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NORTH CAROLINA REPORTS
VOL. 224

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1944
FALL TERM, 1944

REPORTED BY
JOSEPH B. CHESHIRE

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1945

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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, 1944—FALL TERM, 1944.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

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WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
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† On leave, U. S. Army, Acting Reporter, Joseph B. Cheshire.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
C. E. THOMPSON	First	Elizabeth City.
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SPECIAL JUDGES

Name	Address
W. H. S. BURGWYN	Woodland.
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JEFF D. JOHNSON, JR	Clinton.

WESTERN DIVISION

Name	District	Address
JOHN H. CLEMENT	Eleventh	Winston-Salem.
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Name	Address
HENRY A. GRADY	New Bern.
G. V. COWPER	Kinston.

*Died January 5, 1945.

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

Name	*District*	*Address*
J. Erle McMichael	Eleventh	Winston-Salem.
J. Lee Wilson	Twelfth	Greensboro.
Edward H. Gibson	Thirteenth	Laurinburg.
John G. Carpenter	Fourteenth	Gastonia.
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L. Spurgeon Spurling	Sixteenth	Lenoir.
Avalon E. Hall	Seventeenth	Yadkinville.
C. O. Ridings	Eighteenth	Forest City.
James S. Howell	Nineteenth	Asheville.
John M. Queen	Twentieth	Waynesville.
R. J. Scott	Twenty-first	Danbury.

SUPERIOR COURTS, FALL TERM, 1944

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, 1944—Judge Nimocks.

Beaufort—Sept. 18* (A); Sept. 25†; Oct. 9†; Nov. 6* (A); Dec. 4†.
Camden—Aug. 28.
Chowan—Sept. 11; Nov. 27.
Currituck—July 17†; Sept. 4.
Dare—Oct. 23.
Gates—Nov. 20.
Hyde—Aug. 21†; Oct. 16.
Pasquotank—Sept. 18†; Oct. 9† (A) (2); Nov. 6†; Nov. 13*.
Perquimans—Oct. 30.
Tyrrell—Oct. 2.

SECOND JUDICIAL DISTRICT

Fall Term, 1944—Judge Carr.

Edgecombe—Sept. 11; Oct. 16; Nov. 13† (2).
Martin—Sept. 18 (2); Dec. 11.
Nash—Aug. 28; Sept. 18† (A) (2); Oct. 9†; Nov. 27*; Dec. 4†.
Washington—July 10; Oct. 23†.
Wilson—Sept. 4; Oct. 2†; Oct. 30† (2).

THIRD JUDICIAL DISTRICT

Fall Term, 1944—Judge Thompson.

Bertie—Aug. 28 (2); Nov. 13 (2).
Halifax—Aug. 14 (2); Oct. 2† (A) (2); Oct. 23* (A); Nov. 27 (2).
Hertford—July 31; Oct. 16 (2).
Northampton—Aug. 7; Oct. 30 (2).
Vance—Oct. 2*; Oct. 9†.
Warren—Sept. 18*; Sept. 25†.

FOURTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Bone.

Chatham—July 31† (2); Oct. 23.
Harnett—Sept. 4* (A); Sept. 18†; Oct. 2† (A) (2); Nov. 13* (2).
Johnston—Aug. 14*; Sept. 25† (2); Oct. 16 (A); Nov. 6†; Nov. 13† (A); Dec. 11 (2).
Lee—July 17; Sept. 11†; Sept. 18† (A); Oct. 30.
Wayne—Aug. 21; Aug. 28† (2); Oct. 9† (2); Nov. 27 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Parker.

Carteret—Oct. 16; Dec. 4†.
Craven—Sept. 4*; Oct. 2† (2); Nov. 20† (2).
Greene—Dec. 4 (A); Dec. 11 (2).
Jones—Aug. 14†; Sept. 18; Dec. 11 (A).
Pamlico—Nov. 6 (2).
Pitt—Aug. 21†; Aug. 28; Sept. 11†; Sept. 25†; Oct. 23†; Oct. 30; Nov. 20† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Williams.

Duplin—July 24*; Aug. 28† (2); Oct. 2*; Dec. 4† (2).
Lenoir—Aug. 21; Sept. 25†; Oct. 16; Nov. 6† (2); Dec. 11 (A).
Onslow—July 17‡; Oct. 9; Nov. 20† (2).
Sampson—Aug. 7 (2); Sept. 11† (2); Oct. 23; Oct. 30†.

SEVENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Frizzelle.

Franklin—Sept. 11†; Oct. 9*; Nov. 6† (2).
Wake—July 10*; Sept. 4*; Sept. 11* (A); Sept. 18† (2); Oct. 2*; Oct. 16† (3); Nov. 6* (A); Nov. 13† (A); Nov. 20† (2); Dec. 4* (2); Dec. 18†.

EIGHTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Stevens.

Brunswick—Sept. 11; Sept. 18†.
Columbus—Sept. 4*; Oct. 2† (2); Nov. 20*; Nov. 27† (2).
New Hanover—July 24*; Aug. 21† Aug. 28*; Oct. 16† (2); Nov. 6*; Nov. 13; Dec 4† (A); Dec. 11†.
Pender—July 17†; Sept. 25; Oct. 30†.

NINTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Harris.

Bladen—Aug. 7†; Sept. 18*.
Cumberland—Aug. 28*; Sept. 25† (2); Oct. 9* (A); Oct 23† (2); Nov. 20* (2).
Hoke—July 31†; Aug. 21; Nov. 13.
Robeson—July 10† (2); Aug. 14*; Aug. 28† (A); Sept. 4* (2); Sept. 25* (A); Oct. 9† (2); Oct. 23* (A); Nov. 6*; Nov. 13† (A); Dec. 4† (2); Dec. 18*.

TENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Burney.

Alamance—July 31†; Aug. 14*; Sept. 4† (2); Nov. 13† (A) (2); Nov. 27*.
Durham—July 17*; July 31† (A) (2); Sept. 4* (A) (2); Sept. 18† (2); Oct. 2† (A); Oct. 9*; Oct. 16† (A) (2); Oct. 30† (2); Dec. 4*.
Granville—July 24; Oct. 23†; Nov. 13 (2).
Orange—Aug. 21; Aug. 28†; Oct. 2†; Dec. 11.
Person—Aug. 7; Oct. 16.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Clements.

Ashe—July 24† (2); Oct. 23*.
Alleghany—Oct. 2.
Forsyth—July 10 (2); Sept. 4 (2); Sept. 18† (2); Oct. 2† (A); Oct. 9 (2); Oct. 23† (A); Oct. 30†; Nov. 6 (2); Nov. 20† (2); Dec. 4 (2).

#TWELFTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Sink.

Davidson—Aug. 21*; Sept. 11† (2); Oct. 2† (2); Nov. 20 (2).
Guilford—July 10*; July 17*; July 31*; Aug. 7†; Aug. 14†; Aug. 28† (2); Sept. 11*; Sept. 18* (2); Sept. 18† (4); Oct. 16* (2); Oct. 30† (2); Oct. 30* (3); Nov. 20† (2); Dec. 4* (3); Dec. 4† (2).

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Phillips.

Anson—Sept. 11†; Sept. 25*; Nov. 13†.
Moore—Aug. 14; Sept. 18†; Sept. 25† (A).
Richmond—July 17†; July 24*; Sept. 4†; Oct. 2*; Nov. 6†.
Scotland—Aug. 7; Oct. 30†; Nov. 27 (2).
Stanly—July 10; Sept. 4† (A); Oct. 9†; Nov. 20.
Union—Aug. 21 (2); Oct. 16 (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Gwyn.

Gaston—July 24*; July 31† (2); Sept. 11* (A); Sept. 18† (2); Oct. 23*; Oct. 30† (A); Nov. 27* (A); Dec. 4† (2).
Mecklenburg—July 10* (2); July 31* (A) (2);' Aug. 14* (3); Sept. 4† (2); Sept. 4† (A) (2); Sept. 18† (A) (2); Sept. 18* (A) (2); Oct. 2† (A) (2); Oct. 2*; Oct. 9† (2); Oct. 16† (A) (2); Oct. 30† (A) (2); Oct. 30† (2); Nov. 13† (A) (2); Nov. 13*; Nov. 20† (2); Nov. 27† (A) (2); Dec. 4* (A) (2); Dec. 11† (A); Dec. 18†.

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Bobbitt.

Alexander—Aug. 28 (A) (2).
Cabarrus—Aug. 21*; Aug. 28†; Oct. 16 (2); Nov. 13† (A); Dec. 4† (A).
Iredell—July 31 (2); Nov. 6 (2).
Montgomery—July 10; Sept. 25† Oct. 2; Oct. 30†.
Randolph—July 17† (2); Sept. 4*; Oct. 23† (A) (2); Dec. 4 (2).
Rowan—Sept. 11 (2); Oct. 9†; Oct. 16† (A); Nov. 20 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Armstrong.

Burke—Aug. 7 (2); Sept. 25† (3); Dec. 11 (2).
Caldwell—Aug. 21 (2); Oct. 2† (A) (2); Nov. 27 (2).
Catawba—July 3 (2); Sept. 4† (2); Nov. 13*; Nov. 20†; Dec. 4† (A).
Cleveland—July 24 (2); Sept. 11† (A) (2); Oct. 30 (2).
Lincoln—July 17; Oct. 16; Oct. 23†.
Watauga—Sept. 18.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Warlick.

Avery—July 3 (2); Oct. 16 (2).
Davie—Aug. 28; Dec. 4†.
Mitchell—July 24† (2); Sept. 18 (2).
Wilkes—Aug. 7 (2); Oct. 2† (2); Dec. 11 (2).
Yadkin—Aug. 21*; Nov. 20† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Rousseau.

Henderson—Oct. 9 (2); Nov. 20† (2).
McDowell—July 10† (2); Sept. 4 (2).
Polk—Aug. 21 (2).
Rutherford—Sept. 25† (2); Nov. 6 (2).
Transylvania—July 24 (2); Dec. 4 (2).
Yancey—Aug. 7 (2); Oct. 23† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1944—Judge Pless.

Buncombe—July 10† (2); July 17 (A) (2); July 24*; July 31; Aug. 7† (2); Aug. 21*; Aug. 21 (A) (2); Sept. 4† (2); Sept. 18 (A) (2); Sept. 18*; Oct. 2† (2); Oct. 16 (A) (2); Oct. 16*; Oct. 30; Nov. 6† (2); Nov. 20 (A) (2); Nov. 20*; Dec. 4† (2); Dec. 18*; Dec. 18 (A) (2).
Madison—Aug. 28; Sept. 25; Oct. 23; Nov. 27; Dec. 25.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1944—Judge Nettles.

Cherokee—Aug. 7 (2); Nov. 6 (2).
Clay—Oct. 2.
Graham—Sept. 4 (2).
Haywood—July 10 (2); Sept. 18† (2); Nov. 20 (2).
Jackson—Oct. 9 (2).
Macon—Aug. 21 (2); Dec. 4 (2).
Swain—July 24 (2); Oct. 23 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1944—Judge Alley.

Caswell—July 3; Nov. 13*; Nov. 20†.
Rockingham—Aug. 7* (2); Sept. 4† (2); Oct. 23†; Oct. 30* (2); Nov. 27† (2); Dec. 11*.
Stokes—Aug. 21; Oct. 9*; Oct. 16†.
Surry—July 10† (2); Sept. 18*; Sept. 25† (2); Dec. 18*.

*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. Retired.
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. MRS. LORA C. CROWELL, 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. WILLIAM C. SHAW, 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; MRS. HENRIETTA PRICE GILLESPIE, 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, 1944.

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 the examinations of the Board of Law Examiners as of August 3, 1944:

Coxe, William Fotterall Potter........Biltmore.
Hamilton, Harvey, Jr. ....Morehead City.
Johnson, William Archibald........Lillington.
Laufer, Joseph........Durham.
Nance, George Wesley........Asheville.
Shuford, John Franklin........Asheville.

COMITY LICENSE.

Boulding, Ruffin Paige........Charlotte from Oklahoma

Given over my hand and the seal of the Board of Law Examiners of the State of North Carolina, this the 4th day of August, 1944.

(Seal) Edward L. Cannon, *Secretary*.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1944

JOHN H. ABRAMS v. METROPOLITAN LIFE INSURANCE CO.

(Filed 1 March, 1944.)

1. Appeal and Error § 43—

No case should be reheard on a petition to rehear unless it was decided hastily and some material point had been overlooked or some direct authority was not called to the attention of the court.

2. Same—

On petition to rehear the petitioner will not be permitted to shift his ground and take a different position from that upon which the case was originally tried and heard.

3. Insurance § 32a—

If the defendant wrongfully terminated or canceled the policy of insurance, as may be inferred from the evidence in this record, it was in derogation of the plaintiff's rights.

DENNY, J., concurring.

BARNHILL, J., dissenting.

PETITION by defendant to rehear this case, reported in 223 N. C., 500.

Smith, Wharton & Jordan and Battle, Winslow & Merrell for defendant, petitioner.

H. D. Hardison and Henry C. Bourne for plaintiff, respondent.

STACY, C. J. The case was brought back because of an alleged inadvertence or misapprehension of the record as it relates to the second cause of action. It is contended that no evidence was offered by the plaintiff to show a cancellation of the policy.

It was said on the original hearing that the complaint states a cause of action for wrongful cancellation, which is consistent with the cause of action on the policy, as both are in affirmance of the contract, and a new trial was granted, limited to this alleged breach of plaintiff's contractual rights. *Trust Co. v. Ins. Co.,* 173 N. C., 558, 92 S. E., 706; 29 Am. Jur., 286. The case was tried on both causes of action, and there was no objection or challenge to the joinder of the two causes in the same complaint.

The defendant alleges in its answer that the policy lapsed "for the nonpayment of the premium due July 27, 1939"; that the cash surrender value of the policy "at said time" was $1.86 over and above a loan then existing against the policy, and "a check in said amount of $1.86 was drawn payable to the insured . . . and mailed to him, but said check has never been cashed." Defendant further alleges in its answer "that it is due and owing the plaintiff the sum of $7.00," and tenders judgment in this amount.

The plaintiff testified that he tendered the defendant's agent the quarterly premium "due August 27, 1939, within the grace period," which he refused to accept, "and stated as his reason that the policy had been lapsed for the nonpayment of the premium due July 27, 1939." See *McAden v. Craig* (5th syllabus), 222 N. C., 497, 24 S. E. (2d), 1. Plaintiff further testified that "he has never received any notice whatever of the lapse of the policy nor has he ever received any premium notices." See G. S., 58-207 (C. S., 6465).

The defendant's local agent testified that he saw the plaintiff on 27 August, 1939, "the last day of grace according to the policy as I understood it. . . . I told him if the policy (premium) wasn't paid that day the grace expired and it would require a certified form before I could collect any money on the policy. . . . I told him the grace would expire that day." Cross-examination: "The last day of grace was the 27th of August, according to my receipts. . . . My receipts are made up at the home office. . . . The 27th day of August is the date the premium would be due under the terms of the policy, and he would have thirty-one days thereafter in which to pay it." Thus the defendant's agent admits that he was misinformed and that he misled the plaintiff.

If the defendant wrongfully terminated or canceled the policy, as may be inferred from the above evidence, it was in derogation of plaintiff's rights. *Aiken v. Ins. Co.,* 173 N. C., 400, 92 S. E., 184. The home office made up the agent's receipts, and even in the answer, filed 21 October,

1942, the due date of the premium is alleged to be "July 27, 1939." The trial court held, as a matter of law, that the third quarterly premium was due on 27 August of each year, and that the period of grace, in which it could be paid, extended it in each instance for 31 days thereafter. The issue appears to be one for the jury.

It is urged, however, that the plaintiff does not rely upon his allegation of wrongful cancellation, either in his original brief or in his brief on rehearing. His first exception is to the refusal of the court to submit the issues tendered, including the 4th, which relates to the alleged wrongful cancellation of the policy. See issues set out on original hearing, 223 N. C., 501. In his brief on rehearing, the plaintiff says: "The plaintiff offered evidence on both grounds (tender and wrongful cancellation) and tendered issues on both grounds. The trial court submitted the issue on tender, but refused to submit the issue on wrongful cancellation."

This would seem to dispose of the question, certainly so far as a reversal on petition to rehear is concerned. "No case should be reheard on a petition to rehear unless it was decided hastily and some material point had been overlooked or some direct authority was not called to the attention of the court." *Weathers v. Borders,* 124 N. C., 610, 32 S. E., 881; *Weston v. Lumber Co.,* 168 N. C., 98, 83 S. E., 693; *Jolley v. Tel. Co.,* 205 N. C., 108, 170 S. E., 145.

In the petition to rehear, the defendant for the first time takes the position that the plaintiff can sue only on the contract and not for its breach; that the insured and not the beneficiary has such a cause of action. See *Wooten v. Odd Fellows,* 176 N. C., 52, 96 S. E., 654, and *Gorrell v. Water Supply Co.* (1st syllabus), 124 N. C., 328, 32 S. E., 720. This is a shift in position which is not permitted on rehearing. *Holland v. Dulin,* 206 N. C., 211, 173 S. E., 310; *Jolley v. Tel. Co., supra.* Moreover, the record supports the plaintiff's right to pursue the matter of an alleged wrongful cancellation. 48 A. L. R., 109.

We adhere to the original decision.

Petition dismissed.

DENNY, J., concurring: The opinion disposes of the questions properly presented upon the petition to rehear, but, in view of the position taken in the dissenting opinion, I deem it not improper to discuss the extraneous questions raised.

It is true that no specific issue of damages for breach of the insurance contract was tendered by the plaintiff, but an issue based on the alleged wrongful cancellation of the policy was tendered and its submission to the jury refused by the trial judge. It was held in the original opinion, reported in 223 N. C., 500, 27 S. E. (2d), 148, that this was error, and

the majority opinion adheres to the original decision. The issues tendered by the plaintiff were intended and were sufficient to cover both phases of the case.

In the dissenting opinion it is stated: "The original opinion assumes that the complaint states, and plaintiff relies upon, two causes of action. In this I think there is error." In the trial below the defendant made no such contention, and, as stated in the majority opinion, "the case was tried on both causes of action and there was no objection or challenge to the joinder of the two causes of action in the same complaint."

Plaintiff's right to bring an action for breach of the insurance contract is challenged on the following grounds: (1) plaintiff had no vested interest in the policy during the life of the insured because the right to change the beneficiary was reserved by the insured; (2) there is no contract relation between the plaintiff and the defendant; and (3) the policy being canceled and the contract terminated during the life of the insured, the beneficiary loses any contingent interest he may have had; for his rights, if any, are predicated upon the existence of the contract.

In the first place, the challenge comes too late, none of these questions were raised in the trial below or before this Court when the case was here on appeal, they are raised for the first time in the brief on rehearing. In the case of *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5, it was held: "The rule is, that an appeal *ex necessitate* follows the theory of the trial. *Dent v. Mica Co.,* 212 N. C., 241, 193 S. E., 165; *Keith v. Gregg,* 210 N. C., 802, 188 S. E., 849; *In re Parker,* 209 N. C., 693, 184 S. E., 532. Having tried the case upon one theory, the law will not permit the defendant to change its position, or 'to swap horses between courts in order to get a better mount in the Supreme Court.' *Weil v. Herring,* 207 N. C., 6, 175 S. E., 836; *Holland v. Dulin,* 206 N. C., 211, 173 S. E., 310. 'The theory upon which a case is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions'—*Brogden, J.,* in *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123." See also *Gorham v. Ins. Co.,* 215 N. C., 195, 1 S. E. (2d), 569.

In the second place, I do not concede that plaintiff's interest was contingent and that he could not have brought an action during the life of the insured, in the light of the facts disclosed on this record: (1) The right to change the beneficiary was a restricted one. The policy states, "The right on the part of the insured to change the beneficiary, in the manner hereafter prescribed, is reserved." The record does not disclose the manner provided for changing the beneficiary; (2) at the time of the lapse, or wrongful cancellation, of the policy, the insured had been adjudged *non compos mentis* and committed to the State Hospital for the Insane, and was incapable of changing the beneficiary; and (3) the

beneficiary in this policy had furnished the consideration money of the contract.

Justice Walker, in speaking for the Court in the case of *Wooten v. Order of Odd Fellows,* 176 N. C., 52, 96 S. E., 654, said: "The general rule is that the right of a policy of insurance, at least to one of the ordinary character, and to the money which may become due under it, vests immediately, upon its being issued, in the person who is named in it as beneficiary, and that this interest, being vested, cannot be transferred by the insured to any other person (*Central National Bank v. Hume,* 128 U. S., 195) without his consent. This does not hold true, however, when the contract of insurance provides for a change of the beneficiary by the insured, or such a right arises in some other way, for in such a case the right of the beneficiary vests conditionally only, and is subject to be defeated by the terms of the very contract, or instrument, which created it, and is destroyed by the execution of the reserved power. These principles, we take it, are well settled by the highest authority and great weight of judicial opinion. 4 Cooley's Briefs on the Law of Insurance, par. 3762-3772; *Nally v. Nally,* 74 Ga., 669; *McGowan v. Supreme Court of Ind. Order of Foresters,* 104 Wis., 173; *Shoenan v. Grand Lodge,* 85 Minn., 349; *Sanburn v. Black,* 67 N. H., 537; *St. L. Police Relief Assc. v. Strode,* 103 Mo. App., 694; *Luhrs v. Luhrs,* 123 N. Y., 367; *Donnelly v. Burnham,* 86 App. Div. (N. Y.), by Hun., p. 226 (Aff. in same case, 177 N. Y., 546); *Hancock Mutual L. Ins. Co. v. White,* 20 R. I., 457."

In this jurisdiction where one not a party or privy to a contract, but who is a beneficiary thereof, and furnishes the consideration money of the contract, such beneficiary is entitled to maintain an action for its breach. Whatever the law may be elsewhere, this Court, in the leading case of *Gorrell v. Water Supply Co.,* 124 N. C., 328, 32 S. E., 720, laid down the above principle of law, which has been adhered to for more than half a century. The plaintiff had a vested interest in the policy prior to the death of the insured.

In 29 Amer. Jur., sec. 313, p. 286, it is said: "It is generally held that a beneficiary who has a vested interest in a policy may protect his rights and has a cause of action for damages in case of the wrongful cancellation or repudiation of the insurance contract by the insurer, but a beneficiary who has no vested interest cannot maintain such a suit. *Vicars v. Mutual Ben. Health & Acci. Asso.,* 259 Ky., 13, 81 S. W. (2d), 874, citing R. C. L., 124 Wis., 221, 102 N. W., 593, 109 Am. St. Rep., 931."

Notwithstanding the uncontradicted evidence that over a period of twelve years and six months, the defendant collected fifty quarterly premiums, of $9.46 each, from the plaintiff, beneficiary, in this policy, the dissenting opinion states: "The defendant was under no legal obliga-

tion to give plaintiff notice of premiums. It was its duty to notify the insured. That plaintiff received no notice is no indication that notices were not duly mailed, as required by statute—C. S., 6465; G. S., 58-207." I think the long course of dealing between the plaintiff and the defendant, the fact that the beneficiary held the policy, together with the admission by the defendant that it knew the insured was insane, necessitated notice to plaintiff as required by law.

The question as to whether or not a notice was sent to the plaintiff or the insured, is now settled. The defendant admits, for the first time, in its brief on rehearing, that "The defendant sent no notice complying with the statute of the premium due August 27, 1939." It still contends, however, that plaintiff does not know whether the policy was wrongfully canceled or not, since it has not seen fit to disclose the date of its action in that respect. The defendant states in its petition to rehear: "It does not appear from the statement in the further answer, even if it had been introduced, whether the defendant's act of mailing check took place during or after the grace period figured from August 27, 1939, or even whether it took place within or after the year's extension of the grace period, granted by C. S., 6465."

An insurance company will not be permitted to admit the execution of a policy of life insurance and the death of the insured and merely deny the policy was in force at the time of the death of the insured, unless it elects to run the risk of an adverse verdict. *Urey v. Ins. Co.,* 197 N. C., 385, 148 S. E., 432. The burden of proving the policy was not in force at the time of the death of the insured is on the defendant. *Page v. Ins. Co.,* 131 N. C., 115, 42 S. E., 543. This is in conformity with the rule laid down in 25 Cyc., 927, which is as follows: "Ordinarily, where the company pleads the failure to pay premiums or assessments, the burden is on it to prove such failure. And if a statute requires service of notice by the company on the insured before a forfeiture can be declared, the company has the burden of proving the service of such notice."

The case of *West v. Ins. Co.,* 210 N. C., 234, 186 S. E., 262, is not in point.

It is conceded that when a policy is wrongfully canceled by an insurance company, if the insured desires to insist upon reinstatement and continuance, he must pay or offer to pay the premium called for in the contract. But, suppose a policy is wrongfully canceled and the insured does not tender the premium or request reinstatement of the insurance contract. Is he to be denied redress for the injury he has sustained by reason of the wrongful cancellation of the policy? Such is not the law. The original opinion and the opinion dismissing the petition to rehear, do not undertake to pass upon the merits of this controversy, further than to say the plaintiff, under the facts presented, is entitled to have a

jury pass upon the question as to whether or not the company did wrongfully cancel the policy. If it did so, the plaintiff is entitled to recover the damages he has sustained by reason of the breach; if not, the defendant will be absolved from any liability arising out of the alleged breach. Likewise, whether or not the plaintiff has performed his own antecedent obligations to the insurance company as required, in order to prevail on the issue of wrongful cancellation, is now a matter of proof. This Court has decided only that he shall be given an opportunity to present his case, based on alleged wrongful cancellation, to the twelve.

I do not think the other authorities cited in the dissenting opinion are authoritative, when considered in relation to the facts and questions presented on the record in this case.

BARNHILL, J., dissenting: The original opinion assumes that the complaint states and plaintiff relies upon two causes of action. In this I think there is error. At least, the plaintiff has never so contended either in his original brief or in his brief on rehearing.

The plaintiff alleges, in substance, that the defendant attempted to lapse said policy for the nonpayment of premiums, but that he duly tendered the premium and thus kept the policy in full force and effect. He admits in his brief (on rehearing) that while the insured might have sued for breach, he, the beneficiary, can sue only on the policy. He seeks no damages. He tendered no issue of damages for breach. The only issue he tendered as to the amount due is, "by reason of said policy of insurance." Thus it appears he states and relies on only one cause of action. This is on the policy and not for breach thereof.

Even if there are two causes of action, the issues submitted are sufficiently determinative. In the absence of allegation and proof of fraud, *Combs v. Ins. Co.,* 181 N. C., 218, 106 S. E., 826, payment or tender of premium is essential to a cause of action for breach.

This Court, in *West v. Ins. Co.,* 210 N. C., 234, at page 236, said:

"Even if the defendant wrongfully terminated the insurance, that did not relieve the insured, if he desired to insist on its continuance, from his obligation to pay or offer to pay the premiums called for in his contract. . . .

"A party to a contract cannot maintain an action for its breach without averring and proving performance of his own antecedent obligations or some legal excuse for nonperformance."

Without undertaking to cite the cases, it is sufficient to say that this statement is sustained by authorities from other States which hold that the insured is not relieved from the duty to tender premiums by notice of lapse or unlawful forfeiture unless the company refuses to accept the premium or gives notice that it will not accept if tendered.

The allegation of tender has been litigated and decided adversely to plaintiff. This Court has affirmed. He is bound by that verdict.

It may be that if the plaintiff had been misled by the statement of the agent that August 27 was the last day of grace he might have relief under the *Combs case, supra,* even though he never tendered any premium. But such is not the case. He looked at his policy and decided that the premium was payable in August and he could pay in September. He was not deceived. He knew his rights. Yet he stood by for more than two years without action and defaulted in the payment of nine several premiums.

Furthermore, the plaintiff is beneficiary in the policy at the will of the insured. No rights could accrue to him until or unless the insured died without having first changed the beneficiary. Hence, he can have no right of action for breach of the policy during the life of the insured.

The policy in question was issued on the life of Joe Ellis. It was an endowment policy payable at maturity to the insured. It provides, however, that if the insured should die before the maturity of the policy then the proceeds of the policy are to be paid to the plaintiff. But the insured reserved the right to change the beneficiary.

Thus there is no contract relation between plaintiff and defendant, and plaintiff, during the life of the insured, had no vested interest in the policy. His right accrued only in the event there was a valid policy in full force and effect at the time of the death of the insured. Defendant owes him, if it owes him at all, by reason of the fact it promised the insured to pay.

It is true that Abrams alleges and offered evidence tending to show that he paid the premiums; but he does not make any attempt to prove that he applied for and obtained the policy or that there was any agreement or understanding that he should assume the position or discharge the obligations of the insured under the policy. On this record he merely volunteered to make some or all of the payments. This does not change his status as beneficiary.

A policy of insurance is a contract between the insurer and the insured. *Trust Co. v. Ins. Co.,* 173 N. C., 558, 92 S. E., 706; *Rothschild v. Insurance Co.,* 74 Mo., 41. Upon a breach thereof by the insurer we must look to the policy to ascertain who is the injured party and in whom a cause of action vests by virtue of the breach.

When the insurer wrongfully cancels, repudiates, or terminates a policy three optional remedies immediately accrue to the insured: (1) he may elect to consider the policy at an end—that is, he may recognize the breach and recover its just value; or (2) he may sue in equity to have the policy declared in force; or (3) he may *tender the premiums* and treat the policy as in force. *Trust Co. v. Ins. Co., supra; West v.*

Ins. Co., 210 N. C., 234, 186 S. E., 263; Anno. 48 A. L. R., 107. If he follows the latter course then at his death the policy is enforceable as a subsisting contract.

Thus the right of action for a breach, if the insured elects to recognize the breach, vests in the insured and not in the beneficiary. This is admitted in plaintiff's brief. Upon the death of the insured the vested right of action passes to the administrator. The policy being canceled and the contract terminated, the beneficiary loses any contingent interest he may have had; for his rights, if any, are predicated upon the existence of the contract.

The beneficiary may sue only on the policy *after the death of the insured.* To recover he must show that there was an outstanding policy of insurance in full force and effect at the time of the death of the insured, and that he was the then named beneficiary in the policy. "The insured could have brought an action for damages. . . . The plaintiff could only wait until the death of the insured and bring his action on the policy." (Plaintiff's brief.) Hence, when there is a wrongful lapse his rights are preserved and he may sue only in the event the insured elects to adopt the third remedy, and this is predicated upon *a tender of the premiums.*

On this cause of action plaintiff has had his day in court and lost. The jury found there was no tender of premium and that verdict has been affirmed. That fact is fully adjudicated. Now, having asserted that the policy was in force and lost, he is permitted to assume the role of the insured and attempt to recover damages for the wrongful breach. In my opinion no such cause of action vests in him. *Slocum v. Northwestern Nat. L. Ins. Co.*, 135 Wis., 288, 115 N. W., 796; *Mutual Relief Asso. v. Ray*, 173 Ark., 9, 292 S. W., 396.

But, conceding *arguendo* that plaintiff may sue for breach, there is no sufficient evidence to support the issue tendered and rejected.

The plaintiff relies on certain items of evidence as follows: (1) On the due date of the premium payable 27 August, 1939, the agent told him that was the last day of grace; (2) he tendered the premium before the expiration of the due date and it was refused, the agent stating at the time that the policy had lapsed for failure to pay the premium 27 July, 1939; (3) he received no notice of premiums; and (4) the defendant admits in its answer facts which constitute a wrongful cancellation.

(1) The agent told plaintiff on 27 August, 1939, that the period of grace for paying the current premium would expire that day. About this there is no controversy. Both he and the agent so testified. It is likewise true that under the terms of the policy 27 August was the due date and he had thirty-one days thereafter within which to pay.

The mere statement of the agent that the time of payment was about to expire did not constitute a lapse. He had no authority to cancel. Plaintiff admits that the defendant never notified him of any cancellation and, as heretofore stated, he was not misled.

(3) The defendant was under no legal obligation to give plaintiff notice of premiums. It was its duty to notify the insured. That plaintiff received no notice is no indication that notices were not duly mailed as required by statute. C. S., 6465; G. S., 58-207, has no application here. Even if applicable, however, the statute does not relieve of the duty to pay or to tender the premium. It merely extends the time within which the payments may be made. Giving the plaintiff the full benefit of this statute, no premiums have been paid within the time required as extended by the statute. The last payment was made May, 1939. The deceased died in October, 1941—more than two years thereafter.

(4) The alleged admission in the answer is an affirmative allegation of fact. The plaintiff did not offer it in evidence, as he had a right to do. Even so, considering it as an admission, it does not admit a wrongful cancellation. The defendant wrote the insured "upon the lapse of said policy for the nonpayment of the premium due July 27, 1939." Was this after the grace period had expired or after the extended grace period granted by statute? G. S., 58-207. Had the policy in fact lapsed at the time the letter was written? The answers to these questions do not appear in the evidence. The burden was on the plaintiff, and we should not assume that the letter was written prior to the time the policy in fact lapsed by virtue of its self-operating provisions. Anno. 8 A. L. R., 398.

It may be that the plaintiff could have made out a case for the jury, but he offered no evidence of payment, and the jury has found that he made no tender. The other evidence, in my opinion, is insufficient to support the issue which the court declined to submit.

I do not consider that *Aiken v. Ins. Co.,* 173 N. C., 400, 92 S. E., 184, is in point here. It clearly appears in that case that the insured pursued the third remedy above cited and thus kept the policy alive. Surely, under such circumstances, the beneficiary had the right to maintain her action.

There are a number of cases in this and other jurisdictions in which the action by a beneficiary at the will of the insured is referred to as an action for breach of contract. A careful examination of the facts in these cases, however, will disclose that in each instance the insured, as in the *Aiken case, supra,* had kept the policy alive and in force by the tender of premiums. The suits, in fact, were on the policies and recovery was had thereunder.

The case comes to this: the company insured for a specified period—three months—and agreed to extend the insurance for a like period upon the payment of the stipulated premium. In order to obtain the periodic extensions the positive duty rested upon the insured to pay or to tender the premiums. Plaintiff offered no evidence of payment, and the jury has found that he made no tender. More than two years elapsed between the payment of the last premium and the death of the insured. At the time of his death nine premiums were in default. Whatever the rights of the insured may have been, it is clear to my mind that he failed to keep the policy alive and there is now no subsisting contract upon which the plaintiff, the beneficiary, may maintain an action.

Of course plaintiff contends he offered evidence of wrongful cancellation and tender of premium. Having admitted that no premium has been paid since 27 May, 1939, his counsel correctly conceive that it is necessary for plaintiff to prove both in justification of nonpayment and to show that the policy was kept alive. This is essential to make out a case in his action on the policy—the third remedy listed in *Trust Co. v. Ins. Co., supra.* This is the theory he has pursued from the beginning.

Even now, he in his brief on rehearing does not adopt the view that he has proceeded or can proceed for breach of contract. He affirmatively asserts that such a cause of action rested in the deceased. The first suggestion that such a cause of action is alleged is contained in the original opinion. The defendant in its petition for rehearing merely calls this to our attention. In any event, if there has been any shift of position it is not chargeable to defendant.

I vote to allow the petition.

MRS. NANCY I. HAYES (WIDOW), MICHEY ANNE, EDWIN JAMES AND THOMAS WEBB HAYES (CHILDREN), OF EDWIN I. HAYES, DECEASED, v. BOARD OF TRUSTEES OF ELON COLLEGE (EMPLOYER), AND TRAVELERS INSURANCE COMPANY (CARRIER).

(Filed 1 March, 1944.)

1. Master and Servant §§ 37, 55d: Contracts § 8—

There being no substantial controversy as to the facts, the relationship created by a contract is a question of law and the conclusion of the Industrial Commission is reviewable.

2. Master and Servant § 39b—

The elements, which earmark the relationship of employer and independent contractor, are generally as follows: The person employed (a) is engaged in an independent business, calling or occupation; (b) is to

have the independent use of his skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price, or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he thinks proper; (g) has full control over such assistants; and (h) selects his own time. The presence of no one of these *indicia* is controlling, nor is the presence of all required.

3. **Master and Servant § 37—**

The doctrine of the liberal construction of the Workmen's Compensation Act arises out of the Act itself and relates only to cases falling within the purview of the Act. It cannot be invoked to determine when the Act applies.

4. **Master and Servant §§ 39a, 39b—**

Except as to public officers the definition of "employee" contained in the Workmen's Compensation Act adds nothing to the common law meaning of the term. Nor does it encroach upon or limit the common law meaning of "independent contractor." These terms must be given their natural and ordinary meaning in their accepted legal sense.

5. **Master and Servant § 37—**

The courts are without authority to enlarge the meaning of the terms used in the Workmen's Compensation Act by the Legislature or to extend by construction its scope and intent so as to include persons not embraced by its terms.

6. **Master and Servant §§ 37, 52b—**

One who seeks to avail himself of the Workmen's Compensation Act must come within its terms and must be held to proof that he is in a class embraced in the Act.

7. **Master and Servant § 39b—**

Where defendant contracted with plaintiff and two other electricians to rebuild, in their "off" hours, a part of its electric line for a lump sum of $30.00, the defendant having the holes dug and furnishing the poles, a truck, other tools and two helpers, requiring that certain trees be not trimmed but disclaiming any knowledge of the work and leaving it up to the electricians, and plaintiff was killed by a live wire while so engaged, and thereafter the remaining electricians secured other help and completed the job, the relationship thus created is that of independent contractor.

DEVIN, J., dissenting.

SCHENCK and SEAWELL, JJ., concur in dissenting opinion.

APPEAL by defendants from *Carr, J.*, at September Term, 1942, of ALAMANCE. Reversed.

Proceedings before the Industrial Commission for compensation for the death of an alleged employee.

The defendant Board owns a local electric light system which serves its college buildings. It buys electricity wholesale from the Duke Power Company and distributes it over its own system.

One C. W. Wright is the Assistant Superintendent of Duke Power Company and C. D. Lovett is the Business Manager of defendant Board.

One of the poles of defendant's system fell down, and it employed Peele Electric Company, a contractor of Burlington, N. C., to replace it. At that time, the Duke Power Company having been advised that one of its feed lines was out of order, Wright took one of his electricians, Grimes Moore, and went to the college to investigate. He then advised Lovett that the other poles in the college system were in bad condition, and Lovett said he would like to rebuild the whole system, especially the east side, if he could get the material, and he asked what to do about it. Wright stated that his company could not agree to rebuild but that it employed electricians who did jobs of that kind during their "off" hours and that he would look into it and see him again later if he could get the material. Several weeks later Lovett got in touch with Wright and told him he had secured the material to rebuild the east side and was ready to go to work.

"I (Wright) first asked him how did he want to do it, by the hour or what, how did he want to go about the pay. I told him that the fellows when they were off from work tried to make time and a half. He said he didn't know anything about the work, so he had rather do it so much for the job. Then he discussed that he would pay $30.00 to do it, and I told him that I would have to see the boys and see if they would do it for that. Lovett said he would have the holes dug."

Wright then saw Moore and the deceased, Hayes, and told them of his conversation, and that if they wanted to set the six poles and transfer the wires for $30.00 that they could do it. Moore and Hayes got another electrician, Dixon, to accompany them, and went to the plant of the defendant and had a conversation with Lovett, but compensation was not mentioned. "He wanted those six poles from that building around to the dining room replaced or set the new ones in and transfer the wire from the old ones to the new ones, and we asked him if we could get some help, there wasn't but three of us, and he said we could get some of the colored boys from over at the plant over there. Lovett said he didn't know anything about the work and he was leaving it up to us to fix it and fix it right." While talking to Lovett the electricians also told him that they did not have all their equipment and asked if they could have a truck to back the poles in. Lovett replied, "I thought you were going to bring it." They carried with them their "climbers" and other electrician's tools, but "got a shovel and pipe poles." Defendant also furnished a truck and two helpers.

"Mr. Hayes asked him about cutting some limbs, said if he used those poles there would have to be some limbs cut off. Lovett said he would rather not have the trees cut, he would rather make some arrangements about the poles, said he would rather to take some off the poles than to cut the trees. He told us to cut about ten feet off of each pole. One of the colored fellows went and got a saw, and we cut off the poles."

Also "they (the electricians) asked about 'killing' the line. I told them they could have it cut off whenever they liked. I asked them not to cut it off any longer than necessary."

After they had set four poles they found they had to let the wires down in order to set the fifth pole. Moore climbed the pole and "untied" the wires and let them drop. The deceased, thinking it was a low voltage wire, caught hold of it to help, and was killed by the high voltage.

After the death of Hayes the other two electricians procured a third party to assist them and worked awhile each day after five o'clock and on Saturdays and Sundays for about two weeks until they completed the job.

When the job was completed Lovett insisted that he made the contract with Wright and tendered a check for $30.00 payable to Wright. This the electricians refused to accept.

Claim for compensation was filed. The defendant denied that deceased was an employee of the college. The hearing Commissioner made an award which was approved by the full Commission. On appeal the court below affirmed and defendants appealed.

Long, Long & Barrett and Smith, Wharton & Jordan for plaintiffs, appellees.

Sapp & Sapp for defendants, appellants.

BARNHILL, J. Briefly stated, the defendant Board through Wright contracted with the electricians to rebuild a part of its electric line for the lump sum of $30.00. The electricians agreed to undertake and complete the job if the defendant would furnish a truck and two helpers. After some discussion about trimming some trees to clear the wires, at the suggestion of Lovett, the poles were shortened so as to clear the wires without cutting the trees. After deceased was killed the work was temporarily stopped, and defendant notified the other electricians it wanted the job completed. They, and not the defendant, obtained other help and completed the job. Defendant paid in a lump sum by check.

What was the relationship created by this contract? Were the electricians, including the deceased, employees or independent contractors? This is the decisive question.

While the Commission concluded that the electricians were employees, this is not controlling. There is no substantial controversy as to the facts. This being true, the relationship created by the contract is a question of law, and the conclusion of the Commission is reviewable. *Thomas v. Gas Co.,* 218 N. C., 429, 11 S. E. (2d), 297; *Beach v. McLean,* 219 N. C., 521, 14 S. E. (2d), 515.

The distinction between "servant" or "employee" and "independent contractor" has been frequently discussed and defined by this and other courts as well as by textwriters. *Young v. Lumber Co.,* 147 N. C., 26, 60 S. E., 654; *Gay v. R. R.,* 148 N. C., 336, 62 S. E., 436; *Denny v. Burlington,* 155 N. C., 33, 70 S. E., 1085; *Beal v. Fiber Co.,* 154 N. C., 147, 69 S. E., 834; *Johnson v. R. R.,* 157 N. C., 382, 72 S. E., 1057; *Harmon v. Contracting Co.,* 159 N. C., 22, 74 S. E., 632; *Embler v. Lumber Co.,* 167 N. C., 457, 83 S. E., 740; *Simmons v. Lumber Co.,* 174 N. C., 220, 93 S. E., 736; *Cole v. Durham,* 176 N. C., 289, 97 S. E., 33; *Greer v. Construction Co.,* 190 N. C., 632, 130 S. E., 739; *Aderholt v. Condon,* 189 N. C., 748, 128 S. E., 337; *Drake v. Asheville,* 194 N. C., 6, 138 S. E., 343; *Lumber Co. v. Motor Co.,* 192 N. C., 377, 135 S. E., 115; *Bryson v. Lumber Co.,* 204 N. C., 664, 169 S. E., 276; *Construction Co. v. Holding Corporation,* 207 N. C., 1, 175 S. E., 843; *Beach v. McLean, supra; Vogh v. Geer,* 171 N. C., 672, 88 S. E., 874; *Re Murray,* 75 A. L. R., 720; *Gulf Refining Co. v. Brown,* 116 A. L. R., 449; Anno. 19 A. L. R., 226, 1172, and 20 A. L. R., 686; 14 R. C. L., 65; 27 Am. Jur., 479; *Henry v. Mondillo,* 142 A., 230.

It appears from these authorities that the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses is decisive, and when this appears it is universally held that the relationship of master and servant or employer and employee is created.

Conversely, when one who, exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do as it progresses, is clearly an independent contractor.

The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.

Many cases are plainly on one side of the equation and may be readily classified as showing the relation of master and servant. Others are just as plainly to be deemed cases of independent contract.

But men are prone to assume the existence of one fact because of the existence of another. And so, oftentimes, the facts are not so definite or the terms of the contract are not so concise and clear as to permit ready and categorical classification without consideration of other circumstances which tend to show into which class the particular case should fall.

What, then, are the elements which ordinarily earmark a contract as one creating the relationship of employer and independent contractor? The cited cases and the authorities generally give weight and emphasis, amongst others, to the following:

The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time. *Young v. Lumber Co., supra; Bryson v. Lumber Co., supra; Construction Co. v. Holding Corporation, supra; Royal v. Dodd,* 177 N. C., 206, 98 S. E., 599; *Midgette v. Mfg. Co.,* 150 N. C., 333, 64 S. E., 5; *Blake v. Ferris,* 5 N. Y., 48; *Harrison v. Collins,* 86 Pa., 153; *Corbin v. The American Mills,* 27 Conn., 274; *Smith v. Belshaw,* 89 Cal., 427; *Allen v. Willard,* 57 Pa., 374; *Deford v. State,* 30 Md., 179; *Wiese v. Remme,* 140 Mo., 289, 41 S. W., 797; *Litts v. Risley Lumber Co.,* 19 A. L. R., 1147; *Leet v. Block,* 182 Ind., 271, 106 N. E., 373; Anno. 19 A. L. R., 243, 1210; *Re Murray, supra; Mattocks v. Emerson Drug Co.,* 33 S. W. (2d), 142; *Industrial Commission v. Hammond,* 236 Pac., 1006; *Morton v. Day Coal Co.,* 192 Iowa, 160, 180 N. W., 905; *Provensano v. Div. of Industrial Accidents,* 294 Pac., 71, 27 Am. Jur., 485; 14 R. C. L., 74; Anno. 20 A. L. R., 755, 766, 790; 19 A. L. R., 1168.

The presence of no particular one of these *indicia* is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee.

Thus, in applying various combinations of these tests, it has been held that the following are independent contractors:

One who undertakes to cut timber, *Young v. Lumber Co., supra; Bryson v. Lumber Co., supra* (a compensation case), or to cut shingles, *Royal v. Dodd,* 177 N. C., 206, 98 S. E., 599, for compensation on a quantitative basis; one who, being engaged in the trucking business, agrees to move a quantity of hay at a *per diem* for his services, *Flick-*

enger v. Industrial Accident Commission, 181 Cal., 425, 19 A. L. R., 1150 (a compensation case); an electrician employed from time to time to install and repair electric equipment, *Sechrist v. Kurtz Bros.,* 24 Atl. (2d), 128 (a compensation case); a painter who contracts to paint smoke stacks for a lump sum, *Litts v. Risley Lumber Co., supra* (a compensation case); one who is engaged to exterminate bedbugs in an apartment house, *Medley v. Trenton Investment Co.,* 205 Wisc., 30, 76 A. L. R., 1250; one who is employed to move machinery in a factory according to plans on a percentage of cost basis, *Carleton v. Foundry and Mach. Products Co.,* 199 Mich., 148, 19 A. L. R., 1141 (a compensation case); one who contracts to sink a well at an agreed price per foot, *Westover v. Hoover,* 88 Nebr., 201, 19 A. L. R., 215; one who engages to transfer freight at so much per ton, *Smith v. State Workmen's Ins. Fund,* 262 Pa., 286, 19 A. L. R., 1156; one who contracts to blast, break, haul, and deliver designated quantities of rock at a stipulated price per ton, *Stricker v. Industrial Commission,* 55 Utah, 603, 19 A. L. R., 1159 (a compensation case); one who engages to brick in newly installed boilers for a lump sum, *Joseph v. Philip Henrici Co.,* 137 Ill. App., 171; one who is hired to paint a house for a lump sum, *Francis v. Johnson,* 127 Iowa, 391, 101 N. W., 878; a plumber called to do repair work, *Bennett v. Truebody,* 6 Pac., 329; a mechanic who repairs an elevator, *Flori v. Dolph,* 192 S. W., 949; a scaffold builder employed by a painter to construct a scaffold for the use of his servants, *Devlin v. Smith,* 89 N. Y., 407, 42 Am. Rep., 311; one who engages to do repair work on a house for a stipulated price, *Russell v. Buckhout,* 34 N. Y. Supp., 271; one who undertakes to erect boiler and smoke stacks, *Cash v. Casey-Hedges Co.,* 139 Tenn., 179; one who agrees to paper walls and ceilings and to do certain painting for a lump sum, *Southwestern Teleg. and Teleph. Co. v. Paris,* 87 S. W., 724; one who agrees to provide the material and construct a sidewalk in front of a building for a lump sum, *Independence v. Slack,* 134 Mo., 66; a farmer who agrees to haul a boiler from a railroad station, *See v. Leidecker,* 152 Ky., 724, or to remove an engine for a lump sum, *McNally v. Diamond Mills Paper Co.,* 223 N. Y., 83, 119 N. E., 242; one who engages to move a house for a lump sum, *Wilbur v. White,* 56 Atl., 657; one who agrees to install an elevator and put it in running order, *Parkhurst v. Swift,* 68 N. E., 620; *Long v. Moon,* 17 S. W., 810; a carpenter who agrees to do certain work for a stipulated sum, *Kipp v. Oyster,* 114 S. W., 538; one who agrees to tear down a building, retaining one-half of the brick and joists as his compensation, *Thurston v. Kansas City Terminal R. Co.,* 168 S. W., 236; a mechanic called to repair machinery on the premises, payment to be made for the completed piece of work, *Texas Refining Co. v. Alexander,* 202 S. W., 131; a person who undertakes to clear a certain piece of land

at a specified price per acre, *Wright v. Holbrook,* 52 N. H., 120; public draymen employed to cart certain barrels for so much per barrel, *De Forrest v. Wright,* 2 Mich., 368; a mechanic engaged to overhaul automobile engine at $20.00 per week, *Woodcock v. Sartle,* 146 N. Y. Supp., 540; a painter who agrees to paint and erect signboards, *Simonton v. Morton,* 119 Atl., 732.

Careful consideration and analysis of the facts in the light of the cited authorities leads us to the conclusion that the deceased was an independent contractor. Lovett in the beginning expressly declined to employ by the hour. Deceased and his associates were skilled electricians. They were not regularly employed by defendant, but by the Duke Power Company. They engaged extra jobs requiring their special type of skill during their "off" hours. They undertook to perform stipulated work as a whole for a specified sum, and defendant had no control over the division of the compensation. They were not required to report either before beginning or after quitting work, but were free agents as to their hours of labor. The work was to be done at their convenience, and it was left to them to decide when and where to begin and when to "kill" the electricity. They followed their own judgment as to the manner and method of setting the poles and transferring and connecting the wires. After deceased was killed his associates selected extra help to replace deceased and completed the work. Defendant could not discharge deceased or either of his associates without incurring liability for breach of contract. At the same time it had the right to insist that the work should be completed before any payment was made.

These circumstances fail to disclose that the parties to the contract contemplated or intended that the defendant or its representatives should have any right to control or direct the details of the work or what the workmen should do as the work progressed. The opposite conclusion is required.

The fact that defendant furnished a truck and two helpers and loaned a saw, shovel, and pipe poles does not tend to destroy the independency of the contract. *Gay v. R. R., supra; Vogh v. Geer, supra; Beach v. McLean, supra; Litts v. Risley Lumber Co., supra; Emerson v. Fay,* 94 Va., 60; *Perham v. American Roofing Co.,* 193 Mich., 221, 159 N. W., 140; *Miller v. Minnesota and N. W. Ry. Co.,* 76 Iowa, 655, 39 N. W., 185, 14 R. C. L., 73, 84.

The discussion as to whether the trees should be trimmed or the poles shortened took place before the work was begun and related to the general nature of the work to be performed and the general plan to be followed. While worthy of some consideration, this circumstance does not evidence the right to control the details of the work to the extent necessary to create the relation of employer and employee. On this record it is not

inconsistent with the conclusion that the electricians were independent contractors. *Denny v. Burlington, supra; Hopper v. Ordway,* 157 N. C., 125, 72 S. E., 838; *Johnson v. R. R.,* 157 N. C., 382, 72 S. E., 1057; *Embler v. Lumber Co., supra;* 14 R. C. L., 70; Anno. 20 A. L. R., 687; *Lutenbacher v. Mitchell-Borne Constr. Co.,* 19 A. L. R., 206.

But plaintiffs insist that the rule of liberal construction applies in cases arising under the Workmen's Compensation Act and that this rule should be invoked to resolve any doubt in favor of plaintiffs. In answer to this argument we need only to point out that this rule is an interstitial one, benefiting the injured party only in those cases where the Act applies. It cannot be invoked to determine when the Act does apply.

The doctrine of liberal construction arises out of the Act itself, and relates to cases falling within the purview of the Act. Until it is adjudicated affirmatively that the employer-employee relationship existed at the time of the accident no construction or interpretation of the Act—liberal or otherwise—comes within the scope of judicial inquiry.

By express terms the Act applies only where the employer-employee relationship exists. Sec. 8081 (1), Michie's N. C. Code of 1939; G. S., 97-2; *Winslow v. Carolina Conference Association,* 211 N. C., 571, 191 S. E., 403; *Lee v. American Enka Corp.,* 212 N. C., 455, 193 S. E., 809.

Except as to public officers the definition of "employee" contained in the Act adds nothing to the common law meaning of the term. Nor does it encroach upon or limit the common law meaning of "independent contractor." *Bryson v. Lumber Co., supra; Beach v. McLean, supra.* The Act includes only the one and thus excludes the other. *Expressio unius exclusio alterius.*

Hence, in judicially determining the preliminary question of coverage the terms "employee" and "independent contractor" must be given their natural and ordinary meaning and effect. It must be presumed, nothing else appearing, that they are used in their accepted legal sense. *Asbury v. Town of Albemarle,* 162 N. C., 247, 78 S. E., 146; *C. T. H. Corporation v. Maxwell, Comr. of Revenue,* 212 N. C., 803, 195 S. E., 36; *Pacific Gas and Elec. Co. v. Industrial Accident Com.,* 180 Cal., 497, 181 Pac., 788; 2 Sutherland Statutory Construction, 3rd Ed., pp. 438-441, 28 R. C. L., 754, 71 C. J., 341, 417.

The courts are without authority to enlarge the meaning of the terms used by the Legislature or to extend by construction its scope and intent so as to include persons not embraced by its terms. *Carsten v. Department of Labor and Industries,* 172 Wash., 51; *Cornet v. City of Chattanooga,* 165 Tenn., 563, 56 S. E. (2d), 742; *Spivey and McGill v. Nixon,* 163 Okla., 278, 21 Pac. (2d), 1049; *Knudson v. Jackson,* 191 Iowa, 947, 183 N. W., 391; *Birmingham Post Co. v. Sturgeon,* 149 So., 74; *McDon-*

ald v. City of New Haven, 109 Atl., 176, 10 A. L. R., 193; *Mann v. City of Lynchburg,* 129 Va., 454, 106 S. E., 371, 71 C. J., 417.

One who seeks to avail himself of the Act must come within its terms and must be held to proof that he is in a class embraced in the Act. *Knudson v. Jackson, supra; Bingham City Corporation v. Industrial Commission of Utah,* 243 Pac., 113; *Spivey and McGill v. Nixon, supra; Mobley v. Brown,* 151 Okla., 167, 83 A. L. R., 1014; *Hamilton v. Randall,* 276 Pac., 705; *Harris v. Oklahoma Natural Gas Co.,* 216 Pac., 116; *El Reno Broom Co. v. Roberts,* 281 Pac., 273. See also 71 C. J., 341.

As plaintiffs have failed to show that they are dependents of an employee of defendant Board who suffered death by accident arising out of and in the course of his employment the judgment below must be

Reversed.

DEVIN, J., dissenting: It is a cardinal principle in the law by which compensation is allowed to the dependents of workmen who fall victims to the hazards of industry, that the findings of fact made by the Industrial Commission are conclusive on appeal, if supported by any competent evidence. The Commission is constituted the sole judge of the facts.

In this case the Industrial Commission found, and the Superior Court affirmed, that the relationship of the deceased to the defendant was that of employee, rather than that of independent contractor. In the opinion of the majority there was no evidence to support this finding. With this I do not agree.

The general principles of law so well stated in the majority opinion, deduced from the many decided cases on the subject, in which the distinction between an employee and an independent contractor is drawn, together with the ordinary *indicia* of each, are not controverted. It is only in the application of these principles to the facts of the individual case that differences arise.

The Workmen's Compensation Act, under which this claim was instituted, defines the word employee, when used in the Act, as meaning "every person engaged in an employment under any appointment or contract of hire. . . ." The generally accepted definition of independent contractor is that he is one who exercises an independent employment, and contracts to do a piece of work according to his own judgment and methods, without being subject to his employer except as to the results of the work. The usual test is whether control over the work is reserved by the employer. "The circumstance that an employer has actually exercised certain control over the performance of the work may not only render him responsible for the acts done under his direction but may be considered as a factor tending to show the subserviency of the contractor. In other words, the fact that the employer has actually exercised control

is properly considered as tending to show he has a right to control." *Aderholt v. Condon,* 189 N. C., 748, 128 S. E., 337. I think the evidence discloses that control over the details of the work in this case was exercised by the defendant.

The Industrial Commission carefully analyzed all the testimony bearing on this point and found, both as a fact and as a conclusion on the facts found from the evidence, that at the time and with respect to the injury complained of the deceased was an employee of the defendant within the meaning of the Compensation Act. Was there any evidence to support this view?

Taking the facts in evidence, together with the inferences properly to be drawn therefrom, and considering them in the light most favorable for the claimants, I think this picture is fairly presented. The defendant College wished to have some work done on an electric transmission line on its grounds. The Business Manager, Mr. Lovett, spoke to the Superintendent of Duke Power Company about obtaining some of his linemen, stating he wished six new poles set and wires moved from old to new poles; that he had the poles, and would pay $30 for the labor of setting them. He was told the men were at liberty to do this work when they were off duty, if they so desired. In consequence, on Saturday, 23 January, 1943, three linemen, Moore, Dixon, and Hayes, presented themselves at the college grounds and waited for Mr. Lovett to come out. When he arrived, he showed them what he wanted done, six new poles to be set to replace old ones. The holes had already been dug by the defendant. The three men said they would do the work, if the College would furnish a truck, certain tools and implements, and the assistance of two other laborers. This was agreed to. Moore testified at the hearing that Hayes asked Mr. Lovett if it would be all right to cut some limbs off the trees in putting the poles up, and that Mr. Lovett said he would rather not have the trees cut, that he would rather take some off the poles. "He told us to cut some off of them. I think it was ten feet off each pole." That was done. Hayes and one of the colored laborers cut off the ends of the poles with a saw furnished by defendant. Mr. Lovett also told the men he would have the electric current cut off the line on the old poles when necessary, and directed a College employee to cut it when requested, but said as the current heated the building he would rather they would not have it off longer than necessary. The work was begun and Mr. Lovett remained about ten minutes, and then left, saying he didn't know much about the work and expected a good job. He was there when the first pole was being sawed. With the aid of the truck, tools and college laborers four poles were set. When the fifth pole was set one of the wires on the near-by old pole fell and Hayes was electrocuted.

Here the employment of the deceased to do the work desired was personal and direct. He was not working for someone else who had a contract with defendant, but he was doing work the defendant had employed him individually to do. Before beginning he waited for instructions from defendant's Business Manager as to what work was to be done, the means available therefor, and the method of handling certain details. Control was exercised by the employer as to shortening poles, cutting off the current, and as to where the poles should be set. While the bargain of hiring was in parol and its terms not very clearly defined, I think the reasonable implication is that the entire plan for rebuilding the transmission lines was under the supervision of the defendant and subject to its right of control. All the materials, tools, implements and additional labor were furnished by the College. Hayes was told when to work and where, and it is reasonable to infer that defendant could have discharged him subject only to its liability in that case for breach of contract of employment.

Consideration of the full implication of this testimony leads me to the conclusion, as it did the court below, that there was evidence to support the findings of the Industrial Commission.

The case at bar is in material respects similar to *Johnson v. Hosiery Co.,* 199 N. C., 38, 153 S. E., 591. There the defendant employed plaintiff Johnson, an experienced painter, to paint the ceiling of its hosiery mill. While plaintiff was so engaged he fell from the scaffold and was injured. It was held, in an opinion written with his usual clearness by *Brogden, J.,* that the facts excluded the theory of independent contractor, and award of compensation was upheld.

In *Beach v. McLean,* 219 N. C., 521, relied on by defendants, the claimant was employed by McLean, who in turn had a contract with a cotton mill to remove some machinery. As McLean was an independent contractor, it was held the claimant was not an employee of the mill. And in *Bryson v. Lumber Co.,* 204 N. C., 664, 169 S. E., 276, where claimant was debarred from compensation on the ground that he was an independent contractor the facts were stated as follows: "He (plaintiff) was paid $7.00 per thousand feet to haul logs. He employed his own assistants and was at liberty to haul the logs in his own way, without direction from any of the officials of the Lumber Company."

It has been repeatedly declared by this Court that the Workmen's Compensation Act should be liberally construed and applied in order that its predominant purposes may be effectuated, that is, to provide some certain compensation for the losses resulting from those industrial accidents which come within its provisions; or, as expressed by *Justice Brogden,* "to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation."

In this case a workman dependent on his labor for his own support and that of his family has lost his life while in the service of the defendant. The majority opinion holds that the facts in evidence are susceptible of no other reasonable construction but that he was at the time and in respect to his service an independent contractor, and not an employee within the meaning of the Act. In dissenting from the result reached, I venture respectfully to express the opinion that the record discloses some evidence upon which to sustain the judgment below that deceased was an employee, and that his dependents are entitled to the compensation fixed by law.

SCHENCK and SEAWELL, JJ., concur in dissenting opinion.

STATE v. ELMER HARDIE BIGGS, JR., WILLIAM DALTON BIGGS AND JOHN EDGAR MESSER.

(Filed 1 March, 1944.)

1. Criminal Law § 33—

In a criminal prosecution, where statements in the nature of confessions have been made by defendants, if the evidence in respect of the voluntariness of the statements were merely in conflict, the court's determination would be conclusive; however, what facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the court below can be reviewed.

2. Same—

Where a person in authority offers some suggestion of hope or fear to one suspected of crime and thereby induces a statement in the nature of a confession, such statement is involuntary in law and incompetent as evidence.

3. Same—

A free and voluntary statement in the nature of a confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but any statement wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration.

4. Same—

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

5. Same—

Where three boys from 19 to 20 years of age were imprisoned in Virginia under a charge of highway robbery, and on numerous occasions

officers from this State visited these boys and questioned them in regard to a charge of murder made against them here, the final visit consuming the greater part of two days, and the accused constantly refuse to make any statement, but finally the officers told the boys "they were liable to pay the death penalty in Virginia" and that in North Carolina "as to what will be done with you will be left to the jury and the court," whereupon, after a few minutes consultation among themselves, the boys made statements in the nature of confessions. *Held:* Such statements were involuntary and are incompetent as evidence.

DEVIN, J., dissenting.

SCHENCK and SEAWELL, JJ., concur in dissenting opinion.

APPEAL by defendants from *Burgwyn, Special Judge,* at May Term, 1943, of GUILFORD.

Criminal prosecution tried upon indictment charging the defendants with the murder of one E. J. Swanson.

There is evidence tending to show that on the night of 19 February, 1943, between 8:30 and 9:00 p.m. the three defendants (two brothers, one 20 years of age, the other younger, and the third 19 years old) appeared in an automobile near E. J. Swanson's store and filling station at Jamestown, N. C. They tried to stage a hold-up and robbery. Elmer Hardie Biggs, Jr., remained at the wheel while the other two defendants entered the store. In executing the plan, John Edgar Messer shot Swanson and killed him. The two defendants then "broke and ran out the door." They re-entered the automobile, which was waiting on the outside, and all three of the defendants made a get-away. They were next discovered, 19 March, in jail in Danville, Va., there charged with having committed highway robbery in that State on 16 March, 1943.

On several occasions between 19 and 31 March, various officers of Guilford County and Messrs. H. W. Zimmerman and Guy L. Scott of the State Bureau of Investigation went to Danville and questioned the defendants in regard to the Swanson murder. They stated on each occasion that they had no statement to make; that they desired to talk with an attorney, and they denied any connection with the crime until 31 March, when about a dozen witnesses and officers from this State, including the Solicitor of the 12th Judicial District, were in Danville, and the defendants, on this last day, after conferring among themselves, told the officers that they had planned to rob the Swanson store on the night of 19 February, and in doing so Mr. Swanson was shot.

No charges had been preferred against the defendants in this State at the time, and their statements were not reduced to writing.

The defendants testified on the *voir dire* that they were induced to make their statements in the nature of confessions because "Mr. Zimmerman and Mr. Wilson, the solicitor, came back, and he told us he was

going to put this bill of indictment for second degree murder which carried a penalty of twenty-five to thirty years in our home State and at most, in all probability, we would be out in five years. . . . Mr. Wilson and Mr. Zimmerman both made that statement."

The officers denied that any such inducements or offers were made to the defendants, and the solicitor testified that he went to Danville to make sure that no unfair method was employed by anyone in undertaking to identify the perpetrators of the Swanson murder.

Aside from the contradictory evidence, heard on the preliminary inquiry, of which there was quite a bit, the following undisputed testimony is culled from the record and the State's witnesses:

Deputy Sheriff Ray Nance: "By the Court: Was your purpose in going there together with the solicitor and all of you to obtain a confession from these men?

"The witness: I wouldn't say that was our direct purpose there. . . . We were asking them to make a statement. . . . They asked to be permitted to talk together, and they were permitted to talk together, and after that they made a statement."

A special agent for the State Bureau of Investigation, H. W. Zimmerman, testified that he told the defendants "they had been arrested on a charge in the State of Virginia for which the penalty was life imprisonment or the electric chair. . . . A part of my scheme was to tell them that under the law in Virginia they were liable to pay the death penalty. I told them it was a capital offense in Virginia. . . . I told Elmer Hardie Biggs that I didn't like the word confession; that we were not trying to get a confession out of them. I wanted the truth. . . . You can call it a confession. I call it the truth. . . . When I went in the room where all three of the defendants were, Elmer Biggs asked the question something about first degree and second degree charge in North Carolina. If I remember correctly, I think I said, 'If you three boys are charged with the murder of Mr. Swanson, . . . the solicitor will draw a bill for murder in the first degree. . . . As to what will be done with you will be left to the jury and the court. . . . After that, the request was made that the two Biggs boys be permitted to talk to Messer alone. The request was granted, and they went into the room where Messer was and were there three to five minutes. Elmer Hardie Biggs came out and called for Ray Nance. Mr. Nance and myself, Mr. Jones, Ballinger, Donovant and Mr. Watts went into the room where these three boys were, and John Messer made a statement in the presence of the two Biggs boys.' . . .

"By the Court: Can you give me any satisfactory answer why these three young men or two young men, or any one of them, would sit there, after having stated time and time again that they had no statement to

make, and would all of a sudden turn around and say, 'I want to make a statement that will hang me'? A. Your Honor, I cannot. Q. I cannot understand that."

Elmer Hardie Biggs, Jr., one of the defendants, testified on the *voir dire:* "Mr. Zimmerman said, 'What I can't understand is why,' he was hitting the desk all the time, he said, 'I can't understand why an intelligent young man like you, why you can't see the difference in twenty-five to thirty years in your home State and life imprisonment at the best in another State than your own.'" The witness Zimmerman, though present, was not recalled on the preliminary inquiry to deny or to refute this statement.

Upon all the evidence heard in the absence of the jury the trial court held the statements to be voluntary and admitted them in evidence. Exception.

Verdict: Guilty of murder in the first degree as to each defendant.

Judgments: Death by asphyxiation as to each defendant.

The defendants appeal, assigning errors.

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

P. W. Glidewell, Sr., for defendant William Dalton Biggs, appellant.

Robert R. King, Jr. (appointed by the court) for defendants John Edgar Messer and Elmer Hardie Biggs, Jr., appellants.

STACY, C. J. The question for decision is whether the statements in the nature of confessions made by the defendants were properly admitted in evidence. *S. v. Exum,* 213 N. C., 16, 195 S. E., 7. The answer depends on whether the law pronounces them voluntary or involuntary. *S. v. Farrell,* 223 N. C., 804.

It is conceded that if the evidence in respect of the voluntariness of the statements were merely in conflict, the court's determination would be conclusive on appeal. *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603; *S. v. Christy,* 170 N. C., 772, 87 S. E., 499; *S. v. Page,* 127 N. C., 512, 37 S. E., 66; *S. v. Burgwyn,* 87 N. C., 572. Equally well established, however, is the rule that "what facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court." *S. v. Andrew,* 61 N. C., 205; *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821; *S. v. Crowson,* 98 N. C., 595, 4 S. E., 143. And further, where a "person in authority" offers some suggestion of hope or fear, *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337; *S. v. Grier,* 203 N. C., 586, 166 S. E., 595,

to one suspected of crime and thereby induces a statement in the nature of a confession, the decisions are at one in adjudging such statement to be involuntary in law, and hence incompetent as evidence. *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643; Annotation 7 A. L. R., 423.

What are the effective considerations here?

The defendants were in jail at Danville, Virginia, under a charge of highway robbery committed in that State on 16 March, 1943. Officers from this State went to Danville to interrogate them in respect of the Swanson murder at Jamestown, North Carolina, on the night of 19 February, 1943. They were questioned on a number of occasions, including at the end the greater part of two days, 30 and 31 March, and they repeatedly told the officers they had no statement to make in respect of the Swanson case. Finally, they made the statements in the nature of confessions as above set out. Over objections, these statements were admitted in evidence against them.

A free and voluntary statement in the nature of a confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but any statement wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. *S. v. Patrick,* 48 N. C., 443; *S. v. Roberts,* 12 N. C., 259. "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; *S. v. Alston,* 215 N. C., 713, 3 S. E. (2d), 11; *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193.

As bearing upon the influence which produced the defendants' statements in the nature of confessions, whether prompted by the love of truth or induced by hope or fear, the record poses the following pertinent inquiries: Why was it a part of Zimmerman's "scheme" to tell the defendants "they were liable to pay the death penalty" in Virginia? Why did he tell them that in North Carolina "as to what will be done with you will be left to the jury and the court"? What impression did he intend to leave by these statements? Just before the admissions were made, Elmer Biggs wanted to know "something about first degree and second degree charge in North Carolina." He had already been informed "that under the law in Virginia they were liable to pay the death penalty." Where did Elmer Biggs, a boy 20 years of age, get his knowledge of criminal procedure in this State and the idea that under the North Carolina law, second degree murder carries a maximum penalty of 30 years, and, in addition, the parole system obtains here? What was the purpose of discussing these considerations in connection with the Virginia statute (Va. Code 1942, sec. 4405), which prescribes death or

life imprisonment as punishment for robbery with firearms? What bearing could they have had on the Swanson murder, except to induce an expression on the subject different from the repeated protestations of the defendants that they had no statement to make in respect of the matter?

We think the statements in the nature of confessions made by the defendants must be regarded as arising out of circumstances which render them involuntary, and, therefore, incompetent as evidence. The decision in *S. v. Livingston, supra,* and the cases there cited, would seem to be in direct support of the position. To say that no inducement was offered by "those in authority" would be to deny the natural import of the language used and the suggestions made, and withal the situation created by the presence of the solicitor. The effort of the trial court to obtain some satisfactory explanation of the sudden change on the part of the defendants appears to have been fully justified. The case is equally as strong, if not stronger, than *S. v. Anderson, supra,* where a new trial was granted because of similar suggestions made by a State's witness.

It is true, there is ample evidence to convict the defendants without their statements in the nature of confessions. But this in no way affects the competency or materiality of the statements. They undoubtedly weighed heavily against the defendants. The law commands the death penalty only after a hearing free from error.

On the record as presented, a new trial seems necessary. It is so ordered.

New trial.

DEVIN, J., dissenting: It was within the province of the trial judge to determine whether the admissions of guilt on the part of the defendants, offered in evidence, were voluntarily made, or were induced by promises of leniency. This was a preliminary question of fact for his decision. Before ruling thereon, in accord with correct procedure, in the absence of the jury, the judge heard all the testimony of the defendants and of the State's witnesses bearing on the competency of this evidence. He was in position to judge of the credibility of those who deposed in his presence. It was his duty to determine and to declare the fact. As the result of his careful consideration of this testimony, he has found the fact to be that the admissions of guilt were voluntarily made.

The only ground upon which this Court can reverse the judge's finding is that there was no evidence to support it. As the jurisdiction of this Court on appeal is confined to matters of law or legal inference (Art. IV, sec. 8), the only matter of law presented is whether there was any evidence to sustain the ruling appealed from.

This principle was stated by *Justice Reade* in *Cardwell v. Cardwell,* 64 N. C., 621, as follows: "We can no more review the finding of a judge when it is his province to find facts than we can review the finding of a jury." In *S. v. Andrew,* 61 N. C., 205, *Chief Justice Pearson* said: "So, whether there be *any evidence* tending to show that confessions were not made voluntarily, is a question of law. But whether the evidence, if true, prove these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and in case of a conflict of testimony which witness should be believed by the court, are questions of fact to be decided by the judge, and his decision cannot be reviewed in this Court." In *S. v. Fain,* 216 N. C., 157, 4 S. E. (2d), 319, the rule was stated in this language: "It is the established procedure with us that the competency of a confession is a preliminary question for the trial court, 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 will not be disturbed, if supported by any competent evidence." And in the recent case of *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885, it was again declared to be the law that "The competency of a confession is a preliminary question for the trial court, and the court's ruling will not be disturbed if supported by any competent evidence."

Applying these well settled rules to the case at bar, I am unable to agree with the conclusion reached in the majority opinion. A careful consideration of all the testimony heard by the judge below leads me to the conclusion that there *was* evidence to support his finding. True, there was a conflict in the testimony, but it was the judge's province to determine the fact upon the preliminary question presented. I think he should be upheld.

Each of the three defendants in the hearing before the judge stated they were induced to confess by the promise made to them by Mr. Wilson, the State Solicitor, and by Mr. Zimmerman, a member of the State Bureau of Investigation, that if they would admit their guilt, the Solicitor would "put in" a bill of indictment for second degree murder and they would get 25 to 30 years, and in all probability would be out in five years. But these statements were denied by both Mr. Zimmerman and Mr. Wilson. Zimmerman testified, "No one in my presence made any threat against the defendants before they made a statement, nor were any promises made or offers to extend any leniency to them, and no one said anything to them about what they would be tried for except murder in the first degree." He further said, "I made no promise of any kind to them as to how the charge against them would be handled." True, this officer in the course of a prolonged cross-examination by two attorneys used the word "scheme" in referring to his purpose in questioning the defendants and stating (correctly it seems) that the crime for which

they were in jail in Virginia was a capital felony in that state, but this word, to which a sinister significance is attributed, was apparently suggested by the questioner rather than chosen by the witness, for in the same connection he said his purpose was *not* to get a confession nor to induce them to come to North Carolina. He repeatedly said no promises of leniency were made. I do not think this single expression, in whatever sense it was used, should be held in law or in fact sufficient to nullify or contradict his previous testimony. *Hadley v. Tinnin,* 170 N. C., 84, 86 S. E., 1017.

Mr. Wilson testified that no promises of leniency were made, but that on the contrary he warned the defendants they would be tried for murder in the first degree, and, if they were not guilty, not to make any statement.

Deputy Sheriff Nance testified the defendants were advised that any statement made by them would or could be used against them, and that "no threat or reward or promise or anything else was made." One of the defendants testified: "I don't claim Mr. Donovant, Mr. Jones, Mr. Nance or Mr. Scott or any other officer made any promises or threats that caused me to make the statement which I made over there," but asserted he was induced only by the proposition made by the Solicitor in the presence of Mr. Zimmerman, as previously noted.

It is worthy of note that at no time have the defendants denied their guilt. Neither in response to the questioning officers, nor in their statements to the judge did either of them deny they were the ones who shot Mr. Swanson to death. They refused to make any statement to the officers until after they had been identified by four eye-witnesses of the crime. Here was the situation: On the night of 19 February, 1943, Mr. Swanson, in his little store in the village of Jamestown, in the presence of his wife and a friend, was shot to death by two young men in the attempt to hold up and rob him. A third man waited in a car outside. Two other witnesses saw the two men run out of the store after the shooting and get in the car, and saw the third man under the wheel as they drove away. A few weeks afterwards three men answering their general description were arrested in Danville, charged with the robbery with firearms in Virginia (holding up a filling station). The North Carolina officers went to Danville and questioned the suspects. They refused to make any statement. Then the four witnesses from Jamestown were taken to Danville to see if these suspects were the ones they had seen in Jamestown. These witnesses identified the defendants—picked them out of a group of other prisoners—and told them they recognized them. Shortly thereafter, and after the three defendants had privately conferred together, they admitted their participation in the crime.

The fact that the defendants were young men (one of them was 24, record, page 47), may not be considered as tending to render their confessions inadmissible in evidence on that ground. There is no suggestion they were not *sui juris* and in all respects competent. Their being charged with two capital felonies in different states would naturally lead them to inquire what could be done with them. According to the record, the officers informed them correctly. They were told that under the Virginia law they could be sentenced to the electric chair or life imprisonment; that in North Carolina they would be tried for murder in the first degree, and it was for the jury and the court to say what would be done with them. That might be considered as reason for waiving extradition, but not for confession. The officers testified no promises of leniency were made them, and the judge so found. In *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337, the officer admitted he told the defendants if they would tell "it would be lighter on them"; and in *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643, the State's witness admitted he told defendant Overman "it would be better for him to go ahead and tell it." But in the case at bar the record discloses no admissions by any State's witness that inducements of this nature were held out to the defendants.

At the time the defendants were being questioned they were not in the custody of the North Carolina officers but in jail in Virginia. But, in any event, neither the fact that they were in custody, nor the number of officers present (*S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411), nor that they were persistently questioned (*S. v. Exum,* 213 N. C., 16, 195 S. E., 7), would be alone sufficient to render the confessions incompetent, unless the admissions were in fact induced by promises of leniency or some form of compulsion.

I think that the testimony of the State's witnesses heard by the trial judge should be held to constitute some substantial evidence to support his finding of fact that the defendants' admissions of guilt were voluntarily made, and that the court's ruling on this preliminary question should be upheld.

SCHENCK and SEAWELL, JJ., concur in dissent.

CHARLES C. BLADES, JAMES EVANS BLADES, MELICK WEST BLADES AND LEMUEL SHOWELL BLADES, JR., TRUSTEES, v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 1 March, 1944.)

1. Estates § 4: Trusts § 8c—

Where the holder of the legal title and the *cestui que trust* are one and the same person and the equitable interest of no other person intervenes, ordinarily a merger of the legal and equitable title results, defeating the trust, and conferring a fee title upon the person holding the legal title and the beneficial interest.

2. Same—

It is a condition of merger that the legal and equitable estates must be *coextensive* and *commensurate,* these terms implying a reference not only to quantum of the estates, but also to the quality and nature of their tenure.

3. Trusts § 8c: Estates § 4—

But where there is a plurality of trustees and beneficiaries the rule is otherwise. The law will not reject a trust, where the group named as trustees and the group named as *cestuis* are identical in personnel, either on the theory of incompatibility or that of merger, especially where the trustees' action must be unanimous. No *cestui que trust* has a free hand in dealing with his own equitable interest nor with that of any other; and each has an equitable interest which is separate from the legal interest held by the whole group. The confidence has been reposed in the composite mind, will and conscience of the trustees.

4. Trusts § 8b—

Under an active trust, which gives trustees power to sell and convey lands, in their discretion, such trustees and *cestuis* being identical persons, the respective wives of the trustees have no dower interests in the land and are not necessary parties to a conveyance.

APPEAL by defendant from *Thompson, J.,* at Chambers, 10 November, 1943. From CHOWAN.

This is a controversy without action submitted under G. S., 1-250, *et seq.* (C. S., 626-628), upon the following agreement as to the facts, of which the exhibits are a part:

"1st. That under date of July 1, 1940, L. S. Blades and wife, Grace M. Blades, executed and delivered an instrument in which the above named plaintiffs were named Trustees, and a copy of which is hereto attached, made a part hereof, and marked EXHIBIT A.

"2nd. That thereafter said L. S. Blades and wife executed and delivered to plaintiffs a deed, copy of which is hereto attached, the description of which embraces the lands which plaintiffs agreed to sell and convey to defendant, as hereinafter referred to, copy of which is hereto attached, EXHIBIT B.

"3rd. That both of the above instruments were duly recorded in Chowan County.

"4th. That shortly prior to November 2, 1942, plaintiffs entered into an agreement with the defendant by the terms of which plaintiffs agreed to execute and deliver to defendant a good and sufficient deed conveying to defendant a portion of the lands described in EXHIBIT B, free and clear of all encumbrances, which lands defendant agreed to buy and to pay therefor the sum of $300.00.

"5th. That pursuant to said agreement plaintiffs, under date of November 2, 1942, executed and tendered to the defendant a deed for the property in question, copy of which is hereto attached, marked EXHIBIT C, the original thereof having been duly signed and acknowledged by the grantors whose names appear therein; and at the time of tender demanded of the defendant the purchase price of $300.00.

"6th. That defendant, while recognizing the validity of the agreement on its part to purchase said lands as herein set forth, refused to receive the deed and pay the purchase price for the reason that said deed, according to the contention of the defendant, does not convey the property in fee simple to defendant.

"7th. That Charles C. Blades, James Evans Blades, Melick West Blades and Lemuel Showell Blades, Jr., are all married and have children.

"8th. Under the agreed facts as herein set forth the following contentions have arisen:

"(a) The plaintiffs contend that the deed tendered by them is a good and sufficient deed conveying the property in question in fee simple.

"(b) The defendant contends that the deed tendered as aforesaid is not sufficient to convey to it a good and perfect fee simple title to said lands, nor can the plaintiffs as Trustees convey such a title.

"WHEREFORE, the parties hereto pray that the Court will make decision as to the respective contentions of the parties, and render judgment accordingly. If the Court be of the opinion that the deed, EXHIBIT C, is sufficient to convey to this defendant a good and perfect fee simple title, and shall so decree, then it is agreed that judgment may be entered requiring the defendant to accept the deed and pay the purchase price of $300.00.

"But if the Court shall be of the opinion that said deed is not sufficient to convey to the defendant a good and perfect fee simple title, then it is agreed that judgment shall be entered that the plaintiff Trustees shall recover nothing of the defendant.

W. A. WORTH,
Attorney for Plaintiffs.
J. KENYON WILSON,
Attorney for Defendant.

"EXHIBIT A.

"NORTH CAROLINA,
PASQUOTANK COUNTY.

"THIS INDENTURE made this 1st day of July, 1940, between L. S. Blades and wife, Grace M. Blades, parties of the first part, sometimes referred to as Grantors, and Charles Camden Blades, James Evans Blades, Melick West Blades and Lemuel Showell Blades, Jr., Trustees, parties of the second part, sometimes herein referred to as Trustees, all of Elizabeth City, of the above captioned County and State,

"WITNESSETH: That the said Grantors in consideration of the sum of One Dollar, receipt of which is hereby acknowledged, and the performance of certain duties on the part of the Trustees, which they covenant to perform, the said Grantors have bargained and sold, and by these presents do convey unto the said Trustees, their successors and assigns, the following described property:

"That certain lot on the corner of Main and Selden Streets which was conveyed to L. S. Blades, by several deeds, to-wit:

"H. C. Pinnix to L. S. Blades, in Book 29, page 607; C. W. Stevens to L. S. Blades, in Book 75, page 399; C. W. Stevens to L. S. Blades, in Book 42, page 139; Corporation of Elizabeth City to various owners, quitclaim deed for alley, in Book 75, page 406, all of the Pasquotank County public registry.

"TO HAVE AND TO HOLD the said property together with all privileges and appurtenances thereunto belonging or in any wise appertaining unto the said Trustees, their successors and assigns, in fee simple forever.

"IN TRUST, nevertheless, and to and for the uses and purposes hereinafter stated and declared:

"1st: *THE PURPOSE of this trust being for the economic protection of* my Sons, Charles Camden Blades, James Evans Blades, Melick West Blades, and Lemuel Showell Blades, Jr., individually, it being the intent of this instrument to convey in trust, and subject to the conditions of said trust, an equal undivided interest to each of my aforementioned four sons in the property herein conveyed.

"2nd: THE TRUSTEES shall have the power, and the power is hereby granted, to manage the property above referred to or any other property, either real or personal or mixed, which may in the future be transferred to them as Trustees under this indenture (which they are hereby empowered to receive as Trustees of this Indenture) in such a manner and upon such terms and conditions in all respects, as the Trustees in their sole discretion may think fit; and they are hereby empowered upon their discretion, from time to time, to sell, mortgage, hypothecate, lease and convey upon such terms as they may deem best, any or all of the real or personal estate belonging to the Trust and re-invest proceeds at their

absolute discretion and the proceeds from the same shall be a part of the principal trust estate and be subject to all the provisions thereof. And I authorize said Trustees to execute and acknowledge and to deliver any and all legal instruments in writing which may be required to execute all powers herein conveyed free and clear of said trust; and said Trustees may delegate from time to time, any or all of the powers herein conveyed to any one of their number to act in their place and stead, but that there must be a meeting of said Trustees at least twice a year and oftener if deemed necessary, to revoke or instruct as to future actions of said Trustee to whom power has been or may be delegated, or to make future delegations, but with this sole limitation; it shall require joint action and agreement between all my trustees to make any disbursements, advancements or divisions between my sons or any dead son's family.

"3rd: THE GRANTORS further expressly authorize and empower said Trustees to keep the buildings upon any real estate conveyed to them in repair and insured against loss by fire.

"THE GRANTORS specifically instruct the Trustees herein named and empower them to do any of the following acts when they have each agreed thereto, or to do anything else that they may mutually agree upon:

"a. To make advancements to any of my sons or dead son's family.

"b. To make divisions and disbursements of or from said trust property equally between my four sons, the estate of any dead son taking that son's share; always taking into account any previous advancement to any son or dead son's family.

"c. The Trustees herein named shall serve until the number of said Trustees shall have been by death reduced to two, and it shall then be the duty of the remaining Trustees to terminate this Trust promptly, and the remainder shall be divided equally among my four sons, the estate of any dead son taking that son's share, but taking into account any previous advancements to any son or dead son's family.

"d. To render an annual financial statement of the Trust to each Son or dead Son's family.

"e. The Trustees named herein may by proper means appoint any one of their number to vote any stock held by the Trustee at any corporate meeting, and said voting shall be binding on said Trust.

"f. The Trustees are authorized and empowered, in their sole discretion, to sell, at public or private sale, any and all property, real or personal, at any time constituting the trust fund, and to assign, transfer, convey and deliver the same to the purchaser or purchasers thereof, without liability on the part of such purchaser or purchasers as to the application, non-application or misapplication of the purchase money or any part thereof.

"My sons, Charles Camden Blades, James Evans Blades, Melick West Blades and Lemuel Showell Blades, Jr., take no title except the title of Trustee in any of the properties above described or hereafter to be conveyed to said Trust all subject however, to their taking title by mutual agreement as set forth above. It is understood that upon the death of any of the aforesaid Trustees, that title resided in said Trustee to the above described property or any additions thereto, shall vest in the survivor or survivors.

"The Trustees named herein shall not be required to file with the Court, or otherwise, any inventory of any property received or disbursed by said Trustees, and shall not be required to file with the Court any annual or final account, or any account whatever, respecting their Trusteeship.

"The Trustees named herein shall not, nor shall their estates or their personal representatives, be held liable for any loss occurring because of errors of judgment or discretion in the handling of said Trustees estate, or in the deposit or investment of any funds arising therefrom.

"IN WITNESS WHEREOF, L. S. Blades and wife, Grace M. Blades, parties of the first part, and Charles Camden Blades, James Evans Blades, Melick West Blades, and Lemuel Showell Blades, Jr., as Trustees have hereunto set their hands and seals, the day and year first above written.

L. S. BLADES (SEAL)
GRACE M. BLADES (SEAL)
CHARLES CAMDEN BLADES (SEAL)
JAMES EVANS BLADES (SEAL)
MELICK WEST BLADES (SEAL)
LEMUEL SHOWELL BLADES, JR. (SEAL)

"(Duly acknowledged and recorded.)"

The deed referred to in paragraph 2 of the stipulations as "Exhibit B" effected an addition to the trust by the conveyance of other lands, and contains specific reference to the provisions of the original instrument permitting such addition, and purports to subject the lands so conveyed to all the provisions of the original trust.

The deed marked "Exhibit C" and executed by the plaintiffs in pursuance of the contract of purchase and sale was executed by them, as trustees, and under the power of sale contained in the original trust instrument, without joinder of their several wives.

The case came on for hearing before Judge Thompson at Chambers, 10 November, 1943, and after due consideration, a judgment was entered upholding the validity of the trust and declaring that the deed executed and acknowledged and tendered to the defendant by the grantors in pur-

suance of the purchase contract was sufficient to convey the title to the lands in fee, without encumbrance. From this the defendant appealed.

W. A. Worth for plaintiffs, appellees.

J. Kenyon Wilson for defendant, appellant.

SEAWELL, J. The appeal raises no question whether the land described in the subsequently executed deed, marked "Exhibit B," comes under the provisions of the purported trust under the deed designated "Exhibit A." The question for our decision is whether the latter instrument creates a valid trust, empowering the grantees of the legal estate, as trustees, to convey the lands concerned with this controversy in fee. We are of the opinion that it does, and so hold.

The appellant presents the view that the persons to whom the legal title has been committed in trust are the identical persons made beneficiaries and, therefore, as a matter of law the equitable interest is merged in the legal estate, with the result that the grantees in the trust instrument have, at most, a fee simple title to the lands. Defendant says that it is therefore justified in refusing to accept the deed tendered to it by plaintiffs, executed by them as trustees, without the joinder of their several wives to convey, or bar, dower.

Under conditions which greatly restrict the application of the doctrine, it may be broadly stated that the law will not uphold an attempted trust which makes no severance between the legal estate and the beneficial enjoyment and the equitable interests. 26 R. C. L., Trusts, S. 22. As it is more directly expressed, where the holder of the legal title and the *cestui que trust* are one and the same person, the result is a merger of the legal and equitable title, defeating the trust and ordinarily conferring a fee simple title upon the person holding the legal title and beneficial interest. It is essential, however, that the equitable interest of no other person shall intervene. It is also stated as a condition of merger that the legal and equitable estates must be *coextensive* and *commensurate;* Lewin on Trusts (1939 Ed.), p. 12; or, as otherwise stated, the legal estate must be at least as extensive as the equitable. *Odom v. Morgan,* 177 N. C., 367, 369, 99 S. E., 195. Critical examination of the terms coextensive and commensurate, as will appear in our further discussion, will show that there must be implied a reference not only to the *quantum* of the estates, but the quality and nature of their tenure.

We find difficulties in the way of applying the doctrine in the instant case. Amongst them is the impossibility of judicially allocating and applying the individual equitable interest to the appropriate legal interest with which it is supposed to merge, where the trustees and the beneficiaries are plural and where the property is committed to the trustees

collectively, as a body, to act in common for *cestuis* whose equitable interests are individual. And the merger, if it takes place at all, must come through the spontaneous action of the law without carpentry by the court.

In describing the nature of a trust, Lewin on Trusts (1939 Ed.), pp. 11-12, adopts *Lord Coke's* definition of a use—the term by which a trust in lands was formerly known: "A confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land . . . for which *cestui que trust* has no remedy but by subpœna in Chancery." Commenting on the significance of the words "reposed in some other," it is said that because a man cannot issue a subpœna upon himself, he cannot hold in trust for himself; and, therefore, "if the legal and equitable interests happen to meet in the same person, the equitable is forever absorbed in the legal." *Ibid.*, p. 12.

Judge Henderson, in *Butler v. Godley,* 12 N. C., 94, said of this situation: "To me it is incomprehensible how a person can take to the use of or in the trust for himself; that he should be his own trustee; that he should have a right to call upon himself to perform the use or trust, and, if refused, enforce performance."

This is quoted with approval by *Judge Hoke* in *Odom v. Morgan, supra,* with supporting citations.

Although law and equity are now administered in the same courts in our jurisdiction, and most others, the doctrine of merger is still based on this same condition—that a person as *cestui trust* cannot appeal to the court against himself as trustee where only his own rights are involved. In other words, it would be inconceivable that he should have the law upon himself to restrain himself from a civil injury committed in his capacity as trustee to which he consents as *cestui.*

Where the same person is both sole trustee and sole beneficiary, and the trust is passive, the force of the historical reason, still considered fundamental, can be readily seen. In its brief the defendant recognizes "that most of the cases deal with instances wherein a sole trustee is also the sole beneficiary" and recognizes that a different rule has been applied where the sole trustee is only one of several beneficiaries; but calls attention to the fact that in the instant case all the trustees are also all the beneficiaries. It is contended that this identity in personnel constitutes a complete analogy, rendering the case at bar indistinguishable from instances where a single trustee is also sole beneficiary.

