itself a notice of danger and a traveler on the highway, before crossing the tracks, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty. *Bailey v. R. R.* and *King v. R. R.*, 244.

RAPE.

§ 1d. Sufficiency of Evidence.

Positive testimony of rape by prosecutrix is sufficient to carry the case to the jury, even when her evidence is denied by defendant, and nonsuit under C. S., 4643, properly denied. *S. v. Vicks*, 384.

§ 1e. Instructions.

In a criminal prosecution for rape, the court charged the jury that if the State's evidence satisfied them beyond a reasonable doubt that defendant had carnal knowledge of prosecutrix, by force and violence, against her will, it would be their duty to return a verdict of guilty, but should such evidence fail to so satisfy them, then they need not find defendant guilty of rape, where in other parts of the charge the jury was definitely instructed not to convict of rape if not so satisfied, there is no error. *S. v. Vicks*, 384.

§ 3. Carnal Knowledge of Female Between 12 and 16 Years.

On the trial of an indictment for carnal knowledge of a female under 16 years of age, C. S., 4209, time is not of the essence of the offense and a variance between allegation and proof as to the date is not material, the statute of limitation not being involved. *S. v. Baxley*, 210.

§ 5. Less Degree of Crime.

In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an

RAPE—*Continued.*

assault upon a female, and the court accepted defendant's plea, the accepted plea is for a misdemeanor under C. S., 4215, and judgment that defendant be confined to the State's Prison for not less than eight nor more than ten years, is a violation of N. C. Const., Art. I, sec. 14, and C. S., 4173. *S. v. Tyson*, 492.

RECEIVING STOLEN GOODS.

§ 2. Knowledge and Felonious Intent.

In a criminal prosecution for receiving stolen goods, C. S., 4250, the test of felonious intent is whether the prisoner knew, or must have known, that the goods were stolen, not whether a reasonably prudent person would have suspected strangers calling at a very early morning hour. *S. v. Oxendine*, 659.

§ 6. Sufficiency of Evidence.

Where three defendants bought goods, paying full value, about 2 a.m. from two strangers, who represented that they must dispose promptly of the merchandise from their business because both had been called to the armed forces and one defendant promptly admitted all the facts to the officers while the other two first denied and then admitetd the purchase, the State's witness who accompanied the thieves saying on cross-examination that the accused persons had no knowledge of the theft, the element of *scienter* is wanting and demurrer should have been sustained. C. S., 4643. *S. v. Oxendine*, 659.

REFERENCE.

§ 2b. Compulsory Reference.

Where defendant objects and excepts to an order of compulsory reference, he has the option of appealing at once or of awaiting final judgment to present his exception to the order duly preserved. *Leach v. Quinn*, 27.

§ 3. Pleas in Bar.

A plea in bar is so peremptory as to prevent the plaintiff from further prosecuting his cause with effect and, if established by proof, to destroy the action altogether. *Leach v. Quinn*, 27.

It is well settled in this jurisdiction that a plea in bar will repel a motion for a compulsory reference, and no order of reference should be entered until the issue of fact raised by the plea is first determined. *Ibid.*

§ 4a. Consent Reference.

On a consent reference the findings of fact by the referee, approved by the judge, are conclusive on appeal if there is competent evidence to support the findings. *Harrison v. Darden*, 364.

§ 8. Exceptions and Preservation of Grounds of Review.

Where defendant objects and excepts to an order of compulsory reference, he has the option of appealing at once or of awaiting final judgment to present his exception to the order duly preserved. *Leach v. Quinn*, 27.

While the ancient mode of trial by jury has been preserved in our present Constitution, Art. I, sec. 19, the right in civil cases may be waived (Art. IV, sec. 13), and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. *Chesson v. Container Co.*, 378.

REFERENCE—*Continued.*

§ 13. Right to Jury Trial.

In reference cases the trial by jury is restricted by the statute (C. S., 573) to the written evidence taken before the referee, which sufficiently complies with the constitutional mandate, if the testimony is taken under oath in the manner prescribed by law, with opportunity to cross-examine. *Chesson v. Container Co.*, 378.

REGISTRATION.

§ 3. Priorities in Registration.

There is nothing in ch. 47, C. S., known as the Torrens Law, which prevents the courts from proceeding to determine the value of improvements claimed by defendants, who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party and ascertained by a consent reference. *Harrison v. Darden*, 364.

SCHOOLS.

§§ 3, 6, 7, 8. Establishment: State Supervision and Control: County Boards and Superintendents: District Boards and Officers.

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to the pertinent constitutional provisions as to uniformity, sec. 2, Art. IX, and length of term, sec. 3, Art. IX. *Coggins v. Board of Education*, 763.

The Legislature may delegate to the local school administrative units the power to make such rules and regulations as may be deemed necessary or expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions. *Ibid.*

It is generally held that local school authorities have the inherent power to make rules and regulations for the discipline, government, and management of the schools and pupils within their district. With us there is ample statutory authority. G. S., ch. 115. *Ibid.*

The findings and conclusions of the local school board, fixing rules and regulations for the government of the schools, are conclusive, unless the board acts corruptly, in bad faith, or in clear abuse of its powers. The court will interfere only when necessary to prevent such action. *Ibid.*

Membership in secret societies is subject to regulation by school boards and in adopting rules requiring every student to sign a pledge that he is not a member of such organization, will not become a member or support any such society, the penalty for refusal to sign being a denial of the right to participate in extracurricular activities, a school board acts within its authority, where the rules make no attempt to deny those not signing any instruction afforded by class work or by the required curriculum of the school. *Ibid.*

§ 21. Actions on Contracts.

In a civil action by a school principal against the school committee to declare rights under a contract as High School Principal and to enjoin its breach, where plaintiff alleged that, for the school year 1942-43, he gave due, legal notice that his contract was still in force and accepted it for the coming year, and a temporary restraining order was issued, and heard on 22 Septem-

SCHOOLS—*Continued.*

ber, 1942, whereupon the order was dissolved and the action dismissed. *Held:* (1) The dissolution of the restraining order was proper; (2) the dismissal of the action was error. *Groves v. McDonald*, 150.

§ 27. Fiscal Management in General.

The Legislature may delegate to the local school administrative units the power to make such rules and regulations as may be deemed necessary or expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions. *Coggins v. Board of Education*, 763.

§ 30. Taxes and Assessments.

Lands owned by "The School Committee of Raleigh Township, Wake County," and used exclusively for public school purposes, are liable for assessment for street improvements made by the city of Raleigh under Art. IX, ch. 56, of the Consolidated Statutes. *Raleigh v. Public School System*, 316.

In the absence of allegation and proof that funds are available, *mandamus* lies to compel the proper school authorities to raise funds by taxation with which to pay a valid assessment for street improvements, as it would be against public policy to enforce collection of the assessment by foreclosure. *Ibid.*

SEDUCTION.

§ 1. Definition and Elements of the Offense.

To convict of seduction under C. S., 4339, it is incumbent upon the State to satisfy the jury beyond a reasonable doubt (1) that the prosecutrix was at the time of the seduction an innocent and virtuous woman; (2) a promise of marriage; and (3) carnal intercourse induced by such promise. The testimony of the prosecutrix alone is not sufficient. There must be independent, supporting evidence of each essential element of the crime. *S. v. Smith*, 199.

§§ 8, 9. Sufficiency and Requisites of Supporting Testimony: Sufficiency of Evidence and Nonsuit.

Testimony supporting prosecutrix, on an indictment for seduction under C. S., 4339, need not be in the form of direct evidence, for it is seldom possible to produce such proof in respect to some of the elements of the offense. Facts and circumstances tending to support her statements are sufficient. And where there is such evidence, a motion for nonsuit should be denied. C. S., 4643. *S. v. Smith*, 199.

SHERIFFS.

§ 6d. Personal Liability.

Where the complaint alleges that defendant, a sheriff, in procuring a search warrant for plaintiff's premises and a warrant for his arrest, acted corruptly and with malice, wantonly, falsely, without probable cause and without regard for the public interest, and out of hate and revenge, it was error for the court below to sustain a demurrer *ore tenus*. As defendant surety company is the sheriff's bondsman and liable for his misconduct, C. S., 354, there was likewise error in sustaining the demurrer filed by it. *S. v. Swanson*, 442.

SLANDER OF TITLE.

§ 2b. Pleadings.

An allegation that one defendant represented and claimed to a codefendant that it had never assigned the lease, in suit between the parties, to plaintiff and that the plaintiff had no right to the possession of the property therein, does not state a cause of action for slander of title. *Texas Co. v. Holton*, 497.

SPECIFIC PERFORMANCE.

§ 4. Proceedings and Relief.

Specific performance of a contract to convey land will not be decreed when the vendor cannot make a good title to the land sold, or when his title thereto is doubtful, or when he can convey only an undivided interest therein. *Park, Inc., v. Brinn*, 502.

In a suit for the specific performance of a contract to convey land, where the complaint alleges in detail a large number of receipts from defendant to plaintiff, constituting written memoranda of the contract to convey, signed by defendant, there was error in allowing a motion to strike such allegations. *Chason v. Marley*, 738.

Allegations of a complaint, in a suit for specific performance, detailing large numbers of payments and other matters wholly evidential or repetitious, are properly stricken on motion. *Ibid.*

STATE.

§ 1. Boards and Agencies Constituting State Agencies.

The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute. *Dalton v. Highway Com.*, 406.

§ 2a. Action Against the State.

A state cannot be sued in its own courts or elsewhere unless it has consented to such suit, by statutes or in cases authorized by provisions of the organic law, instanced by Art. III, Const. of U. S.; Art. IV, sec. 9, Const. of North Carolina. *Dalton v. Highway Com.*, 406.

The special proceeding, provided by C. S., 3846 (bb) and 1716, is to furnish a procedure to condemn land for a public purpose and to fix compensation for the taking thereof and does not in any way authorize an action for breach of contract. *Ibid.*

STATUTES.

§ 5a. General Rules of Construction.

In dealing with a Federal law it is incumbent upon the State courts to apply the rules of construction obtaining in the Federal jurisdiction. *Horton v. Wilson & Co.*, 71.

Wisdom or impolicy of legislation is not a judicial question. The province of this Court ends when it interprets the legal effect of legislative enactments. *Raleigh v. Bank*, 286.

As a rule, in determining the construction to be given legislative enactments, the courts are not controlled by what the Legislature itself apparently thought the proper interpretation, but the language employed, taken in connection with the context, the subject matter and the purpose in view, must be considered in order to ascertain the legislative intent. *Ibid.*

STATUTES—*Continued.*

When the heading of a section is misleading or is not borne out by the explicit language of the statute itself, it may be disregarded; but, when the meaning is not clear or there is ambiguity, the heading, which the Legislature had adopted in enacting the statute, becomes important in determining the legislative intent. *Ibid.*

The whole Revenue Act of 1939 and all of its parts are to be considered *in pari materia*, and construed accordingly. *Valentine v. Gill, Comr. of Revenue*, 396.

The Revenue Act of 1939, ch. 158, sec. 933, gives the Commissioner of Revenue the power to construe the said Act and such construction will be given due consideration by the courts, although it is not controlling. *Ibid.*

Authority for an individual to sue an officer for money wrongfully detained, C. S., 354, and C. S., 357, allowing damages at twelve per cent on any such recovery, relate to the same subject matter, are part of one and the same statute, and must be construed together. *S. v. Watson*, 437.

The different provisions of Public Laws of 1939, ch. 158, relative to granting license for the sale of beer and wine, are *pari materia* and must be read together as one connected whole. *McCotter v. Reel*, 486.

It is not the policy of the criminal law to make a person charged with crime the victim of ambiguities. Statutes levying taxes and statutes creating criminal offenses are subject to strict construction. *S. v. Campbell*, 828.

Public Laws 1939, ch. 188, is regulatory, involving police power as well as taxing power, and the words, "tourist camp, cabin camp, tourist home, *roadhouse*, public dance hall, or other similar establishment," in sec. 1, are qualified by the words "where travelers, transient guests, or other persons are or may be lodged for pay," so that to convict a person of operating a "roadhouse" and impose the penalties of sec. 13, it must be shown that such person lodged or offered to lodge transient guests. *Ibid.*

§ 5b. Construction in Regard to Constitutionality.

The Legislature may set a time lock even for the sovereign; and the maxim *nullum tempus occurrit regi* is not applicable to statutes which impose a limitation upon the exercise of powers granted municipalities for the enforcement of statutory liens of assessments for public improvements. *Raleigh v. Bank*, 286.

§ 5c. Special and General Statutes.

The general rule is that when a statute creates a liability where none existed before and denominates its violation a misdemeanor, and prescribes remedies for its enforcement, such remedies are usually regarded as exclusive. *Expressio unius est exclusio alterius. Moose v. Barrett*, 524.

§ 8. Criminal Statutes.

It is not the policy of the criminal law to make a person charged with crime the victim of ambiguities. Statutes levying taxes and statutes creating criminal offenses are subject to strict construction. *S. v. Campbell*, 828.

Public Laws 1939, ch. 188, is regulatory, involving police power as well as taxing power, and the words, "tourist camp, cabin camp, tourist home, *roadhouse*, public dance hall, or other similar establishment," in sec. 1, are qualified by the words "where travelers, transient guests, or other persons are or may be lodged for pay," so that to convict a person of operating a "roadhouse" and impose the penalties of sec. 13, it must be shown that such person lodged or offered to lodge transient guests. *Ibid.*

TAXATION.

§ 1. Uniform Rule and Discrimination.

There is no provision of the N. C. Constitution directly forbidding the Legislature to pass any law releasing or remitting taxes. *Raleigh v. Bank*, 286.

§ 3a. Tax Rate.

The total tax assessment by a county shall not exceed the constitutional limit for general purposes, except when levied for a special purpose and with the special approval of the General Assembly, by special or general act, N. C. Const., Art. V, sec. 6; and Cumberland County is authorized by the Act of 1923, now C. S., 1297 (8½), to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. Conceding that C. S., 1297 (28), and C. S., 1335, constitute special approval of the General Assembly for unlimited levy for a special purpose, they are general acts and conflict with the provisions of the later act of 1923. *R. R. v. Cumberland County*, 750.

§ 18. Inheritance, Estate and Gift Taxes.

The inheritance tax of the 1939 Revenue Act is not a tax on the property, but on the transfer of the property; and, while there must be an identity of the property, which is the subject of the transfer and claimed to be recurrently taxed, to qualify for the exemption provided in sec. 12, the exemption is allowed only to the transferees as set out in secs. 3 and 4. *Valentine v. Gill, Comr. of Revenue*, 396.

The exemptions from recurrent inheritance taxes within two years, allowed under sec. 12 of the Revenue Act of 1939, are applicable only to immediate current transfers of property upon which the tax is imposed; and the relationship as set out in secs. 3 and 4 must exist between the transferee and the immediate decedent from whom the property has been received. *Ibid.*

Where inheritance taxes, under the Revenue Act of 1939, are paid on property passing from a wife's estate to her husband, who dies within less than two years thereafter leaving the same property to a sister of his deceased wife, a second inheritance tax must be paid thereon. *Ibid.*

Where three donees have notice that the U. S. Commissioner of Internal Revenue has assessed against them a large gift tax liability, for the whole of which each is liable, and all file petitions with the Board of Tax Appeals for a redetermination of the deficiency, and pending a hearing, one of the donees secures an adjustment and, after notice to the others, who failed to appear and make defenses, pays the same, the donee so paying the entire assessment is entitled to contribution from the other two. *Nebel v. Nebel*, 676.

§ 19. Property of State and Political Subdivisions.

While the Constitution of North Carolina provides that property belonging to the State or to municipal corporations shall be exempt from taxation (Art. V, sec. 5), assessments on public school property for special benefits thereto, caused by the improvement of the street on which it abuts, are not embraced within the prohibition. *Raleigh v. Public School System*, 316.

§ 25. Valuation and Revaluation.

Mandamus is a proper remedy to compel the North Carolina State Board of Assessment to perform a public duty of a ministerial nature imposed by statute —but not to control them in the exercise of any discretion. The assuming of jurisdiction for assessments over the railroad lines of common carriers and reporting to the several counties their quotas of valuation thereof may be regarded as ministerial duties. *Warren v. Maxwell*, 604.

TAXATION—*Continued.*

Where a railroad, under an order of the Interstate Commerce Commission, abandons its operations as a common carrier on a portion of its road, cancels its tariffs over same and thereafter does not operate over such portion of its line, except to haul away the scrap as the roadbed is dismantled and salvaged, it ceases to be vested with a character which would bring it within the jurisdiction of the State Board of Assessment for appraisal and taxation. C. S., 7971 (193), *et seq.* *Ibid.*

§ 40c. Foreclosure of Tax Lien.

Where the judgment of foreclosure, in a tax suit, C. S., 7990, authorized a sale, in default of payment of all taxes, etc., on or before sixty days from the date of the judgment, and the original sale was held within sixty days of such date and after two resales, the last of which was held more than three months after the date of the judgment, the sale was finally consummated, there was ample opportunity to redeem, and sale and confirmation are valid. *Park, Inc., v. Brinn*, 502.

In a suit to enforce a tax lien (C. S., 7987) by foreclosure (C. S., 7990), where the affidavit, orders and notices appear sufficient in form to constitute service by publication upon all persons named therein, both adult and minors, their heirs and assigns, known and unknown, C. S., 484 (3) and (7), yet, minors, if any, must be represented by guardian, or guardian *ad litem*, otherwise such minors are not bound by the judgments in the action. C. S., 451, 452, 453, and Machinery Act of 1939, ch. 310, Art. XVII, sec. 1719 (e). *Ibid.*

In the absence of fraud, or the knowledge of fraud, one who purchases at a judicial sale, or who purchases from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter, and that the judgment on its face authorized the sale. *Ibid.*

Where the record in a tax foreclosure proceeding shows an unknown party in interest, without evidence and finding that he left no minor heirs and no other heirs not before the court, the judgment confirming the sale and deed to the purchaser are invalid as to the interest of any minor heirs of such party. *Ibid.*

In an action to foreclose a tax lien on land, C. S., 7990, the mere inadequacy of the price bid therefor is not sufficient to avoid the sale and cancel the deed to the purchaser, unless some element of fraud, suppression of bidding, or other unfairness in the sale appears. *Duplin County v. Ezzell*, 531.

In actions to foreclose liens for delinquent taxes or special assessments, the judgment obtained constitutes a lien *in rem* and the owner of the property is not personally liable for the payment thereof. *Apex v. Templeton*, 645.

§ 42. Tax Deeds and Titles.

A person, under any legal or moral obligation to pay taxes, cannot by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. *Stell v. Trust Co.*, 550.

TENANTS IN COMMON.

§ 3. Title of Tenants.

An exchange of deeds by tenants in common, where the purpose is clearly partition, does not create or confer upon the parties any new or different title; and where a husband, in such a partition, is made a joint grantee with his wife he acquires no title. *Duckett v. Lyda*, 356.

TORTS.

§ 4. Determination of Whether Tort Is Joint or Separable.

In an action by a city, for contribution as joint tort-feasors, against defendants, alleging that a judgment was taken against the city, for injuries sustained by a pedestrian stumbling on a stake on the property of defendants and very near, but not on, the city sidewalk, a demurrer to the complaint should have been sustained, as it discloses no actionable negligence against the city to which the conduct of defendants could have contributed. *Charlotte v. Cole*, 106.

§ 5. Liabilities of Tort-Feasor to Person Injured.

The liability of joint tort-feasors to one who has sustained an injury through their common negligence is joint and several; and the injured party may sue either of them separately or any or all of them together, at his option. *Charnock v. Taylor*, 360.

In so far as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of C. S., 618, to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. *Ibid.*

§ 6. Right to Contribution Among Tort-Feasors.

Where a judgment has been obtained, arising out of a joint tort, and only one of the joint tort-feasors was a party and judgment against him alone, to enable such judgment debtor to recover, under C. S., 618, against the other joint tort-feasor, he must allege and prove, in an action *de novo*, the negligence of his alleged joint tort-feasor, the defendant, and his duty of contribution. *Charlotte v. Cole*, 106.

If there is no right of action in the sovereignty where the alleged tort occurred, there is none anywhere. *Charnock v. Taylor*, 360.

Under the common law there is no right of action by one joint tort-feasor to enforce contribution from another, and Tennessee follows the common law. *Ibid.*

It was not the purpose and it is not the effect of C. S., 618, to create a cause of action in contribution between joint tort-feasors when the *lex loci delicti* gives none. *Ibid.*

In so far as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of C. S., 618, to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. *Ibid.*

One of several defendants, in an action for wrongful death arising out of a joint tort, may have still another joint tort-feasor brought in and made a party defendant for the purpose of enforcing contribution, where plaintiff's right of action against such other tort-feasor, originally subsisting, has been lost by the lapse of time. C. S., 160. *Godfrey v. Power Co.*, 647.

In actions arising out of a joint tort, wherein judgment may be rendered against two or more persons who are jointly and severally liable, and not all of the joint tort-feasors have been made parties, those who are sued may at any time before judgment, upon motion, have the other joint tort-feasors

TORTS—*Continued.*

brought in and made parties defendant in order to determine and enforce contribution. Indeed, the right of contribution may be enforced after the liability to the injured party has been extinguished by payment of the judgment and its transfer to a trustee for the benefit of the paying judgment debtor. C. S., 618. *Ibid.*

At common law no right of action existed between or among joint tort-feasors who were *in pari delicto*, so that the right necessarily depends upon the terms of the statute. C. S., 618. *Ibid.*

TRIAL.

I. Time of Trial, Notice, Preliminary Proceedings.

4. Continuance. S. v. Lippard, 167; S. v. Farrell, 321; S. v. Rising, 747.

II. Order, Conduct, and Course of Trial.

11. Consolidation of actions for trial. Park, Inc., v. Brinn, 502.

III. Reception of Evidence.

14. Objections and exceptions. S. v. Hunt, 173; Chesson v. Container Co., 378.
15. Motions to strike out. S. v. Hunt, 173; S. v. Herndon, 208.
17. Admission of evidence for restricted purposes. S. v. McKinnon, 160.