This rule has not been generally accepted. While we do not mean to say that the doctrine of merger is confined strictly to cases where one person is the sole trustee as well as the sole beneficiary, and to passive trusts, we should think that where plurality exists as to the trustees and

as to the beneficiaries in an active trust, instances in which merger might occur must indeed be infrequent, and our attention has not been called to any cases which would sustain that view as applied to the case at bar.

It is true that in this case the group named as trustees and the group named as *cestuis* are identical in personnel, but they are not so in comparable relationships. It cannot be said that any one of the beneficiaries has either sole or controlling determination with respect to his own equitable interest or that of any other in the exercise of any of the powers conferred by the trust instrument, or in the making of any decision in the administration of the trust. No *cestui que trust* as trustee has a free hand in dealing with his own equitable interest nor with that of any other. It is expressly required that action be unanimous; and the trust deed provides for complete authority to surviving trustees in case the panel is reduced in number by death. A distinct, but not unusual, type of "confidence" has been reposed—in the composite mind, will and conscience of the group to whom the trust has been committed.

There is no reason why the law should reject such a trust either upon the theory of incompatability or that of merger; and such trusts have been sustained by the impressively greater weight of authority. Speaking directly to this situation, it is said in 1 Bogert, Trusts, sec. 129, p. 387:

"The argument that a duality of interest in one or more trustees should prevent the attempted creation of an express trust from being successful is extremely weak. In one of the worst possible cases, where there is absolute identity of personnel between trustees and *cestuis,* the obtaining of unbiased administration may be difficult and the court may consequently think it proper to appoint new trustees. But the trustees are capable of *taking, holding, and administering.* The equitable gift is perfect. Defects in arrangements for execution of the trust should not be vital to the creation. If the trustee with a dual interest (an interest as trustee and also as beneficiary) is only one of several trustees, the trustees not interested as *cestuis*"—*i.e.,* as to the particular individual equitable interest—"will serve as a check on the interested trustee and secure proper administration."

Pertinent, also, is the paragraph under the same section on p. 383. See, to the same effect, Scott on Trusts, secs. 99-100, pp. 519-538. No such difficulty of unbiased administration is encountered in the case at bar, since the trustees are required to act unanimously.

And in Restatement of the Law, Trusts, pp. 269-270, sec. 99 (4), dealing with beneficiaries as trustees, it is said: "If there are several beneficiaries of a trust, the beneficiaries may be the trustees." After

explaining the merger which takes place when the sole trustee is also sole beneficiary, it is said:

"b. On the other hand, there can be a trust where there are several beneficiaries who are also the trustees. In such a case each of the beneficiaries has an equitable interest which is separate from the legal interest held by the whole group. As trustees they hold the legal title as *joint tenants,* and ordinarily they hold the beneficial interests as *tenants in common.*

Also, in sec. 115 (4), we find the converse statement: "If there are several trustees of a trust, the trustees may be the beneficiaries of the trust."

Reaching the same conclusion by most convincing reasoning are many recent cases, some of which we cite, and from which we would like to quote if time and space did not forbid. Directly in point are: *Morgan v. Murton* (1942), 31 N. J. Eq., 48, 26 A. (2d), 45; *Horlick v. Sidley* (Wis., 1942), 3 N. W. (2d), 710; *Sturgis v. Citizens Bank* (Md.), 137 A., 378. There are cases *contra,* some of which are discussed in *Morgan v. Murton, supra,* but they represent a minority view which we do not find compelling or persuasive.

Few text writers deal with this subject without noting that the intention of the parties frequently prevents merger.

Where the sole trustee is likewise sole beneficiary, and especially in the case of a passive trust, there are more cogent reasons for merger which override the intention. The trust under consideration is not a passive, dry or merely holding trust, subject to transfer of the use to the legal title under the Statute of Uses, and more easily overthrown by the allied doctrine of merger. On the contrary, it is an active trust, with the usual features, containing power of sale, of investment and reinvestment, and of distribution—inviting a more liberal treatment in order to sustain the intent of the parties. There is no question here but that the settlers did not intend to give the grantees of the legal title, as trustees, any interest in the lands beyond that necessary to administer the trust and exercise the powers created for that purpose. The deed limits them to that narrow dominion *in totidem verbis.*

It is generally conceded that the attitude of the American courts toward the doctrine of merger is less rigorous than that which obtains in England, and which might in certain cases reflect the English view in Lewin's great work on Trusts, although, even there, the question of intent is often controlling. Here the doctrine is disfavored. Tiffany and Bullard, The Law of Trusts and Trustees, pp. 813, 814, 815; Tiffany, Real Property, 2d Ed., sec. 34, p. 92. "Merger is not favored in equity." Kent's Commentaries, 14th Ed., pp. 102-103. "It is believed that the doctrine of merger is an elastic doctrine in equity, not one to be applied

with rigidity. Equity will not use merger if serious injustice would arise or intent be obviously frustrated." 1 Bogert, Trusts, sec. 129, p. 383. Perry on Trusts, 7th Ed., sec. 347, p. 589; *Odom v. Morgan, supra; Furniture Co. v. Potter,* 188 N. C., 145, 124 S. E., 122; *Morgan v. Murton, supra; Harris v. Harris,* 205 Pa., 460, 55 A., 30.

Speaking to this point, in *Johnson v. Muller,* 149 Kan., 128, 86 P. (2d), 569, loc. cit. 574, where there was an identity between trustees and beneficiaries, the Court said:

"We are of opinion that under the will the interests of the beneficiaries are not common to each other, that each trustee is to look after the interest of all beneficiaries, that each beneficiary is interested in what all of the trustees may do in the management and control of his estate, and there being specific provision for succession of trustees, that it may not be said that any beneficiary is trustee for himself alone. In so far as merger of the legal and equitable estates is concerned, we are of opinion the intention of the testator is too clear to permit it to be defeated or destroyed by application of the doctrine." Scott on Trusts, sec. 995, pp. 533-534.

We understand that it is conceded by appellant that if the trust is valid, the respective wives of the grantees have no dower interest in the land, since in that case none of the *cestuis que trustent* would hold an equitable estate of inheritance. G. S., 30-5 (C. S., 4100); *Barnes v. Raper,* 90 N. C., 189, 190; *Alexander v. Fleming,* 190 N. C., 815, 130 S. E., 867; *Boyd v. Redd,* 118 N. C., 680, 685, 24 S. E., 429.

Our conclusion is that the questioned instruments create a valid trust empowering the grantees to convey the real estate described in the tendered deed in fee, without the joinder of their respective wives; and that the said tendered deed, nothing else appearing except what we see upon this record, is sufficient to convey an unencumbered title in fee to the defendant. Under the stipulated agreement with reference to the judgment, the requirement that defendant accept the deed and pay the purchase price was proper. The judgment is

Affirmed.

J. H. TURNER, R. L. RASCOE, T. D. HOPKINS, W. H. WILKERSON, R. M. GILLIE, AND W. R. BROWN, ALL RESIDENTS AND CITIZENS OF THE CITY OF REIDSVILLE, SUING FOR THEMSELVES AND IN BEHALF OF ALL OTHER CITIZENS AND TAXPAYERS OF SAID CITY SIMILARLY SITUATED WHO DESIRE TO COME IN AND MAKE THEMSELVES PARTIES TO THIS ACTION, v. CITY OF REIDSVILLE, DR. JOHN N. HESTER, MAYOR; J. B. BALSLEY, HUNTER M. MOBLEY, W. A. TROTTER, AND R. G. WRAY, MEMBERS OF THE CITY COUNCIL OF THE CITY OF REIDSVILLE.

(Filed 1 March, 1944.)

1. Taxation § 5—

It remains, in the final analysis, a question for the court to determine whether a particular expenditure of public funds or a proposed levy of taxes is for a public purpose, taking into consideration the pertinent factors of time and circumstance.

2. Same—

To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest must be so clear and palpable as to be immediately perceptible to every mind. Where there is doubt the act of the Legislature, approved by the people to be taxed, should prevail.

3. Municipal Corporations §§ 8, 30: Taxation § 5—

The construction and maintenance of a municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of the constitutional limitation, and no right guaranteed by the 14th Amendment to the Federal Constitution will be injuriously affected thereby.

4. Constitutional Law §§ 3a, 6b—

The courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so to protect rights guaranteed by the Constitution. The presumption is in favor of constitutionality, and the contrary must appear beyond a reasonable doubt.

5. Constitutional Law § 6b—

A private individual, to invoke the judicial power to determine the validity of executive or legislative action, must show that he has sustained, or is in immediate danger of sustaining a direct injury as a result of that action, and it is not sufficient that he has merely a general interest common to all members of the public.

BARNHILL, J., dissenting.

APPEAL by plaintiffs and defendants from *Sink, J.*, at Chambers, 5 November, 1943. From ROCKINGHAM.

This was an action to enjoin the City of Reidsville from issuing bonds and levying tax for the construction and maintenance of a municipal airport, and to restrain the prosecution of proceedings to condemn lands

for this purpose. The hearing below was on motion to show cause why restraining order should not issue.

The facts found by the court were substantially as follows: Pursuant to an ordinance of the City Council of the City of Reidsville, declaring that it was necessary and in the public interest to construct a municipal airport and to issue bonds and levy a tax therefor, a special election was called and the question submitted to a vote of the people. At the election a majority of the qualified voters approved, and thereafter anticipation notes were issued, surveys made, certain property purchased and condemnation proceedings instituted for the condemnation of lands outside the City of Reidsville, for the purpose of constructing and maintaining a municipal airport. The plaintiffs, who are seeking to restrain the defendants from further proceeding in the matter, are citizens and taxpayers of the City of Reidsville, but do not own, or have any interest in, any of the lands which the City is attempting to condemn.

It was concluded that the election approving the bond issue and tax levy for the airport was in all respects legal, and that the anticipation notes, and the bonds when issued, are and would be binding obligations of the City, and that the establishment and maintenance of the proposed municipal airport was for a public purpose.

However, it was held that ch. 186, Public Laws 1943, which purported to give additional power to the City in the condemnation of land with respect to dwellings and burying grounds, was unconstitutional and void, and therefore it was ordered that the defendants be forever restrained from entering upon or condemning such of the premises described in the condemnation petitions as may be used as cemetery, graveyard, residence occupied by owner, or other property withdrawn from condemnation by C. S., 1714.

From so much of the order as held the bonds and tax levy for a municipal airport valid and for a public purpose the plaintiffs appealed. From so much of the order as held the Act of 1943 unconstitutional, and enjoined defendants from proceeding with the condemnation of certain lands the defendants appealed.

W. R. Dalton and C. L. Shuping for plaintiffs.
Susie Sharp and P. W. Glidewell, Jr., for defendants.

PLAINTIFFS' APPEAL.

DEVIN, J. It was not controverted that in the election called and held pursuant to an ordinance of the City Council of the City of Reidsville, and in accordance with the general statutes and city charter, a majority of the qualified voters approved the proposition to establish and maintain a municipal airport and to issue bonds and levy a tax therefor, but the

plaintiffs base their action to restrain further proceeding upon the ground that the expenditure of city funds for this purpose would violate the constitutional provision that "taxes shall be levied only for public purposes" (Art. V, sec. 3), and that the construction of a municipal airport by the City of Reidsville, such as is proposed, would not be for a public purpose within the meaning of the Constitution, and would result in a waste of public funds.

Thus the controversy is reduced to a narrow compass.

While the statute (Public Laws 1929, ch. 87) authorizes cities and towns to establish municipal airports outside their corporate limits, and declares the acquisition of property therefor to be for a public purpose, and while the ordinance adopted by the City Council of the City of Reidsville declared that the construction of the proposed airport was in the public interest and for a public purpose, it remains in the final analysis a question for the Court to determine whether the particular expenditure of public funds or the proposed levy of taxes is for a public purpose, taking into consideration the pertinent factors of time and circumstance. As was said by *Seawell, J.*, in *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693: "The Court will determine what is a 'public purpose,' looking to the end sought to be reached and to the means to be used, rather than to statutory declarations to aid its decision." Similar statements of this principle were expressed in *Cozard v. Hardwood Co.,* 139 N. C., 283 (295), 51 S. E., 932; *Yarborough v. Park Com.,* 196 N. C., 284, 145 S. E., 563; *Deese v. Lumberton,* 211 N. C., 31, 188 S. E., 857; *Reed v. Highway Com.,* 209 N. C., 648, 184 S. E., 1; *Brown v. Comrs.,* 223 N. C., 744; *Green v. Frazier,* 253 U. S., 233 (240); *Milheim v. Moffat,* 262 U. S., 710 (717).

The rule by which the courts should be governed in determining the question whether a proposed municipal expenditure is for a public purpose was stated in the opinion by *Stacy, C. J.*, in *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597, as follows: "Where the question is doubtful, as it is here, and the Legislature has decided it one way and the people to be taxed have approved that decision, it is the general rule of construction that the will of the law-makers, thus expressed and approved, should be allowed to prevail over any mere doubt of the courts." In support of this statement of the rule the *Chief Justice* quotes the following from *S. v. Cornell,* 53 Neb., 556, 74 N. W., 59, 39 L. R. A., 513: "To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind." In *Hudson v. Greensboro,* 185 N. C., 502, 117 S. E., 629, an issue of bonds to aid in the construction of a railroad passenger station, authorized by the

Legislature and approved by a vote of the people, was held not to violate any constitutional provision, and to be a matter of public policy for the local community.

Undoubtedly the consensus of judicial opinion is in full support of the view that the courts will not interfere with the lawfully expressed will of the community, in the interpretation of its interests and prospective needs, unless the objects to be attained are clearly beyond the scope of corporate purposes and power, or in violation of some constitutional inhibition.

However, the plaintiffs point out that no public air line now makes Reidsville a stopping place for air traffic, nor are there definite assurances for the future, or apparent demands for facilities for public or private aircraft service, and they urge this in support of their contention that a municipal airport for Reidsville is neither needed in the public interest nor prospectively advantageous for its citizens or industries, and that the construction and maintenance of the airport would entail a waste of public funds. It is further contended that the amount authorized to be expended would be inadequate for the purpose. To this the defendants reply that transportation by air would never be available to the City without a suitable landing field, and that the reasonable expectation of obtaining the advantage of this means of transportation for persons and freight, now in general use the world over, for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, renders necessary and advisable, in the public interest, that provisions be made now to accommodate this established and constantly expanding means of transportation. The defendants also assert that the amount of the bond issue was in keeping with the practical estimates of contractors and others experienced in work of this nature.

In *Hesse v. Rath,* 249 N. Y., 436, 164 N. E., 342, decided in 1928, *Chief Justice Cardozo* expressed the Court's recognition of the importance of municipal airports as follows: "Aviation is today an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition." And in *Goswick v. Durham,* 211 N. C., 687, 191 S. E., 728, it was said: "Man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities." In 135 A. L. R., 756; 83 A. L. R., 345; 69 A. L. R., 325; and 62 A. L. R., 777, will be found collected numerous decisions in other jurisdictions holding that the use of public funds for the construction, maintenance and operation of a municipal airport is for a public purpose.

The court found that the City Council acted in good faith in declaring the construction of a municipal airport to be in the public interest. There was evidence to support this finding and to negative the charge of abuse of discretion on the part of the council. *Storm v. Wrightsville Beach,* 189 N. C., 679 (684), 128 S. E., 17; *Harris v. Durham,* 185 N. C., 572 (577), 117 S. E., 801. See also *Ketchie v. Hedrick,* 186 N. C., 392, 119 S. E., 767.

Whatever may be the future results of the planning to which the people of Reidsville by their votes have given approval, upon the finding of the court below on the evidence presented to him, we are constrained to uphold the ruling that the construction and maintenance of a municipal airport for Reidsville is for a public purpose within the meaning of the constitutional limitation, and that no right guaranteed by the 14th Amendment to the Federal Constitution will be injuriously affected.

DEFENDANTS' APPEAL.

The defendants appealed from that portion of the order entered below in which ch. 186, Public Laws 1943, was held unconstitutional and void. Predicated upon that holding, the court restrained the defendants from proceeding with the condemnation of any lands coming within the exceptions set out in C. S., 1714 (now G. S., 40-10). It appears, however, that none of the plaintiffs own any land or interest in any land sought to be condemned. Hence, no right to which they are entitled has been in any way invaded or threatened by any action of the defendants under or by virtue of the challenged statute. In that case they may not be permitted to use the mooted question of the validity of the statute as a weapon with which to strike down a proceeding in which they have no interest.

It is the established rule in this jurisdiction that the courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution. The presumption is that an Act of the Legislature does not violate a constitutional prohibiion. The contrary must appear beyond a reasonable doubt. And the courts will not undertake to determine the constitutionality of a statute in advance of the necessity of doing so. *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563; *Matthews v. Blowing Rock,* 207 N. C., 451, 177 S. E., 429; *Newman v. Comrs. of Vance,* 208 N. C., 675, 182 S. E., 453; *Sprunt v. Comrs. of New Hanover,* 208 N. C., 695, 182 S. E., 655; *Hill v. Comrs. of Greene,* 209 N. C., 4, 182 S. E., 709; *S. v. High,* 222 N. C., 434, 23 S. E. (2d), 343.

"It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is in immediate danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Ex Parte Levitt*, 302 U. S., 633, 82 Law. Ed., 493. "A party who is not personally injured by a statute is not permitted to assail its validity." *Yarborough v. Park Commission, supra.*

The allegation that within the territory at present selected for the construction of the airport there may be some portions of public roads is not material to plaintiffs' action or to the decision of this case. That is a matter primarily for the State Highway and Public Works Commission rather than for these plaintiffs.

We think the court was in error, in this case, in undertaking to determine the constitutionality of the Act of 1943, and in declaring it to be null and void, and thereupon restraining, at the instance of these plaintiffs, the prosecution of the proceedings for condemnation of the lands of others, now pending before the clerk. The question of the validity and effect of this Act, debated in the briefs, is not presented on this record and is not herein decided.

On plaintiffs' appeal: Affirmed.

On defendants' appeal: Reversed.

BARNHILL, J., dissenting: It was conceded here on the argument that presently there are no air lines or airships to be served by the proposed airport. The defendants anticipate that at some time in the future, after the end of the war, there will be a great extension of the air transportation service of the country and they trust and hope that one or more air lines will pass so near that Reidsville may be designated as a stopping point. They are willing to match their faith with their dollars and prepare for the day hoped for but not seen at any time in the near future.

For the time being, at least, the development cannot be self-supporting. It must, perforce, lie idle and unused for an indeterminate period of time—an airport in name only.

All the facts and attendant circumstances refute the finding or conclusion of the City Board that an airport is at this time necessary. Furthermore, in my opinion, the proposed development on the facts here disclosed is not an airport within the meaning and purpose of the statute. It is nothing more than a speculative venture defendants optimistically hope will some day develop into a profitable undertaking.

For the reasons stated, I vote to reverse on plaintiff's appeal.

CITY OF REIDSVILLE, A MUNICIPAL CORPORATION, v. T. HOWARD SLADE, ANNIE I. SLADE, AND W. J. DONOVAN.

(Filed 1 March, 1944.)

1. **Judges § 2a: Courts § 3: Injunctions § 11—**

A Superior Court judge assigned to a district has, during the period of assignment, jurisdiction of all "in Chambers" matters arising in the district, including restraining orders and injunctions, G. S., 1-493, and he may, in an adjoining district, vacate or modify a temporary injunction issued without notice. G. S., 1-498.

2. **Appeal and Error § 4—**

Denial of defendant's right to appeal to this Court is moot after the appeal is here.

3. **Injunctions § 2—**

Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie. This rule applies to condemnation proceedings.

4. **Injunctions § 10—**

If an application for an injunction is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by using an affidavit filed in another cause. G. S., 1-499.

5. **Municipal Corporations §§ 8, 30: Taxation § 5—**

The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the majority of the qualified voters in accordance with the Constitution. Art. VII, sec. 7.

APPEAL by defendants from *Sink, J.,* at Chambers in Greensboro, 27 December, 1943. From ROCKINGHAM.

Civil action instituted under the laws of North Carolina, including the charter of City of Reidsville, with reference to eminent domain, to condemn land for a municipal airport—heard upon motion of petitioner to dissolve temporary restraining order issued without notice at instance of defendants.

Petitioner in petition filed alleges: That on 8 June, 1942, the City Council of the City of Reidsville, finding it necessary and in the interest of the public to establish and maintain a municipal airport, passed an ordinance determining that it is necessary to acquire land suitable for the purpose, and authorizing the issuance of bonds pursuant to the Municipal Finance Act of 1921, as amended, to provide funds with which to build an airport; that on 21 July, 1942, at a special election duly called and held, a majority of the voters qualified to vote at said election approved said bond ordinance; that the petitioner has found it necessary to estab-

lish a portion of said airport on lands located about three miles southeast of the City of Reidsville, in Reidsville Township, Rockingham County, and specifically described, belonging to defendants Slade, as brother and sister, and on which defendant Donovan is a tenant; and that petitioner has been unable to acquire title to said lands for reason that defendants have refused to sell same to petitioner at any price, or have named a price so exorbitant that it amounts to an outright refusal to sell. Upon these allegations petitioner prays that an order be made condemning the lands for the said purpose, that commissioners be appointed to go upon the lands and appraise the same and make report to the court according to law.

Defendants, answering the petition, admit the passage of the ordinance by City Council of City of Reidsville, the holding of a special election on 21 July, 1942, and the ownership and interest of defendants in and to the lands described, but deny all other material allegations. And for a further defense defendants aver: That the lands which petitioner seeks to acquire are valuable and indispensable parts of an entire tract, the taking of which would greatly and irreparably impair and damage the remaining portion, etc.; that erected upon said lands are certain dwelling houses, yards, kitchens, gardens, tobacco barns, pack houses, and other buildings and structures which are now occupied and in use; that the condemnation of said lands with improvements thereon would be in violation of the laws and of the Constitution of North Carolina; that the establishment, maintenance and operation of said proposed airport is not for a public purpose and is violative of Art. V, sec. 3, of the Constitution of North Carolina; that the "Act to amend ch. 168 of the Private Laws of 1935 relating to the charter of the City of Reidsville" passed at the 1943 session of the General Assembly, ch. 186, in amendment to ch. 168 of Private Laws 1935, as amended by adding sec. 1½, which reads as follows:

"Sec. 1½. That the said City of Reidsville, by and through its city council or governing body, shall have full power and authority to condemn, appropriate and use any land or lands, including dwelling houses, yards, kitchens, gardens, burial grounds and any and all other lands, either within or without the city limits of said City of Reidsville, provided said lands are located in Rockingham County, for the purpose of establishing, maintaining and operating airports, hangars, tool shops, work shops and any and all other buildings and appurtenances thereto," is in contravention and in violation of Art. II, sec. 29, of the Constitution of North Carolina, and is, therefore, void; that the petitioner is without authority under the Constitution and laws of North Carolina and under its charter to institute this condemnation proceeding or to condemn any of the lands of the defendants; and that the taking of the

property of defendants would be in violation of the due process clause of Art. I, sec. 17, of the Constitution of North Carolina, and of the 14th Amendment to the Constitution of the United States.

After the answer was filed petitioner was upon motion permitted to amend the original petition so as to include therein certain described lands in substitution for the second tract described in the petition, to which amendment defendants answered setting up in material respects the averments contained in the answer to the original petition.

Defendants, also by permission of the court, filed an amendment to their further answer by adding averments summarily stated as follows: That certain public roads which are under the control of the State Highway and Public Works Commission and in public use lie within the boundaries of the proposed municipal airport, and the petitioner proposes to take over, use, occupy and appropriate same in such way and manner as will interfere with the use thereof by these defendants and other property owners, taxpayers and citizens of Rockingham County, and will deprive them of their rights and interests in and to such public highways; that the petitioner is without power and authority to purchase or to acquire by condemnation proceedings or otherwise a fee or easement in and to said public highways for municipal airport, and the State Highway and Public Works Commission is without power and authority to transfer, sell, release or liquidate its easement in and to said public highways to City of Reidsville for municipal airport purposes and any attempt to do so is void; that the Commission has made no contract or agreement with the City of Reidsville to transfer, sell, release or liquidate its easement and rights in and to said public highways; that if the Commission should agree to sell, transfer, release or liquidate its easement and rights in and to said public highways, the carrying out of the plan set up for the municipal airport would entail enormous cost and expenditure of many thousands of the $100,000 municipal airport fund referred to in the special election held on 21 July, 1942, to pay for said public highways and for the laying out of new highways which would be required to take the place of existing highways, which expenditure would not be for a public purpose and would cause damage to defendants and other taxpayers of Rockingham County; and that the plan and setup in the acts of petitioner are wrongful, unlawful, unconstitutional and violative of the property rights of the defendants and of the general public and of the many property owners who abut on said highways who have rights and interest therein and thereto.

Thereafter, defendants, without notice to petitioner, moved before Carr, regular judge of the Tenth Judicial District, at Burlington, N. C., for an injunction restraining petitioner from proceeding further with the condemnation of lands of defendants. This motion, in the form of a

petition, (a) incorporated as a part of it the pleadings in this action, (b) amplified the averments theretofore made in defendants' answer, and amendment to answer, and (c) further averred: That upon the demand of the City of Reidsville, and over the protest of the defendants, the clerk of Superior Court of Rockingham County has set the proceeding instituted by the City of Reidsville for the condemnation of lands of defendants for hearing before him on 20 December, 1943, at Wentworth, N. C., at which time defendants are advised and believe that the clerk will appoint appraisers and otherwise proceed with the condemnation of the property of defendants as prayed for in the petition of City of Reidsville, and if the City be allowed to proceed in said cause, these defendants will be deprived of their property and of said public highways contrary to law, and these defendants will thereby suffer irreparable damage.

Upon this motion of defendants, and without notice to petitioner, an order was signed at Burlington, N. C., by Carr, J., as aforesaid on 17 December, 1943, restraining temporarily petitioner, its agents, servants, employees, and attorneys from proceeding further in the condemnation proceeding, until further orders of the court, and directing petitioner to appear on 4 January, 1944, before Clement, regular judge, assigned to hold the courts of the Twenty-first Judicial District, beginning 1 January, 1944, at the courthouse in Danbury, Stokes County, and show cause why said restraining order should not be made permanent.

Thereupon, petitioner, City of Reidsville, moved before Sink, J., at Greensboro, N. C., on 20 December, 1943, for order to dissolve the restraining order of Carr, J., for that said restraining order was signed without notice to petitioner, and for that the motion and petition upon which it was granted are not sufficient to warrant the order for these reasons: (a) They do not state grounds for equitable relief, and are insufficient as matter of law to warrant the order. (b) His Honor, Carr, J., who granted the restraining order, was not the resident judge nor was he the judge holding the courts of the Twenty-first Judicial District in which this proceeding is pending, and was not familiar with the litigation. (c) All the matters set out in the motion and petition have heretofore been submitted to Superior Court for decision in a suit brought at instance of these and other defendants like situated in the name of certain taxpayers of the City of Reidsville, to wit: the case of J. H. Turner, *et al.*, *v.* City of Reidsville, which suit has been determined by the judge of Superior Court adversely to contentions of defendant in its motion and the case is now on appeal to Supreme Court of North Carolina. (d) It is assumed what the judgment of the clerk will be. And (e) the matters and things alleged in the motion and petition, if competent and true, would be matters for the clerk to consider in passing upon the

merits of the case and they have been set up as a defense to this action and are not grounds for injunction.

Thereupon Sink, J., on 20 December, 1943, at his residence in Greensboro, N. C., issued an order to defendants and their counsel of record, to appear before him, the judge holding the courts of the Twenty-first Judicial District, on 24 December, 1943, at 10 o'clock a.m., at the courthouse in Greensboro, N. C., if they wish to be heard, at which time counsel for petitioner would make a motion to dissolve the restraining order theretofore issued in the cause by Carr, J., and at the time and place named, all the parties were present through counsel.

Defendants then and there entered a special appearance and excepted to the motion of petitioner, and to order to show cause signed by Sink, J., and moved that said order be set aside and vacated and the motion of petitioner be dismissed for that Sink, J., "was and is without jurisdiction in said cause." In support of this motion defendants offered, and there were received in evidence letters to counsel for defendants, (a) from Clement, J., advising that he was in Forsyth County during the week of 19 December, and had been since 15 December, 1943, and (b) from Carr, J., advising that he was at his home in Burlington all day on Monday, 20 December, and was available if anyone had desired to contact him. The motions of defendants were denied. They objected and excepted and in open court gave notice of appeal to Supreme Court. Further notice waived. Exception 1. Defendants then moved the court to fix amount of appeal bond. Motion was denied—the court being of opinion "that the denial of the special appearance was and is an interlocutory order and not such an order as would permit an appeal at this stage of the proceeding." Exception 2. Thereupon, the court said: "Let the record disclose that no motion to continue the proceeding is made, and the court directs that the hearing proceed. Defendants object and except and in open court give notice of appeal to Supreme Court. Further notice waived." Exception 3.

Thereupon, petitioners offered in evidence (1) a statement of the clerk of Superior Court of Rockingham County setting out in detail and in chronological order the proceedings in this and other special proceedings, eight in all, brought by the City of Reidsville to condemn land for a municipal airport, (2) the original petition filed by the City in this proceeding to be used as an affidavit, and (3) the further answer of the City of Reidsville filed in the taxpayers' suit entitled J. H. Turner *et al.* *v.* City of Reidsville *et al.*, to be used as an affidavit. Exception 4.

For defendants, it was agreed that they ask that their petition in the cause be considered as an affidavit.

Thereupon, the court ruled (1) that, upon consideration of all the facts as disclosed by the record, defendants, movents in the causes there-

tofore instituted against them by the City of Reidsville, designated as condemnation suits, have elected by their respective motions to defend said actions in a court of equity, when the proper course of procedure of North Carolina is by answer in each of the individual original causes; Exception 5; and (2) "that the cause set out in the petition of the municipality of Reidsville with respect to the airport is a necessity, and that the public demands for transportation by air is conditioned upon preparation of airport before this advanced means of transportation can be made available." Exception 6.

The court then directed that the parties prepare and submit to the court such proposed findings of facts and conclusions of law as they deemed proper, in order that the necessary exceptions and records may be noted thereon. Pursuant thereto, on 27 December, 1943, defendants requested thirteen findings of fact and twelve conclusions of law, each of which was denied, with exception of the first finding of fact in whole, and the eleventh in part. To each adverse ruling defendants except. Exceptions 7 to 29, both inclusive.

Thereafter, on 27 December, 1943, Sink, holding the courts of the Twenty-first Judicial District at Chambers in Greensboro, ruling as a matter of law (a) that the defendants are not entitled to equitable relief, but that they have an adequate remedy at law, and (b) that their proper course is to make and set up their defense, as they have done, by answer to the petition in the cause which is an action by the municipality to condemn land under its power of eminent domain, and finding as a fact that defendants will suffer no irreparable loss if the restraining order heretofore issued be dissolved, adjudged that the restraining order issued herein by Carr, J., on 17 December, 1943, be and the same is dissolved. Exception 30. Defendants appealed therefrom to Supreme Court, and further moved the court to continue the restraining order in full force and effect until said appeal has been finally disposed of. Thereupon the court ordered a modification of the restraining order—limiting petitioner in proceeding only with regard to the actual taking of possession pending the appeal; and further ordered that the modified restraining order be continued only upon condition (1) that defendants shall file on or before 30 December, 1943, with clerk of Superior Court of Rockingham County, entitled as in this cause, a bond in sum of $1,000.00 with sufficient sureties to be approved by the clerk and conditioned as required by C. S., 858 (a), and (2) that said appeal shall be docketed in the Supreme Court of North Carolina on or before 15 January, 1944, and that upon the failure of defendants to do either, the restraining order shall be dissolved entirely.

Defendants appeal to Supreme Court and assign error.

Susie Sharp and P. W. Glidewell, Jr., for petitioner, appellee.
W. R. Dalton and C. L. Shuping for defendants, appellants.

WINBORNE, J. Careful consideration of the five questions involved on this appeal, as stated in brief of defendants, appellants, fails to disclose error for which the judgment below may be disturbed.

1. At the outset defendants contend that Sink, J., was without jurisdiction, at the time he acted, to vacate or modify the temporary injunction made by Carr, J. If an injunction be granted without notice, as in this case, it is provided by statute, G. S., 1-498, formerly C. S., 856, that the defendant, that is, the party enjoined, "at any time before the trial, may apply, upon notice to be fixed by court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district." Concededly, Sink, the regular judge of the Superior Court resident of the Twelfth Judicial District, was not in the Twenty-first Judicial District in which this action is pending at the time he signed the orders in question, but he was at that time the judge regularly assigned, under the rotation system in this State, to hold the courts of the Twenty-first District, and he was in an adjoining district. Was he then under these facts "the judge having jurisdiction"? We so hold.

Under the statute relating to rotation of judges, G. S., 7-74, formerly C. S., 1446, a judge assigned to a district is the judge therefor for six months beginning 1 January and July as the case may be. *Hamilton v. Icard,* 112 N. C., 589, 17 S. E., 519. Within the period of such assignment the judge so assigned to a district has jurisdiction of all "in Chambers" matters arising in the district. See *Shepard v. Leonard,* 223 N. C., 110, 25 S. E. (2d), 445. Moreover, "the judge assigned to the district" is specifically designated by statute as one of the judges to whom all restraining orders and injunctions shall be made returnable. G. S., 1-494, formerly C. S., 852. Further, in applying the statute this Court held in the case of *Hamilton v. Icard, supra,* that where a restraining order was made returnable before a judge assigned to the district at a place outside of the district and after the courts were over, but before the end of the term of the assignment, such judge had jurisdiction to hear the application and to grant injunction until the hearing. It is clear, therefore, that Sink, J., was a judge having jurisdiction to vacate or modify the temporary injunction which had been issued without notice.

2. It is contended that Sink, J., for lack of jurisdiction, erred in denying to defendants right of appeal to Supreme Court from his order

of 24 December, 1943, overruling their motion (a) to set aside and vacate his order of 20 December, 1943, and (b) to dismiss motion of plaintiff to dissolve the restraining order of Carr, J. The appeal is here, and the challenge is considered in this Court. Hence, the question is now moot. Nevertheless, upon the facts of record no error appears. See G. S., 40-19, formerly C. S., 1723; Rev., 2587; Code, 1946; and compare *R. R. v. Newton,* 133 N. C., 132, 45 S. E., 549.

3. It is stated that assignment of error No. 5 is involved in this question. This assignment relates to the ruling of the court that the defendants in this, and the other condemnation suits, have elected by their respective motions to defend the actions in a court of equity, when the proper course of procedure in the courts of this State is by answer in each of the individual original actions. The ruling is no more than holding that the defendants have an adequate remedy at law, and that where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie. *Whitford v. Bank,* 207 N. C., 229, 176 S. E., 740. Moreover, injunction will not lie against the prosecution of condemnation proceeding when the matter relied upon as a ground therefor may be urged as a defense in the proceeding. See Annotations 133 A. L. R., 11, at pages 104 and 109, where authorities, including North Carolina cases, are assembled. Compare *Retreat Asso. v. Development Co.,* 183 N. C., 43, 110 S. E., 524.

4. This is a question: Did the court err in holding that said airport is a necessity? The word "necessity" is not used in the sense of "necessary expenses" to which Article VII, section 7, of the Constitution of North Carolina relates, but in the sense that the airport in question is necessary to meet the public demand for transportation by air, which is "conditioned upon preparation of airport before the advanced means of transportation can be made available." The contention that the finding of the city council that the airport is necessary is a manifest abuse of discretion, since the City of Reidsville is already provided with every necessary means required for public convenience and necessity of the traveling public and for the transportation of commerce, and since there are no public airplanes operating in and out of Reidsville, is similar to that made in the taxpayers' suit, *Turner v. Reidsville, ante,* 42. There the court, disposing of it, holds that the construction, maintenance and operation of the airport in question here is for a public purpose to which with approval of a majority of the qualified voters which has been duly given public funds may be provided and used. Further elaboration would be repetitious.

5. The last question: Did the court err in dissolving the restraining order? Defendants contend that serious questions of fact substantially affecting their right to injunctive relief raised in their "petition and

motion" for restraining order are only denied by petitioner, if at all, through its further answer in the taxpayers' suit which, over objection, the court permitted to be filed as an affidavit, and that this should be excluded as incompetent. In this connection it is sufficient to refer to the statute, G. S., 1-499, formerly C. S., 857, which provides that if the application for injunction is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proof.

Also defendants contend that these additional grounds, as alleged, entitle them to a restraining order: (a) That the airport cannot be constructed for $100,000, hence the expenditure of that sum would be a waste of public funds; (b) that the airport is not for a public purpose; (c) that the tax sought to be levied for bonds and maintenance of the airport would be violation of Article V, section 3, of the Constitution of North Carolina that "taxes shall be levied only for public purposes"; and (d) that the taking of the property of defendants would be violative of the 14th Amendment to the Constitution of the United States. In *Turner v. Reidsville, ante,* 42, each of these is treated and decided adversely to contentions here made. Further discussion is unnecessary.

Defendants further contend that the taking of their property would be violative of Article I, section 17, of the Constitution of North Carolina, which provides that "no person ought to be . . . in any manner deprived of his . . . property, but by the law of the land." However, in the brief filed no argument is advanced as to wherein this provision of the Constitution is violated.

It is further contended that the City has failed to negotiate with defendants for purchase of property sought to be condemned. It is noted, however, that the petition contains allegation as to its inability to acquire the title, to which the answer enters denial. This presents a question of fact for decision by the clerk, whose ruling is subject to review at the proper time by the judge on appeal. See *Power Co. v. Moses,* 191 N. C., 744, 133 S. E., 5, and cases cited.

Lastly, the contention that as a part of the airport the city proposes to appropriate public highways, thereby depriving defendants of the use of them in connection with unappropriated lands. Even so, while this might be an element of damage, it is not cause for preventing a public project, such as the airport here involved is held to be.

Thus, after full consideration of all questions presented, and arguments advanced, and authorities cited by appellants, the judgment below is

Affirmed.

STATE v. JOEL DILL.

(Filed 1 March, 1944.)

1. Bastards § 2—

The only prosecution contemplated by the bastardy statutes is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child, the mere begetting of the child not being denominated a crime. G. S., 49-2.

2. Bastards § 4—

A prosecution of the father of an illegitimate child for the willful neglect and refusal to support such child must be instituted within three years next after the birth of the child, or where the reputed father has acknowledged the paternity of the child by payments for its support within three years from the birth thereof, then within three years from the date of such acknowledgment. G. S., 49-1, 49-4.

BARNHILL, J., dissenting.

SEAWELL, J., dissenting.

APPEAL by defendant from *Alley, J.*, at August Term, 1943, of MADISON.

Proceeding on indictment charging the defendant with willful neglect and refusal to support illegitimate child begotten by him of Cora Arrington.

The facts are these:

1. The child in question was born 27 June, 1930.

2. Bastardy proceeding was instituted under C. S., 265-279, which resulted in verdict at the September Term, 1931, Madison Superior Court, establishing the paternity of the child, it being found by the jury that the defendant was the father of said child, and judgment was thereupon entered that he pay to the mother of the child the sum of $200.

3. The child and its mother lived in a house belonging to the defendant from 1930 to 1943. The mother testified, "He has never charged me any rent. . . . I never did rent from him, but I allowed he was letting me live up there on account of that child."

4. The present proceeding was instituted by indictment at the May Term, 1943, Madison Superior Court; tried at the August Term, resulted in verdict of guilty, and judgment of six months in jail, suspended on conditions, etc.

Defendant appeals, assigning errors.

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

Carl R. Stuart for defendant.

STACY, C. J. The case turns on whether the proceeding is barred by the lapse of time. G. S., 49-4.

The child in question was born 27 June, 1930. Its paternity was established under the old law, C. S., 265-279, at the September Term, 1931, Madison Superior Court. The present proceeding originated by indictment at the May Term, 1943, more than 13 years after the birth of the child. Under the decision in *S. v. Killian,* 217 N. C., 339, 7 S. E. (2d), 702, it would seem that the prosecution is barred.

The pertinent provisions of ch. 228, Public Laws 1933, as amended by ch. 217, Public Laws of 1939, follow: "Sec. 3. Proceedings under this Act to establish the paternity of such child may be instituted at any time within three years next after the birth of the child, and not thereafter: *Provided, however,* that where the reputed father has acknowledged the paternity of the child by payments for the support of such child within three years from the date of the birth thereof, and not later, then, in such case, prosecution may be brought under the provisions of this Act within three years from the date of such acknowledgment of the paternity of such child by the reputed father thereof." See *S. v. Moore,* 222 N. C., 356, 2 S. E. (2d), 31.

The only "prosecution" contemplated by this legislation is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child, the mere begetting of the child not being denominated a crime. G. S., 49-2; *S. v. Tyson,* 208 N. C., 231, 180 S. E., 85. It was held in *S. v. Bradshaw,* 214 N. C., 5, 197 S. E., 564, a case which arose prior to the amendment of 1939, that an indictment under this statute, instituted more than three years after the birth of the child, was properly dismissed, as the limitation was positive and unbending, and not confined to proceedings to establish the paternity of the child. Attention was directed to the "penalties as are thereinafter provided" and to the procedural provisions of the enactment, which contemplate initial findings and an order of support, subject to modification or increase from time to time, and to be enforced by such prescribed supplemental orders as the exigencies of the case may require. See G. S., 49-7-8, and *S. v. Duncan,* 222 N. C., 11, 21 S. E. (2d), 822.

In consequence of this decision, the statute was amended in 1939 as above set out. The only material change wrought by this particular amendatory provision was to extend the time within which "prosecution may be brought," where the reputed father has acknowledge the paternity of the child by payments for its support within three years from the date of its birth, from "within three years next after the birth of the child" to "within three years from the date of such acknowledgment of the paternity of such child by the reputed father thereof." *S. v. Killian, supra.*

It is to be noted that here the paternity of the child was established in a bastardy proceeding had under the old law, and not under the existing law. Hence, the present prosecution is a new and independent proceeding, rather than a motion in the original proceeding to enforce the order of support as contemplated by the 1933 Act. As such, it is barred by sec. 3 of the "Act concerning the support of children of parents not married to each other." Ch. 228, Public Laws 1933. See G. S., 49-1.

It results, therefore, that the motion for judgment of nonsuit will be sustained. G. S., 15-173 (C. S., 4643).

Reversed.

BARNHILL, J., dissenting: The Act under consideration was born in a confusion of ambiguous and conflicting language. The intent of the Legislature, particularly in respect to procedure, does not appear with that degree of clarity which should characterize all criminal statutes. Hence, the Court, whichever course it may take, must, to some extent, perform a legislative function by writing into the Act the intent it concludes the General Assembly had in mind.

With this in mind, I refrain from discussion. I merely note that in my opinion the three-year limitation applies only to a proceeding to establish the paternity of the child. Willful failure to support a child is a continuing offense. When the paternity is established within the stipulated period the putative father may be prosecuted at any time thereafter, at least until the child is fourteen years of age. Thus I read the statute.

SEAWELL, J., dissenting: In my judgment, there is now no basis for the holding that the prosecution for the willful failure or neglect to support an illegitimate child must be brought within three years, or any other number of years, after the birth. The original statute, chapter 228, Public Laws of 1933, sec. 3, read as follows:

"Sec. 3. *Proceedings under this act* may be instituted at any time within three years next after the birth of the child, and not thereafter." Now there were two proceedings included in the act—one, a civil proceeding to establish the paternity, if, indeed, that has not become vestigial, which we have not yet conceded; another, a distinctively criminal proceeding directed toward punishment for the newly created offense of willful nonsupport. Since *indictment,* as well as the *civil proceeding to establish paternity,* was a *"proceeding under this act,"* the Court, in *S. v. Bradshaw,* 214 N. C., 5, 197 S. E., 564, concluded that the indictment also in that case was barred under this section. Immediately, by chapter 217,

Public Laws of 1939, the General Assembly amended this section, making it read as it now stands:

G. S., 49-4. "Proceedings under this article *to establish the paternity of such child* may be instituted at any time within three years next after the birth of the child." Then follows the provision relating to the acknowledgment of paternity which, if made within three years of birth, will support an indictment if brought within three years after the acknowledgment, based upon the acknowledgment without reference to any adverse judicial proceeding. The proviso, however, does not touch the facts of this case.

If the Legislature meant anything at all by this change, it could mean only that the three-year limitation is confined to the proceeding for the establishment of the paternity as I have distinguished it, and no longer applies to the criminal prosecution for nonsupport. In such criminal prosecution it may be necessary to establish the paternity where that is an issue, but to refer to the prosecution as "a proceeding to establish the paternity of such child" is so inadequate and inappropriate as to compel rejection of the theory that it was still meant to be included, and moreover, it renders the legislative amendment without any significance whatever.

There is nothing in the 1933 Act which would indicate that the duty of supporting the illegitimate child is imposed solely upon those whose paternity has been established exclusively under this statute. It is prospective in character, as all such enactments are, and provides for the establishment of paternity of the illegitimate child as necessity may arise—currently. It repeals the old bastardy law, but the Legislature could not repeal the judgment pronounced under authority of that law which fixed the status of defendant as father of his illegitimate child. No new proceeding is necessary for that purpose.

S. v. Killian, 217 N. C., 339, 7 S. E. (2d), 702, under authority of which the case at bar was nonsuited, is not controlling. There the indictment was based on an acknowledgment of the paternity of the child by the defendant under the present statute (Sec. 3), which expressly provides that the indictment is barred after three years from the acknowledgment, which must be made within three years after the birth. There is no "kick-back" in the proviso which would institute, either directly or impliedly, any relation between the indictment and the date of birth with reference to a three-year statute of limitation. We are dealing with the question of the judicial establishment of the paternity, which is a matter of record, and not with the mere acknowledgment at which the bar of the statute is directly, and with reason, aimed.

I think, broadly stated, the law recognizes the natural and social responsibility of parents for their offspring, regardless of whether their

advent is with the blessing of the statutes in such case made and provided, or without their approval, and is much more comprehensive in its attitude and inclusive features than I find in its present application. Certain procedure must be had, of course, to see that the social burden is justly placed, but this procedure should be construed in the light of its purpose and not to defeat the Act. All of the provisions of the Act should be read *in pari materia.* The title reads:

"This article shall be referred to as 'An act concerning the support of children of parents not married to each other.'" G. S., 49-1.

The denunciatory part of the Act is as follows:

"G. S., 49-2. NON-SUPPORT OF ILLEGITIMATE CHILD BY PARENTS MADE MISDEMEANOR. Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this article shall be any person less than fourteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent."

The defendant was indicted and convicted for a continuing offense. The burden of the support of his illegitimate child who is still under the age of fourteen years, is fixed upon defendant by the statute, and willful neglect or refusal to do so, I believe to be punishable by law. His conviction should not be disturbed.

STATE v. H. W. SAWYER AND WILLARD MUSE.

(Filed 1 March, 1944.)

1. Robbery § 1a—

Upon an indictment for highway robbery at common law, it is not necessary to prove both violence and putting in fear—proof of either is sufficient.

2. Same—

Force in the offense of robbery may be either actual or constructive. Although actual force implies personal violence, the degree of force is *immaterial, so long as it is sufficient to compel the victim to part with his* property. Constructive force includes all demonstrations of force, menaces or other means, however slight, by which the person robbed is put in fear sufficient to prevent resistance.

3. Robbery §§ 1a, 3—

The kind and value of property taken in highway robbery is not material; and an allegation of ownership is sufficient when it negatives the idea of the accused taking his own property.

4. **Criminal Law § 41b: Evidence § 27—**

Incompetent evidence, by a State's witness in a criminal trial, brought out on re-direct examination in explanation of testimony elicited under cross-examination, is competent.

5. **Criminal Law § 53d—**

Where all the evidence, in the trial of a criminal action, if believed by the jury, tends to show that the crime charged was committed as alleged and there is no evidence to show the commission of a crime of less degree, there is no error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged and convict him of an assault or less degree of the crime charged.

APPEAL by defendants from *Thompson, J.*, at December Special Term, 1943, of CAMDEN.

Criminal prosecution upon indictment charging defendants with highway robbery.

The bill of indictment charges, in substance, that on 14 August, 1943, upon "a common and public highway" at and in the county of Camden, State of North Carolina, H. W. (*alias* Bill) Sawyer, Willard Muse and Shelton Casper did unlawfully and feloniously assault, and put in fear Romeo J. LaBurque, Charles Sipes and Enrico N. Oliverine, and did then and there feloniously and violently and against their will, and from their person, take, steal and carry away fourteen dollars in money of the goods and chattels of the said Romeo J. LaBurque, Charles Sipes and Enrico N. Oliverine, against the form of the statute, etc.

Upon the trial below the State offered as witnesses Romeo J. LaBrueque, spelled in indictment LaBurque, and Enrico N. Oliverine, whose testimony tends to show that they and Charles Sipes, three sailors in the United States Navy, having come into Elizabeth City, North Carolina, from a base near-by, on afternoon of Saturday, 14 August, 1943, and attended a picture show, decided about 11:30 o'clock p.m. "to thumb a ride" to Norfolk. A man, whose identity does not appear in the record, came along in a car and picked them up. He asked if they would like to go to Chantilly Beach, which is in Camden County, about two miles on a dirt road off the Elizabeth City to Norfolk highway. He said that "there was a little action there," that they could have a good time there; that he had just left and taken the girl home. They decided to go there, but when they arrived the place was closed. After looking around, the sailors started walking back toward the highway, when the man who had taken them there called them back and asked if they wanted to go or to ride to Norfolk with him. They accepted the invitation and got in the car. Whereupon, before the sailors had time to close the door four other men jumped in the car. There were three, including the driver on the front seat, and five including the three sailors

on the back seat. The sailors protested that the car was crowded, and spring would break, saying that they "would just as soon walk," and started to get out. But the driver said it was no trouble at all, and started the car and "took some back road up there." After traveling about fifteen minutes, one of the men said he wanted to get out and the car was stopped. All except the sailors got out, and some one of them asked the sailors if they wanted to get out, or told them to get out, but the sailors replied in the negative. The question was repeated, according to testimony of Oliverine, and the sailors again said "No." Whereupon, the five men, including the driver, got around the car, at the doors and windows, and opened doors . . . one of them pointed out in the courtroom as one of defendants, saying to the sailors, "All right, boys, this is a shake-down," or "This is a shake-down," and upon being asked by Oliverine what he meant, said again, "Just a shake-down." Thereupon $10.00 was taken from LaBrueque, $3.40 from Oliverine, and $3.60 from Sipes. The driver of the car reached through the door and took the billfold from the right front pocket of LaBrueque, and got out in the front light, looked through the billfold, took out the money and gave the billfold back to LaBrueque. In like manner the money was taken from Oliverine and Sipes by others. In the taking the defendants actively participated. The five men "were quite men" compared to the sailors. Oliverine on being asked if he knew who took the money from Sipes replied: "I don't know who took his money, I was pretty well occupied with a man who was taking care of me. I did not say it was the man who took my money, because as soon as he took care of me I didn't even look at him. I was ready to bust a blood vessel." Afterwards, according to testimony of LaBrueque, they, the men, tried to force the sailors to drink from a bottle of liquor, which they pretended to do but did not do. Oliverine testified, "They came in the car and that fellow over there practically demanded we take a drink or else we would be thrashed . . . it seemed like it was hours but I could not say how long it was." Then the men took the sailors back to the Chantilly Road and the Elizabeth City-Norfolk highway, let them out, and gave them the wrong direction to Elizabeth City, and then put out the headlights on the car and started and left.

The sailors obtained a ride to Elizabeth City and "went straight to the police station and talked to Corporal Laws," a member of the State Highway Patrol, and reported they had been robbed of the money in the vicinity of Chantilly Beach. Later in the presence of the officer, as well as on the trial, the defendants Sawyer and Muse were identified by LaBrueque and Oliverine, who were unable to identify Casper.

Patrolman Laws testified as witness for the State by way of corroborating in part witnesses LaBrueque and Oliverine. Then on cross-exami-

nation he was asked if he did not fail to serve subpoena on Sipes because Sipes did not identify the defendants. The officer answered in the negative. Then upon redirect examination and over objection by defendants, the solicitor asked these questions and the officer gave the answers indicated:

"Mr. Simpson asked you if it was because Sipes could not identify these men that you permitted him to leave. I ask you to tell the jury if Sipes, at the time you carried the men down to the Naval Air Station for the line-up, whether or not he identified Muse as one of the men who participated in the Robbery? A. He did.

"Q. I ask you to tell the jury whether, at that time Sipes identified Bill Sawyer as being one of the participants in the robbery? A. He did.

"Q. Was there any reason for your excusing him other than the fact that he had a leave of absence from his Commanding Officer? A. None. I had no control over the man."

At the close of State's evidence the court directed verdict in favor of defendant Casper, but denied motion for judgment as of nonsuit in behalf of defendants Sawyer and Muse. Exception. Thereupon, the defendants Sawyer and Muse, as witnesses in their behalf, pleaded an alibi, and denied being present at the time of the alleged robbery, and denied any participation therein, and offered other testimony in corroboration of their alibi. These defendants further offered testimony tending to break down the identification of them by the State's witnesses LaBrueque and Oliverine. The motions for judgment as of nonsuit at the conclusion of all the testimony were denied. Exception.

Verdict: "Guilty as charged as to each of the defendants."

Judgment: As to each of the defendants, imprisonment in State Prison for not less than three nor more than five years.

Defendants appealed to Supreme Court and assign error.

Attorney-General McMullan, Assistants Attorneys-General Patton & Rhodes for the State.

M. B. Simpson for defendants, appellants.

WINBORNE, J. Defendants in the main present and stress for error three points:

1. It is contended that the court should have nonsuited the case, (a) "because no force was shown to have been used," and (b) that there is a fatal variance between the indictment and the evidence in that the indictment charges defendants with taking $14.00 in money of the goods and chattels of LaBrueque, Sipes and Oliverine, and the evidence shows that LaBrueque lost $10,00, Oliverine $3.40, and Sipes $3.60, and neither had any interest in the money of the other, and the amount taken totaled

$17.00 and not $14.00 as charged, and in that the evidence shows no joint taking.

As to the first ground for nonsuit: The charge against defendants is a common law offense. Decisions of this Court with regard thereto adhere to the principle that upon an indictment for highway robbery at common law it is not necessary to prove both violence and putting in fear—proof of either is sufficient. *S. v. Burke,* 73 N. C., 83; *S. v. Brown,* 113 N. C., 645, 18 S. E., 51; *S. v. Holt,* 192 N. C., 490, 135 S. E., 324.

Generally the element of force in the offense of robbery may be actual or constructive. Although actual force implies personal violence, the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with his property or property in his possession. On the other hand, under constructive force are included "all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear." 46 Am. Jur., 146.

Applying these principles to case in hand, the evidence, taken in the light most favorable to the State as we must do in considering a motion for judgment as in case of nonsuit, is sufficient to take the case to the jury. From the words used and acts done under the circumstances portrayed in evidence for the State, a robbery is manifest. The term "shake-down" has in slang a well understood meaning. According to Webster, when used as a verb, it means "to force (one) to give up money . . ."; and as a noun, "shake-down" is an "act or process of shaking down, hence, slang, an instance or means of depriving one of money by persuasion or compulsion." In the case in hand the evidence tends to show that the five men were acting in concert. The number of them and their words, acts and attitude assumed toward the sailors are such as in common experience are likely to create an apprehension of danger and to induce a man to part with his property for the sake of his person. The jury could reasonably infer therefrom at least that the money was taken from the sailors through fear.

As to the second ground for nonsuit: In an indictment for robbery the kind and value of the property taken is not material. The gist of the offense is not the taking, but a taking by force or the putting in fear. *S. v. Burke, supra, S. v. Brown, supra.* Moreover, in an indictment for

robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property. See 54 C. J., 1039, 46 Amer. Jur., 143. For these reasons there is no variance. The authorities cited by defendants are distinguishable.

2. The point is made that the testimony of the witness Laws, a corporal of the State Highway Patrol, that Sipes, the sailor who was not present at the trial, had identified the defendants as participants in the alleged robbery of the three sailors, is hearsay and incompetent. Conceding that the evidence may have been incompetent on direct examination, it was brought out on redirect examination in explanation of testimony elicited under cross-examination by defendants. For this purpose it was competent. *S. v. Orrell,* 75 N. C., 317; *Jordan v. Motor Lines,* 182 N. C., 559, 109 S. E. 566, and cases cited.

3. The court having instructed the jury that, as to each defendant, one of two verdicts, guilty as charged, or of not guilty, might be returned, defendants contend that upon the evidence in the case, the court erred in failing to further instruct the jury that a verdict might be rendered of guilty of an attempt to commit the crime charged, or guilty of a lesser degree of the same offense, or guilty of an assault.

In support of this contention defendants invoke the provisions of G. S., 15-169, formerly C. S., 4639, to the effect that on the trial of any person charged with a felony, and the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding. Defendants also invoke in support of this contention the provisions of G. S., 15-170, formerly C. S., 4640 relating to conviction of less degree or of an attempt to commit the same crime. They rely upon the application of the statutes in the case of *S. v. Holt, supra.* That case is distinguishable from the one in hand. There, while the evidence for the State made out a crime for highway robbery only, the evidence of defendants tended to show that there was no robbery at all for that the State's witness voluntarily paid the money to defendant, Holt, and, after such voluntary payment, was thereafter assaulted. Here the evidence for the State tends to show the crime of robbery only, and the defense of defendants is that of an alibi.

No contention was made by defendants in the trial court that upon the evidence offered the jury should render against them a verdict of guilty of a lesser degree of the same offense, or guilty of an attempt to commit the offense so charged, or guilty of an attempt to commit a less degree of the same crime, or guilty of an assault.

In the case of *S. v. Cox,* 201 N. C., 357, 160 S. E., 358, *Connor, J.,* speaking for the Court as to provisions of G. S., 15-170, then C. S., 4640, states that "the statute is not applicable, where, as in the instant

case, all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein." And, concluding, it is there said: "Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the trial court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree," citing *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605. See also *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402; *S. v. Vick,* 213 N. C., 235, 195 S. E., 779; *S. v. Hairston,* 222 N. C., 455, 24 S. E. (2d), 342, and cases cited. In these cases the sole defense was that of an alibi, and it is held in *S. v. Jackson, supra,* that the provisions of G. S., 15-169, and -170, then C. S., 4639 and 4640, apply only where there is evidence tending to show defendant is guilty of a crime of lesser degree than that charged in the indictment, citing cases.

After careful consideration of all assignments of error, we are of opinion that the case was one for the jury, and that no prejudicial error was committed on the trial.

Hence, in the judgment below we find

No error.

MRS. ETHEL DAVIS POWELL, WIDOW; GWENDOLYN DAVIS BATES, SANFORD DAVIS, DARRELL DAVIS, GLENN DAVIS, KENNETH DAVIS, AND CHARLES DAVIS, v. J. N. TURPIN AND WIFE, PEARL TURPIN.

(Filed 1 March, 1944.)

1. Judgments §§ 22b, 29—

Where a court of competent jurisdiction of the subject matter recites in its judgment or decree that service of process by summons, or in the nature of summons, has been had upon the defendant, who is subject to the jurisdiction of the court, and the judgment is regular on its face, nothing else appearing, such judgment or decree is conclusive until set aside by direct proceedings, or by motion in the cause.

2. Same—

The recital in a judgment is conclusive as against collateral attack, when and only when it is consistent with the whole record in the case, as when the record shows service when in fact no service has been had or when summons has been lost. But the recital will not prevail against positive evidence in the record showing affirmatively that there was no legal service, or where other fatal defect appears on the face of the record or is discernible from an inspection of the record.

3. Judgments § 22h—

Unless a defendant has been brought into court in some way sanctioned by law, or has made a voluntary appearance in person or by attorney, the court has no jurisdiction of his person and a judgment rendered against him is void and may be treated as a nullity.

4. Judicial Sales § 7—

A purchaser at a judicial sale must ascertain that the court had jurisdiction of the subject matter and the person, and that the decree authorized the sale. And when the record itself discloses a want of service of process, he takes with notice that the decree is void and purchases at his peril.

5. Judgments § 22b: Ejectment § 15—

Collateral attack upon a void judgment is particularly apposite in ejectment in which a party may show that any instrument, relied upon by his adversary as evidence of title, is void and ineffectual to convey title.

6. Judgments §§ 22h, 29: Equity § 2—

No statute of limitations runs against a plaintiff's right of action in ejectment by reason of a void judgment of foreclosure for nonpayment of taxes, and laches, if any appeared, is no defense.

APPEAL by defendants from *Clement, J.*, at October Term, 1943, of JACKSON. No error.

Civil action in ejectment.

S. T. (Tom) Davis died intestate in November, 1917, seized and possessed of the lands in controversy. He left surviving his widow and six children, the plaintiffs herein. After his death the real estate in controversy was listed by county officials in the name of the widow, Mrs. Ethel Davis. There having been default in the payment of the taxes for the years 1927, 1928, and 1929, the land was sold for taxes. It was purchased by and tax sales certificates were issued to Jackson County.

On 29 November, 1929, Jackson County instituted a tax foreclosure action, based on said tax sales certificates, against the widow. The summons in the judgment roll bears the following endorsement by the sheriff: "Due search made and defendant not to be found in Jackson County." A verified complaint was filed, an order of sale entered, and a commissioner to make sale was appointed. The land was sold after advertisement and purchased by Jackson County. The sale was confirmed and deed was executed 14 March, 1933.

The interlocutory order of foreclosure contains the following recitals: "This cause coming on to be heard . . . and it appearing to the satisfaction of the court that summons herein was duly served as required by law . . . and that notice of action has been duly advertised as required by law; . . ."

After the foreclosure plaintiffs continued in the possession of the land, but the county had some timber cut and removed therefrom, its agent stating at the time that "they were cutting it off for the taxes; that he was cutting this timber to pay up the taxes on the place for it and was going to straighten it up."

On 5 March, 1943, Jackson County executed and delivered to the defendants a quit-claim deed for said premises. The defendants entered into possession of the premises and began to make improvements thereon. This action, instituted 5 June, 1943, followed.

On the trial below appropriate issues were submitted to the jury, and the Court gave peremptory instructions in favor of the plaintiffs. There was verdict for the plaintiffs. From judgment thereon defendants appealed.

W. R. Sherrill and Stillwell & Stillwell for plaintiffs, appellees.

M. V. Higdon and R. L. Phillips for defendants, appellants.

BARNHILL, J. This appeal presents two questions for decision: (1) Is the decree or judgment of foreclosure void? And (2) if so, is it subject to attack in this action? If the answers are in the affirmative, then the deed from the commissioner appointed to make sale conveys nothing, and the judgment below must stand.

Where a court of competent jurisdiction of the subject matter recites in its judgment or decree that service of process by summons or in the nature of summons has been had upon the defendant who is subject to the jurisdiction of the court, and the judgment is regular on its face, nothing else appearing, such judgment or decree is conclusive until set aside by direct proceedings, *Harrison v. Hargrove,* 120 N. C., 96, 26 S. E., 936, or motion in the cause, *McDonald v. Hoffman,* 153 N. C., 254, 69 S. E., 49; *Pinnell v. Burroughs,* 168 N. C., 315, 84 S. E., 364; *Downing v. White,* 211 N. C., 40, 188 S. E., 815, as the particular facts may require. *Johnson v. Whilden,* 171 N. C., 153, 88 S. E., 223, and cases cited; *McDonald v. Hoffman, supra; Hargrove v. Wilson,* 148 N. C., 439, 62 S. E., 520; *Reynolds v. Cotton Mills,* 177 N. C., 412, 99 S. E., 240; *Harrison v. Hargrove, supra,* and authorities cited; *Isley v. Boon,* 113 N. C., 249, 18 S. E., 174; Anno. 68 A. L. R., 390; 31 Am. Jur., 199.

This rule upon which defendants rely was devised primarily to preserve the integrity of judgments and to safeguard the rights of purchasers in cases where the record is otherwise silent or fails to speak the truth.

The recital is conclusive as against collateral attack when and only when it is consistent with the record in the case, as when the record shows service when in fact no service has been had, *Dunn v. Wilson,*

210 N. C., 493. 187 S. E., 802; *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311; *Downing v. White, supra; Stocks v. Stocks,* 179 N. C., 285, 102 S. E., 306; *Estes v. Rash,* 170 N. C., 341, 87 S. E., 109; *Thompson v. Notion Co.,* 160 N. C., 520, 76 S. E., 470; *Harrison v. Hargrove, supra,* or the summons has been lost, *Pinnell v. Burroughs, supra; McDonald v. Hoffman, supra.*

"A contrary doctrine would be fatal to judicial sales and the values of the title derived under them, as no one would buy at prices at or approximating the true value of property if he supposed that his title might at some distant date be declared void because of some irregularity in the proceeding altogether unsuspected by him and of which he had no opportunity to inform himself." *Sutton v. Schonwald,* 86 N. C., 198; *Pinnell v. Burroughs, supra; England v. Garner,* 90 N. C., 197.

But the recital will not prevail against positive evidence contained in the record showing affirmatively that there was no legal service of process. When the fact of nonservice or other fatal defect appears on the face of the record, or is discernible from an inspection of the record, it is not conclusive. *Rutherford v. Ray,* 147 N. C., 253, 61 S. E., 57, and cases cited; *Card v. Finch,* 142 N. C., 140, 54 S. E., 1009; *Johnson v. Whilden,* 171 N. C., 153, 88 S. E., 225, and cases cited; *Clark v. Homes,* 189 N. C., 703, 128 S. E., 20; *Pinnell v. Burroughs, supra; Dunn v. Wilson, supra; Groce v. Groce,* 214 N. C., 398, 199 S. E., 388; *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737.

That is, when the record itself contradicts the recital of due service contained in the judgment the principle of law which gives rise to a presumption of sérvice does not apply. Instead, the jurisdictional finding is controlled by and must yield to the return of service as it appears in the record. 31 Am. Jur., 202, 203; Anno. 68 A. L. R., 395.

"The reason is that the want of service of process and the want of appearance is shown by the record itself whenever it is offered." *Card v. Finch, supra.*

"It is axiomatic, at least in American jurisprudence, that a judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the court." *Card v. Finch, supra; Johnson v. Whilden, supra; Flowers v. King,* 145 N. C., 234, 58 S. E., 1074; *Rackley v. Roberts,* 147 N. C., 201, 60 S. E., 975; *Doyle v. Brown,* 72 N. C., 393; *Carraway v. Lassiter,* 139 N. C., 145, 51 S. E., 968; *Smathers v. Sprouse,* 144 N. C., 637, 57 S. E., 392; *Pinnell v. Burroughs, supra.*

It is likewise elementary that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, the court has no jurisdic-

tion of the person and judgment rendered against him is void. *Downing v. White,* 211 N. C., 40, 188 S. E., 815, and cases cited; *Casey v. Barker,* 219 N. C., 465, 14 S. E. (2d), 429; *Groce v. Groce, supra; Monroe v. Niven, supra.*

A purchaser at a judicial sale must ascertain that the court had jurisdiction of the subject matter and the person, and that the decree authorized the sale. And when the record itself discloses that the defendant has not been brought into court by the service of process or by appearance in person or by attorney, he takes with notice that the decree of foreclosure is void and he purchases at his peril. *Dickens v. Long,* 112 N. C., 311, 17 S. E., 150; *Card v. Finch, supra; Morris v. Gentry,* 89 N. C., 248; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873, and cases cited.

In determining whether a court had jurisdiction the whole record must be inspected, and if the judgment itself recites service but the return found shows no service or a service which is insufficient or unauthorized by law, the judgment must be regarded as void. *Johnson v. Whilden, supra; Monroe v. Niven, supra; Casey v. Barker, supra; Groce v. Groce, supra; Laney v. Garbee,* 105 Mo., 225.

Recital in a judgment of the service of process is deemed to refer to the kind of service shown in other parts of the record. *Card v. Finch, supra;* 31 Am. Jur., 202. It must be read in connection with that part of the record which sets forth the proof of service. The record being complete, the recital can only be considered as referring to the former. *Card v. Finch, supra.* It is presumed in such case that the service found in the record is the same and the only service referred to in the general recital in the judgment, and that the court acted upon the service appearing in the record. 31 Am. Jur., 202.

The rule which permits collateral attack upon a void judgment whenever it is called to the attention of the court in any proceeding in which it is material to the issue presented is particularly apposite in an ejectment suit in which a party may show that any instrument relied on by his adversary as evidence of title is void and ineffectual to convey title. *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 140; *Ricks v. Brooks,* 179 N. C., 204, 102 S. E., 207; *Toler v. French,* 213 N. C., 360, 196 S. E., 312; *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209; *Ownbey v. Parkway Properties, Inc.,* 221 N. C., 27, 18 S. E. (2d), 710; *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 159.

No statute of limitations runs against the plaintiffs' action by reason of the judgment of foreclosure, and laches, if any appeared, is no defense. *Harrison v. Hargrove,* 109 N. C., 346, 13 S. E., 939; *Card v. Finch, supra; Monroe v. Niven, supra.*

The judgment of foreclosure being void for the want of service of summons, the deed executed by the commissioner appointed to make sale conveyed nothing. Hence, the charge of the court below was in accord with the decisions of this Court, and the verdict and judgment must be sustained.

No error.

SMOKE MOUNT INDUSTRIES, INC., v. JACOB FISHER.

(Filed 1 March, 1944.)

1. **Penalties § 2—**

   An action to enforce or collect a penalty, given by a statute to any person injured, is an action on contract.

2. **Pleadings § 10: Contracts § 21: Master and Servant § 63—**

   A complaint, alleging a breach by defendant of his contract to make patterns and cut goods for plaintiff, states a cause of action *ex contractu*, notwithstanding such breach may have been caused by defendant's neglect and failure to perform his obligations thereunder; and defendant may, therefore, plead as a counterclaim overtime, under payment and penalties under the Federal Fair Labor Standards Act of 1938. G. S., 1-135; G. S., 1-137.

APPEAL by plaintiff from *Alley, J.*, at October Term, 1943, of BUNCOMBE.

The complaint alleges that on 24 March, 1941, the plaintiff entered into a written contract with the defendant to make patterns for and cut certain goods out of which to make ladies' suits and slacks, "and pursuant to said agreement defendant began working for plaintiff in its plant, having charge of the designing, cutting and such duties necessarily connected with his said work; . . . that the saleability of the products manufactured by the plaintiff depends principally on proper designing, cutting and pattern making, all of which the defendant contracted and agreed to, ... the completion and finishing of the said products being dependent upon the manner in which they were cut and designed by the defendant"; that upon the refusal and return of a large number of ladies' suits and slacks "as a result of said faulty and defective work performed by defendant . . . the products so shipped were of very little value and could not be disposed of in stores desiring to retain the prestige and good will of their patrons"; that plaintiff suffered loss of money, business and prestige "due to the neglect and failure of the defendant to properly make and prepare designs and patterns and in his neglect and failure to properly design said garments manufactured by plaintiff in accordance with the contract entered into by defendant with plaintiff,

and upon which plaintiff had relied," and that "by reason of the matters and things hereinabove alleged plaintiff sustained a serious loss and was permanently damaged . . . and in consequence thereof plaintiff was damaged in the sum of $10,000.00."

The answer admits that the defendant entered into a written contract with the plaintiff, but "specifically alleges that the return of said merchandise was in no respect the fault of the defendant . . . and that if the plaintiff lost prestige and good will on account of the merchandise it shipped to its customers, the same was in no respect the fault of the defendant," and denies the allegations of the complaint that the plaintiff sustained any loss by reason of the matters and things alleged therein.

For a further answer and defense to the plaintiff's alleged cause of action, the defendant says that according to the terms of his written contract with the plaintiff the defendant was "to cut and make the patterns for said ladies' suits and slacks" and that plaintiff never intimated to the defendant that any goods were ever returned on account of any default or neglect in the work of the defendant and "that the defendant is advised, informed and believes that this action was maliciously instituted against him for the sole reason that the plaintiff had information that the defendant was about to institute an action against the plaintiff to recover for overtime and underpayment under the Federal Fair Labor Standards Act of 1938," and by way of counterclaim the defendant says "that the plaintiff is engaged in the business of manufacturing men's, women's and children's leather jackets; that the plaintiff purchases all or a large part of its materials used in the manufacture of said clothing from points outside the State of North Carolina, and sells and ships all or a large part of its manufactured products to parties outside of the State of North Carolina, conveying the same in interstate commerce by railroad, truck and other carrier. That on the 24th day of March, 1941, plaintiff employed defendant to work in its plant . . . in the city of Asheville, . . . at the work of designing and cutting the materials for said men's, women's and children's leather jackets manufactured by the plaintiff, thereby furthering the production of goods designed and intended for sale and shipment in interstate commerce and being employed directly in interstate commerce, or at a process or occupation necessary to interstate commerce"; that according to the written contract entered into on 24 March, 1941, between plaintiff and defendant, the plaintiff promised and agreed to pay the defendant certain weekly wages from 24 March, 1941, to 28 June, 1941, and another weekly wage from 28 June, 1941, to 31 December, 1941, and yet another weekly wage from 1 January, 1942, to 25 April, 1942, and that it was understood between the parties that the scale of weekly wages

was to be for a work week in strict conformity with the Federal Fair Labor Standards Act of 1938, that is for a work week of 40 hours each week; that instead of requiring the defendant to work 40 hours each week, the plaintiff required defendant to work many hours over and above 40 hours per week, amounting between 24 March, 1941, and 25 April, 1942, to 1156 hours overtime; that according to the terms of the Federal Fair Labor Standards Act of 1938 the defendant is entitled to receive one and one half times his base pay for all hours worked in excess of the 40 hours per week during the period he was employed by the plaintiff; that for the said period from 24 March, 1941, to 25 April, 1942, the defendant is entitled to recover of the plaintiff the total sum of $1,771.87, for overtime under the Federal Fair Labor Standards Act of 1938, and the like sum of $1,771.87 as liquidated damages as fixed by said act, and reasonable attorney's fee for prosecuting this action.

The plaintiff filed a demurrer to the counterclaim of the defendant alleging that the cause of action set forth therein is (1) not a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, nor is it connected with the subject of the plaintiff's action, and (2) that the counterclaim is not such a demand as can be set up as a counterclaim in this action.

The cause came on to be heard upon the plaintiff's demurrer to the counterclaim of the defendant, and the Court being of the opinion that the demurrer was not well grounded, overruled it, and the plaintiff objected, preserved exception and appealed to the Supreme Court.

J. A. Patla for plaintiff, appellant.

Lucile C. McInturff and Claude L. Love for defendant, appellee.

SCHENCK, J. C. S., 521 (now G. S., 1-137), reads: "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

There is no controversy as to the counterclaim alleged existing in favor of the defendant and against the plaintiff between whom several judgments might be had in the action. In view of our opinion, it is unnecessary to decide whether the counterclaim alleged constitutes a cause of action arising out of the contract or transaction set forth in the com-

plaint as the foundation of the plaintiff's claim, or is connected with the subject of the action.

The action alleged in the complaint is for a breach by the defendant of a contract to make patterns for and cut certain goods for the plaintiff, out of which to make ladies' suits and slacks, and this alleged action is *ex contractu,* notwithstanding the breach may have been caused by the neglect or failure of the defendant to perform his obligations thereunder. Such being the case, under subsection 2 of the statute (G. S., 1-137), "any other cause of action arising also on contract, and existing at the commencement of the action" may be set forth as "new matter constituting a defense or counterclaim." G. S., 1-135.

The counterclaim set forth in the answer sounds in contract. It is to enforce, or to collect, a penalty and such actions have been universally held by us to be *ex contractu.* "An action for a penalty given by a statute to any person injured, is an action on contract. This has been the settled law. 3 Blackstone's Com., 158, 160, 161." *Doughty v. R. R.,* 78 N. C., 22; *Katzenstein v. R. R. Co.,* 84 N. C., 688; *Edenton v. Wool,* 65 N. C., 379; *Wilmington v. Davis,* 63 N. C., 582.

The cause of action originally alleged by the plaintiff being upon contract, the cause of action set forth by the defendant, arising also upon contract, could, under subsection 2 of G. S., 1-137, be properly pleaded as a counterclaim, and for that reason the demurrer to the counterclaim was properly overruled.

The judgment of the Superior Court is

Affirmed.

D. M. JACKSON v. R. H. BROWNING AND CLARENCE TAPER.

(Filed 1 March, 1944.)

1. Trial §§ 22a, 22c: Automobiles §§ 18a, 18c—

Upon a motion for judgment as of nonsuit, G. S., 1-183, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion.

2. Automobiles §§ 9a, 11—

"Right of way" is not an absolute right. It is only relative. Nevertheless, as a rule of the road or of law, it is a practical protection of the highest value, when considering the mutual obligations and duties of persons confronted with a common danger on the highway, bearing on the questions of negligence and the rule of the prudent man.

3. Automobiles § 18g: Trial § 22b—

In an action to recover damages for the alleged negligent collision of two automobiles, where the evidence tends to show that plaintiff, going south and defendant, going north on the same road, met and collided where another car had been abandoned, parked on the east side of the road and in plain view of both drivers, who could also see each other for some distance as they approached, the plaintiff having the right of way and in the absence of timely notice that the other driver intended to turn to the left, there was error in sustaining a motion as of nonsuit at the close of plaintiff's evidence.

APPEAL by plaintiff from *Thompson, J.*, at November Term, 1943, of PERQUIMANS.

The plaintiff sued to recover damages for injury to a truck, or motor vehicle, and its cargo, allegedly caused by the negligence of the defendant. The defendant denied negligence on the part of his employee, the driver, pleaded contributory negligence imputable to plaintiff, and set up a cross action for damage to his own truck through plaintiff's negligence; but, upon dismissal of plaintiff's action, offered no testimony.

The evidence tends to show that both plaintiff and defendant were operating trucks in connection with wholesale businesses conducted by them, that of plaintiff being driven by his employee, J. T. Lane, and that of defendant Browning being driven by his employee—codefendant here—Clarence Taper. On the day of the collision plaintiff's truck, laden with merchandise, was proceeding south from Hertford toward Edenton, driven by said Lane, and defendant's truck was proceeding north on the same highway from Edenton to Hertford. About two miles south of Hertford, an automobile had been left parked on the eastern side of the hard surfaced portion of the highway, causing an obstruction in the lane of travel for cars going north. In other words, the car was parked directly in the path of the defendant's truck going north, and the other side of the highway, or right-hand side of plaintiff's driver, was clear of any obstruction. Both trucks appear to have reached the obstruction, or its vicinity, at approximately the same time.

H. C. Stokes testified that the accident occurred near his place of business about two miles south of Hertford, and that he was an eyewitness. Preceding the collision between the Jackson and Browning trucks, owing to another accident, the occupants of a car had gotten out, leaving the car parked upon the hard surface in the lane of travel of cars going north. The Browning truck, in endeavoring to pass this obstruction, turned to the left and met the Jackson truck going south. Jackson's truck was over on its right-hand side as far as it could get—the shoulder was wide enough for a car—and it looked like he was off the hard surface—had gone into the ditch. After the impact the Jackson truck

ran clear across the highway and into a field on the left, about 150 feet, into a telephone pole. Witness would not say the Browning truck had "practically gotten back on its side of the highway before the impact. My best recollection is that they hit when they were right opposite the car that was parked, but I don't know."

J. T. Lane, driver of the plaintiff's truck, testified that it had been raining that morning, and that he was driving almost 35 miles per hour and had the car under control. When he got up to the curve "this colored fellow was parked there on the road" and as witness started to pass, the Browning truck cut out and hit his car "just about as we were off against each other." Witness had gotten his car practically off on his side. The collision caused the load to fall in the front of the car so that witness could not get his foot on the brake. After the car had crossed the road and gone into a field and hit a telephone pole, it stopped. Witness, not being able to apply the brakes, had cut the switch.

On cross-examination the witness stated he saw the Browning car approaching, but made no effort to stop, stating that he had the right of way, was on the right-hand side of the road, and saw no reason to stop.

He testified that when the Browning car cut out around the obstruction, he attempted to avoid a collision by getting off the road to the right and was practically clear of the hard surface; that to have applied the brakes at that time would probably have turned his truck over.

Upon conclusion of the plaintiff's evidence, the defendant demurred to the evidence and moved for judgment as of nonsuit under the statute, G. S., 1-183 (C. S., 567). The motion was sustained, and the plaintiff appealed.

Whedbee & Whedbee for plaintiff, appellant.
W. L. Whitley and C. R. Holmes for defendants, appellees.

SEAWELL, J. The appeal presents the two frequently recurring questions: (1) Upon the whole evidence, taken in its most favorable light for the plaintiff, is there any reasonable inference of defendant's proximately causative negligence? G. S., 1-183 (C. S., 567), and annotations; *Lincoln v. R. R., infra.* (2) Is there, in plaintiff's own evidence, such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion? *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601; *Mulford v. Hotel Co.,* 213 N. C., 603, 197 S. E., 169; *Pearson v. Stores Corp.,* 219 N. C., 717, 721, 14 S. E. (2d), 811.

The evidence does not require extensive analysis for the purpose of this decision.

As to the alleged negligence of the driver of the Browning truck, it is open to the inference, of whatever potency the jury alone may say, that

Taper, the driver of that truck, aware both of the obstruction in his own path and the approach of the Jackson truck, miscalculated both time and distance in his attempt to pass the car parked in his line of travel, took a chance inconsistent with the exercise of reasonable prudence under the existing conditions, and lost the wager. The obstruction was in his own line of travel, and while he undoubtedly had the right to use the unobstructed part of the highway for the purpose of passing it, he could do so only while in the exercise of due care respecting oncoming traffic in the other line, which, nothing else appearing, would have the right of way; or, in other words, both in the timing and manner of executing the movement, he must observe the rule of the prudent man so as reasonably to avoid injury to the southbound truck or its occupants. Under the evidence, whether he did so was a question for the jury.

As to the contributory negligence of the driver of the Jackson truck, while the evidence is to the effect that the driver of either truck might have seen the other truck at a considerable distance either way, there is no evidence that Lane observed, or had any reason to observe, anything connected with the Browning truck that would have put him on notice that the latter intended to try the hazardous operation of passing the parked car first, and would in doing so cut out and into the traffic lane occupied by the Jackson truck. We are not advised—neither was the court below informed—what was the exact relative distances the trucks were from the obstruction when the driver of the Browning truck turned to his left into the lane of the Jackson truck. This might make some difference. But the want of information cannot be replaced by assumption to the disadvantage of the plaintiff on such an issue. As the evidence stands, there is a permissible inference that the turn was made at a somewhat more critical stage of the transaction—in close proximity to the obstruction and the oncoming truck, thus greatly restricting the range of opportunity on the part of the driver of the Jackson truck, and rendering more or less academic many of the "musts" which might otherwise apply.

"Right-of-way" is not an absolute right. It is only relative. It loses its potency as a defense in the face of a superior obligation of duty which not infrequently arises with respect to the use of a part of a highway ordinarily assigned to particular traffic, when its use must be qualified by reasonable prudence in order to avoid injury to other travelers or other persons, and even to oneself. Sometimes stubborn adherence to the supposed right would ill accord with the conduct of a prudent man. Nevertheless, as a rule of the road, or as a rule of the law, it is a practical protection of the highest value to those using the highway; and when we come to consider the mutual obligations and duties of persons confronted with a common danger on the highway, stemming out of their immediate conduct or the conduct of one of them, "right-of-way" is a

substantial consideration and has an important legal bearing upon the question of negligence—particularly the question of when and under what circumstances the rule of the prudent man dictates that one in possession of such right should take notice that his right of way is challenged or his side of the road is about to be made use of by another and the common use attended with peril. The case at bar is full of these potentialities; but the evidence does not clearly indicate the extent of the notice given to the driver of the Jackson truck of the intention to use his lane of travel, nor does it induce a clear and unequivocal impression of his contributory negligence as a matter of law.

On this record, we think the evidence should have been submitted to the jury.

The judgment to the contrary is

Reversed.

EMORY WEST, BESSIE MURRAY, CORA B. MURRAY, VIRGINIA MURRAY GILLIAM AND CLYDE O. MURRAY, ON BEHALF OF THEMSELVES AND ALL OTHER HEIRS AT LAW OF J. L. MURRAY, DECEASED, v. LYONS LEE, CLARENCE SAWYER, J. C. MARTIN, W. E. RANKIN AND FRANK M. PARKER, TRUSTEES OF THE ESTATE OF J. L. MURRAY, DECEASED.

(Filed 1 March, 1944.)

1. Schools §§ 1, 9—

The State maintains no monopoly in the education of its citizens. Neither the school law nor the educational policy of the State excludes private educational enterprise patently conducive to the public welfare.

2. Trusts § 1d: Schools §§ 1, 9—

A trust created by will in 1895, providing a free permanent common school English education for poor white children of Buncombe County, of eight years old and over, whose parents are financially unable to so educate them, is valid and effective, notwithstanding the great advance in free educational facilities provided by the State.

APPEAL by plaintiffs from *Alley, J.*, at December Term, 1943, of BUNCOMBE.

The plaintiffs brought this action against the defendant trustees to have a testamentary trust created by the will of J. L. Murray, deceased, terminated and to have the remaining property turned over to them as heirs at law of Murray.

The will was executed 10 June, 1895, and was admitted to probate 2 September of that year. After providing a life estate in the property for his wife, the testator devised and bequeathed all of his estate to certain named trustees, and their successors, the income, after paying taxes

and keeping the property in repair, to be used ". . . in establishing and forever maintaining and conducting a permanent common school for the education in the common school branches of an English education of the poor white children of Buncombe County, North Carolina, living anywhere within said county." It is further provided that the school shall be conducted in a building in the City of Asheville to be selected by the trustees, with authority to conduct it in any building located on the demised properties or in any other building within the city. Tuition in the school is required to be free and to be given to the children, of eight years and over, of parents who are not financially able to provide an education for their children in the branches taught in the school. There is provision for succession of trustees.

Under this trust a school known as the Murray Hill School was set up and conducted in a building on the devised premises. This building, however, was later condemned and by arrangement with the Buncombe County Board of Education, a room was assigned to the use of the trustees in the Park Avenue school building, one of the public school buildings under the control of said board in the City of Asheville. For a few years the conduct of the school was suspended due to the inability to secure instructors qualified under the provisions of the will; but the school was reopened and is being conducted by the trustees under the trust. It is understood that only children of parents unable financially to provide for the education of their children, as provided in the will, are admitted; but within this latitude children who, by reason of natural endowment or environment, or other retarding cause, have not been able to keep pace with the average pupil are receiving the special attention of the school.

The trust is assailed in this action, and it is sought to terminate it, upon the ground that the expansion of the State school system and the enlargement of opportunity adequately meet every educational demand of indigent children provided for in the will, and destroy the object of the trust.

There are allegations going to the manner of conduct of the trust and supposed departure from its terms which have no legal bearing on the question before us—the termination of the trust, which is the prayer of the complaint; and these need not be considered here.

Among the stipulations made between the parties for the purpose of the hearing, we find it agreed that on or about the year 1887 public schools were established in Asheville and Buncombe County for the education of children from six to twenty-one years of age, which schools have been continuously operated and have been open to those possessed of the requisite qualifications down to the present time; and in said schools the common school branches of an English education have been

continuously taught; and that this was true at the time of the execution of Murray's will. It is agreed that since the execution of the will great improvements have been made in school facilities, school buildings, and generally in the public school system, and that financial support of the schools has been shifted partly, but not wholly, to the State.

It further appears from the agreement that there are, and have been from the date of the will to the present time, in the City of Asheville and County of Buncombe children of eight and more years of age whose parents were, and are, unable to provide them with an education in the common school branches; and that the children admitted to the Murray School are solely of that class.

It is agreed that the trust declared in the will is a charitable trust, perfectly created and established, without limitation as to time of operation; and that a caveat to the will was filed by J. C. West and judgment sustaining the validity of the will was rendered 26 May, 1906. See *In re Murray's Will,* 141 N. C., 588.

Upon these and other more formal stipulations, the case was, by agreement of parties, submitted to Judge Alley at December Term, 1943, of Buncombe Superior Court, for determination without a jury. From a judgment upholding the validity of the trust and declining the prayer of the plaintiffs to have it dissolved, plaintiffs appealed.

John C. Cheesborough and Ronald E. Finch for plaintiffs, appellants.
S. G. Bernard for defendants, appellees.

SEAWELL, J. The stipulations and admissions of the parties, taken together with the grounds on which it is sought to terminate the trust, leave little to be said by the Court.

Following the reference made to the case "*In re Murray's Will,* 141 N. C., 588," we find that in that proceeding, the will was principally challenged because of the trust now under consideration in this Court. With reference to the trust, it was there contended that its provisions were so vague that no *cestui que trust* was definitely ascertainable from its terms. Although in that case *Justice Connor,* speaking for the Court, declared that the question of validity of the trust on account of such supposed vagueness was not then before the Court, the opinion proceeds to find that there is no defect in that respect. On the present appeal, that question is presented, and we think answered by the stipulations.

The date of the will—1895—is worthy of note. The benevolence of the donor recalls the educational enthusiasm of the period. It is reminiscent of the brilliant crusade of McIver and Alderman, and later of Aycock. It is a history into which was written the aspirations of our whole people; and in the intervening years, the State has accomplished

much. We agree with the encomium counsel for the appellants have addressed to public school progress. Even some of the smaller towns have a larger investment in educational facilities, and buildings more commodious and impressive than the University of North Carolina afforded when Aycock, McIver and Alderman matriculated there. The public school term has been increased under the Constitution from four to six months, and by statute to a minimum of eight months, and a maximum of nine months, if the district or the county may so request. Appropriations are large, considering per capita wealth, and the opportunities of free tuition afforded the youth of the State have been vastly enlarged. But it is not claimed by the most optimistic that this amazing progress has saturated the public demand or the public need. Teacher load is a serious problem, menacing efficiency of instruction. Individual attention to backward children is a related unsolved problem. If the Murray trust were instigated today, we could not, as a matter of law, deny it a place in the all-out educational effort upon the argument advanced, if we were permitted to entertain it at all.

However, the adequacy of the public school system to meet the educational needs of the children of indigent parents is not a question we may consider in passing upon the legality and propriety of the further continuance of a charitable trust having the same purpose in view.

The State maintains no monopoly in the education of its citizens. It neither requires nor expects that its youth receive tuition exclusively within the State sponsored public schools. The compulsory attendance law recognizes the private schools teaching comparable branches, and gives credit for attendance there. Neither the school law nor the educational policy of the State excludes private educational enterprise patently conducive to the public welfare. The reasons are cogent and too numerous for discussion here. So long as there remains the liberty to attend the schools it provides, there remains the *raison d'etre* of a charitable trust of this character, no matter how adequate the public school system provided by the State may become.

Indeed, there is implied in the definition of charitable trusts, whose purposes almost necessarily are found amongst those which all enlightened countries recognize as also obligations of government, that they may, as coadjutors, stand side by side with State agencies instituted and maintained for the same purpose.

"A charity may be defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of

government." Scott on Trusts, sec. 368; *Whitsett v. Clapp,* 200 N. C., 647, 649, 158 S. E., 183.

The appellants have admitted that even in prosperous Asheville and Buncombe County, as indeed elsewhere in all the world, the Biblical adage holds true: "Ye have the poor always with you"; and that there are, in the area covered by the trust, those who may qualify as beneficiaries. The plaintiffs, we think, are concluded by this admission.

We find nothing in the record that would justify dissolution of the trust. The judgment of the court below is

Affirmed.

HERTFORD BANKING COMPANY v. H. C. STOKES, T. S. WHITE, J. P. PERRY, NELLIE NEWBY NIXON, ADMINISTRATRIX OF THOMAS J. NIXON, JR., AND EDNA J. NIXON, ADMINISTRATRIX, AND B. B. DAWSON, ADMINISTRATOR OF THOMAS NIXON.

(Filed 1 March, 1944.)

1. Bills and Notes §§ 9c, 10b—

Where a resolution, by the board of directors of a corporation, authorized two of their number, by their signatures, to bind each of the directors individually on any notes due by the company or renewals thereof, the endorsement of such notes, by the two directors so authorized, binds the other directors as endorsers only and not as principals. G. S., 25-69.

2. Bills and Notes § 10b—

An action on a note under seal against an endorser on the note is ordinarily barred after three years from maturity, even though the endorsement is under seal.

3. Limitation of Actions § 2e: Bills and Notes § 17a—

Payments by the principal on a note under seal do not stop the running of the statute of limitations in favor of an endorser.

APPEAL by plaintiff from *Thompson, J.,* at November Term, 1943, of PERQUIMANS.

Civil action instituted 12 January, 1943, to recover of the defendants, as principal obligors, on certain notes executed by White & Company, Inc.

The pertinent facts are as follows: Prior to 8 February, 1924, H. C. Stokes, T. S. White, J. P. Perry, Thomas Nixon and Thomas J. Nixon, Jr., were partners, and doing business under the firm name of White & Company. On 8 February, 1924, the business was incorporated under the name of White & Company, Inc., and each of the above named partners became directors of the corporation.

Certain loans from the plaintiff bank were renewed by the corporation, from time to time, and the notes now held by the plaintiff, the plaintiff alleges, were executed by the corporation and on behalf of the directors of the corporation, pursuant to a resolution, a certified copy of which was delivered to the plaintiff, as follows:

"HERTFORD, N. C.
March 4th, 1930.