IV. Province of Court and Jury.

19. In regard to evidence. S. v. DeGraffenreid, 461; Curlee v. Scales, 788.

V. Nonsuit.

22a. Consideration of evidence in general. Wingler v. Miller, 15; Ross v. Greyhound Corp., 239; Crone v. Fisher, 635; Ward v. Smith, 141; Gibbs v. Russ, 349; Daughtry v. Daughtry, 528; Stell v. Trust Co., 550; In re Will of Evans, 206.

22b. Sufficiency of evidence. Gregory v. Ins. Co., 124; Pappas v. Crist, 265; Sellers v. Harrelson, 138; Lee v. Chamblee, 146; Gibbs v. Russ, 349; Peel v. Calais, 368; Smith v. Whitley, 534; Stell v. Trust Co., 550; Thompson v. Davis, 792.

23. Contradictions and discrepancies in evidence. Ward v. Smith, 141; Bank v. Ins. Co., 390.

VI. Directed Verdict and Peremptory Instructions.

27c. In favor of defendant. Andrews v. Ins. Co., 583. Requisites and sufficiency in general. S. v. Utley, 39; S. v. Hunt, 173; S. v. Vicks, 384; McNeill v. McNeill, 178; S. v. Friddle, 258; S. v. Cameron, 464; S. v. Redfern, 561. Statement of evidence and explanation of law arising thereon. Byers v. Byers, 85; Cab Co. v. Sanders, 626; Baird v. Baird, 730.

VII. Instructions.

29a. Form, requisites and sufficiency in general. S. v. Utley, 39; S. v. Hunt, 173; S. v. Vicks, 384; McNeill v. McNeill, 178; S. v. Friddle, 258; S. v. Cameron, 464; S. v. Redfern, 561.

29b. Statement of evidence and explanation of law arising thereon. Byers v. Byers, 85; Cab Co. v. Sanders, 626; Baird v. Baird, 730.

30. Conformity to pleadings and evidence. Curlee v. Scales, 788.

31. Expression of opinion by court. S. v. Lippard, 167; S. v. Auston, 203; S. v. DeGraffenreid, 461; Thompson v. Davis, 792.

32. Requests for instructions. McNeill v. McNeill, 178; S. v. Friddle, 258; Woods v. Roadway Express, 269; S. v. Cameron, 464.

33. Statement of contentions and objections thereto. S. v. Cameron, 464; S. v. Rising, 747.

35. Additional instructions and redeliberation of jury. S. v. Hunt, 173.

36. Construction of instructions and general rules of review. Ibid; Woods v. Roadway Express, 269; S. v. Vicks, 384.

VIII. Issues and Verdict.

37. Form and sufficiency in general. Wingler v. Miller, 15.

38. Conformity to pleadings and evidence. Abrams v. Ins. Co., 500.

X. Motions After Verdict.

49. Motions to set aside as being against weight of evidence. Francis v. Francis, 401.

52. Agreements and waiver of jury trial. Chesson v. Container Co., 378.

54. Findings and judgment. Fish v. Hanson, 143; S. v. Griggs, 279.

§ 4. Continuance.

The allowing or disallowing of a motion for a continuance is vested in the sound discretion of the trial judge and his ruling thereon is not reviewable,

where there is no manifest abuse of such discretion. *S. v. Lippard*, 167; *S. v. Farrell*, 321; *S. v. Rising*, 747.

Where a criminal prosecution is continued to the next regular term and prior thereto called for trial at a special term, there is no error for the court to refuse a continuance to such regular term, on the ground of the unavoidable absence of a material expert witness for defense, it appearing that the solicitor agreed not to offer evidence on the facts, which it was alleged would be denied by such absent witness. *S. v. Rising*, 747.

§ 11. Consolidation of Actions for Trial.

Where actions are pending in the same court, at the same time, between the same parties and involving substantially the same facts, they may be consolidated. This principle applies to tax foreclosure suits. C. S., 7987, 7990. *Park, Inc., v. Brinn*, 502.

§ 14. Objections and Exceptions.

In a criminal prosecution objections to the evidence of State's witness must be made to questions at the time they are asked and to answers when given. Objections not so taken in apt time are waived. *S. v. Hunt*, 173.

In a trial before a referee, where by written stipulation counsel on both sides agreed, in lieu of offering oral evidence, that the stenographer's transcript of the sworn testimony of the witnesses at a previous trial of the case in the Superior Court, together with exhibits, should constitute the evidence before the court, there was no error, when this evidence was subsequently offered before a jury, for the court to decline to rule on the objections interposed when the evidence was originally offered, it appearing from the record that the only objections originally interposed were to testimony which was competent. *Chesson v. Container Co.*, 378.

§ 15. Motions to Strike Out.

A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling, unless abuse of discretion appears, is not subject to review on appeal. *S. v. Hunt*, 173; *S. v. Herndon*, 208.

§ 17. Admission of Evidence for Restricted Purposes.

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. Rule 21, Rules of Practice in the Supreme Court. *S. v. McKinnon*, 160.

§ 19. In Regard to Evidence.

The trial court shall not intimate or give an opinion to the jury whether a fact has been fully or sufficiently proved, this being the true province of the jury. *S. v. DeGraffenreid*, 461.

It is the prerogative of the court to supervise and control the introduction of testimony, and when a question arises as to whether evidence was offered and admitted, it is the duty of the judge to decide. *Curlee v. Scales*, 788.

§ 22a. Consideration of Evidence, in General.

On motion for judgment of nonsuit the evidence is taken in the light most favorable to plaintiffs, who are entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn

therefrom. *Wingler v. Miller*, 15; *Ross v. Greyhound Corp.*, 239; *Crone v. Fisher*, 635.

A motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and support a recovery. The question thus presented is a question of law and is always to be decided by the court. C. S., 567. *Ward v. Smith*, 141.

A refusal to admit competent evidence, which, when considered with all the other evidence, fails to make out a case for the jury, is harmless error. The burden is on the appellant, not only to show error, but prejudicial error. *Gibbs v. Russ*, 349.

When the only defendants, who have any interest adverse to the plaintiff, move for judgment of nonsuit, C. S., 567, which is granted, objection and exception thereto, upon the theory that only some of defendants lodged the motion, are untenable. *Daughtry v. Daughtry*, 528.

Upon a motion for judgment as of nonsuit, C. S., 567, at the close of all the evidence, the court will consider only the evidence which tends to support the plaintiff's claim. *Stell v. Trust Co.*, 550.

In proceeding to caveat a will motions as of nonsuit or requests for direction of a verdict on the issues will be disallowed. *In re Will of Evans*, 206.

§ 22b. Sufficiency of Evidence.

In considering a motion for nonsuit after all the evidence of both sides, the defendant's evidence unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff. *Gregory v. Ins. Co.*, 124; *Pappas v. Crist*, 265.

In an action by plaintiffs to have a tax deed to the *feme* defendant Harrelson set aside as fraudulent or to have grantee declared a trustee, where the evidence tended to show that the Harrelsons were plaintiffs' rental agents and as such allowed the property to be sold for taxes and *feme* defendant Harrelson bought same at tax sale and sold parts thereof to the other defendants, one of them paying a consideration and the others none, judgment of nonsuit was proper as to the purchaser who paid a consideration, and improper as to all other defendants. *Sellers v. Harrelson*, 138.

In a suit on a note, which appears to be under seal with defendant and another as joint makers or joint obligors, plaintiff makes out a *prima facie* case by offering the note, and motion for nonsuit should have been denied. *Lee v. Chamblee*, 146.

Where the only evidence to sustain the cause of action alleged by plaintiff is incompetent, but erroneously admitted, and an appeal is taken by defendant from the refusal of judgment of nonsuit thereon, this Court will not overrule the trial court and grant the nonsuit. *Gibbs v. Russ*, 349.

In a petition for partition, converted into an action in ejectment by defendants' plea of sole seizin, where a common source of title is admitted and the description, in the deed relied upon by defendants, does not sufficiently identify the *locus in quo* as a part of the land conveyed, without resort to evidence *dehors* the deed of defendant, a judgment of nonsuit as to plaintiff is erroneous. *Peel v. Calais*, 368.

Where plaintiff was injured in an aeroplane crash, the pilot being negligent in not having a license, there is no evidence that this negligence was the proximate cause of the injury, the doctrine of *res ipsa loquitur* does not apply, and judgment as of nonsuit was proper. C. S., 567. *Smith v. Whitley*, 534.

In a suit by plaintiff, grantor and debtor in a deed of trust on land, against defendants, holders of the debt, for an accounting, upon motion for nonsuit at

the close of all the evidence, which tended to show that plaintiffs rented the lands and the rents were paid to the said holders of the debt to be applied to the debt and interest and taxes, the said holders of the debt allowing the property to be sold for taxes and becoming the purchaser at the tax sale, it was error for the court to allow the motion, on the ground of (1) laches or (2) adverse possession under a valid tax deed. *Stell v. Trust Co.*, 550.

Where plaintiff and two of defendants, in forming a partnership, agreed to purchase a certain lot, title to be taken in the name of the partners, and plaintiff paid one-third of the down payment to one of defendants, who with the other defendant was to take care of the balance, and the defendant to whom the money was paid took title to the property in himself and his wife, without the knowledge of the other partners, there is evidence of a parol trust and motion for judgment as of nonsuit was properly overruled. *Thompson v. Davis*, 792.

§ 23. Contradictions and Discrepancies in Evidence.

Equivocations, discrepancies, and contradictions in plaintiff's evidence affect its credibility only and do not justify withdrawing the evidence from the jury. *Ward v. Smith*, 141; *Bank v. Ins. Co.*, 390.

§ 27c. Directed Verdict in Favor of Defendant.

Where plaintiff's evidence is positive on the vital question involved upon his direct examination and on cross-examination ambiguous, but not diametrically opposed to that on his examination-in-chief, the defendant is not entitled, on plaintiff's evidence, to a directed verdict. *Andrews v. Ins. Co.*, 583.

§ 29a. Form, Requisites and Sufficiency in General.

A charge is to be construed contextually and not by detaching clauses from their appropriate setting. *S. v. Utley*, 39; *S. v. Hunt*, 173; *S. v. Vicks*, 384.

A judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issues and arising on the evidence and this without any special prayer for instructions, which is only necessary in reference to subordinate matters. C. S., 564. *McNeill v. McNeill*, 178.

The judge, in his charge to the jury, should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. C. S., 564. *S. v. Friddle*, 258.

The court is not required to charge on a subordinate feature of the case in the absence of a request therefor at the proper time. *S. v. Cameron*, 464.

Since the charge should be considered contextually, it is not essential that the court charge the jury as to the law in connection with each contention of the parties. The better rule is for the court to give (1) a summary of the evidence; (2) the contention of the parties; and (3) an explanation of the law arising on the facts. *S. v. Redfern*, 561.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

Expressions in an opinion are to be interpreted in connection with the factual situation under review. *Byers v. Byers*, 85.

When the court undertakes to charge the jury upon a particular phase of the evidence, it must state the law applicable to the respective contentions of each party thereupon. *Cab Co. v. Sanders*, 626.