"We, the undersigned, Directors of White & Co., Inc., in meeting here assembled do hereby and henceforth authorize H. C. Stokes and J. P. Perry, by their signatures to bind the directors of the said White & Co., Inc., in the matter of any notes due by the company or any renewals of such notes. And it is understood that by such signatures each director becomes liable for his proportionate share in the same manner as if each director individually signed the notes.

"Given under our hands and seals this 5th day of March, 1930.

T. S. WHITE (SEAL)
J. P. PERRY (SEAL)
THOMAS J. NIXON, JR. (SEAL)
H. C. STOKES (SEAL)
THOMAS NIXON (SEAL)."

The notes are in words and figures as follows:

"Hertford, N. C., Feby. 16, 1933. For value received 60 days after date, on Apr. 17, 1933, I promise to pay Hertford Banking Co., or order, $4,950.00 Forty nine hundred and fifty & No/100 Dollars.

"Negotiable and payable without offset at Hertford Banking Co., Hertford, N. C.

WHITE & CO., INC. (SEAL)
P. O. City. By H. C. STOKES, Mgr. (SEAL)."

On the back of the note appears the following:

"Protest, demand and Notice of non-payment waived.

WHITE & CO., INC. (SEAL)
H. C. STOKES, Mgr. (SEAL)
H. C. STOKES (SEAL)."

"Hertford, N. C., Feby. 9, 1933. For value received 60 days after date, on Apr. 10, 1933, I promise to pay Hertford Banking Co. or order $4,950.00, Forty nine Hundred Fifty & No/100 Dollars.

"Negotiable and payable without offset at Hertford Banking Co., Hertford, N. C.

WHITE & CO. (SEAL)
P. O. City. By H. C. STOKES (SEAL)."

On the back of this note appears the following:

"Protest, demand and Notice of non-payment waived.

WHITE & CO., INC. (SEAL)
By H. C. STOKES, Mgr. (SEAL)
H. C. STOKES (SEAL)."

It is admitted that the above notes are subject to certain credits entered thereon.

Thomas Nixon and Thomas J. Nixon, Jr., are dead and their personal representatives have been made parties defendant.

The defendants set up various defenses in their respective answers and each defendant pleads the several statutes of limitation as an express bar to any recovery by the plaintiff.

At the close of plaintiff's evidence, the defendants moved for judgment as of nonsuit, and renewed the motion at the close of all the evidence, which motion was allowed and judgment entered accordingly. Plaintiff appeals, assigning errors.

J. Kenyon Wilson for plaintiff.

Chas. Whedbee for Nellie N. Nixon, Administratrix.

John H. Hall for Edna J. Nixon, Administratrix, and R. B. Dawson, Administrator of Thomas Nixon.

McMullan & McMullan for White, Stokes and Perry.

DENNY, J. The plaintiff presents for our consideration seventeen exceptive assignments of error. However, a proper disposition of this appeal involves only a consideration of the sixteenth exceptive assignment, which was entered to his Honor's ruling in sustaining the motion by the defendants for judgment as of nonsuit.

The plaintiff is seeking to hold the defendants as principal obligors on the aforesaid notes, under and by virtue of the authority contained in the resolution of the Board of Directors of White & Company, Inc.

It appears of record that prior to the execution of the notes set forth herein, J. P. Perry and H. C. Stokes endorsed the notes executed to the plaintiff and that the notes now held by the plaintiff are renewals thereof. However, there is no evidence to support the contention of the plaintiff that Perry and Stokes, on behalf of themselves and the other defendants, signed any notes for White & Company, Inc., as principals, pursuant to the authority contained in the resolution of the directors of said company. Hence, we need not consider what the liability of these defendants might have been if Stokes had executed these notes under seal, as a principal obligor. We are concerned only with the facts as they exist and Stokes

signed the notes as an endorser and purported to do so under seal. Irrespective of his power to bind the other directors, under the provisions contained in the resolution, we hold that he did not bind them to any greater liability than he himself assumed, which was that of an endorser. G. S., 25-69 (C. S., 3044); *Waddell v. Hood, Comr. of Banks,* 207 N. C., 250, 176 S. E., 558; *Trust Co. v. York,* 199 N. C., 624, 155 S. E., 263; *Dillard v. Mercantile Co.,* 190 N. C., 225, 129 S. E., 598.

An action on a note under seal against an endorser on the note is ordinarily barred after three years from the maturity of the note. G. S., 1-52 (C. S., 441); *Howard v. White,* 215 N. C., 130, 1 S. E. (2d), 356; *Nance v. Hulin,* 192 N. C., 665, 148 S. E., 38. Likewise, the three-year statute of limitations is applicable to an action against an endorser, even though the endorsement is under seal. *Howard v. White, supra.*

Certain payments were made on the notes sued upon by some of the defendants; however, the last of these payments were made and credited on 4 October, 1933. Small payments by White & Company, Inc., were made and credited on the notes in 1937, 1938 and 1939; these payments, however, did not stop the running of the statute of limitations in favor of the defendants. *Nance v. Hulin, supra; Barber v. Absher Co.,* 175 N. C., 602, 96 S. E., 43.

Conceding that the defendants are liable as endorsers on these notes, more than three years elapsed after 4 October, 1933, before the institution of this action, hence the action is barred by the three-year statute of limitations.

His Honor properly sustained the motion of the defendants for judgment as of nonsuit, and the judgment of the court below is

Affirmed.

BOARD OF EDUCATION OF CHOWAN COUNTY v SHIRLEY JOHNSTON.

(Filed 1 March, 1944.)

1. Escheats § 1—

The right of succession by escheat to all property, when there is no wife or husband or parties to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by the State Constitution, Art. IX, sec. 7, and extended by several statutes. G. S., 116-20, 21, 22, 23, 24, and 25.

2. Descent and Distribution § 10b: Escheats § 2—

Prior to 1935, G. S., 29-1, Rule 10, when an illegitimate child died leaving no issue and his mother had predeceased him, the collateral relatives of the mother could not inherit from her illegitimate child.

3. Escheats § 3—

It is not necessary, under our laws governing inheritances and escheats, for the University of North Carolina to institute an action and have a court of competent jurisdiction determine whether or not such an inheritance has escheated before title to the inheritance vests in the University. Title to property which escheats does not remain *in nubibus.*

APPEAL by defendant from *Thompson, J.,* at November Term, 1943, of CHOWAN.

This is an action in ejectment. Plaintiff and defendant claim title through a common source. The land in controversy was conveyed to Allen A. Johnston by deed dated 4 November, 1879, and said deed was duly recorded in the office of the Register of Deeds of Chowan County, North Carolina.

Allen A. Johnston and his wife, Florence Johnston, had born unto them two children, to wit, the defendant Shirley Johnston and Martilda Johnston.

Allen A. Johnston died testate 13 February, 1929, and the will was duly probated in the office of the clerk of the Superior Court of Chowan County.

The testator devised the land described in the complaint filed in this action, in fee simple, to Dorothy Johnston, his grandchild, an illegitimate child of his daughter Martilda, subject, however, to a life estate devised to his wife, Florence Johnston.

Martilda Johnston, the mother of Dorothy Johnston, predeceased Dorothy, and Dorothy died 9 September, 1931, at the age of 18 years, unmarried and childless, leaving Florence Johnston, her grandmother, and Shirley Johnston, her uncle, surviving her.

Florence Johnston died 13 December, 1942, leaving Shirley Johnston, her only heir at law.

In 1937, the State of North Carolina and the University of North Carolina conveyed the land devised by Allen A. Johnston to Dorothy Johnston, to the Chowan County Board of Education, subject to the life estate of Florence Johnston, reciting in said conveyance that the interest of Dorothy Johnston in said land had escheated.

After the death of Florence Johnston in 1942, the plaintiff brought this action to eject defendant, who was in the possession of said land, claiming title.

There was a verdict and judgment below, declaring plaintiff to be the owner and entitled to immediate possession of the land.

The defendant appeals and assigns error.

W. D. Pruden for plaintiff.
P. H. Bell for defendant, appellant.

DENNY, J. The right of succession by escheat to all property, when there is no wife or husband or parties entitled to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by the State Constitution, Art. IX, sec. 7, and extended by several statutes which, are now G. S., 116-20, 21, 22, 23, 24 and 25 (C. S., 5784, 5784 [a], 5785, 5786, 5786 [1] and 5786 [2]). *In re Neal,* 182 N. C., 405, 109 S. E., 70.

Prior to the enactment of chapter 256, Public Laws of 1935, G. S., 29-1, Rule 10 (C. S., 1654, Rule 10), when an illegitimate child died leaving no issue and his mother had predeceased him, the collateral relatives of the mother could not inherit from her illegitimate child. *Carter v. Smith,* 209 N. C., 788, 185 S. E., 15; *Wilson v. Wilson,* 189 N. C., 85, 126 S. E., 181; *In re Neal, supra; University v. Markham,* 174 N. C., 338, 93 S. E., 845.

If Dorothy Johnston had died after the enactment of chapter 256, Public Laws 1935, the defendant would have inherited her interest in the land now in controversy, subject to the life estate of Florence Johnston. However, the appellant contends that the interest of Dorothy Johnston has not escheated to the University of North Carolina, since the University failed to institute an action and obtain a judgment declaring said interest escheated, prior to the enactment of the aforesaid Act. Section 3 of the Act contains the following provision: "This Act shall be in full force and effect from and after its ratification and shall apply to all estates which have not been actually distributed prior thereto." The contention cannot be sustained. It is not necessary, under our laws governing inheritances and escheats, for the University of North Carolina to institute an action and have a court of competent jurisdiction to determine whether or not such an inheritance has escheated before the title to the inheritance vests in the University.

The question involved in this appeal was settled in the case of *Carter v. Smith, supra.* Ed. L. Carter, the intestate, an illegitimate child, had died without issue, in 1932, leaving a substantial estate consisting of both real and personal property. The mother of said child had predeceased him. The proceeds from the sale of the real property and the personal estate were in the hands of the administrator, subject to the order of the court, at the time of the enactment of chapter 256, Public Laws of 1935. The appellants contended that since the estate had not been distributed prior to the enactment of the aforesaid Act, the University was not entitled to the proceeds from the sale of the real property or to take the personal property. However, this Court said: "At his death on 20 August, 1932, Ed L. Carter left surviving him no person who was entitled to his property, real or personal, as his heir at law or as his next of kin. He died intestate. He had never married. He was the only

child of Bettie Carter, who had predeceased him. He was her illegitimate son. Under the Constitution and laws of this State, in force at the death of Ed L. Carter, his property, both real and personal, subject only to the claims of his creditors, if any, vested immediately in the University of North Carolina (see *In re Neal,* 182 N. C., 405, 109 S. E., 70), and could not be divested by a statute enacted by the General Assembly subsequent to his death. Chapter 256, Public Laws of North Carolina, 1935, which was ratified on 29 April, 1935, is not applicable to the instant case, notwithstanding the provisions of section 3 of the statute." See also *University v. High Point,* 203 N. C., 558, 166 S. E., 511, in which opinion *Stacy, C. J.,* discusses the history of escheats, and points out that the title to property which escheats does not "remain *in nubibus.*"

In the trial below, we find

No error.

ATLANTIC DISCOUNT CORPORATION v. C. L. YOUNG, TRADING AS YOUNG MOTOR COMPANY, WILLIAM C. WORSLEY AND DAVID WORSLEY.

(Filed 1 March, 1944.)

Chattel Mortgages §§ 10, 12a: Principal and Agent § 2—

Where a mortgagor is left in possession of the mortgaged goods which, in the contemplation of the parties, are to be disposed of by the mortgagor in the ordinary course of trade, such mortgagor is the agent of the mortgagee to the extent that he may pass the title to the goods, sold in the usual way to a purchaser, freed from the mortgage lien.

APPEAL by plaintiff from *Thompson, J.,* at November Term, 1943, of PASQUOTANK. Affirmed.

This was an action to recover a motor truck in the possession of defendants Worsley, by virtue of a mortgage thereon executed by C. L. Young or the Young Motor Company to the plaintiff.

At the conclusion of all the evidence, defendants' renewed motion for nonsuit was allowed. Plaintiff appealed.

W. A. Worth and McMullan & McMullan for plaintiff.

T. T. Thorne and R. Clarence Dozier for defendants.

DEVIN, J. Plaintiff's appeal from the judgment of nonsuit entered below brings up the question of the sufficiency of the evidence offered to make out a case for the possession of a mortgaged motor truck as against

a subsequent purchaser for value. The question debated in the briefs, whether the mortgage had been properly admitted to registry so as to constitute notice to a subsequent purchaser, we need not decide as we think the judgment below should be sustained on another ground.

It was made to appear that subsequent to the execution of the mortgage on the motor truck described, to secure $850.00, the mortgagor, the Young Motor Company, an automobile dealer, sold the truck to defendants Worsley, who paid the full price therefor, approximately $1,150.00, to the Motor Company. At the time of this transaction, which took place in Roanoke Rapids, a representative of the plaintiff, Mr. W. R. Curry, was present. The Young Motor Company or C. L. Young forwarded a check for the amount of the mortgage to plaintiff to its home office in Elizabeth City. However, the check proved to be worthless on account of insufficiency of funds. Thereafter this action was instituted to recover possession of the truck from the purchasers, the defendants Worsley.

There was evidence tending to show that plaintiff had been engaged for some time in the business of loaning money to Young Motor Company and taking mortgages on motor vehicles which were to be sold in the ordinary course of trade, and that the custom was for the purchasers of these cars to pay the money to the Motor Company, including the amounts due plaintiff, and that plaintiff's representative, whose duty it was to collect delinquent accounts and repossess cars, would "pick up" this money and take it to the home office, or, as in this instance, it would be remitted by check. This practice continued as long as Young was in business.

Thus, it seems to have been contemplated that the mortgaged vehicles were to be sold by Young, and that the purchasers of these vehicles so encumbered should pay the full price therefor to Young, and that he was authorized to receive the amounts due on the mortgages for the plaintiff. Defendants testified that plaintiff's representative, present at the time of the sale, advised them of the mortgage on the truck, but told them to pay the purchase price in full to Mr. Young, and it would be all right. This was not admitted. However, it does sufficiently appear that Young was impliedly authorized to receive payment for the truck, including the amount of plaintiff's mortgage, and that Young failed to make good to the plaintiff the amount of the mortgage debt which the purchasers had in good faith paid. We think the plaintiff's lien had been waived.

The principle is aptly stated in *R. R. v. Simpkins,* 178 N. C., 273, 100 S. E., 418, 10 A. L. R., 731. There it was said that the mortgagor left in possession of goods which, in the contemplation of the parties, are to be disposed of by the mortgagor in the ordinary course of trade, is the agent of the mortgagee to the extent that he may pass the title to the goods, sold in the usual way to a purchaser, freed of the mortgage

lien. This principle of law was also declared in *Bynum v. Miller,* 89 N. C., 393; *Etheridge v. Hilliard,* 100 N. C., 250, 6 S. E., 571; *Merritt v. Kitchin,* 121 N. C., 148, 28 S. E., 358; *Finance Co. v. Cotton Mills Co.,* 187 N. C., 233 (241), 121 S. E., 439; *Boice v. Finance & Guaranty Co.,* 127 Va., 563; 136 A. L. R., 821; 97 A. L. R., 646. While in *Whitehurst v. Garrett,* 196 N. C., 154, 144 S. E., 835, it was held that the mere display of a mortgaged automobile in a show window was not sufficient to constitute waiver of the lien, here the evidence indicates in addition a regular course of dealing for the sale of mortgaged motor vehicles and authorized receipt by the mortgagor of the price, including amounts due on the mortgages.

Upon the evidence presented in this case we are inclined to agree with the trial judge that plaintiff was not entitled to recover the truck from the defendants Worsley. The judgment of the Superior Court is

Affirmed.

RAYMOND L. WILLIAMS v. DONA LEE WILLIAMS.

(Filed 1 March, 1944.)

1. Divorce §§ 2a, 8—

In an action for divorce, based upon two years separation by mutual consent, the plaintiff must not only show that he and the defendant have lived separate and apart for the statutory period, but also that the separation was voluntary in its inception.

2. Same—

There can be no voluntary separation as a ground for divorce without the conscious act of both of the parties, by an agreement expressed or implied; and there can be no agreement, assent or acquiescence on the part of a spouse who is mentally incapable of assenting.

3. Same—

If a plaintiff, in a divorce action on grounds of separation, contributes to the support of his wife, solely in an attempt to fulfill the obligation imposed by statute, his conduct is not inconsistent with a legal separation; but, if he makes such payments in recognition of his marital status and in discharge of his marital obligations, there is no living separate and apart within the meaning of the statute.

APPEAL by defendant from *Thompson, J.,* at September Term, 1943, of CURRITUCK. New trial.

Civil action for divorce on grounds of two years separation.

Plaintiff and defendant were married in 1924. They have four children, the last of which was born 20 June, 1941. In 1938 they were in

New York, and plaintiff had defendant confined in an institution for the feeble-minded. She was first sent to the Jewish Hospital, then to Kings County Observation Ward, and from there to an institution in Brooklyn. Plaintiff could not get her out, and so he borrowed money and had her transferred to a private institution. She was released from this institution in November, 1938. In 1940 he had her confined in the U. S. Public Health Service Institution at Norfolk, and on 6 July, 1939, she was committed to the Eastern State Hospital at Williamsburg "as insane." She obtained a furlough on 22 December, 1940, and received a discharge "as restored" 29 January, 1942.

Plaintiff relies upon a separation by mutual agreement entered into orally on 9 January, 1941. He testified that on that date they had a conversation in which she said she did not want to live with him any longer and wanted a divorce; that when she insisted he told her, "I am through and I won't ever have anything more to do with you. I will help you in any way I can." He further testified that he then separated himself from the defendant with the intent to discontinue all marital relations and has since lived separate and apart from her.

Defendant denied the agreement and offered evidence tending to show that he thereafter contributed to her support, and that they visited and cohabited for some time after the alleged agreement.

The usual issues of residence, marriage, and separation were submitted to and answered by the jury in favor of the plaintiff. From judgment on the verdict defendant appealed.

Chester R. Morris and R. Clarence Dozier for plaintiff, appellee.

M. B. Simpson for defendant, appellant.

BARNHILL, J. The court below failed to instruct the jury as to the law applicable to the evidence offered by the defendant tending to show that at the time of the alleged agreement she was mentally incapable of consenting to or acquiescing in a separation. This is the basis of defendant's primary exception.

The meaning of the terms "separation" and "separate and apart" has been fully and sufficiently discussed in a number of recent decisions of this Court. *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352; *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5; *Byers v. Byers,* 222 N. C., 298; *Byers v. Byers,* 223 N. C., 85; *Parker v. Parker,* 210 N. C., 264, 186 S. E., 346. Repetition here would be supererogatory.

To establish his cause of action, based on separation by mutual consent, plaintiff must not only show that he and the defendant have lived apart for the statutory period, but also that the separation was voluntary in its inception.

There can be no voluntary separation without the conscious act of both of the parties. There must be an agreement, express or implied. It must appear that they lived apart in a state of separation because of their mutual purpose to do so or because one so determined and the other assented or acquiesced.

But there can be no agreement, assent, or acquiescence on the part of a spouse who is mentally incapable of assenting. *Lee v. Lee, supra; Woodruff v. Woodruff, supra; Camire v. Camire,* 43 R. I., 489; *Pile v. Pile,* 94 Ky., 309; *Messick v. Messick,* 177 Ky., 337, 197 S. W., 792; *Galiano v. Monteleone,* 178 La., 567, 152 So., 126; 17 Am. Jur., 233; Anno. 51 A. L. R., 769; and 111 A. L. R., 872.

"It is, of course, well understood that when a ground of divorce is dependent upon the voluntary act or omission of a spouse the ground cannot exist if he is insane." *Ray v. Ray,* 19 Ala., 522; *Knabe v. Berman,* 111 A. L. R., 864.

There was evidence that plaintiff, after the alleged agreement, made provision for an allotment out of his salary as a member of the U. S. Coast Guard for the benefit of defendant, and also from time to time contributed to her support. The force and effect of this evidence is for the jury.

If the plaintiff, after parting from defendant, continued to contribute to her support solely in an attempt to fulfill the obligation imposed by statute, his conduct in this respect was not inconsistent with a legal separation. *Byers v. Byers,* 222 N. C., 298. Conversely, if he made such payments in recognition of his marital status and in discharge of one of his marital obligations, they were not living separate and apart within the meaning of the statute.

Here the evidence is conflicting. The motive which prompted the contributions is material. The court in its charge should explain the law as it applies to the different aspects of this testimony.

The defendant's indicated exceptive assignment of error must be sustained and a new trial awarded.

New trial.

SMOKE MOUNT INDUSTRIES, INC., v. THE EUREKA SECURITY FIRE & MARINE INSURANCE COMPANY OF CINCINNATI, OHIO, AND BANK OF ASHEVILLE, ASHEVILLE, N. C.

(Filed 1 March, 1944.)

1. Removal of Causes § 2—

In considering a petition for the removal of a cause to the Federal Courts, the allegations of the complaint are admitted to be true and the

rights of the parties must be determined upon the allegations contained therein.

2. Same—

A purely nominal party, or technical arrangement of parties, will not oust the jurisdiction of the Federal Courts, nor prevent the removal of a cause thereto. The courts will look to the actual interest and the real contest between the parties for a determination of the question.

3. Removal of Causes §§ 4a, 4b—

Where insured brought suit in the State courts, alleging a loss under a fire policy, against insurer, a foreign corporation, and also against a resident mortgagee, named with plaintiff in the loss payable clause as its interest might appear, and the complaint alleged that the mortgagee had been paid in full, jurisdictional amount and diverse citizenship being admitted, petition for removal to the Federal Court should have been granted.

APPEAL by defendant, The Eureka Security Fire & Marine Insurance Company, from *Nettles, J.*, at January Term, 1944, of BUNCOMBE.

Civil action instituted by plaintiff, a resident of North Carolina, to recover the proceeds of a fire insurance policy which contained a loss payable clause to a resident bank as mortgagee. The complaint alleges that the indebtedness secured by the mortgages held by the bank was paid in full prior to the institution of the action.

The defendant, The Eureka Security Fire & Marine Insurance Company, duly filed its petition for removal of this cause to the United States District Court for the Western District of North Carolina, within the time required, together with a good and sufficient bond duly conditioned as provided by law. Upon a hearing on the petition to remove, before the clerk of the Superior Court of Buncombe County, N. C., the defendant's bond was approved, but the motion for removal was denied. Upon appeal to his Honor, Nettles, J., at the January Term, 1944, of the Superior Court of Buncombe County, the motion to remove was likewise denied, and the defendant, The Eureka Security Fire & Marine Insurance Company, appeals to the Supreme Court.

J. A. Patla and Geo. A. Shuford for plaintiff.
Robinson & Jones for defendant, appellant.

DENNY, J. The petition for removal, in addition to the allegations as to jurisdictional amount, and diverse citizenship, further alleges (1) no subsisting cause of action against the resident defendant, the Bank of Asheville; (2) fraudulent joinder; and (3) the cause of action alleged in the complaint can be fully and completely determined between the petitioner and the plaintiff; and that said cause of action or controversy is

entirely separate and distinct from any controversy involving petitioner's codefendant.

In considering a petition for removal, the allegations of the complaint are admitted to be true and the rights of the parties must be determined upon the allegations contained therein. Plaintiff alleges that it executed certain chattel mortgages to the Bank of Asheville to secure its indebtedness to said bank, that the bank required the plaintiff to have the property, on which it executed the chattel mortgages, insured against loss by fire and to have the proceeds of the policy, in the event of loss or damage, payable to the Bank of Asheville, as its interest may appear. Thereafter a loss occurred and before instituting this action, plaintiff paid all its indebtedness to the Bank of Asheville which was secured by the aforesaid chattel mortgages and the fire insurance policy now in controversy. It is not necessary to have the bank as a party to the action in order to prove the payment of plaintiff's indebtedness to the bank; and if this indebtedness has been paid, as alleged, the Bank of Asheville had no interest in the proceeds of the fire insurance policy, which may be recovered by plaintiff from the nonresident defendant. Therefore, we hold that the Bank of Asheville is not a necessary party. *Simmons v. Ins. Co.,* 196 N. C., 667, 146 S. E., 567; *Timber Co. v. Ins. Co.,* 190 N. C., 801, 130 S. E., 864; *Christiansen v. Bankers' & Shippers' Ins. Co.,* 207 N. W., 108. In the last case the facts are similar to those in the instant case. There the Supreme Court of South Dakota held: "As to the contention that the policy was issued to the National Bond & Investment Company, and the corporation was a necessary party plaintiff, the admissions of the answer show that the policy was issued to respondent on a car owned by her, and the policy held by the corporation to protect its mortgage lien. There is no merit in the contention that the corporation was a necessary party, and proof that its claim was fully paid at the time shows that there is no merit in the contention."

A purely nominal party, or technical arrangement of parties, will not oust the jurisdiction of the Federal Court. *Brown v. R. R.,* 204 N. C., 25, 167 S. E., 479; *Allred v. Lumber Co.,* 194 N. C., 547, 140 S. E., 157; *Calloway v. The Ore Knob Copper Co.,* 74 N. C., 200. In *Niccum v. Northern Assur. Co.,* 17 F. (2d), 160 (Ind.), the Court said: "Actual interest, and not technical arrangement of the parties to a suit, is decisive. *Evers v. Watson,* 156 U. S., 527, 15 S. Ct., 430, 39 L. Ed., 520; *Removal Cases,* 100 U. S., 457, 25 L. Ed., 593; *Pacific Ry. Co. v. Ketchum,* 101 U. S., 289, 25 L. Ed., 932. Under these decisions, and many others not necessary to cite, it seems to be the settled law that the courts, in determining the question of removability, will not be bound by any arrangement or alignment fixed in the pleadings, but will look to the real contest between the parties for a determination of the question."

The appellee insists that the case of *Proctor v. Ins. Co.,* 124 N. C., 265, 32 S. E., 716, is controlling and supports its contention that the defendant bank is a necessary party. We do not so hold. In the *Proctor case, supra,* McCullers, the mortgagor, procured the insurance and had the loss payable clause made to the assured and the mortgagee "as their interests may appear." The mortgagee undertook to collect the insurance without making the assured a party. There was no allegation that the insured had no interest in the proceeds of the policy. Furthermore, the Court pointed out that the assured should be a party plaintiff, and upon failure to come in and make himself coplaintiff, the statute (Code, 185; C. S., 457, now G. S., 1-70) provides that he may be made a defendant.

There was error in refusing to grant the motion for removal of this cause to the Federal Court.

Reversed.

STATE v. WILLARD NUNLEY.

(Filed 1 March, 1944.)

Indictment § 19: Criminal Law §§ 29a, 52b—

In a criminal prosecution, based upon an indictment charging larceny of money and valuable papers and evidence tending to show, at most, an attempt to commit larceny of two suitcases, there is a fatal variance between *allegata* and *probata*, of which advantage may be taken under an exception to the disallowance of a motion for judgment as of nonsuit.

APPEAL by defendant from *Sink, J.,* at November Term, 1943, of ROCKINGHAM.

The defendant was tried upon a bill of indictment charging the larceny of "One Hundred Twenty Four Dollars in money, and valuable papers of the value of Two Hundred Dollars, of the goods, chattels and moneys of one John Nunley," and of the receiving said goods, chattels and moneys, knowing them to have been stolen; and was found to be "guilty of an attempt to commit larceny."

At the close of the State's evidence the court allowed defendant's motion for judgment as in case of nonsuit against the charge of receiving stolen goods knowing them to have been stolen. The court disallowed such motion against the charge of larceny and announced that it would submit to the jury, under such charge, the question of the guilt or innocence of the defendant of the offense of an attempt to commit larceny.

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

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

Sharp & Sharp for defendant, appellant.

SCHENCK, J. The bill of indictment charges the larceny of "One Hundred Twenty Four Dollars in money, and valuable papers of the value of Two Hundred Dollars of the goods, chattels and moneys of one John Nunley." The evidence of the State tending to show larceny or an attempt to commit larceny, if there was such evidence, relates to two suitcases or the baggage of John Nunley. His Honor in his charge refers to the baggage, bags or property of the prosecuting witness, never to his money or valuable papers.

In truth, there appears in the State's brief the following: "It becomes apparent from the evidence and from the charge of the judge that the case was tried upon the theory that the defendant attempted to steal two suitcases."

The allegation being that the defendant committed larceny of money and valuable papers of John Nunley, and the evidence tending to show, at most, an attempt to commit larceny of two suitcases or baggage of John Nunley, there was a fatal variance between the *allegata* and the *probata*, of which defect the defendant could take advantage under his exception to the disallowance of his motion for judgment as of nonsuit. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Grace,* 196 N. C., 280, 145 S. E., 399, and cases there cited.

Reversed.

WINNIE COPENING v. WINSTON MUTUAL LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 1 March, 1944.)

Trial §§ 30, 38—

The failure of the trial court to submit appropriate issues on a material phase of the case presented by pleading and evidence, coupled with instructions to the jury apparently confining consideration of the evidence relating thereto to the issue of fraud, was sufficiently prejudicial to require a new trial.

APPEAL by defendant from *Alley, J.*, at November Term, 1943, of BUNCOMBE. New trial.

Action to recover on a policy of insurance issued by defendant on the life of Nathaniel Copeny.

The issuance of the policy, payment of premiums and death of insured were admitted. The defendant alleged fraud in the procurement of the policy, and also set up provisions in the policy limiting liability for death occurring within two years when due to certain enumerated diseases, and excluding from coverage death resulting from drinking intoxicating liquor or drunkenness, and alleged that the death of the insured resulted from chronic alcoholism. Issues addressed to this last mentioned defense were tendered by defendant and refused by the court.

The issues submitted related only to (1) the issuance of the policy, (2) death within two years, and (3) fraud in the procurement of the policy. The first two issues were answered "yes" by consent. The court then charged the jury upon the controverted issue of fraud which he termed "the main contest at issue." The provisions in the policy limiting liability and excluding from coverage death due to drunkenness were referred to only in connection with the charge on the issue of fraud.

The jury answered the issues in favor of the plaintiff, and from judgment on the verdict defendant appealed.

Geo. F. Meadows for plaintiff.
Sanford W. Brown for defendant.

DEVIN, J. The trial judge declined to submit issues, tendered by defendant, addressed to the defense set up in the answer, and supported by evidence, that the death of the insured was due to causes excluded from coverage by limitations in the policy. In the charge the evidence relating to the issue of fraud in the procurement of the policy was correctly presented to the jury, but the only instructions given with reference to the provisions contained in the policy which limit its coverage were stated in connection with the issue of fraud.

We think the failure to submit appropriate issues on a material phase of the case presented by pleading and evidence, coupled with instructions to the jury apparently confining consideration of the evidence relating thereto to the issue of fraud, was sufficiently prejudicial to require a new trial, and it is so ordered.

New trial.

JAMES COOPER v. T. BODDIE WARD, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA.

(Filed 1 March, 1944.)

(See *S. v. Cooper*, *post*, 100.)

APPEAL by plaintiff from *Harris, J.*, at Chambers, 24 January, 1944. From WAKE.

Civil action for *mandamus* to require defendant to deliver to plaintiff his driver's license surrendered under judgment of Superior Court and forwarded to and now in possession of defendant.

These facts in summary appear from the pleadings: Plaintiff, as defendant in a criminal proceeding in the Superior Court of Forsyth County, on 10 January, 1944, pleaded guilty to a violation of the traffic laws of the State of North Carolina, with which he was charged. Thereupon, the court entered judgment "that the defendant surrender his driver's license to the clerk of this court and not operate a motor vehicle for a period of twelve (12) months and . . . pay a fine of $25.00 and the costs," and ordered the defendant there into custody of sheriff until costs and fine be paid and the driver's license be surrendered to the clerk. Defendant there, in ignorance of his rights, and while his counsel was engaged in other matters before the court, and to avoid going to jail, complied with the judgment, and surrendered his driver's license to the clerk. The counsel, ascertaining that his client had complied with terms of the judgment, made demand upon the clerk for return of the costs and fine paid, and of the driver's license surrendered as aforesaid, to the end that defendant there might appeal from said judgment to the Supreme Court. But the clerk refused to comply with the demand without an order from the court, and the court refused to enter such order. Whereupon the clerk forwarded the license to Commissioner of Motor Vehicles of North Carolina, defendant in this action, who, while conceding that he has not revoked or suspended said license, declines to return it until such time as said judgment is reversed or modified by the courts of North Carolina.

In the present action the court, while finding facts substantially as alleged in the complaint and admitted in the answer, denied the writ of *mandamus* upon ground that an order therefor would be in effect a review of the judgment of another judge of Superior Court. Plaintiff appeals to Supreme Court and assigns error.

Felix L. Webster for plaintiff, appellant.

Attorney-General McMullan and Assistant Attorney-General Adams for defendant, appellee.

WINBORNE, J. Upon hearing in this Court, the parties having agreed that the complaint in this action might be treated as petition for writ of *certiorari* in the case of *S. v. James Cooper,* No. 4091, in Superior Court of Forsyth County, to the judgment in which this action relates, this appeal will be, and is hereby dismissed, and each party shall pay his own costs.

Appeal dismissed.

STATE v. JAMES COOPER.

(Filed 1 March, 1944.)

1. Criminal Law § 69—

By consent of the parties the complaint, in a civil action to compel the Commissioner of Motor Vehicles to restore an automobile driver's license surrendered pursuant to a judgment in a criminal prosecution, will be considered as an application for writ of *certiorari,* in the nature of a writ of error, to bring up the record in the criminal prosecution as it appears in the Superior Court.

2. Automobiles §§ 1, 36—

The power to suspend or revoke an automobile driver's license is vested exclusively in the State Department of Motor Vehicles, subject to the right of review by the Superior Court. G. S., 20—Art. 2.

3. Same—

A judgment of the Superior Court requiring a defendant to surrender his license to drive a motor vehicle and prohibiting him from operating such vehicles for a specified period, is in excess of the jurisdiction of such court and is void.

PETITION for *certiorari* in the nature of a writ of error to bring up for review judgment entered in Superior Court of Forsyth County.

Criminal prosecution tried at 10 January, 1944, Term of Superior Court of Forsyth before *Sink, J.,* on appeal thereto from judgment of municipal court of the city of Winston-Salem upon conviction under warrant charging reckless driving of motor vehicle.

Plea: Guilty of "violating traffic."

Judgment: That defendant surrender his driver's license to the clerk of Superior Court and not operate a motor vehicle for twelve (12) months, and pay a fine of $25.00 and the costs.

Attorney-General McMullan for the State.
Felix L. Webster for defendant.

WINBORNE, J. In the civil action of James Cooper, as plaintiff, against T. Boddie Ward, Commissioner of Motor Vehicles of North

Carolina, as defendant, *ante,* 99, the parties consented on hearing in this Court that the complaint might be considered as an application for writ of *certiorari* in the nature of a writ of error to bring up for review the record in this criminal prosecution as it appears in the Superior Court of Forsyth County. The application is allowed on authority of *S. v. Lawrence,* 81 N. C., 522, and *S. v. Green,* 85 N. C., 600, and in accordance with pronouncements set forth in *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630; *S. v. Stamey,* 209 N. C., 581, 183 S. E., 736; and *S. v. Moore,* 210 N. C., 686, 188 S. E., 421, where further authorities are assembled and the subject treated.

A duly certified copy of the record in the Superior Court has been filed in this Court and is considered as a return to the writ. The record discloses that at the 10 January, 1944, Term of Superior Court of Forsyth County, defendant James Cooper, having appealed thereto from judgment of the municipal court of the city of Winston-Salem upon conviction under warrant charging him with reckless driving of motor vehicle on 3 January, 1944, pleaded "guilty to violating traffic," and that thereupon the court entered judgment as hereinabove indicated. Defendant contends that so much of the judgment as requires him to surrender his driver's license and not operate a motor vehicle for a period of twelve months is void for want of jurisdiction. He relies upon provisions of the Uniform Driver's License Act, Public Laws 1935, chapter 52, as amended by Public Laws 1941, chapter 36, G. S., 20, Art. 2, and the decision of this Court in the case of *S. v. McDaniels,* 219 N. C., 763, 14 S. E. (2d), 793.

In the *McDaniels case, supra,* which originated prior to 1 July, 1941, the effective date of chapter 36 of Public Laws 1941, by which the Department of Motor Vehicles was created and vested with power theretofore existing in the department of revenue to enforce provisions of the Uniform Driver's License Act, Public Laws 1935, chapter 52, this Court, in construing and applying the Act, held that the power to suspend or revoke drivers' licenses is vested exclusively in the Department of Revenue, subject to the right of review by the Superior Court, and that a municipal court is without authority to suspend or revoke such license. This is in keeping with the provisions of the statute as it then existed. But by the 1941 Act, chapter 36, the power to suspend or revoke drivers' licenses after 1 July, 1941, vested exclusively in the newly created Department of Motor Vehicles, subject to the same right of review by the Superior Court as existed prior to that date. G. S., 20-25.

For the same reason that a municipal court is without power to suspend or revoke a drivers' license, and that any attempt by such court to do so is void, as held in *S. v. McDaniels, supra,* the Superior Court is without power to suspend or revoke a driver's license, and any attempt

by it so to do is void as being in excess of jurisdiction. As is stated in *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7, in a quotation from Freeman on Judgments (4 Ed.), p. 176, a judgment may be void for "want of power to grant the relief contained in the judgment," and in pronouncing a judgment of this class, the court "acts in excess of jurisdiction."

In the light of this principle, the provisions of the judgment requiring defendant to surrender his license and prohibiting him from operating a motor vehicle for a period of twelve months, being in excess of the jurisdiction of the Superior Court, are void, and the same are hereby stricken out.

Error.

BESSIE PITT BURGESS v. CHARLES C. SIMPSON AND HIS WIFE, LENA P. SIMPSON.

(Filed 1 March, 1944.)

Wills §§ 33a, 35—

Under a will by a husband, devising all of his property to his wife, her executors, administrators, and assigns, forever, with further provision that at the end of the wife's natural existence, should the whole or any part of the devise remain undisposed of by the wife, the same to go to testator's nearest of kin, the wife acquires and may convey a fee simple title to the land devised.

APPEAL by defendants from *Bone, J.,* at December Term, 1943, of NASH.

Controversy without action submitted on an agreed statement of facts.

Plaintiff, being under contract to convey a lot of land lying in the City of Rocky Mount, known as 326 S. Pearl Street, being the same property described in a deed from W. E. Parrish and wife, Maggie E. Parrish, to B. G. Burgess, recorded in Book 186, page 298, Nash County Registry, duly executed and tendered a deed therefor and demanded payment of the purchase price as agreed, but the defendant declined to accept the deed and refused to make payment, claiming that the title offered was defective.

The sufficiency of the title offered was properly made to depend upon the construction of the following clause in the will of the late B. G. Burgess, to wit:

"I give, devise and bequeath to my beloved wife, Bessie Pitt Burgess, all of my worldly estate, real, personal or mixed, to which I shall be entitled at the time of my decease; to have and to hold to her and her executors, administrators and assigns, forever. However, let it be provided that at the end of my beloved wife's natural existence, should the whole or any part thereof of my original estate remain undisposed of by

her, the same shall go to my nearest of kin, the same to be theirs absolutely, and in fee simple forever."

Upon the facts agreed, the court being of the opinion that the deed tendered would convey an indefeasible, fee simple title to the lot of land described therein, gave judgment for the plaintiff in accordance with the agreement under which the controversy was submitted without action, from which the defendants appealed, assigning error.

Battle, Winslow & Merrell for plaintiff, appellee.
F. S. Spruill for defendants, appellants.

PER CURIAM. This case turns on the question as to whether the plaintiff, Bessie Pitt Burgess, acquired a fee simple title, or is able to convey such a title to the land devised to her by the will of her late husband, B. G. Burgess, quoted above. His Honor correctly held that the plaintiff did acquire and could convey a fee simple title to the land involved. This case is governed by the principles of law enunciated in *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118, and upon its authority the judgment below is

Affirmed.

MRS. JOSEPH A. NEAL v. WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF MRS. IDA HARDY PEGRAM,

and

JOSEPH A. NEAL v. WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF MRS. IDA HARDY PEGRAM.

(Filed 8 March, 1944.)

1. **Executors and Administrators § 15d: Wills §§ 4, 5: Frauds, Statute of, § 9—**

   An oral contract, to devise specific real estate, or to bequeath its value to husband and wife for joint services rendered deceased, is obnoxious to the statute of frauds, and, that issue being raised, the husband and wife may separately sue the estate of deceased upon the *quantum meruit* for the services rendered by them respectively without regard to the contract.

2. **Executors and Administrators § 15d: Evidence §§ 32, 40: Frauds, Statute of, § 14—**

   Recital in a complaint of a parol contract, void under the statute of frauds, does not bind plaintiff in his choice of action, it being common and approved practice, in actions to recover for services rendered on such contracts, to recite the same, not by way of reliance on its terms, but to rebut any presumption that the services were gratuitous, or in support of the contention that they were rendered and accepted in expectation of being paid for. Parol evidence of the contract is competent for such purpose.

3. **Frauds, Statute of, § 9: Wills § 4—**

A contract to devise real estate is within the statute of frauds. A contract to bequeath personalty, standing alone, is not.

4. **Contracts § 9—**

Although it be conceded that under certain conditions alternative promises may be subject to the rule of separability, it does not follow that it may be applied in every case—the facts of the particular case must be strongly controlling.

5. **Limitation of Actions §§ 2e, 3: Wills § 5—**

Where there is a promise by one to reward another for services performed, by devise or bequest, the statute of limitations does not begin to run against the promise until the death of the promisor.

APPEAL by plaintiffs from *Phillips, J.*, at June Term, 1943, of FORSYTH.

The plaintiffs in the above actions, husband and wife, brought separate actions against the executor of Mrs. Pegram's will, each suing upon a *quantum meruit* for services rendered the decedent during a long period of years prior to her death. The complaints are identical except for changes of persons in reference to the different plaintiffs and the nature of the services performed. The suits were consolidated for convenience in hearing, but their separateness is preserved for application of the principles of law and procedure in pleading.

In brief, the complaints set up particulars as to the length and character of the services and their reasonable value. Each complaint further alleges that Mrs. Pegram orally agreed with the plaintiffs, husband and wife, that in return or compensation for the services performed by them she would take care of them in her will; and would will to them her home place on Glenn Avenue, or its value in money at her death; and that, in breach of the agreement, she left a last will and testament in which she failed to provide for either of them in any manner whatsoever. In her action Mrs. Neal alleges her services were reasonably worth $7,080.00, and, having sued within six months from the rejection of her claim by the executor, demands judgment for that amount.

Joseph A. Neal alleges that his services were reasonably worth the sum of $3,776.00, and demands judgment for that amount. Joseph A. Neal was permitted to amend his complaint by alleging that his services were worth $15.00 per week.

In each case the defendant executor answered, denying the material allegations of the complaint; and, further answering, pleaded the three-year statute of limitations in bar of the action.

The cases came on for a hearing at June, 1943, Term of Forsyth Superior Court, at which time, after the pleadings had been read, coun-

sel for the defense demurred, *ore tenus,* in each case for that the complaint failed to state a cause of action, in that it affirmatively appears from each complaint that such cause of action as the plaintiff had, if any, was a joint cause of action and not a separate cause of action. The court, being of that opinion, dismissed both actions, and the plaintiff in each case excepted and appealed.

Fred S. Hutchins and H. Bryce Parker for plaintiffs, appellants.
Womble, Carlyle, Martin & Sandridge for defendant, appellee.

SEAWELL, J. Summarizing the situation with which we have to deal, we observe that the plaintiffs in these separate actions have sued upon implied *assumpsit* for services rendered the decedent. The complaint in each case, however, discloses a parol contract to convey by will specific real estate—the home place on Glenn Avenue—or its value in money, and the death of the promisor, testate, without doing either. The defendant answered, denying the contract. Subsequently the defendant demurred to the complaints, *ore tenus,* upon the ground that plaintiffs had no separate cause of action, but must sue, if at all, in a joint action upon the contract disclosed in the complaints—which, it is contended, contemplates joint employment, joint performance, and common or joint compensation.

The position of the defendant is anomalous, since in the previously filed answer it denies the contract and in the demurrer, in effect, admits it, and draws the legal conclusion that plaintiffs can recover only for its breach. We might work out the rights of the parties on different lines and perhaps reach a different conclusion if it were not for the involvement of the statute of frauds in the controversy, and the necessity of determining its effect on plaintiffs' cause of action, and of clarifying the function of the parol contract, as a part of the declaration, when it is found to be void under the statute.

The demurrer is addressed, as we have seen, to the right of plaintiffs to maintain separate actions on the *quantum meruit* for the services rendered the decedent. The plaintiffs' right to maintain these actions is predicated on the theory that the contract is void and unenforceable under the statute, leaving to them the right to sue on *quasi*-contract or implied *assumpsit* for the value of the services. *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331; *Price v. Askins,* 212 N. C., 583, 194 S. E., 824; *Ebert v. Disher,* 216 N. C., 36, 3 S. E. (2d), 301; *Daughtry v. Daughtry,* 223 N. C., 528, 27 S. E. (2d), 446. If, indeed, plaintiffs are relegated to action upon the contract, their present separate actions in *assumpsit* must fail, since, at least, the contract provides for common or joint compensation. But, if the oral contract is obnoxious to the statute

of frauds, and that issue is raised, the plaintiffs may separately sue upon the *quantum meruit* for the services rendered by them respectively, without relying upon the contract. *Grantham v. Grantham, supra.* Recital in the complaint of a parol contract void under the statute of frauds does not, *ipso facto,* bind the plaintiffs in their choice of action. It is common and approved practice in suits to recover for services rendered under such a contract to recite the contract, not by way of reliance upon its terms, or to recover for its breach, but to rebut any presumption which might arise that the services were gratuitous, or in support of the contention that they were rendered and accepted in expectation that they would be paid for. *Grantham v. Grantham, supra; Price v. Askins, supra.* "The contract itself 'falls out of view as a ground of legal remedy and appears only to give color to the conduct of the parties in furnishing and accepting the services rendered. It affords the means of determining that the service was not a gift but a sale.'" 2 Page on Contracts, sec. 1415; *Gay v. Mooney,* 67 N. J. L., 27, 29, 50 A., 596. Parol evidence of the contract is competent for that purpose. The position of the defendant on its demurrer is, therefore, not aided by its previously filed answer denying the contract. Such denial is one way of invoking the statute of frauds and puts the defendant in position to administer the *coup de grace* by excluding the parol evidence offered in its support. Under this state of the pleadings, the plaintiffs will not be forced to the vain expedient of suing upon the contract to test its validity, and of suffering defeat, before bringing action on the *quantum meruit,* if upon such denial, it appears as a matter of law, that the contract is within the statute, and void. *Price v. Askins, supra,* page 587, and cases cited; *Grantham v. Grantham, supra.*

Mrs. Pegram promised the plaintiffs that she would reward them for their services by making a will conveying to them her "home on Glenn Avenue, or its value in money." In what way is the contract affected by the statute of frauds? The answer to that question depends upon whether with respect to the "promise"—which is in the alternative—the contract is regarded as separate or entire. To guard against a hasty conclusion, we may add that the use of the disjunctive does not necessarily mean that the promise is separable in law. It depends upon other factors which we must consider—principally, the relation of the alternative engagements to each other, if any exists.

A contract to devise real estate is within the statute of frauds. *Grantham v. Grantham, supra; Price v. Askins, supra; Norton v. McLelland,* 208 N. C., 137, 179 S. E., 443; *Shore v. Holt,* 185 N. C., 312, 117 S. E., 165. A contract to bequeath personalty, *standing alone,* is not. *Halsey v. Snell,* 214 N. C., 209, 198 S. E., 635; *Burton v. Styers,* 210

N. C., 230, 186 S. E., 248; *Helsabeck v. Doub,* 167 N. C., 205, 83 S. E., 241.

Questions as to separability more often arise when the contract has two or more distinct items, both in the agreement to perform and in the promise of compensation, capable of "apportionment" or separate allocation the one to the other, as indicated in the contract itself. The practical effect of the severance in such a case is to divide the contract into several smaller contracts, rejecting those which appear to be offensive to the statute. The doctrine of separability, it is apparent, must be applied with caution even in this instance, and the hand of the Court is often stayed by its inability to make a contract for the parties and by the serious question whether the parties would have entered into the contract at all with that part held to be within the statute eliminated. These inhibitions follow the doctrine of separability in whatever form presented and must be hurdled in the case at bar before that part of the promise falling within the statute of frauds is pruned from the agreement and its alternative enforced.

Upon the general question of separability where the promise presents alternatives, one within the statute and one without, there is a sharp division of authorities. Some have taken the more mechanical view that as the option to convey, or will, real estate has not been exercised, the alternative as to the personalty survives and is enforceable. (It may be noted here that the option as to the personalty has just as much expired as that relating to the realty.) Others have taken the broad view that the option presented is personal to the promisor and cannot be exercised by the Court without making a contract between the parties, or that it cannot be relied upon by the plaintiff without showing a breach or nonperformance of the promise that lies within the statute, and the alternative promise is therefore unenforceable. See annotations in 13 A. L. R., 271.

In Browne, Statute of Frauds, 5th Ed., p. 187, 188, it is said, referring to alternative promises, one of which is within the statute and the other without:

"It is manifest that no action will lie upon that one which if it stood alone could be enforced as being clear of the statute of frauds because the effect would be to enforce the other, namely by making the violation of it the grounds of an action." Citing *Van Allstine v. Wimple,* 5 Corven (N. Y.), 562; *Patterson v. Cunningham,* 12 Me., 506; *Goodrich v. Nichols,* 2 Root (Conn.), 498; *Rice v. Peet,* 15 Johns (N. Y.), 503; *Howard v. Brower,* 37 Ohio St., 502, leading cases in this field.

In 3 Elliott on Contracts, sec. 2309, it is said: "Where by the terms of a contract, one either agrees to perform an act which is not within the statute of frauds or at his election to perform a different act which

is within the statute, such contract is unenforceable. Thus an oral contract to pay money or convey realty, or such contract to devise land or bequest personalty, is not enforceable." Citing several of the authorities used by Browne, and adding *Andrews v. Broughton,* 78 Mo. App., 179; *Russell v. Briggs,* 165 N. Y., 500, 59 N. E., 303; *Dyer v. Graves,* 37 Vt., 369; *Clark v. Davidson,* 53 Wis., 317, 10 N. W., 384. In the same section the text states that the contrary view has been reached, based upon the principle that not having performed that part of the contract relating to realty, the promisor "ought" to be compelled to perform the other relating to personalty. See, also, Williston on Contracts, sec. 532. In 49 Am. Jur., Statute of Frauds, p. 852, sec. 549, both views are stated with impartiality and supporting decisions cited.

In *Quirk v. Bank of Commerce & Trust Co.,* 244 Fed. Rep., 682, 687, it is said:

"And when the promisor has the option of giving realty or personalty, his promise is wholly unenforceable because the enforcement of one of the alternatives would be but a wedge to secure the enforcement of the other."

In *Wolfskill v. Wells* (Mo.), 134 S. W., 51, where the oral agreement was to deed one-half interest in land or account for one-half its value at $35 an acre, the Court held that the contract was inseparable, and observed: "As made it was an inseparable contract. It is not disputed that that part of it to convey the land was invalid under the statute of frauds. So the case would stand with one part of the contract within and one part without the statute. In such instance the entire contract is invalid." To the same effect is *Gernhert v. Straeffer's Executor* (Ky.), 189 S. E., 1141, where the agreement was to will property, or if it were sold or not willed, to will the value of the property, the Court held the agreement invalid under the statute of frauds as presenting an inseparable contract.

Similarly, in *Patterson v. Cunningham, supra,* where, with respect to a promise presenting the alternative of land or money, the Court said: "This, being a promise in the alternative, does not relieve the case from the objection. The alternative was that the election of the defendant and Thomas to convey the land and deliver the articles or pay the money."

Contra, Welsh v. Welsh, 148 Minn., 235, 181 N. W., 356; 13 A. L. R., 267, and cited cases. See, also, Annotation 271, noted *supra.*

But it is not necessary for us to adopt literally either of these contrary views in the generalized form where the controversy really exists in order to determine the question before us. It must be clear, we think, that although it be conceded that under certain conditions alternative promises may be subject to the rule of separability, it does not follow that it may be applied in every case by rule of thumb. The facts of the

particular case must be strongly controlling. No reliable text writer, as far as we are aware, has gone so far as to intimate that the dual or multiple promises may be separated, merely because stated in the alternative, when they cannot be separated without violence to a substantial interdependence which may have had an effect on the making of the contract. Many cases have paid deference to the form, rather than the substance, of the promise in a desire to save some part of the contract.

In 24 Michigan Law Review, 749-785, cited in Williston on Contracts, sections 488, 579 (a), and elsewhere, there is an interesting discussion of the subject. Admitting that the weight of authority is against the theory of separability, it is suggested that in many of the instances dealt with, the disjunctive promise does not present a true alternative—that is, where the alternatives are so independent of each other, either may be adopted with indifference. They run all the way from the simple instance of a true alternative up to the point where the promise, which is supposedly without the statute of frauds, is merely a substitution, or a statement of liquidated damages for the nonperformance of the alternative which is within the statute. Obviously no court can follow the disjunctive through this ascending scale without retroactively challenging the freedom of contract, or running counter to positive principles of law. When it passes the first stage, the formulary test becomes inadequate. To put it graphically, separability must then be referred to incision rather than to exploration of an existing fissure. Judicial disregard for that part of the contract which stands without the statute does not eliminate it from the actual contract or from the minds of the parties in which that contract was generated and perfected by mutual understanding.

As we have seen, the promise was not general—just to will land—but specifically to will the Glenn Avenue home; and no specific sum of money is mentioned by the promisor—except by reference to the home place, and then merely "its value." Such a promise leads to the inference that "value in money" was not merely alternative—it was contingent—a substitute for the primary consideration and not the mere measure of a true and independent alternative. It might be said, without violation of the sense, that the promise was if she failed to will the home place, she would will its value in money. This home place therefore might well be considered the primary consideration in the minds of the parties; and we cannot say that a reasonable hope that this might be the choice of the promisor did not play a part in inducing the plaintiffs to accede to the agreement. They knew, of course, that they must abide by her choice. But that the choice might be left to the law was hardly within their contemplation. Plaintiffs were familiar with Mrs. Pegram's home on Glenn Avenue—they knew she had it. Whether they, or anyone else,

had any knowledge of her ability to provide the money instead of the Glenn Avenue home is not clear from this record.

We do not say that there are not instances in which the theory of separability may be applied to a promise alternative in form and fact. But we do hold that the facts of the case at bar are not favorable to its application.

The only other question presented by the demurrers is the bar of the statute of limitations. Since the performance of Mrs. Pegram's promise must be referred to her death, the statute does not apply. *Grantham v. Grantham, supra.*

Other matters discussed in the brief—such as the measure of recovery—are not before us at this time. They are fully covered, however, in several of the cases we have cited, and largely in the leading case of *Grantham v. Grantham, supra,* which we have so freely cited.

There was error in sustaining the demurrers to the complaints, and the judgment to that effect is

Reversed.

FRED S. RAMSEY, JACK RAMSEY, ELIZABETH RAMSEY, AND BOYD RAMSEY, BY THEIR GENERAL GUARDIANS, SOPHIA RICE AND CLEOPHUS RICE, v. JOHN RAMSEY, RUTH BULLMAN AND HUSBAND, EZEKIAL BULLMAN, ARNOLD RAMSEY AND WIFE, GLADYS RAMSEY, EARL RAMSEY AND WIFE, MARTHA RAMSEY.

(Filed 8 March, 1944.)

1. Ejectment §§ 9a, 11—

Ordinarily, any person claiming title to real estate, whether in or out of possession, may maintain an action to remove a cloud from title against anyone who claims an interest in the property adverse to the claimant, and is required to allege only that defendant claims an interest in the land in controversy.

2. Ejectment § 11—

While it has been said that, in an action to determine adverse claims to land, it is not necessary for plaintiff to set forth the nature of defendants' claim, the adverse or beclouding character of the claim or other matter complained of should appear in the complaint; and, where fraud is relied on, it must be alleged and proved.

3. Ejectment § 15—

An action to remove a cloud from title cannot be sustained, when the title or pretended title is not adverse to complainant.

4. Ejectment § 14—

In an action in ejectment, where the actual record title to the land involved is not adverse to plaintiffs, but confirms title in them, and no relief is sought on the ground of fraud, there is no error in the refusal of the trial court to admit in evidence an original deed for the land described in the complaint for the purpose of plaintiff's attacking it.

5. Adverse Possession § 2—

Since the adoption of ch. 195, Public Laws 1917, G. S., 1-36, in actions between individual litigants involving title to real property, except when protested entries are involved, title is conclusively deemed to be out of the State.

6. Adverse Possession § 4f—

Where a widow, entitled to a dower, remains upon the land of her husband after his death, whether or not dower is assigned, her possession is not adverse to the heirs of her husband.

7. Adverse Possession § 7—

The possession of the widow is not only not adverse to the heir, but it may be tacked to the possession of the ancestor for the purpose of perfecting title in the heir.

APPEAL by plaintiffs from *Alley, J.*, at September Term, 1943, of MADISON.

Civil action in ejectment to recover two tracts of land in Madison County containing 25 acres and 15 acres, respectively.

Andrew Ramsey and his wife, Lillie Ramsey, had born unto them three children, to wit, Fred S. Ramsey, Boyd Ramsey and Sophia Ramsey Rice. Boyd Ramsey died leaving three minor children, Jack Ramsey, Elizabeth Ramsey and Boyd Ramsey; Sophia Rice and Cleophus Rice having qualified as their general guardians.

Prior to the institution of this action, Sophia Rice and her husband, Cleophus Rice, executed a deed, dated 14 June, 1941, conveying all their right, title and interest in and to both of the aforesaid tracts of land to Fred S. Ramsey. Hence, the plaintiffs herein are Fred S. Ramsey and the minor children of Boyd Ramsey, deceased.

On 27 March, 1899, James Soloman and wife, Rillia Soloman, executed a deed in fee simple to Andrew Ramsey for the 25-acre tract of land referred to herein, which instrument was recorded in the office of the register of deeds for Madison County, 12 September, 1899.

On 18 November, 1901, James Gosnell executed a deed, in which the names of Andrew Ramsey and Lillie Ramsey appear as grantees, for the 15-acre tract of land referred to herein. This instrument was registered in the office of the register of deeds for Madison County, on the last day of February, 1913.

Plaintiffs allege that at the time of the execution and delivery of the foregoing deed the only name appearing therein as grantee was that of Andrew Ramsey, now deceased.

After obtaining title to the 25-acre tract of land from James Soloman and wife, Andrew Ramsey built a home on said land and moved with his family into said home, and occupied the premises until his death in 1905.

The evidence further discloses that Mrs. Lillie Ramsey, widow of Andrew Ramsey, continued to live on the premises until about 1910, and that she thereafter rented the land to one Mark Chandler for several years. She moved to Tennessee and married John Ramsey, returning to the home place with her said husband some time prior to 1913, where she resided continuously until her death, 16 May, 1941. She was in continuous possession of both tracts of land from the death of Andrew Ramsey, in 1905, until her own death in 1941.

There were born of the second marriage, Earl Ramsey, Ruth Ramsey Bullman and Arnold Ramsey, who, together with their father, John Ramsey, and the wives and husband of said children respectively, are defendants.

The defendants allege that in the execution of the deed to Andrew Ramsey by Rillia Soloman and James Soloman, by mutual mistake and inadvertence, the name of Lillie Ramsey was omitted and only the name of Andrew Ramsey was inserted in the deed. It is also alleged that this 25-acre tract of land was inherited by Lillie Ramsey from her mother, Mary Norton, and that the above deed from her sister Rillia Soloman and her husband, was in exchange of property between the two sisters, and further allege that Andrew Ramsey was a trustee and held the title to said land for the use and benefit of his wife, Lillie Ramsey.

The defendants introduced the last will and testament of Mrs. Lillie Ramsey, executed on 15 May, 1941, which was duly probated in the office of the clerk of the Superior Court of Madison County, on 20 May, 1941, and no caveat has been filed thereto.

In the aforesaid will of Lillie Ramsey, deceased, she devised to her children, Sophia Rice and Fred Ramsey, and to her grandchildren, heirs at law of her son Boyd Ramsey, the 15-acre tract of land. She devised to her children of the second marriage the 25-acre tract of land.

Plaintiffs allege that they are the owners of and entitled to the possession of both tracts of land referred to herein, and that the defendants are in the unlawful possession of the 25-acre tract and are claiming some interest in the 15-acre tract.

The defendants deny both allegations and admit that the plaintiffs are the owners of the 15-acre tract of land, but allege they hold the title under and by virtue of the aforesaid will of Mrs. Lillie Ramsey.

From a directed verdict in favor of defendants, and the judgment thereon, adjudging the defendants to be the owners of the 25-acre tract of said land, the plaintiffs appeal and assign error.

Geo. M. Pritchard and Geo. L. Greene for plaintiffs.
Carl R. Stuart and Guy V. Roberts for defendants.

DENNY, J. The first exception relates to the refusal of his Honor to admit in evidence the original deed for the 15-acre tract of land described in the complaint, for the purpose of attacking it.

The plaintiffs contend that this 15-acre tract of land was conveyed originally to Andrew Ramsey as sole grantee, that the name of his wife, Lillie Ramsey, was inserted afterwards, thereby giving Lillie Ramsey, according to the record, title to the property, since Andrew Ramsey, her husband, predeceased her. Lillie Ramsey devised this tract of land to her two surviving children by her first husband, Andrew Ramsey, and to her grandchildren, heirs at law of another child by her first husband, who had predeceased her. Lillie Ramsey's will has been duly probated and no caveat filed thereto. However, plaintiffs insist they are entitled to hold this land directly from Andrew Ramsey, and not under and by virtue of the deed, which purports to create an estate by the entirety and the devise from Lillie Ramsey. The defendants in their answer aver the plaintiffs are the owners of the 15-acre tract of land, they testified to that effect, and stated in open court in the trial below that they claim no interest in said 15-acre tract of land. They assert, however, the plaintiffs hold title to the 15-acre tract of land under and by virtue of the will of Lillie Ramsey and not otherwise.

Ordinarily, any person claiming title to real estate, whether in or out of possession, may maintain an action to remove a cloud from title against one who claims an interest in the property adverse to the claimant, and is required to allege only that the defendant claims an interest in the land in controversy. *Plotkin v. Bank,* 188 N. C., 711, 125 S. E., 541; *Carolina-Tennessee Power Co. v. Hiawassee Power Co.,* 175 N. C., 668, 96 S. E., 99; *Satterwhite v. Gallagher,* 173 N. C., 525, 92 S. E., 369; *Rumbo v. Gay Mfg. Co.,* 129 N. C., 9, 39 S. E., 581; *Daniels v. Baxter,* 120 N. C., 14, 26 S. E., 635. See also *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 159.

There appears to be some well established exceptions, however, to the general rule. In 44 Am. Jur., sec. 79, p. 63, it is said: "While it has been stated that in an action to determine adverse claims it is not necessary for the plaintiff to set forth the nature of the defendant's claim, except in cases of fraud, the adverse or beclouding character of the claim or other matter complained of should appear from the complaint. If

the complainant relies on fraud to overcome the effect of an instrument, he must allege and prove the fraud," citing *Thompson v. Moore,* 8 Cal. (2d), 367, 65 P. (2d), 800, 109 A. L. R., 1027; *Strong v. Whybark,* 204 Mo., 341, 102 S. W., 968, 12 L. R. A. (N. S.), 240, 120 Am. St. Rep., 710. Moreover, an action to remove a cloud from title cannot be sustained when the title or pretended title is not adverse to the complainant. 44 Am. Jur., sec. 11, p. 11; *Murray v. Hazell,* 99 N. C., 168. The actual record title to the 15-acre tract of land is not adverse to the plaintiffs, but confirms title in them; and the complaint does not seek relief by way of reformation of the deed based on fraud. Hence, we think his Honor properly sustained the defendants' objection to the proffered evidence.

The eighth and tenth exceptive assignments of error are directed to the following portions of his Honor's charge: "The plaintiffs have proceeded in this case upon the theory that they had seven years possession under color of title before the action was brought, but no grant has been shown as having issued to the plaintiffs or anybody else, and before plaintiffs could avail themselves of that remedy they would have to prove that a grant was issued to somebody and then, even without connecting themselves with the grant, show title by adverse possession, open, notorious and continuous possession, for seven years under known and visible lines and boundaries and under color of title. . . . There is no evidence that they had that continuous, open, notorious, adverse possession under color of title for seven years, and they likewise do not introduce a grant from the State to any person, which is absolutely necessary in a case where they claim title by seven years possession under color of title. They must first introduce a grant from the State to some person."

Since the adoption of chapter 195, Public Laws of 1917, C. S., 426, G. S., 1-36, in actions between individual litigants involving the title to real property, except when protested entries are involved, title is conclusively deemed to be out of the State. *Ward v. Smith,* 223 N. C., 141, 25 S. E. (2d), 463; *Berry v. Coppersmith,* 212 N. C., 50, 193 S. E., 3; *Johnson v. Fry,* 195 N. C., 832, 143 S. E., 857; *Dill Corporation v. Downs,* 195 N. C., 189, 141 S. E., 570; *Pennell v. Brookshire,* 193 N. C., 73, 136 S. E., 257; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627.

The seventh exception is to the action of the court in directing a verdict in favor of the defendants.

The plaintiffs introduced the deed to the 25-acre tract of land, which deed is dated 27 March, 1899, and was duly recorded on 12 September, 1899. Plaintiffs also introduced evidence to the effect that Andrew Ramsey, the grantee in said deed, built a house on said tract of land, immediately after the purchase thereof, moved with his family to the premises and occupied the same until his death in 1905, and that his widow and children continued to occupy said premises until about the

year 1910, thereafter the widow rented the land to one Mark Chandler for several years, but upon her marriage to John Ramsey, she returned to the Ramsey home with her husband, some time prior to 1913, and continued to reside there until her death, 16 May, 1941.

This evidence was sufficient to carry the case to the jury on the question of title by adverse possession under color of title for seven years. It was error to direct a verdict in favor of defendants. As stated in *Jacobs v. Williams,* 173 N. C., 276, 91 S. E., 951: "The possession of the widow is not only not adverse to the heir, but it may be tacked to the possession of the ancestor for the purpose of perfecting title in the heir."

Where a widow, entitled to dower, remains upon the land of her husband after his death, whether or not dower is assigned, her possession is not adverse to the heirs of her husband. *Farabow v. Perry,* 223 N. C., 21, 25 S. E. (2d), 173; *Trust Co. v. Watkins,* 215 N. C., 292, 1 S. E. (2d), 853; *Atwell v. Shook,* 133 N. C., 387, 45 S. E., 777; *Everett v. Newton,* 118 N. C., 919, 23 S. E., 961; *Nixon v. Williams,* 95 N. C., 103.

We refrain from discussing the remaining exceptions to matters which may not recur on another trial. For the reasons stated herein, there must be a

New trial.

ATLANTIC COAST LINE RAILROAD COMPANY v. BEAUFORT COUNTY, BOARD OF COMMISSIONERS OF BEAUFORT COUNTY, AND J. S. BENNER, COUNTY ACCOUNTANT AND EX OFFICIO TREASURER OF BEAUFORT COUNTY.

(Filed 8 March, 1944.)

1. Taxation § 3a: Constitutional Law § 4b—

The board of county commissioners of Beaufort County having levied, in the year 1942, a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by Art. V, sec. 6, N. C. Constitution, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation, G. S., 153-9 (6), and any levy for public welfare or poor relief, in excess thereof, is invalid.

2. Appeal and Error § 24—

Where no objection or exception is made in the court below and no contention presented in the brief of appellant, oral contentions in this Court of error below come too late.

APPEAL by defendants from *Thompson, J.,* at October Term, 1943, of BEAUFORT.

Civil action for recovery of *ad valorem* taxes alleged to have been assessed illegally by defendant Beaufort County, and paid under protest by plaintiff.

Plaintiff in its complaint alleges, summarily stated, these facts:

I. That defendant Beaufort County levied *ad valorem* taxes for the year 1942 at the rate of $1.27 on the one hundred dollars property valuation for these purposes and at these rates: (a) For general county fund—fifteen cents; (b) for public health fund—three cents; (c) for public welfare fund—eight cents; (d) for old age assistance fund—three and a half cents; (e) for aid to dependent children fund—one and a half cents; (f) for county debt service—eighty-four cents; (g) for schools (1) current expense fund—six cents, and (2) debt service—six cents.

II. That upon the assessed value of plaintiff's property the tax so levied for the year 1942 amounted to $19,190.10.

III. That that portion of the levy which is designated above for public welfare fund, eight cents, is void and levied without constitutional authority; that it is not, except as it may be included as a general expense of the county, a necessary governmental expense; that it is not a special purpose and was not levied with special approval of the General Assembly; and that if any authority was vested in the board of county commissioners to levy a special tax for said purpose, such special tax was limited to five cents and the excess of such levy above five cents is null and void.

IV. That plaintiff paid the whole of tax assessed against it for the year 1942, protesting that of the amount paid the sum of $443.20, representing a levy of three cents per one hundred dollars value of property, being three cents of the eight cents levied under designation for public welfare fund, is invalid, and was paid under protest on the ground that said part of said levy and assessment is unconstitutional as being in excess of the fifteen cents limitation for State and county taxes prescribed by the North Carolina Constitution, Article V, section 6, and was not levied for any special purpose as provided in said section; and that plaintiff in due time made demand for refund of said sum of $443.20, which defendants failed and refused to do.

Defendants, in answer filed, admit the levy of tax, the payment of the $443.20 under protest and the demand for refund and refusal as alleged by plaintiff, but deny that the levy of the said three cents of the eight cents for public welfare is invalid. Defendants aver that at October meeting, 1943, by resolution duly adopted the Board of County Commissioners of Beaufort County amended the levy made in 1942 in order to speak the truth with respect to what was designated as "public welfare fund," so that that fund be designated "poor relief fund"—"the purpose of said levy being to provide for poor relief, and for a special

purpose as contemplated by law," and that as so amended the tax levy for the year 1942 is a lawful levy, and does not exceed any constitutional limitations, but is made as provided by statute and for a special purpose as authorized by law.

Upon the hearing in Superior Court, the parties having waived a jury trial and consented that the court might hear the evidence, find the facts and, on the facts found, enter judgment, and having further consented that the judgment might be signed out of the county and out of term with the force and effect as if entered in term, the court finds, from the evidence offered and admissions made in open court, facts in pertinent part, briefly stated, as follows:

1. That defendant Beaufort County levied *ad valorem* taxes for the year 1942 at the rate of $1.27 on the one hundred dollars property valuation for the purposes and at the rates as specified in the complaint, and at said rate assessed taxes against property of plaintiff.

2. That plaintiff paid the whole amount of the taxes so assessed against it, but paid under protest $443.20 of that amount—asserting that it represented three cents of the eight cents levied for public welfare fund and duly demanded the refund of it upon the ground that that portion of the levy is invalid and unconstitutional for reasons stated in protest as alleged in complaint.

3. That the appropriation resolution upon which the 1942 tax levy was made for old age assistance fund and for aid to dependent children fund did not include any sum for cost of administration; that the cost and expense of administering these funds is included in the appropriation denominated "public welfare fund"; that, upon calculation made and as specified, a levy of one and eight-tenths cents on the one hundred dollars valuation of property, "assuming 85% tax collection, would suffice to pay the county's portion of the expense of administering the old age assistance and the aid to dependent children and in addition thereto that part of the salary of the superintendent of public welfare not covered in the cost of administering said funds," which expense might have appropriately been included in the appropriations for said funds and if they had been so included would have increased the tax levy or rate for those funds and for the salary of the superintendent of public welfare by a total of one and eight-tenths cents thereby reducing the levy for public welfare fund from eight cents to six and two-tenths cents.

4. That after deducting from the public welfare fund the cost and expense of administering the old age assistance and aid to dependent children funds and the salary of the Superintendent of Public Welfare that there was levied for the fiscal year 1942 for the public welfare fund to be used for the maintenance of the welfare office, other than the salary of the county superintendent, maintenance of the county home and other

appropriations for the aged and indigent a tax of six and two-tenths cents on all property in Beaufort County; that if plaintiff is entitled to a refund of the three cents, as it asserts, the amount claimed by it, to wit, $443.20, with interest, is the correct amount owing to it; and that if it is entitled to a refund of one and two-tenths cents, the correct amount owing to it is $172.86 with interest.

5. That after institution of this action the board of county commissioners of Beaufort County amended the resolution relating to the fund denominated "public welfare fund" in the appropriation resolution of 1942 by changing the name of said fund to "poor relief fund"—the purpose of it being to provide by taxation a fund to be used for poor relief, and for a special purpose as contemplated in law.

Upon the foregoing facts, being of opinion that by virtue of the provisions of chapter 288, Public Laws 1937, G. S., 108--Art. 3, parts 1 and 2, it is mandatory on the counties to levy a tax for the administration of the old age assistance and the aid to dependent children funds, and that these are special purposes with the special approval of the General Assembly, and that it is the duty of the county to provide for the payment of the salary of the superintendent of public welfare and that this, by chapter 319, Public Laws 1937, G. S., 108—Art. 2, is a special purpose with the special approval of the General Assembly, and that while not specifically segregated in the levy made by Beaufort County these purposes were provided for and that a levy of one and eight-tenths was required for that purpose, and that this portion of the eight cents levy is a special purpose and with special approval of the General Assembly, the court so adjudged. And the court, further being of opinion that if the county had a right to levy a tax for the upkeep of the county home and for other purposes set out in its budget it was limited to five cents under provisions of G. S., 153-9 (6), formerly C. S., 1297 (8½), adjudged that one and two-tenths cents of said 1942 levy for public welfare or poor relief fund is invalid, and that plaintiff have and recover of defendants the sum of $172.86, with interest.

Defendants appeal therefrom to Supreme Court and assign error.

Thomas W. Davis, M. V. Barnhill, Jr., and Rodman & Rodman for plaintiff, appellee.

E. A. Daniel for defendants, appellants.

WINBORNE, J. The only question before the Court for decision on this appeal relates to the validity of the ruling of the court below in holding that the board of county commissioners of Beaufort County having levied in the year 1942 a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by

Article V, section 6, of the North Carolina Constitution, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation under provisions of G. S., 153-9 (6), formerly C. S., 1297 (8½), and hence, upon further facts found, the 1942 levy for public welfare or poor relief is invalid to the extent of one and two-tenths cents.

Defendants contend that, in view of the holding in *R. R. v. Lenoir County,* 200 N. C., 494, 157 S. E., 610, that a tax for poor relief is for a special purpose, special approval of the General Assembly is given under the provisions of G. S., 153-9 (23), and -152, formerly C. S., 1297 (28), and C. S., 1335, respectively, for the levy of a rate in the discretion of the board of county commissioners—irrespective of the limitation prescribed in G. S., 153-9 (6), formerly C. S., 1297 (8½). The very recent decision of this Court in opinion handed down on 15 December, 1943, in case of *R. R. v. Cumberland County,* 223 N. C., 750, 28 S. E. (2d), 238, is adverse to such contention. The decision there is authority for upholding the decision in court below on question presented here.

Moreover, defendants contended orally in this Court that in addition to the adjustments in rates so as to provide for expenses of administering the old age assistance and the aid to dependent children funds, G. S., 108, Art. 3, parts 1 and 2, respectively, the court below should have made allowance for expense of administering the appropriation for aid to blind, G. S., 111-17, which was included as an item in the appropriation for public welfare fund. No such contention appears to have been made in court below, and none is made in brief filed in this Court. Hence, oral presentation of it comes too late, and the point may not now be raised in this Court.

Furthermore, plaintiff not having appealed from the judgment of Superior Court, the legality of the rulings under which the calculations and adjustments in the tax levy as made by the court below by which one and eight-tenths cents of the levy above five cents for public welfare or poor relief is declared valid, are not before this Court and have not been considered.

Affirmed.

CORA ROGERS, ADMINISTRATRIX, v. TOWN OF BLACK MOUNTAIN.

(Filed 8 March, 1944.)

1. Negligence § 19a—

In an action to recover damages for wrongful death of plaintiff's intestate, where the evidence tended to show that defendant's servant, contrary to orders and without his master's knowledge, took deceased and other boys, also employees of defendant, at their request, on a pleasure

ride in the master's truck, and, while so engaged on the public highway, the truck struck a hole and plaintiff's intestate was thrown out and killed, demurrer to the evidence should have been sustained.

2. Master and Servant § 21b—

The master is responsible, under the doctrine of *respondeat superior*, for the tort of his servant which results in injury to another, when the servant is acting in the course of his employment and is at the time about his master's business.

3. Same—

If a servant, wholly for a purpose of his own, disregarding the object for which he is employed and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable.

APPEAL by defendant from *Alley, J.*, at November Term, 1943, of BUNCOMBE.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

The town of Black Mountain owns and operates a municipal golf course. In the spring of 1941, the defendant purchased a tractor, or stripped down Chevrolet truck, for use in pulling the mowers over the greens and fairways. The mowers were easily attached to or disconnected from the truck. E. J. Ellis was employed to operate this converted truck or tractor. On the afternoon of 29 July, 1941, he came to Green No. 2, where three boys, Millard Jones, Bill Smith and Albert Rogers, were cutting grass. He had previously disconnected the mowers when he drove home across the road from the golf course about noon. One of the boys, Bill Smith, suggested that they take a ride down the road. They all got on the tractor. Albert Rogers, a boy 15 years old, was sitting on and holding to a beam on the back of the truck. As they came to a bridge, just down the hill, the right front wheel hit a hole in the bridge, threw the truck against the railing, caused Ellis to lose control, and threw Albert Rogers to the ground and killed him.

The plaintiff offered E. J. Ellis, the driver of the truck, as a witness: On the vital issue of defendant's liability he said that before the accident he had been instructed and directed by the manager of the golf links "not to let anybody ride on that tractor." And further he testified: "I knew that I was violating instructions of the Town of Black Mountain in taking them on this pleasure trip. . . . So far as I know none of the officers or employees of the town of Black Mountain knew we were taking this ride."

There is evidence that Ellis had driven the truck a number of times on the highway in hauling dirt to fill in holes on the golf course, traveling

to and from his home, and going to Black Mountain for gas and repairs. Jack Silver, a witness for the plaintiff, testified that he rode with Ellis on one occasion "up the road on a pleasure trip," but admitted that he had been ordered not to do so. "He and I just disobeyed instructions and went off on a trip and Mr. Prevost (manager) didn't know anything about that trip."

Demurrer to the evidence overruled; exception.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff, the damages being assessed at $5,000.00.

The defendant appeals, assigning errors.

Don C. Young for plaintiff, appellee.
Williams & Cocke for defendant, appellant.

STACY, C. J. Conceding that negligence on the part of the driver of the truck has been shown which resulted in plaintiff's intestate's death, still the record is barren of any evidence sufficient to hold the defendant liable under the doctrine of *respondeat superior*. *Cole v. Motor Co.*, 217 N. C., 756, 9 S. E. (2d), 425; *Martin v. Bus Line*, 197 N. C., 720, 150 S. E., 501.

The driver of the truck was not about the defendant's business "at the time of and in respect to the transaction out of which the injury arose." *McLamb v. Beasley*, 218 N. C., 308, 11 S. E. (2d), 283; *Liverman v. Cline*, 212 N. C., 43, 192 S. E., 849. He had departed from the work he was employed to do, and had gone, with other employees, on a pleasure trip in violation of previously given instructions. *Cotton v. Transportation Co.*, 197 N. C., 709, 150 S. E., 505. All of the boys on the truck were aware of the fact that they were disobeying instructions in taking the trip. *Hayes v. Creamery*, 195 N. C., 113, 141 S. E., 340.

If the driver had taken other pleasure trips, on other occasions, and invited others to ride with him on such trips, there is no evidence that the defendant knew it. *Cotton v. Transportation Co., supra.* This is the crucial circumstance in the case. *Russell v. Cutshall*, 223 N. C., 353, 26 S. E. (2d), 866. It is true, the driver had driven the truck a number of times on the highway while about the defendant's business, but there is no evidence that he allowed others to ride with him on these occasions. See Anno. 14 A. L. R., 145.

It is elementary that the master is responsible for the tort of his servant which results in injury to another when the servant is acting in the course of his employment, and is at the time about the master's business. *D'Armour v. Hardware Co.*, 217 N. C., 568, 9 S. E. (2d), 12; *Barrow v. Keel*, 213 N. C., 373, 196 S. E., 366; *Roberts v. R. R.*, 143

N. C., 176, 55 S. E., 509. It is equally well established that the master is not liable if the tort of the servant which causes the injury occurs while the servant is acting outside the legitimate scope of his authority, and is then engaged in some private matter of his own. *Tribble v. Swinson,* 213 N. C., 550, 196 S. E., 820; *Snow v. DeButts,* 212 N. C., 120, 193 S. E., 224; *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 897; *Bucken v. R. R.,* 157 N. C., 443, 73 S. E., 137.

As a general rule "the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders, or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable." *Howe v. Newmarch,* 94 Mass., 49. See *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Robertson v. Power Co.,* 204 N. C., 359, 168 S. E., 415; *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503. To state it in another way, the general rule is, that where a servant steps aside from the business of his master for some purpose of his own which is beyond the scope of his employment, the relation of master and servant is thereby temporarily suspended, and the master is not liable for his acts during the period of such suspension. *Walker v. Manson,* 222 N. C., 527, 23 S. E. (2d), 839; *Smith v. Moore,* 220 N. C., 165, 16 S. E. (2d), 701; *Creech v. Linen Service,* 219 N. C., 457, 14 S. E. (2d), 408; *Parrott v. Kantor,* 216 N. C., 584, 6 S. E. (2d), 40; *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126.

Here it appears that the driver of the truck was on a mission of his own and not performing any work he was employed by the defendant to do. He was therefore about his own business and not that of the defendant at the time of plaintiff's intestate's injury and death. See Annotations, 22 A. L. R., 1404; 45 A. L. R., 482; 68 A. L. R., 1055; 80 A. L. R., 727; 122 A. L. R., 863. He was his own master while out driving on a pleasure trip in violation of the defendant's instructions. This defeats recovery on the theory of *respondeat superior.* *Martin v. Bus Line, supra.* The doctrine is inapplicable when there is no superior to respond. *McLamb v. Beasley, supra; Creech v. Linen Service, supra.*

It results, therefore, that the demurrer to the evidence should have been sustained. G. S., 1-183 (C. S., 567).

Reversed.

MISS EUNICE HARRINGTON, TRUSTEE, AND A. B. HARRINGTON, v. A. G. BUCHANAN, SHERIFF OF LEE COUNTY, NORTH CAROLINA; W. H. CAMPBELL, ADMINISTRATOR OF MISS TANNIE S. CAMPBELL; AND W. H. CAMPBELL, ADMINISTRATOR D. B. N., C. T. A. OF W. W. HENLEY, DECEASED.

(Filed 22 March, 1944.)

Judgments § 36—

Upon the transfer on the judgment docket of a judgment by an attorney of record, acting under authority expressly granted by G. S., 1-240, nothing appearing to indicate that the attorney received less than full value, there is a presumption that such attorney acted within the scope of his authority, and the burden is on the party seeking to set the transfer aside to prove that no such authority existed. Proper issues on the pleadings and evidence herein suggested.

APPEAL by plaintiff from *Williams, J.*, at September Term, 1943, of LEE.

Civil action to restrain levy and sale under execution and to declare the validity of an assignment of judgment made by attorney of record under G. S., 1-240, formerly C. S., 618. See former appeal, 222 N. C., 698, 24 S. E. (2d), 534.

Plaintiffs in their complaint allege in brief these facts:

1. That on 21 January, 1935, there was docketed in Lee County a judgment in favor of Miss Tannie S. Campbell, Executrix of W. W. Henley, deceased, and against J. L. Covington and his wife, Mrs. Madge Covington, J. C. Watson and A. B. Harrington, for the sum of $952 with interest thereon at 6% per annum from 18 April, 1932, and for costs $20.46, subject to these credits: $60.00 on 29 April, 1933, $25.00 on 20 November, 1933, $10.00 on....... December, 1933, and $60.00 on........ October, 1934; that though the judgment failed to distinguish the liability of defendants for the indebtedness therein, J. L. Covington and Mrs. Madge Covington were principals, and A. B. Harrington was only a surety; and that on the judgment a further credit of $300.00, derived from sale of property of said principals, should be made.

2. That on 4 April, 1936, A. B. Harrington, defendant in above judgment, and plaintiff in this action, "purchased the said judgment, and the said Miss Tannie S. Campbell, Executrix, acting by and through her duly authorized agent and attorney, H. M. Jackson, who was authorized to collect and compromise same, sold and transferred the same to Miss Eunice Harrington, Trustee, for A. B. Harrington's use and benefit; and on said date the said Executrix, acting by and through said agent, executed the following transfer thereof: 'For value received and without recourse on me this judgment is assigned to Miss Eunice Harrington, Trustee. This April 4th, 1936. Tannie S. Campbell, Executrix W. W.

Henley Estate, by H. M. Jackson, Attorney for Tannie Campbell, Executrix,' " entry of which was made upon the judgment record where the judgment was docketed, and witnessed by "W. G. Watson, C. S. C.," thereby becoming a record of the Superior Court of Lee County.

3. That at the time the judgment was assigned in the manner set forth in last preceding paragraph "the said Jackson caused plaintiff to execute a check in the sum of $501.00 on the National Bank of Sanford, N. C., payable to Tannie S. Campbell, Executrix, which was given and accepted in payment of said sum, in compromise of and for said transfer of said judgment"; "that said check so given was retained from April 4, 1936, to June 27, 1936, when someone caused" it "to be sent through the mails to A. B. Harrington, who immediately turned same over to W. G. Watson, C. S. C., who has had the same continuously in his possession since said date"; that about the same time an entry, in the handwriting of H. M. Jackson, was made in ink upon the judgment record, under the entry of the assignment aforesaid, in these words: "Check never accepted by Tannie Campbell therefore judgment never was paid by A. B. Harrington," and apparently in same kind of ink "lattice lines" were drawn across the original assignment, both of which "were null and void and of no effect in law for all purposes"; that said check was not returned to A. B. Harrington because it was not cash, but in an effort to repudiate the settlement which had theretofore been made; that the check was good for the amount thereof at all times until it was returned, and A. B. Harrington then tendered payment thereof in cash, and has at all times since been ready, able and willing to pay in cash the amount of the check either to the clerk, to the Executrix, to H. M. Jackson, agent and attorney, or to any other person designated by the court; and that in law and in equity plaintiffs are entitled to have the sum of $501.00 accepted, and the said transfer of 4 April, 1936, to Miss Eunice Harrington, Trustee, declared to be valid and binding.

4. That Miss Tannie S. Campbell is dead, and has been for several years, and on or about 26 February, 1941, W. H. Campbell qualified as administrator of Miss Tannie S. Campbell or as administrator *d. b. n., c. t. a.* of W. W. Henley, deceased, or both, and without authority of Miss Eunice Harrington, Trustee, or of A. B. Harrington, has caused an execution to be issued on said judgment, against A. B. Harrington, calling for payment of $705.15 principal with interest thereon from 26 February, 1935, and costs $23.46.

5. That during the lifetime of Miss Tannie S. Campbell the said W. H. Campbell, who was her brother and son-in-law of W. W. Henley, acted as her agent as Executrix under the will of W. W. Henley, deceased.

Defendants in answer filed 11 June, 1941, admit that judgment was entered, that Miss Tannie S. Campbell is dead, and that W. H. Camp-

bell qualified as administrator, or as administrator *d. b. n., c. t. a.*, and that he caused execution to issue, all as alleged in the complaint, and while admitting that W. H. Campbell advised with his said sister during her life, they deny that he was agent for her personally, or as executrix, and they further deny all other material allegations, averring "the true facts" to be "as hereinafter set out and not otherwise."

And "for a further answer, further defense, counterclaim and for affirmative relief," defendants in pertinent part aver in substance:

I. That defendant, W. H. Campbell, administrator *d. b. n., c. t. a.* of W. W. Henley, is the owner of and entitled to receive payment of the judgment of 21 January, 1935, that is, the judgment in question, subject to a credit of $298 as of March Term, 1935, of Superior Court of Lee County.

II. "3. (That on or about April 4, 1936, the said A. B. Harrington did offer to H. M. Jackson, attorney representing Miss Tannie S. Campbell, Executrix, the sum of $501.00 which amount represented the principal of said judgment then and now unpaid and excluded the interest on said judgment from April 18, 1932, subject to the credits hereinbefore set out, which the said H. M. Jackson agreed to take) on the following conditions, that he would submit the same to Miss Tannie S. Campbell, Executrix and plaintiff, and if it was satisfactory with her it would be with the said H. M. Jackson, and thereupon and on said condition the said A. B. Harrington issued his check in said sum and delivered the same to the said H. M. Jackson and at said time and with the same understanding the entry appearing on the judgment docket and set out in paragraph 2 of the complaint was made with the further understanding and agreement that if said offer was not satisfactory and was not accepted by Miss Campbell the same should be stricken out; that Miss Eunice Harrington, Trustee, was not present, had no consideration with the same and did not know of said entry and paid nothing for the same and no sum has ever been paid for said entry and purported transfer of said judgment used as a receipt as therein stated and the same was and is without consideration and void; that said H. M. Jackson explained at the time to the said Harrington that he was without authority to make said settlement unless the same was agreeable to the plaintiff, Tannie S. Campbell, and that it might be necessary for her to take the same up with the heirs at law, most of whom were of age and entitled to the larger part of said judgment; (that the said H. M. Jackson delivered said check of A. B. Harrington to Tannie S. Campbell, who immediately took the same up with the heirs at law of the said W. W. Henley and particularly with Earl Henley, who lived at some distance, and for some time had various negotiations in an effort to perfect the settlement of the same)"; that Earl Henley, as well as other heirs at law of W. W.

Henley, refused to accept said check in settlement of the judgment, and advised Tannie S. Campbell that he and they would hold her liable for said judgement, in consequence of which on 25 June, 1936, she so notified A. B. Harrington and returned the check; and that thereafter H. M. Jackson, pursuant to and in accordance with the agreement, struck lines across the entry on the margin of the judgment, which attempted to transfer the judgment to Eunice Harrington, Trustee, and no complaint thereof or objection thereto has been made until execution on the judgment was caused to be issued.

Defendants in answer filed 3 October, 1941, adopt the averments included in further answer, etc., of 11 June, 1941, and (1) as further defense and plea in bar of plaintiffs' right to recover in this action, plead the three-year statute of limitation, and (2) for "counterclaim, cross action and affirmative relief," declare upon the judgment and pray judgment thereon against plaintiff A. B. Harrington.

Plaintiffs in reply deny all the allegations of the answers and cross actions of defendants which are contradictory of allegations of the complaint.

Upon the trial the parties having offered evidence tending to support their respective allegations, and having made certain admissions, the court submitted the case to the jury upon one issue as follows: "Is the plaintiff, Mrs. Eunice Harrington, Trustee for A. B. Harrington, owner and holder of the Judgment No. 5570, recorded in Book 8, at page 280, of the office of the Clerk of the Superior Court of Lee County, rendered in the action of Tannie S. Campbell, Executrix, and W. W. Henley, deceased, *vs.* J. L. Covington, *et als?*" which the jury answered "No."

Two other issues, as to balance due and unpaid on the judgment, and as to the three-year statute of limitation, were answered by the court.

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

K. R. Hoyle for plaintiffs, appellants.
E. L. Gavin and H. W. Gavin for defendants, appellees.

WINBORNE, J. While in the record on this appeal there are many assignments of error, the one paramounted by plaintiffs permeates many of them. It is that the court erred in placing the burden of proof on the plaintiffs as to the issue submitted, and in undertaking to have the jury pass upon affirmative averment of defendants under the same issue, and requiring defendants to satisfy the jury from the evidence, but not by its greater weight, as to the averment that the transfer was on condition. We are of opinion, and hold, that this was inappropriate under the pleadings.

The plaintiffs declare upon a public record, a transfer of judgment, allegedly made by attorney of record, acting under authority expressly granted by statute, G. S., 1-240, formerly C. S., 618, in which there is nothing to indicate that the attorney received less than full value. When this is shown it is presumed, as held on former appeal, *supra,* that he acted within the scope of his authority, and the burden is on the party seeking to set the transfer aside, to prove that no such authority existed. See *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Chavis v. Brown,* 174 N. C., 122, 93 S. E., 471; *Chemical Co. v. Bass,* 175 N. C., 426, 95 S. E., 766; *Bizzell v. Equipment Co.,* 182 N. C., 98, 108 S. E., 439; *Barnes v. Trust Co.,* 194 N. C., 371, 139 S. E., 689; *Bank v. Penland,* 206 N. C., 323, 173 S. E., 345; *Jones v. Waldroup,* 217 N. C., 178, 7 S. E. (2d), 366; *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209.

In other words, plaintiffs have the burden of proving the record, and defendants have the burden of making good their attack upon the record, and not simply the burden of going forward with evidence. The burden of proof under such circumstances cannot be on both parties at the same time. See *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; *Williams v. Ins. Co.,* 212 N. C., 516, 193 S. E., 728.

Moreover, an analysis of the pleadings indicates that in lieu of the single issue submitted to the jury, and in addition to the two issues answered by the court, on the trial below, issues substantially these arise:

1. Did H. M. Jackson, attorney for Tannie S. Campbell, Executrix of W. W. Henley, deceased, make the transfer of the judgment to Miss Eunice Harrington, Trustee, in words and figures as alleged in the complaint?

2. If so, was such transfer on condition that Jackson, attorney, would take the check for $501.00 and submit it to Tannie S. Campbell, Executrix aforesaid, for her acceptance, and, if not accepted by her the transfer should be stricken out?

3. Was the transfer of the judgment by Jackson, attorney, based upon compromise settlement?

4. If so, was H. M. Jackson, attorney, without special authority from Tannie S. Campbell, Executrix of W. W. Henley, to effect such settlement?

5. If not, did Tannie S. Campbell, Executrix of W. W. Henley, ratify the acts of H. M. Jackson, attorney, in such settlement?

The burden of proving the first issue is upon the plaintiffs. The burden of proof as to the second, third and fourth issues, respectively, is upon the defendants. The burden of proof as to the fifth issue, which arises in the event either the second or fourth issue, or both of them, be answered in the affirmative, would be upon the plaintiffs.

As there must be a new trial, the matters to which other exceptions relate may not recur. Hence, no consideration is given to them.

New trial.

STATE v. WILLIAM DAVIS HAM, THURMAN HARDY, AND RAYMOND HARDY.

(Filed 22 March, 1944.)

1. Criminal Law § 52b—

On the trial of several defendants, upon an indictment for robbery, where the evidence against one of the defendants raises no more than a suspicion of his guilt, a motion to dismiss as to such defendant should be allowed. G. S., 15-173.

2. Evidence § 15—

Variance, or lack of definiteness and positiveness, on cross-examination of a witness, affects only the credibility of the witness, and of this the jury is the judge.

3. Criminal Law § 29e—

In a prosecution for robbery evidence of prosecutrix, that she "thought" or "reckoned" defendants were trying to borrow considerable sums from her shortly before the robbery, was competent to show motive and knowledge of defendants.

4. Criminal Law § 31a—

To the rule that opinion evidence is incompetent there are, at least, three exceptions: First, opinions of experts; second, opinions on the question of identity; and third, opinions received from necessity, where no better evidence can be obtained.

5. Criminal Law § 30—

G. S., 15-88, 15-91, and 15-100, making competent evidence on preliminary hearings reduced to writing by the magistrate, are an extension of the common law rule and such testimony, when properly taken, may be read in evidence on mere identification.

6. Same—

The testimony of a witness, stenographically taken at a *habeas corpus* proceeding before the trial of defendants, may be received as evidence on their subsequent trial upon indictment, the witness in the meantime having become insane, when its correctness is testified to by the official stenographer who took and transcribed it, and there is no suggestion that the record thereof is not full and accurate.

7. Criminal Law § 29e—

On a trial upon an indictment for robbery from the person of a woman, evidence that one of defendants was heard to say some time before the alleged robbery, in a conversation relative to other robberies, that he knew an old woman who kept money under her dress, *held* competent.

8. Criminal Law § 41e: Trial § 17—

Where evidence, competent only for the purpose of corroborating a witness, is admitted generally without objection, there is no error in the court's failure to so restrict it.

9. Criminal Law § 8—

Where two defendants go into a house and rob a person, while a third remains outside in an automobile, parked near-by for the purpose of aiding and abetting the two in getting away and sharing the money with them, all are equally guilty as principals.

APPEAL by defendants from *Williams, J.*, at December Term, 1943, of JOHNSTON.

The defendants were convicted of robbery of one Ardella Evans committed on the first day of October, 1943. With the appellants Ernest Evans was charged in the bill of indictment, but in the course of the trial the solicitor for the State took a *nol. pros.* as to him.

From judgment of imprisonment predicated upon a jury verdict of guilty of robbery the defendants William Davis (*alias* Jack) Ham, Thurman Hardy and Raymond Hardy appealed to the Supreme Court, assigning errors.

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

Edward G. Hobbs and Claude C. Canaday for defendants, appellants.

SCHENCK, J. The first exceptive assignments of error set out in the appellants' brief are those numbered one and two and are to the court's refusal to allow the defendants' motion to dismiss the action or for judgment of nonsuit lodged when the State had produced its evidence and rested its case and renewed after all the evidence in the case was concluded (G. S., 15-173). We are constrained to sustain these assignments in so far as they relate to the defendant Raymond Hardy, since the evidence raises no more than a suspicion of his guilt. The assignments in so far as they relate to William Davis (*alias* Jack) Ham and Thurman Hardy are not sustained, since the testimony of the prosecuting witness Ardella Evans was to the effect that she was robbed of between five and six thousand dollars by two men who came to her house on the night, or late evening, of the first day of October, 1943; that one of the men held her while the other took the money from a pocket or bag attached to her slip; that the man who held her was the taller of the two, and the man who actually took the money off of her person was the shorter; that the two men she subsequently saw in the jail were the two men who robbed her, and that these two men were Jack Ham and Thur-

man Hardy, two of the defendants. The fact that there may have been some variance or lack of definiteness and positiveness in her testimony on cross-examination could only affect the credibility of her testimony, and of this the jury were the sole judges. *S. v. Smoak,* 213 N. C., 79, 195 S. E., 72.

Assignments of error 5 and 6 are to certain testimony of the prosecuting witness Ardella Evans to the effect that she did "reckon" the defendants "were trying to borrow money" from her, and that they "were trying to borrow some" at the time they carried her to the show, and that she "thought" they tried to borrow $300.00 the first time, and she "reckoned" they wanted to borrow $750.00 the second time. The appellants contend that this testimony was incompetent for the reason that it was indefinite and not clear, and speculative, and against the interest of the appellants. With this contention we do not concur. How much weight should be given to the testimony was for the jury. The testimony was competent to show a motive in that it tended to show the defendants knew the prosecuting witness had the money and that the defendants were in need of money. *S. v. Cain,* 175 N. C., 825, 95 S. E., 930.

Assignments of error 7 and 8 are to certain evidence relative to the physical and mental condition of one Ernest Evans offered for the purpose of showing that the said Ernest Evans was unable to attend court and testify and thereby render competent in this trial his testimony theretofore taken in a *habeas corpus* proceeding instituted by the defendants in this case. The first evidence assailed being the testimony of Dr. E. N. Booker, an admitted medical expert, to the effect that Ernest Evans was not, in his opinion, able to attend court, and the second evidence assailed being the testimony of Lester Hales to the effect that Ernest Evans "lost his mind or something." We think both the testimony of Dr. Booker and of Lester Hales falls within the well recognized exceptions to the rule rendering opinion evidence incompetent. "To the general rule that the opinion evidence is incompetent there are three, at least, well recognized exceptions: First: opinions of experts; second, opinions on the question of identity; and third, opinions received from necessity, *i.e.,* when from the nature of the subject under investigation, no better evidence can be obtained." *S. v. Harris,* 213 N. C., 648, 197 S. E., 156; *S. v. McLaughlin,* 126 N. C., 1080, 35 S. E., 1037. We are of the opinion that the testimony of Dr. Booker falls within the first exception and that of the witness Hales within the third. These assignments are therefore untenable.

Assignment of error No. 13 relates to the introduction by the State of the testimony of Ernest Evans, taken at the *habeas corpus* proceeding before the trial of this case, over the objection of the defendants.

In speaking of the effect of our statutes (formerly C. S., 4560, 4563, and 4572, now G. S., 15-88, 15-91, and 15-100) making competent evidence of testimony reduced to writing by magistrates upon preliminary hearings upon the common law rule, *Hoke, J.,* in *S. v. Maynard,* 184 N. C., 653, 113 S. E., 682, says: "But a proper perusal of this legislation will disclose that the same is in extension of the common-law principle which we are considering, that its purpose was to make these preliminary examinations, when properly taken, certified, and filed, in the nature of an official record, to be read in evidence on mere identification, and that it does not and was not intended to restrict or trench upon the common-law principle that evidence of this kind, when repeated by a witness under proper oath, and who can and does swear that his statements contain the substance of the testimony as given by the dead or absent witness, shall be received in evidence on the second trial. And well considered authority is to the effect that stenographers' notes, when the stenographer who took them goes on the stand and swears that they are accurate and correctly portray the evidence as given by the witness, come well within the principle." The distinguished Justice also quotes with approval from *Mattox v. U. S.,* 156 U. S., 237, as follows: "That all the authorities hold that a copy of stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, is competent evidence of what he said," and also cites *Settee v. R. R.,* 171 N. C., 440, 88 S. E., 734, where it is written: "The testimony of a witness stenographically taken at a former trial, who is absent from the State under such circumstances that his return is merely contingent or conjectural, may be received as evidence on a subsequent trial of the same cause of action when its correctness is testified to by the official stenographer who took and transcribed it, and there is no suggestion that the record thereof was not full and entirely accurate." Mrs. Carrie Speight Edwards testified: "I am Court Reporter for Johnston County, and took the evidence in the *habeas corpus* proceeding in this matter. The book handed me is a true transcript of the evidence as taken by me. The testimony of Ernest Evans begins on page 71, and is a true copy of this evidence as taken by me. He was cross-examined by counsel for the defendants." It would seem that the requirements of the common law rule as applied by us were met in this case and there was no error in the admission in evidence of the testimony of the witness Ernest Evans as stenographically taken at the *habeas corpus* proceeding and as transcribed and identified under oath by the reporter who took it, and we so hold.

Assignments of error 14 and 15 are to the admission in evidence of the testimony of Erwin Alexander over the objection of defendants and the refusal of the court to strike such testimony upon motion so to do.

The testimony involved was to the effect that the witness had heard Jack Ham, one of the defendants, some time before the alleged robbery was committed, say in a conversation relative to recent robberies in the community that he knew an old woman who had some money and was keeping it under her dress. This evidence was competent as tending to show that the defendant Ham knew the prosecutrix had money and kept it under her dress, of which money she was subsequently robbed. This was a circumstance, which standing alone may not have had any potency, but when considered in connection with all the other circumstances appearing in the evidence may not have been entirely feckless. In criminal cases every circumstance calculated to throw any light upon the supposed crime is permissible. *S. v. Payne,* 213 N. C., 719, 197 S. E., 573, and cases there cited. These assignments cannot be sustained.

Assignment of error No. 18 is directed to the failure of the court to instruct the jury that certain testimony of Sheriff K. L. Rose was competent only for the purpose of corroborating the witness Ernest Evans. This assignment is untenable for the reason that the appellant did not ask, at the time of the admission of the evidence, that it be restricted to the purpose for which it was competent. Rule 21, Rules of Practice in the Supreme Court, 221 N. C., 558; *S. v. Tuttle,* 207 N. C., 649, 178 S. E., 76; *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606, and cases there cited.

Assignment of error No. 19 is to an excerpt from the charge reading: "In that connection I charge you that if you find beyond a reasonable doubt that two of the defendants went in the home of Miss Evans and seized her and held her by force and violence, one holding her while another feloniously took from her person a sum of money with intent to appropriate it to their own use, and while so doing another was out in an automobile parked near there for the purpose of aiding and abetting them in getting away and getting gone with the money, it would be your duty to return a verdict of guilty as to all, because in that instance all would be principals and all would be equally guilty." The appellants in their brief contend that the three "defendants would not be guilty as principals in equal degree of the crime" and "insist that to aid and abet in escaping from the commission of the crime would not constitute a person guilty of the original crime committed." We see no error in the charge as quoted, but if the objection of the appellants to the charge be limited to the defendant who is alleged to have remained in the automobile to carry his codefendants away after the robbery had been perpetrated, any error therein is rendered harmless since we have reversed the judgment of the trial court in so far as it related to this defendant, Raymond Hardy, whom the State contended was aiding and abetting by being present in a waiting automobile for the purpose of accomplishing an escape.

Assignments of error 3 and 4 are formal and relate to the court's refusal to set the verdict aside and for a new trial for errors committed in the course of the trial, and to the judgment. All of the assignments of errors have been discussed *seriatim* as they are set out in appellant's brief and in them we find no prejudicial error as to the defendants William Davis (*alias* Jack) Ham and Thurman Hardy.

Since we are of the opinion that the evidence was insufficient to carry the case to the jury as to the guilt of Raymond Hardy the judgment as to him is reversed.

As to defendant William Davis (*alias* Jack) Ham and defendant Thurman Hardy, no error.

As to defendant Raymond Hardy, reversed.

E. N. MOORE AND WIFE, FLORENCE W. MOORE; H. B. MOORE AND WIFE, ESTHER R. MOORE; BETH MOORE HUNTER (WIDOW), SALLIE H. LEGGETT AND HUSBAND, L. W. LEGGETT; ELIZABETH HYMAN (UNMARRIED), EMILIE HYMAN (UNMARRIED), W. D. HYMAN AND WIFE, HILDA E. HYMAN, AND E. P. HYMAN AND WIFE, BESSIE E. HYMAN, v. MARTHA NORMAN (PATTIE) BAKER (WIDOW), SALLIE BAKER EVERETT AND HUSBAND, B. B. EVERETT, AND JOHN B. CHERRY AND SUSIE HYMAN BOWDEN.

(Filed 22 March, 1944.)

1. Partition § 4a: Pleadings § 16a—

In a petition for partition of land, alleging that petitioners and defendants, except John B. Cherry, are tenants in common and owners of, and are seized in fee of the lands therein described, an additional statement that Cherry is in wrongful possession of some part of the land is insufficient to oust jurisdiction and a demurrer thereto was properly overruled.

2. Wills § 33b: Estates §§ 5, 9a—

In a will devising lands to testator's three daughters, during their natural lives, and providing that the share of each of the daughters shall upon her death go to *her children* and their heirs absolutely, the word "children" is a word of purchase. This use of "children" does not create an estate in fee simple or a fee tail which would be converted into a fee simple by G. S., 41-1.

3. Wills §§ 33b: Estates § 9a—

When the devise is to one for life and after his death to his children or issue, the rule in *Shelley's case* has no application, unless it manifestly appears that such words are used in the sense of heirs generally.

APPEAL by respondents other than Cherry and Bowden from *Parker, J.*, at November Term, 1943, of HALIFAX.

This is a special proceeding instituted before the clerk of the Superior Court of Halifax County on 4 February, 1942, for the partition of certain lands.

It is alleged that the petitioners and respondents are now tenants in common and are the owners of and seized in fee simple of the lands referred to in the petition, except the respondent John B. Cherry, and that the petitioners are informed and believe that the said John B. Cherry is now "in possession of some part of said lands, to which possession he is not entitled."

The respondents Martha Norman (Pattie) Baker, Sallie Baker Everett and B. B. Everett demurred to the petition on the ground (1) that the court had no jurisdiction in that the interest of John B. Cherry is not set out and it is affirmatively stated in the petition that the said defendant is in possession of a part of said land, to which possession he is not entitled, and (2) "that the complaint does not in law state a cause of action." The respondents Cherry and Bowden filed no pleadings.

The cause was heard upon the demurrers filed on 28 July, 1942, by the clerk of the Superior Court of Halifax County, and, after the suggestion of her death and the making of the personal representative of Martha Norman (Pattie) Baker a party, and the correction of certain errors in the transcription to the records of the will of the late S. R. Spruill, under which the petitioners claim title, the said clerk entered judgment sustaining the demurrer upon both grounds asserted, namely (1) the want of jurisdiction, and (2) the petition did not state a cause of action, and from this judgment of the clerk the petitioners appealed to the judge holding the courts of the district at term, and the judge at the August Term, 1942, of Halifax Superior Court, being of the opinion that it was without jurisdiction due to an improper joinder of parties and causes of action, sustained the demurrer on that ground; and having sustained the demurrer upon jurisdictional grounds, the court was of the further opinion that the second ground of demurrer, namely, the failure of the petition to state a cause of action, was not before the court, and, therefore, did not rule thereon.

The petitioners appealed to the Supreme Court from the judgment of the Superior Court sustaining the demurrer upon jurisdictional grounds, making as their only assignment of error the judgment signed.

The Supreme Court held that the allegation relative to the wrongful possession of John B. Cherry "is insufficient to convert this action into an action for ejectment and may therefore be treated as surplusage, except as affecting costs," and for that reason did not place the title to the *locus in quo* at issues, and such being the case, the petitioners were not required to prove title as in an action in ejectment, and hence the jurisdiction of the Superior Court was not denied by misjoinder. The

judgment of the Superior Court sustaining the demurrer and dismissing the action upon the ground of a misjoinder of parties and of causes of action was accordingly reversed. *Moore v. Baker,* 222 N. C., 736, 24 S. E. (2d), 749.

The cause came on to be heard at the November Term, 1943, of Halifax Superior Court, when and where the judge presiding denied a motion of the respondents that the entire proceeding be dismissed for the reason that it was *res adjudicata,* and ordered, pursuant to the opinion of the Supreme Court, that the judgment sustaining the demurrer upon the ground of lack of jurisdiction due to misjoinder of parties and causes of action be reversed, and ordered and decreed that the demurrer of the respondents on the ground that the petition does not state a cause of action be overruled. From this judgment the respondents appealed to the Supreme Court, assigning error.

I. T. Valentine and Wilkinson & King for plaintiffs, appellees.

R. O. Everett and Irwin Clark for respondents, appellants.

SCHENCK, J. From the outset this proceeding has posed two questions, the answers to which are determinative of the controversy. The first question is should the demurrers filed by the respondents be sustained upon the ground of a misjoinder of parties and of causes of action. This question has been previously answered in the negative. *Moore v. Baker, supra.* The second question is should the demurrers filed by the respondents be sustained upon the ground that the petition fails to state facts sufficient to constitute a cause of action. We are constrained to answer this question also in the negative.

The answer to the second question turns upon the construction of a portion of the will of the late S. R. Spruill admitted to probate in Book of Wills 6, page 179, office of the clerk of the Superior Court of Halifax County. Said portion of said will reads: "I give, devise and bequeath the whole of my estate, both real and personal, to my three daughters, Frances Elizabeth, Martha Norman and Susan Amelia during the time of their *natural lives.* No part of my estate is to be divided until the marriage of all of my three daughters, or in case of the death of one before marriage, then upon the marriage of the others, when the last one shall be married, my estate shall be divided between my said daughters who may then be living, and the issue of such as may then be dead leaving issue, the said issue to take *per stirpes* and not *per capita.* The share of each one of my said daughters shall upon her death go to *her children* and their heirs absolutely. Until the marriage of the last one of my said daughters my estate shall be held as common stock."

The petitioners are grandchildren of the testator and children of the testator's daughters mentioned in his will, and their spouses. The respondent Martha Norman (Pattie) Baker was a daughter of the testator and has died since the institution of this proceeding. The respondent Sallie Baker Everett is the daughter of the late Martha Norman (Pattie) Baker, and B. B. Everett is her husband. The respondent Susie Hyman Bowden is a daughter of the late Frances Elizabeth (Spruill) Hyman and a granddaughter of the testator. The respondent John B. Cherry is a stranger to the blood of S. R. Spruill, the testator.

The three daughters of the testator, Frances Elizabeth, Martha Norman and Susan Amelia, mentioned in the will, were all married before the institution of this proceeding, and all except Martha Norman died before the institution thereof. The parties to this proceeding include all of the children of the deceased daughters mentioned in the will of the testator.

It is the contention of the respondents, appellants, that the parties to this proceeding, children of the daughters of the testator, did not take under the will of their grandfather, S. R. Spruill, since such will created a fee tail title in their respective mothers, which was converted into a fee simple title by the statute (C. S., 1734, now G. S., 41-1), and therefore if such parties had any claim to the *locus in quo* it was by inheritance from their respective mothers, and the allegations in the petition that they took as tenants in common under and by virtue of said will were on its face erroneous—in other words, the word "children" was a word of limitation. However, with this contention we do not concur. We are of the opinion, and so hold, that the word "children" is a word of purchase. The will devises the real estate to the three daughters of the testator, naming them, "during the time of their *natural lives*" and provides that "the share of each one of my said daughters shall upon her death go *to her children* and their heirs absolutely." The use of the word "children" following the life estate does not create a fee simple estate or a fee tail estate which would be converted by the statute into a fee simple estate. "When the devise is to one for life and after his death to his children or issue, the rule (in *Shelley's case*) has no application, unless it manifestly appears that such words are used in the sense of heirs generally." 25 A. & E., 651, and cases there cited; *Brown, J.*, in *Faison v. Odom,* 144 N. C., 107, 56 S. E., 793. There is no indication here that the word "children" was used in the sense of heirs generally. It therefore appears that the parties to this proceeding took in remainder by purchase under the will of S. R. Spruill, the rule in *Shelley's case* not applying, *Bobbitt v. Pierson,* 193 N. C., 437, 137 S. E., 160, and thereby became tenants in common and were authorized to have the land partitioned under the provisions of C. S., 3215, *et seq.*, now G. S., 46-3, *et seq.*

It follows that the demurrer was properly overruled and the judgment of the Superior Court so holding should be affirmed, and it is so ordered.

Affirmed.

A. B. HOPKINS, JR., AND HARTFORD FIRE INSURANCE COMPANY, v. COLONIAL STORES, INC.

(Filed 22 March, 1944.)

1. Evidence §§ 19, 42b—

In an action to recover damages caused by the collision of two motor vehicles, whether or not the answer of defendant's driver, made to a question by plaintiff's driver immediately after the accident, that he "must have been asleep," was part of the *res gestæ* becomes feckless, after defendant's driver goes upon the stand and denies the statement attributed to him, the first evidence becoming competent to impeach the defendant's driver.

2. Appeal and Error § 29—

Assignments of error, without reason, argument, or authority in the brief to support them, will not be considered on appeal. Rule 28 of the Rules of Practice in the Supreme Court.

3. Bailment §§ 3, 6—

A bailee has a right of action against a third party, who by his negligence causes loss of or injury to the bailed articles, and this right has been held to be the same even though the bailee is not responsible to the bailor for the loss.

4. Appeal and Error §§ 23, 39a—

Assignments of error relating to damages, where the record shows no such damages awarded, are untenable as no prejudicial error appears.

5. Evidence § 27: Trial § 19—

A statement by a witness of his conclusion as to the cause of damage invades the province of the jury and should be stricken out.

6. Appeal and Error § 39e—

A charge as to proper brakes on motor vehicles, in compliance with G. S., 20-124, where the evidence shows no mention of brakes, is a harmless inadvertence.

APPEAL by defendant from *Thompson, J.,* at October Term, 1943, of TYRRELL.

This is a civil action to recover damages for injury to an automobile truck of the individual plaintiff, as well also for injury to a trailer and cargo of said plaintiff, inflicted in a collision between the trailer of said plaintiff with a truck and semi-trailer of the defendant, on North Caro-

lina State Highway No. 32, between Edenton and Sunbury in Chowan County near the Gates County line, on 19 August, 1941; and wherein the defendant filed a counter action for damages due to injury inflicted to his truck and semi-trailer in said collision.

The truck and trailer of the plaintiff was driven by one Dixon in a northern direction and the truck and semi-trailer of the defendant was driven by one Roberts in a southern direction. There is allegation and evidence on the part of the plaintiff tending to show that the defendant's truck at the time of the collision was being driven on its left side of the center of the highway, while on the other hand there was allegation and evidence on the part of the defendant tending to show that the truck of the plaintiff was being driven on its left side of the center of the highway at the time of the collision. Therefore, the determinative question of fact presented on the trial was which of the trucks involved in the collision was driven on the wrong side of the highway, that is, on its left of the center of the highway when meeting and passing another vehicle coming in an opposite direction.

Appropriate issues were framed upon these adverse allegations and submitted to the jury and were answered in favor of the plaintiff, as were likewise the other issues submitted relating to contributory negligence and measure of damage.

From judgment in favor of the plaintiff the defendant appealed, assigning errors.

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

SCHENCK, J. The assignments of error set out in appellant's brief may be most satisfactorily disposed of by discussing them in the order in which they appear.

Assignments of error 1 and 2 assail the testimony of the plaintiff's witness Dixon, the driver of the plaintiff's truck, to the effect that Roberts, the driver of defendant's truck, immediately after the collision walked back to where the plaintiff's truck had come to rest and replied to a question of Dixon as to what was the matter with him that he (Roberts) "must have been about half sleep." Whether the reply of Roberts, the agent and employee of the defendant, testified to by Dixon, the driver of the plaintiff's truck, was a part of the *res gestæ* and therefore competent, under authority of *Harrill v. R. R.*, 132 N. C., 655, 44 S. E., 109; *Seawell v. R. R.*, 133 N. C., 515, 45 S. E., 850, or was a mere narrative of a past occurrence and therefore hearsay and incompetent, under authority of *Hester v. Horton Motor Lines,* 219 N. C., 743, 14 S. E. (2d), 794, and *Howell v. Harris,* 220 N. C., 198, 16 S. E. (2d),

829, need not be decided, since it appears that Roberts subsequently went upon the witness stand and testified that he made no such statement as was attributed to him by the witness Dixon. This made the testimony of the witness Dixon competent to contradict and impeach the testimony of the witness Roberts and rendered the exception thereto feckless. *Hester v. Motor Lines, supra,* at p. 746.

The rule in this jurisdiction with reference to the competency against the principal or employer of evidence of what an agent or an employee says relative to the acts of such agent or employee bottomed upon the theory that such statements were a part of the *res gestæ,* and the incompetency of statements made by the agent or employee which were mere narratives of past occurrences is clearly stated by the present *Chief Justice* in *Hubbard v. R. R.,* 203 N. C., 675 (678), 166 S. E., 802. The assignments of error 1 and 2 are untenable.

Assignments of error 3, 4, 5, 6, 7 and 8 are to evidence to the effect that the truck of the plaintiff prior to the collision was in "perfect shape" and the trailer of the plaintiff was in "good condition," whereas after the collision the truck was "completely ruined" and a "total wreck," and the trailer even after being repaired was "never as good," and that there were two repair bills, "one was $125.00 and one for $298.00." "No reason or argument is stated or authority cited" in appellant's brief to sustain these assignments. The mere reference to them and nothing more affords no assistance to the Court or to the litigants, and is a mere "pass brief" which does not comply with Rule 28 of Rules of Practice in Supreme Court. 221 N. C., 562-3. *Jones v. R. R.,* 164 N. C., 392, 80 S. E., 408. Assignments of error 3, 4, 5, 6, 7 and 8 are not sustained.

Assignments of error 11, 12 and 13. These assignments all relate to damages suffered by the plaintiff by reason of injury to his cargo, namely, staves, the property of the Richmond Cedar Works, for whom they were being transported under contract. The plaintiff was a bailee for hire of the staves and was entitled to recover damage for loss or injury thereto, since "where a third party has deprived a bailee of the possession of the property bailed, or has injured it by his negligence, the bailee may recover the whole value of the property, unless the bailor interposes by a suit for his own protection, and that he will hold the excess beyond his special interest in trust for the bailor. 5 Cyc., 223, sec. 8; 6 C. J., 1168, sec. 184. It has been uniformly held that the bailee has a right of action against a third party, who by his negligence causes the loss of or an injury to the bailed articles, and this right has been held to be the same, even though the bailee is not responsible to the bailor for the loss. 5 Cyc., 210; 6 C. J., 1149, sec. 111; 3 R. C. L., p. 138, sec. 62." *Harris v. R. R.,* 190 N. C., 480, 130 S. E., 319. See, also, *R. R. v. Baird,* 164 N. C., 253, 80 S. E., 406. Assignments of error 11, 12 and 13 are untenable.

Assignments of error 14, 15 and 16. These assignments all relate to damage alleged to have accrued by reason of the loss of the use of the truck. These assignments are untenable for the reason that it does not appear in the record that any damage was awarded for the loss of the use of the truck. It is stated in appellee's brief that an issue reading: "What damage, if any, is the plaintiff, A. B. Hopkins, Jr., entitled to recover for loss of use of his truck?" was submitted and answered "Nothing"; and while the court in its charge referred to such an issue in setting forth the issues in the record, page 7, no such issue appears. However, whether such issue was submitted, or whether, if submitted, was answered, no damage for loss of the use of the truck was included in the judgment, hence no prejudicial error appears.

Assignment of error 19. This assignment assails the ruling of the court in striking out a portion of the testimony of the witness Roberts that "what damage was done to Mr. Hopkins' truck when the truck turned over the rate of speed he was going is what did the damage to it." This statement stricken out was a mere conclusion, which invaded the province of the jury. The witness had already testified to the specific facts upon which the conclusion was based. Assignment of error 19 is untenable.

Assignments of error 22 and 23. These assignments are to portions of his Honor's charge. No. 22 assails the following excerpt: "If plaintiff has satisfied you from the evidence and by the greater weight that on this occasion the driver of the defendant's truck at the time of the collision failed to drive the defendant's truck upon the right half of the highway, then that would constitute negligence on the part of defendant's driver." The appellant fails to give any reason or make any argument or cite any authority for his position that this excerpt from the charge was error. It seems to be in accord with the statute, G. S., 20-148, which reads: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible." Assignment 22 cannot be sustained.

Assignment No. 23 assails an excerpt from the charge to the effect that the failure to equip a motor vehicle with brakes adequate to control the movement of and stop such vehicles shall constitute negligence, or failure to maintain brakes in good working order shall constitute negligence. We have compared the charge with the statute, G. S., 20-124, and the former seems to be in compliance with the latter. It is true, as stated in the brief of the appellant, that no mention of brakes or absence of adequate brakes is made in the evidence, but on the record as presented we do not regard the exception as valid, or the inadvertence, if such it were, as hurtful.

As aforesaid the evidence of the plaintiff and of the defendant was diametrically opposed. This raised clear cut issues of fact. The issues were submitted to the jury upon evidence and a charge free from prejudicial error, and the jury answered the issues in favor of the plaintiff. These answers compel an affirmation of the judgment predicated on the verdict.

No error.

STATE v. DAVID T. GAY.

(Filed 22 March, 1944.)

1. Rape §§ 2, 5—

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short distance to her home, the evidence is insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. G. S., 15-169; G. S., 14-33.

2. Rape § 2—

In order to convict of an assault with intent to commit rape, the evidence should show, not only an assault, but that defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part.

3. Rape §§ 1d, 5: Criminal Law § 52b—

Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. G. S., 15-169.

4. Rape § 2: Criminal Law § 53f—

Where, on trial of an indictment for an assault with intent to commit rape, the evidence is not sufficient to convict as charged but is sufficient to support a verdict for an assault, and defendant moves, not only for dismissal and nonsuit, but also for directed verdict, such motions are tantamount to a request for an instruction that there is no evidence to support a conviction as charged, and upon conviction and judgment of an assault with intent to commit rape, a new trial will be granted.

APPEAL by defendant from *Williams, J.,* at November-December Term, 1943, of WAYNE.

Criminal prosecution upon indictment charging defendant with feloniously assaulting a female person "with the intent, forcibly and against her will . . . to rape and carnally know" her. G. S., 14-22, formerly C. S., 4205.

In the trial court the named female person, testifying as a witness for the State, narrated these facts: On 17 November, 1943, she, a married woman, was residing in the city of Goldsboro, North Carolina. About ten minutes before eleven o'clock on the night of that date while en route from a near-by military camp where her husband was stationed, she alighted from a bus about four city blocks from, and started walking to her place of abode. As she was walking alone along a public street about one hundred and fifty feet from her destination, a man, whom she identified as the defendant, came from the middle of the street, where she first saw him, alongside of her, and, exposing his person by the light of a flashlight, accosted her with an indecent question, prefaced with the words, "Pardon me, Miss, may I . . ." She testified further: "If he had started towards me he would have had to take three or four steps to get to me. I screamed and ran. He chased me. He must have run about 10 or 11 steps . . . I ran home . . . The man never put his hands on me, never touched me . . . He never attempted to put his hands on me, because I turned and ran . . ." The State offered evidence in corroboration of her testimony, and as to her identification of defendant.

On the other hand, defendant, as witness for himself, denied that he was the man to whom the State's witness referred, and testified, and offered testimony of others that he was elsewhere at the time of the alleged offense as described in the State's evidence.

Verdict: Guilty as charged in the bill of indictment.

Judgment: That the defendant be confined in the State's Prison for a term of not less than three nor more than five years.

Defendant appeals therefrom to Supreme Court and assigns error.

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

Langston, Allen & Taylor and N. W. Outlaw for defendant, appellant.

WINBORNE, J. At the close of the State's evidence and again at the close of all the evidence defendant demurred thereto and moved for judgment of dismissal or nonsuit, G. S., 15-173, and for a directed verdict. Defendant, having reserved exceptions to the rulings of the court in denying these motions, stresses for error the refusal of the court to direct the jury that there is not sufficient evidence to convict defendant of the offense laid in the bill of indictment, and to limit the verdict to an assault. G. S., 15-169, formerly C. S., 4639.

The statute, G. S., 15-169, provides that on the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault if the evidence warrants such

finding. See *S. v. Smith,* 157 N. C., 578, 72 S. E., 853. An assault with intent to commit rape is a felony. G. S., 14-1, and -22. And "in order to convict a defendant on the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part." *S. v. Massey,* 86 N. C., 658; *S. v. Jeffreys,* 117 N. C., 743, 23 S. E., 175; *S. v. Hill,* 181 N. C., 558, 107 S. E., 140. See, also, *S. v. Jones,* 222 N. C., 37, 21 S. E. (2d), 812, and cases cited.

Applying these principles, the evidence presented in the record on this appeal, taken in the light most favorable to the State, is insufficient to support a verdict of guilty of an assault with intent to commit rape. While the evidence shows defendant solicitous to gratify his passion on the person of the woman, it is wholly lacking in the intention "to do so, at all events, notwithstanding any resistance on her part." Yet the evidence in the record would warrant the finding of a verdict of guilty of an assault upon a female person, G. S., 15-169; G. S., 14-33; *S. v. Smith, supra; S. v. Williams,* 186 N. C., 627, 120 S. E., 224, and cases cited, or of a simple assault. *S. v. Hampton,* 63 N. C., 13; *S. v. Rawles,* 65 N. C., 334; *S. v. Jeffreys, supra; S. v. Williams, supra.*

Therefore, concededly, even though the evidence is insufficient to support a verdict of guilty of an assault with intent to commit a rape, the motions for judgment of dismissal or nonsuit could not be granted as the defendant could have been convicted of an assault. G. S., 15-169; *S. v. Hill, supra; S. v. Holt,* 192 N. C., 490, 135 S. E., 324; *S. v. Jones, supra.*

However, in the *Jones case, supra,* while holding that upon the evidence appearing in the record nonsuit, for which alone motions were made, could not be granted, it is stated: "If there had been a request for instruction to limit the verdict to a less degree of the same crime, C. S., 4640, we are of opinion that upon the evidence appearing in the record, the court would have erred in refusing to give the instruction in the light of the principles enunciated in *S. v. Massey,* 86 N. C., 658, and approved and followed in *S. v. Jeffreys,* 117 N. C., 743, 23 S. E., 175; *S. v. Smith,* 136 N. C., 684, 49 S. E., 334; and *S. v. Hill, supra.*"

In the light of this intimation it is contended for defendant in the present appeal that he having moved in trial court not only for a judgment of dismissal or nonsuit, but for a directed verdict, the motion for directed verdict when so coupled with the motion for dismissal or nonsuit, is tantamount to a request for instruction that there is no evidence to support a verdict of guilty of an assault with intent to commit a rape —the offense charged. In support of this contention it is pointed out that after verdict defendant moved (1) in arrest of judgment "for the reason that the evidence does not justify the verdict of the jury and does not

show that the crime for which defendant was convicted has been committed," and (2) for a new trial "for the reason that the evidence did not justify a conviction for assault with intent to commit rape." From this it is argued with force and conviction that it is apparent that the purpose of the motion for directed verdict was to request an instruction which would limit at most the verdict to an assault upon a female person. This argument carries conviction.

However, it is contended for the State that the motion for a directed verdict is general, and has no more force and effect than a general motion for dismissal or nonsuit—that the effect is the same and the terms are used interchangeably. This contention might hold good if the motion had been only for a directed verdict. The State relies upon the decision in *S. v. Hill, supra.* That decision is not in conflict with, but rather supports decision here reached. There motion for nonsuit was not allowed, but a new trial was granted for error in the trial court refusing to give an instruction, requested by defendant, that there was no evidence that would justify the jury, beyond a reasonable doubt, to convict of the offense charged, the same as in the present case.

For error shown let there be a

New trial.

JESSE S. CREECH v. SUN LIFE ASSURANCE COMPANY OF CANADA AND MILTON BEST.

(Filed 22 March, 1944.)

1. Insurance § 30c—

Payment of the initial premium on a policy of life insurance to one, who is a soliciting agent or broker of the company to solicit the insurance and deliver the policy, constitutes payment to the company by virtue of G. S., 58-46.

2. Insurance §§ 22b, 30a—

A recital of payment of premium in a policy of insurance, unconditionally delivered, may not be contradicted to work a forfeiture of the policy, or to defeat a recovery thereon, in the absence of fraud. If in fact the premium was not paid, it may be recovered, but the policy cannot be invalidated on that account.

3. Insurance § 37—

In an action to recover on a policy of life insurance, where defendant admits the issuance of the policy, its assignment to plaintiff, payment by plaintiff of all premiums except the first and the death of insured, there being evidence for plaintiff of payment by him of first premium to defendant's agent, a *prima facie* case for the jury is made out.

APPEAL by plaintiff from *Dixon, Special Judge,* at November Term, 1943, of JOHNSTON.

Civil action instituted 28 April, 1942, by plaintiff, the absolute assignee, in a life insurance policy, issued upon the life of Cullen Creech, 8 April, 1935, in the sum of $2,500.00, by Sun Life Assurance Company of Canada, to collect the proceeds of said policy, Cullen Creech having died on 9 May, 1941.

In the trial below, at the close of plaintiff's evidence, defendants moved for judgment as of nonsuit. Motion granted and judgment entered accordingly. Plaintiff excepted and appealed.

Edward G. Hobbs and Lyon & Lyon for plaintiff.
Abell, Shepard & Wood and Smith, Wharton & Jordan for defendants.

DENNY, J. The evidence discloses that L. D. Short solicited the insurance issued on the life of Cullen Creech by the Sun Life Assurance Company of Canada, and procured the policy through Milton Best, the agent and representative of the company. There is also evidence tending to show that L. D. Short delivered the policy to the plaintiff and collected from him the first annual premium on the policy, in the sum of $232.45; that Short failed to remit any part thereof to the company; that thereafter the company changed the method of payment of premiums from an annual to a quarterly basis and also collected from the plaintiff through its office in Greensboro, N. C., the first annual premium on the policy on the quarterly basis.

The appellees contend that under the decisions of this Court in *Mills v. Ins. Co.,* 209 N. C., 296, 183 S. E., 287, and *Thompson v. Assurance Society,* 199 N. C., 59, 154 S. E., 21, the evidence to the effect that plaintiff paid to L. D. Short a certain premium or premiums, does not establish any liability on the part of the defendant insurance company, since there is no evidence that the company received any part of the premiums paid to Short. The position is untenable as to the payment of the first annual premium. It is held in *Mills v. Ins. Co., supra,* and in *Thompson v. Assurance Society, supra,* as well as in many other cases, that payment of the initial premium on a policy of life insurance to insurer's soliciting agent is payment to the company. While the defendants deny that Short was the agent of the defendant company, there is ample evidence to show that L. D. Short was the soliciting agent or broker for the purpose of obtaining the insurance, and the agent of the company for the purpose of delivering the policy. Therefore, if the plaintiff or the insured paid to Short the first annual premium on the policy, in the sum of $232.45, it would constitute payment to the company by virtue of the statute, G. S., 58-46; C. S., 6304.

In the case of *Williamson v. Ins. Co.,* 212 N. C., 377, 193 S. E., 273, it is stated: "The authorities are to the effect that a recital of payment in a policy of insurance, unconditionally delivered, may not be contradicted to work a forfeiture of the policy, or to defeat a recovery thereon, in the absence of an allegation of fraud. *Grier v. Ins. Co.,* 132 N. C., 542, 44 S. E., 28. To this extent it is contractual and binding upon the parties. *Britton v. Ins. Co.,* 165 N. C., 149, 80 S. E., 1072. Compare *Smith v. Land Bank, ante,* 79. 'If the premium in fact is not paid, the acknowledgment of payment, so far as it is a receipt for money, is only *prima facie,* and the amount can be recovered; but so far as the acknowledgment is contractual, it cannot be contradicted so as to invalidate the policy.'"

The policy involved in this action states a premium is to be paid 8 April, 1935, in the sum of $232.45 and annually thereafter on 8 April in every year during the continuance of the policy. However, the policy was not executed by the company until 25 April, 1935, and the plaintiff testified the first annual premium was paid at the time of the delivery of the policy, which was necessarily some time after 25 April, 1935. The recitals in the policy in the case of *Williamson v. Ins. Co., supra,* could not be contradicted in the absence of an allegation of fraud. In the instant case, however, the plaintiff must show payment of the premium as alleged. Upon such showing, the company will be required by virtue of G. S., 58-46, to give credit therefor, whether or not any portion thereof was received by it.

The defendants admit the issuance of the policy, the absolute assignment thereof to the plaintiff, the payment by plaintiff of all premiums received by the company on the policy and the death of the insured. Notwithstanding the admission by plaintiff that he has paid no premiums on the policy since June, 1940, at which time he was notified by the company the policy had lapsed, the evidence tending to show payment of the first annual premium to the soliciting agent, for which he has been given no credit by the company, together with the above admissions, made out a *prima facie* case for the jury. *Blackburn v. Woodmen of the World,* 219 N. C., 602, 14 S. E. (2d), 670; *Williamson v. Ins. Co., supra; Creech v. Woodmen of the World,* 211 N. C., 658, 191 S. E., 840; *Knight v. Ins. Co.,* 211 N. C., 108, 189 S. E., 121; *Harris v. Jr. O. U. A. M.,* 168 N. C., 357, 84 S. E., 405; *Wilkie v. National Council,* 147 N. C., 637, 61 S. E., 580; *Kendrick v. Life Ins. Co.,* 124 N. C., 315, 32 S. E., 728.

Whether or not this policy was in force at the time of the death of the insured, if the jury should find that the first annual premium thereon was paid to Short and that plaintiff has been given no credit therefor by the company, is not presented for our determination. The status of the

policy, after crediting the sum of $232.45 thereon, if it should be determined that said amount should be credited by the defendant company, will be determined under the provisions contained in the policy for extended insurance.

Plaintiff offered no evidence in support of the allegation in the complaint as to the liability of the defendant Milton Best, hence the judgment below as to him should be affirmed.

Affirmed as to defendant Milton Best.

Reversed as to defendant Sun Life Assurance Company of Canada.

STATE v. ENNIS TRUELOVE, BILL BYRD AND KATHALEENE BYRD.

(Filed 22 March, 1944.)

1. Criminal Law § 47—

Upon the consolidation and trial together, over defendants' objection, of two indictments, the first against all three of defendants for abduction of a fourteen-year-old girl, and the second against two of the three defendants for an assault with intent to commit rape upon the abducted child during the abduction, while a verdict of guilty on the first charge and a verdict of not guilty on the second would seem to render the exception to the consolidation feckless, the right to consolidate was in the sound discretion of the trial court. G. S., 15-152.

2. Criminal Law § 53a—

The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away."

3. Trial § 29a: Appeal and Error § 39e—

Where the court, in concluding its charge, referred to the indictment for abduction as one for "kidnapping," and the jury corrected it by the use of the word "abduction" in the verdict, there is no error, the inadvertence being a *lapsus linguæ.*

APPEAL by defendants from *Williams, J.,* at November Term, 1943, of HARNETT.

Criminal prosecutions tried upon indictments charging the defendants, Annis (Ennis) Truelove, Bill Byrd and Kathaleene (Catherine) Byrd, in one bill, with abducting Edna Byrd in violation of G. S., 14-41 (C. S., 4223), and charging the defendants, Annis Truelove and Bill Byrd, in another bill, with an assault upon Edna Byrd with intent to rape, con-

solidated and tried together, as both charges arose out of the same transaction or a series of connected transactions. Exception.

There is evidence on behalf of the prosecution to show that on 21 August, 1942, about 3 p.m., in the town of Coats, the three defendants induced Edna Byrd, a child under 14 years of age, who at the time was skating alone on a sidewalk near her grandmother's home, to enter an automobile in which they were riding, under the guise of offering to take her to her grandmother's and then continued on beyond her grandmother's house and carried her out into the country, where the two male defendants assaulted her with intent to rape according to her testimony. Due to car trouble, they did not get back until 10:00 p.m., or about seven hours from the time of the alleged abduction.

The evidence is in sharp conflict as it relates to both indictments. It is amply sufficient, however, to carry the case to the jury on both charges.

Verdicts: On the charge of abduction: "Defendants guilty of abduction as charged in the indictment." On the charge of assault with intent to rape: "Not guilty."

Judgment: Imprisonment in the State's Prison for not less than 3 nor more than 5 years. Judgment against *feme* defendant suspended on terms.

The defendants appeal, assigning errors.

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

Neill McK. Salmon for defendants.

STACY, C. J. The questions presented are, (1) the propriety of the consolidation, and (2) the correctness of the charge.

First, in respect of the consolidation, it is to be observed that the jury returned a verdict of "not guilty" on the second indictment, or the one charging assault with intent to rape. This would seem to render the exception feckless, even if initially regarded as one of substance, though the State contends the consolidation was proper in any event. *S. v. Stephens,* 170 N. C., 745, 87 S. E., 131.

It is provided by G. S., 15-152 (C. S., 4622), that when 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 for trial. *S. v. Norton,* 222 N. C., 418, 23 S. E. (2d), 301; *S. v. Chapman,* 221 N. C., 157, 19 S. E. (2d), 250.

Speaking to the subject in *S. v. Combs,* 200 N. C., 671, 158 S. E., 252, it was said: "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which

the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others."

On the record as presented, we think the question of consolidation was a matter resting in the sound discretion of the trial court. *S. v. Waters,* 208 N. C., 769, 182 S. E., 483; *S. v. Stephens, supra.*

Second, in respect 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 attack. *S. v. Alex Harris,* 223 N. C., 697; *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193.

The principal exception is addressed to the instruction that if Edna Byrd were intriguingly induced to get into the car, "and as a result of such inducement she got in the automobile and was taken out," the defendants would be guilty of a violation of the statute. G. S., 14-41 (C. S., 4223.) The defendants complain at the use of the expression "taken out" as being in excess of the statutory language, "induce . . . to leave," and necessarily too broad. *S. v. Burnett,* 142 N. C., 577, 55 S. E., 72. It is quite clear, from a reading of the entire charge, and the jury must have so understood it, that "taken out" was here employed in the sense of "taken away." In speaking to the same matter in other portions of the charge, the expressions, "induce . . . to leave" and "took her away," are used. The meaning seems clear enough. It is hardly susceptible of any misunderstanding. The exception is without substantial merit. It must be overruled.

In concluding the charge, the court referred to the indictment against all three of the defendants as one for "kidnapping." This was a clear inadvertence, a *lapsus linguæ,* and the jury corrected it by using the word "abduction" in the verdict.

No fatal error has been shown and the record appears to support the verdict, hence the result is an affirmance.

No error.

ADA CHESTNUTT v. ISAIAH DURHAM, DALE RAYNOR, ADMINISTRATRIX OF THE ESTATE OF MARY ELIZA McCULLEN, DECEASED, AND DALE RAYNOR, INDIVIDUALLY, AND ED RAYNOR, ADMINISTRATOR OF IDA RAYNOR, DECEASED.

(Filed 22 March, 1944.)

1. Gifts §§ 1, 2—

An owner of personalty may make a valid gift thereof, *inter vivos,* with the right of enjoyment in the donee postponed until after the death of the donor, if the subject of the gift is delivered to a third person to be

given to donee on donor's death, the donor thereby intending to part with all control over the property.

2. Evidence § 15—

Statements on cross-examination, which conflict with and contradict the testimony of the witness made on direct examination, affect only his credibility and do not warrant a withdrawal of the case from the jury.

APPEAL by defendant, Dale Raynor, individually, and as administratrix of the estate of Mary Eliza McCullen, from *Burgwyn, Special Judge,* at September Term, 1943, of WAYNE. No error.

Some time about 1928 Mary Eliza McCullen, who lived on or near the land of defendant, Isaiah Durham, carried to his home a fruit jar containing $1,000.00 in currency. She and Durham buried the jar near an outhouse on his land, and she requested him to look after it and at her death to give it to her two sisters, plaintiff and Ida Raynor.

About five years later she went back and inquired about the money. She and Durham then dug it up, and she examined it to see if it was damaged. Finding it in good condition, they reburied it. Shortly thereafter she moved some fifteen miles away and made no further inquiry about it. She died 25 April, 1943. Durham then told the plaintiff about the money and stated he would give it to her and Ida but her brother objected and he would have to turn it over to the administrator.

Durham delivered the money to the defendant, Dale Raynor, Administratrix, and plaintiff instituted this action to recover same. On motion, Ed Raynor, Administrator of Ida Raynor, deceased, the other sister, was made party defendant. Defendant, Dale Raynor, Administratrix, admitted the receipt of the money but denied there was any valid gift *inter vivos* and asserted ownership as administratrix. She likewise pleaded a cross action against Durham, alleging that he, Durham, received $2,000.00 and had accounted for only $1,000.00.

At the trial below, when plaintiff rested, defendant Dale Raynor, Administratrix, admitted she had no competent evidence to support her cross action. Thereupon, judgment of nonsuit as to Durham was entered by consent. Appropriate issues were submitted to and answered by the jury in favor of plaintiff. From judgment thereon defendant, Dale Raynor, individually and as Administratrix, appealed.

Faircloth & Faircloth for plaintiff, appellee.

J. Faison Thomson for defendant Dale Raynor, individually and as Administratrix, appellant.

BARNHILL, J. A person may make a valid gift *inter vivos* with the right of enjoyment in the donee postponed until the death of the donor.

The rule governing such gifts is stated in American Jurisprudence as follows:

"It is, of course, competent for an owner of personal property to make, and he may make, a valid gift thereof, with the right of enjoyment in the donee postponed until the death of the donor, if the subject of the gift is delivered to a third person, with instructions to deliver it to the donee on the donor's death, and if the donor parts with all control over it, reserves no right to recall it, and intends thereby a final disposition of the property. In such a case, where the gift is absolute, postponement of the delivery and enjoyment of the gift does not necessarily prevent the passing of a present interest, even though possession by the donee is not obtained until after the donor's death." 24 Amer. Jur., 749.

This rule has been approved and adopted in this jurisdiction. *Parker v. Ricks,* 53 N. C., 447; *Handley v. Warren,* 185 N. C., 95, 116 S. E., 168. See also Anno. 3 A. L. R., 902; 60 A. L. R., 1055.

Durham testified in part that Mary Eliza McCullen, at the time she delivered the money to him, said: "I want you to take this money and keep it until I die, and when I die I want you to give it to my two sisters." This evidence, together with the other facts and circumstances appearing from the testimony, when considered in the light most favorable to the plaintiff, is amply sufficient to require the submission of appropriate issues to the jury.

It is true that Durham, on cross-examination, made statements which are in conflict with and tend to contradict his testimony given on direct examination. These statements were in large measure an attempt on his part to give his interpretation of the effect of his transaction with the donor. At most they only tend to weaken his former testimony. They do not warrant a withdrawal of the case from the jury. It must determine the weight and credibility of the evidence. *Hadley v. Tinnin,* 170 N. C., 84, 86 S. E., 807; *Tomberlin v. Bachtel,* 211 N. C., 265, 189 S. E., 769, and cases cited.

Appellant, Administratrix, is custodian of the fund. She must account to the true owners. Hence, evidence tending to show ownership in plaintiff and the administrator of her deceased sister was competent.

The case is one of fact, and the jury has weighed the evidence and rendered its verdict in a trial free from error. Its verdict is conclusive.

No error.

DELL GLOVER v. CARL GLOVER.

(Filed 22 March, 1944.)

Estates § 5: Deeds § 13b—

A conveyance to one for "his lifetime, and at his death to his heirs, if any, his heirs," invokes the application of the rule in *Shelley's case* and vests a fee in the first taker. The use of the phrase "if any" does not prevent the application of the rule, since there is no limitation over.

APPEAL by defendant from *Dixon, Special Judge,* at November Term, 1943, of JOHNSTON. Affirmed.

This was a controversy without action, submitted on an agreed statement of facts, to determine the title to land, the subject of a contract to convey. From judgment that plaintiff's deed would convey a good title, defendant appealed.

Wellons, Martin & Wellons for plaintiff.
Parker & Lee for defendant.

DEVIN, J. Plaintiff derived his title to the described land under a deed conveying the land "to him his lifetime, and at his death to his heirs, if any, his heirs and assigns." The word "assigns" was stricken through with a pen. Apparently the repetition of the word heirs and the crossing out of the word assigns was occasioned by the use of a printed form in drawing the deed.

We think the word heirs used in the premises and *habendum* of plaintiff's deed must be construed in its technical sense as indicating those who are to take in inheritable succession, rather than as meaning children or issue. The intention of the grantor is to be ascertained from the language used in the deed, interpreted in accord with the well established rules of law applicable thereto. *Williamson v. Cox,* 218 N. C., 177, 10 S. E. (2d), 662. The conveyance is to the plaintiff for "his lifetime," and in the same conveyance the remainder is to his heirs general. This invoked the application of the rule in *Shelley's case,* and vested the fee in the first taker. *Martin v. Knowles,* 195 N. C., 427, 142 S. E., 313; *Benton v. Baucom,* 192 N. C., 630, 135 S. E., 629. The use of the phrase "if any," following the word heirs may not be held to prevent the application of the rule, since there is no limitation over. This distinguishes this case from *Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15, and *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503, relied on by defendant.

We think the court below has ruled correctly, and the judgment on the facts agreed is

Affirmed.

J. W. GLOVER v. CARL GLOVER.

(Filed 22 March, 1944.)

(See *Glover v. Glover, ante,* 152.)

APPEAL by defendant from *Dixon, Special Judge,* at November Term, 1943, of JOHNSTON. Affirmed.

Wellons, Martin & Wellons for plaintiff.
Parker & Lee for defendant.

DEVIN, J. This was a controversy without action to determine the title to land which plaintiff has contracted to convey to the defendant. The deed under which plaintiff's title is derived conveys the land to him "his lifetime and then to his heirs and his heirs, and assigns." The word "assigns" was stricken through with a pen.

For the reasons stated in *Glover v. Glover,* No. 234, *ante,* 152, we think the court below has ruled correctly in holding that plaintiff can convey a good and sufficient title in fee.

The judgment is
Affirmed.

PEOPLES BANK & TRUST COMPANY, GUARDIAN AND ADMINISTRATOR OF W. L. GROOM, v. TAR RIVER LUMBER COMPANY, A CORPORATION.

(Filed 22 March, 1944.)

Appeal and Error § 37e—

On an appeal from the denial of a motion to set aside an order allowing a claim of a creditor against a corporation in the hands of a receiver, where it appears that the judgment on the motion below was based on numerous findings of fact, which in some instances are not supported by evidence and some of which are not in accord with the record, the judgment will be vacated and the cause remanded for further consideration.

BARNHILL, J., dissents.

APPEAL by movant S. T. Anderson from *Williams, J.,* at May Term, 1943, of NASH.

Motion in the cause by S. T. Anderson was denied, and he appealed.

John F. Matthews and G. M. Beam for movant, appellant.
F. S. Spruill for defendants, appellees.

PER CURIAM. The movant S. T. Anderson, a creditor of the defendant, Tar River Lumber Company, moved to set aside so much of an order

heretofore entered in the receivership of the defendant Lumber Company as allowed the claim of the W. L. Groom estate, on the ground that the order in this respect was irregular. Questions relating to the receivership of defendant Lumber Company, in so far as they involved the disallowance of the Hanes claim, were considered by this Court at Spring Term, 1942 (221 N. C., 89). The movant S. T. Anderson alleges that the Groom claim was invalid, was improperly allowed, and that this claim is so large that if the allowance stands movant's claim cannot be paid in full.

The matter was heard below and judgment rendered denying the motion. This ruling was based on numerous findings of fact. Upon examination of these, however, it appears that in some instances supporting evidence is lacking, or the finding is not in accord with the record. Questions arise whether the receivers and the Groom estate are jointly resisting the motion; whether the movant's evidence does not show a meritorious defense to the Groom claim; whether the affidavit of the former attorney of movant was considered against him by the court (*Guy v. Bank,* 206 N. C., 322, 173 S. E., 600); whether the alleged agreement between movant and the representatives of the Groom estate was approved by the Court, and whether such an agreement was available to the receivers in support of the validity of the Groom claim, and as a defense to Anderson's motion.

Under the circumstances, we think the judgment appealed from should be vacated and the cause remanded to the Superior Court for further consideration of the matters involved in Anderson's motion, and it is so ordered.

Error and remanded.

BARNHILL, J., dissents.

ISAAC KADIS v. E. G. BRITT.

(Filed 29 March, 1944.)

1. Contracts § 7a—

Contracts in partial restraint of trade are contrary to public policy and void, unless shown to be reasonable. The burden of showing their reasonableness is upon the person relying thereon.

2. Same—

The reasonableness and validity of a contract in partial restraint of trade is a question for the court and not for the jury, to be determined from the contract itself and admitted or proven relevant facts.

3. Appeal and Error § 37c—

On appeal from a judgment dissolving an injunction, the evidence is addressed to the court.

4. Contracts § 7a: Master and Servant § 2—

Equity will not specifically enforce, as of course, the naked terms of a negative covenant restricting other employment, unless ancillary to and supported by a valid affirmative covenant of the employer, who has a substantial right—unique in his business—which it is the office of the court to protect; and the restriction laid upon the employee has a reasonable relevancy to that result, and imposes no undue hardship.

5. Same—

The right of the employer to protect, by reasonable contract with his employee, the unique assets of his business, a knowledge of which is acquired in confidence during the employment and by reason of it, is recognized everywhere.

6. Master and Servant § 7a—

While an employee may not subsequently use written memoranda concerning customers entrusted to him or made by him for use in his principal's business, or copies thereof, or trade secrets of his employer, he is privileged to use, in competition with his former principal, the names of customers retained in his memory and methods and processes of doing business which are but variations of those in general use.

7. Master and Servant § 2—

Ordinarily, employment is a sufficient consideration to support a restrictive negative covenant in a contract, but will not, of course, aid it as to other defects.

8. Same: Contracts § 5—

Where a contract, containing a negative covenant against other employment, is exacted from an employee while he is, and has been for years, in the same employment, his position and duties and the nature of the business remaining the same, there is a threat of discharge and no present consideration.

9. Injunctions § 4: Master and Servant § 2—

Injunction will not issue to compel the performance of an affirmative promise of service, because that would result in involuntary servitude—man may sell his services but not himself.

10. Contracts § 7a: Master and Servant § 2—

Where a deliveryman and bill collector, after years of service, is required by his employer to enter into a written contract, without change in his position, duties, or nature of the employment, except the requirement that neither the employee nor any member of his family shall work in a business of the same character for two years after the cessation of the employment, the contract is unreasonable and void.

APPEAL by plaintiff from *Williams, J.*, at August-September Term, 1943, of WAYNE.

Plaintiff brought this action to enjoin the defendant from entering into employment with another concern in alleged violation of a contract hereinafter set forth.

The plaintiff was a retail clothing dealer in the city of Goldsboro, and the defendant had been for some years in his employment, his principal duties being that of deliveryman and bill collector. During his entire service with the plaintiff he never received more than $27.50 per week, and that only during the last few weeks of his employment. His compensation during the prior years had been less.

After he had been in the employment of the plaintiff for some years, they entered into the following contract:

"NORTH CAROLINA
WAYNE COUNTY

"THIS AGREEMENT, Made this the 7th day of December, 1940, by and between Isaac Kadis, party of the first part, and E. G. Britt, party of the second part:

"WITNESSETH: That whereas the said party of the second part is now an employee of the said party of the first part and the said E. G. Britt desires to continue in said employment for as long a period of time as the said Isaac Kadis shall desire from the date of this agreement; and whereas the said Isaac Kadis is desirous of continuing the said E. G. Britt in his employment so long as the said services of the said E. G. Britt shall be satisfactory to the said Isaac Kadis, and no longer:

"NOW, THEREFORE, in consideration of the premises and for the purposes aforesaid and the mutual covenants and agreements herein contained, and the especial consideration of the continued employment of the said party of the second part by the said party of the first part after the date of the execution of this agreement and for the consideration of the sum of One Dollar ($1.00) each in hand paid to the other by the said parties of the first and second parts, the receipt of which is hereby acknowledged, the said parties have agreed as follows:

"The said party of the second part agrees to diligently and faithfully serve the said party of the first part in the transaction of his business and in such manner as the said party of the first part shall direct, *and the said party of the second part further agrees that he will not disclose or make known to any person or persons, firm or corporation any of the correspondence or business affairs whatsoever of the said party of the first part.* The said party of the second part further agrees that during the period of his employment by the said party of the first part that he will keep a true and accurate account of all moneys, goods and effects which may come into his hands for the said party of the first part and will not waste or destroy any of the same, or use same for his own per-

sonal use, or any part thereof, but shall at all times strive to the best interest of the said party of the first part in all things and will, when required, render an exact accounting of such properties coming into his hands for the said party of the first part.

"And the said party of the first part agrees to and with the said party of the second part that he will continue to employ the said party of the second part for such a time as the said party of the first part is in need of, or desirous of, the services of the said party of the second part. It being distinctly understood between the parties hereto that that part of this contract in reference to duration of employment is unspecified and solely rests in the discretion of the said party of the first part.

"*The said party of the second part further agrees that he will not work for, or be employed as an agent, servant, or employee, partner, shareholder, or in anywise interested in, any firm or corporation engaged in any business or businesses such as is conducted by the said party of the first part at the time of the cessation of employment between the said parties of the first and second parts, in Wayne County, North Carolina, for a period of two years from the date of such cessation of employment, nor in any county in North Carolina whose boundaries touch Wayne County, North Carolina, for said period of time; nor will, during said period of time nor within the vicinity herein designated, the said party of the second part allow or permit his wife or any member of his immediate family to engage in any business that is herein restricted and within the territory herein restricted as to the said party of the second part.*

"*It being expressly understood and agreed between the parties to this agreement that the continued employment of the said party of the second part by the said party of the first part, at and upon the date of the execution of this agreement, is one of the considerations of the said parties of the first and second parts in reducing this agreement to writing.*

"IN WITNESS WHEREOF, the said parties of the first and second parts have hereunto set their hands and seals, this the day and year first above written.

ISAAC KADIS (SEAL)
E. G. BRITT (SEAL)"

Pertinent parts of this contract involved in the discussion have been italicized for convenience.

The defendant served the plaintiff for about two years after the execution of this contract and was then discharged, the plaintiff saying that he needed him no longer, but expressing his satisfaction with the service and efficiency of the defendant.

Thereafter the defendant obtained employment for a short while driving a truck, but found himself physically unable to continue this work.

He then, within two years of the cessation of his employment with plaintiff, accepted employment with L. A. Collins, who was, and is, doing a clothing business in Goldsboro similar to that carried on by the plaintiff; and in his new employment, the defendant had a position and performed duties of the same kind performed by him in his former employment with plaintiff, but at a larger salary.

The defendant is about forty-five years old and has a family dependent upon him.

The plaintiff sued out this injunction to prevent the defendant from continuing in the employment of Collins. Upon the hearing before Judge Williams at the August-September, 1943, Term of Wayne Superior Court, judgment was rendered dissolving the injunction and dismissing the case, and plaintiff appealed.

Paul B. Edmundson for plaintiff, appellant.
W. A. Dees for defendant, appellee.

SEAWELL, J. It is correctly stated in 17 C. J. S., Contracts, sec. 240, that "the distinction drawn between contracts in general and in partial restraint of trade by which the strict early common law rule invalidating all restraints was relaxed was subsequently replaced by the test of the reasonableness of the restraint." But it must be added that this test must be applied against a public policy which has come to recognize exceptions to the general rule. Contracts in partial restraint of trade do not escape the condemnation of public policy unless they possess qualifying conditions which bring them within that exception. They are still contrary to public policy and void "if nothing shows them to be reasonable." Benjamin on Sale, Seventh Ed., p. 535; *ibid.*, p. 538, quoting *Tindal, C. J.*, in *Horner v. Graves,* 7 Bing., 743. They must be supported under the rule which places the burden upon those who would avail themselves of an exception—at least to the extent that their reasonableness must be made to appear. Since the determinative question is one of public policy, the reasonableness and validity of the contract is a question for the court and not for the jury, to be determined from the contract itself and admitted or proven facts relevant to the decision. Benjamin on Sale, *supra,* p. 535. The appeal here is from a judgment dissolving the injunction and the evidence is addressed to the court.

Any contract in restraint of trade tends to produce or foster monopoly —a result peculiarly offensive to the age in which public policy against such agreements was engendered and became a fixed principle of the common law. At common law all contracts in restraint of trade were against public policy and void. In retreat from the severity of this rule toward justifiable exceptions, and particularly with respect to contracts

involving personal service, we can go only so far without coming into opposition to the public welfare as sponsored by government, and critically imperiling individual rights which our fundamental laws have declared to be inalienable. At that point, a superior sort of public policy supervenes, which does not have its root in the mere conveniences of trade, but in the necessity of self-support, both in its public and in its private implications.

The restrictive negative covenant in a contract of this sort, to be legally effective, must be ancillary to a valid affirmative covenant, and examination by the court is necessarily directed to the substance and validity of this covenant. When the contract is defective for want of a legally protectible subject or because its practical effect is merely to stifle normal competition, it is as much offensive to public policy as it ever was in promoting monopoly at the public expense and is bad. Hence, the trend of discriminating decision is away from the latitude by which contracts in restraint of employment have been upheld almost as a matter of course, or upon a merely plausible showing of some shadowy right to which the negative covenant is ancillary. The grave consequences of unemployment demand that the principal affirmative promise, and its basis or subject, be examined and weighed with care.

Whatever difficulty we may encounter in maintaining an equitable balance between conflicting interests of employer and employee under contracts like this, the effort of the court will not avail unless, in as far as it may be done with proper regard to the contract itself, and the public policy which supervises it, applicable rules are rationalized to the end that in each case the employer may be made to absorb such part of the vicissitudes of employment, unemployment and change of employment as justly belong to him, and the employee only those which are his. In short, equity will not specifically enforce, as of course, the naked terms of a negative covenant restricting other employment unless, supporting the affirmative promise, the employer has a substantial right—unique in his business—which it is the office of the court to protect; and the restriction laid upon the employee has a reasonable relevancy to that result, and imposes no undue hardship. But, after all this has been said, the right of the employer to protect, by reasonable contract with his employee, the unique assets of his business, a knowledge of which is acquired in confidence during the employment and by reason of it, is recognized everywhere.

The relaxation of the common law rule came about, not in the interest of monopoly, but in order to secure and make available to the creator thereof an intangible right of property in some peculiar product of his industry and skill—such as the good will of his business—and make his possession thereof unassailable or its transfer effective. While, generally

speaking, many of the rules which have been evolved in such cases are applicable to contracts involving restrictions on employment, both the English and the American courts make a substantial distinction between the two in administrative practice. 5 Williston on Contracts, sec. 1643, p. 4607. The distinction rests upon a substantial basis, since, in the former class of contracts we deal with the sale of commodities, and in the latter class with the performance of personal service—altogether different in substance; and the social and economic implications are vastly different.

Contracts restraining employment are looked upon with disfavor in modern law. *McCluer v. Supermaid Cookware Co.*, 62 Fed. (2d), 426; *Samuel Stores v. Abram*, 94 Conn., 248, 108 A., 54, 9 A. L. R., 1450; *Brown v. Williams*, 166 Ga., 804, 144 S. E., 256; *Love v. Miami Laundry Co.*, 118 Fla., 137, 160 So., 32; 22 Cornell Law Review, pp. 248 and 249; 5 Williston on Contracts, sec. 1643. And they have been held to be *prima facie* void. *McCluer v. Supermaid Cookware Co., supra.* From the beginning the argument against restraint of employment was—and still is—more powerful than those based on the evils of monopoly incident to restrictions in sales contracts. Restraint of employment tends not only to deprive the public of efficient service, but to impoverish the individual and make him a public charge at the expense of the taxpayer. *Clark Paper and Manufacturing Co. v. Stenacher*, 236 N. Y., 312, 150 N. E., 708, 29 A. L. R., 1325; also, Benjamin on Sale, *supra*. Modern thought, at least in this country, would perhaps place the emphasis on the plight of the individual who might be needlessly pauperized while ready, able and willing to work at his usual occupation for the support and independence of himself and his family. The preamble to our Unemployment Compensation Law recognizes the security of employment as a prime factor in the stability of government.

The problems presented by the restrictive provisions of sales contracts presented no great difficulty of solution. The modern infiltration of the device into ordinary employment in the common types of business and industry has given rise to serious questions, some of which are sharply outlined in the case at bar.

For the most part, cases of this class are concerned with the effort on the part of the employer to protect his business against the subsequent use, by a competitor, of trade secrets confidentially acquired in the course of employment; and, in so far as we may judge from the record and arguments, the case at bar is of that character. Such contracts are upheld only when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." *Mar-Hof Co. v. Rosenbacker*, 176 N. C., 330, 97 S. E., 169; *Co-operative*

Assn. v. Jones, 185 N. C., 265, 117 S. E., 174; *Bradshaw v. Millikin,* 173 N. C., 432, 92 S. E., 161. To this must be added the condition that they do not impose unreasonable hardship on the covenantor, since modern decision has a thought—even though an afterthought—for the individual, as well as the public, the interests of which have heretofore been paramounted. *Milwaukee Linen Supply Co. v. Ring,* 210 Wis., 467, 246 N. W., 567, 568; 17 C. J. S., Contracts, sec. 254; *Milgram v. Milgram* (Ind. App.), 12 N. E. (2d), 394, 395.

Quoting from the contract, the promise of the defendant is that he "will not disclose or make known to any person or persons, firm or corporation any of the correspondence or business affairs whatsoever of the party of the first part." (the employer.) Under this provision the plaintiff complains that he will suffer an irreparable injury because of "the continued employment by the said L. A. Collins t/a Collins Clothing Company of the defendant . . . in that the system of conduct of the type of business conducted by the plaintiff, Isaac Kadis, would become known to, and the customers of said Isaac Kadis would be known to the said L. A. Collins t/a Collins Clothing Company, who would thereby acquire the same." The apprehended injury resulting from the violation of this promise is that the competitor Collins will, through Britt, obtain information respecting the customers of Kadis. There is no allegation or evidence that Britt either has violated or has threatened to violate his promise not to transmit information. It is apparently assumed that he will do so if afforded an opportunity through employment. To refrain from imparting information is the promise—loss of future employment is the sanction; and the Court is invited to impose the sanction without reference to whether there is any threatened violation of the promise. As to this, there is neither averment nor proof. If it be conceded that the restricted employee had occupied some position of prominence in the office, such as manager, or solicitor of customers, and occupied such a position in his new employment, we might consider whether from these facts alone there might be an inference that the former employer's trade secrets would be known and used in competition. We could hardly indulge that presumption without averment or proof as to an employee occupying the very subordinate position of Britt, both in his employment by the plaintiff and his subsequent employment by Collins; and injunction will not issue simply to appease a groundless apprehension on the part of the petitioner.

Injunctive relief against use in competition of confidentially acquired information of the customers of the employer has been frequently before the courts under varying factual conditions, and different conclusions have been reached. We call attention to some observations in texts and decisions which we think appropriately express our views:

In *Peerless Pattern Co. v. Pictorial Review Co.,* 147 App. Div. (N. Y.), 715, where the question of dealing with the customers of a firm was involved, the Court said. "All that clearly appears is that he (the employee) undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful, for equity has no power to compel a man who changes employers to wipe clean the slate of his memory." (In this case there was no copying of the list of customers, and there was none in the case at bar.)

See, also, *Sachter's Ice C. Co. v. Sunshine Ice C. Co., Inc.,* 116 Misc. (N. Y.), 428, 429, in which the facts are comparable to those in the case at bar. Also see *Federal Laundry Co. v. Zimmerman,* 218 Mich., 211.

In 5 Williston on Contracts, sec. 1646, p. 4625, we find: "By the majority view, the knowledge of a deliveryman, or other personal solicitor, of the names and addresses of his employer's customers, gained during the performance of his duties, is not a trade secret, partly because the information would be readily discoverable, and partly because of the court's reluctance to deprive the employee of his subjective knowledge acquired in the course of employment."

In Restatement, Agency, section 396, it is said: "The agent may use general information concerning the methods of business of the principal and the names of customers retained in his memory, if not acquired in violation of his duty as agent."

In commenting on this clause, it is said, p. 898: "Thus, while an agent cannot properly subsequently use written memoranda concerning customers entrusted to him or made by him for use in the principal's business, or copies thereof, or processes which the employer has kept secret from other manufacturers, he is privileged to use in competition with the principal the names of customers retained in his memory as the result of his work with the principal and methods of doing business and processes which are but skillful variations of general processes known to the particular trade." *A fortiori* this should apply in the case of mere employees entering other similar employment.

Cases *pro* and *con* are numerously cited in texts and encyclopedias, and need not be listed here.

The defendant contends that the contract is without consideration, and with this we are inclined to agree. Ordinarily, employment is a sufficient consideration to support a restrictive negative covenant, but will not, of course, aid it as to other defects; *Scott v. Gillis,* 197 N. C., 223, 148 S. E., 315; and it has been frequently held that employment at will will afford such consideration, although some cases held that where the employment is at will, there must be provided a reasonable notice in order

that it may be accounted a consideration. Other cases hold that where the employment is actually continued for a substantial period, it may be considered as importing a consideration. To some of these holdings we will be compelled to dissent on principle; but the course of decision relieves us from more detailed discussion. For the most part, these cases featuring employment as constituting consideration will be found to deal with initial employment—where the employee is for the first time inducted into the service. It would seem that the principle has no reasonable application to situations like that presented in the case at bar, where the contract containing the negative covenant is exacted from the employee while he is, and has been for years, in the employment, where his position and duties are left unchanged, and the nature of the business remains the same, and where, in the nature of things, he must already have acquired such knowledge of the business as his position afforded. In that case, the question of consideration is narrowed to the question of discharge rather than to its correlative of employment, and in the case at bar that feature is frankly paramounted. The grammatical sense of the language used, taken with the context, plainly infers that *continued employment* must be understood to mean further *continuance in employment,* which more than implies the threat of immediate discharge. A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee, and where the performance of the promise is under the definite threat of discharge. Unemployment at a future time is disturbing—its immediacy is formidable. The choice may be expected.

> "Ah, Take the Cash and let the Credit go,
> Nor heed the rumbling of a distant Drum."

We think that the observation of Judge Williams in rendering his judgment is pertinent: "The . . . contract . . . was not based upon a valuable consideration moving to the defendant, E. G. Britt, as it in no particular whatever, in the opinion of the Court, increased, expanded or enlarged or in any way modified the obligations of the plaintiff, Isaac Kadis, in respect to the defendant, and does not modify the obligation of defendant to plaintiff, or operate to change the status of the parties on their contractual relationship in any manner, as employer and employee, as the same theretofore existed."

Injunction will not, of course, issue to compel the performance of the affirmative promise of service, because that would result in involuntary servitude, and for the same reason, it will not interfere to enforce the negative covenant when the apparent purpose and effect is to enforce the

affirmative promise to perform duties of the employment. *Clark Paper and Mfg. Co. v. Stenacher, supra.* In the contract itself, to be safe on the principle of severability, these connotations must be kept widely apart—here they are blended.

It is true that the plaintiff has sought here merely to enforce the negative covenant of the contract, but primarily contracts are made to live by, not to law by. Whatever angle of the contract may be presented to the Court, and however the Court might be inclined to "carve out of the stipulation of the parties a contract and enforce it," we cannot ignore the fact that the defendant had lived by this contract for several years before the sword of Damocles fell, nor can we ignore the fact that the contract itself is of a type which, when exacted under the circumstances just outlined, is admirably adapted to effect economic peonage. The question arises whether a contract of that sort, no matter what angle is presented to the Court after the service has ceased, should not, in considering its reasonableness, be put upon the footing it had at the time it was made, and whether or not, however or whenever considered, it should not be held bad as against public policy, as it would doubtless have been held if the defendant had quit the service voluntarily and had been enjoined at that time. Mann, Cornell Law Quarterly, Vol. 22, pp. 246, 250. It is perhaps the most significant result of Democracy, properly organized and administered, that a man may sell his services, but not himself. In 5 Williston, p. 4647, we find: "For reasons analogous to those applicable to prohibitions of bargains in restraint of trade generally, there is a broad policy forbidding a man from contracting himself into slavery or unduly restricting his personal liberty. Bargains are illegal which deprive the party restrained of a reasonable opportunity to earn a livelihood."

However, we are not so much concerned with this question as we are with the question of undue hardship imposed upon the defendant. That neither he nor any of his family should work for another retail clothing company of a similar kind for two years following the cessation of his employment by the plaintiff, under the circumstances of this case, is a wider protection than any which the plaintiff might have demanded under any conscionable agreement for the protection of any peculiar right or unique asset which he has shown himself to have, if indeed any exists, in the business conducted by him; and therefore the prospect presented to the defendant of abandoning the only occupation for which he is fitted and in which he is experienced, or expatriating himself and family to find employment elsewhere, with persons to whom his character and proficiency are unknown quantities, is a hardship which equity will not impose.

Reference to our reports will show that it has been many moons since the Court has "frowned," in the old-fashioned sense of condemnation, and none has been profane in centuries. See *Dyer's Case,* 1614. We can only say that the case presented to us is devoid of any equity upon which the Court might grant the relief demanded by the plaintiff.

The judgment of the court below is

Affirmed.

FANNIE GROCE, BY HER NEXT FRIEND, M. C. GROCE, v. DR. DWIGHT L. MYERS.

(Filed 29 March, 1944.)

1. Physicians and Surgeons § 15d: Evidence § 45a—

In cases where the physician's or surgeon's want of skill or lack of care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required.

2. Physicians and Surgeons §§ 14, 15b—

It is required of a physician, who has undertaken the care and treatment of a patient, not only that he have a reasonable amount of the knowledge and skill he holds himself out to have, but that he use it in the treatment of the patient.

3. Physicians and Surgeons § 12—

After the relation of physician and patient has been established, unless otherwise limited in the contract of employment, it cannot be terminated at the mere will of the physician, but must last until treatment is no longer required, or until dissolved by mutual consent or reasonable notice.

4. Physicians and Surgeons § 15e—

In an action to recover damages for malpractice against a physician, where all the evidence tended to show that plaintiff, a patient in defendant's hospital and admittedly in an insane condition, got under her bed and could not be removed by the nurses, whereupon defendant took hold of her arm and pulled so hard that he heard the bone break, and failed to reduce or immobilize the fracture in a reasonable time, but sent for her father and delivered her to him, declining to treat her further, there was error in sustaining a motion for judgment as of nonsuit.

APPEAL by plaintiff from *Pless, J.,* at November Term, 1943, of YADKIN.

Allen & Henderson, Hall & Zachary, and J. T. Reece for plaintiff, appellant.

J. Laurence Jones and Trivette & Holshouser for defendant, appellee.

SEAWELL, J. The plaintiff, by her next friend, brought this action to recover damages of the defendant, a practicing physician, for the alleged malpractice and injuries inflicted upon her while a patient at his hospital at Harmony, North Carolina, known as Dr. Myers' Clinic. The evidence on both sides is entirely too voluminous for full transcription here. For the purposes of this decision, the following brief outline must suffice:

The plaintiff, after having spent two weeks at some prior time at the same hospital, was carried to Dr. Myers' Clinic about 19 June, 1941, and remained there for about eight days. She had been suffering with dysmenorrhea and difficult menstruation since the time of puberty, and had now reached the age of thirty-three years. There is evidence to the effect that she had spells as the menstrual period approached, but that otherwise her mental condition was good. She had gone to the seventh or eighth grade in school, and her school work was satisfactory. She was able to take care of herself, to do house work, to quilt, to make her own clothes, to help raise and take care of tobacco.

Members of her family visited her while in Dr. Myers' hospital some time after her arrival there, and testified that she was bright, smiling and in good condition.

Later, upon a call from Dr. Myers, her father, two brothers and sister went to the hospital, found her in a highly nervous and disturbed mental condition, having lost her faculties to such extent that she failed to recognize some members of the family. There were bruises of an aggravated nature all over her body, upon her face, body, hips, and limbs. Her arm had been broken, was swollen to an enormous size and hanging down by her body.

Dr. Myers, the witnesses said, stated to them that Fannie, the plaintiff, had been under the bed and that in trying to pull her out from under the bed, he had broken her arm, that he heard it snap. The arm had been in this condition for some days, and the father inquired what he should do about it, and was told just to tie something around it and let it hang down. There was no tape, gauze, dressing or anything else upon the arm. Dr. Myers, as these witnesses testified, upon request of the father that something should be given her to ease her pain, gave him a bottle of chloral hydrate, without instructions as to the dosage, and also some tablets. As the chloral hydrate was marked poison, it was not used.

Upon taking the plaintiff home, the bruises upon her body, as well as her face, particularly the jaws, were examined, and the testimony is to the effect that the flesh on the arm was black, was swelled near to bursting, and that the bruises on the body, which were numerous, were the width of three fingers, and black and green.

The plaintiff was carried to Chatham Hospital, where an X-ray was made of the arm and it was put in a cast, in which it remained for a month.

Further testimony for the plaintiff was to the effect that whereas the mental condition of the plaintiff had been reasonably good, notwithstanding her spells, up to the time of her stay in the Myers' Clinic, she was found practically insane thereafter, and now at times had to be tied or kept in a wire cage; that she now had delusions that she was fighting Dr. Myers and exhibited fear of injury.

Dr. Beale, an expert physician, testified for plaintiff that he had examined Miss Groce, plaintiff, and had found upon her such bruises as were testified to by her family, and that her arm had been broken and was swollen as described, and had recommended that she be taken immediately to Chatham Hospital. He also testified that he had treated the plaintiff over a period of about two years for dysmenorrhea and painful menstruation at some time prior to her admission into the Myers' Clinic; that she was highly nervous at such times, but otherwise seemed to be in good mental condition.

He identified the X-ray picture made at Chatham Hospital and interpreted it to the jury, indicating that because of the failure to reduce the fracture, there was a malformation at the broken place which interfered with the free movement of the arm, and was calculated to injure the surrounding tissue and produce pain.

The witness further stated that the accepted practice in treatment of fractures such as he had described was to reduce the fracture and immobilize it—to reduce it as soon as possible. He then described the results of the failure to immobilize the fracture and the failure of a perfect union.

Dr. Beale stated that at the time he had seen Fannie, the plaintiff, the fracture had existed more than twenty-four hours.

Dr. J. R. Finney, admitted to be an expert, a witness for the plaintiff, stated that he was called to the Groce home about the 27th or 28th of June to treat the plaintiff and examined her. He found that there was a fracture of the humerus, or shoulder joint, and found that there was crepitus, or a peculiar noise you feel rather than hear, of the bones. The arm was blue and some areas getting to be yellow; the arm was swollen very much. He recommended that she be carried immediately to the hospital. As to the reduction of the fracture, he stated that it should be done as soon as possible after it occurred by setting or immobilization of the parts; otherwise, there would be a trauma of the soft tissue surrounding the bone. The witness was of the opinion that such a fracture should be X-rayed and set under a fluoroscope immediately.

The witness stated that some time afterwards he had a conversation with Dr. Myers, who told him how the accident occurred. Dr. Myers stated that the girl was off the bed and under it, and the nurses could not handle her; that he reached under the bed and got her by the arm and

pulled until he heard a pop, and stated that he did not go any further with that because she refused to have him put a dressing on.

The accepted practice, witness stated, when a person has a fracture and does not agree for the doctor to set the broken limb, is at times to administer anesthesia, and then again force enough to hold the patient quiet while the fracture is set and bandage applied.

For the defendant, Dr. J. R. Saunders, Superintendent of the State Hospital at Morganton, stated that some years prior to this the plaintiff had been admitted to the Morganton Hospital, and that a record had been made of her condition at that time. He stated that in his opinion she was suffering from dementia praecox which had probably set in at the age of puberty; and that while in the hospital she exhibited hallucinations and delusions, and was violent.

The defendant, testifying for himself, stated that the plaintiff, after admission into the hospital, became increasingly violent, making grotesque motions, stabbing at the walls with the tableware, tearing out the electric light, refusing to take her medicine, and becoming frightening to the nurses. He stated that there were a number of patients in the hospital, who were disturbed by the noise made by the plaintiff, and that finally she became so unruly that upon a call from the nurse, he went to her room and attempted to quiet and control her; that she was under the bed, and in his attempt to get her out, he pulled her by the arm, with the result that the arm was broken. That he sent for the father of the patient and advised him to take her out of the hospital, as he could no longer take care of her. He stated that he was not prepared to handle a case of that sort.

There is much other evidence, which we do not find it necessary to record.

At the conclusion of the plaintiff's evidence, and again at the conclusion of all the evidence, the defendant moved for judgment as of nonsuit. This was declined at the termination of the plaintiff's evidence, but was allowed at the conclusion of all the evidence. The plaintiff appealed, assigning error.

In taking the case from the jury, the eminent trial judge remarked: "I don't conceive it to be the law, if doctors cannot agree, to ask the jury to agree on the case." Students of this branch of jurisprudence are not unfamiliar with the doctrine the judge probably had in mind. Applying it in extreme form, it has sometimes been held that no verdict affirming malpractice could be rendered in any case without the support of expert medical opinion. Any case must be articulated from the facts. The inhibition is not against the admission of nonexpert testimony, since lay witnesses are only permitted to give factual testimony; it is against con-

clusions by the jury, who are themselves laymen, upon the facts in evidence. Between the postulated facts and the rationalization by the jury, there could be no commerce except in the presence of the professional catalytic. Here it is suggested that the failure of expert witnesses to be in substantial accord lets the jury out of the picture altogether.

In cases involving the application of scientific knowledge peculiar to that branch of learning, there is no question that the rules of evidence requiring expert opinion in matters of scientific knowledge ought to be carefully enforced, both in the interest of justice and in the protection of a profession peculiarly liable to suit when, after exhausting every known resource and applying the highest degree of skill, the result is not what the patient or friends desire or hoped for. It is often said that the physician does not insure the result; and that is simply to say that he is not God, and does not hold in his hand all the issues of life. But often the difficulty of establishing malpractice does not arise out of rules requiring the evidence of experts as to matters of peculiarly scientific learning and practice. Often the reason has nothing particularly to do with the question of scientific knowledge or skill in its application, but rather the contrary. It is the reluctance to permit the jury to draw inferences from the facts because of what has been long regarded as the peculiar nature of medical knowledge and practice, which amongst the professions makes it *sui generis* in the face of challenge. The usual argument which has relegated the decision of malpractice cases to the opinion of professional men, and thence to the court, as distinguished from the jury, is that the practice of medicine and surgery is empiric—which means that it has not yet become a matter of scientific knowledge or proceeding. The implication is that only a doctor can know from his own actuarial or statistical experience, or that of others handed down to him, what is good or bad practice in any case. On this theory the doctor, instead of being an expert in scientific learning and methods, is an expert in the trial and error results which are nowhere available except in the arcana of the profession. Many opinions afford a curious blending of views as to the scientific and empiric status of the profession, with consequent confusion as to the result.

There are few fields of human endeavor which in recent years have shown greater advancement in scientific information and the application of scientific methods than the practice of medicine and surgery. Perhaps no skilled profession has achieved a higher standard of excellence in its work or has uniformly produced more remarkable results. Science literally rules in that vast field, rather than the empiric standards which have formerly proved helpful without any particular scientific understanding of the reason why.

One of the incidental obligations of science imposed on professional men is that they shall be judged by the standards of the science they profess, and not wholly by empirical standards, vague and indefinite, and incapable of scientific expression, behind which may lurk charlatanry and quackery.

Thus in the most recently collected authorities, the empiric basis of complete cloture is wholly lacking. They stress the necessity of enforcing the rule against the admission of lay opinion on matters peculiarly within the domain of expert scientific knowledge which belongs to the profession. They follow the general rule which, in the nature of things, has a wide coverage and regard malpractice ordinarily as unproved, or totally wanting in evidence, when such expert testimony is lacking. But they uniformly recognize exceptions to the rule—or rather, recognize instances where the rule is inapplicable—where the facts are so clearly within the common knowledge and experience of laymen that they may be reasonably interpreted by the jury.

The commentator in the annotations to *Richeson v. Roebber,* 141 A. L. R., 1, loc. cit. 12, says "There is abundant authority for the view that in cases where the physician's or surgeon's want of skill or lack of care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required."

Among the numerous cases cited and quoted under this text we call attention, without further elaboration, to *Nicholas v. Jacobson,* 113 Cal. App., 382, 298 P., 505; *Farrah v. Patton,* 99 Colo., 41, 59 P. (2d), 76; *Boyce v. Brown,* 51 Ariz., 416, 77 P. (2d), 455; *Marangian v. Apelian,* 286 Mass., 429, 190 N. E., 729; *Covington v. James,* 214 N. C., 71, 197 S. E., 701.

In the case at bar there were two outstanding features which must be separately considered: The first is the evidence that the defendant, while his patient was admittedly in an insane condition, applied such force to her arm—"jerked" it, as one witness said the admission of the doctor was—as to break it. No reasonable person would contend that the breaking of the patient's arm was either necessary or desirable in treating her for her dysmenorrhea, nervousness or insanity. The factual particulars with regard to the breaking of the arm—the force used and the circumstances under which it was used—are matters for the jury. If these facts are all established contrary to the contentions of the defendant, what follows? In the face of an extraordinary occurrence like this, may the jury draw no inference adverse to the defendant on the issue of malpractice because of the absence of expert testimony?

The second item of evidence refers to the treatment of the plaintiff after the arm had become broken—the failure to immobilize or set the

limb immediately or within a reasonable time after it had been broken, to the knowledge of the defendant. Various reasons were stated by the defendant as to why this was not done, but we are considering the evidence of the plaintiff. That evidence is that the limb was not immobilized, the bones not set, nor the fracture reduced, for an extended period while the patient was still in the care of the defendant; and upon her being taken away from the hospital by her father and relatives, the defendant advised them to wrap a cloth around the arm and let it hang. As to this phase of the alleged malpractice there is, however, expert medical testimony from which inference may be drawn condemnatory of the practice. For that reason we enter into no controversial discussion as to the extent to which the breaking of the arm might speak for itself.

It is required of a physician who has undertaken the care and treatment of a patient not only that he have a reasonable amount of the knowledge and skill he holds himself out to have, but that he use it in the treatment of the patient—make it available to the patient. After the relation has been established, unless otherwise limited in the contract of employment, it cannot be terminated at the mere will of the physician, but must last until the treatment is no longer required, or until it is dissolved by the consent of the parties, or until reasonable notice is given in order that the patient may have an opportunity to engage the services of another. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356, Anno. 56 A. L. R., 819; *Stohlman v. Davis* (Neb.), 220 N. W., 247, 60 A. L. R., 658, Anno. 664. In addition to what we have said, some aspects of the evidence may give rise to an inference of abandonment for which, if it actually occurred, defendant would be liable.

We see no point in taking the case away from the jury because the doctors could not agree. The decision is not for them, nor is the verdict of the jury an opinion. It is the determination of the truth from the evidence. In controversies about inventions and patents, about delicate and complicated machinery, about construction and engineering practices, and in dozens of other matters about which the unaided juror knows little or nothing, where disagreement often exists amongst the experts, the jury has the final say. The case at bar may be conceived to be somewhat simpler.

Taking the evidence in the most favorable light to the plaintiff, she was entitled to have it submitted to the jury.

The judgment sustaining the motion for judgment as of nonsuit is

Reversed.

JESSIE C. EARLY v. FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 29 March, 1944.)

Insurance § 47—

In an action to recover damages for personal injuries, received by plaintiff in an automobile accident, against defendant, the owner of the car, where defendant's insurer undertakes the defense of the action, with full information as to the character of the injury, and a judgment is rendered against insured, in a subsequent action by the same plaintiff against the insurer, based on such judgment, an objection that the liability is not one within the terms of the policy will be deemed waived and a demurrer to complaint for failure to state a cause of action overruled.

APPEAL by plaintiff from judgment sustaining demurrer upon the ground that the complaint "does not state or set out a cause of action" entered by *Ervin, Special Judge,* at November Term, 1943, of CALDWELL.

W. H. Strickland for plaintiff, appellant.

Townsend & Townsend, Hunter Martin, and J. T. Pritchett for defendant, appellee.