An exception to the court's charge, that it failed to state in a plain and correct manner the evidence and law arising thereon as provided in C. S., 564, is a broadside exception and presents no question for decision. *Baird v. Baird*, 730.

§ 30. Conformity to Pleadings and Evidence.

Where the court in its charge submits to the jury for their consideration facts material to the issue, which were no part of the evidence offered, there is prejudicial error. *Curlee v. Scales*, 788.

§ 31. Expression of Opinion by Court.

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate the statute (C. S., 564), since this statute relates only to the expression of opinion during the trial of the case. *S. v. Lippard*, 167.

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. C. S., 564. *S. v. Auston*, 203.

The trial court shall not intimate or give an opinion to the jury whether a fact has been fully or sufficiently proved, this being the true province of the jury. *S. v. DeGraffenreid*, 461.

The use of the formula "the evidence tends to show" is not an expression of opinion upon the evidence in violation of C. S., 564. *Thompson v. Davis*, 792.

§ 32. Requests for Instructions.

A judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issues and arising on the evidence and this without any special prayer for instructions, which is only necessary in reference to subordinate matters. C. S., 564. *McNeill v. McNeill*, 178; *S. v. Friddle*, 258.

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 269.

The court is not required to charge on a subordinate feature of the case in the absence of a request therefor at the proper time. *S. v. Cameron*, 464.

§ 33. Statement of Contentions and Objections Thereto.

On a criminal prosecution, objections to the court's statement of the contentions of the State and the defendant, in its charge to the jury, will not be sustained, where no unfairness appears therein and the contentions as stated were predicated on reasonable deductions from the evidence. *S. v. Cameron*, 464.

While the judge was stating the contentions of the parties in a criminal case, objection was made by defendant that a certain witness did not testify as stated by the court and the court at once instructed the jury that they were to be governed by their own recollection of what the witness said, there is no reversible error. *Ibid.*

Exceptions to the court's statements of the evidence are untenable, where it does not appear in the record that the alleged errors were called to the attention of the court in time to make correction. *S. v. Rising*, 747.

TRIAL—*Continued.*

§ 35. Additional Instructions and Redeliberation of Jury.

Where the court charged the jury that they might convict defendants of rape, or of the lesser degrees thereof, as they should find from the evidence, failing to state, as to one defendant, that they might also find him "not guilty," and the court thereafter recalled the jury and again clearly instructed the jury that they might find defendants "not guilty," in terms which could not have been misunderstood, no prejudicial error is made to appear. *S. v. Hunt*, 173.

§ 36. Construction of Instructions and General Rules of Review.

Where the court charged the jury that they might convict defendants of rape, or of the lesser degrees thereof, as they should find from the evidence, failing to state, as to one defendant, that they might also find him "not guilty," and the court thereafter recalled the jury and again clearly instructed the jury that they might find defendants "not guilty," in terms which could not have been misunderstood, no prejudicial error is made to appear. *S. v. Hunt*, 173.

Errors in the court's charge, on an issue answered in favor of the party who makes the exceptive assignments of error, are harmless. To be reversible, the error must be material and prejudicial to appellant's rights. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 269.

Where the court, at the time testimony is withdrawn, definitely instructs the jury not to consider same, there is a presumption on appeal that the jury obeyed such instruction, unless prejudice appears or is shown by appellant, on whom the burden rests. *S. v. Vicks*, 384

§ 37. Form and Sufficiency in General.

Where a stipulation is entered into by counsel for plaintiffs and defendants that only one issue may be submitted to the jury and the parties waive the submitting of any other issue, on appeal the Court's consideration is limited to those exceptions and assignments of error bearing on the single issue submitted by consent. *Wingler v. Miller*, 15.

§ 38. Conformity to Pleadings and Evidence.

In an action to recover under the terms of a life insurance policy, where plaintiff also alleges a wrongful cancellation of the policy, such allegation is an additional cause of action and, defendant admitting the cancellation, it was error for the trial court to refuse to submit an issue on the question of such cancellation. *Abrams v. Ins. Co.*, 500.

§ 49. Motions to Set Aside Verdict as Being Against Weight of Evidence.

The allowance or denial of a motion to set aside the verdict, on the ground of an excessive recovery, is within the sound discretion of the trial judge. *Francis v. Francis*, 401.

§ 52. Agreements and Waiver of Jury Trial.

While the ancient mode of trial by jury has been preserved in our present Constitution, Art. I, sec. 19, the right in civil cases may be waived (Art. IV, sec. 13), and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. *Chesson v. Container Co.*, 378.

TRIAL—*Continued.*

§ 54. Findings and Judgment.

Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. C. S., 569. *Fish v. Hanson*, 143.

Where the court below in denying a motion made no findings of fact on the point involved, but there was evidence to support the ruling and no request was made that the facts be found, it will be presumed on appeal that the court found sufficient facts to support its conclusions. *S. v. Griggs*, 279.

TRUSTS.

§ 1b. Parol Trusts.

The section of the English statute of frauds relating to parol trusts has not been enacted in North Carolina and our present statute, G. S., 22-2, has no application to such trusts and does not prohibit their establishment by parol evidence. And such proof is not a violation of the rule prohibiting parol evidence to contradict, alter or explain a written instrument. *Thompson v. Davis*, 792.

The fact that the title is an estate by the entireties presents no obstacle to the enforcement of the equity of a parol trust, if properly shown to exist. *Ibid.*

While the evidence to establish a parol trust must be clear, strong and convincing, it is the province of the jury to say whether it is of that nature. *Ibid.*

Where plaintiff and two of defendants, in forming a partnership, agreed to purchase a certain lot, title to be taken in the name of the partners, and plaintiff paid approximately one-third of the down payment to one of defendants, who with the other defendant was to take care of the balance, and the defendant to whom the money was paid took title to the property in himself and his wife, without the knowledge of the other partners, there is evidence of a parol trust and motion for judgment as of nonsuit was properly overruled. *Ibid.*

In a suit to impress realty with a parol trust in favor of a partnership, there is no reversible error in the admission of evidence of the partnership affairs, occurring after a reference for an accounting, showing that profits were used to enhance the value of the realty in question and that rents from such realty went into the partnership fund. *Ibid.*

In a suit to impress realty with a parol trust for the benefit of a partnership, where proper instructions have been given, there is no error in the submission of the issue, "Do defendants (naming them) hold the legal title to the property described in the complaint as trustees for the partners (naming them)?" *Ibid.*

§ 1d. Charitable Trusts.

Where testator devised realty to his wife and another for life, remainder to plaintiff, a charitable corporation, to apply, after paying upkeep, to its maintenance, but should plaintiff refuse this gift or reject it, then to testator's heirs, and life tenants, who are now dead, allowed the property to deteriorate and some of it burned, all without action for waste by plaintiff, who has sold and leased some of the property and contracted to sell the remainder, there is no forfeiture, abandonment, refusal or rejection of the property. The gift is not a charitable trust but is a fee simple remainder, subject to reverter upon a failure to accept or a rejection after acceptance. *Oxford Orphanage v. Kittrell*, 427.

TRUSTS—*Continued.*

§ 15. Acts and Transactions Creating Resulting or Constructive Trusts.

In an action by plaintiffs to have a tax deed to the *feme* defendant Harrelson set aside as fraudulent or to have grantee declared a trustee, where the evidence tended to show that the Harrelsons were plaintiffs' rental agents and as such allowed the property to be sold for taxes and *feme* defendant Harrelson bought same at tax sale and sold parts thereof to the other defendants, one of them paying a consideration and the others none, judgment of nonsuit was proper as to the purchaser who paid a consideration, and improper as to all other defendants. *Sellers v. Harrelson*, 138.

UTILITIES COMMISSION.

§ 4. Appeal.

The jurisdiction of the courts over regulations for "public convenience and necessity," made by State administrative bodies, in accordance with statutes, is neither original nor wholly judicial in character, and it is not the intent of such statutes that the public policy of the State shall be fixed by a jury. *Utilities Commission v. Trucking Co.*, 687.

While on appeal from the Utility Commission to the Superior Court the provision of the statute has been interpreted to mean that the trial shall be *de novo*, it also provides that the decision or determination of the Commission "shall be *prima facie* just and reasonable." C. S., 1098. *Ibid.*

Where on petition of an interstate trucking company, operating across the State, to the Utilities Commission for the privilege of intrastate business on part of its lines, the Commission finds, on competent evidence, that the present intrastate carriers maintain sufficient schedules to meet the transportation needs of the territory involved, on appeal to the Superior Court, there being no showing sufficient to overcome the "*prima facie* just and reasonable" disposition of the matter by the Commission, judgment as of nonsuit was proper. *Ibid.*

As a general rule, where a matter is committed to an administrative agency, one, who fails to exhaust the remedies provided before such agency and by appeal, will not be heard in equity to challenge the validity of its orders. *Warren v. R. R.*, 843.

VENUE.

§ 2a. Residence of Parties.

If an action be one in which the recovery of personal property is not the sole or chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. C. S., 463 (4). *Chevrolet Co. v. Cahoon*, 375.

Where plaintiff brings an action in the county of his residence, based upon a note secured by a chattel mortgage on an automobile, against three defendants, two of whom executed the said note and mortgage and are residents of another county, and the third defendant, who has possession of the car, is a resident of a third county, the chief relief sought is the collection of the debt and a claim and delivery for the car is only ancillary, so that the action should not be removed. *Ibid.*

WATERS AND WATERCOURSES.

§ 1. Riparian Rights in General.

A riparian proprietor who owns no part of the bed of navigable waters has no several and exclusive fishery therein. *Hampton v. Pulp Co.*, 535.

The public has a common right to fish in all navigable waters, provided that right is exercised with due regard for the rights of others. *Ibid.*

§ 13. Determination of Whether Waters Are Navigable.

The Roanoke River, at the place of controversy, is a navigable stream. *Hampton v. Pulp Co.*, 535.

§ 14. Rights of Public and Riparian Owners.

A riparian proprietor who owns no part of the bed of navigable waters has no several and exclusive fishery therein. *Hampton v. Pulp Co.*, 535.

The public has a common right to fish in all navigable waters, provided that right is exercised with due regard for the rights of others. *Ibid.*

WILLS.

§ 13. Revocation by Testator.

The fact that a will was executed in duplicate does not alter the rule that a will left in the custody of the testator, which cannot be found after his death, is presumed to have been intentionally destroyed by him *animo revocandi*. This presumption is of fact and may be rebutted by evidence. *In re Will of Wall*, 591.

§ 16b. Proof of Will and Probate Proceedings.

The rule generally followed by the courts, where the probate of duplicate wills has been considered, is that, where the duplicate copy retained by the testator is not produced or its absence satisfactorily accounted for, the other copy may not be admitted to probate. *In re Will of Wall*, 591.

The fact that a will was executed in duplicate does not alter the rule that a will left in the custody of the testator, which cannot be found after his death, is presumed to have been intentionally destroyed by him *animo revocandi*. This presumption is of fact and may be rebutted by evidence. *Ibid.*

§ 22. Burden of Proof.

The intent of the testator, as expressed in the will, "taking it by its corners," is the "Polar star" guiding the Court in arriving at the proper construction of the language used. Generally two presumptions prevail—(1) against intestacy; and (2) in favor of the first taker. *Trust Co. v. Miller*, 1.

Upon filing a caveat to a will the burden of showing reversible error is upon caveators, and verdict and judgment will not be set aside for harmless error or for mere error and no more. To accomplish this result, it must appear not only that there is error, but also that it is material and prejudicial, amounting to a denial of some substantial right. *In re Will of Cooper*, 34.

The fact that a will was executed in duplicate does not alter the rule that a will left in the custody of the testator, which cannot be found after his death, is presumed to have been intentionally destroyed by him *animo revocandi*. This presumption is of fact and may be rebutted by evidence. *In re Will of Wall*, 591.

WILLS—*Continued.*

§§ 23b, 23c. Evidence on Issue of Mental Capacity: Evidence of Fraud, Duress or Undue Influence.

In certain known and definite fiduciary relations, if there be dealing between the parties, on complaint of the party in the power of the other, the relation of itself, and without other evidence, raises a presumption of fraud as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted. Among these relations are (1) trustee and *cestui que trust;* (2) attorney and client; (3) mortgagor and mortgagee; (4) guardian and ward; and (5) principal and agent. *McNeill v. McNeill*, 178.

Provisions of a will, and recitals in other writings, may be considered by a jury, in connection with other evidence, as bearing on the issue of mental capacity and undue influence. *Ibid.*

§ 24. Sufficiency of Evidence and Nonsuit.

Upon caveat to a will and issue of *devisavit vel non*, where there is no conflict in the testimony as to the due execution of the paper writing as a will and no evidence of undue influence or mental incapacity, it is not error for the court to charge the jury to answer the issue in the affirmative, should they find, by the greater weight of the evidence, the facts to be as testified to by the witnesses and as shown by the documentary evidence. *In re Will of Evans*, 206.

In proceeding to caveat a will motions as of nonsuit or requests for direction of a verdict on the issues will be disallowed. *Ibid.*

§ 25. Instructions.

In an action to set aside deeds and issue of *devisavit vel non*, where the evidence showed that, at the time of the execution of the instruments, the grantee in the deeds and the executor and principal beneficiary in the will was the agent of grantor and testatrix and in full charge of her business affairs, it was reversible error for the court to fail to charge that such circumstances create a strong suspicion of fraud and undue influence and the law casts upon such grantee and principal beneficiary the burden of removing such suspicion by offering proof that the instruments in question are the free and voluntary act of the maker. *McNeill v. McNeill*, 178.

Where, in an action to set aside deeds and issues of *devisavit vel non*, consolidated for trial, the judge charged the jury that recitals in the deeds and in the will were some evidence of mental capacity, it was error for the court, upon proper prayer of caveators and those attacking the deeds, to refuse to instruct the jury that, if they were satisfied from the evidence that grantor and testatrix did not give directions for the recitals in the deeds and will, then such recitals would not be evidence of mental capacity. *Ibid.*

Upon caveat to a will and issue of *devisavit vel non*, where there is no conflict in the testimony as to the due execution of the paper writing as a will and no evidence of undue influence or mental incapacity, it is not error for the court to charge the jury to answer the issue in the affirmative, should they find, by the greater weight of the evidence, the facts to be as testified to by the witnesses and as shown by the documentary evidence. *In re Will of Evans*, 206.

§ 27. Verdict and Judgment.

In proceedings to caveat a will motions as of nonsuit or requests for direction of a verdict on the issues will be disallowed. *In re Will of Evans*, 206.

WILLS—*Continued.*

The policy of the law will not permit an issue of *devisavit vel non* to be determined by the consent of the parties thereto, where some of them are infants. *Butler v. Winston*, 421.

§ 31. General Rules of Construction.

The intent of the testator, as expressed in the will, "taking it by its corners," is the "Polar star" guiding the Court in arriving at the proper construction of the language used. Generally two presumptions prevail—(1) against intestacy; and (2) in favor of the first taker. *Trust Co. v. Miller*, 1.

The intention of the testator need not be declared in express terms in the will, but it is sufficient if the intention can be clearly inferred from particular provisions of the will, and from its general scope and import. *Ibid.*

The cardinal principle in the interpretation of wills is to discover the intent of the testator, looking at the instrument from its four corners, and to give effect to such intent, unless contrary to some rule of law or at variance with public policy. *Williams v. Rand*, 734.

In construing a will, the entire instrument should be considered; clauses apparently repugnant should be reconciled; and effect given where possible to every clause or phrase and to every word. And words should be given their primary or ordinary meaning. *Ibid.*

It is permissible, in order to effect a testator's intention or to ascertain his intention, for the court to transpose words, phrases, or clauses; and the court may disregard or supply punctuation. *Ibid.*

Even words, phrases and clauses will be supplied, in the construction of a will, when the sense of the phrase or clause in question, as collected from the context, manifestly requires it. *Ibid.*

§ 32. Presumption Against Partial Intestacy.

Generally two presumptions prevail—(1) against intestacy; and (2) in favor of the first taker. *Trust Co. v. Miller*, 1.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

Cross remainders are implied in a will where there is a gift for life on in tail to two or more persons as tenants in common, followed by a gift over of all property at once. Cross executory limitations apply to personal property like cross remainders to realty and both prevent a chasm or hiatus in the limitation. *Trust Co. v. Miller*, 1.

Where real and personal property is left by will in trust for two grandchildren until they reach the age of 35 years, when the principal is to be given them, with the provision that should they not live and not have bodily heirs the property shall go to other named persons, upon the death of one of the grandchildren, without issue and before reaching 35 years of age, his part of the trust goes to the surviving grandchild under the terms of the will. *Ibid.*

Where testator devised realty to his wife and another for life, remainder to plaintiff, a charitable corporation, to use and apply after paying upkeep, to its maintenance, but should plaintiff refuse this gift or reject it, then to testator's heirs, and life tenants, allowed the property to deteriorate and some of it burned, all without action for waste by plaintiff, who has sold and leased some of the property and contracted to sell the remainder, there is no forfeiture, abandonment, refusal or rejection of the property. The gift is not a charitable trust but is a fee simple remainder, subject to reverter upon a failure to accept or a rejection after acceptance. *Oxford Orphanage v. Kittrell*, 427.

WILLS—*Continued.*

§ 33d. Estates in Trust.

Cross remainders are implied in a will where there is a gift for life on in tail to two or more persons as tenants in common, followed by a gift over of all property at once. Cross executory limitations apply to personal property like cross remainders to realty and both prevent a chasm or hiatus in the limitation. *Trust Co. v. Miller*, 1.

Where real and personal property is left by will in trust for two grandchildren until they reach the age of 35 years, when the principal is to be given them, with the provision that should they not live and not have bodily heirs the property shall go to other named persons, upon the death of one of the grandchildren, without issue and before reaching 35 years of age, his part of the trust goes to the surviving grandchild under the terms of the will. *Ibid.*

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

By the use in a will of the words: "To my beloved brother, W. K. Rand, Durham, N. C., I bequeath my interest in 'Apt. House,' 125 Bloodworth St., Raleigh, N. C.—also ½ stock in Carolina Power & Light Co. after burial expenses—and putting plot in Oakwood Cemetery in perpetual care, the remainder, if there should be any, to be equally divided among the other brothers and sister (Mrs. Eugene Anderson)," the testatrix clearly intended to give her interest in the apartment house and also ½ of all of her stock in the company named to her brother W.; and the remainder of the stock in said company, if there should be any after burial expenses and putting the cemetery plot in perpetual care, to be equally divided among her other brothers and sister, Mrs. E. A. *Williams v. Rand*, 734.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

59, 60. Referred to. *Smith v. Smith*, 433.

135. Gives Superior Courts original, concurrent jurisdiction with probate courts to require accounting by executors, administrators, collectors and guardians, and a surety on the bond may maintain such action. *Casualty Co. v. Lawing*, 8; *S. v. Griggs*, 279.

160. Actions for wrongful death not necessarily in jurisdiction of Industrial Commission, under Workmen's Compensation Act. *Barber v. Minges*, 213; a joint tort-feasor, who has been sued for wrongful death, may have another joint tort-feasor made a party for contribution even after plaintiff's right of action against such new party has been lost by lapse of time. *Godfrey v. Power Co.*, 647.

182 *et seq.* Abandonment of child by parent dispensed with such parents' consent to adoption before repeal of this section. Locke v. Merrick, 799.

354. Provides a remedy for an individual against an officer for a fund due or for an injury done. *S. v. Watson*, 437; as a public officer's bondsman, a surety company is liable hereunder for his misconduct. *S. v. Swanson*, 442.

354 and 357. *In pari materia* and must be construed together. *S. v. Watson*, 437.

356. Referred to. *S. v. Watson*, 437. Motion for summary judgment against officer. *S. v. Sawyer*, 102.

357. Whether clerk of Superior Court entitled to benefits hereunder in suit against his predecessor, not decided. *S. v. Watson*, 437.

420. Notwithstanding this section, it has been uniformly held that no statute of limitations runs against the State, unless it is expressly named therein. *Raleigh v. Bank*, 286.

426. Except in trials of protested entries, title presumed out of State. *Ward v. Smith*, 141.

428. Adverse possession under as to mineral rights. *Vance v. Guy*, 409. Deed of gift not registered in two years is void and is not color of title. *Winstead v. Woolard*, 814.

428-430. Possession for seven years under color or twenty years without color sufficient. *Ward v. Smith*, 141.

430. Deed of gift retaining life estate in grantor, confers no right of possession in grantee during life of grantor. *Winstead v. Woolard*, 814.

437 (2). Sealed instruments against principals barred only after ten years. *Lee v. Chamblee*, 146.

437 (3). Refers to actions to foreclose. *Raleigh v. Bank*, 286.

441. Note under seal repels three-year statute of limitations, although three-year statute applies to sureties. *Lee v. Chamblee*, 146.

441 (9). Suit for fraud of agent allowing tax sale of land instituted within three years of discovery of sale. *Small v. Dorsett*, 754.

451-452. Minors, defendants in tax foreclosure suits, must be represented by guardians. *Park, Inc., v. Brinn*, 502.

CONSOLIDATED STATUTES—*Continued.*

SEC.

463 (4). Where recovery of personalty is not the sole or chief relief sought, the action is not removable to the county where the personalty is located; otherwise where such recovery is the principal relief demanded. *Chevrolet Co. v. Cahoon*, 375.

476. Summons in civil action must be served within ten days, or *alias* or *pluries* issued; otherwise it is valid. *Green v. Chrismon*, 724.

480. Summons not served in ten days must be returned and *alias* or *pluries* issued to avoid discontinuance. *Ibid.*

481. Process must be kept alive by *alias* or *pluries* summons to avoid discontinuance. *Ibid.*

484. *Strictissimi juris* applies to substituted service. *Southern Mills, Inc., v. Armstrong*, 495. To make such service valid on nonresident, he must have property here and the subject of suit must be within the jurisdiction and under control of the court. *Ibid.* Minors made parties by publication must be represented by guardians. *Park, Inc., v. Brinn*, 502.