SCHENCK, J. In summary the complaint alleges that the plaintiff is a resident of Caldwell County and the defendant is a foreign corporation authorized to and doing the business of writing insurance in the State of North Carolina, including policies insuring against liability for both personal and property damage due to accidents for which its policyholders are liable; that the defendant issued a policy of insurance to W. A. Early purporting to insure the said W. A. Early against damages occasioned by personal injuries and damages to personal property resulting from automobile accident, and while said policy of insurance was in full force and effect the said W. A. Early was involved in an automobile accident in which the plaintiff, his wife, was seriously injured; that subsequent to said accident and subsequent to the defendant's declining to recognize its liability on the said policy, the plaintiff, Jessie C. Early, instituted action against the insured, W. A. Early, to recover damages for the injuries she received in said accident, which action was tried at the May Term, 1943, of Caldwell County, when and where the issues were answered in favor of the plaintiff and against the defendant, and judgment in the sum of $3,000.00 and costs was awarded the plaintiff; that the defendant elected to defend under the terms of its policy the action instituted by the plaintiff, Jessie C. Early, against the insured, W. A. Early, and employed counsel to conduct such defense, who did conduct such defense throughout the trial thereof until after a verdict

adverse to the defendant had been rendered therein, and gave notice of appeal to the Supreme Court of North Carolina; and "that by reason of the defendant Insurance Company having elected to defend the former cause of action that it is now estopped to deny liability on the judgment rendered in said cause of action"; that subsequent to the said trial and subsequent to the appeal entered in said cause by the defendant Insurance Company through the name of its insured, W. A. Early, the defendant Insurance Company abandoned its appeal to the Supreme Court and advised W. A. Early, its insured, that it was disclaiming coverage under its policy, and that he, W. A. Early, might take such steps as he might deem proper; and thereupon the said Insurance Company refused to pay the judgment rendered in favor of the plaintiff, Jessie C. Early, against the insured, W. A. Early; and, further, "that among other provisions contained in said policy there is the following provision contained under Condition 14: 'No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until that amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company. Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured' "; that the plaintiff is informed and believes, and therefore alleges, that by reason of her having recovered judgment against the insured, W. A. Early, and the defendant Insurance Company's having refused to pay such judgment, that she is entitled to recover judgment against the defendant Insurance Company in the amount of the judgment recovered by her against the insured, W. A. Early, together with costs.

The defendant Insurance Company demurred to the complaint filed in the cause "for the reason that the complaint does not state or set out a cause of action."

The court sustained the demurrer, dismissed the action and entered judgment accordingly, from which the plaintiff appealed, assigning as the sole error the signing of the order as appears in the record.

It will be noted that the policy of insurance, attached to and made a part of the complaint, issued by the defendant company to W. A. Early, is a contract of indemnity against liability rather than a contract of indemnity against loss, there appearing in the outset of the policy the following clause: "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages."

While the demurrer fails to specify wherein the complaint does not state or set out a cause of action, as by the rules it should, *Elam v. Barnes,* 110 N. C., 73, 14 S. E., 621; C. S., 512 (now G. S., 1-128), still the defendant Insurance Company, appellee, in its brief, contends that the complaint is fatally defective in that it fails to allege that the insured, W. A. Early, had fully complied with all the terms of the policy involved and that the amount of the insured's obligation to pay had been determined by judgment after actual trial or written agreement, which was a condition precedent, under the policy, to the maintenance of any action by a person who has secured such judgment or written agreement —in this case the plaintiff.

The plaintiff, appellant, contends that the defendant Insurance Company by assuming control of the defense of the action by her, Jessie C. Early, against its insured, W. A. Early, as alleged in the complaint, the said defendant waived all conditions or technicalities contained in the policy involved. In other words, it is the contention of the appellant that when the defendant Insurance Company took the defense of the action out of the hands of its insured, W. A. Early, and conducted the defense until an adverse judgment had been rendered against said insured, it thereby became estopped to deny liability upon the policy.

The apposite rule as we gather it from the decisions of various jurisdictions is that an objection that the liability is not one within the terms of the policy may be waived, and where the insurer undertakes the defense of the action by the injured person against the insured, with full information as to the character of the injury, it will be deemed to have waived such objection. *Royle Mining Company v. Fidelity & Casualty Company of New York,* 103 S. W., 1098 (Mo.). The effect of this rule would seem to be that by having elected to defend the action of the plaintiff against its insured the insurer deprived its insured of his right to control his own lawsuit, and thereby assured the insured that the insurer would recognize the liability as falling within the terms of the policy.

According to the allegations of the complaint, the insurer having come in and assumed charge of the defense in the action of the plaintiff and continued in charge of such defense until an adverse judgment was rendered against the insured, and having used the insured as a witness in his own behalf, and there being no suggestion of fraud, conclusion or lack of full knowledge of the facts, the insurer cannot now be heard to deny liability upon the ground of failure on the part of W. A. Early, the insured, in whose shoes the plaintiff now stands, to comply with the conditions precedent in the policy to the right to bring the action, or upon the ground of lack of knowledge of the facts regarding the injury to the plaintiff. Even if the failure of such compliance by the insured or the lack of such knowledge by the insurer would have originally constituted

a defense to the action, such defense was waived by the action of the insurer in assuming the defense of the action brought by the plaintiff against the insured.

This case being before us on an appeal from a judgment sustaining a demurrer, the complaint must be liberally construed to sustain the cause therein alleged, and the contract of insurance involved being prepared by the defendant Insurance Company, it must be construed in the light most favorable to the insured. Construed in the light of these principles, we are constrained to hold that there was error in sustaining the demurrer, and for that reason the judgment of the Superior Court must be

Reversed.

HOWARD YOUNG v. W. C. PITTMAN AND WIFE, MRS. W. C. PITTMAN.

(Filed 29 March, 1944.)

1. Injunction § 6—

Ordinarily, a court of equity will not interfere by injunction to determine a disputed question of title to land, nor undertake to dispossess one party for the benefit of another, but rather will leave the controverted issues of fact to be decided in an action at law.

2. Same: Trespass § 1g—

When equity has been invoked by allegations of continuous trespass or wrongful interference with present right of possession, under circumstances permitting the inference of inadequate remedy at law, or other ground of equitable jurisdiction, the court may proceed to give relief by temporary restraining order, pending the action, with such reasonable restrictions as the exigencies of the case may require.

3. Injunction § 6—

As one of the ends sought by the use of the ancillary remedy of injunction is to preserve the *status quo* and to protect the parties from irreparable injury, and in view of the evidence that defendant's dwelling and spring would be endangered by the use of high explosives, it was proper for the court's order to restrict the plaintiff's use of dynamite in mining mica and feldspar within 200 yards of the said house and spring.

4. Adverse Possession § 9a—

A letter of one purporting to be attorney for one of plaintiff's predecessors in title, disclaiming any interest in the land in controversy, is neither muniment nor color of title.

APPEAL by plaintiff and defendants from *Pless, J.*, at November Term, 1943, of AVERY. Affirmed on both appeals.

A temporary restraining order was continued to the hearing, restraining defendants from interfering with plaintiff's mining for mica and

feldspar in certain lands, with restrictions upon plaintiff's use of explosives near defendants' home.

Defendants appealed from the order continuing the restraining order. Plaintiff appealed from so much of the order as imposed restriction on his mining operations.

J. V. Bowers for plaintiff.

W. C. Berry and L. S. Brassfield for defendants.

DEFENDANTS' APPEAL.

DEVIN, J. The defendants base their appeal from the order continuing the temporary restraining order to the hearing upon the ground that the title to the mineral rights claimed by plaintiff in the described lands was in dispute, and that the ancillary remedy of injunction properly would not be available until final determination of the issues of fact.

Ordinarily, a court of equity will not interfere by injunction to determine a disputed question of title to land, nor undertake to dispossess one party for the benefit of another, but rather will leave the controverted issues of fact to be decided in an action at law. *Black v. Jackson,* 177 U. S., 349, 26 A. J., 322, 32 C. J., 26, 134. But when equity has been invoked by allegations of continuous trespass or wrongful interference with present right of possession, under circumstances permitting the inference of inadequate remedy at law, or other ground of equitable jurisdiction, the court may proceed to give relief by temporary restraining order, pending the action, with such reasonable restrictions as the exigencies of the case may require. Pomeroy Eq. Jur. (5th Ed.), sec. 252. When relief is sought against a continuing trespass, a restraining order may properly issue without allegation of insolvency, G. S., 1-486; *Cobb v. R. R.,* 172 N. C., 58, 89 S. E., 807; and this ancillary remedy may be available in an action where the title to land is at issue, *Jackson v. Jernigan,* 216 N. C., 401, 5 S. E. (2d), 143, but may not be used as an instrument to settle a dispute as to the possession, or to effect an ouster, *Jackson v. Jernigan, supra.* Where a continuous trespass is alleged and no harm can result the court may continue the restraining order until the facts can be determined. *R. R. v. Transit Co.,* 195 N. C., 305, 141 S. E., 882; *Kinsland v. Kinsland,* 188 N. C., 810, 125 S. E., 625.

The power of the court to restrain a continuing trespass, in proper case, has been upheld in other jurisdictions. *United Fuel Gas Co. v. Townsend,* 104 W. Va., 279, 139 S. E., 856; *Union Cent. Life Ins. Co. v. Audet,* 94 Mont., 79, 21 P. (2d), 53; *St. Louis Mining & Milling Co., v. Montana Mining Co.,* 58 Fed., 129. Numerous cases on this point are cited in annotations in 32 A. L. R., 464 (546), and 92 A. L. R., 578.

A fortiori is this principle applicable when substantial evidence of title or possession on the part of the alleged trespasser is lacking and the plaintiff shows a *prima facie* title.

While the court below made no specific findings of fact, in the absence of request, it appears from the pleadings and affidavits set out in the record that there was evidence to support the ruling that the temporary restraining order should be continued, pending the final determination of the issues raised by the pleadings. The surface and mineral rights in the land had been, by deed or reservation, segregated. *Vance v. Pritchard,* 213 N. C., 552, 197 S. E., 182; *Hoilman v. Johnson,* 164 N. C., 268, 80 S. E., 249. The plaintiff, claiming under a mining lease from E. C. Guy and D. T. Vance for the minerals and mineral rights in and upon the land, showed a *prima facie* title in his lessors. This chain of title was the same as that referred to in *Vance v. Guy,* 223 N. C., 409. The defendants, owners of the surface, and alleging title to the minerals, refused to permit plaintiff to mine for mica and feldspar. However, the defendants' claim of title to the minerals was based on adverse possession, of which at the hearing no substantial evidence was offered. *Davis v. Land Bank,* 219 N. C., 248, 13 S. E. (2d), 417; *Vance v. Guy, supra.* The letter of one Harrison Baird purporting to be attorney for one of plaintiff's predecessors in title disclaiming any interest in the land was neither muniment nor color of title to support defendants' plea.

Upon the evidence before the court on the hearing, we think the conclusion was warranted that no serious questions of title or possession were raised by the defendants, and that plaintiff's right of ingress for the purpose of mining was being wrongfully and continuously denied. In addition, there was evidence offered by plaintiff that the mica which plaintiff was attempting to mine was "of No. 1 quality strategic mica, the very identical kind being sought now by the United States Government through its subsidiary, Colonial Mica Corporation, for production to further the war effort." The court's order restrains interference on the part of defendants and permits the mining and removal of mica and feldspar from the land pending the action, and at the same time affords protection to any interests the defendants may have therein by requiring adequate bonds and accounting for proceeds of sales. *Falls v. McAfee,* 24 N. C., 236 (239).

The ruling of the court below in continuing the temporary restraining order to the hearing will not be disturbed. It will be understood, however, that neither the court's order nor this opinion is intended to prejudice the defendants in the assertion of title to the mineral rights referred to by additional or other evidence which they may hereafter be able to present in the trial of the cause on the issues raised in the pleadings.

PLAINTIFF'S APPEAL.

In view of the evidence that defendants' dwelling house and the spring from which water is piped for domestic purposes would be endangered by the use of high explosives, the order appealed from restricts the plaintiff in his mining operations from using dynamite for the purpose of mining mica or feldspar within 200 yards of the house or spring.

As one of the ends sought by the use of the ancillary remedy of injunction is to preserve the status quo and to protect the parties from irreparable injury pending the final determination of the action, we think the insertion of this qualification upon plaintiff's right to mine was in the exercise of a wise and just discretion on the part of the judge. His ruling will be upheld.

On defendants' appeal: Affirmed.

On plaintiff's appeal: Affirmed.

STATE v. DALLAS SUMMERLIN.

(Filed 29 March, 1944.)

1. **Criminal Law § 1a—**

In criminal procedure one may only be punished for that which has already transpired—never for what he may do in the future.

2. **Bastards § 2—**

A man cannot be criminally liable for the willful failure to support an illegitimate child one day old, of whose existence he had, upon the face of the record, no previous knowledge.

APPEAL by defendant from *Ervin, Special Judge,* 29 November, 1943. From CALDWELL.

The defendant was brought into court on the following warrant issued by a justice of the peace:

"FAYE BOLICK, being duly sworn, complains and says, that at and in said County, and Lenoir Township, on or about the 6th day of November, 1942 Dal. Summerlin did unlawfully and wilfully beget an illegitimate child upon the body of Faye Bolick. Said child was born August 6, 1943. The said Dal. Summerlin has unlawfully and wilfully refused to provide any medical expense and support and maintenance for said Faye Bolick or her child against the form of the Statute in such cases made and provided, and contrary to law and against the peace and dignity of the State. (Signed) FAYE BOLICK."

Upon this warrant the cause was heard in the Recorder's Court of Caldwell County, and the defendant was found guilty. Judgment was rendered sentencing the defendant to six months in jail and assigning him to work upon the roads, to be suspended on payment of $10 per month to the prosecuting witness and $47.50 to N. D. Bolick for medical bill incident to the birth of the child.

On appeal to the Superior Court, the warrant was amended so as to allege that "the defendant unlawfully and wilfully failed and refused to provide adequate medical treatment and support and maintenance for the illegitimate child, Janette Bolick, herein alleged as begotten by him upon the body of the prosecuting witness, Faye Bolick."

Upon the trial the prosecutrix gave direct testimony of her relations with defendant, of the times and occasions on which sexual intercourse occurred, and testified that defendant was father of the child. She further testified that shortly after the warrant was issued, the defendant came to her home and wanted to know how he could fix it up, and that she told him she had not made up her mind.

Defendant denied that he was the father of the child or that he had ever had sexual intercourse with the prosecutrix. He further denied that he had tried to arrange the matter in any way, testifying that, on the contrary, he had reproved her for accusing him falsely.

On p. 4 of the Record the verdict is recorded as finding the defendant "guilty as charged in the warrant." On p. 5, the verdict is recorded as finding the defendant "guilty of wilfully failing and refusing to support the illegitimate child, Janette Bolick, begotten by him upon the body of the prosecuting witness, Faye Bolick." Owing to the manner in which the record is brought here, it is impossible to distinguish the transcript proper from the case on appeal.

The defendant moved to set aside the verdict for errors committed by the court during the progress of the trial, and the motion was denied. Defendant excepted. Defendant then moved in arrest of judgment. The motion was denied, and the defendant excepted.

Judgment followed that the defendant be imprisoned in the common jail of Caldwell County for the term of six months, to be assigned to work on the public roads, to be suspended on condition that defendant pay costs, pay the medical bill incident to the birth of the child, and provide $10 per month for the prosecuting witness for support and maintenance of the child until further order.

From this judgment defendant appealed.

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

W. H. Strickland for defendant, appellant.

SEAWELL, J. It is apparent from comparison of the original warrant with its final amended content that the proceeding had so substantially changed character in the Superior Court that the defendant was tried and convicted on the criminal offense of willfully failing and neglecting to support his illegitimate child, who was only one day old when the warrant was issued. The suggestion that the result of the proceeding might be sustained—only as settling the paternity—is not tenable, since that is not the theory on which the case was tried. The question of paternity was incidental to the prosecution for the crime of nonsupport, and was considered only in connection with the plea of not guilty.

It is impossible to reconcile the substantially different statements as to what the verdict was, and the Court is left in uncertainty as to what the jury took into consideration in finding the defendant guilty. It is certain, however, that the proceeding under review gathered up and rolled along without much regard for the statutory definition of the crime denounced—the willful failure of the parent to support an illegitimate child. There was included in the charge against him—and the only items that could by any stretch of imagination be considered supported by the evidence—the failure to provide for the mother and to pay the expenses incident to the birth of the child. These are not criminal offenses—although provision for the mother and for such expenses may be required upon conviction.

However, with respect to the conviction for willful nonsupport, there is no evidence that the defendant knew the child was born, or even expected, until, at the instance of the prosecutrix, the hand of the law was laid upon him the day after the child was born. The record shows that the warrant was issued the day after the child was born. The prosecutrix had never notified the defendant of her pregnant condition, much less of the fact of birth or its approach. She testified, and in this is supported by her relatives, that immediately upon finding that a warrant had been issued for him, the defendant came to see her and sought to settle the matter by making such payments as might be agreed upon, and that the prosecutrix did not accept that offer, because she had not made up her mind. The defendant, it is true, denied that he had offered any money, protesting that the accusation was false; but that is part of the evidence on which the State relies.

We are safe, we think, in holding that a man cannot be criminally liable for the willful failure to support an illegitimate child one day old, of whose existence he had, upon the face of the record, no previous knowledge. It is true of all criminal procedure that a man may only be punished for that which has already transpired—never for what he may do in the future; and although he may—in a grammatical sense and as expressing his immediate intention—refuse to support a new-born illegiti-

mate child, or make immediate provision for it, he is not punishable for the expression of the intention; but only for the overt conduct into which it has been translated. Upon the same principle, the charge must be supported by the facts as they existed at the time it was formally laid in the court, and cannot be supported by evidence of willful failure supervening between the time the charge was made and the time of trial —at least, when the trial is had, as it was here, upon the original warrant.

On account of the exceedingly confused state of this statute and the practical impossibility of satisfactory construction, the Court has not always agreed as to what may be done under it; but as to what may not be done in this instance, we entertain no doubt.

The motion of the defendant in arrest of judgment should have been allowed. The judgment to the contrary is

Reversed.

SAM SUDDERTH ET AL. v. FRANCES A. SIMPSON ET AL.

(Filed 29 March, 1944.)

Bill of Discovery §§ 3, 8: Appeal and Error § 37b—

Upon verified application for examination of an adverse party, under G. S., 1-569-570, the affidavit complying with the requirements of the statutes, an appeal from an order granting the application is premature and will be dismissed.

APPEAL by defendants from *Rousseau, J.*, at September Term, 1943, of CATAWBA.

Civil action pending in the Superior Court of Catawba County.

The plaintiffs, desiring to elicit information upon which to draft complaint, filed motion and affidavit under G. S., 1-569-570 (C. S., 900-901), setting out that from 7 January, 1937, to 9 April, 1943, defendant Simpson held a certain house and lot in trust for the use and benefit of plaintiffs; "that prior thereto and during said period, plaintiffs regularly paid to defendant, Frances A. Simpson, substantial sums of money" which she agreed to apply on certain loans procured from building and loan associations, first "by plaintiffs in their own names" and later by said defendant for their use and benefit; that on 9 April, 1943, without notice to or consent of plaintiffs, defendants Simpson conveyed legal title to said house and lot to defendants Waggoner, and that defendants refuse to advise plaintiffs the consideration for such transfer, in spite of plaintiffs' requests that they be so advised, although defendant Mrs. Simpson

has stated defendants Waggoner hold the property subject to the terms of the trust; that on or about 9 April, 1943, when she conveyed the property to defendants Waggoner, the *feme* defendant Simpson procured from plaintiffs, who are uneducated persons and who kept no other records, all of the receipts she had given them from time to time for money paid by them to her to be applied upon the loans, for the stated purpose of checking them against her books of account, and thereafter refused to return the receipts to plaintiff, "notwithstanding repeated demands made upon her to do so"; that plaintiffs have no record of their transactions had with the *feme* defendant Simpson, other than said receipts, and are therefore unable to advise their counsel as to the status of the trust account, and that their application for an order to examine the defendants is made in good faith.

In the order allowing the motion, the court finds "that the plaintiffs have a cause of action against the defendants, the nature of which is made sufficiently to appear; that information material to the issues involved is peculiarly and solely within the knowledge and possession of the defendants, and is by them withheld from the plaintiffs; that without such information plaintiffs are unable to frame their complaint herein, and that plaintiffs' application for examination of the defendants is made in good faith and not for the purpose of harassing the defendants."

The defendants Simpson except to the order and finding, and appeal.

C. W. Bagby and John W. Aiken for plaintiffs, appellees.

Theodore F. Cummings and D. M. McComb, Jr., for defendants, appellants.

STACY, C. J. The question for determination is the sufficiency of the affidavit to support the order of examination.

It is conceded that as a condition precedent to an order for examination under G. S., 1-569-570, the verified application should disclose: (1) The nature of the cause of action; (2) that the information sought is material and necessary, and not otherwise accessible to the applicant; and (3) that the application is meritorious and made in good faith. *Washington v. Bus, Inc.*, 219 N. C., 856, 15 S. E. (2d), 372; *Knight v. Little*, 217 N. C., 681, 9 S. E. (2d), 377.

Here, it appears from the facts sets out in the affidavit, that plaintiffs are entitled to an accounting of trust funds; that the information sought is essential and not otherwise accessible, and that the application is meritorious and made in good faith. This would seem to meet the requirements of the statute. *Smith v. Wooding*, 177 N. C., 546, 94 S. E., 404.

Moreover, it would seem that no harm could come to the defendants in requiring them to disclose matters in connection with their trusteeship.

his circumstance distinguishes the present case from those cited and lied upon by defendants.

The appeal will be dismissed on authority of *Abbitt v. Gregory,* 196 . C., 9, 144 S. E., 297; *Monroe v. Holder,* 182 N. C., 79, 108 S. E., 359; *'ard v. Martin,* 175 N. C., 287, 95 S. E., 621.

Appeal dismissed.

STATE v. O. B. WILLIAMS AND LILLIE SHAVER HENDRIX.

(Filed 12 April, 1944.)

Criminal Law §§ 65, 78a—

In a criminal prosecution, where the legal theory upon which the State chiefly relies to defeat the defense is disapproved on appeal, this does not perforce preclude further challenge to the defense on other grounds, and it does not work an acquittal of defendants.

Criminal Law § 34e—

In a subsequent prosecution the State is not bound by an admission, made by its counsel in the appellate court on the hearing of a former appeal from a conviction upon the same indictment.

Criminal Law § 78a—

To sustain a conviction and the judgment upholding it, the prosecution is compelled, upon appeal, to rely on the main theory of the trial below.

Criminal Law § 83—

When a conviction in a criminal prosecution is affirmed by this Court and reversed by the Supreme Court of the United States on the ground that the case was tried in the main upon an unsound principle of law, the practice is to remand for another hearing.

Bigamy § 3: Criminal Law § 23—

Where in a criminal prosecution for bigamous cohabitation, G. S., 14-183, there is a conviction and judgment chiefly on the ground of insufficient service, which on appeal is affirmed by this Court and reversed by the Supreme Court of the United States and remanded, upon the second trial on the issue of domicile only, the plea of former jeopardy and motion to dismiss were properly overruled.

Bigamy § 3—

Upon issues of traverse on indictment for bigamous cohabitation, G. S., 14-183, the prosecution offering evidence tending to show that defendants had been previously married, that their respective spouses were still living, that defendants had undertaken to contract a marriage in another state and thereafter had cohabited with each other in this State, a *prima facie* case is made out and a demurrer to the evidence was properly overruled.

7. Divorce §§ 3, 19: Domicile § 2—

Leaving one's domicile of origin and going into another state simply and solely for the purpose of obtaining a divorce, with a mind of immediately returning, is not sufficient to effect a change of domicile. The *animus manendi* is lacking.

8. Domicile § 1—

Domicile is a matter of fact and intention, and ordinarily it is the place where one lives. Two circumstances must concur in order to establish domicile: first, residence; and secondly, the intention to make it a home or to live there permanently. A domicile once obtained is never lost until another is acquired.

9. Divorce § 19: Judgments § 31—

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as *prima facie* valid, they are not conclusive; and, when challenged in a prosecution under G. S., 14-183, for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired *bona fide* domiciles in the state granting their divorces and that such divorces are valid.

10. Divorce §§ 3, 19: Process § 5: Judgments §§ 31, 40: Constitutional Law § 23—

No valid divorce from the bonds of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. Such a decree is void and not entitled to the full faith and credit clause of the Federal Constitution. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce.

11. Constitutional Law § 23: Judgments § 40—

The full faith and credit clause of the Federal Constitution does not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it appears that such facts did not exist, the record will be a nullity, notwithstanding recitals in the judgment.

12. Constitutional Law § 15a—

G. S., 14-183, making bigamous cohabitation in this State a felony is valid and offends neither the Federal nor State Constitutions.

13. Bigamy § 2—

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution may be instituted in the county of their apprehension. G. S., 14-183.

APPEAL by defendants from *Ervin, Special Judge,* at November Term, 1943, of CALDWELL.

Criminal prosecution tried upon indictment charging the defendants with bigamous cohabitation in violation of G. S., 14-183 (C. S., 4342).

The controlling facts as disclosed by the record are:

1. That the male defendant was married to Carrie Ora Wyke in 1916; that they lived together in Caldwell County, this State, as husband and wife for more than 23 years and reared a family of four children; that they have not lived together since the male defendant deserted his home on 7 May, 1940; that Carrie Ora Wyke Williams had brought no divorce proceeding against her husband at the time of the first trial of this cause in the spring of 1941, at which time she testified in the case, and that she is now dead.

2. That the *feme* defendant was married to Tom Hendrix in 1920; that they lived together in this State as husband and wife for more than 19 years; that no children were born of this marriage; that they have not lived together since the *feme* defendant deserted her home on 7 May, 1940; that Tom Hendrix had brought no divorce proceeding against the *feme* defendant prior to the first trial of this cause, at which time he testified in the case, but that he has since, and remarried.

3. That Tom Hendrix was working in the store of the male defendant at the time the defendants herein left the State; that the first knowledge he had of his wife's departure was "when he went home at night and she was gone."

4. That both of the defendants appeared at the Alamo Court, Las Vegas, Nevada, on 15 May, 1940.

5. That the male defendant instituted action for divorce in Clark County, Nevada, on 26 June, 1940, charging his wife with "extreme cruelty towards this plaintiff." Service of summons was obtained by publication, and no appearance was made by the defendant, Carrie Ora Williams, albeit notice was served on her by the sheriff of Caldwell County, North Carolina. A decree of absolute divorce was granted by the Nevada Court on 26 August, 1940, for cause set out in the complaint. I. S. Thompson appeared as counsel for plaintiff in the action.

6. That the *feme* defendant instituted action for divorce in Clark County, Nevada, on 26 June, 1940, alleging failure to support and "extreme mental cruelty" on the part of her husband. Service of summons was obtained by publication, and no appearance was made by the defendant, Tom Hendrix, though he sent plaintiff's counsel a post card saying that upon receipt of original appearance he would sign it. This he never did. O. B. Williams testified for the plaintiff in the case. He said the plaintiff had been living at the Alamo Court, Las Vegas, since 15 May, 1940, and that he had seen her every day while there. The plaintiff testified that she arrived in Clark County, Nevada, on 15 May, 1940, with intention of establishing an indefinite permanent residence. A decree of absolute divorce was granted by the Nevada court on 4 Octo-

ber, 1940, for causes set out in the complaint. I. S. Thompson appeared as counsel for plaintiff in the action.

7. That the defendants were married in the State of Nevada on 4 October, 1940, and shortly thereafter in the fall of 1940, returned to North Carolina and are now living together at Pineola, Avery County, N. C. A true bill was returned against them at the February Term, 1941, Caldwell Superior Court.

8. The case was tried at the February-March Term, 1941, Caldwell Superior Court, which resulted in verdict and judgments against the defendants, and these were upheld on appeal. 220 N. C., 445, 17 S. E. (2d), 769. The judgment of affirmance was reversed on *certiorari* to the Supreme Court of the United States, and the cause remanded for proceedings not inconsistent with the opinion filed therein. 317 U. S., 287, 87 L. Ed., 279. The case was thereupon remanded for a new trial in accordance with the opinion of the Supreme Court of the United States. 222 N. C., 609, 24 S. E. (2d), 256.

When the matter was again called for trial at the November Term, 1943, Caldwell Superior Court, the defendants entered a plea of former jeopardy, and moved to dismiss on the ground that the judgment of affirmance had been "reversed" by the Supreme Court of the United States, and, therefore, the defendants were entitled to be discharged. Overruled; exception.

Verdict: Guilty as charged in the bill of indictment.

Judgments: Imprisonment in the State's Prison as to male defendant for not less than one nor more than three years, as to *feme* defendant for not less than 8 nor more than 24 months.

The defendants appeal, assigning errors.

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

W. H. Strickland for defendants.

STACY, C. J. This is the same case that was before us at the Fall Term, 1941, reported in 220 N. C., 445, 17 S. E. (2d), 769, with ample reference to pertinent statutes and full statement of the facts, to which reference may be had to avoid repetition.

The short and simple facts upon which the case was made to turn in the court below are these: For many years the defendants lived with their respective spouses in the village of Granite Falls, Caldwell County, this State. The *feme* defendant's husband worked in the store of the male defendant. The defendants disappeared from their respective homes on 7 May, 1940. Eight days thereafter they both appeared at the Alamo Court, Las Vegas, Nevada. Exactly six weeks later each filed suit for

divorce in Clark County, Nevada, on grounds recognized in that State, but not in this State. No appearance was made by the nonresident defendant spouse in either case. Service was by publication. Both defendants employed the same attorney. The uncontested divorces were granted on 26 August and 4 October, 1940, respectively. On the day of the last divorce, the defendants were married in the State of Nevada, and almost immediately thereafter they returned to North Carolina and have since lived together in this State. In all, they were out of the State about six months. The defendants were convicted of bigamous cohabitation at the February-March Term, 1941, Caldwell Superior Court, and judgments pronounced. The judgments were affirmed on appeal, and later reversed by the Supreme Court of the United States and the cause remanded for proceedings not inconsistent therewith.

Our former decision was predicated primarily upon the ground that the Nevada divorce decrees, here in question, were not entitled to full faith and credit in this jurisdiction, because they were obtained on constructive service and no appearance had been made in the divorce proceedings by the nonresident defendants named therein. For this position we relied upon the celebrated case of *Haddock v. Haddock,* 201 U. S., 562, and a number of our own decisions accordant therewith. *Tyson v. Tyson,* 219 N. C., 617, 14 S. E. (2d), 673; *Pridgen v. Pridgen,* 203 N. C., 533, 166 S. E., 591; *S. v. Herron,* 175 N. C., 754, 94 S. E., 698. Aside from this, however, but secondarily, it was suggested that the evidence tended to show the defendants were not *bona fide* residents of the State of Nevada, and that they had fraudulently obtained their divorces in that State.

When the matter reached the Supreme Court of the United States on *certiorari* the *Haddock case* was overruled. This removed the principal ground upon which our decision had been made to rest. The logical result, therefore, was a reversal of the judgment of affirmance. *Williams and Hendrix v. North Carolina,* 317 U. S., 287, 87 L. Ed., 279, 143 L. R. A., 1273. Not finding it appropriate to do so, the court of last resort did not pass upon the further challenge to the divorce decrees, to wit, that the plaintiff in each case had acquired no actual, *bona fide* domicile in Nevada, and the proceeding was a sham and a fraud.

The contention is advanced that as the Supreme Court of the United States grounded its decision on the assumption the defendants had acquired *bona fide* domiciles in the State of Nevada (the only occasion for overruling *Haddock v. Haddock*), based in part at least on concession of evidence to support such a finding, the assumption must continue throughout all subsequent proceedings, and that so far as the present prosecution is concerned, no further inquiry into the matter is permissible. The argument is that originally the prosecution assumed it might

assail the Nevada divorce decrees on one or two grounds: first, want of domicile in the divorce forum, *Bell v. Bell,* 181 U. S., 175, 45 L. Ed., 804; and, secondly, want of effective service of process if domicile were established, *Haddock v. Haddock, supra.* Either showing, it was thought, would suffice to defeat the jurisdiction of the Nevada court. So, without contesting the question of domicile, the prosecution elected to stake its case in the Supreme Court on the second view, and lost. Consequently, it ought not to be permitted to go back now and challenge the defense on the first ground alone. *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123. This would be taking "two bites at the cherry." *Dependents of Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500. In short, the contention is that the assumption of domicile being necessary to reach the second view—the chosen battleground of the State—the fact of domicile is *res judicata,* and binding on the prosecution.

The conclusion is a *non sequitur.* Even if the jury had found the defendants were domiciled in Nevada, still under the doctrine of Haddock, the divorce decrees, since they were entered on constructive service, might have been, and in fact for this very reason were, held for naught in North Carolina. This, and this alone, is what the court of last resort overruled and "reversed." The record did not disclose a finding by the jury that the defendants had actually acquired *bona fide* domiciles in Nevada. Indeed, they may have found just the reverse. The verdict was a general one and there was evidence to support the State's challenge to the defense on the single ground of defective process or on the dual ground of no *bona fide* domicile and no valid process, albeit the record indicated the latter as the basic cause for sustaining the challenge. The indefiniteness of the record in this respect, however, coupled with an admission which the State regarded as immaterial under the *Haddock case, supra,* induced the reversal of the judgment of affirmance. In other words, the legal theory upon which the State chiefly relied to defeat the defense set up by the defendants was disapproved. This did not perforce preclude further challenge to the defense on other grounds. It eliminated the second premise, but it did not work an acquittal of the defendants. An error in respect of the defense set up in a criminal action would not dispose of the indictment. Moreover, the concession was made in the appellate court. Had such admission been made by the solicitor in the trial court and acted upon by the jury, a different situation might have arisen. But that is another matter. 20 Am. Jur., 469. See *S. v. Butler,* 151 N. C., 672, 65 S. E., 993, 25 L. R. A. (N. S.), 169, 19 Ann. Cas., 402. To sustain the conviction and the judgment upholding it, the State was compelled to rely on the principle of the Haddock decision because it was the main theory of the trial. The issue was squarely joined.

The effect of the decision of the Supreme Court of the United States in this case is to preserve the sufficiency and effectiveness of constructive service of process in actions for divorce in proper cases of domicile. The pronouncement is that full faith and credit to such proceedings may no longer be denied in other states of the Union upon this ground alone. Speaking directly to the point, the majority opinion says: "So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause because its enforcement or recognition in another state would conflict with the policy of the latter."

The issue of domicile was expressly left open, as witness the following from the opinion: "Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicile was acquired in Nevada." And further: "If the case had been tried and submitted on that issue (domicile) only, we would have quite a different problem, as *Bell v. Bell* indicates. We have no occasion to meet that issue now and we intimate no opinion on it. However, it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that the petitioners' domicile in Nevada was a sham and a fraud."

Following this last suggestion and faced with the appraisal that the case had been tried in the main upon an unsound principle of law, we remanded it for another hearing or a new trial, as is the rule in this jurisdiction. 222 N. C., 609, 24 S. E. (2d), 256. Where a case is tried under a misapprehension of the law, the practice is to remand it for another hearing. *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9; *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324. This then became the law of the case. "A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Harrington v. Rawls* (6th syllabus), 136 N. C., 65, 48 S. E., 57. See *Robinson v. McAlhaney,* 216 N. C., 674, 6 S. E. (2d), 517, and cases there cited. It results, therefore, that the plea of former jeopardy and motion to dismiss were properly overruled. *S. v. Rhodes,* 112 N. C., 857, 17 S. E., 164; *United States v. Ball,* 163 U. S., 662.

We now come to the exceptions noted during the trial after the special pleas had been overruled.

The defendants are charged with bigamous cohabitation in violation of G. S., 14-183 (C. S., 4342), the pertinent provisions of which follow: "If any person, being married, shall contract a marriage with any other

person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

Upon the issues raised by the pleas of traverse, the prosecution offered evidence tending to show that each of the defendants had been previously married; that their respective spouses were still living at the time of the first trial; that the defendants had undertaken to contract a marriage in the State of Nevada, and that thereafter they had cohabited with each other in this State. This made out a *prima facie* case, sufficient to carry the issue to the jury, and hence the demurrer to the evidence was properly overruled. *S. v. Herron,* 175 N. C., 754, 94 S. E., 698.

It will be observed that the statute does not apply to persons who have been "lawfully divorced" from the bond of the first marriage at the time of the second marriage. Such persons are exempt from the operation of the statute, and properly so. Hence, a lawful divorce from the bond of the first marriage at the time of the second marriage would be a defense to the prosecution.

The defendants set up in defense their respective divorces obtained in the State of Nevada. The court instructed the jury that the record of these divorces, offered by the defendants, constituted *prima facie* evidence of their lawfulness and binding effect, not only in the State of Nevada, but also in the State of North Carolina and every other state. *Loughran v. Loughran,* 292 U. S., 216, 78 L. Ed., 1219.

In reply, the prosecution contended that neither of the defendants had acquired an actual, *bona fide* domicile in the State of Nevada at the time of the institution of the divorce actions, and that the proceedings, while apparently regular, were in fact void for want of jurisdiction. *Andrews v. Andrews,* 188 U. S., 14, 47 L. Ed., 366.

In this connection the court instructed the jury as follows:

1. "If a person has a domicile in North Carolina, and such person leaves North Carolina and goes to the State of Nevada simply and solely for the purpose of obtaining a divorce in the State of Nevada, and with the intention of returning to the State of North Carolina when such divorce is obtained, such person never loses his domicile in North Carolina, and never acquires a new domicile in the State of Nevada."

2. "If a court in a suit in the State of Nevada should grant a divorce to a plaintiff who is not domiciled in Nevada, against a nonresident spouse who is not domiciled in the State of Nevada, and who is not personally served with summons in Nevada, and who does not enter a general appearance in the suit in the court in Nevada, then the divorce granted

by the court in Nevada in such instance is void, and is not entitled to full faith and credit in the state in which the nonresident spouse has his or her domicile."

If these pronouncements be sound, the exceptions taken on the trial are without substantial merit and cannot be sustained.

The first instruction would seem to be in accord with the decisions on the subject. Leaving one's domicile of origin and going into another state simply and solely for the purpose of obtaining a divorce, with a mind of immediately returning, is not sufficient to effect a change of domicile. *McKarthy v. McKarthy,* 39 N. Y. S. (2d), 922; *Commonwealth v. Esenwein,* 35 A. (2d), 335; *Commonwealth v. Kendall,* 162 Mass., 221, 38 N. E., 504; 106 A. L. R., 6, *et seq.* The *animus manendi* would be lacking. *Williamson v. Osenton,* 232 U. S., 619; 106 A. L. R., 14.

Domicile is a matter of fact and intention. *In re Martin,* 185 N. C., 472, 117 S. E., 561; 17 Am. Jur., 595. In ordinary acceptation, it is the place where one lives or has his home. *Reynolds v. Cotton Mills,* 177 N. C., 412, 99 S. E., 240. Two circumstances must concur in order to establish a domicile: first, residence, and secondly, the intention to make it a home, or to live there permanently, or, as some of the cases put it, indefinitely. *Horne v. Horne,* 31 N. C., 104; *Thayer v. Thayer,* 187 N. C., 573, 122 S. E., 307. To effect a change of domicile, therefore, the first domicile must be abandoned with no intention of returning to it, and actual residence taken up in another place coupled with the intention to remain there permanently or indefinitely. *Roanoke Rapids v. Patterson,* 184 N. C., 135, 113 S. E., 603; Annotation, 148 A. L. R., 1413.

On the other hand, the jury was instructed that if the defendants went to Nevada with the requisite intent and actually acquired a domicile there, though they later changed their minds and returned to this State, the courts of that state acquired jurisdicion of the marital status of the defendants and the decrees in evidence would be entitled to full faith and credit in this State and every other state. *Davis v. Davis,* 305 U. S., 32, 83 L. Ed., 26; 118 A. L. R., 1518; *Atherton v. Atherton,* 181 U. S., 155, 45 L. Ed., 794. The court further instructed the jury that since the defendants had set up these foreign judgments as a defense and the prosecution had challenged them, the practice in this jurisdiction was to require the defendants to show to the satisfaction of the jury that they had acquired *bona fide* domiciles in the foreign state at the time of the institution of the divorce proceedings. *S. v. Melton,* 120 N. C., 591, 26 S. E., 933. In other words, having pleaded lawful divorces in defense, the burden was on the defendants to satisfy the jury of their lawfulness. *S. v. Herron, supra; S. v. Norman,* 13 N. C., 222. And while the decrees, standing alone, were to be taken as *prima facie* valid, nevertheless they

were not conclusive. *Streitwolf v. Streitwolf,* 181 U. S., 179, 45 L. Ed., 807; *Thompson v. Whitman,* 85 U. S., 457. At the threshold of the case, however, and throughout the hearing, the prosecution was required to establish the guilt of the accused beyond a reasonable doubt. *S. v. Harris,* 223 N. C., 697. Under these instructions, the jury has resolved the issue against the defendants, and the evidence is amply sufficient to support the verdict. Indeed, it was said on the former hearing, "the evidence indicates collusion between the defendants, and bad faith in attempting to secure decrees of divorce, contrary to the laws of this State."

Perhaps it should be noted that what is here said in respect of the "burden of satisfaction" has reference to a defense pleaded in a criminal action, the validity of which is challenged by the prosecution. *S. v. Harris, supra.* "When a divorce is set up as the sole defense to an indictment, as in this case, the invalidity of such defense is not a collateral matter, but a legitimate reply by the State directly impeaching the defense set up." *S. v. Herron, supra.* It should not be confused with the rules applicable in civil actions. 143 A. L. R., 1307.

The second instruction above quoted is directly supported by what was said in *Bell v. Bell,* 181 U. S., 175, 45 L. Ed., 804. "No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled." Jurisdiction of the court granting a divorce in one state may be impeached in another, and if it appear that neither party had acquired a *bona fide* domicile when and where the proceedings were instituted, notwithstanding recital of the jurisdictional fact and evidence supporting it, the decree annulling the marriage would be void and entitled to no protection under the full faith and credit clause of the Federal Constitution. *In re Bingham's Will,* 39 N. Y. S. (2d), 756; *McKarthy v. McKarthy, supra; Commonwealth v. Esenwein, supra;* Annotation 143 A. L. R., 1294; 31 Am. Jur., 156. Nothing was said in *Davis v. Davis, supra,* which militates against this position. See annotation 118 A. L. R., 1524.

In *Andrews v. Andrews, supra,* it was said that in divorce actions, domicile is the inherent element upon which jurisdiction must rest, whether the proceeding be *ex parte* or *inter partes.* Where one's domicile is, there will his marital status be also. The marriage relation is interwoven with public policy to such an extent that it is dissolvable only by the law of the domicile. So the domiciliary state, and no other, furnishes the proper forum for valid divorce proceedings. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. 143 A. L. R., 1298. A domicile once obtained is never lost until another is acquired. *Reynolds v. Cotton Mills, supra.*

Here, the jury has found that the defendants were domiciled in this State when they brought their actions for divorce in Nevada; that they

had acquired no *bona fide* domicile in that state, and that the Nevada decrees were ineffectual to sever the marriage ties. The result was a rejection of the pleas interposed by the defendants, and a conviction as charged in the bill of indictment. The record and the law applicable to the facts appearing thereon support the jury's findings. *German Sav. & Loan Security v. Dormitzer,* 192 U. S., 125, 48 L. Ed., 373.

It was held in *Thompson v. Whitman,* 85 U. S., 457, that the full faith and credit clause did not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; that the record of a judgment rendered in another state might be contradicted as to the facts necessary to give the court jurisdiction, and, that if it should appear such facts did not exist, the record would be a nullity, notwithstanding a recital in the judgment that such facts did exist. See *Lefferts v. Lefferts,* 263 N. Y., 131, 188 N. E., 279; and *Forster v. Forster,* 46 N. Y. S. (2d), 320.

There remains to be considered the constitutionality of the statute under which the defendants have been indicted and convicted. It is challenged upon the ground that it offends both the Federal and State Constitutions. This was the subject of investigation in the case of *S. v. Moon,* 178 N. C., 715, 100 S. E., 614. The constitutionality of the enactment was there upheld. It would only be repetitious to reiterate here what was said there. Nor is the fact that the bigamous cohabitation took place in Avery County, and not in Caldwell, fatal to the prosecution. *S. v. Moon, supra.* The defendants originally lived in Caldwell County and were apprehended there. The venue is prescribed by the statute: "Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county."

From a legal standpoint, it all comes to this: On the first appeal the State relied on the case of *Haddock v. Haddock.* We were minded to follow that case. It was overruled by the Supreme Court of the United States. The State now relies on the case of *Bell v. Bell.* We are disposed to follow this case.

A careful perusal of the record leaves us with the impression that the case has been tried in accordance with the pertinent decisions on the subject, and that it is free from reversible error. Hence, the verdict and judgments must be upheld.

No error.

DELIA MONK, ODEL K. BENNETT, JULIA MAE HOLMES, LETHA WILLIAMS, BETTY C. INGRAM, PEARL C. BENNETT, JOHN COLE, EDWARD KORNEGAY, MARSHALL KORNEGAY, MAMIE C. EVANS, SANFORD COLE, COLLIE L. COLE, MARION COLE, RAYMOND COLE, OWEN COLE, JOHN HENRY COLE, AND MAUDE C. LAWSON, v. WILLIAM TAFT KORNEGAY AND LEM KORNEGAY, TRUSTEES, AND WILLIAM TAFT KORNEGAY AND WIFE, ORA KORNEGAY; LEM KORNEGAY AND WIFE, ELSIE D. KORNEGAY; JAMES RAYNOR, ANNIE MAY RAYNOR (MINOR), CATHERINE RAYNOR (MINOR), ESTENE RAYNOR (MINOR), MAMIE RAYNOR (MINOR), REPRESENTED HEREIN BY JAMES RAYNOR, THEIR GUARDIAN AD LITEM; JOHN ROBERT KORNEGAY, WILLIAM KORNEGAY AND WIFE, VIRGINIA KORNEGAY; MARY LOU KORNEGAY, MINNIE IRENE McLEAN AND HUSBAND, CHESTER McLEAN; LILLY KORNEGAY, EARL KORNEGAY AND WIFE, MAYBELLE KORNEGAY; WILEY KORNEGAY, EVASTUS BRITT, LILLY MAE BRITT (MINOR), REPRESENTED HEREIN BY EVASTUS BRITT, HER GUARDIAN AD LITEM; AND JOHN B. WILLIAMS, JR., GUARDIAN AD LITEM FOR THE CHILDREN AND HEIRS AT LAW OF MINERVA COLE SHAW; AND THE OWNERS OF ANY SHARES, BOTH IN BEING AND NOT IN BEING, WHO ARE UNKNOWN AND UNREPRESENTED.

(Filed 12 April, 1944.)

1. Deeds § 11—

Ordinarily, the intent of the grantor must be found within the four corners of the deed.

2. Same—

But when the intent materially depends on ambiguous or equivocal expressions, resort may be had to evidence *de hors* the deed to explain its terms; and such evidence may include the circumstances attending its execution, the relation of the parties to each other and to the property and generally all sources of inquiry as to things which might have acted on the mind of the grantor.

3. Same—

Where an ancestor, by deeds delivered and recorded at one and the same time, makes a division of all of his property among his children and grandchildren of two marriages and his second wife, declaring in the deeds for the benefit of the children and grandchildren of the first marriage that the property thereby conveyed is an advance in full of their share of the grantor's estate and reciting in the deed for the benefit of second wife and her children and grandchildren that the same should include "any other children that are born to said grantor in lawful wedlock," the words "any other children born to said grantor in lawful wedlock" do not include grantor's children of the first marriage.

APPEAL by plaintiffs from *Stevens, J.*, at September Term, 1943, of SAMPSON.

The plaintiffs, claiming that they, with the named defendants, were tenants in common of the lands described, filed a petition for partition

thereof. Certain of the defendants answered, pleading that they were solely seized and possessed of the said lands and denying that petitioners had any interest therein. The case was duly transferred to the civil issue docket, and was heard by Stevens, J., at September Term, 1943, of Sampson Superior Court, the parties waiving jury trial.

From admissions of uncontroverted facts, and the record evidence, the following appears to comprise the facts:

Richard Kornegay, from whom all the parties, plaintiff and defendant, derive title, was married twice. By the first wife he had seven children—three sons and four daughters; and by the second wife he had three children. At the time of the execution of the deeds hereinafter mentioned, all these children were living, as well as Annie Kornegay, the second wife. Both Annie Kornegay and Richard Kornegay are now dead.

The group of plaintiffs is made up of some of the living children of the first marriage and descendants of those deceased, while other members of this class not joining in the petition are made parties defendant. Parties defendant are made up principally from children of the second marriage and those of the first marriage, and their descendants, as did not join in the petition. All of the parties plaintiff and parties defendant are descendants of Richard Kornegay, and are his sole heirs at law.

Of the 17-acre tract of land described in the petition, it appears that this was sold under a mortgage deed, by order of court, and became the property of Annie Monk, and was thus withdrawn from the controversy by the findings of the trial judge. Of the 99-acre tract described in the petition, the following disposition was made by Richard Kornegay, above designated as the common ancestor of all the parties:

On 10 January, 1914, Kornegay conveyed parcels thereof as follows: To his son, John R. Kornegay, son of the grantor by his first wife, for life, with remainder to Callie, Clio, Pauline, Katie, and Richard Kornegay, Jr. (children of John R.) in trust "for themselves and any other children of John Robert Kornegay, born in wedlock, their heirs and assigns," etc. The land is charged with $200, interest bearing until paid, in favor of Ida K. Underwood, a full sister and daughter of grantor's first marriage. The deed contains the following provision:

"This deed is made as an advancement in full to the said grantee of his entire share in the real and personal estate of the grantors, Richard and Annie Kornegay, and the said grantee, nor his heirs nor assigns, shall not have any other share in the estate of either of us, and by accepting this deed, and putting same to record, he hereby agrees to the same."

On the same day—10 January, 1914—he executed two other similar deeds, respectively conveying to Jim Kornegay, son of the first marriage, a life estate in another parcel of this tract, with remainder to the named children of the said Jim Kornegay, in trust for themselves "and any

other children that may be and are born of said Jim Kornegay in lawful wedlock," in fee, containing a charge upon the land for $200, to be paid to Delia Monk, and providing that the deed is made in full advancement of all the share that Jim Kornegay is to have in the estates, real and personal, of the grantor and his wife, and constituting the deed as an acceptance of that condition; and another deed of a similar nature to Wiley Kornegay for life, and to Earl, Julia May, Lela, and Letha Kornegay, children of Wiley, as trustees for themselves and "any other children that are born to said Wiley Kornegay in lawful wedlock," in fee. As appears in the other deeds, this deed is to be recorded as an advancement to Wiley K. Kornegay of his entire share in the estate of the grantors, and provides a charge upon the land in favor of Ola Cole in the sum of $200, to draw interest from the death of Richard Kornegay.

Upon the same day, Richard Kornegay and wife conveyed to Georgianna Kornegay, an unmarried daughter of the first marriage, a life estate in 5 acres of land in full advancement of her share in the estate of the grantors "except what we give her before our death."

These provisions comprise in their terms all of the children of the first marriage, and their descendants, and make no provision for those of the second marriage.

On the same day, Richard Kornegay and wife made a conveyance to Annie Kornegay, and others, reading as follows:

"NORTH CAROLINA, SAMPSON COUNTY.

"This Indenture, made and entered into this January 10, 1914, by and between Richard Kornegay and wife, Annie Kornegay, and Annie Kornegay, Metta Kornegay, William Taft Kornegay, and Lem Kornegay, the last three being trustees.

"Witnesseth: That the parties of the first part for and in consideration of the love and affection that they bear to the parties of the second part, and for the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, have bargained and sold, and conveyed, and by these presents do hereby bargain, sell and convey unto the said Annie Kornegay, wife of Richard Kornegay, for the term of her widowhood, after the death of Richard Kornegay, who hereby reserves his life estate in all of the hereinafter described property, and after she dies or remarries then to Metta Kornegay, William Taft Kornegay, and Lem Kornegay, Trustees for themselves and all other children that are born to Richard Kornegay, the grantor herein, in remainder, all of the following described property, to wit: All of the personal estate of the said Richard Kornegay that he leaves at his death of any and every description, and also the following described tract of land, to wit:

"Lying in Newton Grove Township, Sampson County, North Carolina, adjoining the lands of C. F. Ingram, and others, and described as follows, to wit: Lying on the west side of J. B. Sutton's mill pond beginning at a blackgum stump in the mouth of a small branch in the edge of the high water mark; thence up said branch to a pine stump on the new road; thence up the new road as it meanders to a stake, C. F. Ingram's corner; thence his line, N. 35 E. 64 poles to a stump, said Ingram's corner, in James Ingram's line; thence his line, N. 64 E. 51 poles to a stake, said James Ingram's corner in an old field; thence his line, N. 44 E. 24 poles to a poplar on the run of Cow Bone Branch; thence down the run of said branch to the high water mark of the Sutton mill pond; thence with the edge of high water mark to the beginning, containing 99 acres, more or less, saving and excepting from the said lands two tracts of 29 and 28 acres respectively, this day conveyed off to Wiley Kornegay and others, and to Jim Kornegay and others.

"To Have and to Hold said lands to Annie Kornegay, after the death of Richard Kornegay, for and during her widowhood and no longer, and upon her death or remarriage to Metta Kornegay, William Taft Kornegay, and Lem Kornegay, Trustees for themselves and any and all children that may be and are born to Richard Kornegay, in fee simple.

"And the parties of the first part covenant that they are seized of said lands and premises in fee simple; that they have a right to convey the same; that same are free and clear from any and all encumbrances, and that they will forever warrant and defend the title to the same against the lawful claims of any and all persons whomsoever. In Testimony Whereof, the parties of the first part have hereunto set their hands and seals, this the day and date first above written."

HIS
RICHARD × KORNEGAY (SEAL)
MARK
ANNIE KORNEGAY (SEAL)

(Duly acknowledged 31 January, 1914, and recorded on 15 March, 1915.)

All of the deeds here mentioned appear to have been acknowledged 31 January, 1914, and to have been put on record 15 March, 1915.

The defendants further introduced the affidavit of J. Harmon Britt to the effect that he was a magistrate in Newton Grove Township on 10 January, 1914; that he well knew Richard Kornegay, and that the latter had come to him and talked over his property and its disposition, and declared that he wanted to divide it amongst his children during his lifetime; and that at the request of the said Kornegay, and pursuant to his instructions, that he had written for him the deeds above referred to,

all of which were written and executed upon the same date, and with reference thereto the grantor, Kornegay, stated that he had divided his property as "equal as he knew how."

There was further evidence from John Robert Kornegay, a son of the first marriage, that the father, Richard Kornegay, told him that he was dividing the lands and property so as to make an equal division, and that the charges made upon the land would about equal the remaining value of the several parcels, and stated that the deeds and the money paid was an equal division between his children.

To the introduction of the deeds offered by the defendants and to the evidence of Britt and Kornegay, the plaintiffs objected.

Upon the hearing, Judge Stevens found as a fact that the several deeds above described were partition deeds—intended by the grantor, Richard Kornegay, to be a final disposition and division of his property between the beneficiaries in an effort to make the division as equal as possible; and construing them together, held it not to be the intention or effect of the trust set up in the deed proffered by the plaintiffs to give to the children of the first marriage any interest in the lands therein described. Upon this construction of the several deeds under consideration, he entered judgment in accordance therewith, and from this judgment the plaintiffs appealed.

The controversy here is over the significance of the following expression in the conveyance made to Annie Kornegay and others, above set out: ". . . unto the said Annie Kornegay, wife of Richard Kornegay, for the term of her widowhood, after the death of Richard Kornegay, . . . and after she dies or remarries then to Metta Kornegay, William Taft Kornegay, and Lem Kornegay, Trustees for themselves and all other children *that are born to Richard Kornegay,* the grantor herein, in remainder . . .," and especially relates to the phrase above italicized. The plaintiffs contend that the expression "all other children that are born to Richard Kornegay" includes the children of the first marriage. Certain of the defendants contend that it applies only to after born children of the grantor born to the second marriage.

Butler & Butler for plaintiffs, appellants.

P. D. Herring for defendants, appellees.

Seawell, J. Few judicial expressions have been more widely quoted than that of *Justice Holmes* in *Towne v. Eisner,* 245 U. S., 418, 62 L. Ed., 372: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used." We

think its application to the case under consideration will become clear as we proceed.

Fortunately for the continuity of human knowledge, the more important intellectual edifices which have weathered the ages have not been built wholly of the softer material mentioned by the great jurist. In science and philosophy there are words—and even phrases—of such crystalline structure that they have standardized the wave lengths of human thought for a thousand years. But the common man, in his everyday business, is not expected to select words cut with jewel-like precision, offering facets to every light, if the language afforded them. And we think here we are dealing perhaps as much with the peculiarities of our language as we are with its free and rather casual idiomatic use.

Perhaps the best mode of expression is that which conveys the thought with the least effort on the part of those who are to receive it. But even the most careful propositor ordinarily does not expect his expression to be met with obduracy or a mental attitude which would compel resort to the technique of the dialectician.

Students of semantics tell us our English language suffers the handicap of all analytic languages—it has not the compactness, sometimes not the precision, of more inflectional languages. It may lean more strongly on the awareness or alertness of those to whom the communication is addressed—strict attention to the subject matter, the occasion, and the attendant circumstances—all of which are important in any language. In fact, when we are called upon to find the meaning of words in a document, we discover that in our formal rules of construction we have merely activated those principles which intelligent persons subconsciously and spontaneously apply to the understanding of communications which are addressed to them. Hence, resort to these aids of construction will not be denied by the court where an ambiguity in a written instrument or an equivocal expression upon which the intent materially depends justifies it under the established practice of the court.

The plaintiffs say they belong to the fortunate class of beneficiaries designated generally in the trust set up in the Annie Kornegay deed as those who "are born" to Richard Kornegay—that this expression is grammatically all-inclusive and needs no construction. We think this view is too optimistic. There is about it a suggestion of absolutism and literalness which we do not think justified by the language itself or the circumstances under which it was shown to have been used.

As to the language itself we cannot but refer to the lack of inherent certainty in defining the class intended to be included—due to the varied and accommodating use of the verb "be"—either singly or in combination with other more significant words. We are told that the Greek verb is capable of expressing finer shades of meaning, in the time relation, than

that of any modern language. However, when used in any other sense than to express the mere fact of existence, few "parts of speech" in the English language have less fixed significance than the present indicative of the verb *be*. It is relational in character, often subject to elision without affecting the sense. It is equative, comparative, attributive. It lives by borrowing—and never keeps what it borrows. While its tense form is present, this often denotes a mere currency with some event or circumstance that actually fixes the time relation. It is so versatile that it serves with almost equal facility the past, present and the future, depending on where the speaker stood in time, space, or circumstance, when the utterance was made. It is truly the universal joint of the linguistic machinery.

The expression over which the controversy is pitched is "any other children that are born to said Richard Kornegay in lawful wedlock." Does this reference include plaintiffs, children of the first marriage, who have already been born to Richard Kornegay, or does it refer to the children of the second marriage who may be born to him during the subsistence of a trust made, in part, for their benefit?

Ordinarily, the intent of the grantor must be found "within the four corners of the deed." *Triplett v. Williams,* 149 N. C., 294, 63 S. E., 70. But where the intent materially depends on ambiguous or equivocal expressions, resort may be had to extrinsic aids to construction, within the bounds of established practice. We think the facts of this case justify the admission of evidence *dehors* the deed to explain its terms. Once this is conceded, it follows that the instrument, in the respect thus aided, must be considered in the light of the circumstances attending its execution in order to discern the intent of the grantor. Among the circumstances to be considered are the relation of the parties to each other and to the property, and generally all sources of inquiry as to things which might have acted on the mind of the grantor. *Central Bank & Trust Co. v. Wyatt,* 189 N. C., 107, 129 S. E., 93; *Seawell v. Hall,* 185 N. C., 80, 116 S. E., 189; *Patrick v. Jefferson Standard Life Ins. Co.,* 176 N. C., 660, 97 S. E., 657. We do not find the evidence introduced for this purpose objectionable in content or mode of presentation. *Allen v. Allen,* 213 N. C., 264, 195 S. E., 801.

In the light of the material from which the trial court had to draw its conclusions, the whole matter may be summed up in this: The plaintiffs argue that if the grantor had intended to exclude them from the trust set up in the Annie Kornegay deed, he could have done so in direct terms. The defendants reply that if he had intended to include the plaintiffs, the whole vocabulary was open to him with which to say so. We are inclined to think the edge of the argument is with the defendants. However, the trial judge, in effect, suggests to both sides that more importance should

be attached to the groove in which the Kornegay mind was probably working when the provisions of the deed were formulated. All the deeds were concurrently executed. He had just provided for the children of the first marriage, of whom there would be no more, and expressly stated that the gift constituted all of his estate he intended them to have. Presumably, he turned to his second, living, wife, and the children of that marriage, to provide for them in turn. He had remarried late in life. There were three children of this marriage *in esse,* and the possibility of more, born to him. There was the further possibility, mentioned elsewhere in the deed, that this wife might remarry after his death, and in that event she might have children for the second husband. It is reasonable to suppose that he did the natural thing under such circumstances—took care of his wife, the children already born of the marriage, and those which might still be born to him, without further thought of those for whom he had provided in the contemporaneously executed deeds.

A naked trust of this kind could have but one purpose—to negative the exclusiveness of the named children as beneficiaries of the gift and put them on an equal footing with children of the same class, born to Kornegay of that marriage. The same device is used in all the contemporary deeds for this purpose. *Contra* the category thus set up, the plaintiffs demand to be admitted to the benefits of the trust, under its general provision, *sine nomine,* although their names were well known, to the exclusion of children who might afterwards be born to the grantor by the second marriage, and for whom every principle of parental affection and social duty demanded consideration. Under these circumstances, we are of opinion that the court below correctly construed the disputed clause in the deed as not including the plaintiffs.

The construction of the deed and determination of the controversy was for the court below upon the deed itself and the evidence adduced. We merely assign reasons that constrain us to affirm the conclusions there reached. The findings of the court were made upon competent evidence, and we find no error of law in the trial.

The judgment is
Affirmed.

M. W. McCOY v. ALTON TILLMAN.

(Filed 12 April, 1944.)

1. Animals § 2—

Where adjoining landowners apportion to each a part of the division fence to be kept in repair, each is liable for trespass on the lands of the other committed by his livestock through defects resulting from his failure to perform the duty assumed. Conversely, if one fails to keep his part of

the fence in repair and as a result the livestock of the other landowner trespasses upon his land, he may not recover from the other damages therefor.

2. Same—

However, all persons are under the statutory duty of restraining their livestock from running at large, G. S., 68-23, and when out of the pasture such stock is at large and is subject to be taken up and impounded by any person, G. S., 68-24, even though they are at large as a result of the negligence of the person who so impounds them, where the owner has knowledge of their being at large and neglects to restrain them.

Appeal by plaintiff from *Williams, J.*, at February Term, 1944, of Craven.

Civil action commenced in justice of peace court for recovery of two hogs of the value of $30.00 allegedly wrongfully detained by defendant, tried in Superior Court on appeal thereto by defendant from judgment of justice of peace.

Plaintiff alleges ownership of the two hogs described in the summons and that they were wrongfully detained by defendant. On the other hand, defendant denies the claim of plaintiff, and asserts that he bought the hogs at a public sale, pursuant to impounding statute, G. S., 68-24 and -25, and as such purchaser he is the rightful owner and entitled to possession of the hogs.

Upon the trial in Superior Court evidence for plaintiff tended to show these facts: At the times referred to, plaintiff and R. M. Wood were adjoining landowners with a division fence between their respective holdings. In 1936 persons selected by them for the purpose determined and designated the part of the fence that should be kept up by plaintiff, and the part of it that should be kept up by R. M. Wood, and plaintiff and Wood "agreed to erect and keep up the fence as designated." Plaintiff kept up his part of the fence. Wood failed to keep up his part of it. A part of the fence which Wood agreed to keep up "fences one side" of plaintiff's hog pasture. On 3 May, 1943, the part of the fence which "Wood agreed to keep up was out of repair," and plaintiff's hogs went through holes in that part of the fence, and on that day Wood notified plaintiff that his hogs were in Wood's corn field rooting up his corn, and asked plaintiff to get them out, but as plaintiff testified: "I did not promise; I did not say I would; I didn't do anything. No, I didn't get them out then. I did not fix the fence." After notifying plaintiff Wood put the hogs up in a pen, but later in the afternoon of that day the hogs got out of the pen and returned to plaintiff's pasture. The next day Wood went to home of plaintiff and told him that his hogs had been in his, Wood's, corn field again, and that he had taken two of them out of the field and put them in a pen, and that plaintiff "could get them by

paying the damage that had been done and expense of shutting them up." Plaintiff told Wood that "the hogs had gotten out because he failed to keep up his part of the fence," and "refused to pay him anything . . .," "refused to pay him for taking up the hogs and feeding them." Wood advertised the hogs for sale on 17 May, 1943, under C. S., 1851, now G. S., 68-25. A written notice of sale was mailed to plaintiff, and he had notice of it ten days before the sale. Plaintiff went to the sale, which was attended by four or five others. At the request of plaintiff, W. H. Heath went to Wood and asked for the hogs, but Wood refused to surrender them unless plaintiff "paid his charges." At the sale and before he sold the hogs Wood asked plaintiff if he "wanted to pay him $7.50 for impounding and feeding the hogs and take them," but plaintiff refused to do it and protested the sale and told all present that "whoever bought the hogs would buy a lawsuit." Then Wood sold the hogs to his brother-in-law and tenant, the defendant, for $10.00, and offered to plaintiff $2.50, which he refused to accept. This action was begun while defendant held the hogs, though he sold them before plaintiff "could get them." The fair market value of the hogs at the time Wood took them up and sold them was $30.00 to $35.00, and defendant said he sold them for $34.02.

Plaintiff as witness for himself said: "I know all about taking up stock. In February, 1943, I took up a cow belonging to Mr. Wood. I did not notify Mr. Wood I had his cow. Mr. Wood was sick in the hospital at the time. When he came to see me he paid me $3.00 to get his cow. I took up Mr. Sermon's cows about the same time. There was court action about them. He took them back by claim and delivery."

Defendant having reserved exception to refusal of court to allow his motion for judgment as in case of nonsuit, offered evidence tending to show this version of the facts: On 3 May, 1943, plaintiff's hogs were in Wood's corn field rooting up his young corn. Wood went down in the field where plaintiff was operating a tractor and told him that his hogs were out of the pasture, and were in his corn field and asked plaintiff to get them out. Plaintiff did not answer, and did not go then to get the hogs out of the field. Wood then took up the hogs and put them in a pen, but later in the evening plaintiff's wife called the hogs and they broke out of the pen and went back to the pasture. The next day the hogs were again in Wood's field, and he took them up, and went over to see plaintiff at his home and told him to come and get the hogs and pay for taking them up and feeding, but he refused to get them. Two days later plaintiff sent Heath to see Wood about getting the hogs and Wood told him that plaintiff could get them if he paid $2.00 for taking them up and feeding them. After three days Wood advertised the hogs for sale "to cover costs and expenses of impounding and feeding said stock," as stated

in the written notice of sale, and sold them at public sale on 17 May—when and where five or six persons were present. Wood asked plaintiff if he would pay $7.50 to cover expenses of taking up hogs and feeding, and take the hogs, and, upon his refusal to do so, Wood sold the hogs to defendant for $10.00. Wood's charges was $7.50 and he offered plaintiff $2.50, which he refused to accept. Defendant further offered evidence tending to show that plaintiff "never fixed or kept up his section of the dividing fence as was designated . . . in 1936."

Wood, as witness for defendant, testified, "We were required and agreed to set new posts and run two strands of barbed wire across top of the fence. McCoy has never strung the wire and has never fixed or kept up any portion of his section of the fence. He allowed the posts to rot and the fence to fall down. It would not keep any stock from crossing over his section of the fence. I strung the two strands of wire over the top of my section of the fence, set lightwood posts and maintained the fence in good condition. In February, 1943, McCoy took up one of my cows that had crossed over his section of the division fence . . . I asked him to let me have the cow. He refused and made me pay $3.00 . . . I then asked McCoy to fix his section of the fence. He told me that he was never going to fix the fence. I then told him that unless he fixed his section of the fence as he had agreed to do, I was not going to keep my section of the fence adjoining his hog pasture. He established his hog pasture after 1936 on a part of the section of the fence I was to keep up. At the sale McCoy tried to keep others from buying the hogs by stating if they bought they would buy a lawsuit. On the day of the sale, McCoy stated . . . in my presence that he had never intended to keep up his section of the fence after it was settled in 1936."

Defendant further offered evidence tending to show deficiency of the section of the fence plaintiff was to keep up, that portions of it were down, some of it was "down not over a foot or two from the ground," and that no barbed wire was strung across the top, and that the section which Wood was to keep up was in fair condition, and had two strands of barbed wire on top of the fence.

Defendant further admitted that he sold the hogs for $34.02, but testified that he sold them before plaintiff brought suit.

At close of all the evidence, the court allowed defendant's demurrer to the evidence and granted judgment as in case of nonsuit. Plaintiff appeals therefrom to Supreme Court and assigns error.

R. A. Nunn for plaintiff, appellant.

W. H. Lee for defendant, appellee.

Winborne, J. Upon all the evidence in the record on this appeal taken in the light most favorable to plaintiff, this is the basic question for decision: Did R. M. Wood have the right to impound the plaintiff's hogs? If he did, the judgment below is correct. If he did not, there is error in refusing to let the case go to the jury upon proper issues.

In this connection it is pertinent to review the appropriate stock law effective in this State. It is provided that it is a misdemeanor for any person to allow his livestock to run at large within the limits of any county, township, or district in which a stock law prevails pursuant to law. G. S., 68-23, formerly C. S., 1849. It is also provided that "any person may take up any livestock running at large within any township or district wherein the stock law shall be in force and impound the same," and that "such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for each day such stock is kept impounded, and may retain the same . . . until all legal charges for impounding said stock and for damages caused by the same are paid, the damages to be ascertained by two disinterested freeholders to be selected by the owner and impounder . . . and their decision to be final." G. S., 68-24, formerly C. S., 1850. It is further provided that "if any person shall impound any animal and shall fail to supply to same during such confinement a sufficient quantity of good and wholesome food and furnish water he shall be guilty of a misdemeanor," G. S., 68-28, formerly C. S., 1854, and provision is made for collecting of the owner of the animal "the reasonable cost of such food and water." G. S., 68-29, formerly C. S., 1855.

Moreover, it is provided that "if the owner of such stock be known by the impounder he shall immediately inform the owner where his stock is impounded, and if the owner shall for two days after such notice willfully refuse or neglect to redeem his stock, then the impounder, after ten days written notice" posted as indicated and in form required, "shall sell the stock at public auction, and apply the proceeds in accordance with the provisions of this article, and the balance he shall turn over to the owner if known . . ." G. S., 68-25, formerly C. S., 1851.

And in this connection, the statute pertaining to fences prescribes what is a lawful fence in Craven County, G. S., 68-2, formerly C. S., 1828. And the general statute as to division fences provides that "where two or more persons have lands adjoining, which are either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line." G. S., 68-6, formerly C. S., 1832.

And it is further provided by statute that "if any person who is liable to build or keep up a part of any division fence fails at any time to do so, the owner of the adjoining land, after notice, may build or repair

the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction." G. S., 68-7, formerly C. S., 1833.

Furthermore, the authorities dealing with the subject generally hold that where adjoining landowners have apportioned to each a part of the division fence to be kept in repair by him, each is liable for trespass on the lands of the other committed by his livestock through defects resulting from his failure to perform the duty assumed. Conversely, if he fail to keep his part of the fence in repair, and as a result the livestock of the other landowner trespasses upon his land, he may not recover from the other damages therefor. See 2 Amer. Jur., 776, Animals; sec. 112, 3 C. J. S., 1296, Animals, 186 (b), and cases cited.

Applying these statutes and principles to the evidence in the case in hand, and conceding as plaintiff's evidence tends to show that R. M. Wood, the adjoining landowner, neglected to maintain that part of the fence which he had agreed to keep in repair, and that as a result plaintiff's hogs got out of his pasture and trespassed upon Wood's corn field, Wood may not recover of plaintiff damage resulting from such trespass.

However, plaintiff was under the statutory duty of restraining his stock from running at large. G. S., 68-23, formerly C. S., 1849. When the hogs were out of his pasture they were at large in so far as he was concerned, and subject to be taken up by "any person" and impounded. G. S., 68-24, formerly C. S., 1850. And even though they may have been at large as result of negligence of his neighbor Wood, as plaintiff's evidence tends to show, the plaintiff had knowledge of it, and elected not to repair the fence sufficiently to restrain his hogs from running at large, and as a matter of law he is not relieved of his statutory duty in that respect. Compare *Gardner v. Black,* 217 N. C., 573, 9 S. E. (2d), 10.

Manifestly, therefore, independent of his relation to plaintiff as an adjoining landowner, and irrespective of lack of legal right to claim damages for the trespass of the hogs, R. M. Wood had the right under the provisions of the statute, G. S., 68-24, formerly C. S., 1850, to take up the hogs of plaintiff running at large in stock law territory and to impound same.

And the evidence tends to show that the amount demanded of plaintiff by R. M. Wood is not greater than the cost of impounding allowed by statute, G. S., 68-24, formerly C. S., 1850, and for which the hogs were sold. Therefore, the sale to defendant was in accordance with law, and the judgment below is

Affirmed.

R. P. HINSON, W. E. GARRISON, AND GEORGE SAMON v. TOM SHUGART.

(Filed 12 April, 1944.)

1. Appeal and Error § 8—

The theory upon which a case is tried in the Superior Court must prevail in considering the appeal and in interpreting the record and in determining the validity of the exceptions.

2. Tenants in Common § 8—

While, ordinarily, a tenant in common in dealing with third parties may not bind his cotenant by any act, with relation to the common property, not previously authorized or subsequently ratified, acts by one tenant, with relation to the common interest, are presumed to have been done by authority and for the benefit of a cotenant, if there be any circumstances upon which to base such presumption. And there is no presumption to the contrary.

3. Trial § 32—

Where the record does not show a request for specific instructions and the question not having been presented on the trial, a failure to charge on the subject will not be held for error.

APPEAL by plaintiff from *Stevens, Jr., J.*, at November Term, 1943, of ONSLOW.

Civil action to restrain defendant from making changes in structure of leased building and for recovery of damages sustained.

In the trial court the parties stipulated that plaintiffs R. P. Hinson and W. E. Garrison were from 25 May, 1942, to the present time the owners in fee simple of that lot of land in the town of Jacksonville, North Carolina, on which are located the Gizmo Cafe and the Estelle Summersill house, including the improvements and buildings thereon subject to contract between Hinson and Garrison and plaintiff George Samon, and subject to leases offered in evidence. And on the trial plaintiff offered evidence, in so far as pertinent to this appeal, tending to show these facts:

(1) That by contract dated 1 June, 1942, and duly registered 4 June, 1942, R. P. Hinson and wife and W. E. Garrison and wife, residents of Lincoln County, N. C., as parties of the first part, a few days after they purchased the property, leased to defendant as party of the second part the lot, improvements and buildings to which the above stipulation relates, for a period of three years, with agreement, among others, that "The party of the second part agrees to accept said premises in their present condition, and the said parties of the first part agree, during the term of this lease, to make such repairs as may be necessary to maintain said premises in their present condition, ordinary wear and tear excepted;

in the event that the party of the second part desires to make any changes in the building hereby leased to him he shall first obtain permission from the parties of the first part, if permission is granted for such changes, then the party of the second part shall pay all expenses incurred in said changes made."

(2) That on 28 November, 1942, the defendant sold and transferred to plaintiff George Samon his property and rights connected with, and good will of the business conducted by him under the name of Gizmo Cafe, and further conveyed to Samon "all of his leasehold interest that he has to the space occupied by the Gizmo Cafe as well as the house adjoining the said building with the exception of the front porch of said house, which is hereby reserved by the party of the first part for his use during the life of the aforementioned lease," it being "specifically understood that the reservation of the said porch is a part of the consideration of this contract and that no further rent shall be paid for the use of the said porch by party of the first part."

(3) That thereafter, on 11 January, 1943, R. P. Hinson and wife, and W. E. Garrison and wife, entered into a contract with George Samon for the sale by them to him of the lot and premises covered by their lease to defendant, but this contract was not filed for registration until 29 July, 1943.

(4) That at the time the lease was made there was on the front of the Estelle Summersill house an open porch about one and one-half feet above the ground, supported by sills on pillars, with banisters around it, and with rooms over it; that there was a door leading from the porch into the house, and there were two windows on the front opening on to the porch; that at the time defendant sublet to Samon the two front rooms in the house were used as storage rooms and the porch as a shoe shine stand; and that thereafter for several months the defendant continued to use the porch for shoe shine purposes and Samon used the two front rooms as living quarters, with the front door locked up "mostly," Samon used it "once in a while"—opened it in summer with screen door in place.

(5) That late in July, 1943, defendant tore away the open porch and enclosed the space from the ground up, with door entrance thereto from the street, and entirely shut up the door and windows formerly between the old porch and the front of the house—thereby cutting off air circulation, and depreciating the value of this property.

(6) That defendant did not say anything to Hinson or Garrison about the change, nor did he obtain their consent thereto, and though he did mention the subject to Samon from time to time, Samon did not agree for him to tear the porch away and close it up. (And in this connection it is noted in the record that while plaintiffs allege in their complaint,

and on the trial both Hinson and Garrison gave testimony tending to show that they did not give permission to defendant to make the changes in the porch, about which plaintiffs complain, there is neither allegation nor proof that Hinson was without authority to give such permission.)

(7) That plaintiffs Hinson and Garrison were together when they were negotiating with defendant "about the lease of these premises," but Hinson, as he testified, "made the trip down here to Jacksonville."

On the other hand, defendant offered evidence tending to show: That at the time he sublet the Estelle Summersill house to plaintiff Samon and when Samon took it over, the whole downstairs of the house was used for storage and the front windows and door were closed and nailed up and the window shades drawn; and that the door and windows stayed closed and the shoe shine business was continued on the porch until defendant started remodeling the porch. Defendant testified: "Mr. George Samon discussed what was going to be done with the porch time and again; we discussed when I would remodel it and why I did not go ahead and remodel it." And, continuing, defendant testified: "I leased the premises from Mr. Hinson and Mr. Garrison. After I obtained lease from them I had a conversation with Mr. Hinson regarding the remodeling of the front porch. He gave me permission to remodel the porch. He gave me ideas as to how to do it; said he would furnish part of the material from a hotel that he and Mr. Garrison owned in the mountains in the western part of the State, that they were going to dismantle, and were going to let me have the half doors to wall it in. . . . At the time of that conversation one of the Ramseur boys, Mr. Sparks and myself were all present, and were present all the time we were talking business. . . . The conversation took place either in the cafe or out on the porch adjoining the cafe." And on cross-examination defendant continued: "The porch was old and didn't look well. On one occasion Mr. Hinson came down and I had a conversation with him about the porch . . . I had a letter from him, but I lost the letter; I had permission from him and lost it and can't find it . . ."

Dewitt Sparks testified in corroboration of defendant as to conversation with plaintiff Hinson, concluding by saying, "I heard him tell Mr. Shugart he could go ahead and build and I saw a letter some time after the contract was closed."

Defendant further offered evidence tending to show that the changes in the porch increased the value of the property.

There was other testimony offered by the parties bearing upon their respective contentions.

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

"1. Did the defendant, Tom Shugart, without permission of the plaintiffs, injure, alter, remove or destroy the front porch described in the complaint? A. No.

"2. If so, what damages are the plaintiffs entitled to recover of the defendant therefor? A. Nothing."

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

Moore & Corbett and Douglass & Douglass for plaintiff, appellants.

John D. Warlick, Albert Ellis, and Bailey, Holding, Lassiter & Wyatt for defendant, appellee.

WINBORNE, J. The theory upon which the plaintiffs presented the case, and upon which it was tried in Superior Court, as is disclosed by the record and case on appeal, is that no permission was given by either Hinson or Garrison to defendant to make the changes in the structure of the porch to the Estelle Summersill house, as required by the terms of the lease. No evidence appears to have been offered, and no contention appears to have been made that Hinson was without authority to act for the lessors of the property, Hinson and Garrison, who owned it as cotenants. But, if such contention had been made, there is sufficient evidence on which to base a presumption that Hinson had authority to act for his cotenant Garrison as well as for himself. Therefore, decision on the first issue was made to rest upon the question as to whether Hinson gave permission to defendant. There is evidence in behalf of plaintiffs that he did not give such permission. And there is evidence in behalf of defendant that he did give such permission. Thus a clear-cut issue of fact in that respect was presented to the jury and the jury has answered in favor of defendant.

It is a well settled principle in this State that the theory upon which a case is tried in Superior Court must prevail in considering the appeal and in interpreting the record and in determining the validity of exceptions. *Simons v. Lebrun,* 219 N. C., 42, 12 S. E. (2d), 644, and cases cited. See also cases in N. C. Digest, Vol. 2, Appeal and Error, 171 (1).

Hence, the first question of law raised on this appeal, that is, whether one tenant in common may bind his cotenant with respect to common property, was not mooted on the hearing and does not arise on the record. But assuming that it does, it may not be amiss to say that while under ordinary circumstances a tenant in common in dealing with third parties may not bind his cotenant by any act with relation to the common property not previously authorized or subsequently ratified, acts by one tenant with relation to the common interest are presumed to have been done by authority and for the benefit of his cotenant, if there be any circumstances upon which to base such presumption. Moreover, it will not be presumed that a tenant in common entered into an agreement with relation to the common property without the consent of his cotenant. 62

C. J., 533 and 535. Subject Tenancy in Common, sections 209, 210. *Cf. Hudson v. Cozart,* 179 N. C., 247, 102 S. E., 278.

In the light of these principles there appears in the record these evidentiary facts: Both Hinson and Garrison reside at Lincolnton, N. C., in the western part of the State. Together they purchased the property in Jacksonville, N. C., in the eastern part of the State. A few days thereafter they acted together in negotiating the lease, and in leasing it to defendant. They acted together in agreeing in the lease that upon permission from them as "parties of the first part" defendant at his own expense might make changes in the building leased to him by them. And Hinson made the trip to Jacksonville in connection with the property. This indicates a close association and unity of action between Hinson and Garrison as regards this property, and shows Hinson looking after it. From this it may be presumed that Hinson was acting with authority of Garrison.

The next question is that the court failed to charge the law relating to authority of one tenant in common to bind his cotenant. The record fails to show that such instruction was requested, and the question was not presented on the trial. Hence, failure to charge on the subject will not be held for error. See *Simons v. Lebrun, supra,* and other citations above to which reference is made.

The third and last question is whether plaintiffs were entitled to a directed verdict upon all the evidence. The record fails to show a request for peremptory instruction for verdict in favor of plaintiffs and no exception in this respect appears to have been taken on the trial. Hence, the question may not be considered. And, in any event, under the law as applied to the evidence, such instruction would not have been correct.

After careful consideration we fail to find cause for disturbing verdict of the jury.

No error.

HAROLD CONLEY, BY HIS NEXT FRIEND, NEALIE CONLEY, v. PEARCE-YOUNG-ANGEL COMPANY AND GLENN ROBERT ENGLISH.

IVEY RUTHERFORD, ADMINISTRATRIX ESTATE OF VERDELL RUTHERFORD, DECEASED, v. PEARCE-YOUNG-ANGEL COMPANY AND GLENN ROBERT ENGLISH.

FRANCIS RUTHERFORD v. PEARCE-YOUNG-ANGEL COMPANY AND GLENN ROBERT ENGLISH.

(Filed 12 April, 1944.)

1. Trial § 11: Appeal and Error § 19—

When cases are consolidated for trial they become one case for the purpose of trial and appeal. Only one record is required.

2. Trial § 29b—

In an action for damages, based upon injuries by negligence and wrongful death from an automobile collision, a peremptory charge, based on plaintiff's evidence alone, which fails to apply the law to the evidence offered by defendant on the particular aspect of the case in question, or fails to require the finding of negligence and proximate cause from a consideration of all the evidence, must be held for error.

3. Automobiles §§ 13, 18a—

Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. It is the stopping without giving a signal, approved by statute, whenever the operation of any other vehicle may be affected thereby. G. S., 20-154. A violation of the statute is negligence *per se.*

4. Negligence § 5—

Proximate cause is an inference of fact, to be drawn from other facts and circumstances, hence what is proximate cause is ordinarily for the jury. If the evidence is so slight as not to warrant the inference, the court will not leave the matter to the speculation of the jury.

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

The violation of a statute, imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety, has been held to constitute negligence *per se;* but, before the person claiming damages for injuries sustained can be permitted to recover, he must show a causal connection between the injury received and the disregard of the statutory mandate.

APPEAL by defendant from *Rousseau, J.,* at September-October Term, 1943, of BURKE. New trial.

The plaintiff Rutherford, Administrator, instituted action for wrongful death, and the other plaintiffs sued for damages for personal injuries. The causes of action all arose out of the same automobile-truck collision. In the court below the three actions were, by consent, consolidated for the purpose of trial.

On 21 April, 1943, defendant's agent and employee was operating a truck of defendant on Highway 70, near Glen Alpine, going in a westerly direction. One Elbert Conley was operating an automobile going in the same direction and to the rear of the truck. He had six passengers, including plaintiffs Harold Conley and Francis Rutherford, and the deceased, Ivy Rutherford.

Plaintiffs' evidence tends to show that both vehicles were going about 30 or 35 miles per hour; that the car was trailing within 30 or 35 feet of the truck; that the truck suddenly stopped without any signal; that the car cut to the left in an attempt to avoid a collision, but that in so doing it struck the left rear corner of the truck, and that Ivy Rutherford was killed and the others suffered certain personal injuries.

The driver of the defendant's truck admits that he stopped without giving any signal, but testified that he did not stop suddenly. He testified further that before stopping he looked through his rear-view mirror and through the "back glass"; that no car was within his vision to the rear, and that after he had stopped the car ran into the truck. Defendant also offered evidence tending to show that the car was traveling at high speed.

Issues in each case were submitted to and answered by the jury in favor of the plaintiff. From judgments thereon defendant appealed.

Hatcher & Berry and Mull & Patton for plaintiffs, appellees.

Smathers & Meekins and J. Bennett Riddle, Jr., for defendants, appellants.

BARNHILL, J. These appeals were brought up on three separate records. We may note in this connection that when the cases were consolidated for trial they became one case for the purpose of trial and appeal. Only one record was required.

The court in its charge instructed the jury in part as follows:

"The court charges you as a matter of law that if you find the evidence to be true, of these plaintiffs and all the witnesses offered by the plaintiffs, that the driver of the car in which the plaintiffs were riding, that that driver was guilty of negligence; and the court also charges you that the driver of the car in which plaintiffs were riding, that that negligence did at least become one of the proximate causes that brought this event about.

"And if you find that evidence to be true and believe what they say about it, that the driver of this firm's car was guilty of negligence and his negligence at least becomes one of the proximate causes that helped to produce this collision and his injury."

The defendant excepts to the second paragraph above quoted.

This was a peremptory charge based on plaintiff's evidence alone. While the jury was instructed that defendant contended the jury should not believe the testimony offered by the plaintiffs and should find the facts as testified to by witnesses for the defendant, it inadvertently failed to go further and apply the law to the evidence offered by defendant on this particular aspect of the case, or to require the finding of negligence and proximate cause from a consideration of all the evidence. Under the circumstances of this case it must be held for error for two reasons.

1. The evidence was in sharp conflict as to the relative positions of the two vehicles at the time defendant's truck was stopped on the highway. Violation of the statute, it is true, constitutes negligence *per se.*

But did the defendant's agent fail to comply with its terms? His evidence does not tend to so show.

Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. *Leary v. Bus Corp.*, 220 N. C., 745, 18 S. E. (2d), 426. It is stopping without giving a signal by hand and arm "or by any approved mechanical or electrical signaling device" approved by the Department of Motor Vehicles *whenever the operation of any other vehicle may be affected by such movement.* G. S., 20-154 (sec. 116, ch. 407, Public Laws 1937).

Hence, the question of negligence is for the jury to decide, and is to be decided upon a consideration of all the testimony.

2. Proximate cause is an inference of fact, to be drawn from other facts and circumstances. If the evidence be so slight as not reasonably to warrant the inference, the court will not leave the matter to the speculation of the jury. *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555.

It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case. *Taylor v. Stewart,* 172 N. C., 203, 90 S. E., 134. Hence, "what is the proximate cause of an injury is ordinarily a question for the jury. . . . It is to be determined as a fact in view of the circumstances of fact attending it." *R. R. v. Kellogg,* 94 U. S., 464, 24 L. Ed., 256; *Hardy v. Lumber Co.,* 160 N. C., 113, 75 S. E., 855; *Newton v. Texas Co.,* 180 N. C., 561, 105 S. E., 433; *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5; *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180; *Harper v. Bullock,* 198 N. C., 448, 152 S. E., 405; *McAtee v. Mfg. Co.,* 166 N. C., 448, 82 S. E., 857; *McMillan v. Butler,* 218 N. C., 582, 11 S. E. (2d), 877; *Mulford v. Hotel Co.,* 213 N. C., 603, 197 S. E., 169; *James v. Coach Co.,* 207 N. C., 742, 178 S. E., 607; *Pearson v. Stores Corp.,* 219 N. C., 717, 14 S. E. (2d), 811.

That the act complained of is the violation of a statute and constitutes negligence *per se* does not take the case out of the general rule.

According to the uniform decisions of this Court, the violation of a statute imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence *per se,* but before the person claiming damages for injuries sustained can be permitted to recover he must show a causal connection between the injury received and the disregard of the statutory mandate, and what is the proximate cause of the injury is usually a matter to be determined by the jury. *Holland v. Strader,* 216 N. C., 436, 5 S. E. (2d), 311; *Barrier v. Thomas and Howard,* 205 N. C., 425, 171 S. E., 626; *Godfrey v. Coach Co.,* 201 N. C., 264, 159 S. E., 412; *Sherwood*

v. Express Co., 206 N. C., 243, 173 S. E., 605; *Stultz v. Thomas,* 182 N. C., 470, 109 S. E., 361; *Lowe v. Taylor,* 196 N. C., 275, 145 S. E., 611; *Stone v. Texas,* 180 N. C., 546, 105 S. E., 425.

As the questions presented by other exceptive assignments of error may not again arise, discussion thereof would serve no useful purpose.

For the reason stated, there must be a

New trial.

W. K. OLIVER AND WIFE, LEORA OLIVER, v. J. R. PINER AND WIFE, JULIA PINER.

(Filed 12 April, 1944.)

1. Mortgages § 30c—

Where there is default in the payment of the first nine annual installments of a debt, secured by a deed of trust on lands, and these nine installments are all paid, there can be no valid foreclosure, based on default, commenced before default in payment of the tenth annual installment of the debt.

2. Same—

The foreclosure of a deed of trust on lands securing a debt is not valid when based on a failure to pay taxes on the property, under a provision of the deed of trust which requires the grantor to pay all taxes accruing and upon his failure so to do authorizing the holder of the debt to pay the same and making sums so paid a part of the debt secured by the deed of trust, it appearing that the unpaid taxes in question have not been paid by anyone and nowhere in the deed of trust is any specific or definite time fixed when nonpayment of taxes shall constitute default.

3. Same—

When a deed of trust on lands, to secure a debt, contains a provision requiring the grantor to keep the property insured for the benefit of the holder of the debt, but fails to specify any amount of insurance, the grantor may not be penalized by a foreclosure for not procuring insurance.

APPEAL by defendants from *Williams, J.,* at February Term, 1944, of CRAVEN.

This is an action in ejectment to recover the possession of a certain tract of land in No. 6 Township, Craven County, North Carolina, it being the second lot described in a deed from Sidney Tilton to Hazel Blalock, recorded in Book 294, page 107, Records of Craven County, and being the same land conveyed to the plaintiffs by deed from W. B. Rouse, Trustee, joined in by Hazel Blalock, dated 3 July, 1942, recorded in Book 364, page 182, of said records.

The defendants are in possession of the *locus in quo* and claim title thereto by virtue of a deed from Hazel Blalock to them dated 22 August, 1936, recorded in Book 322, page 256, of the Records of Craven County.

Plaintiffs and defendants claim Hazel Blalock as a common source of title.

It is the contention of the plaintiffs that Hazel Blalock executed and delivered to the defendants a deed for the *locus in quo* on 22 August, 1936, and simultaneously therewith the defendants executed and delivered to the said Hazel Blalock a deed of trust securing a purchase price note for $540.00, with W. B. Rouse as trustee therein; that there was default in the compliance with the terms of the deed of trust, and as a consequence thereof the deed of trust was subsequently foreclosed, at which foreclosure sale Hazel Blalock became the last and highest bidder and assigned her bid to the plaintiffs, and deed was accordingly made by the trustee, W. B. Rouse, in which Hazel Blalock joined, to the plaintiffs, on 3 July, 1942; and that by virtue of said foreclosure deed the plaintiffs became the owners of and entitled to the possession of the land.

The defendants, while admitting that there was a purported foreclosure sale of the *locus in quo* by W. B. Rouse, trustee in a deed of trust executed by them to secure a purchase price note to Hazel Blalock, and that Hazel Blalock joined in the foreclosure deed to the plaintiffs, allege that such purported sale was void for the reason that there was no default in the conditions of the deed of trust signed by them.

The jury, upon instructions peremptory in their nature, answered the issues in favor of the plaintiffs and from judgment predicated on the verdict the defendants appealed, assigning errors.

William Dunn and H. P. Whitehurst for plaintiffs, appellees.
L. A. Smith and W. H. Lee for defendants, appellants.

SCHENCK, J. The decision of this case turns upon the question as to whether the foreclosure sale, consummated by the delivery of the deed of 3 July, 1942, from Rouse, Trustee, joined in by Hazel Blalock, assignor of the last and highest bid at the foreclosure sale, to the plaintiffs was valid. If valid, the plaintiffs must prevail and the judgment of the Superior Court must be affirmed; if not valid, the defendants must prevail and the judgment of the Superior Court must be reversed.

The plaintiffs contend that the foreclosure sale was valid for the reason that the defendants defaulted in the compliance with the conditions in the deed of trust executed by them to Rouse, trustee for Hazel Blalock, in that the defendants, first, failed to make the payments of $60.00 on the first day of September of each year for nine years, as provided in the deed of trust; second, failed to pay the taxes on the land involved for the

years 1936, 1937, 1938 and 1939; and, third, failed to keep the property insured for the benefit of the party of the third part, Hazel Blalock.

As to the first default which the plaintiffs contend the defendants made in the compliance with the conditions in the deed of trust, namely, the failure to pay $60.00 on the first day of September for nine successive years, the contention cannot be sustained for the reason that the testimony of W. B. Rouse, Trustee, as witness for the plaintiffs, is to the effect that these annual payments of $60.00 were all finally made up to and including 1 September, 1941, and, according to the written conditions in the deed of trust, another such payment was not due until 1 September, 1942, and the advertisement of the foreclosure sale was begun on 20 May, 1942, and the said sale was conducted on 22 June, 1942, and this action was commenced on 24 July, 1942, all before the due date of the installment in 1942, namely, the first day of September, 1942, in which there was no default.

As to the second default which the plaintiffs contend that the defendants made in the compliance with the conditions in the deed of trust, namely, failure to pay the taxes on the lands for the years 1936, 1937, 1938, and 1939, inclusive, the contention cannot be sustained. The provisions in the deed of trust reads: "It is hereby expressly stipulated and agreed that the said parties of the first part shall pay all taxes accruing upon said property; to keep the same in good order and condition, and shall keep the property herein conveyed insured in a good and reliable insurance company for the benefit of the party of the third part in the sum of.................Dollars, and upon the failure of said party so to do, said party of the third part is authorized and empowered to pay said taxes and effect said insurance, and such sums so paid therefor shall become a part of the aforenamed indebtedness and draw interest from the date of such payment at the rate afore-agreed to be made; but the election of said party to pay said taxes and insurance shall not be a waiver of the right to demand a sale as above provided."

Nowhere in the deed of trust is any specific or definite time fixed when the nonpayment of taxes shall constitute a default; and in order for the benefit of a default to inure to the holder of the note, it is necessary that he pay the taxes and charge it in as a part of the debt, and then if the maker of the note shall suffer the taxes due on said property to remain unpaid, the holder of the note may collect the amount that he has paid on the taxes as a part of the debt when a foreclosure is had for failure to pay the debt or for any other reason.

As to the third default which the plaintiffs contend the defendants made in the compliance with the conditions in the deed of trust, namely, the failure to keep the property insured for the benefit of the party of the third part, Hazel Blalock, the contention cannot be sustained for the

reason that while the deed of trust appears to have been drawn upon a form providing for the keeping of the property insured, the blank left for the amount of the insurance is not filled out, thereby evidencing an intention of the parties not to incorporate any provision as to insurance in the deed of trust. Certainly in the absence of any amount being specified in the deed of trust, the parties of the first part therein, the defendants in this action, could not be penalized by a foreclosure sale for not procuring insurance.

Since we have reached the conclusion that the evidence fails to establish that there have been breaches in the conditions of the deed of trust justifying a foreclosure sale, it becomes unnecessary to discuss the other questions presented in the briefs, namely, the validity of the advertisement of the foreclosure sale, and the question of fraud arising out of the contention that the trustee in the deed of trust was acting for the plaintiffs, and those under whom they claim, without regard to the protection and rights of the defendants.

There being no evidence of a breach by the parties of the first part in the performance of the conditions in the deed of trust authorizing a foreclosure thereof, the deed from the party of the second part, the trustee, joined in by the party of the third part, the *cestui que trust,* who was likewise the assignor of the last and highest bid at the foreclosure sale, to the plaintiffs is rendered void, and since said void deed constituted an essential link in the chain of title of the plaintiffs, their action in ejectment must fail, as the burden was upon them to establish their title. It follows that the motion of the defendants duly lodged when the plaintiffs had introduced their evidence and rested their case, and renewed after all the evidence on both sides was in, to dismiss the action and for a judgment as in case of nonsuit (G. S., 1-183), should have been allowed. Hence the judgment of the Superior Court is

Reversed.

STATE v. MACK WALSH AND KIMBER BISHOP.

(Filed 12 April, 1944.)

1. Rape § 2—

In a prosecution against two defendants for assault with intent to commit rape on the prosecutrix, at different times on the same night, where the State's evidence tends to show that the assaults were made separately, without evidence that either defendant aided and abetted the other, there is reversible error in a charge that, if the intent to ravish and carnally know the prosecutrix existed in the mind of one of the defendants, or both of them, at any time during the assault, both would be guilty of an assault with intent to commit rape.

2. Same—

A jury may not convict an accused of assault with intent to commit rape without evidence and findings, upon proper instructions, that defendant committed an assault upon the person of the prosecutrix with intent at the time to ravish and carnally know her, by force and against her will, notwithstanding any resistance she might make.

APPEAL by defendants from *Rousseau, J.*, at September Term, 1943, of CALDWELL. New trial.

Both defendants were convicted of assault with intent to commit rape upon the State's witness. From judgment imposing prison sentences, the defendants appealed.

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

Max C. Wilson, J. T. Pritchett, and Trivett & Holshouser for defendants.

DEVIN, J. For the purpose of this appeal it is unnecessary to set out at length the voluminous testimony offered in the trial below. The State's evidence tended to show an aggravated and felonious assault on the witness Ileana Barlow by the defendants, separately, at different times, on the night of 6 June, 1943. This witness, who lives in Lenoir and is sixteen years of age, had gone with three young men in an automobile some distance to a lake or bathing beach, arriving there about 6:30 or 7:00 p.m. The defendants were already there. Each of them made improper advances to her, and sought, at different times, to overcome her resistance and to induce her to consent. Two of the young men with whom she had gone there drove off and left her, and she was forced to get in the car with the defendants and Younce, one of the young men who had come with her. About 9:00 p.m. they started back toward Lenoir. On the way they stopped for some time off the highway near a church. There, at the request of defendant Walsh, the other two men got out and moved off a short distance, and Walsh, according to the State's evidence, attempted to ravish the girl on the back seat of the car. As the result of her vigorous resistance Walsh abandoned or did not succeed in carrying out his purpose. Thereafter Walsh got out, and defendant Bishop got in the automobile and against her protest and resistance sought, without success, to have sexual relations with her. Younce testified he remonstrated with the defendants but without avail. Later the automobile was driven back to Lenoir, Bishop and Younce got out, and Walsh drove the car to another part of the town and kept the girl in the car for some time. She finally succeeded in getting out of the car, and walked home.

The defendants denied assaulting the witness in any manner or attempting to ravish her. Defendant Walsh admitted that in the car he tried, without success, to induce her consent, and defendant Bishop testified he subsequently got in the car to see if she would consent to him. Each denied the use of force.

Among other things, the court charged the jury as follows: "The court charges you that if at any time the assault was being made, if there was an assault being made by one or both of these defendants, that if that intent existed in the mind of one of the defendants, or both of them, to ravish and carnally know and rape this young girl, even if they abandoned it and failed to carry it out, if that intent existed at any time during any assault, they would be guilty of assault with intent to commit rape. So the State says you ought to convict them on that count, and that you ought to convict both of them, and the court charges that if you do so find, it will be your duty to say 'guilty as charged in the bill of indictment.'"

The vice of this instruction, repeated in substance in another portion of the charge, is that the guilt of both was made to depend upon the intent in the mind of one. As the State's witness testified the assaults were made separately at different times by the defendants, and there was no evidence that either aided and abetted the other in making an assault, it was error to charge that the intent of one would make the other guilty.

Defendants also noted exception to the following instruction:

"The State contends, gentlemen, that Bishop said he was there for the purpose of having sexual intercourse with her, sitting in the automobile in the darkness at a late hour of the night, that he laid his hands on her, and laid his hands upon her in rudeness, and that if he did not have the intent to rape her that he had the intent to play with her and lead her up to the moment where she would give her consent, and that you ought to believe her when she said that what he did was over her protest and against her will, that it was done with rudeness at least, if not by violence and by force, that it was done with rudeness on his part. The State contends, as to the other defendant, that he tried it out with her in the automobile and hugged her and kissed her, and then failed to carry out his purpose because she resisted and did not permit him to have sexual intercourse with her, and the State contends, gentlemen, that during the time he was there with her he had his hands on her, at least against her will and in rudeness and in violence and by force, and that she never did consent . . . and that the very fact that she got out and walked home ought to satisfy you that what he was doing there was against her will and at least in rudeness if not in violence and by force, so the State contends, gentlemen, that you ought not to reach the second count, that is,

the count of assault on a female, but that you ought to convict him on the count of assault with intent to commit rape."

True, the words quoted were stated as the contention of the State, but the language used by the court in stating the grounds upon which the State relied was such as to engender the reasonable inference in the minds of the jurors that they could convict without finding all the essential elements of the offense charged, that is, that each of the defendants committed an assault upon the person of the State's witness with the intent at the time to ravish and carnally know her by force and against her will, notwithstanding any resistance she might make. *S. v. Massey,* 86 N. C., 658; *S. v. Jones,* 222 N. C., 37, 21 S. E. (2d), 812; *S. v. Gay, ante,* 141.

While the State's evidence tends to show a base and wanton attack upon the virtue of this girl, the defendants, upon their plea of not guilty, are entitled to a trial free from substantial error in law before they may be convicted and punished for the commission of so serious a crime.

As there must be a new trial, it is unnecessary to consider the other exceptions noted and brought forward in the assignments of error.

New trial.

JENNIE FUTRELL, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF ZEDIC FUTRELL, DECEASED, ET AL., v. BRANCH BANKING & TRUST COMPANY, EXECUTOR OF THE ESTATE OF A. J. PICKETT, DECEASED, H. D. BATEMAN, TRUSTEE, ET AL.

(Filed 12 April, 1944.)

Appeal and Error § 13—

When an action in the Superior Court is dismissed, the judgment of dismissal remains in full force and effect until modified or reversed on appeal and, until so modified or reversed, any subsequent order in the cause is void for want of jurisdiction.

APPEAL by defendants Branch Banking & Trust Company, Executor, and H. D. Bateman, Trustee, from *Frizzelle,* judge presiding over the courts of the Sixth Judicial District. From DUPLIN.

This is an action, among other things, to recover of the defendant Banking & Trust Company, executor of the estate of A. J. Pickett, damages for breach of seizin and warranty, and for improvements made upon lands purported to be conveyed to Jennie Futrell and husband, Zedic Futrell, by A. J. Pickett, deceased; and, in the event the cloud upon the title to the land so purported to be conveyed to Jennie Futrell and husband by said Pickett should be removed by judgment in this cause,

that such balance as may be found due upon the purchase price of the lands evidenced by notes executed by Jennie Futrell and husband, Zedic Futrell, to said Pickett, and secured by deed of trust to one Wells, Trustee, be divided into equitable and fair payments, to the end that the said Futrell and husband be privileged to pay off and discharge said indebtedness, after the title to said land shall have been vested in them in fee simple, according to the terms originally contemplated; and to obtain a restraining order against the exercising of the power of sale contained in the aforesaid deed of trust by the defendants.

On 12 September, 1942, his Honor, Henry L. Stevens, Jr., resident judge of the Sixth Judicial District, issued a temporary restraining order against the foreclosure of the deed of trust from Jennie Futrell and husband, Zedic Futrell, to Wells, Trustee, securing notes to A. J. Pickett for the purchase price of the lands therein described.

On 25 September, 1942, the defendants Banking & Trust Company, Executor, Bateman, Trustee, and others, demurred to the complaint filed upon the grounds (1) that the complaint did not state facts sufficient to constitute a cause of action, and (2) for that there was an improper joinder of parties and of causes of action.

The cause came on for hearing upon the demurrer filed before Stevens, J., at the August Term, 1943, of Duplin, when it was agreed that judgment might be signed after the expiration of the term, and on 13 December, 1943, his Honor "adjudged upon said demurrer and the complaint filed that there is a misjoinder both of parties and of causes of action, and that the said action be and the same is hereby dismissed. . . ." To this judgment the plaintiff excepted and gave notice of appeal to the Supreme Court.

On 3 February, 1944, Frizzelle, J., upon motion of the plaintiffs, issued an order in the cause restraining the defendants from proceeding further with the effort to sell the lands described in the complaint, particularly in deed of trust under which the defendant H. D. Bateman presumed to act as substituted trustee, pending the determination of the proceeding in the Supreme Court or the final disposition of the cause upon its merits. To the foregoing order the defendant Banking & Trust Company, Executor, and the defendant Bateman, Trustee, excepted and appealed to the Supreme Court.

On 28 March, 1944, the defendant Banking & Trust Company, Executor of A. J. Pickett, and defendant H. D. Bateman, Trustee, moved in this Court to docket and dismiss the plaintiffs' appeal from the judgment of Stevens, J., sustaining the demurrer and dismissing the action, under Rule 17, Rules of Practice in the Supreme Court, 221 N. C., 551, for that the plaintiffs failed to bring up and file a transcript of the record as by rule required, as appeared by certificate of the clerk of the court from

which the appeal came filed by the appellees, which motion was allowed by this Court on 28 March, 1944.

No counsel for plaintiffs, appellees.

R. D. Johnson and Beasley & Stevens for defendants, appellants.

SCHENCK, J. Since the judgment of Stevens, J., dismissing the action became effective when entered 13 December, 1943, and remained in full force and effect by the dismissal of the plaintiffs' appeal on 28 March, 1944, the judgment of Frizzelle, J., restraining the defendants from proceeding further with the foreclosure sale, entered 3 February, 1944, was and remained void for the want of jurisdiction in his Honor to enter any judgment in the cause.

Reversed.

FRANCES BARLOW, ADMINISTRATRIX OF JAMES EDWARD BARLOW, DECEASED, v. R. J. GURNEY, TRADING AND DOING BUSINESS AS IRENE COTTON MILLS.

(Filed 12 April, 1944.)

1. Negligence § 4d—

A person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so.

2. Same—

When a person maintains premises attractive to children of tender years, which become a common playground for such children, and the owner knows or by the exercise of due care should know of such use of his premises, then it becomes his duty to exercise ordinary care to provide reasonably adequate protection against injury. Failure so to do constitutes negligence.

3. Same—

Attractiveness of the premises, as well as notice to the owner, may be shown by evidence that children were accustomed to play in and around the premises for such length of time that the owner knew or by the exercise of ordinary care should have known of such use thereof.

APPEAL by defendant from *Ervin, J., at* August-September Term, 1943, of ALEXANDER. Affirmed.

Civil action to recover damages for wrongful death.

Defendant owns and operates the Irene Cotton Mills and the surrounding mill village occupied by his employees. He maintains on the premises an unenclosed pond, which is within 40 feet of the village church

and 20 feet of the road, and is in close proximity to the dwellings occupied by employees.

On 10 May, 1942, about 4:30 p.m., plaintiff's intestate, a child less than four years of age, while playing around the pond attempting to catch a tadpole, fell in and was drowned.

At the close of the evidence for plaintiff defendant moved for judgment as of nonsuit. The motion was denied, and defendant excepted. There was verdict and judgment for plaintiff, and defendant excepted and appealed.

Lewis & Lewis and Burke & Burke for plaintiff, appellee.
Jones & Smathers and Sam Poole for defendant, appellant.

BARNHILL, J. Defendant brings up and discusses only his exception to the ruling of the court denying his motion to nonsuit. Hence, the sufficiency of the evidence is the one question debated.

It may be that some conditions, instrumentalities, and machines are so inherently dangerous and attractive to children that the owner is charged with notice by the very nature of the thing itself. If so, such is not the case here.

A person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so. *Hedgepath v. Durham*, 223 N. C., 822.

When, however, he exercises this right and children of tender years are attracted thereto and it becomes a common resort of persons of tender years to which they go to play, and it appears that the owner knows or by the exercise of ordinary care should know that it is being so used, then it becomes his duty to exercise ordinary care to provide reasonably adequate protection against injury. Failure so to do constitutes an act of negligence. Proximate cause is for the jury. *Starling v. Cotton Mills*, 168 N. C., 229, 84 S. E., 388; *Starling v. Cotton Mills*, 171 N. C., 222, 88 S. E., 242; *Comer v. Winston-Salem*, 178 N. C., 383, 100 S. E., 619; *Ferrell v. Cotton Mills*, 157 N. C., 528, 73 S. E., 142; *Brannon v. Sprinkle*, 207 N. C., 398, 177 S. E., 114; *Cummings v. Dunning*, 210 N. C., 156, 185 S. E., 653.

Also, it is generally held that the attractiveness of the premises as well as notice to the owner may be shown by evidence that children were accustomed to play in or around the premises for such length of time that the owner knew or by the exercise of ordinary care should have known that it was being so used.

The plaintiff offered evidence tending to show that the defendant over a period of years maintained an unenclosed pond within the mill village.

It was within sight of the mill itself. Children of tender age for a period of two or three years had "habitually" and "continually" "gathered up and played around the edge and all around the pond." Most of the children "played around the pond," fishing, playing, and catching tadpoles. Defendant's foreman on two or three occasions tried to run them off. Nothing further was done for their protection.

This testimony was amply sufficient to bring plaintiff's case within the principles enunciated in the above cited decisions in which the law has been fully and extensively discussed. Repetition here would serve no useful purpose.

It follows that the court below properly overruled the motion for judgment as of nonsuit.

The judgment below is

Affirmed.

ROBERT BATTEN v. W. P. AYCOCK, TRUSTEE, ANNIE HOGE VICK AND FIRST-CITIZENS BANK & TRUST COMPANY, CO-EXECUTORS OF THE ESTATE OF DR. GEORGE D. VICK, DECEASED.

(Filed 12 April, 1944.)

1. Evidence § 32—

The plaintiff on his examination-in-chief, in an action against an executor or administrator, is competent to testify to the handwriting of the deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. G. S., 8-51.

2. Same—

When the defendant, representative of the deceased, is examined in behalf of himself and his co-representative concerning a personal transaction between plaintiff and deceased, G. S., 8-51, he thus opens the door and makes competent the testimony of his adversary concerning the same transaction.

3. Same—

The door is opened, under G. S., 8-51, by the representative of the deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opens the door as to one transaction, the other party cannot swing it wide in order to admit another independent transaction.

APPEAL by plaintiff from *Williams, J.*, at September Term, 1943, of JOHNSTON. New trial.

Civil action to restrain foreclosure of trust deed.

In 1927 plaintiff and his wife executed a mortgage to Dr. George D. Vick to secure the payment of $1,000.00. The plaintiff paid the interest to 1930. The building on the land conveyed having been destroyed by fire, Dr. Vick requested additional security. Thereupon, plaintiff executed the trust deed described in the complaint, conveying as security the original land and a twelve-acre tract in addition.

Plaintiff contends that in 1932 Dr. Vick demanded payment of the full amount and that he and his mother on or about 29 March, 1932, went to Dr. Vick's office and paid him $500.00 by check and $500.00 in cash in full settlement. He holds a paper-writing, which purports to be a receipt signed by Dr. Vick for $1,000.00 "On land. Paid in full." No further demands were made on him for payment.

Dr. Vick died 2 November, 1940. Thereafter, defendant Aycock, Trustee, advertised the land for sale under the trust deed. Plaintiff went to see defendant executors and exhibited check and receipt. The executors gave credit for the check but declined to recognize the validity of the receipt. Thereupon, plaintiff instituted this action to restrain the sale.

On the trial below plaintiff offered evidence that Dr. Vick gave a receipt showing that the debt was paid in full, and he identified the paper writing exhibited to the executors as a receipt. But evidence offered by him as to the genuineness of the signature was excluded under G. S., 8-51 (C. S., 1795).

Defendant Annie Hoge Vick, widow of the deceased and co-executor, testified for defendants and was examined concerning the signature on the receipt. She stated: "I would not recognize that as the doctor's writing. I kept his books for thirty years, and I do not recognize it as his handwriting. I have to be honest about that. I can't say it is or it isn't. It is very foreign to his writing, as far as I am concerned. Defendant Aycock and a son of deceased also testified in respect thereto. Neither testified positively that it was or was not Dr. Vick's handwriting.

In rebuttal plaintiff offered to testify that Dr. Vick wrote the receipt and that the signature was in his handwriting. This testimony was excluded and plaintiff excepted.

There was a verdict and judgment for defendants. Plaintiff excepted and appealed.

Levinson & Pool for plaintiff, appellant.
Lyon & Lyon for defendants, appellees.

BARNHILL, J. Plaintiff on his examination-in-chief was competent to testify to the handwriting of the deceased from his general knowledge, but not to testify that he saw the deceased person actually sign the par-

ticular receipt. *Lister v. Lister,* 222 N. C., 555, and cases cited; *Herring v. Ipock,* 187 N. C., 459, 121 S. E., 758.

When, however, the defendant, representative of the deceased, was examined in behalf of the defendants concerning the same transaction, she thus opened the door and made competent the testimony of her adversary concerning the same transaction about which she testified. G. S., 8-51 (C. S., 1795); *Pope v. Pope,* 176 N. C., 283, 96 S. E., 1034; *Sumner v. Candler,* 92 N. C., 634; *Herring v. Ipock, supra; Lewis v. Mitchell,* 200 N. C., 652, 158 S. E., 183; *Hall v. Holloman,* 136 N. C., 34, 48 S. E., 515.

The evidence offered by the defendants, although equivocal, was for the purpose of attacking the genuineness of the receipt and to prove that the deceased did not, in fact, sign the same. This, in our opinion, opened the door in respect to this particular part of the controversy. So soon as they undertook to attack the instrument through the evidence of the executors, its execution became an open question and made competent plaintiff's testimony that Dr. Vick signed the paper writing, even though the statement was based on the fact he saw him sign at the time he claims he made the payment.

But the "door is opened" only in respect to the transaction or set of facts about which the representative of the deceased person testified. "In other words, if one party opens the door as to one transaction, the other party cannot endeavor to swing it wide in order to admit another independent transaction." *Walston v. Coppersmith,* 197 N. C., 407, 149 S. E., 381.

Plaintiff also stresses another assignment of error which appears in the record. His mother was surety on the prosecution bond. She offered to testify concerning the transaction between plaintiff and the deceased at the time plaintiff alleges he paid the debt in full. Her testimony was excluded under G. S., 8-51; C. S., 1795. Plaintiff excepted and assigns the same as error.

As the question thus presented may become moot by the substitution of another bondsman before the next hearing, a majority of the Court are of the opinion that we need not take notice of the exception at this time. In deference to this majority view, we pass the exception without discussion.

The exclusion of plaintiff's proffered testimony to the effect that he saw the deceased sign the receipt was error prejudicial to the plaintiff, entitling him to a

New trial.

STATE v. SAM MILLER AND JOSEPHINE SHOOK.

(Filed 12 April, 1944.)

1. Marriage § 2b—

All marriages between a white person and a person of Negro descent to the third generation, inclusive, shall be void. N. C. Const., Art. XIV, sec. 8; G. S., 51-3. Therefore, every person who has one-eighth Negro blood in his veins is within the prohibited degree set out in our Constitution and statute.

2. Same—

While the Legislature has prescribed no exclusive mode or manner in which the percentage of Negro blood may be ascertained, evidence competent to show Negro blood includes—the kind of hair, color of skin, opinion and expert testimony. The evidence in this case *held* sufficient to be submitted to the jury.

APPEAL by defendant Sam Miller from *Rousseau, J.*, at July Term, 1943, of CATAWBA.

Criminal prosecution upon a warrant charging defendants with fornication and adultery.

The evidence tends to show that Sam Miller is of Negro blood, that he and Josephine Shook, a woman of white blood, entered into a purported marriage and cohabited as man and wife in Catawba County, North Carolina.

There was a verdict of guilty as to the defendant Sam Miller. From judgment imposing prison sentence, which was suspended upon certain conditions, defendant Miller appeals.

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

W. H. Childs for defendant.

DENNY, J. Prior to the argument of this case, it was agreed by counsel for the appellant and the Attorney-General for the State that on this appeal the Court should consider the following question only, to wit: Was the evidence sufficient to take the case to the jury on the question as to whether or not Sam Miller is of Negro blood, within the prohibited degree as provided in the Constitution of North Carolina, Art. XIV, sec. 8, and the statute passed pursuant thereto, G. S., 51-3; C. S., 2495?

It was admitted at the outset of the trial below by counsel representing the defendants, that defendants entered into a marriage in South Carolina and returned to Catawba County, North Carolina, where they lived together and did bed and cohabit with one another as man and wife; and

it was further admitted that if the defendant Sam Miller is of Negro blood within the prohibited degree, that said marriage is null and void.

The section of the Constitution and the statute referred to above, provide in substance, that all marriages between a white person and a Negro or between a white person and a person of Negro descent to the third generation, inclusive, shall be void. Therefore, every person who has one-eighth Negro blood in his veins is within the prohibited degree within the meaning of the Constitution and the statute. *Ferrall v. Ferrall,* 153 N. C., 174, 69 S. E., 60, and the cases there cited.

There is some evidence tending to show that Henry Hewitt, a Negro, was the father of the defendant Sam Miller. There is also evidence tending to show that the defendant Sam Miller is a Negro within the prohibited degree, and the jury by its verdict so found.

Our Legislature has not prescribed an exclusive mode or manner in which, in cases of this character, the percentage of Negro blood must be ascertained. *S. v. Watters,* 25 N. C., 455. However, this Court has approved various ways to ascertain the extent to which white and Negro blood are commingled in a person.

In the case of *S. v. Chavers,* 50 N. C., 11, the defendant was indicted as a "free person of color" for carrying about his person a shotgun, contrary to law, and the statute defining free persons descended from Negroes, read as follows: "That all free persons descended from Negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall be deemed free Negroes and persons of mixed blood." Upon the sufficiency of the evidence to establish the fact that defendant was a free Negro, the Court said: "We think there was testimony sufficient to be left to the jury, tending to prove that the defendant was a free Negro. The evidence introduced to show the color of his father—the kind of hair which he and his father both had, was competent, and that, together with his confessions, and his own color, which his own counsel called upon the jury to inspect, was sufficient for the consideration of the jury upon the question submitted to them. Upon its weight and its sufficiency to establish the fact of his being a free Negro, it was for them alone to decide."

Another method was approved in *Hare v. Board of Education,* 113 N. C., 9, 18 S. E., 55, where the Court said: "While in doubtful cases only an expert would be qualified to testify from the appearance of a person as to the extent to which white and Negro blood are commingled in his veins, it does not require any peculiar scientific knowledge 'to be able to detect the presence of African blood by the color and other physical qualities of the person.' *Hopkins v. Bowers,* 111 N. C., 175; *S. v. Jacobs,* 6 Jones, 284," *S. v. Patrick,* 51 N. C., 308.

While in the case of *Ferrall v. Ferrall, supra,* where there was no question of admixture of white and Negro blood, save and except as to the one ancestor, the Court said: "Where all other persons whose race and blood affected the question were white, in order to bring a marriage within the prohibited degree, one of the ancestors of the generation stated must have been of pure Negro blood."

In the instant case there is expert testimony of Dr. Fred Long, who was the attending physician when the defendant Sam Miller was born. Dr. Long testified substantially as follows: He had known the defendant all his life, that when the defendant was born he had certain definite physical characteristics of the colored race. That in his opinion he was of mixed blood. His mother is of the whole white blood. "I knew these Negroes and I did not consider his grandmother a full Negro. . . . I think he is . . . about 3/8 Negro; I think his people on the other side had some white blood in them."

There was evidence by many witnesses for the State to the effect that the reputation of the defendant Sam Miller in the community in which he lives is that he is of the colored race. This evidence was competent. 20 Am. Jur., Evidence, sec. 475, p. 416. *Medlin v. Board of Education,* 167 N. C., 239, 83 S. E., 483; *S. v. Patrick, supra;* and *S. v. Chavers, supra.*

We think the evidence offered by the State is sufficient to sustain the verdict of the jury, and we so hold.

In the trial below, there is

No error.

IN RE ESTATE OF S. T. LOFLIN, DECEASED.

(Filed 12 April, 1944.)

1. Executors and Administrators § 4—

Where a son of an intestate, who left a widow, was appointed administrator and shortly thereafter the widow filed her renunciation of prior right and requested the appointment of another, the clerk's notice to the son, already appointed, to show cause on 6 September why his appointment should not be revoked, was served on 4 September, and respondent personally appeared on 6 September and objected that the notice did not provide sufficient time, refusing an offer of continuance. *Held:* Respondent was in court and the clerk acted properly in revoking his appointment.

2. Same—

The appointment of one as administrator of an estate should be revoked upon renunciation of the widow, who has a prior right to administer the

estate or to nominate in her stead, and the clerk of the court has jurisdiction and should appoint on her request a fit and competent person nominated by her. G. S., 28-32, 28-20 (3), 28-15.

APPEAL by respondent W. H. Loflin from *Warlick, J.*, at September Term, 1943, of RANDOLPH. Affirmed.

This was a proceeding before the clerk for the appointment of an administrator of the estate of S. T. Loflin.

The material facts involved in the appeal were these: The decedent S. T. Loflin died 24 July, 1943, leaving him surviving his widow, Margaret E. Loflin, and ten children. August 27, 1943, the clerk appointed a son, W. H. Loflin, administrator of the estate. September 1st the widow filed with the clerk notice of her renunciation of her prior right to administer and requested in writing that W. B. Millikan, the Public Administrator, be appointed administrator in her stead. Thereupon the clerk issued notice to W. H. Loflin to show cause on September 6th why his appointment as administrator should not be revoked. This notice was served September 4th. On September 6th the respondent W. H. Loflin appeared specially with counsel and moved that the proceeding be dismissed for want of service and for the further reason that the notice did not give proper time. The clerk found that he had been properly served and was in court, and overruled his motion. Offer was made to continue the hearing to another time if respondent desired further time. No request for extension having been made, the clerk proceeded to hear the matter, and ruled that under the statute the widow had prior right to administer, and that, upon her renunciation and nomination in her stead of the Public Administrator, W. B. Millikan, who was found to be a fit and competent person, the letters of administration theretofore issued to respondent should be revoked, and W. B. Millikan appointed administrator of the estate.

Respondent appealed to the judge of the Superior Court, who found the facts to be substantially as found by the clerk, and affirmed his order. Respondent appealed to the Supreme Court, assigning error.

John G. Prevette for respondent, appellant.

J. A. Spence for petitioner, appellee.

DEVIN, J. The respondent appealed from the judgment below upon the ground that the notice to him to show cause why the letters of administration previously issued to him should not be revoked did not provide sufficient time; and further that the orders of the clerk were improperly entered. Neither of these grounds can avail the respondent. If the time fixed in the notice to show cause was too short, the notice was not

void, and was duly served. At the time designated in the notice respondent was personally present, and offer was made to him to extend the time for such period as he might desire. This offer he declined. Thus he was afforded full opportunity to be heard. *Stafford v. Gallops,* 123 N. C., 19, 31 S. E., 265; *Nall v. McConnell,* 211 N. C., 258, 190 S. E., 210.

It is apparent upon the facts found, which are not controverted, that another had prior right to administer the estate, and that the clerk acted properly in moving to revoke an appointment which had been improvidently made. Neither by lapse of time nor by any act on her part had the widow of the decedent lost any of her rights in the premises, either to administer or to nominate a fit and competent person for appointment in her stead. The rulings of the clerk and the judgment of the judge in affirmance were in accord with the well settled principles of law applicable to the settlement of estates. G. S., 28-32; G. S., 28-20 (3); G. S., 28-15; *In re Estate of Smith,* 210 N. C., 622, 188 S. E., 202; *Williams v. Neville,* 108 N. C., 559, 13 S. E., 240; *Little v. Berry,* 94 N. C., 433.

The respondent's plea to the jurisdiction is without merit. The Superior Court had jurisdiction both of the subject matter and the parties. *Murrill v. Sandlin,* 86 N. C., 54.

The judgment appealed from is

Affirmed.

STATE v. BOB COUCH.

(Filed 12 April, 1944.)

Appeal and Error § 30b: Criminal Law § 80—

While failure to serve "case on appeal" may not perforce, in and of itself, entitle appellee to a dismissal, motion to dismiss will be allowed, where the record shows on its face that an appeal would be frivolous or could only be taken for the purpose of delay.

MOTION by State to docket and dismiss appeal under Rule 17.

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

STACY, C. J. At the February Term, 1944, Yadkin Superior Court, the defendant herein, Bob Couch, was tried upon indictment charging him, among other things, with the larceny of a sewing machine, valued at $75, the property of the Board of Education of Yadkin County, which resulted in a conviction of larceny and sentence of two years on the roads.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court. No extension of time for serving case, countercase or exceptions was allowed. Appeal bond was fixed at $75 and appearance bond at $2,500.

The clerk certifies that no appeal bond, no order allowing the defendant to appeal *in forma pauperis,* and no case on appeal has been filed in his office; that the time for perfecting the appeal has expired, and that no agreement extending the time for service of case on appeal, or order allowing the same, has been filed. The solicitor of the district also certifies that the time for service of case on appeal has expired.

While failure to serve "case on appeal" may not perforce, in and of itself, entitle the appellee to a dismissal of the appeal, *S. v. Parnell,* 214 N. C., 467, 199 S. E., 601, nevertheless it appears from an inspection of the record proper that an appeal for errors appearing on the face thereof would be frivolous and could only be taken for the purpose of delay. On this showing, the motion is allowed. *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507.

Appeal dismissed.

FANNIE C. HALL, ETHEL SLOAN TURNER, ROBBIE L. ZIBELIN, LINA W. POTTER (BETTIE WILLIAMS WARD, EXECUTRIX OF GEORGE R. WARD, DECEASED), v. J. F. LANDEN AND WIFE, EMILY S. LANDEN (G. F. LANDEN, ADMINISTRATOR AND INDIVIDUALLY, AND MYRTLE LANDEN; EMILY C. HUNT AND HUSBAND, GLENN HUNT).

(Filed 12 April, 1944.)

Appeal and Error § 37b—

The exercise of a discretionary power by the trial court, in the absence of allegation or suggestion of abuse, is not reviewable on appeal.

APPEAL by plaintiffs from *Stevens, J.,* at December Term, 1943, of DUPLIN. Appeal dismissed.

Oscar B. Turner for plaintiffs.

Gavin & Gavin and R. D. Johnson for defendants.

PER CURIAM. Plaintiffs declared on certain notes, one of them secured by mortgage on land, executed by J. F. Landen and his wife, Emily S. Landen. Upon the death of J. F. Landen pending the action his administrator, G. F. Landen, and his heirs, were made parties defendant. Liability on the notes was denied. When the cause came on for trial, at the close of plaintiffs' evidence, nonsuit was ordered as to all defendants

except G. F. Landen, administrator. In response to issues submitted the jury found, (1) that plaintiffs were owners and holders of two of the notes, (2) that no credits had been made thereon by J. F. Landen, and (3) that plaintiffs were not entitled to recover of G. F. Landen, administrator, on said notes. Plaintiffs moved to set aside the verdict on the third issue and for judgment on the other issues, or for judgment notwithstanding the verdict. After hearing argument, the court, in its discretion, set aside the verdict and the order of nonsuit, and ordered a new trial on the entire case.

Under the circumstances, we think the exercise by the judge below of his discretion to set aside the verdict and the order previously entered during the trial may not be successfully challenged. The exercise of a discretionary power in the absence of allegation or suggestion of abuse is not reviewable on appeal. *Bird v. Bradburn,* 131 N. C., 488, 42 S. E., 936; *Brantley v. Collie,* 205 N. C., 229, 171 S. E., 88; *Jones v. Ins. Co.,* 210 N. C., 559, 187 S. E., 769.

Appeal dismissed.

STATE v. RAY DRY.

(Filed 12 April, 1944.)

Criminal Law § 77a—

On appeal in a criminal case the indictment or warrant is a necessary part of the case on appeal and in its absence the appeal will be dismissed.

APPEAL by defendant from *Armstrong, J.,* at January Term, 1944, of CABARRUS.

Defendant entered a plea of guilty on 8 February, 1943, to charges contained in four separate warrants, in the recorder's court of Cabarrus County. Prison sentence was entered in each case and suspended upon certain conditions. The recorder of said court, on 6 December, 1943, found as a fact that the defendant had willfully violated the terms and conditions of the suspended sentence in one of the above cases, and ordered capias to issue. Defendant appealed to the Superior Court and the judgment of the recorder's court was affirmed. Whereupon, the defendant appealed to the Supreme Court and assigns error.

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

E. T. Bost, Jr., and B. W. Blackwelder for defendant.

PER CURIAM. The record proper filed in this Court is fatally defective for the reason that no warrant appears therein.

The appeal is dismissed on the authority of *S. v. Currie,* 206 N. C., 598, 174 S. E., 447, and *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

BIRDIE S. BUFORD ET AL. v. JOHN MOCHY ET AL.

(Filed 19 April, 1944.)

1. Estoppel §§ 1, 6b: Deeds § 3: Husband and Wife § 18a—

Neither a covenant nor a representation on the part of a married woman that she is a *feme sole* will estop her from asserting her incapacity to convey her separate real estate without the written assent of her husband and privy examination as required by statute; and a married woman cannot by her own misrepresentation enlarge her capacity to convey an estate in land.

2. Husband and Wife § 4c: Deeds § 3—

While G. S., 52-2, may enable a married woman ordinarily to contract and deal with her property as if she were unmarried and to be bound by estoppel; yet this statute contains a pertinent delimitation making a conveyance of real estate invalid unless with the written assent of her husband, Art. X, sec. 6, of the N. C. Constitution, and privy examination as required by law.

3. Husband and Wife §§ 4a, 18a, 18b: Deeds § 3—

One who deals with a married woman is chargeable with knowledge of her disability, and that she can convey her real estate only in the manner prescribed by the Constitution and laws on the subject.

4. Estoppel § 1—

Estoppel is applied against those who are capable of acting in their own right in respect of the matter at issue, and not against those under specific disability in respect of it.

5. Husband and Wife § 4a: Estoppel § 6d—

To the extent that a married woman is authorized to deal with her property as a *feme sole* she is liable on her contracts and subject to estoppel: but otherwise her disability may not be circumvented or the pertinent legal restrictions of coverture set at naught.

6. Estoppel § 6d: Husband and Wife § 17—

A married woman is no more estopped by her acts *in pais* than by her covenant of warranty; and it is only in a case of pure tort, altogether disconnected with contract, that an estoppel against her can operate.

BARNHILL, J., dissenting.

DEVIN and SEAWELL, JJ., concur in dissent.

APPEAL by defendants from *Bone, J.*, at November Term, 1943, of WILSON.

Civil action in ejectment.

The plaintiffs, who had been married to each other, were divorced in 1936. Thereafter the *feme* plaintiff held herself out and did business as a single woman. On or about 1 September, 1940, she authorized her attorney, Thomas J. Moore, to sell her house and lot in the town of Wilson. Pursuant to this authorization, Moore forthwith negotiated a contract with the defendants for the purchase of the property. They were told that the *feme* plaintiff was unmarried, and at the time the deed was drafted, which was prior to its execution and delivery, she made the statement in the presence of one of the defendants that she was a single woman. In the deed "Birdie S. Buford" is designated "party of the first part."

The sale was consummated 21 September, 1940. In the meantime, however, the *feme* plaintiff had gone to Dillon, S. C., and on 15 September, she and her former husband were remarried. This fact was not disclosed to her attorney or to the defendants at the time of the execution and delivery of the deed, albeit the deed is signed "Mrs. Birdie S. Buford."

On 18 March, 1942, the *feme* plaintiff and her husband instituted this action to recover possession of the land, alleging that the deed of 21 September, 1940, was void, because executed by the *feme* plaintiff, a married woman, without the written assent of her husband or privy examination as required by law. The plaintiffs offer to make the defendants whole by accounting for the purchase money, offsetting improvements against rents, etc.

The defendants admit the allegations of the complaint in respect of the deed, but allege that they were defrauded by the plaintiffs, in that they schemingly withheld from the defendants the fact of their remarriage, and such conduct is set up as a bar to the present action. The precise denomination of the plea is estoppel *in pais.*

On the hearing, "it was admitted . . . that the plaintiff, Birdie S. Buford, is the owner of the land in question unless she is estopped in accordance with the allegations of the answer."

The plaintiffs' demurrer to defendants' evidence on the plea of estoppel was sustained, and the demurrer to the amended answer was not passed upon as it "raises the identical question."

From judgment in favor of plaintiffs, and retaining the cause for an accounting, etc., the defendants appeal, assigning errors.

L. L. Davenport and A. O. Dickens for plaintiffs, appellees.
Connor, Gardner & Connor for defendants, appellants.

STACY, C. J. The plaintiff, a married woman, executed a deed to her land without the written assent of her husband or privy examination as required by law. The grantees allege that during the negotiations she represented herself to be unmarried. She offers to return the purchase money and to save the grantees harmless, but they decline to surrender possession. Plaintiff sues in ejectment. The defendants plead estoppel *in pais.*

Is the plea of estoppel good? The law answers in the negative.

In *Scott v. Battle,* 85 N. C., 184, where a married woman executed a deed to her land without the joinder of her husband—a case identical in principle with this one—it was said that the plaintiff's right to recover in ejectment could not be questioned as nothing passed by the deed. It is admitted on the present record that "the plaintiff, Birdie S. Buford, is the owner of the land in question unless she is estopped in accordance with the allegations of the answer."

The question of estoppel was fully discussed in the case of *Williams v. Walker,* 111 N. C., 604, 16 S. E., 706. There it was said that neither a covenant nor a representation on the part of a married woman that she was a *feme sole* would estop her from asserting her incapacity to convey her separate real estate without the written assent of her husband and privy examination as required by statute, and further that a married woman could not by her own misrepresentation enlarge her capacity to convey an estate; that she would not be allowed to do indirectly what the law prohibits her from doing directly; that she could not do by acts *in pais* what she could not do by deed; that to hold otherwise "would be to introduce into our law an entirely new system of the conveyances of the real estate of *femes covert,*" *Drury v. Foster,* 69 U. S., 24; that, as no remedy could be had upon the void contract, it would be against the policy of the law to allow the same result to be reached through the medium of an estoppel, and that the conclusion reached was in full accord with the constitutional limitation and statutes adopted and enacted for the protection of married women, and not "to permit, much less help, one of them to perpetrate a fraud." The following from Bishop was quoted with approval: "If a married woman executes a conveyance of land in her maiden name, and dates it back to a time before her marriage, this transaction, however fraudulently intended, does not pass the land by estoppel." Bishop Law Married Women, sec. 489. Also the following from *Farthing v. Shields,* 106 N. C., 289, 10 S. E., 998: "Whatever may be the rulings in other states (and they are admitted to be in hopeless conflict), we prefer to adhere to the principle, so often declared by this Court, that a married woman, as to her statutory separate property, is to be deemed *feme sole* only to the extent of the power conferred by the Constitution and laws creating the same." To allow a

married woman voluntarily to disregard the provisions of the law intended for her benefit would render them nugatory or of no binding effect. "So if a *feme covert,* reciting by her deed that she is a *feme sole,* grant an annuity, this is a void grant, and she shall not be concluded by this recital." *Brinegar v. Chaffin,* 14 N. C., 108.

It is contended, however, that all these earlier cases were rendered apocryphal by the passage of the Martin Act in 1911. G. S., 52-2 (C. S., 2507). Conceding the general broad effect of this statute, enabling a married woman ordinarily to contract and deal with her property as if she were unmarried, *Martin v. Bundy,* 212 N. C., 437, 193 S. E., 831, and to be bound by estoppel, *Tripp v. Langston,* 218 N. C., 295, 10 S. E. (2d), 916, yet the following pertinent delimitation must not be overlooked: "But no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the Constitution, and her privy examination as to the execution of the same taken and certified as now required by law." See *Fisher v. Fisher,* 218 N. C., 42, 9 S. E. (2d), 493; *Capps v. Massey,* 199 N. C., 196, 154 S. E., 52; *Wallin v. Rice,* 170 N. C., 417, 87 S. E., 239.

Admittedly the deed given by the plaintiff to the defendants is void for failure to comply with the terms of the statute. Whatever rights and remedies the defendants may have against the plaintiff in other respects, and she offers to comply with these, it will not do to say the plaintiff has title to the land and yet she shall not have it, or that the defendants may hold it under a void deed. 50 A. L. R., 956. The Constitution and statutes forbid. In no previous decision have we exacted of a married woman divestiture of her land as a penalty for misrepresenting her capacity to convey it. Nor has she been permitted, by any voluntary act, to circumvent or to set at naught the provisions of the law intended for her protection. Equity abhors fraud and diligently seeks to prevent it or to redress it wherever found, but it also follows the law. One who deals with a married woman is chargeable with knowledge of her disability, and that she can convey her real estate only in the manner prescribed by the Constitution and laws on the subject. *Johnson v. Bryan,* 62 Tex., 623. Here, the deed which the defendants took from the plaintiff is signed "Mrs. Birdie S. Buford." Numerous decisions have shaped and cast the law in this jurisdiction.

But supposing the plea of estoppel were held to be good, what would be the result? The plaintiff with title to the land could not recover in ejectment. Yet if perchance she should obtain possession of it, the defendants could not recover in ejectment on a void deed. Thus the law would be in the position of saying to the parties:

"He may take who has the power;
He may keep who can."

Such, we apprehend, would ill befit the law. *Mosseller v. Deaver,* 106 N. C., 494, 11 S. E., 529; *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12. It seems incontestable that unless the *feme* plaintiff is estopped by her deed, which is not pleaded, she is entitled to recover. Certainly if the *feme* plaintiff had signed no writing at all, it would hardly be contended she could not recover. G. S., 22-2 (C. S., 988). The deed she did sign has the same effect so far as the land is concerned. It is inoperative as a deed and conveys nothing. *Vann v. Edwards,* 135 N. C., 661, 47 S. E., 784. At no time in this State has a married woman had the capacity to convey her real estate without the written assent of her husband. The limitation is constitutional, Art. X, sec. 6, and the General Assembly is without authority to change it. Similar provisions are not to be found in most of the other state constitutions, *Stallings v. Walker,* 176 N. C., 321, 99 S. E., 25, a circumstance to be borne in mind in assessing the persuasiveness of decisions in other jurisdictions.

It all comes to a narrow compass: By the Constitution and laws of this State a married woman is incapable of making a valid conveyance of her real estate without the written assent of her husband and privy examination duly taken and certified. Hence, she may not convey it by estoppel, or fraudulently divest herself of coverture, if such characterization be preferred. A married woman cannot by a simple declaration or by intentional fraud change her status from *feme covert* to *feme sole* and thus convert a void deed into a valid conveyance of her real estate. Nor will equity close the doors of the courts to her in the assertion of a legal right. Estoppel is applied against those who are capable of acting in their own right in respect of the matter at issue, and not against those under specific disability in respect of it. *Morris Plan Co. v. Palmer,* 185 N. C., 109, 116 S. E., 261. To the extent that a married woman is authorized to deal with her property as a *feme sole* she is liable on her contracts and subject to estoppel, *Council v. Pridgen,* 153 N. C., 443, 69 S. E., 404, but otherwise her disability may not be circumvented or the pertinent legal restrictions of coverture set at naught. *Smith v. Ingram,* 132 N. C., 959, 44 S. E., 643. Equity will go as far as the law permits to make the defendants whole, but it will not impinge on positive constitutional and statutory provisions. Neither the doctrine of clean hands nor any kindred principle on which courts refuse relief is applicable here. "Equity does not demand that its suitors shall have led blameless lives.". *Loughran v. Loughran,* 292 U. S., 216, 78 L. Ed., 1219. Moreover, the plaintiff has not come into equity. She is suing at law in ejectment. The law will not allow that to be done indirectly which it has forbidden to be done directly, and if a married woman can, by the simple expedient of misrepresenting her marital status, practically convey her real estate, the very disability which the law has imposed will be removed, and the safe-

guards which it has carefully thrown about her will be broken down and abrogated. *Ray v. Wilcoxon,* 107 N. C., 514, 12 S. E., 443. The law in its protective features is not so easily swept aside.

"A married woman is no more estopped by her acts *in pais* than by her covenant of warranty. This Court has said that no one can reasonably rely upon the acts and representations of a married woman, at least those which are contractual in their nature, as he must know that she is not bound thereby, and 'it is only in the case of a pure tort, altogether disconnected with the contract, that an estoppel against her can operate—' " *Walker, J.,* in *Smith v. Ingram, supra.*

It should be observed that the case is one in which the parties have undertaken to form a contractual relationship with each other, and not one in which a third person has dealt with the property in ignorance of plaintiff's rights. *Bishop v. Minton,* 112 N. C., 524, 17 S. E., 436; Note, 50 A. L. R., 962.

With the above disposition of the case, no cognizance need be taken of the fact that all the evidence comes from a single witness, namely, the attorney who represented the *feme* plaintiff at the time of the execution and delivery of the deed, *McNeill v. Thomas,* 203 N. C., 219, 165 S. E., 712, nor of the circumstance that the defense was dismissed on challenge to the evidence, *Lester v. Harward,* 173 N. C., 83, 91 S. E., 698, rather than on demurrer to the answer. McIntosh on Procedure, 507. Had the result been otherwise, however, these obstacles might have appeared formidable. *Guy v. Bank,* 206 N. C., 322, 173 S. E., 600.

The judgment seems to be in accord with our former decisions.

Affirmed.

BARNHILL, J., dissenting: The *feme* plaintiff, a divorced woman, had been engaged in business under the name "Mrs. Birdie S. Buford." She was in default and her property was about to be sold under foreclosure. In an attempt to save her equity, she contracted to sell her real estate to the defendants, who knew her as a *feme sole.* After arriving at an agreement she leaves the State and remarries her former husband, who did not live in the same town and was unknown to defendants. Upon her return the deed was drafted, and she makes the positive assertion that she is unmarried. She had theretofore, through her attorney, conveyed the same information to the defendants. Defendants accepted the deed and paid their money on the strength of this representation. She again asserts that she is unmarried. She stands by until defendants have converted the property into a safe and profitable investment. She now seeks to recover the property.

Unquestionably, had the plaintiff been a *feme sole* at the time, her conduct as disclosed by this evidence (which we must accept as true on

the question here presented) would work an estoppel against any claim she might assert. Does her coverture cloak her fraud and enable her to maintain her action notwithstanding her unconscionable conduct? This is the real question for decision.

It may be conceded that the results arrived at by the courts in the consideration of this question are far from harmonious. This is due in part to the gradual evolution of the law itself, but most of the difficulty and confusion has arisen out of the difference in approach in seeking to apply the doctrine.

Those courts (notably of Massachusetts) which conceive that the enforcement of the doctrine against married women would operate as a ratification of the conveyance and serve to provide a means of alienation disapproved by statute uniformly conclude that it cannot serve to preclude a married woman.

Conversely, where the doctrine is deemed to be directed to the remedy and not to the right, the plea, on a proper showing, is sustained, the courts holding that coverture does not serve to cloak the fraud of a married woman and enable her to use the processes of the court to reap an advantage growing out of her own wrong. The court does not adjudicate the strict legal right or attempt to validate the conveyance. It merely requires of married women that degree of good faith and fair dealing exacted of all other litigants.

The *ratio decidendi* in these cases is that a court will not stoop to aid any litigant, even a married woman, in the prosecution of a claim bottomed on inequitable or unconscionable conduct.

The majority choose to adopt the view that enforcement of the law of estoppel *in pais* would operate as a ratification of the conveyance and serve to provide a means of alienation disapproved by statute.

I adhere to the view that the doctrine is directed to the remedy and not to the right; and that as a married woman can now contract and sue and be sued as a *feme sole,* there is no sound reason why she should not be as subject to the plea as any other litigant. *Tripp v. Langston,* 218 N. C., 295, 10 S. E. (2d), 916. This, in my opinion, is in accord with the weight of modern authority.

In view of the importance of the question and the sharp conflict of opinion on the subject, I deem it essential that I set forth fully the grounds of my dissent.

The history of the evolution of the law concerning the status of married women in respect to property and as a party to actions in court is interesting and instructive. I refrain, however, from any discussion thereof except to call attention to certain fundamental changes which have a direct bearing upon the decisions of the Court and render some of the older cases inapposite.

By the early common law the identity of a married woman was merged into that of her husband. She could not possess a separate estate or sue or be sued alone. Neither could she be held to her contracts. The motivating purpose of the law was to assure the husband complete control over his wife's estate.

In 1868 her separate estate was assured to her, and she was granted the right to devise and, with the written assent of her husband, to convey the same as if she were unmarried. Const. 1868, Art. X, sec. 6. She was likewise granted the power to sue or be sued when the action concerned her separate estate or was between her and her husband, and the requirement that she prosecute or defend by guardian or next friend was abolished. C. C. P. of 1868, sec. 56. Then, by the Martin Act, ch. 109, Public Laws 1911, sometimes called the Married Woman's Act of Emancipation, she was vested with authority to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, subject only to the limitations prescribed by sec. 6, Art. X, N. C. Const., and G. S., 52-12 (C. S., 2515).

She is now under no disability in respect to her right to sue and be sued. As to this she is a free agent and may exercise the right in respect to her separate estate as fully as if she were a *feme sole.* C. S., 454; *Lipinsky v. Revell,* 167 N. C., 508, 83 S. E., 756; *Craddock v. Brinkley,* 177 N. C., 125, 98 S. E., 280; *Royal v. Southerland,* 168 N. C., 405, 84 S. E., 708; *Croom v. Lumber Co.,* 182 N. C., 217, 108 S. E., 735.

The attainment of a just and fair result is the primary objective of a court. The principles of equity are the machine tools with which it works. Through their proper use and application justice is fashioned.

One of these principles, the doctrine of estoppel *in pais,* shuts the door of the court against one who seeks to take advantage of his own wrong or to profit by his own misrepresentations. It had its origin in the determination to prevent fraud resulting in injustice. *Thomas v. Romano,* 33 So., 969; *Kelly v. Wagner,* 61 Miss., 299. It is based upon the manifest inequity of permitting a person to reap advantage from his own wrong. *Scott v. Bryan,* 210 N. C., 478, 187 S. E., 756, or to allege and prove the existence of facts which by his own conduct he has induced another to believe did not exist. *Shean v. U. S. Fidelity & Guaranty Co.,* 248 N. W., 892. Its object is to prevent fraud resulting in injustice. Dallas *Joint Stock Land Bank v. Gore,* 100 S. W. (2d), 396; *Chernick v. National Surety Co.,* 148 Atl., 418. It is applied to transactions where it is found that it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted the benefits. *Young v. Venters,* 229 Ky., 806, 18 S. W. (2d), 277. It concludes and shuts a man's mouth from speaking the truth, where to permit him to speak would allow a departure from

fair dealing and render it impossible to administer the law as a system, *Lumber Co. v. Price,* 144 N. C., 50, 56 S. E., 684, and is applied and enforced on the grounds of public policy and good faith. *Houston Nat. Bank of Dothan v. Eldridge,* 84 So., 430.

Thus it does not challenge the strict legal right. It denies a remedy. In short, it is the conscience of the court in action, repelling the plea of one who seeks to reap the benefits of his own misrepresentations or wrong-doing.

Even before married women were granted full capacity to contract in regard to their separate estates, this Court spoke on the question of the effect of their fraud.

To estop a married woman from alleging a claim to land, there must be some positive act of fraud or something done upon which a person dealing with her might reasonably rely, and upon which he did rely, and was thereby injured. *Towles v. Fisher,* 77 N. C., 437; *Loftin v. Crossland,* 94 N. C., 76; *Weathersbee v. Farrar,* 97 N. C., 106, 1 S. E., 616.

"It must be borne in mind that the legal disability of coverture, or of infancy, carries with it no license or privilege to practice fraud or deception on other innocent persons; nor will the disability be permitted to protect them in doing so." *Pilcher v. Smith,* 2 Head (Tenn.), 208; *Boyd v. Turpin,* 94 N. C., 137; *Burns v. McGregor,* 90 N. C., 222.

"Coverture disables a woman to enter into a binding contract, but it affords no protection or shelter for fraud." *Walker v. Brooks,* 99 N. C., 207, 6 S. E., 63.

A married woman "has capacity to perpetrate and participate in a fraud. . . . She has no right, or privilege, or disability, that excuses her as to such fraudulent transactions in which she participates, nor that protects her against their consequences. . . . She has privileges and immunities in some respects, but not such as will help her to share in a fraud with impunity when she must go into a court of justice to enforce her claims growing out of it. The law abhors fraud and will not help any person to take advantage of and have benefit of it. . . . In such case the wife must be on the same footing as a *feme sole,* and treated as such." *Hart v. Hart,* 109 N. C., 368, 13 S. E., 1020; *Hodge v. Powell,* 96 N. C., 64, 2 S. E., 182.

"The general rule is, that 'to estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon which a person dealing with her, or in a matter affecting her rights, might reasonably rely, and upon which he did rely and was thereby injured.' " *Rich v. Morisey,* 149 N. C., 37, 62 S. E., 762; *Wells v. Batts,* 112 N. C., 283, 17 S. E., 417; *Williams v. Ellingsworth,* 75 Tex., 480, 12 S. W., 746; *McLaren v. Jones,* 89 Tex., 131, 33 S. W., 849; *Matador Land and Cattle Co. v. Cooper,* 87 S. W., 235.

Then, in *Martin v. Bundy,* 212 N. C., 437, 193 S. E., 831, decided after the enactment of the Martin Act, this Court said by way of dictum: "The full doctrine of estoppel did not apply to a married woman (before the Martin Act) because she was not *sui juris* and was under disability, but she could bind herself by way of estoppel by some affirmative act of fraud upon which a prudent man might rely to his injury in matters affecting her rights." See Kelly, Contracts of Married Women, p. 122; Bishop, the Law of Married Women, Vol. 2, p. 395; Harris, Contracts by Married Women, p. 435; Cord, Legal and Equitable Rights of Married Women, 2nd Ed., sec. 1287; *Bodine v. Killeen,* 53 N. Y., 96. See also *Land Bank v. Moss,* 215 N. C., 445, 2 S. E. (2d), 378; and *Tripp v. Langston,* 218 N. C., 295, 10 S. E. (2d), 916.

The great weight of authority sustains the view as stated in the *Martin case, supra,* that a married woman may be estopped by her misrepresentations or other unconscionable or inequitable conduct to assert a right to real property, although her deed is void because not executed according to the formalities required to bind married women, or the nonjoinder of her husband. See Anno. 76 A. L. R., 1501, and 107 A. L. R., 331.

"As has been said in a number of cases, coverture is no excuse, in equity, for fraud, and a party entitled to relief in a court of equity will not be denied such relief simply because the person by whose fraudulent act he has been injured is a married woman." 26 Am. Jur., 659; *Newman v. Moore,* 94 Ky., 147, 21 S. W., 759; *McDanell v. Landrum,* 87 Ky., 404, 9 S. W., 223; *Holder v. Hunter,* 29 N. M., 644, 226 Pac., 163; *Bucknor's Estate,* 136 Pa., 23, 19 Atl., 1069.

In the absence of her husband's coercion, a married woman can bind herself by way of estoppel by some affirmative act of fraud, upon which a prudent man might and did rely to his injury in matters affecting her rights. . . . She can only be divested of her property in the method prescribed by law, except by intentional fraud. Kelly, Contracts of Married Women, p. 122, sec. 4.

If the only inquiry concerns the effect of her fraud as an estoppel, there is no reason why she should not suffer the consequences of her fraud the same as though she were not under coverture. . . . The question is not one of power to convey. If a man can lose his lands by estoppel when the general law authorizes him to convey only by deed, it is impossible to find a good legal reason why a wife may not lose hers by estoppel, though the general law qualifies her to convey them only by a deed executed jointly with her husband. Bishop, the Law of Married Women, Vol. 2, pp. 395-6.

A fraud may be committed by the wife in the sale of her land which will not vitiate the sale and authorize a recission at the instance of the

vendee, but will estop her from avoiding the sale or conveyance of her property. Harris, Contracts of Married Women, p. 448.

A married woman may commit such acts as will amount to positive fraud and thereby estop herself and destroy all rights in her separate estate, under many circumstances, whatever those rights may be. *Ibid,* p. 452.

A married woman should be held to the observance of that good faith in her dealings with the world to which others are bound. Her protection is for the prevention of fraud. She ought not thereby to be enabled, with impunity, to defraud others. *Bucknor's Estate, supra; Grim's Appeal,* 105 Pa., 382.

She is not privileged to practice deliberately a fraud upon an innocent person. *Read v. Hall,* 57 N. H., 482. If she could be estopped in no instance, the morality of the law would be placed upon a very low plane, and the disability of coverture, instead of being, as it ought to be, a shield for her protection againt legal wrong, would become a sword of injustice for the license of fraud. While, therefore, she may not always be estopped to deny her capacity to contract, especially so as to convey her property in a mode prohibited by law, she may be estopped by any positive act of fraud, as a person *sui juris* would be. *Wilder v. Wilder,* 89 Ala., 414, 7 So., 767; *Patterson v. Lawrence,* 90 Ill., 174; *Grice v. Woodworth,* 10 Idaho, 459, 80 Pac., 912; 3 Pomeroy's Eq. Jur., 5th Ed., sec. 814.

The contracts and agreements of married women in reference to their real estate, when not joined therein by their husbands, where such agreement is free from fraud, cannot be enforced at law or in equity. But where married women make such contracts or agreements by fraudulent means and thus obtain inequitable advantages, a court of chancery will hold them estopped from setting up and relying on their coverture to retain the advantage. *Grice v. Woodworth, supra.*

In *Newman v. Moore, supra,* the plaintiff, a married woman, concealed her marriage and declared she was a widow. The Court said: "She (plaintiff, a married woman) will not be allowed to take advantage of her own wrong and will be estopped from interposing her inability to contract, in bar of the consequences of her own fraud."

In *Bryant v. Freeman,* 134 Tenn., 169, the plaintiff's husband had been sentenced to the penitentiary for life. She disposed of her property, representing herself to be a widow. The court held that her fraud estopped her from questioning the conveyance on the ground that her husband did not join and her privy examination was not taken in the form prescribed for deeds of married women. In so doing it said: "We think the defense (of estoppel) is well founded. The law intends the disability of coverture as a shield, not as a cloak for fraud. When used

for the latter purpose it will not be permitted to inflict a wrong on innocent people."

In *Patterson v. Lawrence, supra,* a married woman when applying for a loan on the security of a deed of trust represented that she was a widow. The Court said: "Where married women make such contracts or agreements (in reference to their real estate) by fraudulent means, and thus obtain inequitable advantages, a court of chancery will hold them estopped from setting up and relying on their coverture to retain the advantage."

"While as a general thing the courts are loath to hold that a married woman may divest herself of her property in any way other than that prescribed by statute, yet we have repeatedly held that a married woman may by her acts and declarations estop herself from asserting dower or other claims, when to permit her to do so would operate as a fraud (citing cases). The estoppel in such cases is rested altogether upon the doctrine that a married woman will not be allowed to use her coverture to perpetrate a fraud." *Ayer & Lord Tie Co. v. Baker,* 128 S. W., 346 (Ky.); 26 Am. Jur., 658; 3 Pomeroy's Eq. Jur., 5th Ed., sec. 814, p. 239.

In *Cupp et al. v. Campbell,* 103 Ind., 213, a married woman executed a mortgage on her separate estate to secure a debt of her husband. Under the Indiana law such deed is void. The Court said: "A married woman has no more right to injure or mislead others by her conduct or representations than if she were *sui juris,* and where it is made to appear that by fraud, misrepresentation or concealment she has led one into contracting with her as principal, she will not be permitted to gainsay such representations as may have induced another to act who in good faith relied on them." *Oglesby Coal Co. v. Pasco,* 79 Ill., 164; *Powell's Appeal,* 98 Pa. St., 403; Bigelow Estoppel, 513; Cooley, Torts, 117."

"Neither the statute of frauds nor the various statutory provisions enacted for the protection of a homestead claimant can be held to do away with the general equity doctrine of estoppel *in pais.* While it is true some courts have held to the contrary, the weight of modern authority is to the effect that the doctrine of equitable estoppel will be applied to married women as well as to a *feme sole.* The doctrine is not invoked to render invalid a contract which is void under the statute of frauds or under statutes for the benefit and protection of the homestead claimants, but it is invoked to prevent the successful perpetration of fraud by preventing wrongdoers from urging the provisions of such statutes to shield them in their tortious conduct." *Engholm v. Ekrem,* 119 N. W., 35 (N. D.). See also note, *Grice v. Woodworth,* 69 L. R. A., at page 584; also *Smith v. Willard,* 174 Ill., 538; *Hobbs v. National R. Co.,* 122 Ala., 602; *Warner et al. v. Watson et al., Trustees,* 35 Fla., 402; and *Bruce v. Goodbar,* 104 Tenn., 638.

The Martin Act, *supra,* is very broad, comprehensive, and thorough in its terms, meaning, and purpose, and primarily secures to the wife the complete ownership and control of her property as if she were unmarried. She is now *sui juris* in respect to her contracts. *Tise v. Hicks,* 191 N. C., 609, and cases cited. She may convey her real property, but to do so by deed she must first obtain the written assent of her husband and be privately examined. There are, incidentally, reciprocal limitations on the right of the husband.

Even these requirements are not ironclad, as the law of the Medes and Persians. They may be set at naught by the insanity of the husband, *Lancaster v. Lancaster,* 178 N. C., 22, 100 S. E., 120; or by a deed of separation, G. S., 52-5 (C. S., 2529); or the abandonment of her husband, G. S., 52-21 (C. S., 2524); *Nichols v. York,* 219 N. C., 262, 13 S. E. (2d), 565; or through the bar of the statute of limitations, ch. 78, Public Laws 1899; *Graves v. Howard,* 159 N. C., 594, 75 S. E., 998; *In re Bateman's Will,* 168 N. C., 234, 84 S. E., 272; or by silence when it was her duty to speak, *Payne v. Flack,* 152 N. C., 600, 68 S. E., 16. And she may subject her land to judgment and execution sale by breach of her contract. *Everett v. Ballard,* 174 N. C., 16, 93 S. E., 385; *Warren v. Dail,* 170 N. C., 406, 87 S. E., 126; *Lipinsky v. Revell, supra; Thrash v. Ould,* 172 N. C., 729, 90 S. E., 915; *Miles v. Walker,* 179 N. C., 479, 102 S. E., 884.

But her right to convey and the formalities required are only secondary although important considerations as bearing upon her complete emancipation. The all-important, decisive fact is that she may sue as a *feme sole.* Coverture as a disability is not recognized. *Carter v. Reaves,* 167 N. C., 131, 83 S. E., 248. The husband is no longer a necessary party. *Lipinsky v. Revell, supra; Earnhardt v. Clement,* 137 N. C., 91, 49 S. E., 49; *Kirkpatrick v. Crutchfield,* 178 N. C., 348, 100 S. E., 602.

The Martin Act carries with it the privilege and liability of suing and being sued alone. *Croom v. Lumber Co., supra,* and cases cited. This right to sue is a personal privilege. *Lippard v. Troutman,* 72 N. C., 551.

When she seeks to avail herself thereof, she comes into court subject to all the limitations imposed upon other litigants. She sues as a *feme sole.* Her standing in court is to be determined by the same standards required of others, and she should be held to the observance of that good faith in her dealings with the world to which others are bound.

On the showing made by the defendants, the *feme* plaintiff placed them in possession of the *locus in quo* and induced them to part with their money by falsely representing that she was unmarried. For eighteen months she was apparently content. But now, since all past-due taxes and installments on the loan have been paid, the debt has been reduced and placed in good standing, the property has been repaired, and eco-

nomic conditions have improved, she seeks to recover possession of the land. As a litigant she should not be heard to deny the truth of the assertion she then made. Nor should the court come to her assistance by ejecting defendants.

Applying the doctrine, as I think it should be here, the Court does not pass upon and decide the strict legal rights of the parties. It does not decide that the deed is void or that the defendants' possession is lawful or unlawful. On the contrary, the protection given by way of defense theoretically assumes that the title of the purchaser is really defective as against that of his adversary. The Court simply ignores the question of validity, declines to examine into the intrinsic legal merits of the two claims, and bases its action upon entirely different considerations. It simply refuses to come to the aid of the one who seeks to profit by his own inequitable conduct.

It is said, however, in the majority opinion: "It seems incontestable that unless the *feme* plaintiff is estopped by her deed, which is not pleaded, she is not entitled to recover." This is the theory upon which the opinion is bottomed. But as I view it such is not the case. Defendants do not rely on estoppel by deed. Estoppel *in pais* is quite a different principle and has an entirely different application.

Some of the decisions cited, such as *Brinegar v. Chaffin*, 14 N. C., 108, were decided long before vital changes were made in the law. All relate to estoppel by deed or contract. In each the validity of the contract was directly in issue. None are directed to the law of estoppel *in pais* and are, in my opinion, beside the point.

Scott v. Battle, 85 N. C., 184, is decidedly different in factual situation. No wrongdoing was alleged. Defendant merely asserted that he bought without knowledge of the marital status of his grantor and prayed a lien for purchase price and improvements.

In *Williams v. Walker*, 111 N. C., 604, plaintiff sought to enforce a contract liability and attempted unsuccessfully to prove that the *feme* defendant was a "free trader." While the law of estoppel is there discussed, it should be noted that the Court said: "These principles (that the deed of a married woman cannot be made good by estoppel) announced by these high authorities are not in conflict with that other principal so tersely stated by *Chief Justice Smith* in *Walker v. Brooks*, 99 N. C., 207: 'It (coverture) affords no shelter or protection for fraud'; and by *Chief Justice Merrimon* in *Burns v. McGregor*, 90 N. C., 222: 'The Constitution and the statute wisely extend large and careful protection and safeguards to married women in respect to their rights and property, but it is no part of our purpose to permit, much less help, one of them to perpetrate a fraud, if by possibility, under some sinister

influence, she should attempt to do so. It would be a reproach upon the law if such a thing could happen.' "

In *Farthing v. Shields,* 106 N. C., 289, the Court was careful to note the difference between the liability of the wife's separate estate for undertakings in the nature of contracts and where she has obtained an undue advantage by fraud.

Without undertaking to analyze each of the other cases cited, it is sufficient to say that an examination thereof will disclose like distinctions and a persistent purpose on the part of the Court to limit the decisions to estoppel by deed and to distinguish the law as stated from cases of fraud. In none of them does it appear that the Court had any intention of altogether disavowing the applicability of the doctrine of estoppel *in pais* to married women. Hence, none of the authorities cited by the Court or by the plaintiff are in conflict with my position. Indeed, I concede that if the situation were reversed and defendants were seeking to enforce the contract a different result would follow.

The law as stated in *Williams v. Walker, supra,* when applied to the facts in that and similar cases, is sound. But the law draws its quality of soundness from the particular facts to which it is applied. It should not be taken out of its setting, transplanted, and so applied as to confer special privileges and immunities upon a married woman and authorize her to use the courts to reap the benefits of a fraudulent transaction. *Warren v. Dail,* 170 N. C., 406, 87 S. E., 126; *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10; *Ross v. Greyhound Corp.,* 223 N. C., 239.

On the facts in this case, that plaintiff signed the deed, "Mrs. Birdie S. Buford," has no significance. That was her name through her first marriage. She had been known by and done business in that name for years, when she was admittedly a *feme sole.* It could not serve to put defendants on notice of her second marriage to the same party.

It is true that no other State has an identical constitutional provision. The fact is that few of the States have made any effort by constitutional provision to free married women of their common law disabilities.

Arkansas, Mississippi, South Carolina, Alabama, and Utah have granted complete emancipation. In those States a *feme covert* may convey her separate estate as if unmarried.

The provisions in the other States may be summarized as follows:

The property of the wife shall be and remain her separate estate. California, Kansas, Georgia, Oregon, North Dakota, South Dakota, Nevada, Texas, and Florida.

The separate estate of a married woman shall not be liable for the debts of her husband. Maryland, West Virginia, Georgia, Oregon, Arkansas, North Dakota, South Dakota, and Florida.

Local or special laws are not to be passed relieving a *feme covert* of disability. Kentucky.

So, while our provision has no exact counterpart, the general limitations are not unlike. Indeed, it is in those states which have no constitutional provision freeing married women of their common law disabilities, in whole or in part, that the doctrine of estoppel *in pais* has been most often applied.

The divergence of opinion comes to this: The majority say that estoppel by deed is the only defense and that this doctrine cannot be applied as against a void deed of a *feme covert.* I freely concede that a married woman is not estopped by a deed which is void at law, but contend that this doctrine is not relevant to the facts in this case. Estoppel *in pais,* pleaded by defendants, is the controlling principle of equity which should be applied and, if applied, it shuts the doors of the court against the plaintiff as a litigant without regard to her marital status.

Hence, my view of the law, as well as the dictates of my own conscience, compels me to vote to reverse.

DEVIN and SEAWELL, JJ., concur in dissent.

W. DANIEL BOONE v. C. D. MATHENY, TRADING AS SERVICE CHEVROLET COMPANY.

(Filed 19 April, 1944.)

1. Master and Servant § 21a: Principal and Agent § 7—

In an action to recover for personal injuries to plaintiff, a passenger in defendant's wrecking car, from alleged negligence of defendant's driver, where plaintiff's evidence tended to show that defendant's foreman, on application of plaintiff, directed an employee of defendant to take defendant's wrecker and go to plaintiff's damaged car and repair it, plaintiff being invited, in the presence of the foreman, to ride with such employee, and they went to the damaged car, which could not be repaired where it was, and was taken in tow by the wrecker and on the way to defendant's garage the wrecker and its tow ran off the road, overturned and injured plaintiff, motion for judgment of nonsuit, for want of evidence of authority in driver to carry plaintiff as a passenger, was properly overruled.

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

Where plaintiff, a passenger in defendant's motor vehicle, brings an action to recover damages for personal injuries received from the alleged negligence of defendant's driver, when the car in which they were driving at about 35 to 40 miles per hour, on a paved highway, in fair weather,

about seven-thirty a.m., suddenly left the road, ran down an embankment and turned over, causing the plaintiff injuries, motion for judgment as of nonsuit, for lack of evidence of negligence, properly refused.

3. Negligence § 19a—

When a thing which causes an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care.

APPEAL by defendant from *Stevens, J.,* at January Term, 1944, of WAKE.

Bailey, Holding, Lassiter & Wyatt and Douglass & Douglass for plaintiff, appellee.
Smith, Leach & Anderson for defendant, appellant.

SEAWELL, J. The plaintiff sued to recover damages for injuries sustained in the overturning of defendant's wrecking car in which he was a passenger while the car was being driven by defendant's employee. The injuries were alleged to have been caused by the negligence of the driver. Upon the trial defendant suffered an adverse verdict upon the issues and appealed from the judgment entered thereupon. Pertinent evidence on the points considered is summarized in this opinion.

The appeal, *inter alia,* presented for error the refusal of the trial judge to render judgment as of nonsuit, upon a demurrer to the evidence. G. S., 1-183. Counsel rests the validity of the motion to nonsuit upon (a) a want of evidence showing authority of the driver of the truck, or wrecker, of the defendant to carry plaintiff as a passenger thereon; and (b) the lack of evidence to show that the driver was negligent in the operation of the vehicle which left the highway, ran down an embankment, and overturned, with consequent injury to plaintiff.

1. The evidence discloses that plaintiff, leaving his car about 10 miles from Wake Forest with a flat tire and a damaged wheel, caught a ride into town, and went to defendant's garage and told the foreman about the need of repairs to his car. Thereupon, the foreman instructed a colored man, an employee of defendant, to take a wrecker and go out and make the needed repairs to plaintiff's car. After getting out the wrecker and servicing it with gas, the colored man, in the presence of the foreman, asked plaintiff if he was ready to go, and plaintiff told him he was. He got into the car, or wrecker, and went with the driver to the place where his car had been parked. Upon inspection of the car the colored man said it would have to be towed to the garage, as he was unable to make

the repairs there. The car was hoisted behind the wrecker, taken in tow, and the driver told plaintiff he would have to ride with him in the wrecker, which plaintiff did, down to the point where the vehicle left the highway and was overturned.

Without elaboration, which we think unnecessary, we conclude from these facts and circumstances that the jury might infer, as it did, that the plaintiff became a passenger in the wrecker, and continued as such to the place of his injury, under authority derived from defendant.

2. The evidence as to the occurrence out of which the plaintiff sustained his injury is substantially this: The weather was fair, and the wrecker was being driven along a paved highway, with shoulders on each side. The highway was dry. It was about 7:30 in the morning. The wrecker was running 35 or 40 miles an hour. There was no obstruction of any sort on the highway. The plaintiff testified: "We were on our way back to Wake Forest and had gone about two miles when the Negro suddenly lost control of the wrecker, and it ran off the road on the right-hand side down a fill and turned over." The driver stated that the sun had got into his eyes and that he couldn't see how to drive. To this latter testimony there was objection and exception, but the evidence was introduced in practically the same form later without exception. The witness repeated that it was a fair day and that the sun had just come up at the time.

In support of the contention that there is an utter lack of evidence affording an inference of negligence on the part of defendant, counsel observes that such evidence could only be made to appear by resort to the doctrine of *res ipsa loquitur,* and that the doctrine is inapplicable here, because, when an attempt is made to apply it, the facts do not speak unequivocally of defendant's negligence. Citing *Tartara v. State,* 269 N. Y., 167, 199 N. E., 44, appellant suggests that there is no definitely assignable reason why defendant's wrecker left the road—that it was just as probable that it occurred from a failure of the steering gear as a want of prudent operation; and that the balance of probabilities does not afford such a margin in favor of the theory of negligence as to justify that inference. Counsel supports this view by citations and quotations from *Galbraith v. Busch,* 264 N. Y., 230, 196 N. E., 36, in which the same principle is asserted—namely, that the swerving of the car otherwise unexplained, is as likely to have occurred from a break in the mechanism as from negligent operation; and the opinion adds that since there is no evidence of knowledge on the part of the defendant of any defect in his car, he was under no duty to the injured person with respect thereto.

We question whether the conclusion reached in this comparison of the probabilities of mishap arising from mechanical defects of the car on the one hand, and from the fault of the driver who operates it on the

other, is justified by the common experience of the present day. Vast improvements have been made in automotive machinery since the days of the gasoline buggy with regard to reliability and uniformity of performance. Meantime, the factors of human conduct have remained substantially the same. To the driver who follows the thread of the road even at a moderate speed, situations and events develop in rapid succession, varying in significance, color and configuration. They come almost as varicolored beads on a string, which must be separately counted and appraised as they slip through the fingers. The machine performs without thinking, according to the degree of efficiency built into it by engineering skill and practice. Under the rule of due care, the factor of intelligence involved in observation, outlook and volitional control has put the driver under obligation to many situations in which uniformity of behavior might be less expected. At any rate, the Court has not adopted the view suggested in the cited cases.

We are constrained to rest decision on the rule as explained and applied in *Etheridge v. Etheridge,* 222 N. C., 619, where, with reference to a comparable situation, *Mr. Justice Barnhill,* speaking for the Court, says:

"Hence, this rule has been formulated and generally followed: When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care. 9 (Part 2) Blashfield, sec. 6034, p. 306; Sherman & Redfield, Negligence (4d) sec. 59; Jaggard, Torts, 938; *Roberts v. Economy Cabs,* 2 N. E. (2d), 128; *Smith v. Kirby,* 178 Atl., 739; *Morrow v. Hume,* 3 N. E. (2d), 39; *Zwich v. Zwich,* 163 N. E., 917; *Howard v. Texas Co.,* 205 N. C., 20, 169 S. E., 832; Anno. 64 A. L. R., 255; *Feldman v. Chicago Railways Co.,* 6 A. L. R., 1291."

This Court has in many instances declined to apply this rule where the facts and evidence were uncertain in their inference or where the cause, or probable cause, of the mishap was known and was not inconsistent with due care. *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251; *Womble v. Grocery Co.,* 135 N. C., 474, 47 S. E., 493; *Fitzgerald v. R. R.,* 141 N. C., 530, 54 S. E., 391; *Dail v. Taylor,* 151 N. C., 284, 66 S. E., 135. In considering the propriety of this mode of proof, the Court has usually made the reasonableness of the inference to be drawn from the facts of the particular case the test of availability. Where there is such a reasonable inference of negligence, it may not be defeated by mere speculative possibility that there may have been another cause.

Moreover, the plaintiff does not depend upon the application of the doctrine of *res ipsa loquitur* to support his case, but on such inferences only as may be reasonably drawn from the facts in evidence. The explanation given by the driver of his difficulty in keeping the road is inconsistent with the theory of fault in the steering apparatus, since he says the car left the road, ran down the embankment, and turned over because he was unable to see on account of the rising sun. This gives rise to the inference that he failed in his duty to stop when visibility was too much impaired for safe driving.

We have carefully examined all the exceptions in the record and do not find in them cause for disturbing the verdict.

In the trial we find

No error.

W. J. KILLOUGH v. FRANK WILLIAMS AND BERNICE LOCKAMY.

(Filed 19 April, 1944.)

Negligence § 19a—

In an action to recover damages for injuries to plaintiff caused by alleged negligence of defendant, where plaintiff's evidence tended to show that he was driving his automobile just after dark, on a paved highway, following about forty feet in the rear of defendants' truck, at about 35 miles per hour, when defendant pulled to the right, off the shoulder of the road, apparently as if to stop, then suddenly, without signal or warning, drove the truck to the left across the road immediately in front of plaintiff's car, leaving neither time nor space to avoid the collision from which the damage resulted, motion for judgment as of nonsuit was erroneously granted, as contributory negligence on the part of plaintiff does not conclusively appear from his evidence.

APPEAL by plaintiff from *Stevens, J.*, at February Term, 1944, of WAKE. Reversed.

Action for damages for personal injury alleged to have been caused by the negligence of the defendants in the operation of a motor truck. At the conclusion of the plaintiff's evidence motion for judgment of nonsuit was allowed, and plaintiff appealed.

Thomas W. Ruffin for plaintiff, appellant.
Smith, Leach & Anderson and P. D. Herring for defendants, appellees.

DEVIN, J. The plaintiff's appeal brings up for review the ruling of the trial court that the evidence offered was insufficient to warrant submission of the case to the jury. In order to determine the correctness of this ruling the evidence must be considered in the light most favorable for the plaintiff.

From the evidence introduced on the trial it was made to appear that on the occasion alleged, just after dark, plaintiff was driving his automobile on a paved highway following defendants' truck. Defendants' truck pulled to the right, off on the shoulder of the road, apparently as if about to stop, the plaintiff being about 40 feet to the rear and driving about 35 miles per hour. Then suddenly, without signal or warning, defendants' truck was driven to the left across the highway immediately in front of plaintiff's automobile, leaving him neither time nor space within which to avoid a collision. Plaintiff sustained substantial injury.

Obviously there was evidence of negligence on the part of defendants, but it is insisted by appellees that according to plaintiff's own testimony he was guilty of contributory negligence in following too closely in the rear of the truck. G. S., 20-152; *Allen v. Bottling Co.,* 223 N. C., 118. However, we do not think contributory negligence on the part of the plaintiff conclusively appears from his evidence. Hence he was entitled to have his case submitted to the jury. *Hampton v. Hawkins,* 219 N. C., 205, 13 S. E. (2d), 227; *Smith v. Coach Co.,* 214 N. C., 314, 199 S. E., 90; *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637; *Hayes v. Tel. Co.,* 211 N. C., 192, 189 S. E., 499; *Murphy v. Coach Co.,* 200 N. C., 92, 156 S. E., 550.

The judgment of nonsuit was improvidently entered and must be

Reversed.

ROBERT HOLLAND ET AL. v. PROCTOR A. SMITH ET AL.

(Filed 3 May, 1944.)

1. Wills § 31—

The end to be sought 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 at variance with some rule of law or contrary to public policy.

2. Same—

In ascertaining the meaning of particular parts, the intention of the testator is to be gathered from the whole. Apparent inconsistencies are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose. No words ought to be rejected if any meaning can possibly be put upon them.

3. Wills § 32—

A presumption exists that a testator intends to dispose of his entire estate and not to die intestate as to any part of his property.

4. Wills §§ 33a, 33f—

Where lands are devised to one generally, and to be at his disposal, this is a fee in the grantee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee.

5. Wills §§ 33a, 33b—

Where by will one takes a life estate in remainder, with limitation to her bodily heirs, if any, and, if none, then over, this excludes the rule in *Shelley's case*, and the devise terminates upon the death of the devisee without bodily heirs.

6. Wills § 33c—

A devise of lands to testator's wife for her life to do with as she pleases and at her death to H. for life and then to H.'s bodily heirs, if any, and, if none, then to testator's kin, where testator's wife dies without disposing of the property, and H. dies without issue, the entire estate goes by the will in fee to the heirs of the testator.

BARNHILL, J., dissenting.

SEAWELL, J., concurring in dissenting opinion.

APPEAL by plaintiffs from *Stevens, J.*, at February Term, 1944, of WAKE.

Civil action in ejectment.

After the pleadings had been filed, the parties agreed upon the facts and submitted the matter to the court for final determination and adjudication.

J. R. Blinson died in 1890 seized of a tract of land in Wake County, the subject of the present controversy. He left a will. The contest is among the heirs and next of kin of those named as devisees and the defendants in possession under a deed from the heirs of the testator.

From a judgment upholding the claim of the defendants in possession, the plaintiffs appeal, assigning errors.

Wellons, Martin & Wellons and Royall, Gosney & Smith for plaintiffs, appellants.

No counsel for interveners.

Albert Doub and Bailey, Holding, Lassiter & Wyatt for defendants, Proctor A. Smith and wife, appellees.

STACY, C. J. On the hearing the case was made to depend on the operation of the following clause in the will of J. R. Blinson, late of Wake County, this State:

"I give to my wife all the Property that I own her life time land and all to do as she pleases with and at her death the land is to go to Sallie

A. Hocutt for her life time and then to her bodily heirs if any and if none back to my Kin and My wife Kin all except the land. My wife can do as she pleases with it."

Sarah L. Blinson, wife of the testator, died intestate in 1912 without having disposed of the land. The plaintiffs are her heirs and next of kin.

Sallie A. Hocutt, the first remainderman named in the will, died in 1941 without children or the issue of children. The interveners are her heirs and next of kin.

The defendants, Proctor A. Smith and wife, are in possession of the land under a deed from the heirs and next of kin of the testator.

The plaintiffs make two contentions: First, that the land was devised to Sarah L. Blinson, wife of the testator, in fee, and, secondly, that at least an undivided one-half interest in the land passed to the wife's next of kin under the ulterior limitation.

The interveners claim as heirs and next of kin of Sallie A. Hocutt.

The trial court was of opinion that the "will failed to dispose of the real estate . . . beyond the date of the death of . . . Sallie A. Hocutt," upon her dying without bodily heirs, which is found as a fact, and judgment was thereupon entered that "the said real estate reverted to the heirs at law of the said J. R. Blinson," making good the deed from the heirs of the testator to the defendants.

It is apparent from a reading of the above testamentary clause that some of the materials of construction will be needed in this case.

The appropriate ones would seem to be:

1. The end to be sought 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 at variance with some rule of law or contrary to public policy. *Williams v. Rand,* 223 N. C., 734; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356.

2. In ascertaining the meaning of particular parts, the intention of the testator is to be gathered from the will as a whole. Apparent inconsistencies are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose of the will. 28 R. C. L., 217. "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.

3. A presumption exists that a testator intends to dispose of his entire estate and not to die intestate as to any part of his property. *Gordon v. Ehringhaus,* 190 N. C., 147, 129 S. E., 187; *Powell v. Wood,* 149 N. C., 235, 62 S. E., 1071; 28 R. C. L., 227. Testacy presupposes no intestacy. *Reeves v. Reeves,* 16 N. C., 386.

Applying these principles to the subject case, it seems clear the first contention of the plaintiffs that the devise to the testator's wife is in fee cannot be sustained. *Parks v. Robinson,* 138 N. C., 269, 50 S. E., 649. At most, it is a life estate with power of disposal. *Smith v. Mears,* 218 N. C., 193, 10 S. E. (2d), 659.

Speaking to the question in *Chewning v. Mason,* 158 N. C., 578, 74 S. E., 357, *Walker, J.,* delivering the opinion of the Court, concluded: "We may, therefore, take the rule to be settled that where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee."

The second contention of the plaintiffs is more difficult. But first a word in respect of the intervening claim of the heirs and next of kin of Sallie A. Hocutt. She took a life estate in remainder with limitation to her bodily heirs, if any, and if none, then over. *Murdock v. Deal,* 208 N. C., 754, 182 S. E., 466. This excludes the application of the rule in *Shelley's case, Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15, and as Sallie A. Hocutt died without bodily heirs the devise to her terminated at her death.

The question then arises, Who takes under the ulterior limitation?

It will be observed that the testator first gives to his wife her lifetime all of his property "land and all," and at her death "the land" is to go to Sallie A. Hocutt her lifetime and finally upon the happening of an uncertain event it goes "back" to the testator's kin and his wife's kin "all except the land," but his wife can do as she pleases with it. In other words, the testator wanted his wife to do as she pleased with all of his property, and he was desirous that his wife's kin should contingently share in all "except the land." This seems manifest from the repeated expression that the testator's wife can do as she pleases with "it," the land. *Trust Co. v. Lindsay,* 210 N. C., 652, 188 S. E., 94. Then, too, the word "back" may connote to its former family ownership.

The foregoing harmonization of the different clauses avoids any intestacy and gives effect to all parts of the will in accordance with the general rules of construction. "The object of all interpretation is to arrive at the intent and purpose expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose unless at variance with some rule of law or contrary to public policy." *Krites v. Plott,* 222 N. C., 679, loc. cit. 683, 24 S. E. (2d), 531. On the other hand, to say the entire ulterior limitation has no application to the land would be to pose the question whether Sallie A. Hocutt takes a fee under the rule in *Shelley's case, Glover v. Glover, ante,* 152; *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60, as against a reversion to the

heirs of the testator. *Baugham v. Trust Co.,* 181 N. C., 406, 107 S. E., 431.

Of course, much could be written in probing the mind of the testator, but it all comes at last to divining his intent from the language of the will. In this case it may be "no more than guesswork," *Clement v. Whisnant,* 208 N. C., 167, 179 S. E., 430, as the clause in question is very cloudily expressed, nevertheless by applying the rules of construction the intent is thus legally ascertained; whereas, if ignored, the Court might become the creator, rather than the discoverer, of the intent. After all, wills are made by testators. *Thomas v. Houston,* 181 N. C., 91, 106 S. E., 466. "If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient; and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it"—*Merrimon, J.,* in *McDaniel v. King,* 90 N. C., 597.

Since our conclusion has the same effect as the judgment below—the same persons taking the same estate whether by remainder or reversion, *Baugham v. Trust Co., supra*—the result will not be disturbed.

Affirmed.

BARNHILL, J., dissenting: In my opinion the testator expressed the intent that his wife should take all his property and that she might "do as she pleases" with all of it except the land. The land was to go to her for life, and then to Sallie A. Hocutt for life, with remainder to her bodily heirs, if any, and if none then to his kin and his wife's kin. If so, the will in effect reads:

"I give to my wife all the property that I own her lifetime, land and all, to do as she pleases with all of it except the land. At her death the land is to go to Sallie A. Hocutt for her lifetime and then to her bodily heirs, if any, and if none back to my kin and my wife's kin. As to all my estate except the land my wife can do as she pleases with it."

Under the construction of the majority opinion the gift of the land after the first life estate is meaningless. "At her death the land is to go to Sallie A. Hocutt for her lifetime and then to her bodily heirs if any and if none back to my kin and my wife's kin all except the land." The testator was here dealing only with the land. Thus, if the majority conclusion is correct he gave and he took away in the same breath.

Accepted rules of construction require us, if possible, to so construe the language used as to give effect to each and every part thereof. But the majority thus negates one of the most important provisions of the will.

It is to be noted that there was no gift over of the personal property. This evidences an intent that his wife should have the right to "do as she pleases" with it. On the other hand, there was a specific limitation over of the land, carefully guarding against any lapse for failure of a taker. This to my mind confirms the view that the wife was not to "do as she pleases" with the land.

The testator and his wife had no children. There was an adopted daughter, Sallie A. Hocutt. No doubt, as is so often the case, he and his wife had accumulated what estate he possessed. Hence, if the gift to the adopted daughter failed he wanted his kin and his wife's kin to share equally in the land, the fruits of their joint efforts.

It follows that I am of the opinion that the plaintiffs are cotenants and that the judgment below should be reversed.