490. Party, who initiated proceeding in juvenile court and who was present at hearing, cannot complain of his failure to sign petition. *In re Prevatt*, 833.

491 (a), (b). Substituted service of process under these sections, as amended by Public Laws 1941, ch. 36, must be as specifically required. *Propst v. Trucking Co.*, 490.

491 (c). Referred to. *Ibid.*

506. Means that complaint shall contain material, essential and ultimate facts. *Chason v. Marley*, 738.

507. If defect or demurrer is only a misjoinder of causes, the court will order the actions separated under C. S., 516; but where there is misjoinder of both causes and parties, this cannot be done. *Southern Mills, Inc., v. Yarn Co.*, 479.

511. Demurrer is to test sufficiency of pleading and admits factual averments, relevant and well stated, but not inferences of law. *Ins. Co. v. Stadiem*, 49. Plea in bar not overthrown by demurrer. *Byers v. Byers*, 85. General demurrer overruled if any count states a cause of action. *Pharr v. Pharr*, 115; demurrer to complaint is not the same as demurrer to evidence., *Montgomery v. Blades*, 331; upon dismissal of action for misjoinder of causes and parties, appeals from all preliminary orders are dismissed also. *Southern Mills, Inc., v. Yarn Co.*, 479.

511 (4), (5). Suit against two corporations, joining alleged breach of contract by one with action against the other for accounting under C. S., 1146, and another cause against first defendant for fraud and deceit, there is misjoinder of both causes and parties. *Ibid.*

511 (6). Insurance company's suit against bank, for failure to pay check for premium, does not state cause of action. *Ins. Co. v. Stadiem*, 49; in suit for criminal conversation and alienation of affections. *Barker v. Dowdy*, 151.

516. On demurrer under 507, court may separate causes misjoined, but may not salvage the action where misjoinder of both causes and parties. *Southern Mills, Inc., v. Yarn Co.*, 479.

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519 (2). Plea of *res judicata* cannot be presented by demurrer, unless facts appear on face of complaint. *Hampton v. Pulp Co.*, 535.

535. Requires liberal construction of pleadings and presumption in favor of pleader. *Dickensheets v. Taylor*, 570; *Corbett v. Lumber Co.*, 704.

544. Pleading, summons, etc., lost, court may authorize use of copy, and such action not reviewable. *Park, Inc., v. Brinn*, 502.

545. Amendment after time to answer expires in discretion of court. *Thompson v. Davis*, 792.

547. Amendments, permitted to conform pleadings to proof, must not substantially change claim or defense. *Bank v. Sturgill*, 825; clerk may sign summons to another county after service and return, as amendment. *Land Bank v. Aycock*, 837.

549. Discretionary ruling on amendment not reviewable on appeal. *Byers v. Byers*, 85; *Pharr v. Pharr*, 115; *Propst v. Trucking Co.*, 490.

556. Judgment on pleadings for defendant, on affirmative issue error, if complaint states a case. *Lockhart v. Lockhart*, 123.

564. Referred to. *Ward v. Smith*, 141; statement by court, where criminal case called, that he would not try case until defendants apprehended, no violation of, *S. v. Lippard*, 167; court hereunder should present by its charge every essential feature of case on issues and evidence. *McNeill v. McNeill*, 178; cold neutrality of impartial judge required. *S. v. Auston*, 203; court should array facts on both sides and apply pertinent principles of law. *S. v. Friddle*, 258; the trial court shall not give an opinion to the jury as to whether a fact has been sufficiently proven, this being the office of the jury. *S. v. DeGraffenreid*, 461; where, in an action for slander, the court properly instructed jury as here required, and it appearing that jury understood elements of actionable defamation necessary for liability, no error in failure to give more elaborate definition of slander. *Gillis v. Tea Co.*, 470; instructions hereunder are geared to the facts and court cannot restrict jury contrary to a positive statute. *S. v. Bentley*, 563; instructions in perjury case, where only one uncorroborated witness testified that if jury believed evidence they should convict is erroneous as contrary to law. *S. v. Hill*, 711; exceptions hereunder that charge failed to state evidence and law thereon is broadside. *Baird v. Baird*, 730. Where court in charge submits to the jury material facts not in evidence, it is violation of this section. *Curlee v. Scales*, 788; use of "evidence tends to show" is not an expression of opinion hereby forbidden. *Thompson v. Davis*, 792.

565. Litigant desiring fuller or more detailed instructions must ask therefor. *Woods v. Roadway Express, Inc.*, 269.

567. On motion for nonsuit, plaintiff entitled to all reasonable inferences from evidence. *Wingler v. Miller*, 15; *Ross v. Greyhound Corp.*, 239; and defendant's evidence to be considered when, *Gregory v. Ins. Co.*, 124; *Pappas v. Crist*, 265; motion for nonsuit always question of law. *Ward v. Smith*, 141; where plaintiffs evidence shows his negligence proximate cause. *Bailey v. R. R.*, 244; demurrer to evidence is not same as demurrer to complaint. *Montgomery v. Blades*, 331; where only defendants who have adverse interest to plaintiff move for nonsuit, properly granted. *Daughtry v. Daughtry*, 528; demurrer after

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all evidence only such as supports plaintiff considered. *Stell v. Trust Co.*, 550; on facts, nonsuit erroneous, *Wingler v. Miller*, 15; *Lee v. Chamblee*, 146; *Hill v. Stansbury*, 193; *Yokeley v. Kearns*, 196; *Pappas v. Crist*, 265; *Ripple v. Stevenson*, 284; *Peel v. Calais*, 368; in case of slander, *Gillis v. Tea Co.*, 470; *Crone v. Fisher*, 635; *Nebel v. Nebel*, 676; on facts, nonsuit proper, *Gregory v. Ins. Co.*, 124; *Sellers v. Harrelson*, 138; *Malever v. Jewelry Co.*, 148; *Hill v. Stansbury*, 193; *Anderson v. Petroleum Carrier Corp.*, 254; *Hiatt v. Ritter*, 262; *O'Kelly v. Barbee*, 282; on insolvency under Bankruptcy Act, 1898, *Sample v. Jackson*, 335; *Russell v. Cutshall*, 353; *Morrison v. Cannon Mills Co.*, 387; *Battle v. R. R.*, 395; *Wilson v. R R.*, 407; *Smith v. Whitley*, 534; *Utilities Com. v. Trucking Co.*, 687.

567. Referred to, *Small v. Dorsett*, 754; on facts, nonsuit proper, *Benton v. Building Co.*, 809; *Hedgepath v. Durham*, 822.

569. Findings on consent reference not disturbed on appeal, when, *Fish v. Hanson*, 143.

573 (1). No facts necessary for determining a plea in bar could be involved in examining such an account as herein referred to, *Leach v. Quinn*, 27.

573 (5). Trial by jury hereunder is restricted to the written evidence taken before the referee, *Chesson v. Container Co.*, 378.

600. Upon judgment absolute against defendant and surety, same will not be set aside hereunder, where no allegation or evidence of meritorious defense. *S. v. O'Connor*, 469.

614. Lien by judgment against realty ten years only and strictly construed, *Cheshire v. Drake*, 577; sales of realty under execution, made within ten years of docketing judgment, where bid raised under C. S., 2591, and resale after ten-year period, void, *ibid.;* orders of resale under execution, C. S., 2591, do not prolong statutory lien of judgment, *ibid.*

618. For one joint tort-feasor to recover hereunder against another, an action *de novo* is necessary, *Charlotte v. Cole*, 106; not intended to create a cause of action in contribution between joint tort-feasors, when the *lex loci delicti* gives none, *Charnock v. Taylor*, 360; a defendant cannot avail himself of this section to compel plaintiff to join issue with one he has not elected to sue, *ibid.;* in actions on joint tort the parties sued at any time before judgment may have one or more of the other joint tort-feasors made parties to enforce contribution, and may enforce contribution even after judgment paid, *Godfrey v. Power Co.*, 647; these rights depend on the statute, *ibid.*

630. Conceding that the complaint here is sufficient as a petition for *certiorari*, it is without merit, *Hunsucker v. Winborne*, 650.

633. Appeal from clerk, who had original jurisdiction, to judge—notice ten days, *Muse v. Edwards*, 153.

660. Appeal from justice of the peace by defendant, trial *de novo* necessary where defendant fails to appear, *Poster Corp. v. Davidson*, 212.

663. Issuance of execution does not prolong the life of judgment lien, *Cheshire v. Drake*, 577.

672. The life of an execution is controlled by statute and not by court order, *Gardner v. McDonald*, 555; *Gardner v. McDonald*, 854.

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687. Notice by trustee in deed of trust to his agent to stop publication irreparable breaks the continuity, *Smith v. Bank*, 249.

699. To secure betterments one must enter into possession under color of title in good faith, *Rogers v. Timberlake*, 59.

700. Rents and rental values, obtained by defendants solely by reason of the improvements made by them, cannot be used to offset compensation for such improvements, *Harrison v. Darden*, 364.

753. Referred to, *Green v. Chrismon*, 724.

943. In action hereunder by clerk of the Superior Court against his predecessor for recovery of records and funds held under color of office, the county is not proper party, *S. v. Watson*, 437.

988. Oral contract to give or devise land void hereunder, *Daughtry v. Daughtry*, 528. Has no application to parol trusts and does not prohibit their establishment, *Thompson v. Davis*, 792.

1097. Remedies by appeal from administrative agency must be exhausted before equity may be invoked. *Warren v. R. R.*, 843.

1098. On appeal from Utilities Commission to Superior Court, decision of Commission is *prima facie* just and reasonable, *Utilities Com. v. Trucking Co.*, 687.

1146. Preliminary order for audit hereunder dismissed by allowance of demurrer to action for misjoinder of parties and causes, *Southern Mills, Inc., v. Yarn Co.*, 479.

1178. *Mandamus* operates only *in personam*, and in action to compel directors of domestic corporation to pay dividends, as far as substituted service is relied on, the proceeding is a nullity, *Southern Mills, Inc., v. Armstrong*, 495.

1297 (8½), 1297 (28). Allows Cumberland County to levy only 5 cents for county home, etc., in view of Art. V, sec. 6, N. C. Constitution, *R. R. v. Cumberland County*, 750.

1335. Does not authorize Cumberland County to levy unlimited taxes for special purposes mentioned, Art. V, sec. 6, N. C. Const., *R. R. v. Cumberland County*, 750.

1437. No conflict of jurisdiction, hereunder and under C. S., 1567, between Superior and Recorder's Courts, *S. v. Suddreth*, 610.

1473. Jurisdiction of justice of peace on contract as herein specified is limited and special—no equitable powers, *Hopkins v. Barnhardt*, 617; no authority to fix and allow attorney's fees. *Ibid.*

1567. No conflict of jurisdiction hereunder and under C. S., 1437, between Superior and Recorder's Courts, *S. v. Suddreth*, 610.

1659. Discussion of divorce—some prior cases apocryphal after codification hereunder, *Byers v. Byers*, 85.

1659 (a). Party in wrong, in face of plea in bar based thereon cannot secure divorce hereunder, *Pharr v. Pharr*, 115; in action where defense is divorce *a mensa*, judgment on pleadings for defendant is error, *Lockhart v. Lockhart*, 123; in separation here contemplated includes a "judicial separation" as well as by the act of the parties, or one of them. *Ibid.*

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1660. "Party injured," *Byers v. Byers*, 85; effect of divorce hereunder on subsequent action under 1659 (a). *Lockhart v. Lockhart*, 559.