SEAWELL, J., concurring in dissent: In the case at bar, I think we may indulge the presumption against intestacy without feeling we have resorted to a merely mechanical device. In that event, I think we ought not to permit the expressions in the will—jumbled as they are—to cancel out the testate intent if it can be reasonably discerned. As as alternative to that result, I believe the view taken by *Mr. Justice Barnhill* is the more reasonable interpretation of what the testator wanted to do with his property.

He may not have been as consistent as he was insistent, but I get the impression that he wanted the land to go to his own and his wife's kin, and so vote.

CITY OF SALISBURY v. K. C. AREY, TRUSTEE OF THE ESTATE OF D. L. AREY; CLARENCE H. SUMMERS AND WIFE, PHEBE AREY SUMMERS; W. B. AREY AND WIFE, HELEN R. AREY; HARRY L. AREY AND WIFE, GRACE K. AREY; HAROLD A. ISENHOWER AND WIFE, MILDRED N. ISENHOWER; ALBERTA I. FISHER AND HUSBAND, REUBEN L. FISHER; HAROLD A. ISENHOWER, ADMINISTRATOR OF THE ESTATE OF B. N. ISENHOWER; HAROLD A. ISENHOWER, ADMINISTRATOR OF THE ESTATE OF LOTTIE AREY ISENHOWER; K. C. AREY AND WIFE, SUSIE H. AREY; JAMES BUSTARD AND L. C. HORNE, ADMINISTRATORS C. T. A. OF THE ESTATE OF E. C. AREY.

(Filed 3 May, 1944.)

1. Municipal Corporations § 34—

The provisions of G. S., 160-92, giving the property owner thirty days in which to pay assessments for local improvements, in cash without interest, or the election to pay the same in installments, are for the benefit of the property owner and, when exercised, become mandatory upon the

municipality; but, when the property owner remains silent and neither pays in cash nor elects to pay in installments, the option passes to the municipality to foreclose or to collect in installments.

2. Same—

No authority, by way of resolution or ordinance of the governing body of a municipality, is required to divide an assessment for local improvements into installments in accordance with the terms of the original resolution.

3. Same—

A resolution of the governing body of a municipality, providing for an extension of the payments of an assessment for local improvement in installments, which is contrary to the statute, G. S., 160-94, is defective but not void, and may be amended by a subsequent resolution to conform to the statutory requirements.

4. Municipal Corporations § 7—

The power to enact ordinances and resolutions necessarily implies power in the same body to amend them.

5. Municipal Corporations § 34—

The lien of a municipality, for an assessment for public improvements, is not invalidated by an extension resolution providing a new series of installment payments, where the sums of the new installments in the aggregate exceed the amount actually due at the time of the extension. Differences may be adjusted under G. S., 160-90.

6. Limitation of Actions §§ 2a, 3—

Where a new series of installment payments of an assessment for local improvements is provided under G. S., 160-94, the ten-year statute of limitations begins to run on each new installment as it becomes due.

WINBORNE, J., concurring.

BARNHILL, J., joins in concurring opinion.

APPEAL by defendants from *Armstrong, J.,* at February Term, 1944, of ROWAN.

The pertinent parts of the agreed statement of facts, submitted to the court below for the determination of the questions involved in this action, are as follows:

"I. That the plaintiff is a municipal corporation, duly chartered, organized and existing under the laws of the State of North Carolina.

"II. That, pursuant to Section 6, Chapter 56, Public Laws of 1915, now C. S., 2708, the governing body of plaintiff, on May 5, 1925, passed an original resolution providing for certain street paving improvements and the manner of payment of the assessment hereinafter set forth, and said resolution included the following:

" 'That the owners of the abutting property affected hereby shall pay the amount assessed against their property in cash upon completion of

the work and confirmation of the assessment roll, as provided in said article, or in ten equal annual installments bearing interest at the rate of 6% per annum from the date of the confirmation of the assessment roll.'

"III. That pursuant to said resolution, the plaintiff duly and lawfully levied a street paving assessment against the real estate described in paragraph 3 of the complaint, which was then and is now owned by the defendants; that said assessment was in the principal sum of $952.02, was confirmed on the 6th day of April, 1926, after due advertisement and notice of the confirmation hearing thereon, no objection was filed to said assessment and no appeal taken therefrom.

"IV. That the defendants filed no objection to the aforesaid assessment, but did not consent thereto, and did not elect, in writing, to pay the same in installments as provided by law.

"V. That upon the failure of the defendants to elect, in writing, to pay the aforesaid assessments in installments, and upon the failure of the defendants to pay said assessments in cash within thirty days after a notice of said assessment was published in accordance with C. S., 2717, the governing board of the plaintiff took no further action on said assessment, by way of resolution or ordinance, but the official or agent of plaintiff fixed with the duty of accounting for and collecting the same entered said assessment upon the assessment ledger of plaintiff as payable in ten equal annual installments, with interest at 6% per annum from date of confirmation, April 6, 1926, the first of such installments, in the amount of $95.20, to become due the first Monday in October, 1926.

. . . .

"VIII. That on May 31, 1935, pursuant to the authority of Chapter 126 of the Public Laws of 1935, now C. S., 2717-b, the governing body of the City of Salisbury adopted the resolution shown by Exhibit 'A' attached to the complaint, and on September 13, 1935, amended said resolution as shown by said exhibit.

"IX. That as of October 1, 1935, the aforesaid principal sum of $952.02, was unpaid, with interest amounting to $541.85, a total of $1,493.97, but pursuant to the aforesaid resolution of May 31, 1935, as amended on September 13, 1935, the official or agent of plaintiff having charge of said assessments, accounting therefor and collecting the same, caused said assessment to be charged against the defendants, and entered in the assessment ledger, in a new principal amount of $1,736.96, payable in ten equal annual installments of $173.70, the first of which was due on October 1, 1936, which was admittedly erroneous as to the amounts actually due.

"X. That the defendants made no objection to the aforesaid resolution or entries, but gave no consent thereto."

PLAINTIFF'S EXHIBIT "A".

"Resolution of the City Council of the City of Salisbury Relating to Extension of Time for Payment of Special Assessments and Adopted on May 31, 1935.

"BE IT RESOLVED by the City Council of the City of Salisbury, North Carolina, that all installments of Special Assessments heretofore levied by the City of Salisbury for local improvements, whether due or not due, together with all accrued interest thereon, be and they are hereby rearranged into a new series of ten equal installments the first of which extended installments shall be due and payable on the first Monday in October of the year 1935, and each of the remaining installments shall become due and payable serially on the first Monday in October in each year thereafter, so that the last of such extended installments shall be due and payable on the first Monday in October in the year 1944.

"BE IT FURTHER RESOLVED, that any installment or installments, together with accrued interest and costs, extending in accordance with the provisions of this resolution shall bear interest at the rate of 6% per annum from October 1, 1935.

"PROVIDED, that nothing in this resolution shall prevent the payment of any installment or installments or interest at any time."

"Resolution of the City Council of the City of Salisbury Amending the Foregoing Resolution and Adopted on the 13th Day of September, 1935.

"BE IT RESOLVED by the City Council of the City of Salisbury, that the resolution entitled 'A Resolution Providing for the Extension of the Special Assessments,' heretofore adopted by the City Council on May 31, 1935, be and the same is hereby amended by striking out the date '1935' appearing at the end of the seventh line and inserting the date '1936' in lieu thereof.

"BE IT FURTHER RESOLVED that the aforementioned resolution be further amended by striking out the date '1944,' appearing at the end of the first paragraph therein and inserting in lieu thereof the date '1945.' "

Judgment was entered to the effect that upon the failure of the defendants to pay said assessment in cash within thirty days after notice of said assessment was published in accordance with C. S., 2717, G. S., 160-92, the governing body of the city of Salisbury had the legal right and power to make said assessment payable in ten equal annual installments with interest at the rate of 6% per annum from the date of confirma-

tion, to wit, 6 April, 1926, and the said assessment having been made so payable by the municipality and having been extended by the plaintiff in accordance with the law, the plaintiff's cause of action is not barred by the ten-year statute of limitations, and that there is owing and due on the assessment levied by the plaintiff against the property of the defendants, described in the complaint, the sum of One Thousand Four Hundred Ninety-Three and 97/100 Dollars, with interest thereon at the rate of 6% per annum from 1 October, 1935, until paid. The aforesaid amount is adjudged a lien on the specific property against which the said assessment was levied. A commissioner was appointed and directed to sell the lands described in the complaint, for the satisfaction of the judgment and the costs were taxed against the defendants.

From said judgment, the defendants appeal to the Supreme Court, assigning error.

Linn & Linn and J. W. Ellis for plaintiff.
Walter H. Woodson, Jr., and Walter H. Woodson for defendants.

DENNY, J. We think the questions raised on this record for our consideration and determination may be stated as follows:

1. Where a municipality confirms a street assessment for local improvements, in accordance with the provisions of Chapter 56, Public Laws of 1915, and the property owner fails to pay the assessment in cash within the thirty-day period prescribed by G. S., 160-92 (C. S., 2717), and does not request the privilege of paying in installments, as provided therein, may the municipality, without further action, divide the assessment into installments, in accordance with the terms of the original resolution authorizing the improvements?

2. Are the resolutions of the city council of the city of Salisbury, as set forth in the agreed statement of facts herein, sufficient to extend the unpaid assessment or the installments thereof, into a new series of ten equal installments, as authorized by ch. 126, Public Laws of 1935 (now as amended G. S., 160-94; C. S., 2717 [b])?

3. Does the entry of the new series of installments, authorized by an extension resolution, which in the aggregate exceed the amount actually due, vitiate the lien of the city and relieve the property owner from the payment of the correct amount?

4. Is the original assessment barred by the ten-year statute of limitations?

On the first question the appellants contend that in the absence of a written request from the property owner to be permitted to pay the assessment in installments, the city had no authority to divide the assessment into installments, but was limited to a foreclosure proceedings for

the collection of the entire amount, which proceedings could have been instituted at any time within ten years after the expiration of thirty days from the confirmation of the assessment roll on 6 April, 1926, and rely upon the following authorities: *Lexington v. Crosthwait,* 25 Ky. L. R., 1898, 78 S. W., 1130; *Lexington v. Woolfolk,* 138 Ky., 392, 128 S. W., 104; *Hubbell v. Hammil,* 187 Iowa, 1083, 175 N. W., 41; *Schaefer v. Hines,* 56 Ind., A. 17, 102 N. E., 838; *Cleveland v. Spartanburg,* 185 S. C., 373, 194 S. E., 128; and *Blake v. Spartanburg,* 185 S. C., 398, 194 S. E., 124; 114 A. L. R., 395. An examination, however, of these authorities discloses that in each case an agreement between the city and the landowner was required, either by statute or by the ordinance authorizing the local improvements, before the city could divide the assessment into installments. There is no such requirement in our statute or in the preliminary resolution authorizing the local improvements for which the original assessment involved herein was levied. The statute requires the preliminary resolution to designate "the terms and manner of the payment." G. S., 160-83; C. S., 2708; and the resolution provided: "That the owners of the abutting property affected hereby shall pay the amount assessed against their property in cash upon completion of the work and confirmation of the assessment roll, as provided in said article (sec. 6, ch. 56, Public Laws of 1915, G. S., 160-83; C. S., 2708), or in ten equal annual installments bearing interest at the rate of 6% per annum from the date of the confirmation of the assessment roll."

The pertinent part of G. S., 160-91; C. S., 2716, is as follows: "The property owner or railroad or street railway company hereinafter mentioned shall have the option and privilege of paying for the improvements hereinbefore provided for in cash, or if they should so elect and give notice of the fact in writing to the municipality within thirty days after the notice mentioned in next succeeding section, they shall have the option and privilege of paying the assessments in not less than five nor more than ten equal annual installments as may have been determined by the governing body in the original resolution authorizing such improvement. . . . The whole assessment may be paid at the time of paying any installment by payment of the principal and all interest accrued to that date."

We think the foregoing provisions in the above statute were enacted for the benefit of the property owner, giving the owner a period of thirty days from the date notice is given as required by G. S., 190-92; C. S., 2717, in which to pay the assessment in cash, without interest; or, if he should so elect and give notice in writing to the municipality within said period of thirty days, that he desires to pay his assessment in installments, then it becomes mandatory upon the city to permit such

property owner to pay his assessment in installments. But, where the property owner remains silent and neither pays in cash within the thirty-day period nor signifies in writing his election to pay in installments, the option passes to the municipality to proceed to foreclose and collect the entire assessment or to collect the assessment in installments, as provided in the original resolution authorizing the improvements.

Upon the facts presented on this record, the governing body of the city of Salisbury had the same right to waive the failure of the property owner to pay the assessment in cash and to collect the assessment in installments in accordance with the terms and provisions of the resolution authorizing the improvements, that it has to waive the acceleration provision contained in the same statute in cases of default, which provision is as follows: ". . . In case of the failure or neglect of the property owner . . . to pay any installment when the same shall become due and payable, then and in that event all of the installments remaining unpaid shall at once become due and payable and such property . . . 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." G. S., 160-91; C. S., 2716. Our Court has held that the above acceleration provision was enacted for the benefit of the municipality and may be waived without starting the running of the statute of limitations as to unmatured installments. *Farmville v. Paylor,* 208 N. C., 106, 179 S. E., 459, which decision is in accord with the following decisions from other jurisdictions: *Town of Cheraw v. Turnage,* 184 S. C., 76, 191 S. E., 831; *Mayor and Aldermen of the Town of Morristown v. Davis,* 172 Tenn., 159, 110 S. W. (2d), 337; 113 A. L. R., 1164; *City of Jackson v. Willett,* 178 Tenn., 605, 162 S. W. (2d), 367; *Barber Asphalt Paving Co. v. Meservey,* 103 Mo. App., 186, 77 S. W., 137; *Voorhees v. North Wildwood,* 75 N. J. L., 463, 68 A., 175; *Middleboro v. Terrell,* 259 Ky., 47, 81 S. W. (2d), 865.

In the case of *Jackson v. Willett, supra,* the Supreme Court of Tennessee was considering the identical question we have under consideration, except the city of Jackson was under no obligation to grant the property owner the privilege of paying on the installment plan unless and until the property owner agreed in writing not to contest the debt. The Court held that: "The municipality had the right by virtue of this provision to refuse to grant to the taxpayer the 'privilege' of the installment plan of payment, unless and until the written agreement not to contest the debt had been entered into, and upon the failure or default of the taxpayer in this regard, the city had the right to demand and collect the payment in cash. But, just as with the acceleration clause, the provision was obviously for the benefit of the city, to be exercised or waived at its option. We can find no reason for applying the rule to

the provision for acceleration, which does not call for its application to the provision under consideration. The principle involved is the same. In both cases the taxpayer seeks to penalize the city for its indulgence; in the one case for its failure to mature the entire debt by enforcement of the statutory acceleration provision, and in the other for its failure to enforce payment of the entire debt in cash under the pertinent statutory provision." Likewise, in the case of *City of Norman v. Allen,* 47 Okla., 74, 147 Pac., 1002, it was held and approved in *City of Norman, et al., v. Van Camp, et al.,* 87 Okla., 182, 209 Pac., 925, that where the ordinance provides "that the property owners may, within thirty days from the passage thereof, have the privilege of paying all assessments without interest, and if such property owners do not avail themselves of such privilege, their assessments and installments thereof shall draw interest from the date of the passage of the assessing ordinance, and the interest on the whole or entire unpaid installments and assessments then be payable annually at the time the respective installments under the assessments are payable."

The appellants further contend that the governing body of Salisbury did not authorize by way of resolution or ordinance the entry or division of the assessment involved herein, into ten equal annual installments. No action by way of resolution or ordinance is required. After the governing body of a municipality levies an assessment, it then becomes the duty of the city clerk, unless some other party is designated, to prepare from the assessment roll and deliver to the tax collector a Special Assessment Book, containing information in detail as required by G. S., 160-100; C. S., 2722, including the amount that has been assessed and the amount of such installments and the date on which the installments shall become due.

The contention that the governing body of the city of Salisbury was without authority to divide the assessment involved herein into installments, as provided in the original resolution authorizing the improvements, upon the failure of the property owner to pay in cash within the thirty-day period, or to signify his election in writing within said period hereinbefore mentioned, to pay in installments, cannot be sustained.

The appellants attack the validity of the extension resolution and the amendment thereto, on the theory that the original resolution passed by the city council of the city of Salisbury, 31 May, 1935, was null and void, since the first installment of the new series of installments fell due in less than one year from the date of its passage, whereas the statute, chapter 126, Public Laws of 1935 (now, as amended, G. S., 160-94; C. S., 2717 [b]), provided that in arranging the new series of ten equal installments, one of said installments shall fall due on the first Monday in October after the expiration of one year after the adoption of the

extension resolution and one of said installments on the first Monday in October of each year thereafter. The city council, on 13 September, 1935, amended the original resolution to conform to the statutory requirement in respect to the dates on which the installments would fall due.

The appellants urge that statutory requirements as to the contents of a resolution or ordinance must be strictly complied with, citing 44 C. J., sec. 2401, p. 240. It will be noted, however, that it is also stated in the same section, that "When from the language used the intention of the council is manifest, and the requirements affecting substantial rights of the persons interested in the improvements are recognizable, the resolution is sufficient." Hence, we think the resolution was defective, but not void.

It seems to be the general rule that the power to enact ordinances or to adopt resolutions necessarily implies power in the same body to amend them. 43 C. J., sec. 882, p. 561. It is stated in section 883, of the last cited authority, that "Ordinances defective because imposing excessive penalties may be amended so as to change the invalid penalty to one which is valid." *State v. McDonald,* 121 Minn., 207, 141 N. W., 110; *Simpson v. Berkowitz,* 110 N. Y. S., 485. In the last case cited, the Supreme Court of New York said: "The power is inherent in every deliberative body to amend a resolution previously adopted by it." In the case of *Bacon v. City of Savannah,* 105 Ga., 62, 31 S. E., 127, the city passed an ordinance under legislative authority, but the ordinance was defective on account of an illegal apportionment of the assessment among the several abutting parcels of real estate, the Supreme Court of Georgia held it was competent for the city to amend its ordinance, after the completion of the work upon the street, so as to conform to the statute in its provisions touching a legal apportionment of the assessment.

We hold that the extension resolution, as set forth herein, as passed and amended by the city council of the city of Salisbury, was a valid exercise of the statutory authority to extend the payments for local improvements, and did extend all installments of special assessments levied by the city of Salisbury prior to 31 May, 1935, for local improvements, whether due or not due, together with accrued interest thereon into a new series of ten equal installments, the first of the extended installments to be due and payable on the first Monday in October, 1936, and the remaining installments to become due serially on the first Monday in October each year thereafter.

The appellants also challenge the validity of the lien of the plaintiff, on the ground that the new series of installments, entered on the records of the city, pursuant to the extension resolution and the amendment thereto, were for sums, which in the aggregate exceeded the amount

actually due at the time by the appellants. There is no merit in this challenge. The governing body of a municipality is given the power by statute to correct, cancel or remit any assessment for a local improvement, and may remit, cancel or adjust the interest or penalties on any such assessment. G. S., 160-90; C. S., 2715. See also *Vester v. Nashville,* 190 N. C., 265, 129 S. E., 593; *Gallimore v. Thomasvillė,* 191 N. C., 648, 132 S. E., 657.

We now come to the final question for determination. Is the original assessment barred by the ten-year statute of limitations? In view of the conclusion reached on the other questions presented, it necessarily follows that this question must be answered in the negative. The new series of installments date from the first Monday in October, 1935, and the first installment did not mature until the first Monday in October, 1936, and this action was instituted 26 October, 1943. *Charlotte v. Kavanaugh,* 221 N. C., 259, 20 S. E. (2d), 97; *City of Raleigh v. Mechanics & Farmers Bank,* 223 N. C., 286, 26 S. E. (2d), 573; *Raleigh v. Public School System,* 223 N. C., 316, 26 S. E. (2d), 591.

The judgment of the court below is

Affirmed.

WINBORNE, J., concurring: The answers to the first three questions stated in the Court's opinion, with which I agree, render the plea of statute of limitation of no avail regardless of the view held with respect to such statute. See *Raleigh v. Bank,* 223 N. C., 286, 26 S. E. (2d), 573, where the question was fully debated.

BARNHILL, J., joins in this opinion.

THURMAN ELLIS v. ELMER J. WELLONS.

(Filed 3 May, 1944.)

1. Process § 15—

Abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. The abuse may be of civil or criminal process. Its distinctive nature is its improper use after it has been issued, and not for maliciously causing it to issue.

2. Same—

There are two essential elements for an action for abuse of process, (1) the existence of an ulterior motive, and (2) an act in the use of the process not proper in the regular prosecution of the proceeding.

3. Process § 16—

In a civil action for damages, based on abuse of process, where plaintiff's evidence tended to show that defendant procured the issuance of a warrant against plaintiff for disposing of mortgaged property and offered not to have it served if plaintiff would pay the amount claimed by defendant, and that, after plaintiff's arrest under the warrant and imprisonment, defendant offered to procure his release if plaintiff would pay or work out the amount claimed, there is sufficient evidence of motive and intent to carry the case to the jury and motion for judgment as of nonsuit was properly denied.

4. Same—

While there is a definite distinction between an action for malicious prosecution and an action for abuse of process in that, among other things, in the former want of probable cause is a requisite and not in the latter, the evidence may be competent on both causes of action.

5. Trial § 29b—

An exception, simply to the general failure of the court to state the evidence in a plain and correct manner and explain the law arising thereon, is too general and cannot be sustained.

6. Trial § 32—

Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have an opportunity to correct the oversight.

STACY, C. J., dissenting.

WINBORNE and DENNY, JJ., concur in dissenting opinion.

APPEAL by both plaintiff and defendant from *Hamilton, Special Judge,* at November Term, 1943, of WAKE.

The complaint in this action alleges three causes of action, namely, (1) malicious prosecution, (2) false imprisonment, and (3) abuse of process. The jury answered the issues in the first cause of action alleged, namely, malicious prosecution in favor of the defendant. The court sustained a demurrer *ore tenus* to the second cause of action alleged, or attempted to be alleged, namely, false imprisonment. The jury answered the issues in the third cause of action alleged, namely, abuse of process in favor of the plaintiff.

From judgment in the action for abuse of process in favor of the plaintiff, predicated on the verdict, the defendant appealed, assigning errors. The plaintiff appealed from action of the court in sustaining the demurrer *ore tenus* to the cause of action for false imprisonment, and from the rulings by the court in the course of the trial of the action for malicious prosecution.

W. L. Spencer, James R. Pool, and Louis L. Levinson for plaintiff.
Parker & Lee for defendant.

SCHENCK, J. We will first discuss the defendant's appeal, since the conclusion we have reached thereon renders any extensive discussion of the plaintiff's appeal supererogatory.

The defendant seriously presses his assignments of error addressed to the refusal of the court to allow his motion in the alleged cause of action for abuse of process for a judgment as in case of nonsuit lodged when the plaintiff had introduced his evidence and rested his case and renewed after all the evidence on both sides was in. C. S., 567; G. S., 1-183.

"Abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured. A power conferred by legal process may not be abused or exercised with unreasonable indignity or oppressive hardship to another. The abuse may be of civil or criminal process." 1 Am. Jur., Abuse of Process, par. 2, p. 176. The distinctive nature of an action for abuse of process is the improper use of process after it has been issued, and not for maliciously causing it to issue. Where the process has been lawfully issued and has subsequently willfully been perverted so as to accomplish a result not commanded by it or lawfully obtainable under it the action for abuse of process lies. *Griffin v. Baker,* 192 N. C., 297, 134 S. E., 651, and cases there cited. There are two essential elements for an action for abuse of process, (1) the existence of an ulterior motive, and (2) an act in the use of the process not proper in the regular prosecution of the proceeding. *Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577. Measured by this standard, there was sufficient evidence in the case at bar to be submitted to the jury and to sustain the verdict rendered.

It was admitted that the defendant procured the arrest and prosecution of the plaintiff. The plaintiff testified that he did not owe the defendant any amount and that when he (plaintiff) refused to pay him (defendant) the amount claimed, the defendant procured the warrant from the clerk of the recorder's court charging the plaintiff with having disposed of a crop of tobacco, after executing an agricultural lien thereon without applying the proceeds in payment of such lien, with intent to defeat the rights of the defendant, lienee, and had the plaintiff arrested and incarcerated thereunder; that after such warrant was issued the defendant told plaintiff he would not have it served if plaintiff would pay the defendant what he claimed was due to him by plaintiff; and after plaintiff had been arrested and lodged in jail upon said warrant,

and while he was in jail, the defendant came to him and told plaintiff that he, defendant, would procure his release if he, plaintiff, would agree to pay him, defendant, the amount he claimed, and further, he, defendant, would procure plaintiff's release if he would agree to go to Fayetteville and work in defendant's guano plant and there work out the amount claimed. This was evidence that the motive of the defendant was to collect what he claimed was due him from the plaintiff, which was an ulterior motive, a motive foreign to the only legitimate purpose for which the warrant could have issued, namely, to punish the person charged for the commission of the offense against which the law inveighs. This was not only evidence of an ulterior motive, bad intent or wicked purpose, but also evidence of such motive, intent or purpose finally culminating in an abuse, which is the gist of the action. *Carpenter v. Hanes, supra.* The testimony of the plaintiff likewise furnishes evidence of acts in the use of the process, after its issue, which were not proper in the regular prosecution of the proceeding.

While it is true the defendant's testimony contradicted in part and denied in part the plaintiff's testimony, such variance presented issues of fact for the jury and not solely questions of law for the court, and rendered the demurrer to the evidence, and the assignments of error based thereon, untenable.

The defendant also stresses assignments of error based upon the contention that the charge of the court did not comply with C. S., 564; G. S., 1-180, in that it failed to properly declare and explain the law arising on the evidence.

It should first be observed that the exceptions to the charge upon which these assignments of error are based are not made in strict accord with Rule 28, Rules of Practice in the Supreme Court, 221 N. C., pp. 564-5, but passing this apparent failure to comply with the rule, we do not concur in the position taken by the defendant that the charge fails to comply with the statute, since it presents the principal features of the evidence relied upon by the respective parties, states the positions taken by them, and declares and explains the law arising on the evidence. *S. v. Graham,* 194 N. C., 459, 140 S. E., 26. An exception simply to the general failure of the judge to state in a plain and correct manner the evidence and declare and explain the law arising thereon is too general and cannot be sustained. *Jackson v. Lumber Co.,* 158 N. C., 317, 74 S. E., 350.

"Besides, any omission to state the evidence or to charge in any particular way, should be called to the attention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances and, after availing himself of the chance to win a verdict, raise an objection afterwards.

He is too late. His silence will be adjudged a waiver of his right to object. The subject is fully discussed in *Simmons v. Davenport,* 140 N. C., 407." *Davis v. Keen,* 142 N. C., 496, 55 S. E., 359. In the case at bar no special instructions were prayed and no omission of evidence, nor error in the stating thereof, was called to the attention of the court by the defendant. The court directed the attention of the jury to the principal questions which were under investigation and explained the law applicable thereto. This was all required of him by the statute in the absence of prayers for special instructions.

The defendant advances the argument that since the jury failed to find the absence of probable cause for the prosecution of the plaintiff by the defendant upon the charge of disposing of crops upon which a lien existed without settling with the lienee, and thereby denied the plaintiff's alleged cause of action for malicious prosecution, the plaintiff was thereby also denied the right to recover on his alleged cause of action for abuse of process, and for that reason the court erred in failing to instruct the jury not to consider the evidence applicable to the first cause of action in considering the issues as to the second cause of action. This argument is untenable for the reason that while there is a definite distinction between an action for malicious prosecution and an action for abuse of process in that, among other things, in the former want of probable cause is a requisite and not in the latter, the same evidence may be competent on both causes of action.

It appears in his Honor's charge that "it was agreed by counsel on both sides that I need not review it (the evidence)." However, we are of the opinion that the court stated the evidence with sufficient fullness to enable the court to present every substantial and essential feature of the case, and to declare and explain the law arising thereon. If the defendant desired any fuller explanation on some subordinate feature of the case, or upon some particular phase of the evidence, he should have aptly tendered prayers for special instructions relating thereto. *School District v. Alamance County,* 211 N. C., 213, 189 S. E., 878.

Viewing the charge as a whole and considering it contextually, we find no prejudicial error therein.

On the oral argument counsel for plaintiff stated that if no error was found on defendant's appeal, the plaintiff did not care to pursue further his appeal. Accordingly, since we are affirming the judgment below, the appeal of the plaintiff is treated as withdrawn. The judgment of the Superior Court is affirmed.

No error.

STACY, C. J., dissenting: An offer to alleviate a writ is not to abuse the process, and that's all that is left on this record after eliminating

the first cause of action which was resolved in favor of the defendant and from which neither side has appealed. The rest is *brutum fulmen,* "harmless thunder." *Finance Corp. v. Lane,* 221 N. C., 189, 19 S. E. (2d), 849; *Wright v. Harris,* 160 N. C., 543, 76 S. E., 489; *Ludwick v. Penny,* 158 N. C., 104, 73 S. E., 228. Speaking to a similar situation in *Stanford v. Grocery Co.,* 143 N. C., 419, 55 S. E., 815, it was said: "While the complaint endeavors to set up two causes of action, as a matter of fact the testimony only discloses one—that for malicious prosecution—and the allegations purporting to be a second cause of action amount to nothing more than the assertion of a bad motive prompting the first."

Conceding the defendant's purpose was to collect a debt, this goes only to the motive, which is not enough in an action for abuse. *Martin v. Motor Co.,* 201 N. C., 641, 161 S. E., 77; *Abernethy v. Burns,* 210 N. C., 636, 188 S. E., 97; *Wright v. Harris, supra; Stanford v. Grocery Co., supra; Roberts v. Danforth,* 92 Vt., 88, 102 Atl., 335; *Bonney v. King,* 201 Ill., 47, 66 N. E., 377. To make out his case, the plaintiff must aver and prove irregular steps taken under cover of the process after its issuance, and injury resulting therefrom. *Italian Star Line v. U. S. Shipping Bd. E. F. Corp.,* 53 Fed. (2d), 359, 80 A. L. R., 576. "This action for the abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue. . . . The bad intent must finally culminate in the abuse for it is only the latter which is the gist of the action"—*Walker, J.,* in *Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577. "An abuse of process consists in its employment or use for some unlawful purpose, which it was not intended by the law to effect, and amounts to a perversion of it." *Wright v. Harris, supra.*

Malicious prosecution consists in the origination of a groundless prosecution, while abuse of process consists in its perversion after issuance.

On the first cause of action, the jury has found "probable cause" for issuing the warrant. *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446. The issue of abuse of process was answered against the defendants on the theory that if the defendant's purpose was to collect a debt, rather than to prosecute the plaintiff for a violation of the criminal law, "that would amount to an abuse of process." *Ledford v. Smith,* 212 N. C., 447, 193 S. E., 722; Note, 16 N. C. L., 277. The law is otherwise when probable cause exists for issuing the writ, and no perversion is shown. *Tucker v. Davis,* 77 N. C., 330; *Glidewell v. Murray-Lacy & Co.,* 124 Va., 563, 98 S. E., 665, 4 A. L. R., 225; *Jeffrey v. Robbins,* 73 Ill. App., 353; Anno. 86 Am. St. Rep., 397, *et seq.;* Anno. 80 A. L. R., 580; 1 Am. Jur., 178; 50 C. J., 612, *et seq.* As said in *Plummer v. Gheen* (1st syllabus), 10 N. C., 66, 14 Am. Dec., 572: "If

a man prosecute another from real guilt, however malicious his motives may be, he is not liable in an action for malicious prosecution; nor is he liable if he prosecute him from apparent guilt arising from circumstances which he honestly believes."

The essentials of an action for abuse of process, as distinguished from one for malicious prosecution, are purposely left indefinite by the courts. Anno. 86 Am. St. Rep., 397. Perhaps the main reason for this is to afford a remedy in cases of actionable injury resulting from the improper use of judicial process which may not come within the narrow confines of an action for malicious prosecution. 1 Am. Jur., 178; 50 C. J., 612. Thus an action for abuse of process has been held to lie for an excessive levy or needlessly harsh execution, *Barnett v. Reed,* 51 Pa., 190, 88 Am. Dec., 574; greatly disproportionate attachment, *Zinn v. Rice,* 154 Mass., 1, 27 N. E., 772, 12 L. R. A., 288; seizure of exempt property, *Nix v. Goodhill,* 95 Iowa, 282, 58 Am. St. Rep., 434; injury to property attached or improper eviction, *Bradshaw v. Frazier,* 113 Iowa, 579, 85 N. W., 752, 55 L. R. A., 258, 86 Am. St. Rep., 394; oppressive treatment of one in custody, *Wood v. Graves,* 144 Mass., 365, 11 N. E., 567, 59 Am. Rep., 95; extortion by means of arrest, *Sneeden v. Harris,* 109 N. C., 349, 13 S. E., 920; *Hewit v. Wooten,* 52 N. C., 182; *Lockhart v. Bear,* 117 N. C., 298, 23 S. E., 484; *Grainger v. Hill* (Eng.), 4 Bing. N. C., 212; and one may be held liable for making an arrest in an unauthorized manner, *Read v. Case,* 4 Conn., 166, 10 Am. Dec., 110; Anno. 86 Am. St. Rep., 397, *et seq.* In a number of cases, it is said that two elements must concur in order to give rise to an action for abuse of process: First, an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. *R. R. v. Hardware Co.,* 143 N. C., 54, 55 S. E., 422; Cooley, Torts (3rd Ed.), 355. In addition, the plaintiff must show damage from the irregular act. Bigelow, Torts (8th Ed.), 232.

The present case, stripped of any malicious prosecution, falls in none of the foregoing categories. My vote is for a reversal.

WINBORNE and DENNY, JJ., concur in dissenting opinion.

ARTHUR HERMENIJILDO RODRIGUEZ v. ISABEL RODRIGUEZ.

(Filed 3 May, 1944.)

1. Judgments §§ 1, 2—

In many respects a judgment by consent is treated as a contract between the parties. The power to render such judgment depends upon the

subsistence of the consent at the time the agreement receives the sanction of the court, or is rendered and promulgated as a judgment. Without such consent the judgment is void.

2. Process § 11: Judgments § 1: Divorce § 10—

In an action for divorce a defect in service of process cannot be validated by a consent judgment, since that would be, in practical effect, consenting to a divorce—which is diametrically opposed to public policy.

3. Appearance §§ 1, 2a—

A defendant, by asking leave to file an answer to the complaint, casts aside the cloak of special appearance assumed for the purpose of objecting to the jurisdiction and, in effect, enters a general appearance.

4. Same: Judgment § 2: Divorce § 10—

While a request by defendant for leave to answer supersedes her motion to dismiss the action for want of service, it does not, by relation back, cure any prior fatal defect in the proceeding with reference to notice, or validate a judgment or decree of divorce entered upon such defective service.

5. Process §§ 5, 11—

The jurisdiction of the court, where substituted service is sought, depends upon the factual representations made to it under statutory procedure. G. S., 1-98. Since this method of giving notice is out of the ordinary, a strict compliance with the statute has always been deemed to be necessary. Averment as to due diligence is jurisdictional and its absence is a fatal defect.

6. Same: Judgments §§ 2, 22h—

While an affidavit, upon which substituted service is based, may be amended, G. S., 1-163, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction.

7. Pleadings § 23—

Leave to file answer may be granted in the court below or, in proper cases, in this Court. And such leave is hereby granted, partly because of complications in this case and to avoid repeated reviews.

APPEAL by defendant from *Armstrong, J.*, at 22 November, 1943, Term, of MECKLENBURG.

The plaintiff brought an action against the defendant in the Superior Court of Mecklenburg County for absolute divorce, making the following affidavit:

"ARTHUR HERMENIJILDO RODRIGUEZ, first being duly sworn, deposes and says:

"That in the above entitled action now pending in the Superior Court of Mecklenburg County, the Sheriff of said county and State has re-

turned the summons issued to him in said action endorsed as follows: 'The defendant, Isabel Rodriguez, cannot, after due diligence, be found in Mecklenburg County or in the State of North Carolina'; that the plaintiff, after due diligence, has been unable to locate the defendant and that her whereabouts to this plaintiff herein is not known and that the plaintiff has a just cause of action against the defendant for an absolute divorce on the grounds of two successive years of separation.

"WHEREFORE, the plaintiff prays that an order be made by the Court that service of summons be made on the defendant by publication in some newspaper published in Mecklenburg County, North Carolina.

"This the 8th day of February, 1943.

ARTHUR HERMENIJILDO RODRIGUEZ,
Affiant."

With the affidavit was filed the summons and the complaint. Thereupon the following order of publication was made by the clerk of the Superior Court:

"It appearing from the affidavit of Arthur Hermenijildo Rodriguez in this action that Isabel Rodriguez, the defendant herein, is not to be found in Mecklenburg County, and cannot, after due diligence, be found in the State, and

"It further appearing that a cause of action exists against the defendant for an absolute divorce on the grounds of two successive years of separation, as is now provided by law for such in the Consolidated Statutes of North Carolina; and that this is one of the causes in which service of summons may be made by publication, due to the fact that the defendant, after due diligence, could not be found in the above county and State.

"It is, therefore, ordered that summons be served on said Isabel Rodriguez by publication, and to that end that notice of this action be published once a week for four (4) consecutive weeks, in a weekly newspaper published in Mecklenburg County, setting forth the title of the action, the purpose of the same, and requiring the defendant to appear at the office of the Clerk of the Superior Court for Mecklenburg County in the Courthouse in Charlotte, and answer or demur to the complaint, on the 24th day of March, 1943, or the relief stated and alleged therein will be granted the plaintiff.

"This 8th day of February, 1943.

J. LESTER WOLFE,
Clerk Superior Court."

In accordance therewith, notice was published the statutory length of time in a weekly paper of general circulation, published at Charlotte, N. C.

At the March, 1943, Term of the Superior Court of Mecklenburg County, the cause was brought to a hearing before his Honor, Wilson Warlick, Judge, and a jury; and appropriate issues were submitted to the jury, all of which were answered in favor of the plaintiff. Thereupon, judgment was rendered, to wit, on 5 April, 1943, granting an absolute divorce to the plaintiff from the defendant.

Thereafter, to wit, on 18 September, 1943, the defendant, through her counsel, entered a special appearance and filed a motion to dismiss the action for that (1) the sheriff returned upon the summons issued to him only: "After due and diligent search, Isabel Rodriguez not to be found in Mecklenburg County"; (2) that the plaintiff's affidavit to procure service by publication was defective in that it failed to state that diligent search had been made for the defendant and that after due diligence she was not to be found in the State of North Carolina, substituting therefor that the "plaintiff, after due diligence, has been unable to locate the defendant and that her whereabouts to this plaintiff herein is not known"—neither the return of the sheriff nor the affidavit stating that the defendant could not at the time, after due diligence, be found in the State of North Carolina, as required by statute.

Thereupon, on 26 November, 1943, the plaintiff made a motion to amend the affidavit by inserting therein the following statement: "That the defendant, after due diligence, cannot be located within the State of North Carolina"—supporting the motion with an affidavit that the defendant was at the time a resident of Hillsborough County, Florida, and was at said time within the State of Florida and not within the State of North Carolina. In this affidavit accompanying the motion, plaintiff stated that he was acting in good faith in signing the affidavit to obtain service by publication; that the application for publication had been prepared by his attorney, and that he had been remarried since the granting of the divorce. He further stated that the defendant never had been a resident of North Carolina, and so far as plaintiff knew, had never been in North Carolina prior to the trial of the divorce case, and it would have been absolutely impossible to obtain personal service of summons upon her in the divorce proceeding.

On 7 December, 1943, Frank McCleneghan, Esq., the attorney representing the defendant, asked to be permitted to withdraw as counsel, which was allowed; and Thaddeus A. Adams, Esq., substitute counsel for the defendant, continuing the special appearance, asked for a continuance of the motion originally made by defendant for dismissal of the action.

On 8 December, 1943, the following judgment was rendered by his Honor, Frank M. Armstrong, Judge presiding over the Regular Term, 22 November, 1943, of Mecklenburg Superior Court, purporting to be based on consent of parties, over the protest of defendant, who had withdrawn her consent:

"The above-entitled cause coming on to be heard and being heard before his Honor, Frank M. Armstrong, Judge presiding over the Regular November 22, 1943, Term of the Superior Court for Mecklenburg County, and being heard upon the Special Appearance and Motion therein filed by the defendant for dismissal of this action upon the ground that proper service was not had upon her, and that the action was tried at the March 29th, 1943, Term of the Superior Court for Mecklenburg County wherein the last notice of publication was had on the 4th day of March, 1943, and being heard also upon the motion of the plaintiff to be permitted to amend his affidavit of publication by adding thereto, 'that the defendant, after due diligence, cannot be found within the State of North Carolina,' and it appearing to the Court that the plaintiff is entitled to amend his said affidavit, and that thereupon the motion of the defendant should be denied:

"It is, upon motion of CARSWELL & ERVIN, attorneys for the plaintiff, ORDERED, ADJUDGED AND DECREED that the plaintiff be, and he hereby is permitted to amend his affidavit of publication and the same is, by this Order, so amended so as to add thereto 'that the defendant, after due diligence, cannot be found within the State of North Carolina,' and the motion of the defendant to dismiss this action upon the ground hereinbefore set forth be and the same is hereby denied:

"And it appearing to the Court that there was born of the marriage of the plaintiff and the defendant a son, Arthur Loel Rodriguez, Jr., age 11 years, and that it has been agreed between the parties to this action that his custody shall be divided between the parties to this action during his minority in the following manner:

"The custody of said child shall remain with the father, the plaintiff in this action, until the 15th day of July, 1944, at which time the custody of said child shall be with the mother, the defendant in this action, until the 15th day of July, 1945, when the custody of said child shall be with the father for the next 12 months and thereafter the parties shall alternate in having custody of said child, each one for 12 months at a time; that the plaintiff shall provide transportation for said child to and from the residence of the defendant in order that he and she may be placed in custody of the child, as contemplated by this judgment; that during such time that the child is in the custody of the defendant, the plaintiff shall pay to her the sum of $30.00 each month to be used for the support, maintenance and education of said child; that during the

time that the plaintiff has custody of said child under this judgment, he shall keep the child in the State of North Carolina, and that during such time as the defendant has custody of said child under the terms of this judgment, she shall keep the child in the State of Florida, the provisions of this sentence being subject to the further orders of this Court after due notice to the parties in this action:

"IT IS FURTHER ORDERED that neither of the parties to this action shall bring any proceeding in any Court for the custody of said child, and that the Superior Court of Mecklenburg County shall retain and have sole jurisdiction with respect thereto.

"The defendant hereby accepts service of summons and complaint in this action as of February 11, 1943, and it is hereby ADJUDGED that the divorce decree heretofore entered in this action is valid and binding upon both parties in this action.

"Let the costs of this action, if any, be taxed against the plaintiff, and the plaintiff is further ordered to pay to F. A. McCleneghan, Attorney for the defendant, the sum of $25.00.

"By agreement of the parties hereto, in open Court, it was agreed that the Court might sign this judgment out of term, and as of the 30th day of November, 1943.

"This 30th day of November, 1943.

FRANK M. ARMSTRONG,
Judge Presiding.

Consented to:
A. M. BUTLER,
CARSWELL & ERVIN,
Attorneys for Plaintiff.
COCHRAN & MCCLENEGHAN,
Attorneys for Defendant.
ARTHUR HERMENIJILDO RODRIGUEZ,
Plaintiff.
MRS. ISABEL RODRIGUEZ,
Defendant."

Contemporaneously, the following findings of fact were made by Judge Armstrong:

"In the above-entitled action, the agreement was made by counsel for the defendant who entered a special appearance, as shown by the record, and by the defendant herself, that the judgment was drawn and signed by her and her said counsel, could be signed by the Court, on this the 8th day of December, 1943, as of November 30, 1943, and on this the 8th day of December, 1943, Thaddeus A. Adams made a special appearance,

as shown by the record, in the place and stead of said former counsel for the defendant, and urged the Court, for and on behalf of the defendant, not to sign said judgment on the ground that the defendant, through her said counsel, withdraws her consent thereto, and wishes the judgment set aside, in accordance with her original motion.

"Said counsel also objected to the signing of the judgment as a matter of law, because the court is present in the county holding a criminal term of court.

"The Court heard said matters today, when the criminal term was adjourned for the mid-day recess, and overruled the motion and contentions of counsel for the defendant, and signed the judgment by virtue of the agreement, as shown in the judgment.

"This 8th day of December, 1943, in Charlotte, N. C.

FRANK M. ARMSTRONG,
Judge holding the Superior Courts of the
14th Judicial District of North Carolina."

The defendant appealed, assigning error.

G. T. Carswell and Joe W. Ervin for plaintiff, appellee.
Raymond Sheldon and Thaddeus A. Adams for defendant, appellant.

SEAWELL, J. It appears from the record that the judgment promulgated by Judge Armstrong as of November 30, 1943, was prepared in the form of an agreement signed by the parties and their counsel, to be presented and signed as a consent judgment. Before such presentation the defendant changed her mind, employed other counsel, and withdrew her consent. She protested at the time the judgment was rendered and signed.

In many respects the judgment by consent is treated as a contract between the parties. *Cason v. Shute,* 211 N. C., 195, 189 S. E., 494; *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209; *Morris v. Patterson,* 180 N. C., 484, 486, 105 S. E., 25; *Bank v. Commissioners,* 119 N. C., 214, 226, 25 S. E., 966. The power to render such judgment depends upon the subsistence of the consent at the time the agreement receives the sanction of the court, or is rendered and promulgated as a judgment.

Contemporaneously with signing the judgment, Judge Armstrong found facts, amongst which it is stated that the parties agreed that the judgment might be signed as of 30 November, 1943. It was signed at Chambers in Mecklenburg County on 8 December, 1943. It is clear, however, that this agreement was prospective and that at the time it was made no judgment had been rendered, nor was any judgment rendered until the day of signature—after the consent of the defendant had been

withdrawn and after the court had notice of that fact. Without such consent the judgment is void.

It may be added that even had the defendant not withdrawn her consent, it could not be made effectual in curing the defect in service and thereby validating the judgment, if such an amendment could ever be conceived to have that result, since that would be, in practical effect, consenting to a divorce—which is diametrically opposed to public policy.

Since the judgment, in all of its provisions—including plaintiff's motion to amend the affidavit on which service by publication was secured, and defendant's motion to vacate the judgment—is formally and actually made to depend upon such consent, which was withdrawn before its rendition, no hearing has been had, in the legal sense, upon any of the matters dealt with in the judgment.

If no more appeared, no doubt the proper course would be to remand the case for a hearing upon the motions. But the defendant has asked leave to file an answer to the original complaint, upon which the plaintiff seeks divorce. By so doing she has cast aside the cloak of special appearance assumed for the purpose of objecting to the jurisdiction and has, in effect, entered a general appearance. McIntosh, Practice and Procedure, p. 324; *Dailey Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175; *Scott v. Mutual Reserve Fund Life Assn.,* 137 N. C., 515, 50 S. E., 221. Her request for leave to answer, as a matter of course, supersedes her motion to dismiss the action for want of service of summons, and renders academic the plaintiff's motion to amend the procedure in procuring service by publication. But it does not, by relation back, cure any prior fatal defect in the proceedings with reference to notice, or validate the original judgment or decree of divorce entered upon such defective service.

According to the practice, leave to file answer may be granted in the court below or, in proper cases, in this Court. Whether it should be done here may depend upon the facts of record as we find them to be, when examined upon the merits of the motion.

Whether the defendant was, or was not, a resident of the State of North Carolina, or was, or was not, to be found within the State at the time the action was instituted and service of process was attempted is not a matter of present inquiry. The jurisdiction of the court, where substituted service by publication is sought, necessarily depends, in the first instance, upon the factual representations made to it under statutory procedure. The provisions of G. S., sec. 1-98, require that it must appear by affidavit to the satisfaction of the court, or judge thereof, that the person on whom the service of summons is to be made "cannot, after due diligence, be found in the State"—and this specifically applies to actions for divorce. See sec. 5. Since this method of giving notice is

out of the ordinary, a strict compliance with the statute has always been deemed to be necessary. Averment as to due diligence is jurisdictional in its character, and its absence is a fatal defect. *Davis v. Davis,* 179 N. C., 185, 102 S. E., 270; *Sawyer v. Camden Run Drainage District,* 179 N. C., 182, 183, 102 S. E., 273; *Grocery Co. v. Collins Bag Co.,* 142 N. C., 174, 55 S. E., 90; *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737; *Fowler v. Fowler,* 190 N. C., 536, 540, 130 S. E., 315; *Groce v. Groce,* 214 N. C., 398, 399, 199 S. E., 388; *McLeod v. McLeod, post,* 856.

While such an affidavit may be amended, and ordinarily in that respect comes under the provisions of G. S., 1-163, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is necessarily void because of want of jurisdiction. Due process of law is satisfied by notice and hearing—but they must come in that order. The defendant has, in contemplation of law, had no hearing. *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7.

It follows that the original decree of divorce entered on 5 April, 1943, by Warlick, J., is void and of no effect; and the proceeding stands in the Superior Court of Mecklenburg County as it originally stood upon the issuance of the summons and filing of the complaint; except that the defendant has now entered a general appearance by asking leave to file answer.

Returning now to the question whether such leave should be granted in this Court, we are of opinion that, partly because of the complications which have arisen in the case, and the necessity of avoiding repeated review, leave to file answer should be granted here.

The defendant, therefore, has leave to file answer to the complaint, which may be done within thirty days after this opinion is handed down to the Superior Court of Mecklenburg County; the cause will then stand for trial in due course, or further proceedings had according to the practice of the court.

Reversed and remanded.

STATE OF NORTH CAROLINA ON THE RELATION OF THE NORTH CAROLINA UTILITIES COMMISSION v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 May, 1944.)

1. Utilities Commission § 3: Carriers §§ 4, 14—

Where the Utilities Commission, after due notice and hearing, establishes rates for intrastate shipments of pulpwood which it finds to be just and reasonable, and thereafter, upon petition of defendant and other

common carriers for reconsideration, the rates so established are ordered by the Commission to remain in full force and effect, by virtue of the statute (G. S., 62-123) these rates must be deemed the only just and reasonable rates for this commodity, rendering it unlawful for defendant to charge a greater amount. G. S., 62-135.

2. Same—

After rates for certain intrastate shipments have been duly established by the Utilities Commission and defendant seeks to increase such rates by filing tariff schedules to that effect, whereupon the Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates, pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant, such action of the Commission is binding on the defendant. G. S., 62-11. However, defendant should be given a reasonable time to comply with the order before penalties may be invoked.

3. Constitutional Law § 4c—

While the power of the Legislature to delegate authority to an administrative agency of the State to prescribe rules and regulations for the due and orderly performance of its public functions is unquestioned, this does not authorize the formulation of rules contrary to the statute.

4. Utilities Commission § 3—

The Utilities Commission's rules of practice and procedure, promulgated under legislative authority (G. S., 62-12), require a defendant, if it desires the vacation or modification of a previous order, to file a written notice of intention to make changes resulting in increases, which would seem to implement the requirements of the statute (G. S., 62-126) that thirty days notice of an increase be given the Commission.

APPEAL by defendant from *Stevens, J.*, at March Term, 1944, of WAKE. Affirmed.

The defendant Railroad Company excepted to an order of the North Carolina Utilities Commission relative to the rates on pulpwood shipped over defendant's lines, to Plymouth, N. C., and appealed to the Superior Court. From judgment affirming the order of the Utilities Commission, the defendant appealed to the Supreme Court.

The material facts upon which the order appealed from was based may be stated in chronological sequence as follows:

On 11 April, 1938, the Utilities Commission authorized carriers by railroad operating in North Carolina to increase their rates on pulpwood, and 25 April, 1938, entered a supplemental or amended order limiting the increase to 5% over the previous, or "Roanoke Rapids Scale." Thereafter application was made on behalf of the rail carriers, including this defendant, petitioning the Commission for reconsidera-

tion and requesting that an increase of 10% on the pulpwood rate be authorized on intrastate shipments. After full hearing by the Commission the petition was denied, and it was ordered that the "order of April 11, 1938, as amended, shall remain in full force and effect." This last order was dated 12 June, 1939.

On 4 June, 1942, the defendant Atlantic Coast Line Railroad Company filed with the Utilities Commission tariffs containing new and higher rates on pulpwood. Thereupon the Commission ordered that an investigation be had concerning the lawfulness of the rates on pulpwood stated in the schedules, and ordered suspension of the rates and postponement of the effective date of the schedules pending investigation and decision thereon. It was further ordered "that the rates and charges and the regulations and practices thereby sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of or until the period of suspension or any extension thereof has expired, unless authorized by special permission of the Commission."

Thereafter the suspension was continued to 7 January, 1943, and the defendant not being ready to enter upon the investigation, and at the request of the defendant, the operation of the proposed tariff schedules was postponed "until such time as respondents herein are ready to proceed with the investigation."

On 2 August, 1943, and 26 November, 1943, the defendant again filed with the Commission tariffs containing higher rates on pulpwood than those established by the order of 12 June, 1939, according to which the existing rates would expire and the new rates become effective 1 January, 1944.

On 24 January, 1944, the Utilities Commission, finding as a fact that its notice to the defendant to restore the rates on pulpwood to the level provided in the order of 12 June, 1939, had not been complied with, declared that it regarded defendant's action as constituting a refusal to obey an order of the Commission, and thereupon issued notice to the defendant to show cause why the Commission should not institute action to recover the penalty therefor prescribed by G. S., 62-142 (C. S., 1106).

Pursuant to this notice hearing was had 3 February, 1944, and on 15 February, 1944, the Commission entered an order holding that the pulpwood rates contained in defendant's tariff schedules, to the extent they exceeded the maximum level permitted under the outstanding order of 12 June, 1939, were unlawful, and that continued refusal to obey the previously established orders of the Commission rendered defendant liable to an action for the penalty prescribed by the statute. The defendant was directed to correct its published rates for intrastate transportation of pulpwood, so as to bring the statement of such rates into

harmony with the order of 12 June, 1939. The Commission upheld its rule wherein it was prescribed that if vacation or modification of an existing order was sought for the purpose of permitting the filing of rates other than those in effect, it should be by petition, or written notice in triplicate setting out the reasons and conditions relied on as a basis for the changes proposed.

To this order the defendant excepted on the ground that the Utilities Commission was without authority to issue the order for the reason that the tariff was filed in accordance with the statute, G. S., 62-125, and the Commission had not proceeded in accordance with this statute; that the defendant had violated no valid order of the Commission, and the Commission had no authority to order a correction of defendant's tariff, or to declare that refusal to do so rendered defendant liable under G. S., 62-142. Defendant also excepted to the application of the Commission's rule in so far as it prescribed action in addition or contrary to the statute. It was asserted that the enforcement of the order contemplated would deprive the defendant of its property without due process of law in violation of the Federal Constitution.

The defendant's exceptions were overruled, and, upon appeal to the Superior Court, the ruling of the Utilities Commission was in all respects affirmed. The defendant appealed to the Supreme Court, assigning errors in the judgment.

Attorney-General McMullan, Assistant Attorney-General Patton, and I. M. Bailey for plaintiff, appellee.

Richard B. Gwathmey and Murray Allen for defendant, appellant.

DEVIN, J. This appeal brings up for consideration the validity of an order of the Utilities Commission, adverse to the defendant Railroad Company, with respect to rates for the transportation intrastate of pulpwood over the lines of the defendant.

The order of the Utilities Commission, which was affirmed by the Superior Court, held that the action of the defendant, under the circumstances, in attempting to effectuate changes in tariff charges on pulpwood in excess of the maximum rate established by the previous orders of the Commission, at a time when investigation as to previously filed tariffs of the same tenor was pending, and the refusal of the defendant, after notice, to correct these rates to conform to the established rates on this commodity, constituted failure to obey a lawful order of the Commission entailing liability to an action for the statutory penalty.

The defendant excepted to the order and to the judgment of the Superior Court in affirmance, on the ground that the statute permitted a carrier at any time to file with the Commission a tariff containing dif-

ferent and increased rates, regardless of how the previous rate had been determined, and that the power of the Commission with respect thereto was limited to suspending the operations of the new rates pending an investigation of their lawfulness.

The statute referred to, now codified as G. S., 62-125 (Acts 1939, ch. 365), contains the following provisions (omitting words not pertinent to our inquiry): "Whenever there shall be filed with the Utilities Commission any schedule stating an increase in any new individual or joint rate . . . for the transportation of property by a public carrier . . . the Commission is hereby authorized . . . upon its own initiative . . . to enter upon a hearing concerning the lawfulness of such rate . . . and pending such hearing . . . may suspend the operation of such schedule . . . and defer the use of such rate . . . for a period of ninety days . . . but not for longer period in the aggregate than one hundred and eighty days." The succeeding section (G. S., 62-126), originally a part of the same act, follows: "No increase shall be made in any rate . . . the result of which will be an increase, which has been published and filed by any of the transportation companies named in the preceding section, except upon not less than thirty days notice to the Commission and to the public."

It appears that in 1938 the Utilities Commission, after due notice and hearing, had established rates for intrastate shipments of pulpwood to Plymouth which it found to be just and reasonable, and that thereafter upon petition of this defendant and other carriers for reconsideration, the rate so established was ordered "to remain in full force and effect." By virtue of the statute (G. S., 62-123) these rates so established must be deemed the only just and reasonable rates for this commodity over defendant's lines, rendering it unlawful for the defendant to charge a greater amount. G. S., 62-135.

It further appears that after the rate had been duly established the defendant sought in 1942 to increase these rates by filing tariff schedules to that effect, but the Commission by order of postponement deferred use of the new rates pending investigation. In this proceeding, to which defendant was a party, the Commission ordered that the rates previously fixed "shall not be changed by any subsequent tariff or schedule until this investigation and suspension proceeding has been disposed of." To this order there was no exception. Then at the request of defendant the postponement was continued until the investigation into the lawfulness of the proposed rates could be had. While the matter was still pending, the defendant again filed tariff schedules calling for increased rates on pulpwood.

We think the Commission's order, duly entered without objection in a proceeding to which defendant was a party, was binding upon the

defendant, and that it could not thereafter, without proceeding with the investigation it had by its action called for, begin all over again by filing subsequent tariffs of the same tenor with respect to the same commodity. Hence the order of the Commission that the defendant be required to correct its last published tariff so that the rates "sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of," must be upheld. The Utilities Commission is by statute (G. S., 62-11) constituted a court of record with the powers of a court of general jurisdiction as to all matters properly before it. The defendant, however, should be given reasonable time within which to comply with this order before penalty may be invoked.

The defendant contends that the statute (G. S., 62-125), properly interpreted and applied to the facts of this case, should be held to justify its action, and to manifest the invalidity of the order appealed from. But we are unable to agree that on the record here presented this statute authorized the procedure claimed, nor do we concur in an interpretation that would sustain the attitude of the defendant in the face of the previous order of the Commission.

If it should be concluded that, after a rate has been duly established by the Commission, and after new and increased rates shown by subsequent tariffs filed have been suspended pending investigation, the carrier could from time to time continue to file in the record the same or other tariffs carrying increased rates, despite the orders of the Commission to the contrary, while investigation into the reasonableness of the rates was still pending and undisposed of, the public service required of the Utilities Commission in establishing and maintaining just and reasonable freight rates would be impaired.

We think the better view is that pending further investigation into the reasonableness of a rate which has been established by the Commission as the only just and reasonable rate for that commodity, the rate so fixed should not be superseded by a higher rate by the railroad, in violation of an order in the proceeding forbidding it, except after proper determination of the reasonableness of the increase desired.

In further support of the order appealed from it may be noted that according to the Commission's rules of practice and procedure, which were formulated and promulgated under legislative authority (G. S., 62-12), it was the duty of the defendant, if it desired vacation or modification of a previous order, to file "written notice in triplicate of intention to make changes resulting in increases" (Rule 11 [9]). While the power of the Legislature to delegate authority to an administrative agency of the state to prescribe rules and regulations for the due and orderly performance of its public functions is unquestioned (*State ex rel.*

Utilities Com. v. Greyhound Corp., post, 293; *Pue v. Hood,* 222 N. C., 310, 22 S. E. (2d), 896; Annotation 79 Law Ed., 474 (509), U. S. Supreme Court Reports), this would not authorize the formulation of rules contrary to the provisions of the statute itself. Rules thus prescribed may not be held to control or override those set out in the statute or appearing therein by necessary implication, but under general authority to formulate rules and regulations, the state agency may undoubtedly prescribe by rule the procedure by which a right granted may be exercised. Hence it would seem that the requirement of the statute (G. S., 62-126), that thirty days' notice of an increase in rates be given the Utilities Commission, properly may be implemented by rule of the Commission requiring that the notice be in writing in triplicate. With this rule the defendant did not comply.

Under the facts disclosed by the record the judgment below will be upheld in its affirmance of the order of the Utilities Commission not inconsistent with this opinion.

Affirmed.

H. J. CHESSON v. LILLY JORDAN AND L. P. JORDAN.

(Filed 3 May, 1944.)

1. Easements § 3: Highways § 14—

The recent use for an indefinite number of years of a neighborhood road across lands to a river, for purposes of hauling wood, boating, fishing and bathing, is no evidence of the existence of a public way.

2. Highways §§ 6, 9—

There can be in this State no public road or highway unless it be one either established by the public authorities in a proceeding before a proper tribunal; or one generally used by the public and over which the proper authorities have asserted control for a period of twenty years or more; or one dedicated to the public by the owner of the soil with the sanction of the authorities and for maintenance of which they are responsible.

3. Easements § 3: Highways § 14—

Permissive use of a road across the lands of another does not create a right of way. The user must be hostile in character, repelling the inference that it was with the owner's consent.

4. Easements § 5: Highways § 14—

The weight of authority gives the owner of lands, used for agricultural purposes and burdened with a right of way acquired by prescription, the right to erect gates across the way.

5. Easements § 5: Highways § 13—

Generally speaking, the nature of the easement acquired rather than the character of the use must control the rights of the parties. Hence, no hard and fast rule may be prescribed. Each case is controlled, in a large measure, by the particular facts and circumstances therein.

APPEAL by plaintiff from *Thompson, J.*, at December Special Term, 1943, of CAMDEN. New trial.

Civil action to recover damages for the unlawful destruction of a private gate and to restrain a trespass.

Plaintiff owns an "L" shaped tract of land on Pasquotank River. The lands of defendants fit into the inner angle formed by the northern and eastern lines of the plaintiff's tract so that the upright part of the "L" lies between the river and defendants' land, and the base section extends eastward toward Shiloh Road, and to the south of defendants' tract. There is a vehicular way leading from Shiloh Road to and along the southern edge of defendants' tract. This is used in going to and from the land both of plaintiff and of defendants.

Defendants contend that this way extends westwardly to the junction of the inner lines of the "L" and on across plaintiff's land to the river.

Plaintiff having theretofore fenced his property for use in raising livestock, erected a gate at the point where this road or an extension thereof reaches plaintiff's eastern line. Defendants, claiming the right to use the alleged way from the point the gate was erected on across plaintiff's land to the river, destroyed the gate thus erected. It was again erected and again destroyed. Thereupon, plaintiff instituted this action.

In the trial below issues were submitted to and answered by the jury in favor of defendants as follows:

1. Is the plaintiff the owner and in possession of the land described in the complaint?

Answer: Yes.

2. Are the defendants the owner of an easement over said land entitling them to use the lane in controversy without obstruction from the main Shiloh Road to Pasquotank River?

Answer: Yes.

3. If so, has plaintiff obstructed defendants in the use of said easement, as alleged?

Answer: Yes.

From judgment on the verdict plaintiff appealed.

M. B. Simpson and John H. Hall for plaintiff, appellant.
R. Clarence Dozier for defendants, appellees.

BARNHILL, J. The exceptions entered and duly preserved by plaintiff present three questions for decision: They are: (1) Does the evidence establish a public way, to the unobstructed use of which defendants are entitled; (2) if not, is evidence of user by the public competent to establish defendants' right to a private way; and (3) does the owner of the servient estate have the right to erect a gate across a private way over agricultural land?

Defendants allege in defense the ownership of a private way, acquired by prescription, from their western line across plaintiff's land to the river. The evidence offered consists almost entirely of testimony tending to show that the alleged pathway has been used for many years past by members of the public "going fishing."

Even so, waiving any variance between allegation and proof, the existence of a public way or road is not made to appear. At most, nothing more than a neighborhood road is shown, and a neighborhood road is not a public road. *Collins v. Patterson,* 119 N. C., 602.

According to the current of decisions in this Court there can be in this State no public road or highway unless it be one either established by the public authorities in a proceeding regularly instituted before the proper tribunal; or one generally used by the public and over which the proper authorities have asserted control for the period of twenty years or more; or one dedicated to the public by the owner of the soil with the sanction of the authorities and for the maintenance and operation of which they are responsible. *S. v. McDaniel,* 53 N. C., 284; *Boyden v. Achenbach,* 79 N. C., 539; *S. v. Purify,* 86 N. C., 681; *Kennedy v. Williams,* 87 N. C., 6; *Stewart v. Frink,* 94 N. C., 487.

The mere use of a way over land by the public does not constitute it a highway. Nor does the mere permissive use of it imply a dedicatory right in the public to use it. The use must be adverse to the owner, and as of right, *manifested in some appropriate way by the properly constituted public authorities. Hemphill v. Board of Aldermen,* 212 N. C., 185, 193 S. E., 155, and cases cited; *Collins v. Patterson, supra; S. v. Fisher,* 117 N. C., 733; *S. v. Wolf,* 112 N. C., 889; *Stewart v. Frink, supra.*

The record is devoid of any evidence tending to show that the proper public authorities at any time or in any way manifested any intent or purpose to claim the alleged way as a public road. The mere fact that people generally passed over it and defendants themselves occasionally used it is insufficient to establish an easement in the public or to be treated as a dedication of plaintiff's land to the purpose of a highway.

The testimony relating to the use of the way by members of the public was admitted over objection and exception by plaintiff. These exceptions must be sustained.

The defendants own a tract of land in the northern tip of the "L," a considerable distance from the point the alleged lane approaches the river. The evidence of user by defendants comes from the defendant, L. P. Jordan, who testified:

"I have got boats at the end of the road; I fish myself and rent my boats to people that go and want to use them in the summer time. I own a piece of woods back there and haul a load of wood once in awhile."

He testified further as to the use by the public that "people go in bathing right much down there, and it has been used for this purpose I guess 25 or 30 years."

Just how long defendants have been adjoining land owners and so used the land is not made to appear. Nor is it shown that such use has extended over a period of at least twenty years. The only claim of right they have made was made within recent years.

To supplement this rather meager evidence of adverse claim, the defendants seek to prove that members of the public generally have been using the way for forty or fifty years. But there is no evidence that it was being so used in connection with any property or business of defendants. Indeed, it was in part long before defendants became adjoining land owners.

Neighborliness is a virtue the law neither condemns nor penalizes. Hence, the user by defendants must be hostile in character, repelling the inference that it was permissive and with the owner's consent. And there must be evidence of such hostile use for the full period of twenty years. *Boyden v. Achenbach,* 86 N. C., 397; *Mebane v. Patrick,* 46 N. C., 23; *Smith v. Bennett,* 46 N. C., 372; *Snowden v. Bell,* 159 N. C., 497, 75 S. E., 721; *Weaver v. Pitts,* 191 N. C., 747, 133 S. E., 2; *Gruber v. Eubank,* 197 N. C., 280, 148 S. E., 246. This may not be established in behalf of defendants by proof of a wholly disconnected user by others. Evidence thereof was prejudicial to the plaintiff.

While the authorities are at variance as to the right of an owner of land burdened with a right of way acquired by prescription to erect gates across the way, the weight of authority is in accord with the holding that such a right exists in the case of agricultural land. 17 Am. Jur., 1012, sec. 122; 21 C. J. S., 770; Anno. 73 A. L. R., 788. See also *Alexander v. Autens Auto Hire,* 175 N. C., 720, 95 S. E., 850; *Jacobs v. Jennings,* 221 N. C., 24, 18 S. E. (2d), 715.

The right to an easement by prescription is founded on a fiction of the law that a grant was made but has been lost. But the law will not assume, in the absence of proof, that the owner of agricultural lands made a grant for mere ingress and egress, not appurtenant to any business or property, that substantially limits his use of his property for the purposes to which it is adapted.

Generally speaking, the nature of the easement acquired rather than the character of the use must control the rights of the parties. Hence, no hard and fast rule may be prescribed. Each case must be controlled, in large measure, by the particular facts and circumstances being made to appear.

Ordinarily, however, a mere private easement for the general purpose of ingress and egress over and across agricultural lands carries with it no implication of a right to deprive the owner of the servient estate of the full enjoyment of his property. It is subject only to the right of passage. Hence, he may erect gates across the way when necessary to the reasonable enjoyment of his estate, provided they are not of such nature as to materially impair or unreasonably interfere with the use of the lane as a private way for the purposes for which it has theretofore been used.

The easement here in controversy, if it in fact exists, is not a way of necessity. The land on the river at the end of the lane belongs to plaintiff. If defendants maintain boats for hire at that point, it is, so far as this record discloses, by permission. Plaintiff uses his land for agricultural purposes which requires fencing. To prohibit the erection of gates would deprive him of the reasonable use of his land. Thus the question of unreasonable obstruction is at issue and should be determined by the jury.

There was evidence that at one time more than fifty years ago a mill was located at the end of the lane on the river bank. Even so, if the owner thereof acquired a right of way appurtenant to his business the property now belongs to plaintiff, and that right has passed to him as the present owner of the fee.

For the reasons stated there must be a

New trial.

STATE OF NORTH CAROLINA ON THE RELATION OF THE NORTH CAROLINA UTILITIES COMMISSION v. ATLANTIC GREYHOUND CORPORATION, CAROLINA COACH COMPANY, NORFOLK SOUTHERN BUS CORPORATION, AND SEASHORE TRANSPORTATION COMPANY.

(Filed 3 May, 1944.)

1. Utilities Commission § 1—

The N. C. Utilities Commission, a creature of the General Assembly, is an administrative agency of the State with such powers and duties as are given it by statute, G. S., ch. 62. These powers and duties are of a dual nature—supervisory or regulatory and judicial.

2. **Utilities Commission § 2: Public Utilities § 2b—**

The Legislature has not undertaken to foresee and provide for every contingency involved in the problem of supervising and regulating public utilities within the State, but it has authorized and empowered the Utilities Commission, generally, to make rules and regulations by which the purpose of the statute may be effectuated.

3. **Utilities Commission § 4—**

No procedure for appeals to the courts, from rules and regulations of the Utilities Commission, has been prescribed by statute, hence the validity thereof cannot be challenged by appeal.

4. **Utilities Commission § 2: Public Utilities § 2b—**

For the purpose of making investigations and conducting hearings, the Legislature has constituted the Utilities Commission a court of record, with all the powers of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure is prescribed, G. S., 62-11, *et seq.*, with right in any party affected thereby to appeal, G. S., 62-20, to the courts.

APPEAL by above styled defendants from *Stevens, J.*, at February Civil Term, 1944, of WAKE.

Proceeding before North Carolina Utilities Commission.

The record discloses: (1) That by order dated 20 September, 1942, the North Carolina Utilities Commission struck out the then existing "rule 22 of the rules and regulations for the operation of union bus stations established under order June 12, 1925, as amended June 6, 1939, and amendments thereto," and in lieu thereof substituted the following: "22. WHEN CARRIERS SHALL HONOR TICKETS OF ONE ANOTHER. Carriers operating from a common station where tickets are sold to a common destination, over the same or different routes, shall honor the tickets of one another between said points, and the carrier lifting the same shall be reimbursed therefor by the issuing carrier in the amount paid for same, less the applicable station charge at point of sale." The Commission fixed 10 October, 1942, as the effective date of this order.

(2) After the entry of this order, and on 1 October, 1942, under caption "In the matter of order of the Commission of date September 20, 1942, purporting to amend Rule 22 of the Rules for the Operation of Union Bus Stations Established under order of June 12, 1925, as amended June 6, 1939, and amendments thereto," the Carolina Coach Company, a common carrier by motor vehicle engaged in the transportation of passengers within the State of North Carolina over its inter- and intrastate franchise routes, filed with the North Carolina Utilities Commission special appearance for the purpose of moving, and moved to vacate, the order of 20 September, 1942, designated in the caption above set forth, and quoted hereinabove, and to have same declared void for

that, briefly stated, (a) it had been entered without notice, hearing or opportunity to be heard, and irregularly and in violation of constitutional requirements of due process and observance of the law of the land and without authority in law, (b) it will not promote harmony between carriers, but will tend to confusion, (c) it is unreasonable, arbitary and discriminatory in various specific aspects, and (d) it impairs the obligations of contract, works a peculiar hardship on and violates property rights of movant, and (e) the existing Rule 22 was sufficient to cover the needs of the public, and requested "that this motion be set for hearing at an early date."

(3) Thereupon the Utilities Commission set the motion "for hearing" on 12 October, 1942, and at same time deferred the effective date of said order to six o'clock on date of hearing.

(4) Thereafter, Atlantic Greyhound Corporation, Norfolk Southern Bus Corporation and Seashore Transportation Company, respectively, common carriers by motor vehicle engaged in the transportation of passengers within the State of North Carolina each over its inter- and intrastate franchise routes, in the order named, filed with the North Carolina Utilities Commission special appearances for like purpose, and upon like reasons to that previously filed by the Carolina Coach Company as above described.

The hearing was postponed from time to time, and the effective date of the order deferred to correspond to dates set for hearing, until 22 October, 1942, of all of which the Utilities Commission gave notice by letter to attorneys for those common carriers who had filed special appearances and motions as above stated, and to attorneys for Queen City Coach Company and Smoky Mountain Stages.

(5) On 22 October, 1942, at time and place set for hearing, appearances were made by attorneys for Atlantic Greyhound Corporation, Carolina Coach Company, Norfolk Southern Bus Corporation, and Seashore Transportation Corporation. The Commission heard statements and arguments of said attorneys in support of the motions made by these common carriers. At the same time and place appearances were made by attorney for Queen City Coach Company, Smoky Mountain Stages, Greensboro-Fayetteville Bus Lines, and Fort Bragg Bus Lines, in whose behalf the attorney spoke in opposition to the said motions. At the conclusion of the hearing the Commission took the matter under advisement, and deferred the effective date of the order to 1 November.

(6) Thereafter, in opinion filed on 12 November, 1942, the Utilities Commission denied the motions to vacate and declare void Rule 22 as issued on 20 September, 1942, and ordered that the rule shall be in full force and effect on and after 1 December, 1942, of all of which notice was

given to attorneys for those common carriers in whose behalf appearances were made as above stated.

(7) Thereafter, on dates between 17 and 20 November, 1942, both inclusive, Atlantic Greyhound Corporation, Carolina Coach Company, Seashore Transportation Company, and Norfolk Southern Bus Corporation, in order named, filed with the North Carolina Utilities Commission exceptions to the order of 12 November, 1942, and again prayed the Commission to vacate the order of 20 September, 1942, and stated respectively that "if the Commission should construe the motion and special appearance filed herein . . . as constituting exceptions to the order entered by the Commission on September 20, 1942, and the order of the Commission of November 12, 1942, as an order overruling such exceptions" it "prays that the foregoing exceptions be filed and accepted as its assignment of error and statement of exceptions, and thereupon notice is hereby given of appeal from said order of November 12, 1942, to the Superior Court."

(8) Thereafter, under date of 23 November, 1943, the Utilities Commission entered an order, in which after reciting that "the Commission has given full and careful consideration to all of the exceptions filed and to the contention of counsel in support of said exceptions, and finds no good reason why said rule should be vacated or changed . . . ordered, 1st, that each and all of said exceptions are hereby overruled and denied, 2nd, that the chief clerk of this Commission is hereby directed to change the effective date of said rule to January 1, 1944, file the same with the Secretary of State immediately and furnish copies thereof to all of the bus companies in North Carolina," all of which was done.

(9) Thereafter, on 1 December, 1943, the Utilities Commission entered order, in which after noting "it having been made to appear to the Commission that the protestants of record in the above entitled matter are preparing to appeal from the Commission's order putting into effect amended Rule 22, dated September 20, 1942, and the Commission being of the opinion that a matter of this sort should not be enforced pending litigation as to its validity"—it ordered that the effective date of said Rule 22 is hereby "extended for a period of ninety days from January 1, 1944," and copy of same was filed with Secretary of State.

(10) Thereafter, on 2 December, 1942, each of the common carriers who had filed exceptions as hereinabove stated, filed formal notice of appeal to Superior Court and of exception to the overruling of each exception, as ground of appeal, and requested the Commission to docket said appeal in accordance with law. And on 10 December, 1943, the chief clerk to the Commission certified the record.

(11) In Superior Court the Utilities Commission entered motion to dismiss the appeal for that, among other reasons, the promulgation of

the rule of 20 September, 1942, does not afford ground and basis for an appeal by the common carriers who are attempting to appeal therefrom in this case. The court allowed the motion, and entered judgment dismissing the appeal. The common carriers named appeal to Supreme Court and assign error.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for plaintiff.

Bailey, Holding, Lassiter & Wyatt and Ehringhaus & Ehringhaus for Atlantic Greyhound Corporation.

Fuller, Reade & Umstead for Carolina Coach Company.

Simms & Simms for Norfolk Southern Bus Corporation.

D. L. Ward for Seashore Transportation Company.

WINBORNE, J. While appellants seek to challenge the validity of the order of the North Carolina Utilities Commission, dated 20 September, 1942, amending Rule 22 of its rules and regulations for the operation of union bus stations, the question arising upon the challenge to judgment from which appeal is taken, and determinative of this appeal is whether appellants are entitled to appeal to the courts from the action of the Commission in adopting and promulgating such amended rule. The court below held that they were not, and with this ruling we are in accord.

The North Carolina Utilities Commission, a creature of the General Assembly, is an administrative agency of the State with such powers and duties as are given to it by statute. G. S., chapter 62, entitled "Utilities Commission." These powers and duties are of a dual nature—supervisory or regulatory and judicial. *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593; *Pue v. Hood, Comr. of Banks,* 222 N. C., 310, 22 S. E. (2d), 896.

The Legislature has not undertaken to foresee, and provide for every contingency involved in the problem of supervising and regulating public utilities, including motor vehicle carriers, within the State of North Carolina, but, in accordance with prevailing custom recognized in public administrative law, it has authorized and empowered the Utilities Commission to make rules and regulations by which the purpose of the statute may be effectuated. G. S., 62-109. This is power of a supervisory or regulatory nature, and general in character. *Provision Co. v. Daves, supra,* and *Pue v. Hood, Comr. of Banks, supra.* And from the adoption and promulgation of rules and regulations in this respect, the Legislature has prescribed no procedure for appeal to the courts.

On the other hand, for the purpose of making investigations and conducting hearings, the Legislature has constituted the North Carolina

Utilities Commission a court of record, with all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure is prescribed and authorized, G. S., 62-11, *et seq.*, with right in "any party affected thereby" to appeal "from all decisions and determinations made by the Utilities Commission." G. S., 62-20. By these provisions the Legislature has granted to the Utilities Commission the power to hear and adjudicate on cases arising within the scope of its activities. The exercise of this power is judicial in nature.

In the light of the distinctive characteristic of the powers thus granted to the Utilities Commission, no appeal may be taken from an order by which the Commission adopts and promulgates a general regulatory rule of supervisory nature. The validity of it may not be challenged in such manner. The rule in question is of this character, and the validity of it may not be challenged by appeal from the order adopting and promulgating it.

Nevertheless, if and when any motor vehicle carrier comes in judicial conflict with the provision of the rule or regulation, it may then challenge the validity of the rule or regulation. Compare *Yakus v. U. S.*, 88 L. Ed., 653, 1943 Term of the United States Supreme Court, Law Ed. Advance Opinions, No. 11, decided 27 March, 1944, where Congress provided procedure for determining the validity of regulations of O.P.A.

Proceedings before the Utilities Commission previously considered by this Court deal with individual cases and are distinguishable, and are not controlling here.

Affirmed.

SAM S. SAWYER AND L. L. STEVENS v. A. N. STAPLES AND E. P. LEARY, INDIVIDUALLY AND PARTNERS TRADING AS LEARY & STAPLES.

(Filed 3 May, 1944.)

Appeal and Error § 8—

Having tried a case upon one theory, the law will not permit a party to change his position in the Supreme Court. The rule is that an appeal *ex necessitate* follows the theory of the trial.

APPEAL by defendant A. N. Staples from *Thompson, J.*, at December Term, 1943, of CAMDEN.

Civil action against A. N. Staples and E. P. Leary, individually and as partners, trading as Leary & Staples.

The complaint alleges that on 24, 25, and 26 June, 1943, plaintiffs delivered to the defendants 487 bags, 100 lbs. each, of Irish potatoes, same being U. S. #1 grade, at the price of $2.25 per bag, 71 bags of #2

potatoes at 75c per bag, and 60 bags of pick-outs at 50c per bag, making a total sale price of $1,179.00; that the defendants have resold said potatoes and received the proceeds from said sale, that the defendants are offering to pay the aforesaid price for the #2's and the pick-outs, but are attempting to include in the settlement the U. S. #1 grade at a price lower than that agreed upon.

The defendants filed their answer and alleged that they were not, nor have they ever been partners under the name of Leary & Staples, or any other name. The plaintiffs offered no evidence to support their allegation as to the partnership, nor as to any agreement with the defendant, E. P. Leary, in connection with the sale of the potatoes referred to in the complaint; hence, at the close of plaintiffs' evidence, upon motion for judgment as of nonsuit as to E. P. Leary, the motion was granted.

The evidence discloses that plaintiff, Sam S. Sawyer, grew the potatoes involved herein on the land of his coplaintiff, L. L. Stevens, under an agreement that Mr. Stevens was to receive one-fourth of the potatoes for his rent.

Upon the evidence offered by the plaintiffs, and that introduced on behalf of the defendant, A. N. Staples, the court submitted to the jury the following issues, which were answered as indicated:

"1. Is the defendant Staples indebted to plaintiff, Sam S. Sawyer, as alleged in the complaint, and, if so, in what amount? Answer: $561.18.

"2. Is the defendant Staples indebted to plaintiff, L. L. Stevens, as alleged in the complaint, and, if so, in what amount? Answer: $187.06."

Judgment was entered on the verdict and defendant, A. N. Staples, appeals to the Supreme Court, assigning errors.

J. Henry LeRoy for plaintiffs.
R. Clarence Dozier for defendant.

DENNY, J. The only exception presented by appellant for our consideration is to the charge of the court below in that his Honor failed to charge the law arising upon the defendant's plea of accord and satisfaction.

An examination of the answer discloses that it does not contain a plea of accord and satisfaction, as between the plaintiffs and the defendant, A. N. Staples. There is a plea of accord and satisfaction as between the plaintiffs and E. P. Leary, individually; however, Leary is no longer a party to this action, and, if he were his testimony, as well as that of Staples, negatives the plea.

On 12 August, 1943, E. P. Leary issued his check in the sum of $1,680.15, payable to Sam Sawyer and A. N. Staples. This check did include the sum of $521.82 for the potatoes involved in this action which

were shipped by E. P. Leary. Sawyer protested the price allowed by Leary for the U. S. #1 grade potatoes. However, Sawyer endorsed the check and Staples retained it and gave Sawyer his personal check for $700.71, and made the following entry thereon: "Payment for difference in fertilizer—seed potatoes"; therefore, A. N. Staples retained out of the check for $1,680.15, the sum of $979.44. However, the evidence is contradictory as to the amount due Staples for fertilizer, seed potatoes, hauling, grading and for money advanced by the defendant Staples to enable Sawyer to employ help to dig his potatoes.

There is no allegation, suggested issue or prayer for instruction to sustain the defendant's contention that he was entitled to have the jury consider the endorsement of the Leary check by Sawyer, and the acceptance of his personal check as an accord and satisfaction as between the plaintiffs and himself. On the contrary, the case was tried below on the theory that the plaintiff, Sam S. Sawyer, tenant of his coplaintiff, L. L. Stevens, entered into a contract with the defendant, A. N. Staples, to sell and deliver to said A. N. Staples, the potatoes involved in this action at the prices alleged in the complaint. The defendant, A. N. Staples, rested his defense upon the theory of agency, alleging in his answer that he "had no connection with the transaction except that the plaintiff, Sam S. Sawyer, authorized and directed him to assist in handling the said potatoes on behalf of the said Sam S. Sawyer."

The plaintiff Sawyer testified that Staples agreed to pay him the government price for U. S. #1 grade potatoes, which at the time of delivery was $2.25 per bag. There appears to be no dispute as to the price for the #2 potatoes and the pick-outs. We do not think that Staples or Leary considered the payment made by Leary as a complete settlement between Sawyer and Staples. Staples nullifies the idea of accord and satisfaction as between himself and Sawyer, by his testimony to the effect that Sawyer is still indebted to him in connection with the marketing of said potatoes in the sum of $22.00; and Leary, as a witness for the defendant Staples, testified on cross-examination, that "The potatoes on the Stevens farm were delivered on June 24th, 25th and 26th; the market price for #1 potatoes at Camden was $2.25 a bag on June 24th. On June 25th some potatoes sold for $2.30. Some of Mr. Sawyer's potatoes off the Luke Stevens field sold for $2.20 a bag at Camden. I filed a claim with the railroad for these potatoes. I don't know the exact figures. I filed several claims with the railroad but each car is filed separately. The claim filed with the railroad was for enough to bring all of Mr. Sawyer's potatoes that are involved in this suit to $2.25 a bag at Camden." Hence, plaintiffs' allegation as to the price of U. S. #1 grade potatoes at the time of delivery to defendant, is virtually admitted by defendant's evidence. Moreover, both Leary and

Staples testified that Sawyer is entitled to whatever amount may be realized from the claims filed by Leary against the railroad, except Staples claims the right to deduct an additional sum of $22.00 therefrom.

Therefore, if on 12 August, 1943, Leary had paid to Sawyer and Staples the government price of $2.25 per bag for the potatoes, the check would have included $1,179.00 for the potatoes involved in this action, instead of the sum of $521.82, which was included therein, or, to put it another way, the check would have been for $2,337.33, instead of $1,680.15. The evidence discloses that this difference is represented in claims filed against the railroad by Leary. Therefore, the real question is whether Staples bought these potatoes from Sawyer, as alleged in the complaint, and marketed them through Leary, or did he merely act as agent for the plaintiffs, pursuant to an agreement made with Sawyer to assist him in marketing the potatoes, as alleged in the answer. The answer to this question was for the jury.

The issues set forth herein were submitted to the jury without objection on the part of the defendant, and were sufficient to determine the above question as well as the amount Staples was entitled to recover for seed potatoes, fertilizer and advancements to Sawyer. The jury answered the issues in favor of plaintiffs for the respective amounts set forth herein, and there is ample evidence to support the verdict.

Having tried the case upon one theory, the law will not permit a defendant to change his position in the Supreme Court. *Weil v. Herring,* 207 N. C., 6, 175 S. E., 836; *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123. "The rule is, that an appeal *ex necessitate* follows the theory of the trial." *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5; *Dent v. Mica Co.,* 212 N. C., 241, 193 S. E., 165; *Mercer v. Williams,* 210 N. C., 456, 187 S. E., 556; *Keith v. Gregg,* 210 N. C., 802, 188 S. E., 849. *In re Parker,* 209 N. C., 693, 184 S. E., 532.

The contention of the defendant cannot be sustained, and in the trial below, we find

No error.

MRS. ELMA S. WYRICK, ADMINISTRATRIX OF THE ESTATE OF GLENN WYRICK, v. BALLARD & BALLARD COMPANY, INC.

(Filed 3 May, 1944.)

1. Automobiles § 18g—

In an action to recover damages for the wrongful death of plaintiff's intestate caused by a collision between the automobile of plaintiff's intestate and a truck of the defendant, where plaintiff's evidence tended to show, though no eyewitness testified, that defendant's truck was being

operated on its left-hand side of the highway and the coupe of plaintiff's intestate was being operated on its right-hand side of the highway, at the time of the collision between the two vehicles going in opposite directions, there was error in the allowance of a motion for judgment as of nonsuit at the close of plaintiff's evidence.

2. Negligence §§ 5, 19a—

When a thing which causes an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care.

3. Negligence § 19a—

Direct evidence of negligence is not required, but the same may be inferred from facts and circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury.

APPEAL by plaintiff from *Harris, J.*, at September Term, 1943, of WAKE.

W. L. Spencer and Douglass & Douglass for plaintiff, appellant.
Joyner & Yarborough for defendant, appellee.

SCHENCK, J. This is an action for the wrongful death of the plaintiff's intestate resulting from a collision between a motor truck owned by the defendant and operated by its employee in the course of his employment and a Plymouth Coupe driven by the plaintiff's intestate.

It is admitted that the collision took place on 17 October, 1940, between Durham and Raleigh while the truck was being driven westward on Highway 70-A and the coupe was being driven eastward on said highway, and that as a result of the collision the plaintiff's intestate was killed.

It is alleged in the complaint, *inter alia,* that the defendant's truck was being "operated on the left-hand side of the highway, contrary to the law provided therefor and in violation of section 2621 (293-5) of the North Carolina Code." (G. S., 20-146, 147-148.)

No eyewitnesses to the collision were introduced. The driver of the coupe, the intestate, was dead, and the driver of the truck was not called. Hence it was necessary to determine the case upon evidence which was largely circumstantial in its nature. The testimony of the plaintiff's witness, T. R. Stone, was to the effect that he was driving eastward toward Raleigh, in the same direction as the intestate was driving, and that he came upon the scene of the collision very soon after it happened, that the deceased was still under the wreckage when he arrived and was

taken out and he took the deceased to the hospital; that the truck was headed westward toward Durham and the automobile was headed eastward toward Raleigh, that Wyrick's (intestate's) automobile was on the right side of the highway (the south side), and the front of the truck was resting on the front of the automobile; that the truck was loaded with flour and flour was on Wyrick's side of the highway and a lot of glass and dry mud from the two vehicles were also on the south side of the highway; that there were tire marks on the south side of the highway leading up to the truck and extending back toward Raleigh 40 or 50 feet on the same side of the highway, one of the marks of the dual wheels of the truck was on the center line and one was a little over the center line; the road was straight; that while the Plymouth Coupe was on its right side, the south side of the highway, the front of the truck was on top of the coupe and the rear of the truck was on the north side of the highway, the truck being across the center line.

When the plaintiff had introduced her evidence and rested her case the defendant lodged motion for judgment as in case of nonsuit (C. S., 567; G. S., 1-183), which motion was allowed, and from judgment predicated on such ruling the plaintiff appealed, assigning such ruling and judgment as error.

Barnhill, J., in *Etheridge v. Etheridge*, 222 N. C., 616, 24 S. E. (2d), 477, enunciates the following rule: "When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care." And, also, "Direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. *Fitzgerald v. R. R.*, 141 N. C., 530, *Dial v. Taylor, supra.*" (151 N. C., 284, 65 S. E., 1101.) See also *Boone v. Matheny, ante*, 250, and cases there cited.

We are constrained to hold that there was error in the ruling of the court below. There is evidence tending to show that the defendant's truck was being operated on its left side of the highway and the plaintiff's intestate's coupe was being operated on its right side of the highway at the time of the collision between the two motor vehicles proceeding in opposite directions. Such evidence consisted of the testimony of the witnesses who were at the scene of the collision almost immediately after it occurred to the effect that they saw glass, flour and mud on the south

side of the highway, the intestate's right side and the defendant's left side of the highway, and nothing of the kind on the opposite side of the highway, the north side. This was evidence that the defendant's truck was being operated in violation of the statutes pleaded which required the defendant to drive his truck on his right side of the highway and to give the plaintiff's coupe half of the main traveled portion of the roadway as nearly as possible, and that this violation proximately caused the collision which resulted in the death of plaintiff's intestate.

The case at bar differs from *Cheek v. Brokerage Co.,* 209 N. C., 569, 183 S. E., 729, in that it is therein said: "There is no evidence to establish on which side of the center line of the road the collision took place, or to establish the failure by the defendant to keep a proper lookout."

The judgment of the Superior Court is

Reversed.

STATE v. JOHN GORDON.

(Filed 10 May, 1944.)

1. Intoxicating Liquors § 9d—

In a criminal prosecution for having liquor for the purpose of sale, where the State's evidence tended to show that defendant, who was not listed as owner or driver, had possession of a truck loaded with 579 cases of liquor, part of an interstate shipment from Maryland to South Carolina which had been diverted far from the usual route, the packages not being labeled as to consignee and contents in violation of the U. S. penal code, and the evidence also showing that defendant had offered to let one have some of the liquor and was, when arrested, apparently in the act of making delivery to this party, who then had $1,000.00 in cash on his person, an exception to a refusal to dismiss as in case of nonsuit, G. S., 15-173, is without merit, the evidence being amply sufficient without resort to the statutory presumption, G. S., 18-32.

2. Intoxicating Liquors § 7—

A cargo of liquor, started on its way as an interstate shipment, may be diverted to unlawful purposes and the nature of the shipment does not license the one in possession to dispose of it at will in this State.