1663. Judgment for subsistence under C. S., 1667, survives a judgment for absolute divorce under two-year statute. *Simmons v. Simmons*, 841.

1666. Order for support not final and may be modified or set aside on showing of changed conditions, *Byers v. Byers*, 85.

1667. In action hereunder, wife must not only set out acts of cruelty, but must also allege and prove want of adequate provocation on her part, *Howell v. Howell*, 62. Order for support hereunder will not perforce defeat an action for divorce, *Byers v. Byers*, 85. Irrelevant excuses for separation, *ibid.*; subsistence and counsel fees allowed when and how and reviewable for abuse of discretions. *Phillips v. Phillips*, 276; plaintiff must charge and prove such conduct as would entitle her to a divorce *a mensa et thoro* at least. *Ibid.*

1716. Proceeding hereunder and under C. S., 3846, is to condemn land for a public purpose and does not authorize an action for breach of contract, *Dalton v. Highway Com.*, 406.

1744. Contingent interest alone cannot be sold, *Butler v. Winston*, 421; plaintiff must have vested interest, *ibid.*; judgment hereunder void where some of parties represented by guardian appointed day after judgment signed. *Ibid.*

1749. Requires our courts to take judicial notice of laws of another state, *Charnock v. Taylor*, 360.

1786, 1787. Doubted that ledger sheets or accounts, offered without objection, constitute legal evidence of the charges therein, where no attempt to comply herewith, *Perry v. Trust Co.*, 642.

1791. Annuities are figured at four and one-half per cent, *Smith v. Smith*, 433.

1795. In suit by distributees against administrator and partner of deceased to recover money found on deceased and claimed by his partner, one of plaintiffs may testify about sale of timber owned by witness and deceased, but partner cannot testify to conversation with deceased about partnership assets, *Wingler v. Miller*, 15.

1799. Defendant who avails himself of, occupies same position as any other witness, *S. v. McKinnon*, 160; *S. v. Auston*, 203. Evidence hereunder is voluntary and may be used at any subsequent stage of the proceeding. *S. v. Farrell*, 804.

1809. Competency, in proper cases, of deposition as proof in civil actions is unquestioned, *Chesson v. Container Co.*, 378.

1823. Not necessary to decision in *Shepard v. Leonard*, 110.

1968. Was enacted in part for protection of commercial fishermen, *Hampton v. Pulp Co.*, 535.

2162. Surety on guardian's bond, in case of default, has right of action for accounting, *Casualty Co. v. Lawing*, 8.

2195. Jurisdictional for transfer of guardian funds to another state and order for such transfer otherwise is void. *S. v. Sawyer*, 102.

2241. Superior Court has exclusive jurisdiction to hear *habeas corpus* for custody of children of parents separated but not divorced, which is not affected by C. S., 5039. *In re Prevatt*, 833.

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2283 (w), *et seq.* Involves police and taxing power. Words "roadhouse," etc., qualified by "where travelers and transients are entertained," which must be shown before penalty can be imposed, *S. v. Campbell*, 828.

2285. Incompetent hereunder restored to competency, how, and review of matter, *In re Jeffress*, 273.

2287. Petition for restoration of competency, parties, procedure and review, *In re Jeffress*, 273.

2377-2428 (a). Nothing in "Torrens Law," which prevents courts from awarding betterments, in accordance with judgment under consent reference, *Harrison v. Darden*, 364.

2583. Such statutes become part of deeds of trust, *Thompson v. Scott*, 340.

2583 (a). Provides method of substituting trustee in mortgage or deed of trust by *ex parte* proceeding. *Ibid.*

2591. Sales of realty under execution within ten-year life of judgment, C. S., 614, where resales ordered under which occur after ten-year period, void, *Cheshire v. Drake*, 577.

2621 (283). Parking on paved highway at night without lights, etc., negligence, *Allen v. Bottling Co.*, 118.

2621 (286). Driving while intoxicated not alone sufficient to sustain prosecution for manslaughter, *S. v. Lowery*, 598.

2621 (288). *Quære:* May a municipality prescribe rule of evidence as to speed, *Crone v. Fisher*, 635.

2621 (290). Curves and darkness as affecting operation of motor vehicle, *Allen v. Bottling Co.*, 118.

2621 (301). Failure to give signals not alone sufficient to sustain prosecution for manslaughter, *S. v. Lowery*, 598.

2621 (302). Prescribes the rights of parties when they enter street intersection at same time, but not when they enter at different times, *Cab Co. v. Sanders*, 626; *Crone v. Fisher*, 635.

2621 (308). Operator of motor vehicle at night must be able to stop in radius of lights, *Allen v. Bottling Co.*, 118.

2703-2737. Regulate assessments for public improvements by municipal corporations, *Raleigh v. Bank*, 286; lands of school committee used exclusively for public school purposes are liable for assessments for street improvements, *Raleigh v. Public School System*, 316.

2710. Provides that no lands in municipality shall be exempt from local assessment, *Raleigh v. Public School System*, 316.

2713. Provides that assessment, when confirmed, shall be a lien superior to all other liens, *Raleigh v. Bank*, 286.

2716. Accelerating clause for payment, *Raleigh v. Bank*, 286.

2717 (a). In suit to foreclose for street improvements under sec. 2990, installments ten years overdue are barred hereunder, *Raleigh v. Bank*, 286; *Raleigh v. Public School System*, 316.

2779, 2780, 2781, 2782. In action to restrain Board of Municipal Control from changing the name of a town where no allegation of failure to follow statutes, or of capricious acts, or bad faith, demurrer properly sustained, *Hunsucker v. Winborne*, 650; upon petition to change name of

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town, Board of Municipal Control has power to investigate and determine whether or not statutes here have been complied with. *Ibid.*

2787. Makes municipal authorities sole judges of necessity for streets, *Parsons v. Wright*, 520.

2787 (7), (11), (36). Licensing of taxicabs and their regulation and use of public streets may be delegated by Legislature to municipalities upon such terms as be for public interest, *Suddreth v. Charlotte*, 630.

2792 (b). Referred to in relation to condemnation of lands for city alley, *Parsons v. Wright*, 520.

2815. Lien for taxes shall attach to all realty of taxpayer and continue until taxes paid, *Raleigh v. Bank*, 286.

3171. Payee of uncertified check has no right of action against bank, but drawer has such right for breach of contract. *Ins. Co. v. Stadiem*, 49.

3206. Suit against commissioners and county treasurer for recovery of salary paid latter without legal authority, nonsuit as to commissioners, but not as to treasurer. *Hill v. Stansbury*, 193.

3212 (23). Constitutional and State official may be given leave to accept temporary officer's commission in U. S. armed forces. *In re Yelton*, 845.

3315. A deed of gift of an estate of any nature, if not proven and registered in two years, is void. *Winstead v. Woolard*, 814.

3379. Possession of intoxicants, hereunder unlawful, must be harmonized with later statutes permitting sales in certain counties and under conditions named, *S. v. Suddreth*, 610.

3411 (b). Has not been so modified by A.B.C. Acts as to permit purchase or sale of intoxicants in Mecklenburg County, *S. v. Gray*, 120; must be harmonized with subsequent statutes permitting sale in certain counties, *S. v. Suddreth*, 610.

3411 (j). Possession of tax paid intoxicants of not more than one gallon, in one's home and in county where its sale is lawful, Public Laws 1937, ch. 49, is not now *prima facie* evidence hereunder of possession for sale, *S. v. Suddreth*, 610.

3411 (101), *et seq.* Pertinent provisions of these statutes, regulating sale of wine and beer, are *pari materia* and must be read as a whole, *McCotter v. Reel*, 486.

3411 (101), 3411 (101)a, 3411 (103), 3411 (105). License hereunder not available as matter of right to any citizen and will issue only when all conditions complied with, *McCotter v. Reel*, 486.

3838 (a). Not intended to withdraw from cities and towns their exclusive control over their streets and alleys, *Parsons v. Wright*, 520; and confers no power on clerk of Superior Court to establish an alley inside an incorporated municipality. *Ibid.*

3846 (bb). Proceeding hereunder and under C. S., 1716, is to condemn land for public purpose and does not authorize action for breach of contract, *Dalton v. Highway Com.*, 406.

4152. An exemplified copy of a New York will, probated according to our statute and recorded here in proper county, is admissible as link in chain of title, *Vance v. Guy*, 409.

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4171. Assault with intent to kill is misdemeanor and not punishable by imprisonment in State's Prison, *S. v. Gregory*, 415; referred to, *S. v. Bentley*, 563.

4173. In prosecution for rape, acceptance of plea of assault on female makes offense misdemeanor, and judgment of imprisonment in State's Prison from eight to ten years a violation of N. C. Const., Art. I, sec. 14, *S. v. Tyson*, 492.

4200. Does not require an allegation in indictment as to means used in committing murder, *S. v. Smith*, 457.

4209. Carnal knowledge of female under sixteen, time not of essence, statute of limitations not involved, *S. v. Baxley*, 210.

4214. Indictment hereunder, sufficient to describe injury in words of statute, *S. v. Gregory*, 415; omission in charge of all mention of assault with deadly weapon does not deprive jury of power to convict therefor, *S. v. Bentley*, 563.

4215. As to punishment of assault hereunder, see *S. v. Gregory*, 415; acceptance, in prosecution for rape, of plea of assault on female makes offense misdemeanor punishable hereunder, *S. v. Tyson*, 492; classifies assault for the purpose of fixing punishments, *S. v. Bentley*, 563.

4226-4227. Upon indictment on two counts, one under each of these sections, and verdict of guilty, and upon poll all jurors stated verdict on first, and after further deliberation verdict of not guilty on second, no error, *S. v. Dilliard*, 446.

4235. Felonious intent in breaking and entering and in larceny, *S. v. Friddle*, 258.

4236. In indictment burden on State to show possession of implements enumerated without lawful excuse, *S. v. Boyd*, 79.

4250. Verdict of guilty of larceny, tantamount to acquittal of receiving, *S. v. Holbrook*, 622; test of felonious intent in prosecution for receiving, *S. v. Oxendine*, 659.

4339. Proof necessary to convict of seduction hereunder, *S. v. Smith*, 199; testimony of prosecutrix, *ibid.*; *S. v. Hill*, 711.

4358. Sufficiency of evidence on prosecution for permitting use of property for prostitution, *S. v. Herndon*, 208.

4447. "Willful abandonment," *Byers v. Byers*, 85.

4515. Right to counsel and to confront one's accusers are closely related and counsel will be allowed reasonable time to prepare for defense, *S. v. Farrell*, 321.

4561. Confession to officer, after arrest, not inadmissible where failure to advise prisoner of his rights hereunder applicable only to preliminary judicial examinations. *S. v. Grass*, 31.

4561. Evidence hereunder is not under oath and, if taken contrary to this section, may not be used against accused. *S. v. Farrell*, 804.

4606. Where no challenge to indictment prior to plea of guilty, offense deemed committed in county alleged, *S. v. McKeon*, 404.

4613. Granting motion for bill of particulars in court's discretion and not reviewable except for gross abuse, *S. v. Lippard*, 167.

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4614. Indictment drawn as hereby required includes charge of murder committed in perpetration for robbery, *S. v. Smith*, 457.

4622. Consolidation of criminal cases will be seasonably made and not *in medias res*, *S. v. Harris*, 697.

4625. Time not of essence in prosecution for unlawful possession of intoxicants for sale, *S. v. Suddreth*, 610.

4639. All evidence of graver crime, verdict for lesser, will not be disturbed, *S. v. Bentley*, 563.

4639-4640. Relative to assaults and conviction of less degree of same crime, *S. v. Gregory*, 415.

4640. Where evidence tending to support milder verdict, defendant entitled to have different views presented under proper charge, *S. v. DeGraffenreid*, 461; defendant could be convicted of less crime in this case, *S. v. Bentley*, 563.

4643. Where any evidence, case should be submitted; but mere suspicion or conjecture not enough, *S. v. Boyd*, 79; when State's case establishes a complete defense, motion allowed, *ibid.*; "formal objection" for failure to grant motion hereunder not considered, no mention thereof in brief *S. v. Hunt*, 173; evidence of prosecutrix and other proof in seduction sufficient, *S. v. Smith*, 199; on motion, evidence considered in light most favorable to State, *S. v. Herndon*, 208; positive testimony of rape by prosecutrix is sufficient to take case to jury and nonsuit properly denied, *S. v. Vicks*, 384; evidence of operation on pregnant woman sufficient, *S. v. Dilliard*, 446; violation of statutes against driving while intoxicated and failure to give signals not sufficient to sustain prosecution for manslaughter, when no causal violation shown between such failure and the death, *S. v. Lowery*, 598; where evidence showed possession in one's home and in a county authorized to sell intoxicants, no presumption now of illegal possession and nonsuit should have been sustained, *S. v. Suddreth*, 610; evidence of *scienter* wanting in prosecution for receiving stolen goods nonsuit should have been sustained, *S. v. Oxendine*, 659; motion at close of State's evidence and not reviewed at close of all evidence, waived, *S. v. Epps*, 741; evidence of accomplice sufficient to carry case to jury, *S. v. Rising*, 747.

5039. Juvenile court's adjudication, where it has jurisdiction, will be binding subject to review. *In re Prevatt*, 833.

5041. Juvenile court is part of Superior Court and the word "court" as used therein means ordinary juvenile court. *Ibid.*

5043. Proceedings in juvenile court commenced by petition, but its absence not fatal to one who voluntarily appears therein. *Ibid.*

5058. Juvenile court judgment subject to appeal. *Ibid.*

5383 *et seq.* School authorities have ample power hereunder to make rules and regulations for the schools and pupils within their district. *Coggins v. Board of Education*, 763.

6465. In action, alleging wrongful cancellation of insurance policy, cancellation admitted, error to refuse to submit an issue on question, *Abrams v. Ins. Co.*, 500.

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7880 (½)-7880 (1), *et seq.* Whole Revenue Act of 1939 is *in pari materia* and is construed accordingly, *Valentine v. Gill*, 396; *McCotter v. Reel*, 486.

7880 (1). Imposes an inheritance tax in accordance with schedules in sections following, *Valentine v. Gill*, 396; tax is not on property but on transfer. *Ibid.*

7880 (3), (4), (5). Rates of inheritance, applicable to the classes named, are here fixed, *Valentine v. Gill*, 396.

7880 (12). Exempts from recurring inheritance taxes within two years under certain conditions. *Ibid.*

7880 (191). Gives Commissioner power to construe the Revenue Act of 1939 and his construction will be considered by courts, although it is not binding. *Ibid.*

7971 (193), *et seq.* Railroad track, abandoned under order of Interstate Commerce Commission and torn up, is not subject of appraisal and assessment for taxation hereunder, *Warren v. Maxwell*, 604.

7971 (222). Tax list in hands of tax collector equivalent to execution, *Apex v. Templeton*, 645.

7971 (224)-7971 (226). Requires county to bid in property, in absence of bid equal to tax due and costs, and assign bid for not less than that amount, *Duplin County v. Ezzell*, 531.

7971 (228). Judgment hereunder creates no personal liability and is *in rem* only, *Apex v. Templeton*, 645.

7971 (228) (e). Minors, defendants in tax foreclosure suits, must be represented by guardians, *Park, Inc., v. Brinn*, 502.

7971 (230), (232), (233). As superseding sec. 8038 and forbidding the reopening or setting tax foreclosure sale after one year from date on which deed recorded. *Ibid.*

7987-7990. Actions hereunder, pending in same court at same time and between same parties, may be consolidated, *ibid.*; minors not barred in foreclosure unless represented by guardians. *Ibid.*

7990. In suit to foreclose for street improvements, installments ten years overdue are barred by statute of limitations, sec. 2717 (a), *Raleigh v. Bank*, 286; consolidation of actions pending hereunder between same parties in same court, *Park, Inc., v. Brinn*, 502; judgment of sale, in default of payment, sale not held as prescribed, good where ample opportunity to redeem, *ibid.*; mere inadequacy of price bid not sufficient to avoid sale unless some element of fraud, *Duplin County v. Ezzell*, 531; in action hereunder judgment constitutes lien *in rem* only and against defendant personally, *Apex v. Templeton*, 645.

8037. Prescribes ten years for tax foreclosures by municipalities and its relation to 2717 (a), *Raleigh v. Bank*, 286; power of Legislature to set a time lock on State has been distinctly affirmed. *Ibid.*

8038. Providing for redemption of lands sold for taxes in one year from sale, etc., repealed by Michie, 7971 (234), except as otherwise provided in 7971 (232) and 7971 (233), *Park, Inc., v. Brinn*, 502.

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8081 (h), *et seq.* N. C. Workmen's Compensation Act deals with risks of industrial accidents and does not affect common law or other rights disconnected with employment, *Barber v. Minges*, 213; Industrial Commission, not court of general jurisdiction, *ibid.;* Workmen's Compensation Act substitutes for common law and statutory rights of system of payments for loss of capacity to earn wages, *Branham v. Panel Co.*, 233.

8081 (i), (b). Referred to, *Barber v. Minges*, 312; (i) meaning of disability, *Branham v. Panel Co.*, 233.

8081 (bb), (b). Does not require claim to be filed with Industrial Commission before bringing action in Superior Court, *Barber v. Minges*, 213.

8081 (kk), 8081 (ll). Referred to, *Branham v. Panel Co.*, 233.

8081 (mm). Disfigurement. *Ibid.*

8081 (nn). Referred to. *Ibid.*

8081 (r). Regarding surrender of common law or statutory actions, not absolute and must be construed as qualified by Act, *Barber v. Minges*, 213.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

1, sec. 7. There is no provision of this Constitution directly forbidding the Legislature to pass a law releasing or remitting taxes, *Raleigh v. Bank*, 296; forbids gifts of public money, *Brown v. Comrs.*, 744; Legislature has no power to authorize municipality to pay claim for which it is not liable. *Ibid.*

I, sec. 11. Carries with it the opportunity fairly to present one's defense. No denial where evidence of absent witnesses admitted as though their testimony given. Right observed in form but not in substance is a right denied, *S. v. Utley*, 39; when motion for continuance is based on this section, question is one of law and not of discretion and is reviewable, *S. v. Farrell*, 321; does not apply to civil cases, *Chesson v. Container Co.*, 378; no denial of right of confrontation by refusal of continuance for absence of witness, where State agreed not to offer evidence which such witness would testify about, *S. v. Rising*, 747; is directed against compulsion and not against voluntary admissions, confessions or willing testimony, *S. v. Farrell*, 804.

I, sec. 14. Acceptance of plea of assault against female, in prosecution for rape, makes offense a misdemeanor and judgment of imprisonment in State's Prison from eight to ten years is violation of this section, *S. v. Tyson*, 492.

I, sec. 16. Act requiring ten cents to be paid the county cotton weigher for each bale of cotton bought or weighed in county, punishing failure as misdemeanor cannot make the fee a debt without a violation of this section, *Moose v. Barrett*, 524.

I, sec. 17. When motion for continuance is based on this section, the question is one of law and not of discretion and is reviewable, *S. v. Farrell*, 321.

I, sec. 19. While trial by jury is hereby preserved, the right in civil cases may be waived by Art. IV, sec. 13, and by consent reference, *Chesson v. Container Co.*, 378; *Utilities Com. v. Trucking Co.*, 687.

II, sec. 1. There is no provision in this Constitution directly forbidding the Legislature to pass any law releasing or remitting taxes. *Raleigh v. Bank*, 286.

II, sec. 29. Municipal Board of Control is creature of Legislature within provision of this section. *Hunsucker v. Winborne*, 650.

IV, sec. 9. State cannot be sued unless it has consented thereto by statute or its organic law. *Dalton v. Highway Com.*, 406. State Highway and Public Works Commission is an agency of the State and not subject to suit except as stated. *Ibid.*

IV, sec. 11. General Assembly bound by provisions as to power of special and emergency judges. Public Laws 1941, ch. 51. *Shepard v. Leonard*, 110.

IV, sec. 13. Trial by jury guaranteed under Art. I, sec. 19, may be waived hereunder. *Chesson v. Container Co.*, 378.

IV, sec. 27. Jurisdiction of justice of the peace is limited and special, not general, and he has no equity powers—only those conferred hereunder. *Hopkins v. Barnhardt*, 617.

CONSTITUTION—*Continued.*

SEC.

IV, sec. 28. This section, with C. S., 4215, carves out the general jurisdiction of assaults and gives exclusive jurisdiction to justices of the peace where no deadly weapon used and no serious damage done. *S. v. Gregory*, 415.

V, sec. 5. There is no provision of this Constitution directly forbidding the Legislature to pass any law releasing or remitting taxes. *Raleigh v. Bank*, 286; assessments on public school property for special benefits thereto are not embraced in the prohibition herein against taxation of property of the State or municipal corporations. *Raleigh v. Public School System*, 316.

V, sec. 6. Limits taxation except for special purposes as herein provided, and C. S., 1297 (8½), allows Cumberland County to levy only 5 cents for county homes, etc., *R. R. v. Cumberland County*, 750.

VII, sec. 7. Municipality, even with legislative sanction, cannot embark on private enterprise, unless by vote as herein prescribed. *Brown v. Comrs. of Richmond County*, 744.

IX, secs. 2, 3. Public school system subject to legislative control, subject to uniformity, separation of races, minimum term, etc., *Coggins v. Board of Education*, 763.

XII, secs. 1, 3. Referred to. *In re Yelton*, 845.

XIV, sec. 7. Is intended to prevent double office holding. *In re Yelton*, 845. Acceptance of second office vacates the first. *Ibid.* Where second office is temporary or does not require continuous service, not double office holding. *Ibid.* "Militia" comprehends all citizens who, in time of war, enter active military service for the duration. *Ibid.* Public Laws 1941, ch. 121, does not violate this section. *Ibid.*