3. Intoxicating Liquors § 9b—

The Turlington Act, G. S., 18-2—18-32, contemplates that no person shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions and, ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession.

4. Intoxicating Liquors § 9f: Criminal Law § 53b—

Where an instruction, that "the possession of more than one gallon of liquor constitutes *prima facie* evidence of unlawful possession for the purpose of sale in violation of G. S., 18-32," is directed to a count charging unlawful possession for the purpose of sale, and defendant is convicted on that count and on another count of unlawful transportation, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case.

5. Criminal Law § 81c—

Error in the admission of evidence is rendered harmless by the later admission of substantially similar evidence without objection.

6. Criminal Law § 53f—

Where the court in its charge substantially complies with G. S., 1-180, if defendant desires further elaboration and explanation, he should tender prayers for instructions; otherwise, he cannot complain.

7. Criminal Law §§ 10, 45—

One, who does not seek the right to prosecute and who is not charged with participation in the crime, cannot complain of the court's refusal to grant his petition to intervene in a criminal prosecution.

APPEAL by defendant and the Atlantic States Motor Lines, Inc., petitioner, from *Burgwyn, Special Judge,* at November Criminal Term, 1943, of WAKE. No error.

Criminal prosecution on warrant charging violation of certain provisions of the prohibition law.

The Calvert Distilling Company, of Baltimore, Maryland, delivered to the Atlantic States Motor Lines, Inc., 727 cases of liquor for transportation under a master way bill showing Charleston, South Carolina, as the point of destination. The "truck dispatch" sheet and other documents name Augusta, Georgia, as the destination. The transportation company hired the truck of one M. C. Garner with Charles Stephens as driver to transport 579 cases, and the remaining 148 cases were shipped on another truck as a part of a load of miscellaneous freight. Free astray bills in addition to the master way bill were issued.

The motor company's main terminal is at High Point, N. C. Similar shipments go by Danville, Va., and High Point. On 10 July, the Garner truck was seen in Wake County in charge of the defendant. Defendant went to Garner's home and used his car to visit one Mills and he offered to let Mills have some of the liquor. Thereafter he drove the truck out on the Pittsboro road with Mills following on his automobile. They were later found by officers just across the Chatham County line. At that time the automobile was backed up to the rear of the truck and apparently defendant was in the act of transferring cases

of liquor to Mills' car. Defendant was arrested and the liquor was seized and is now being held by the proper authorities pending the final determination of this action.

When the case was called for trial counsel for the Motor Lines appeared and moved the court that the Motor Lines be allowed to participate in the trial and through counsel to examine and cross-examine witnesses. The court offered to permit the Motor Lines to appear through counsel as requested, and in addition to offer evidence, if it would agree that the jury trying the case might pass finally upon the rights of the Motor Lines, if any, to the possession of the property involved, and that except for errors committed by the court in the trial there would be no appeal. It declined to so agree, and the court denied its motion. It excepted.

There was a verdict of guilty on three counts. (1) Unlawful possession of intoxicating liquor; (2) unlawful possession of intoxicating liquor for the purpose of being sold, given away, or otherwise disposed of; and (3) unlawful transportation of intoxicating liquor.

The Motor Lines then filed a petition for an order directing the officers to deliver the cargo of liquor to it as the rightful custodian for transportation to the original assignee. The court declined to sign the order tendered therewith. It excepted and gave notice of appeal.

The court entered an order of confiscation under the statute, but at the same time granted any and all persons claiming an interest in the liquor thirty days within which to intervene and assert their rights. The order of confiscation was suspended, pending the hearing on such petitions as might be filed. The Motor Lines excepted. Thereafter, it intervened and set up its claim to the right of possession of the liquor. Hearing on this petition is still pending.

The court pronounced judgment on the verdict, and defendant and the petitioner appealed.

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

Walter D. Siler, W. P. Horton, Wm. Y. Bickett, and L. S. Brassfield for Board of Education of Wake County and Board of Education of Chatham County, appellees.

Douglass & Douglass for John Gordon, defendant, appellant.

Roberson, Haworth & Reese and Joyner & Yarborough for Atlantic States Motor Lines, Inc., petitioner, appellant.

BARNHILL, J. Defendant's exception to the refusal of the court to dismiss as in case of nonsuit under G. S., 15-173; C. S., 4643, is without merit. There is ample evidence in the record which tends to show that

the shipment, even though interstate in origin, was being diverted and prostituted to purposes which are violative of our law. The truck was not sealed. The packages were not so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein. Thus the shipment was in direct violation of the penal code of the United States. 18 U. S. C. A., sec. 390. The truck was in possession of one who was not listed as owner or driver. He was considerably off the course usually followed in making such shipments. He stopped in or near Apex for several hours, during which time he approached Mills and offered to let him have some of the liquor. When apprehended he was apparently in the act of making a delivery to Mills, who then had $1,000 in cash on his person. These and other facts and circumstances disclosed by the testimony are amply sufficient to support an adverse verdict without resort to any statutory presumption. G. S., 18-32.

The court instructed the jury as follows:

"Now, I charge you that whether or not the liquor was properly and legally consigned to the Atlantic States Motor Lines, and whether or not it was an interstate shipment, if you are satisfied beyond a reasonable doubt that while it was in this county, John Gordon took possession of it and had it in his possession for the purpose of sale, it would become your duty to find him guilty of possession of whiskey for the purpose of sale, unlawful possession of whiskey for the purpose of sale."

We perceive no error in this instruction. Exception thereto is without merit. To hold otherwise would require the conclusion that a cargo of liquor, once started on its way as an interstate shipment, could not be diverted to unlawful purposes and that the nature of the shipment licenses the one in possession to dispose of it at will in this State with impunity. Such is not the purpose, intent, or effect of the law protecting shipments in interstate commerce. *Johnson v. Yellow Cab Transit Co.*, 88 L. Ed., 553; *Duckworth v. Arkansas*, 86 L. Ed., 294, 138 A. L. R., 1144; *Carter v. Commonwealth of Va.*, 88 L. Ed., 387.

But the court instructed the jury further that the possession of more than one gallon of liquor constitutes *prima facie* evidence of unlawful possession for the purpose of sale in violation of the statute, G. S., 18-32; C. S., 3379, to which defendant excepts.

The Act, G. S., 18-2, 18-32, contemplates that no person shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions. One of these is a person engaged in the *bona fide* transportation of liquor through, but not to be delivered in, the State. Ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class author-

ized by law to have intoxicants in his possession. *S. v. Epps,* 213 N. C., 709, 197 S. E., 580; *S. v. Davis,* 214 N. C., 787, 1 S. E. (2d), 104.

Even so, the defendant contends that on this record, in the light of the fact the State offered evidence of the interstate nature of the shipment, the general rule does not apply; that the State, having offered evidence of lawful possession, cannot now call to its aid any statutory presumption of unlawfulness.

Conceding without deciding that this position may be sound and that the charge was erroneous, it cannot avail the defendant here. The instruction complained of was directed to the count charging unlawful possession for the purpose of sale. Defendant was convicted on all three counts. The offenses charged are of equal gravity, and the sentences imposed run concurrently. On this state of the record defendant must show error affecting the whole case. *S. v. Pace,* 210 N. C., 255, 186 S. E., 386; *S. v. House,* 211 N. C., 470, 191 S. E., 24; *S. v. Epps, supra; S. v. Johnson,* 220 N. C., 252, 17 S. E. (2d), 7; *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360.

The State, having examined Mills as its witness, on cross-examination of the defendant's witness Garner, elicited the statement that he, the witness, had heard that Mills dealt in whiskey. It stressfully contends that this evidence was competent as tending to show that Mills was the kind or type of person the defendant would approach to make a sale of liquor, and that as such it was a material circumstance lending credence to its other testimony. There is much force in the argument. In any event, the error, if any, was rendered harmless by the later admission of substantially similar testimony without objection. *S. v. Hall,* 199 N. C., 685, 155 S. E., 567; *S. v. Hudson,* 218 N. C., 219, 10 S. E. (2d), 730.

It is conceded that the court below fully instructed the jury as to the evidence and the contentions of the parties. A careful examination of the charge discloses that he applied the law in substantial compliance with the requirements of G. S., 1-180; C. S., 564. If the defendant desired further elaboration and explanation of the law he should have tendered prayers for instructions. In the absence thereof he cannot now complain. *Ellis v. Wellons, ante,* 269; *S. v. Puckett,* 211 N. C., 66, 189 S. E., 183; *Arnold v. Trust Co.,* 218 N. C., 433, 11 S. E. (2d), 307; *Motor Co. v. Insurance Co.,* 220 N. C., 168, 16 S. E. (2d), 847.

We have carefully examined the other exceptive assignments of error. In them we find no sufficient cause for disturbing the verdict.

PETITIONER'S APPEAL.

The petitioner cites no authority which sustains its contention that it had the right to intervene and participate in the criminal prosecution of

the defendant. It did not seek the right to prosecute and it was not charged with participation in the crime. The issue was exclusively one of guilt or innocence. Hence, we can perceive no sound reason why it should be permitted to do so.

Even so, the court offered to permit it to become a party so as to be bound by the verdict. This offer it declined. Surely it does not seriously insist that it should be permitted to engage in the trial while clothed in a cloak of immunity protecting it against the results of an adverse verdict.

The statute provides: "The court, upon the conviction of the person so arrested, shall order the liquor destroyed." G. S., 18-6. (See also G. S., 18-13 and -48.) Whether this provision is in the nature of a forfeiture for crime or a confiscation as contraband is not presented for decision on this record. Upon its determination the rights of the petitioner largely depend. 30 Am. Jur., 541. As the question has not been decided by this Court, it should have full opportunity to be heard. This right the court below was careful to preserve. Petitioner was granted a hearing and opportunity to present its claim. But the hearing has not been had. It appealed before it was hurt.

As to defendant,
No error.

As to petitioner,
Appeal dismissed.

E. F. MIDDLETON, EDWIN MEDLOCK, JOHN MALLARD, INEZE DRAKE, ET AL., v. WILMINGTON, BRUNSWICK & SOUTHERN RAILROAD COMPANY.

(Filed 10 May, 1944.)

Taxation § 38c—

Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. A compliance with G. S., 105-403, is a prerequisite to a right of action for the recovery of taxes or any part thereof.

APPEAL by claimant, Machine Tool & Equipment Corporation, from *Burney, J.*, at October Term, 1943, of NEW HANOVER.

This is a receivership proceeding, instituted in 1933.

On 26 May, 1933, the United States of America, through the then Undersecretary of the Treasury, made and filed its proof of claim with the receiver of the Wilmington, Brunswick & Southern Railroad Company, in the sum of $90,000.00, evidenced by a promissory note, dated

15 January, 1921, payable five years after date, extended by agreement to 15 January, 1928. The claim included accrued and unpaid interest from 1 January, 1930, to 10 April, 1933, in the sum of $17,676.80, a total of $107,676.80, which indebtedness was secured by the hypothecation of First Mortgage Bonds in the principal sum of $168,000.00 issued by the Wilmington, Brunswick & Southern Railroad Company, 1 January, 1911.

The appellant, Machine Tool & Equipment Corporation, purchased this claim from the United States of America, on 22 April, 1943, and filed with the receiver a supplemental proof of claim as assignee of the claim of the United States of America, dated 29 June, 1943.

The indebtedness of the Wilmington, Brunswick & Southern Railroad Company and the receiver, on 18 February, 1943, exceeded the sum of $213,000.00.

A referee was appointed 18 February, 1943, to hear and pass upon all claims against said Railroad Company, and to determine the priorities thereof. Among the claims considered by the referee were those of Brunswick County and the town of Southport, for unpaid taxes, penalties and interest, duly assessed on the property and franchise of the railroad, during the years 1930 to 1943, inclusive. A claim for taxes due Brunswick County, including penalties and interest, aggregating $10,875.65, was allowed. A claim for taxes due the town of Southport, including interest and penalties, aggregating $1,107.16, was allowed.

All the assets of the said Railroad Company were sold at public auction pursuant to an order of court, for the sum of $72,500.00, to the appellant or its assignee, except $4,000.00 of real estate situate in the town of Southport, and the sale was confirmed at the August Term, 1943, of the Superior Court of New Hanover County, by his Honor, Burney, Judge.

A hearing on the report of the referee and the exceptions filed thereto by the appellant, was held before his Honor, Burney, J., 22 October, 1943, and on said date the court signed an order, overruling the exceptions and confirmed and approved the findings of fact and conclusions of law of the referee in respect to the allowance of the aforesaid claims.

The Machine Tool & Equipment Corporation excepted to the order of the court approving the tax claims of the county of Brunswick and town of Southport, and appealed to the Supreme Court.

Irwin Geiger for appellant, Machine Tool & Equipment Corp.

E. J. Prevatte for appellee, Brunswick County.

J. W. Ruark for appellee, town of Southport.

DENNY, J. The appellant contends that the court, notwithstanding the provisions of G. S., 105-403; C. S., 7976, should not have allowed that portion of the respective claims for taxes filed by the county of Brunswick and the town of Southport which consisted of penalties and interest accrued on taxes assessed prior to receivership and which accumulated during the period when the property so assessed was in the custody of the court.

Upon the threshold of this appeal we are confronted with motions, interposed in this Court on behalf of the county of Brunswick and the town of Southport, to dismiss the appeal, on the ground that the question purported to be presented to the court is moot. The motions are based upon the following, which appears in the agreed statement of the case on appeal: "Immediately after the rendition (of the order) of Burney, J., dated 22nd October, 1943, the appellant paid to Brunswick County and the City of Southport their entire claims for taxes, interest and penalties and the costs of this action."

It does not appear of record that the taxes, penalties and interest, involved herein, were paid under protest or that the appellant has complied with the provisions of the statute, G. S., 105-406; C. S., 7979, which is a prerequisite to a right of action for the recovery of taxes or any part thereof. *Hunt v. Cooper,* 194 N. C., 265, 139 S. E., 446; *Blackwell v. Gastonia,* 181 N. C., 378, 107 S. E., 218; *Teeter v. Wallace,* 138 N. C., 264, 50 S. E., 701; *R. R. v. Reidsville,* 109 N. C., 494, 13 S. E., 865. Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. *Maxwell, Comr. of Revenue, v. Hans Rees' Sons,* 199 N. C., 42, 153 S. E., 850.

In view of the disclosure in the record to the effect that the appellant has paid the taxes, penalties and interest involved herein, in the absence of a showing that the appellant has preserved its right to maintain actions for the recovery of the portion of the taxes to which it might be entitled, in the event of a favorable determination of the question presented, the motions to dismiss must be allowed.

Appeal dismissed.

MELVIN WILLIAMSON v. M. D. SPIVEY.

(Filed 10 May, 1944.)

1. Boundaries § 7: Reference §§ 4a, 12—

In a proceeding to establish the dividing line between two adjoining landowners, where the original papers had been lost and substituted

pleadings filed and reference made, apparently without objection, the report of the referees reciting that the reference was for finding the true dividing line and the trial court finding the report of the referees to be in compliance with their appointment to determine the matters at issue, motion of plaintiff to remand to the clerk, on the averment that the reference was simply to locate the "agreed line," was properly overruled, and, after hearing and overruling exceptions to the report, there was no error in a judgment confirming same.

2. Judgments § 30—

The principle of *omnia rite acta praesumuntur* and *prima facie* presumption of rightful jurisdiction arise from the fact that a court of general jurisdiction has acted upon a matter.

3. Reference §§ 4a, 12: Appeal and Error § 37e—

On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause.

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

APPEAL by plaintiff from *Burney, J.*, at October Term, 1943, of COLUMBUS.

Special proceeding to establish dividing line between adjoining landowners.

It appears that summons was issued and petition duly filed 15 November, 1934; that referees were appointed at the August Term, 1936, a majority of whom filed their report 1 October, 1941; that the original papers have been lost; that order was entered at the July Term, 1942, permitting "substitute pleadings," which have been filed, and that order was entered by Judge Leo Carr at the December Term, 1942, adjudging "that the Report of the Referees heretofore appointed by the court to determine the matters at issue in this cause, complies with said orders and is the Report of said orders and is the Report of said Referees . . . and the plaintiff, through counsel, having no objection to said finding, the court in its discretion allows the plaintiff until Monday, December 7, 1942, to file any exceptions to said report he may be advised are proper."

Thereafter the plaintiff lodged motion to remand to the clerk with direction that he proceed as in special proceedings to establish the disputed boundary line. Overruled; exception.

Exceptions were thereupon filed to the report of the referees, which were heard and overruled at the October Term, 1943.

From judgmnt confirming the report of the referees, the plaintiff appeals, assigning errors.

Varser, McIntyre & Henry for plaintiff, appellant.
No counsel appearing for defendant.

STACY, C. J. The motion of the plaintiff to remand to the clerk perhaps would have been allowed, but for the order entered at the December Term, 1942, finding the report of the referees to be in compliance with their appointment, "to determine the matters at issue," and this finding was made without objection on the part of the plaintiff. It is recited in the report that the cause was referred to the referees "for the purpose of finding the true dividing line between the lands of the plaintiff . . . and the lands of the defendant." McIntosh on Procedure, 563. True, the plaintiff avers the reference was simply to locate the "agreed line," but the report indicates a different understanding on the part of a majority of the referees, which was confirmed by Judge Carr without objection.

In addition, the defendant is entitled to call to his aid the principle of *omnia rite acta praesumuntur* and the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter. *S. v. Adams,* 213 N. C., 243, 195 S. E., 822; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873; *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209. *Cf. Beck v. Bottling Co.,* 216 N. C., 579, 5 S. E. (2d), 855.

The exceptions to the report of the referees present no serious difficulty. They are without substantial merit. The reference, as well as its composition, appears to have been made without "objection on the part of either the plaintiff or the defendant." G. S., 1-189; McIntosh on Procedure, 570. Hence, the findings of the referees, approved as they are by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause. *Wilson v. Allsbrook,* 205 N. C., 597, 172 S. E., 217; *Corbett v. R. R.,* 205 N. C., 85, 170 S. E., 129; *Thompson v. Smith,* 156 N. C., 345, 72 S. E., 379 (opinion by *Walker, J.,* pointing out the difference between the duties of the trial court, *Anderson v. McRae,* 211 N. C., 197, 189 S. E., 639, and the appellate court in dealing with exceptions to reports of referees).

As no reversible error has been made to appear, the result will be upheld.

Affirmed.

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

STATE v. BERT HALL.

(Filed 24 May, 1944.)

1. **Intoxicating Liquors § 8—**

Where one, who was in possession of seized liquor at the time he was arrested for unlawful acts with respect thereto, pleads guilty to charges of unlawful possession and unlawful transportation of this liquor and thereupon personal judgment is rendered against him, the provisions of the statute, G. S., 18-6, are mandatory that the judgment also order the confiscation and forfeiture of the liquor so unlawfully possessed and transported.

2. **Same—**

Our statutes seem to indicate the legislative intent to be that liquor itself, when the subject of unlawful traffic and capable of harmful effects, offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. Only in case of failure to establish a violation of the law is the restoration of the liquor permitted. G. S., 18-13. However, the processes of our courts are available to anyone legally interested to present his claim for seized liquor, and his plea will be heard.

3. **Intoxicating Liquors § 2—**

Both by the Constitution of the United States (Amendment XXI) and our State statutes (G. S., 18-2, *et seq.*) liquor has been placed in a category somewhat different from other articles of commerce, and the State's regulations thereof should not be held obnoxious to the interstate commerce clause, unless clearly in conflict with granted Federal powers and congressional action thereunder.

4. **Intoxicating Liquors § 7—**

The Twenty-first Amendment to the Constitution of the United States removes the protection afforded interstate commerce only from shipments of liquor into a dry state, but does not affect shipments through such state. However, congressional action under the interstate commerce clause of the Constitution renders criminal the interstate transportation of liquor in packages unlabeled to show the consignee. 18 U. S. C. A. 390, amended 25 June, 1936.

5. **Same—**

When a cargo of intoxicating liquor, though started on its way as an interstate shipment, is diverted to unlawful purposes in violation of the law of the state in which it has come to rest, the initial character of the shipment does not clothe those in possession with immunity from prescribed penalties or oust the jurisdiction of the state courts, either as to person or property.

6. **Bailment §§ 1, 6—**

A bailee may sue a third person for interference with the bailment, but in order to do so he must have possession of the goods at the time of the trespass. Possession and control are essential elements in the law of bailment.

7. Intoxicating Liquor § 8—

Where liquor has been confiscated by judgment, in a criminal prosecution, an order, entered more than a year after seizure, awarding it to petitioning bailee can only be construed as affording ground for further action by the real party in interest, the subject matter of the order being no longer in existence and it being manifest that no claim therefor can be prosecuted by the petitioner.

APPEAL by the State from an order entered in the above entitled case by *Johnson, Special Judge,* at March Term, 1944, of CUMBERLAND. Reversed.

The order appealed from related to the disposition of a quantity of intoxicating liquor seized in the possession of the defendant Hall. From an order adjudging the interpleader, Roadway Express, Inc., entitled to the immediate possession of the liquor, the State appealed.

The defendant Bert Hall was charged in the recorder's court of Cumberland County with unlawful possession and transportation of 323 cases of intoxicating liquor. To this charge he pleaded guilty, and judgment was thereupon rendered imposing sentence on him, and also, in accordance with the North Carolina statute, decreeing confiscation and forfeiture of the liquor. From this judgment there was no appeal. The judgment was dated 27 February, 1943.

Shortly thereafter Roadway Express, Inc., filed a petition and interplea in the cause in the recorder's court alleging title to the 323 cases of liquor as bailee, and asked that immediate possession thereof be surrendered to it. It was set out in the petition, in substance, that the intervening petitioner was an Ohio corporation engaged in the motor trucking business as a common carrier in interstate commerce; that on 22 February, 1943, it leased from McElveen Motor Freight Lines a Ford truck and trailer for the transportation of a cargo of whiskey, including the 323 cases, from the Frankfort Distilleries, Inc., Baltimore, Md., consigned to Vincent Chicco, Charleston, S. C., the truck being operated by the defendant Bert Hall; that en route, due to motor trouble, the truck was stopped in Cumberland County, N. C., and some of the liquor having been disposed of the defendant Hall was indicted and convicted, and the liquor ordered confiscated; that petitioner had no knowledge of any unlawful acts on the part of Hall, who was an employee of McElveen Motor Freight Lines, and did not authorize him to maintain possession of the liquor except for the purpose of operating the truck and transporting the shipment from Baltimore to Charleston; that proper shipping papers were issued at the time of making the shipment, and that petitioner is owner of or bailee of the 323 cases of liquor. No bond was filed, nor was stay of execution of the recorder's judgment or impounding of the liquor requested.

On 2 March, 1944, more than a year later, the matter came on for hearing before the recorder, who, after hearing evidence and argument on the petitioner's claim, entered judgment overruling the motion and interplea of Roadway Express, Inc., and confirmed the disposition of the liquor as ordered in the original judgment in the criminal action. The petitioner appealed to the Superior Court upon the ground that the judgment was contrary to the evidence and the law, and violative of the Fifth Amendment to the Constitution of the United States.

At the hearing before the judge of the Superior Court, the pertinent circumstances of the transportation and seizure of the liquor in question were made to appear, substantially, as follows: 25 February, 1943, the Ford truck and trailer containing the liquor was discovered at a filling station near Fayetteville, N. C., backed up close to another truck apparently abandoned. Two men were rolling one of the trucks from the rear of the other. The Ford truck was an enclosed type without lock or fastening on the rear doors. There was no seal on the truck and no interstate commerce license number in view. The truck contained 323 cases of whiskey, labeled "Paul Jones," "Four Roses," and "M and M," all in pint and half-pint bottles. South Carolina revenue stamps were attached, but no North Carolina A. B. C. stamps. There were two broken cases in the lot, one of those was short 12 one-half pints and the other 18 pints. Around the truck were empty cartons and pieces of cartons, similar to those in the truck, showing same brand. A manifest stuck in the dash board called for 330 cases of whiskey and designated Vincent Chicco as consignee. On a paper under letterhead of McElveen Motor Freight Lines appeared the following: "Trailer sealed at Frankfort Distilleries. Seal #19928. Compensation $100—balance due $69.49 to be paid at Charlotte, N. C., upon clear delivery receipt, return of lease form and yellow manifest form with logs. Freight represented by above freight bills received by (signed) Bert Hall, driver." On the freight bill the destination was first written "Charlotte," and that stricken out and "Charleston" written under. None of the cartons bore designation of consignee or consignor. The whiskey was not being transported to or from a North Carolina A. B. C. store.

Bert Hall, the driver, stated the truck was never sealed or locked; that his employer was S. L. Stevenson, of Columbia, S. C., operating as McElveen Motor Freight Lines; that when his truck was disabled he was instructed by Stevenson to take another truck similarly loaded, which had accompanied him from Baltimore, and drive it to Columbia, leaving the driver of the other truck in charge of the broken truck; that he did this, and came back to Fayetteville. When he came back to Fayetteville he was "ordered to pull that load of whiskey to Columbia."

It was in evidence from an employee of the filling station that the Ford truck containing the liquor in question, and an International truck driven by a red-headed young man, arrived at the filling station near Fayetteville, 23 February, the Ford truck disabled. Both drivers were drinking and defendant Hall gave this witness a pint of whiskey from which he became intoxicated. Other people around the station were drinking Paul Jones and Four Roses whiskey. The next day the International truck was gone, but the Ford truck and red-headed driver in charge were still there. This driver was disposing of the whiskey, and witness saw him carry off 16 bottles in a sack, which he said he was going to sell.

Petitioner offered the evidence of its manager, B. H. Ways, tending to show that 19 February, 1943, it was offered by Frankfort Distilleries, Inc., a shipment of liquor for Charleston, S. C.; that the Roadway Express, having no equipment available, entered into a leasing agreement 22 February, 1943, with Bert Hall, agent for McElveen Motor Freight Lines and operator of the latter's truck and trailer; that Bert Hall took the truck and trailer to the warehouse of the Distilleries Company where 330 cases of whiskey, the property of the Distilleries Company, were loaded to be transferred by the Distilleries Company to Vincent Chicco; that the bill of lading included also another shipment of liquor to Columbia, S. C., which was included for the purpose only of affecting the freight rate; that there accompanied the bill of lading a dray ticket for the cargo on the truck operated by Hall indicating 330 cases of whiskey from Baltimore to Charleston; that the cargo on the other truck was routed direct to Columbia; that Bert Hall was instructed to take the cargo to Charleston without stop en route and upon delivery McElveen Motor Freight Lines was to have been paid by Roadway Express for use of its equipment; when the cargo was loaded it was found that the trailer could not be sealed or its door fastened, and Hall was cautioned not to leave the cargo unprotected. There was also evidence from employees of the Frankfort Distilleries, Inc., that 330 cases were duly checked as loaded on the truck consigned to Frankfort Distilleries, Inc., Charleston, S. C., for distribution by Vincent Chicco.

It was stated in the argument in this Court that in accordance with the order of the recorder the whiskey seized had been sold by the Cumberland County A. B. C. Board. The proceeds of sale presumably were placed in the school fund (G. S., 18-13). The question of the proper disposition of the liquor or proceeds of sale is not presented or considered. It was also stated the truck and trailer had been released by order of court on the petition of the Credit Company which held a valid lien thereon.

Upon the evidence presented the court below found that the operator of the truck was not authorized to maintain possession of the contents except for the purpose of transporting the same from Baltimore to Charleston, and that the shipment was in interstate commerce undertaken by the petitioner in good faith; that interpleader had not been convicted of violation of any law pertaining to the handling of intoxicating liquor and had violated no law or regulation with respect to the transportation of the aforesaid cargo. It was thereupon ordered that the judgment of the recorder be overruled, and that Roadway Express, Inc., as bailee, was entitled to the immediate possession of the 323 cases of whiskey. To this order the State and the Cumberland County Alcoholic Beverage Control Board excepted, and appealed.

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

James R. Nance for Cumberland County Alcoholic Beverage Control Board.

Robert H. Dye for defendant.

DEVIN, J. The judgment below, from which the State appealed, denied the power of the court to enforce the provisions of the statute with respect to a quantity of intoxicating liquor which had been seized by State officers while being unlawfully possessed and unlawfully transported in the State by the defendant Bert Hall. The ruling appealed from was based on the ground that the liquor was being transported in interstate commerce and was therefore protected from seizure for unauthorized acts of the persons in possession, however unlawful.

In the consideration of the question thus presented we note at the outset that the defendant Bert Hall, who was in the possession of the seized liquor at the time he was arrested for unlawful acts with respect thereto, pleaded guilty to charges of unlawful possession and unlawful transportation of this liquor. Thereupon personal judgment was rendered against him, and, in accord with the mandatory provisions of the statute, the judgment also ordered the confiscation and forfeiture of the liquor so unlawfully possessed and transported. G. S., 18-6. From this judgment Hall did not appeal.

From an examination of this and other related statutes it will be observed that ample provision is made for determining right of possession of innocent claimants in case of seizure of vehicles used in the unlawful possession and transportation of intoxicating liquor, but the liquor itself is not included in this category. The absence of such provision in the matter of seized liquor, together with the requirement that it be destroyed, would seem to indicate the legislative intent that the

liquor itself when the subject of unlawful traffic and as capable of harmful effects offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. 30 Am. Jur., 541. Only in case of failure to establish a violation of law is the restoration of the liquor permitted. G. S., 18-13. However, in accord with approved practice the processes of the courts of North Carolina are available to anyone legally interested to present his claim for the possession of seized liquor, and his plea will be heard. *S. v. Gordon, ante,* 304.

In this case petitioner, after filing his interplea, waited more than a year before prosecuting his claim, at which time the liquor had been disposed of in accordance with the recorder's judgment. However, the adjudication on appeal in the Superior Court in petitioner's favor is challenged by the State on behalf of the public agencies directly involved. Thus the question of the propriety of the judgment declaring petitioner entitled to the immediate possession of the described liquor is now presented to this Court for determination.

The North Carolina statutes have banned the transportation of intoxicating liquors within its borders except in restricted instances, and declared its possession in quantity unlawful except under special circumstances not here pertinent. G. S., 18-2. Both by the Constitution of the United States (Amendment XXI), and the State statutes liquor has been placed in a category in some respects different from that of other articles of commerce, and the State's regulations aimed at the suppression of its prohibited transportation and unlawful possession should not be held obnoxious to the interstate commerce clause of the United States Constitution unless clearly in conflict with granted Federal powers and congressional action thereunder.

The evidence heard below reveals as one of the significant circumstances attending this shipment that the truck leased by petitioner and in which the liquor was being transported had no fastening, lock or seal on its doors, and that none of the packages of liquor were anywhere labeled to show the name of the consignee, in violation of the express provisions of the Federal statute. 18 U. S. C. A. sec. 390. Thus a cargo of whiskey without legal safeguards, in small bottles, was being transported in an open truck within the State in violation of State laws, and handled in such a manner as to facilitate the convenient disposal of the liquor. Clearly the shipment was being diverted from permitted channels. As a result, after the truck had remained in Fayetteville some three days seven cases of liquor had been disposed of and those having custody for the carrier were actively engaged in selling it.

Under these circumstances, was the seizure of the liquor and the arrest of the person in charge an unlawful interference with interstate com-

merce, or did it deprive the petitioner of property without due process of law, or take its property for public use without just compensation?

The record in this case discloses that under the State law and in a court of competent jurisdiction, the person in the actual possession of a large quantity of intoxicating liquor has been adjudged guilty of unlawful possession and unlawful transportation thereof within the State. This conviction entailed not only a personal penalty against the person, but brought the liquor itself, when thus being unlawfully possessed and transported, within the condemnation of the law, which requires its destruction or expropriation for the benefit of the public school fund.

Thus we are dealing with a case in which North Carolina is undertaking to enforce her own laws. *Carter v. Virginia,* 320 U. S., ... (88 Law. Ed., 387). The State can lawfully impose restrictions upon the interstate transportation of liquor through its borders by requiring permits, bonds or the designation of definite routes of travel. *Carter v. Virginia, supra; Johnson v. Yellow Cab,* 88 Law. Ed., 553; *Duckworth v. Arkansas,* 314 U. S., 390, 86 Law. Ed., 294. We see no reason to deny the right of the State to enforce its laws with respect to this shipment of liquor, under the circumstances here presented, notwithstanding the liquor was ostensibly designated for a destination beyond the State. We think it was subject to immediate seizure. *Ziffrin v. Reeves,* 308 U. S., 132.

In the case last above cited, where it was sought in a U. S. District Court to restrain the enforcement of the contraband and penal provisions of a state statute of Kentucky regulating the transportation of intoxicating liquor, it was said by a unanimous Court, "Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. . . . The state may protect her people against evil incident to intoxicants, *Mugler v. Kansas,* 123 U. S., 623; *Kidd v. Pearson,* 128 U. S., 1, and may exercise large discretion as to means employed."

The effort to exercise control in the public interest over the traffic in intoxicating liquor has been attended with difficulty, "due," as said by *Chief Justice Stone* in *Duckworth v. Arkansas, supra,* "to its tendency to get out of legal bounds." Here, the judgment of the recorder upon the evidence in this case in ordering the confiscation of the liquor was in compliance with the mandatory provisions of the North Carolina statute and should have been upheld.

We think the controlling principle of law to be applied here is that when a cargo of intoxicating liquor, though started on its way as an interstate shipment, is diverted to unlawful purposes in violation of the law of the state in which it has come to rest, the initial character of the shipment does not clothe those in possession with immunity from prescribed penalties or oust the jurisdiction of the state courts, either as to person or property. This was the rule laid down in the recent case of *S. v. Gordon, ante,* 304.

We note further that the record does not disclose the real ownership of the whiskey seized. Neither the Frankfort Distilleries, Inc., by and to whom it was consigned, nor Vincent Chicco to whom it was to be delivered for distribution, has interposed any claim for it. The only claim for its release is filed by Roadway Express as bailee. It is a familiar principle that a bailee may sue a third person for interference with the bailment. But in order to entitle him to do so he must have been in possession of the goods at the time of the trespass. 8 C. J. S., 317; *R. R. v. Baird,* 164 N. C., 253, 80 S. E., 406. "Possession and control are essential elements in the law of bailment," said *Justice Brown* in *Matthews v. R. R.,* 175 N. C., 35, 94 S. E., 714. Here the situation was somewhat complicated by the method employed, whether by accident or design, in handling the shipment. It appears that petitioner, a motor carrier which had handled many shipments of liquor for the Frankfort Co. to South Carolina and Georgia, accepted this shipment, but not having available equipment, leased or rented for the transportation of this whiskey to Charleston a truck belonging to McElveen Lines and operated by Bert Hall. In the petition it was alleged that Hall was an employee of McElveen Lines. The written lease signed by Bert Hall stated that possession and control of the truck was leased to Roadway Express. It was stipulated that "while the equipment is under the direction and control of Roadway Express, Inc., it shall be operated by lessor (McElveen) or his representative while in the employ of Roadway Express, Inc." Roadway Express agreed to pay compensation for rental and wages. If Bert Hall were an independent contractor in the operation of his truck, then petitioner could not be said to have been in actual possession of it at the time of the seizure. That is, if Roadway Express, though the shipment was offered to and accepted by it, merely turned it over to another for uncontrolled handling, it could not sustain its claim as bailee. On the other hand, if a simple agency resulted from the contract of lease, and Hall were merely the *alter ego* of the Roadway Express, it as principal can occupy no superior position with respect to third parties and must suffer for the fault of the agency which it has created. Neither Bert Hall nor his employer or lessee can claim immunity from the penalty invoked by his unlawful conduct.

The Twenty-first Amendment to the Constitution of the United States removes the protection afforded interstate commerce only from shipments into a dry state, but does not affect shipments through such state. *U. S. v. Gudger,* 249 U. S., 373. However, congressional action under the Interstate Commerce Clause of the Constitution does render the things done and omitted by the petitioner itself as well as by its agent, Bert Hall, in this case, criminal offenses under Federal law (18 U. S. C. A. 390, amended 25 June, 1936). When these violations of Federal statutes also give rise to and result in violations of state laws, the offender may not be heard to complain of the unfavorable result.

The order of the court below, entered more than a year after the seizure, declared Roadway Express, Inc., as bailee, entitled to the immediate possession of the 323 cases of whiskey. However, the record discloses that this whiskey had long before been ordered confiscated and sold. It is admitted this has been done. Presumably the proceeds have been covered into the public school fund. It appears, therefore, that the subject matter of the order is no longer in existence, and the effect of the order could only be construed as affording ground for further action by the real party in interest with respect to the proceeds. In that event it is manifest that a claim against the state or its agency for reimbursement could not be prosecuted in this action by the petitioner.

This case differs in material respects from *Johnson v. Yellow Cab Transit Co.,* 88 Law. Ed., 553. In that case liquor being transported through the State of Oklahoma en route to the U. S. Military reservation of Fort Sill was seized by state officers. No action, criminal or civil, was pending or commenced in state courts, and claimant brought suit in the U. S. District Court against the state officers for a mandatory injunction for return of the liquor. There was no evidence of violation of law by those from whom the liquor was seized while in the State of Oklahoma.

Exceptions were noted to the findings of the court below. In so far as these findings are not in accord with the record or supported by the evidence, the exceptions are sustained.

For the reasons herein stated, the judgment is

Reversed.

GEORGE NASSANEY v. R. B. CULLER, TRADING AS NATIONAL UPHOLSTERY COMPANY.

(Filed 24 May, 1944.)

1. Pleadings §§ 15, 22—

In a suit to rescind a contract and for a return of the purchase price paid, where the complaint alleges that defendant sold plaintiff a truck and trailer for a down payment, balance in monthly installments from payments to plaintiff for hauling freight for defendant, who agreed to furnish sufficient freight for that purpose, and after a substantial sum had been paid on the balance of the purchase price from such freight, the defendant took possession of the truck and trailer, arbitrarily refused to give plaintiff any more freight, demanded the balance of the purchase money, and attempted to sell the truck and trailer privately, a cause of action is stated and the allowance on the trial of an amendment to the complaint, alleging a public sale of the property by defendant to himself, and also conversion, and the court's refusal to grant defendant a continuance on that account are not prejudicial errors.

2. Pleadings §§ 21, 22—

The court in its discretion may allow an amendment to pleadings setting up new matter, even where the transaction occurred after the action was brought, provided it does not assume the role of a new and entirely different claim. G. S., 1-163.

3. Same: Limitation of Actions § 15—

A new cause of action may be introduced by way of amendment to the original pleadings; but if the amendment introduces new matter, or a cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit.

4. Pleadings § 22—

Ordinarily, when an amendment is made containing substantially new and material allegations, the opposing party must be given an opportunity to meet the new allegations and a continuance for such purpose has been regarded as a matter of right; but not so where the facts set up are well known to the other party and a continuance would not put him in a position to dispute them.

APPEAL by defendant from *Gwyn, J.*, at 1 November, 1943, Civil Term of the High Point Division of the Superior Court of GUILFORD.

The plaintiff brought this action on 4 November, 1942, and filed his complaint alleging that he had purchased from the defendant a 1941 Model Ford Tractor and a Black Diamond Trailer for the sum of $3,300, and at that time made a down payment in the sum of $728. The balance of the purchase price was to be paid in monthly installments from moneys paid to the plaintiff by the defendant for freight hauled by the

plaintiff for the defendant with the said tractor and trailer. The defendant, it is alleged, agreed to furnish the plaintiff sufficient freight to enable him to meet the monthly payments. The truck was delivered to the plaintiff, but as a matter of convenience, the title was not then transferred. Subsequently, the plaintiff leased to the defendant the tractor and trailer for a period of twelve months, or so long as the equipment was in such condition as to be safely used in hauling.

Immediately thereafter the plaintiff began to haul freight for the defendant, and continued to haul the same and make payments on the tractor and trailer until some time in December, 1941. At that time there was an approximate balance due on the tractor and trailer of $1,300.

Some time in December the defendant, declaring that his business was slow, discontinued giving the plaintiff freight to haul and directed the plaintiff to park the truck on defendant's premises. The defendant continued to make shipments to points covered in the lease, not through the plaintiff or by the leased truck and trailer, but by rail and other trucks, and refused to furnish the plaintiff with freight to haul; and thereupon demanded payment of the balance of the purchase price of the truck and trailer, and refused to permit the plaintiff to remove the same from the premises of the defendant and refused to transfer title until payment was made. Plaintiff alleges that he stayed in High Point about two months thereafter to perform his part of the agreement, and has always been ready and willing to do so; but defendant continued to refuse to give him any more freight to haul, and continued to demand payment for the balance due on the purchase price, which plaintiff was unable to make because of defendant's breach of his contract. Plaintiff alleges that the equipment was in excellent condition at all times and that defendant's refusal to furnish him with freight to haul was arbitrary and without cause.

The plaintiff further alleged that the defendant had sold the equipment described at private sale, without consent of plaintiff and without his knowledge.

Alleging that the breach of the contract was such as to abrogate the same at plaintiff's election, the plaintiff expressed his election to consider the contract rescinded, and demanded a return of the purchase price.

Some time thereafter, the defendant filed an answer, denying certain material allegations of the complaint and averring that the plaintiff had become in arrears with his payments on a promissory note secured by chattel mortgage on the tractor and trailer given to the defendant, and was also in arrears with payments to the Universal Credit Company

on the balance due it by the defendant, which the plaintiff had assumed, and that the plaintiff had failed to keep the tractor and trailer in good condition, with the result that it was not in condition for the hauling of defendant's freight. Defendant admitted that he had attempted to sell the equipment at private sale and had entered into an agreement for the sale of the same, but that the purchaser had returned the tractor without paying for it; and that defendant later offered the tractor and trailer for sale at public auction, after due advertisement as provided by law. The defendant in a further and affirmative defense alleged, *inter alia,* that on 21 December, 1942, he had sold the tractor under the chattel mortgage made to him, after due advértisement, "to the last and highest bidder for the sum of $1,000.00." (See paragraph 9, R., p. 9.)

When the cause came on for trial, the plaintiff asked leave to amend his complaint by alleging, amongst other things, that the defendant had become purchaser at the sale under the chattel mortgage made to him—which sale was set up by defendant as a further defense—and had converted the property—that is, the tractor and trailer—of the plaintiff to his own use, and demanded damages therefor. There were other allegations as to the value of the property at the time of the alleged conversion and the indebtedness thereupon. The amendment was allowed over the objection of the defendant, and defendant excepted. Thereupon, the defendant moved for a continuance of the cause upon the ground that the amendment had entirely changed the nature of the case, and that he was taken by surprise and had had no opportunity of preparing an adequate defense to the amendment. The motion for continuance was overruled, and defendant excepted.

The defendant then demurred, *ore tenus,* to the complaint and amendment as not constituting a cause of action. After argument upon this motion, it was overruled and defendant excepted.

The cause then proceeded to trial.

With reference to what took place at the mortgage sale and the final disposition of the equipment, the defendant, testifying in his own behalf, stated that the tractor and trailer were bid off by Mr. Fleet Lewis, and further said: "I asked him to be at the sale and if it did not bring as much as was owing on the debt I wanted it back because I wanted to get out of it what I had in it. I took it back over. I sold the tractor. I have not sold the trailer."

Testifying for the defendant, Fleet Lewis said: "At this sale I had the understanding or arrangement with Mr. Culler that I would go over and bid for him up to the amount of the indebtedness. When I bid I was bidding for him. I bid $1,000. I turned it over to Mr. Culler. I did not get the title in my name. I don't know the procedure. I had nothing

to do with getting a title—I just bought it off for him and let him look after the title part."

Issues were submitted to the jury, which were found in favor of the plaintiff; and judgment was rendered for the plaintiff in the sum of $592.50, together with costs.

Upon the submission of the issues referred to, the amount of the indebtedness upon the car had been agreed upon as $1,407.50. The reasonable market value of the car was answered by the jury as $2,000, and the amount of recovery, as determined by the jury, was $592.50.

From this judgment the defendant appealed, assigning errors.

James B. Lovelace for plaintiff, appellee.

Walter E. Crissman and C. A. York for defendant, appellant.

SEAWELL, J. There are three questions posed by the appeal: 1. Was the court justified, in law, in permitting plaintiff to amend his pleading? 2. Did the amendment to the pleading, as a matter of law, confer upon the defendant an unconditional right to continuance? 3. Did plaintiff's pleading in its final form state a cause of action?

The question whether the complaint states a cause of action must be answered in the affirmative. As originally filed, we think the allegations of fact, if supported by the evidence, would have justified a recovery of damages for a breach of contract, or a rescission of the contract, at the election of the plaintiff. The amendment does not detract from the legal effect of these allegations, but superadds to them the circumstance that the defendant bought plaintiff's tractor and trailer at his own mortgage sale. At this point we are concerned only with the inquiry whether the complaint, as amended, states a cause of action, of whatever kind, and we find that it does. *Meyer v. Fenner,* 196 N. C., 476, 146 S. E., 82.

The amendment allowed the plaintiff does not seem to be challenged because the transaction to which it relates occurred after the action was brought. That circumstance would not, *ipso facto,* preclude the plaintiff from pleading it by leave of court in a proper case as a matter occurring *puis darrein continuance* and important to be considered in disposing of the controversy—provided it does not assume the role of a new and wholly different claim. In such a situation—that is, where the matter is wholly distinct and did not stem out of the transaction set out in the original complaint and is not sufficiently correlated thereto—the real objection would be noncompliance with G. S., 1-123. See annotation II under this section. Also *Reynolds v. R. R., infra.* In many jurisdictions, where an amendment setting up matter occurring after the institution of the suit is allowed, it must be by supplemental plead-

ing. 41 Am. Jur., Pleading, sec. 302. That technicality does not prevail here. When a substantially new situation supervenes affecting the rights of the parties within the reasonable scope of the dispute, both justice to the litigants and the convenience of the court in ending the controversy is often served by bringing the matter within the pending investigation. *Walston v. Bryan,* 64 N. C., 764, 765.

Our statute, G. S., 1-163, provides that the court may "before and after judgment in furtherance of justice . . . amend any pleading . . . by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the proceeding to the fact proved." Construing this section of the law (C. S., sec. 547), McIntosh, in North Carolina Practice and Procedure, sec. 487, has this to say: "The statute permits an amendment in the discretion of the court—'when the amendment does not change substantially the claim or defense.' This is found in connection with the amendment to make the pleading conform to the proof, but it has been applied generally to all amendments made under order of court." See Note. A more discriminating view of the statute, contrary to the contention of the defendant, is taken in *Capps v. R. R.,* 183 N. C., 181, loc. cit. 187, where *Mr. Justice Stacy,* speaking for the Court, says:

"It is the general rule, and consistently held with us, that a new cause of action may be introduced by way of amendment to the original pleadings; but the established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduce a new matter, or a cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit." Citing *King v. R. R.,* 176 N. C., 301; *Belch v. R. R.,* 176 N. C., 22; *McLaughlin v. R. R.,* 174 N. C., 182; *R. R. v. Dill,* 171 N. C., 176; *Fleming v. R. R.,* 160 N. C., 196; and *Union Pac. Ry. Co. v. Wyler,* 158 U. S., 285, 39 L. Ed., 983. See also *Sams v. Price,* 119 N. C., 572, 574, 575, and cases cited.

However, under the facts of this case we do not regard the amendment as introducing such an entirely new and distinct cause of action as to have put it beyond the discretionary power of the court to permit it. The fact that, if standing alone, it might form the basis of a separate suit, if indeed it had that completeness, is not determinative. Many suits are properly based on a series of related transactions, any one of which might constitute a separate cause of action. Also, several causes of action may arise out of the same transaction and different legal consequences may ensue, according to the theory on which the case is tried. But in applying the test, we must regard the factual situation and the manner in which it develops rather than technical labels. "Technical

considerations or ancient formulae are not controlling." *Klopstock v. Superior Court,* 17 Cal. (2d), 13, 108 P. (2d), 906, 135 A. L. R., 318.

It is not necessary here to be reminded of the numerous cases in our reports which stress the new liberalism introduced by our code pleading. See G. S., 1-163, *supra,* and annotations. Pertinent to the point under discussion and typical of that liberality, in *Reynolds v. R. R.,* 136 N. C., 345, 48 S. E., 765, *q.v.,* the Court permitted a change in the form of action from contract to tort; and in *Oates, etc., Co. v. Kendall,* 67 N. C., 241, 243, from trover and conversion to *assumpsit.* See *Sams v. Price, supra,* 119 N. C., 572, 574, 26 S. E., 170.

Moreover, the defendant seems to have waived the objection to the amendment which he now makes, since the matter sought to be set up therein was first introduced to the controversy by defendant's own pleading, in which, as a further defense, he set up the public sale under the mortgage, basing on that transaction a demand for a deficiency judgment against the plaintiff.

Ordinarily, when an amendment is made containing substantially new and material allegations, the opposing party must be given an opportunity to "meet the new allegations and prepare for trial," and a continuance for such purpose has been regarded a matter of right. McIntosh, N. C. Practice and Procedure, sec. 486, and cases cited and notes. *Sams v. Price, supra.* But the principle expressed in the maxim *cessante ratione legis, cessat et ipsa lex* should, *a fortiori,* apply to a rule of procedure which is the product of the court. The facts set up in the amendment were well known to defendant, and an indefinite continuance would not have put him in a position to dispute them. He also had the parties concerned in the transaction present in court. On the trial he readily testified that he procured an agent to bid in the property for him, and subsequently disposed of the major part of it, the tractor, and regarded the trailer as junk. He then put this agent up as his own witness, who testified that he bought the property for defendant at his request, and turned it over to him. If there was any error in refusing a continuance, it was, therefore, not prejudicial.

We find upon the record no sufficient reason for interfering with the result of the trial.

No error.

STATE v. ELIJAH GRAYSON KING.

(Filed 24 May, 1944.)

1. Criminal Law § 41d: Evidence § 19—

Our courts do not permit a witness to be impeached by independent evidence of particular misconduct; and the admission of extrinsic record evidence of conviction of crime, for the purpose of impeaching a witness, has not been adopted in this jurisdiction.

2. Criminal Law §§ 41b, 41d: Evidence § 22—

On cross-examination questions relating to crime and anti-social conduct are freely allowed; but this latitude is peculiar to cross-examination, and the examiner is bound by the answers of the witness when such answers are collateral to the issue.

APPEAL by defendant from *Johnson, Special Judge,* at September Criminal Term, 1943, of GUILFORD.

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

R. R. King and Clifford Frazier for the defendant, appellant.

SEAWELL, J. The defendant was tried in the municipal county court of the city of Greensboro upon a warrant charging him with operating a lottery in the city of Greensboro and having in his possession "tickets, certificates or orders" used in the operation of said lottery, in violation of chapter 434, Public Laws of 1933, and convicted of this offense. A sentence of six months upon the roads, suspended upon payment of the costs and fine, totaling $175, was imposed. The defendant appealed to the Superior Court, and at a regular term of the said Superior Court, presided over by Johnson, Special Judge, the cause was brought to trial and the defendant was again convicted and sentenced to the roads. From this judgment, defendant appealed.

In the argument here, counsel for defendant challenged the validity of the trial in two respects: The refusal to allow judgment as of nonsuit upon the demurrer to the evidence; and the rejection of record evidence of the prior convictions of State's witness G. M. Sneed of several violations of the criminal law, which, it is contended, went to his credibility as a witness.

Sneed was a plainclothes man on the police force of the city of Greensboro, assigned to the investigation and detection of defendant's operations in violation of the lottery laws, and the State relied principally upon his testimony for conviction.

1. Sneed testified that he saw the defendant in the act of operating tip boards, selling tickets therefrom, comparing them with the sealed or winning number, and paying off the winners. This was certainly sufficient to take the case to the jury.

2. On cross-examination of Sneed, numerous impeaching questions were addressed to him and variously answered, substantially as follows:

"Q. I ask you if you did not get two years on the roads, suspended on the condition that the defendant pay $3.00 a week to the Clerk of Superior Court for the use of Rilmer. Have you got a daughter named Rilmer, or is that your wife?

"A. That is my wife.

"Q. 'And upon failure, sentence to become operative. Defendant to remain of good behavior.' Was that not the sentence they gave you?

"A. I am not positive.

"Q. On November 2, 1936, you were indicted for the possession of liquor, called and failed. How about that?

"A. Indicted for liquor and ran away.

"Q. Let me ask you another. I ask you if they did not have you up again for assault on a female, and you plead guilty, six months on the roads, suspended on condition that you not assault your wife any more. How about that?

"A. We were in family trouble.

"Q. In that order, they said you were to pay one-half of your weekly wages received from the Shoaf-Sink Hosiery Mill to be paid to Rilmer Sneed?

"A. I remember paying her on some occasion, but I don't remember the date. She went up and taken all that up.

"Q. I ask you if you were not convicted that time of going over and going into the house and causing trouble with her, and if you did not come up and plead guilty?

"A. I would not say.

"Q. See if you remember this. On November 27, 1939, I ask you if you were not indicted again for assault on a female and came up and plead guilty and got six months on the roads for that?

"A. Not as I know of.

"Q. Coming on to May 27, 1940, at that time, you got so drunk that you were guilty of disorderly conduct. They had you up for that?

"A. I was drunk; yes, sir.

"Q. And you were disorderly?

"A. I don't remember about that.

"Q. Did you not plead guilty May 27, 1940, for disorderly conduct and judgment was suspended for twelve months?

"A. I don't know anything about it.

"Q. So out of all those occasions that I have just read to you, will you swear that you were not up every time that I asked you about and that they did not give you the judgments that I read to you? What I want to know, is that record right or wrong?

"A. So far as my knowledge, it is wrong."

When defendant's turn came to present evidence, he caused to be identified and offered in evidence certain records from Davidson County for the purpose of showing that witness had been convicted of various specified offenses, including unlawful possession of liquor, assault on a female, failure to provide support for his wife and child, and disorderly conduct. The proffered evidence was ruled out, and as to each item so excluded defendant excepted.

There are other exceptions which we find it unnecessary to discuss, as they present no novel features.

The question presented is whether a witness, not himself a party, may be impeached by record evidence of his conviction of crime, introduced either in contradiction of his denial thereof, or independently as evidence going to his credibility.

The admission of extrinsic evidence, particularly record evidence of conviction of crime, for the purpose of impeaching a witness is, under varying conditions and limitations, rather general in this country. In some jurisdictions its introduction is authorized and controlled by statute; in others, by rules of evidence locally recognized. The practice has not been adopted here, and the uniform usage of the courts, existing over a long period, may be regarded as unfavorable to the recognition of this mode of proof. Moreover, the test ordinarily applied here—that of general character, which with us means reputation—is based upon a consistent theory, which prefers an estimate of character based on the current experience of the community in which the witness lives, rather than proof of particular acts—a sort of mosaic pattern built up before the jury out of heterogeneous piece-material, often of doubtful significance and of little relevancy.

Therefore, our courts do not permit the witness to be impeached by independent evidence of particular misconduct. *Barton v. Morphes,* 13 N. C., 520; *S. v. Bullard,* 100 N. C., 486, 6 S. E., 191; *Nixon v. McKinney,* 105 N. C., 23, 15 S. E., 154; *S. v. Warren,* 124 N. C., 807, 32 S. E., 552; *S. v. Arnold,* 146 N. C., 602, 60 S. E., 504; *S. v. Holly,* 155 N. C., 485, 71 S. E., 450; *S. v. Maslin,* 195 N. C., 537, 143 S. E., 3; *S. v. Colson,* 194 N. C., 206, 139 S. E., 230; *S. v. Winder,* 183 N. C., 776, 111 S. E., 530; *S. v. Bailey,* 179 N. C., 724, 102 S. E., 406. A somewhat different rule applies to cross-examination, where the purpose, as Wigmore puts it, is to "sift the witness." There questions relating to crime and anti-social conduct are freely allowed. But the latitude

allowed is peculiar to cross-examination—no doubt a survival of a franker age, of rough-and-tumble practice, with few holds barred. And here, the answers of the witness are regarded as collateral to the issue and the examiner is bound by them.

In this connection, we may say much criticism has been directed at the latitude allowed on cross-examination, especially in quizzing the witness as to anti-social conduct and the commission of crime. Where there is a suspicion that the examination is not in good faith, there is perhaps no other feature in the conduct of a trial that has received so much universal condemnation amongst laymen. The eminent counsel who conducted this cross-examination made no departure from strict propriety; but all such examinations are not so obviously in good faith. In many jurisdictions questions as to commission of crime are not permitted at all, unless addressed to those offenses which have an obvious relation to the virtue of veracity. 70 C. J., Witnesses, sec. 1097 (cc).

The theory that proof of particular acts or conduct is rejected solely to prevent confusion of the issue and for the convenience of the courts, and therefore the rule should yield to the conclusiveness and certitude of record proof which raises no issue it does not settle, is not wholly satisfying. As presented here it is full of danger and possible injustice, because of the lack of relevancy to the purpose which must in many instances ensue, the exaggerated effect of the mode of proof, and the fact that the witness is cut off from any explanation or extenuation of the offense. We could not adopt the innovation urged upon us without raising other related problems of a serious nature which would probably occupy our attention for a decade, at least.

At common law, a person who had been convicted of certain offenses was disqualified to testify as a witness. The disqualifying offenses were those classed as infamous, as involving moral turpitude, and the *crimen falsi*—such as false pretense, fraud, cheating, and other crimes indicating a disposition to falsify. Infamous crimes and those involving moral turpitude challenged the integrity of the whole moral fiber. In removing this disqualification, in many of those jurisdictions which permit impeachment of the witness by official record of conviction, either the statutes or the rules of the court pay deference to the common law classification by limitations respecting the nature of the offenses which may be so used. Differences in phraseology there are, but the general purpose and import is the same. See 28 R. C. L., Witness, sec. 212; Notes, 82 A. S. R., 37; 70 C. J., Witness, sec. 1052 (9), and notes; Wigmore on Evidence, 3rd Ed., sections 980, 987.

The general purpose of the statutes and rules which pretend to any scientific justification is to confine the intended impeachment to proof of those crimes which more directly and reliably bear on credibility.

It would be a barbarous rule which called in question a man's veracity because of the violation of a petty traffic law of which he may not have any knowledge. There are many graver offenses whose bearing on the question of veracity or credibility is no less remote.

None of the offenses appearing against witness in the criminal records of Davidson County, reprehensible as they are, is classified at common law as involving moral turpitude, infamous, or as *crimen falsi,* and in the most discriminating jurisdictions, either by statute or rules recognized by the courts, they could not be used independently to impeach the witness. In others, the wide open rule would admit them all on record proof.

In Wigmore on Evidence, 2d Ed., sec. 413, we find the following overall comment: "The tendency is to a simplicity of the rule defining the kinds of crime (*i.e.,* either all crimes or felonies only) instead of the common law subtleties."

In Wigmore on Evidence, 3d Ed., section 980, we find the following postulations:

"*What crimes are relevant* to indicate bad character as to credibility? There are here three answers possible on principle: (a) Whatever offenses were formerly treated as *disqualifying* one entirely as a witness shall now be treated as available for impeachment. This is the commonest solution, and has come about usually by express proviso in the statutory abolition of the former disqualification; (b) If in a given jurisdiction general bad character is allowable for impeachment, then *any offense* will serve to indicate such bad character; (c) If character for veracity only is allowable for impeachment, then only such specific offenses may be used as indicate *a lack of veracity-character.*"

As to the second postulate, we must bear in mind that when in our practice a "character witness" is asked about the general good or bad character of another, it is understood the inquiry is about the reputation of the witness. The question involved is not wholly one of *relevancy,* but primarily of the *reliability* and fairness of the test applied. It is conceived that an estimate derived from current conduct of the witness, as observed and experienced by members of the community who have a knowledge of him, may be more just and accurate. If any criticism is due, it might be directed to the reluctance of the court to permit direct inquiry, in the first instance, into the reputation for veracity. But this is not within the scope of our present inquiry.

In such a welter of confusion, we feel the wisdom of the conclusion thus expressed in *Nelson v. Seiler,* 154 Md., 63: "No line can be definitely established, that is to say, any line undertaken to be established would be, in its nature, arbitrary; and if such is to be established, it is a question for the legislature and not for the court."

We have felt it best to clarify the attitude of the Court so counsel may not consider the contribution they have seriously offered to the amendment of our jurisprudence wholly as "love's labours lost." It is thought, however, that we do not necessarily come to grips with this question on the record presented. Most of the answers to the impeaching questions asked the witness on cross-examination may be construed as admitting conviction of the offenses suggested, and those of an equivocal nature are too unimportant to have influenced the result, and the rejection of the record evidence to the same effect we do not regard as prejudicial error.

Other exceptions are not meritorious.

We find

No error.

ROSA WATKINS v. CLARENCE GRIER, TRADING AS ROSETTA TAXI COMPANY.

(Filed 24 May, 1944.)

1. Trial §§ 21, 51—

Where a trial court has refused to grant motions of nonsuit made under G. S., 1-183, it is error for such trial court to set aside the verdict for insufficiency of evidence as a matter of law.

2. Trial § 51—

The trial judge has the discretionary power, during the term at which the case is tried, to set aside a verdict and to order a new trial.

3. Appeal and Error § 47—

When a municipal court has erred in setting aside a verdict as a matter of law and its action, on appeal to the Superior Court, is affirmed, on appeal to this Court the usual practice would be to send the case back to the Superior Court to be remanded to the municipal court for judgment on the verdict; but the ends of justice requiring it, the verdict in this case is set aside and a new trial is ordered, so that the cause may be developed in accordance with the usual course and practice.

4. Appeal and Error § 20—

Appeals in civil actions may be taken from judgments of the municipal court of High Point to the Superior Court of Guilford County, for errors in matters of law, in the same manner as appeals from the Superior Court to the Supreme Court. Public-Local Laws 1927, ch. 699, sec. 5, subsec. (j). And attention is called to Rule 19, subsec. 3, of Rules of Practice in the Supreme Court, so that in such cases confusion may be avoided in the transcript to this Court by a separate grouping of exceptions presented on such appeals.

5. Appeal and Error § 3a—

Only the party aggrieved may appeal from the Superior Court to the Supreme Court. G. S., 1-271.

BARNHILL, J., concurring.

APPEAL by plaintiff from *Phillips, J.,* at 10 April, 1943, Term, of GUILFORD.

Civil action instituted in the municipal court of the city of High Point to recover for personal injuries allegedly sustained as result of actionable negligence of defendant.

Plaintiff, in complaint filed, alleges that she suffered serious and permanent personal injuries on 13 February, 1942, as proximate result of the negligence of agent of defendant in the operation of defendant's taxicab in which she was riding as a passenger—all to her damage in large sum.

Defendant in answer filed denies the material allegations of the complaint, and by way of further answer and defense avers that plaintiff, acting under the advice of her attorney, and for a specific valuable consideration "executed and delivered to persons other than this defendant a release . . . in full, complete and final settlement of all damages sustained" by her, which release is pleaded as an estoppel upon her bringing this action, and as a bar of her right to recover herein.

In reply plaintiff denies the averments in further answer of defendant, and alleges that, if defendant or any other person has a release of any kind signed by plaintiff, (1) the same was obtained by fraud and undue influence, and without substantial consideration, and (2) she did not have sufficient mental capacity at the time of signing it to understand the nature and effect of it.

Upon the trial in the municipal court of the city of High Point defendant moved for judgment as in case of nonsuit when plaintiff first rested her case, and renewed the motion at the close of all the evidence. Both motions were overruled, and defendant excepted to each ruling. The case was submitted to the jury on these issues:

"1. Did the plaintiff execute the paper-writing as alleged by the defendant in his answer?

"2. If the said paper-writing was executed and delivered as alleged in the answer, was the same procured by fraud or undue influence by the defendant, as alleged by the plaintiff?

"3. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

"4. What damage has plaintiff sustained?"

The parties agreed that the court might answer the first issue "Yes." The jury answered the second and third issues "Yes," and assessed damages in answer to fourth issue.

Thereupon, defendant moved to set aside the verdict as to the second issue upon the ground that there is no sufficient evidence in that respect for submission to the jury. And the court, as a matter of law, set aside the verdict as to this second issue, to which ruling plaintiff excepted.

Plaintiff then moved for a new trial. The motion was overruled, and plaintiff excepted.

Thereupon the court entered judgment in which, after reciting among other things that "it further appearing to the court that the answer to the second issue is erroneous as a matter of law and that there is no evidence of fraud on the part of the defendant," it is adjudged "that the answer to the second issue be set aside as a matter of law, and that the plaintiff have and recover nothing of the defendant." To the signing of the judgment both plaintiff and defendant excepted and gave notice of appeal to Superior Court of Guilford County. On such appeal (1) plaintiff assigned as error, among others, the ruling of the municipal court of the city of High Point, in setting aside the verdict as to the second issue, and in thereupon entering judgment of nonsuit, and in refusing to submit an issue which she tendered as to whether at the time she executed the release she had sufficient mental capacity to understand its nature and effect; and (2) defendant assigned as error the refusal of the municipal court to grant his motions for judgment as in case of nonsuit made when plaintiff first rested her case and renewed at close of all the evidence.

Upon hearing on such appeal, the court (1) "overruled each and every objection and exception of plaintiff," (2) refused motion of plaintiff to dismiss the appeal of defendant, and (3) sustained defendant's exceptions to the refusal of the municipal court of the city of High Point to allow motions of defendant for judgment as of nonsuit—made when plaintiff first rested her case and renewed at close of all the evidence, and entered judgment affirming the judgment of the municipal court of the city of High Point, and dismissing the action. Plaintiff excepts to each of the rulings of the judge of Superior Court, and to the judgment and appeals therefrom to Supreme Court, and assigns error.

C. A. York and Walser & Wright for plaintiff, appellant.
Gold, McAnally & Gold for defendant, appellee.

WINBORNE, J. Assignments of error of plaintiff appellant based upon exceptions to the rulings of the judge of Superior Court in overruling plaintiff's assignments of error based upon exceptions to the rulings of the judge of municipal court of the city of High Point setting aside the verdict of the jury as to the second issue for insufficiency of evidence to support it, as a matter of law, and then entering judgment as of nonsuit are well taken.

In the act giving civil jurisdiction to the municipal court of the city of High Point, Public-Local Laws 1927, chapter 699, amending Public-Local Laws 1913, chapter 569, by which the court was created, the

General Assembly provided in section 5 that the rules of practice as required by law in the Superior Court for the trial of all causes shall apply to said municipal court, subsection (m); and that the procedure of the municipal court, except as otherwise therein prescribed, shall follow the rules and principles laid down in the chapter on civil procedure in the Consolidated Statutes and the amendments thereto in so far as the same may be adapted to the needs and requirements of the said municipal court, subsection (r).

Among the rules of practice laid down in the chapter on civil procedure in the Consolidated Statutes is C. S., 567, now G. S., 1-183, relating to motions for nonsuit. In construing and applying this section this Court has held it to be the uniform practice that where a trial court has refused to grant motions of nonsuit made under this statute, it is error for it to set aside verdict for insufficiency of evidence as a matter of law, *Riley v. Stone,* 169 N. C., 421, 86 S. E., 348; *Jernigan v. Neighbors,* 195 N. C., 231, 141 S. E., 586; *Godfrey v. Coach Co.,* 200 N. C., 41, 156 S. E., 139; *Lee v. Penland,* 200 N. C., 340, 157 S. E., 31; *Price v. Ins. Co.,* 200 N. C., 427, 157 S. E., 132; see also *Bruton v. Light Co.,* 217 N. C., 1, 6 S. E. (2d), 822.

The trial judge, however, has the discretionary power during the term at which a cause is tried to set aside a verdict and to order a new trial. G. S., 1-207, formerly C. S., 591. *Brantley v. Collie,* 205 N. C., 229, 171 S. E., 88, and numerous other cases. In this connection, terms of the municipal court of the city of High Point for the trial of cases by jury are for two weeks, each beginning on the first Monday of each month. The term at which the present case was tried having expired, the trial court may not now as a matter of discretion set aside the verdict.

Hence, the municipal court of the city of High Point having erred in setting aside the verdict as a matter of law, and the action of the court in that respect having been affirmed by the Superior Court on appeal thereto, and exception to the ruling of the Superior Court having been presented on appeal to this Court, the usual practice would be to send the case back to the Superior Court to be remanded to the municipal court for judgment on the verdict rendered. Then the defendant, as the party aggrieved, would have the right to appeal to the Superior Court, in its appellate capacity, and the case would go up to the Superior Court upon the record and proceedings had in the municipal court, for hearing only upon assignments of error in matters of law preserved, assigned and relied upon by him.

We are of opinion, however, that the ends of justice require that the verdict be set aside and a new trial be had, in which the whole case may be developed in accordance with the usual course and practice. *Jernigan v. Neighbors, supra.*

As the case must be retried in the municipal court, it is not amiss to call attention to the provision of the statute, Public-Local Laws 1927, chapter 699, section 5, subsection (j), that appeals may be taken in civil actions by either plaintiff or defendant from judgments of municipal court of the city of High Point to the Superior Court of Guilford County in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court. And, in preparing the transcripts of records on appeal, attention is called to Rule 19, subsection 3, of the Rules of Practice in the Supreme Court. 221 N. C., 544. See also *Jenkins v. Castelloe,* 208 N. C., 406, 181 S. E., 266. Any confusion there is in the transcript of the case on appeal to this Court, arises upon the merging of the proceedings in the trial in the municipal court of the city of High Point with the proceedings had on appeal to Superior Court, without separate grouping of exceptions presented on such appeal.

Moreover, it is provided by statute, G. S., 1-271, formerly C. S., 632, that any party aggrieved may appeal to the Supreme Court from judgment of the Superior Court. In the present case the defendant was not the party aggrieved by the judgment of the municipal court of the city of High Point. Hence, the appeal by defendant from that court to the Superior Court should have been dismissed.

Error and remanded.

BARNHILL, J., concurring: The trial judge has authority to set aside a verdict as a matter of law for errors committed during the progress of the trial and thus save the expense and delay incident to an appeal—except when the error was in overruling the motion to dismiss as in case of nonsuit. In this one instance he is not permitted to change his ruling although fully convinced he ruled incorrectly in the first instance.

The majority opinion is in accord with the decisions establishing this exception to the general rule. The Court is not disposed to abolish the exception. As the opinion is in accord with the law as now written, I concur.

In so doing, I wish to express the view that there is no sound reason to support the exception to the general rule. An order setting aside the verdict as a matter of law for that the court erred in overruling the motion to nonsuit presents a question of law only and provides a ready method of obtaining a final decision of the controversy. If the order setting aside the verdict is sustained the case is ended. If overruled, there is a verdict of record to support a judgment. If plaintiff has failed to offer sufficient evidence to support a verdict he is not hurt. If defendant makes the motion he elects to rest his case on that one ques-

tion, so he cannot be heard to complain that the procedure deprives him of the benefit of other exceptions.

The exception to the general rule leaves us with this anomaly. The trial judge, being convinced there is no sufficient evidence to support the verdict, may set aside the verdict in the exercise of his discretion. But he cannot, as a matter of law, correct a patent error of which he, upon reflection, has become fully aware.

The error, if any, in overruling motion to nonsuit is an error committed in the progress of the trial. The general rule governing the authority of the trial judge in such matters should apply.

BRADY H. WATKINS v. CLARENCE GRIER, DOING BUSINESS AS THE ROZETTA CAB COMPANY OR THE ROZETTA TAXICAB COMPANY.

(Filed 24 May, 1944.)

1. Torts § 9a—

A release, executed by an injured party and based upon a valuable consideration, is a complete defense to an action for damages on account of such injuries, and where the execution of such a release is admitted or established by the evidence, it is necessary for the plaintiff to prove matter in avoidance of the release.

2. Same—

An injured person, who can read, is under the duty to read a release from liability for damages for personal injuries before signing it. Hence, where such person signs a release without reading it, he is charged with knowledge of its contents, and he may not thereafter attack it upon the ground that, at the time of signing, he did not know its purport, unless his failure to read it was due to some artifice or fraud of, or chargeable to the party released.

APPEAL by plaintiff from *Phillips, J.*, at 10 April, 1943, Term, of GUILFORD.

Civil action instituted in the municipal court of the city of High Point to recover for loss of service of, and *consortium* with wife of plaintiff allegedly resulting from actionable negligence of defendant.

Plaintiff alleges in his complaint, and on the trial in municipal court of the city of High Point offered evidence tending to show, that his wife suffered serious and permanent personal injuries, received on 13 February, 1942, as proximate result of the negligence of agent of defendant in the operation of a taxicab in which she was riding as a passenger, and that in consequence thereof he has been deprived of the services of, and *consortium* with his wife to his damage.

Defendant, in answer filed, denies the material allegations of the complaint, and for further defense alleges: "That on or about the 3rd of April, 1942, the plaintiff for and in consideration of the sum of $25.00 to him in hand paid executed and delivered unto the defendant, under the advice and guidance of an able and highly reputable counsel, a release of all claims in words and figures as follows:

" 'RELEASE OF ALL CLAIMS

" 'KNOW ALL MEN BY THESE PRESENTS, That Brady Watkins in consideration of Twenty Five & No/100 . . . ($25.00) to me in hand paid by John Harris & Little Rosetta Taxi, receipt whereof is hereby acknowledged, have released, acquitted and discharged and by these presents do release, acquit and forever discharge said John Harris & Little Rosetta Taxi of and from any and all actions, causes of action, damages or demands of whatever name or nature in any manner arisen, arising or to grow out of any and all accidents or matters and especially an accident to my wife, Rosa Watkins, claimed by the undersigned to have been sustained on or about the 14th day of February, 1942, substantially as follows: taxi turned over and injured my wife, Rosa Watkins and this release is for loss of services, consortment, and any and all other claims as provided by law.

" 'It is further acknowledged that there is no agreement or promise on the part of said John Harris & Little Rosetta Taxi to do or omit to do any act or thing not herein mentioned, and that the above consideration is in full settlement of any and all damages to the undersigned arising from or out of any and all matters aforementioned. The said .... in paying the said sum of money does so in compromise of the said claim or claims, action or actions, cause of action or causes of action, damages and demand or demands above released, not admitting any liability on account of the same.

" 'IN WITNESS WHEREOF I have hereunto set my hand and seal this 3rd day of April A. D., 1942.

" 'IN PRESENCE OF
NORMAN A. BOREN BRADY WATKINS (L. S.)'

and this defendant pleads said release in bar of any recovery whatsoever on the part of the plaintiff in this action."

Plaintiff, replying, denies knowledge that the paper writing signed by him is the one described in the answer, and, while admitting that he endorsed a check for $25.00, denies that he received any part of the same, and alleges (1) that he was not informed by anyone that the paper writing signed by him released any claim he might have against defend-

ant; that he is not able to read sufficiently to understand the meaning and effect of a paper writing of this nature; that if the said paper writing was a release of all claims of plaintiff against defendant on account of injuries to the wife of plaintiff, the consideration is so small as to constitute the same legal fraud, and he alleges that the same was obtained by fraud; and that when he signed the paper writing, as above set out, he did not know the contents thereof nor did he know the nature and effect of the same, nor did he know that it released any rights he had against defendant or any other person.

Upon the trial in the municipal court of the city of High Point, as stated in brief of counsel for plaintiff filed in this Court, "the whole case turned upon the question of whether or not the plaintiff had executed a valid and binding release of his claim." Pertinent to this question the record on this appeal discloses evidence as follows: Plaintiff before resting his case offered the following: Rosa Watkins, wife of plaintiff, testified: "Mr. Norman A. Boren is and was a lawyer in Greensboro . . . at the time I was injured . . . my husband employed him . . . to be the lawyer in the case . . . He represented my husband . . . my husband can read . . . I got the money . . . my husband didn't get it."

Plaintiff, testifying by deposition, said: "I employed Hines & Boren for her. I signed that paper. I was at the job I cook at. It was during the dinner hour and Mr. Boren came in and told me to sign the paper . . . He did not read it before I signed it . . . I signed a paper, I don't know what it was for. I know what a check is. I signed a check. I did not receive any money after I signed the check but my wife received some. She received some from Mr. Boren. She did not tell me how much."

Dr. Russell O. Lyday, who at the request of plaintiff treated the wife of plaintiff for her injuries, stated: "They told me they were going to settle. They told me they were considering a settlement. I told her she was far from well at that time."

Defendant, reserving exception to the refusal of the court to grant his motion for judgment as of nonsuit, made when plaintiff first rested his case, introduced in evidence the following: (1) The release identified by plaintiff. (The release introduced is in the identical words and figures set out in the further answer of defendant as hereinabove quoted). Objection and exception by plaintiff. (2) Testimony of Mr. Norman A. Boren who as witness for defendant stated in pertinent part the following: "I am a practicing attorney of Greensboro, N. C. . . . I have been practicing law there since I stood the Bar examination in August, 1920. I am a member of the firm of Hines & Boren . . . I was approached by her husband first, who came to my office a very short while after the

accident had occurred. . . . He told me that his wife was in the hospital . . . and on some subsequent occasion he asked me to go with him down to the hospital to see his wife . . . which I did. I received a draft for $25.00 from the insurance adjuster in this case payable to Brady Watkins, the plaintiff, and Rosa Watkins. I deposited that draft in the bank and when it cleared I gave a check to Brady and Rosa Watkins, which they endorsed and cashed." (3) The plaintiff admits that Brady Watkins endorsed the check for $25.00 payable to himself and Rosa Watkins. (4) The defendant offered in evidence two checks, one for $25.00 endorsed by Brady Watkins and Rosa Watkins. Defendant rested.

Plaintiff in rebuttal recalled Rosa Watkins, who after testifying that her husband didn't know he had a case and that Mr. Boren represented her, and not her husband, said, "Mr. Boren gave me a check payable to me and my husband in the sum of $25.00 which had been endorsed by my husband and was endorsed by me and I got the money and paid family bills with it."

At the conclusion of all the evidence the court allowed defendant's motion for judgment as in case of nonsuit, and in accordance therewith entered judgment of nonsuit—dismissing the action. Plaintiff excepted and appealed therefrom to Superior Court, assigning as errors, among others, (1) the ruling of the court in allowing the motion of defendant for judgment as of nonsuit, and (2) the signing of the judgment. On such appeal the judge of Superior Court, in judgment entered, overruled each of the exceptions taken by plaintiff in the progress of the trial in the municipal court of the city of High Point, and affirmed the judgment of said municipal court from which appeal is taken. Plaintiff excepted and appeals to the Supreme Court, and assigns error.

Walser & Wright and C. A. York for plaintiff, appellant.
Gold, McAnally & Gold for defendant, appellee.

WINBORNE, J. Appellant, in challenging the correctness of the judgment of Superior Court affirming judgment as of nonsuit entered in the municipal court of the city of High Point, states in brief filed in this Court that "the whole case turned upon the question of whether or not the plaintiff had executed a valid and binding release of his claim."

"A release executed by an injured party and based upon a valuable consideration is a complete defense to an action for damages for the injuries, and where the execution of such a release is admitted or established by the evidence, it is necessary for the plaintiff to prove the matter in avoidance of the release." *Aderholt v. R. R.*, 152 N. C., 411, 67 S. E., 1029. See also *Butler v. Fertilizer Works,* 193 N. C., 632,

137 S. E., 813; *McInturff v. Trust Co.,* 201 N. C., 16, 158 S. E., 547; *Ward v. Heath,* 222 N. C., 470, 24 S. E. (2d), 5.

An injured person, who can read, is under the duty to read a release from liability for damages for a personal injury before signing it. Hence, where such a person signs a release without reading it, he is charged with knowledge of its contents, and he may not thereafter attack it upon the ground that at the time of signing he did not know its purport, unless his failure to read it was due to some artifice or fraud of, or chargeable to the party released. *Aderholt v. R. R., supra; Butler v. Fertilizer Works, supra; Presnell v. Liner,* 218 N. C., 152; *Ward v. Heath, supra.*

In the present case the execution of the release by plaintiff, though denied in the reply, is admitted upon the trial in the municipal court of the city of High Point. And the evidence fails to show that defendant, or other party released, or anyone representing either of them, was present when plaintiff signed the release. It was presented to him by his attorney, and he signed it in the presence of his attorney. While he says it was not read to him before he signed it, he could read, and the paper was under the control of him and his attorney, and he says he signed it under direction of his attorney. The circumstances of such signing of the release may not be chargeable to the parties released, and, hence, as against them and defendant, he may not now attack the validity of the release. Furthermore, the evidence shows that he endorsed the check representing the consideration for the release. If the consideration be inadequate, that alone will not suffice to overthrow the release.

Authorities cited by plaintiff have been considered.

Attention is called to what is said in opinion filed contemporaneously herewith in case of *Rosa Watkins v. Grier, ante,* 334, with regard to the requirements as to preparation of transcripts of record on appeal from the municipal court of the city of High Point to the Superior Court. See Rule 19 (3) of Rules of Practice in the Supreme Court, 221 N. C., 544, and *Jenkins v. Castelloe,* 208 N. C., 406, 181 S. E., 266.

The judgment of Superior Court is

Affirmed.

C. M. MERCHANT v. IRVING M. LASSITER AND J. WAYNE WILLIARD, TRADING AS CITY TRANSFER & STORAGE COMPANY.

(Filed 24 May, 1944.)

1. Appeal and Error § 29—

Exceptive assignments of error, not brought forward and discussed in the brief, are deemed abandoned.

2. Trial § 30: Carriers § 12—

While proof of facts which constitute *prima facie* evidence of negligence permits but does not compel a verdict for plaintiff, a peremptory instruction upon the evidence of loss of goods is justified where the defendant is admittedly a common carrier.

3. Carriers § 12—

A common carrier is an insurer against the loss of goods received for shipment; and it is liable for loss of property in its possession not due to acts of God, the fault of the shipper, or the inherent nature or quality of the goods.

4. Same—

A common carrier is bound to safely carry and deliver merchandise received and accepted for transportation, and in case of loss plaintiff need only prove delivery to and nondelivery by the carrier. In the absence of proof tending to bring the case within one of the exceptions, nondelivery by the carrier affords a presumption of negligence, and its obligations render it liable to plaintiff for the resulting damage.

5. Evidence § 27—

Unaccepted offers of compromise are incompetent as evidence.

APPEAL by defendants from *Phillips, J.*, at March Term, 1944 (High Point Division), of GUILFORD. No error.

Civil action to recover damages for the nondelivery of merchandise received and accepted by defendants for shipment.

On 1 June, 1943, plaintiff delivered to defendants all the furniture, wearing apparel, food supplies, and other personal effects owned by him and the members of his family, for shipment by truck to Columbus County. That part of such property for which suit was instituted has never been delivered. It is alleged that the undelivered part was destroyed by fire, but there is no evidence tending to show the cause of nondelivery except that plaintiff in reference to certain articles testified: "They were burned up along with the insurance papers and everything else."

Plaintiff furnished defendant with a list of the undelivered property. This list was offered in evidence. A part of the property is under the heading, "Barbara Ann Merchant," "Bernita Merchant," and "Beverly," infant children of plaintiff. Some of it belonged to Mrs. Merchant.

As to the property listed under the names of the children, plaintiff testified it was made up of articles of wearing apparel and personal effects purchased and paid for by him for the use of his children.

The plaintiff offered evidence tending to show the delivery to defendant, the nondelivery at the designated destination, and the value, and rested. Defendant offered no evidence in rebuttal.

There was a verdict and judgment for plaintiff, and defendants appealed.

C. N. Cox and Walser & Wright for plaintiff, appellee.
Gold, McAnally & Gold for defendants, appellants.

BARNHILL, J. A number of the exceptive assignments of error are not brought forward and discussed in the brief. They are deemed to be abandoned. Rule 28, 221 N. C., 562. (See cases cited.)

The defendants insist that they are not common carriers and that the court's charge thereon was erroneous. As to this the plaintiff alleges: "(3). That the defendants are common carriers and engaged in the hauling and transferring merchandise and other articles from place to place, both in the City of High Point, North Carolina, and to other parts of the State, and are licensed and permitted by the State of North Carolina to engage in said business." The defendants answer: "(3). The allegations in paragraph 3 are admitted except it is denied that the defendants are common carriers."

Thus the defendants admit that they are engaged in hauling and transferring merchandise from place to place in North Carolina under license from the State. This makes them a common carrier. Their denial that they are such carrier is without substance.

Plaintiff, in detailing his conversation with one of the defendants which culminated in the contract to transport, said: "He told me at that time I had nothing to worry about, that he carried insurance."

He insists that this was one of the representations made to him by defendants to induce him to give the business to them rather than to a competitor, and that it was competent for that purpose. In any event, the error, if any, was rendered harmless by the later admission of the same testimony. Plaintiff testified without objection: "He said 'We have insurance, everything will be fully covered.' I took that to mean fire, breakage, or anything. Yes, insurance on whatever I got him to haul." *S. v. Gordon, ante,* 304, and cases cited.

The court charged the jury:

"Now, Gentlemen of the Jury, when a *prima facie* case is made out by the plaintiff, the Court charges you that if you find by the greater weight of the evidence that the plaintiff delivered the goods in question to the defendants for transportation from High Point to Columbus County and that the goods were accepted by the defendants for transportation for a valuable consideration and then the goods were not delivered in Columbus County, according to the contract, the Court charges you that makes out a *prima facie* case of negligence on the part of the

defendants. And then, if you find those facts to be true from the evidence and by the greater weight thereof, the Court charges you that you will answer the first issue Yes; otherwise, No."

While proof of facts which constitute *prima facie* evidence of negligence permits but does not compel a verdict for the plaintiff, and the last sentence in the quoted excerpt amounts to a peremptory instruction upon the evidence, exception thereto cannot be sustained.

A carrier is an insurer against the loss of goods received for shipment, *Morris v. Express Co.,* 183 N. C., 144, 110 S. E., 855, and it is liable for the loss of property in its possession not due to the act of God, the fault of the shipper, or the inherent nature or quality of the goods. *Moore v. R. R.,* 183 N. C., 213, 111 S. E., 166.

It is bound to safely carry and deliver merchandise received and accepted for transportation, *Meredith v. R. R.,* 137 N. C., 478, and in case of loss plaintiff need only prove delivery to and nondelivery by the carrier. *Perry v. R. R.,* 171 N. C., 158, 88 S. E., 156. In the absence of proof tending to bring the case within one of the exceptions nondelivery by the carrier affords a presumption of negligence. *Holmes v. R. R.,* 186 N. C., 58, 118 S. E., 887, and its obligations as a common carrier render it liable to the plaintiff for the resulting damage. *Meredith v. R. R., supra; Aycock v. R. R.,* 89 N. C., 321; Anno. 53 A. L. R., 996; 106 A. L. R., 1156.

Thus, where the defendants are both receiving and delivering carriers, proof that the property was received by the carriers and has never been delivered under the contract of carriage entitles plaintiff to a verdict unless there is proof that the failure to transport and deliver was occasioned by some cause excepting the carrier from absolute liability.

Here the defendants offered no evidence. The record fails to disclose any testimony tending to show that the loss was due to any cause which would excuse the nondelivery and free the defendants from their liability as common carriers. A peremptory instruction was not inappropriate.

What has already been said leads to the conclusion that there was no error in the refusal of the court to dismiss as in case of nonsuit.

Mrs. C. M. Merchant, wife of plaintiff, appeared in this Court through counsel and moved that she be permitted to make herself a party plaintiff. The motion was allowed. This disposes of the contention that as to part of the property she is the real party in interest.

As to the articles listed in the name of the children, the evidence tends to show that they are the property of plaintiff. Furthermore, there was no motion or prayer for instructions in respect thereto. The record contains no exception which properly presents the question defendants seek to debate. They made the contract of carriage with plaintiff. On

this record they cannot now successfully challenge his right to recover the damages resulting from their failure to deliver.

Defendants proposed to prove through examination of plaintiff that they tendered $1,000.00, the alleged amount of the insurance, in settlement of the claim. The evidence was excluded. The ruling was in accord with the law rendering unaccepted offers of compromise incompetent. *Sutton v. Robeson,* 31 N. C., 380; *Poteat v. Badget,* 20 N. C., 349; *Peeler v. Peeler,* 109 N. C., 628; *Stein v. Levins,* 205 N. C., 302, 171 S. E., 96. In any event, as it was in the nature of an acknowledgment of nondelivery, its exclusion was not prejudicial to defendants.

Defendants have been afforded a trial free from error. It was for the jury to assess the damages. We cannot say as a matter of law that the amount awarded was excessive. No cause for disturbing the verdict is made to appear.

No error.

STATE v. CHESLEY GRAHAM.

(Filed 24 May, 1944.)

1. Criminal Law § 32a—

Where the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce, in the minds of the jurors, a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis.

2. Criminal Law § 2—

Intent alone is not sufficient for a conviction even of an attempt to commit the offense charged.

3. Intoxicating Liquor § 9d—

In a prosecution for the unlawful possession of intoxicating liquor for the purpose of sale, evidence that defendant, who resided four miles from the still, came to the still and got one-half gallon of nontax-paid whiskey and left with it, is sufficient to make out a *prima facie* case for the jury. G. S., 18-11.

4. Criminal Law § 54b—

A general verdict on a warrant or bill of indictment, containing several counts charging offenses of the same grade and punishable alike, is a verdict of guilty on each and every count.

5. Criminal Law § 60—

When offenses, of the same grade and punishable alike, are distinct, and there is a general verdict, the court can impose sentences on each count.

6. Criminal Law § 65—

If the verdict on any count be free from valid objection, and having evidence tending to support it, the conviction and sentence for that offense will be upheld.

7. Criminal Law § 60—

Where on a warrant containing five counts, charging offenses of the same grade and punishable alike, there is a general verdict of guilty and on four of the counts there is insufficient evidence to support conviction, and the court below pronounced judgment, treating the counts severally, and sentenced the defendant on the counts not supported by the evidence, and prayer for judgment was continued on the only count supported by the evidence, there will not be a new trial, but the sentence imposed will be set aside and the case remanded for judgment upon the verdict on the count supported by the evidence.

APPEAL by defendant from *Burney, J.,* at January Term, 1944, of BLADEN.

Criminal prosecution tried *de novo* in Superior Court on appeal thereto from judgment of the recorder's court of Bladen County upon warrant charging defendant with unlawful (1) possession of whiskey still, (2) manufacture of whiskey, (3) possession of intoxicating liquor for purpose of sale, (4) possession of materials for the purpose of manufacturing whiskey, and (5) aiding and abetting in the manufacture of liquor.

Upon the trial in Superior Court, defendant Chesley Graham, and his brother, Macey Graham, were tried together. The evidence offered by the State, in so far as it relates to defendant Chesley Graham, tends to show these facts: On 31 July, 1943, about 2 o'clock p.m., a whiskey still in operation and located about 300 to 325 yards from the house of Preston Bowen, near DeVane's Landing in Carver's Creek Township, Bladen County, North Carolina, was found by the sheriff of that county. "DeVane Landing is right on the river bank where they have fish frys." Preston Bowen's house is not over 20 or 30 feet from the road going into the still. Only two men, Thelbert Bowen, a brother of Preston, and one Robert Smith, were at the still. Chesley Graham was not there.

Preston Bowen, as witness for the State, testified: "I talked with Chesley Graham about three weeks before the still was found. I was at the DeVane Landing where I live and he said he wanted to put a still out there down below the house where I was living at in the woods. I knew where the still was down there. I saw Chesley Graham down there several times and he said he was looking for his boat. There is fishing down there. That time he went down right in front of the house. The still was kind of biasing back of the house . . . Chesley Graham . . . lives about four miles from me . . . Chesley came to see me about the first of July. He came down there about two or three miles from the highway and said he and Macey wanted to put a still down there . . . After that I never did see him down there except when he was going after the boat that time. That is right, I never did see Chesley go toward the still . . ."

Thelbert Bowen as witness for the State gave this narrative: ". . . Macey Graham asked me to help him make some liquor. I went down there and Robert was there running the whiskey. I stayed and Macey got me to help Robert run the liquor and that evening the sheriff came and run us out . . . Chesley came down there one time and got a one-half gallon jar of liquor. He told the boy he wanted a jar of liquor, got it and left . . . I never saw Chesley down there but one time . . . that was Friday evening when he came by himself about one o'clock and got two quarts of whiskey. He said, 'Can I get a jar of liquor?' . . . Robert told him it would be all right. After that he picked up the liquor and left. . . . He just whistled before he got there. We did not run. There was no Federal stamp nor State stamp on this whiskey."

On the other hand, defendant offered evidence tending to support a plea of alibi—that he was elsewhere at the time Thelbert Bowen says he came to the still and got whiskey, as above detailed.

Verdict: Guilty in "manner and form as charged in the bill of indictment."

Judgment: (1) On the count of manufacturing: imprisonment for period of eighteen months in common jail of Bladen County and assigned to work the roads under the supervision of the State Highway and Public Works Commission. (2) Upon the counts (a) for possession of materials for the purpose of manufacturing whiskey and (b) for possession of intoxicating liquor for the purpose of sale, prayer for judgment was continued. Defendant appealed to Supreme Court and assigns error.

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

James R. Nance and Hector H. Clark for defendant, appellant.

WINBORNE, J. Appellant presents for error the refusal of the trial court to sustain demurrer to the evidence, aptly made under G. S., 15-173, to which ruling exceptions were duly taken and preserved.

A careful consideration of the evidence in the record and case on appeal, taken in the light most favorable to the State, leads to the conclusion as a matter of law (1) that the evidence is insufficient to support a verdict on either the first, second, fourth or fifth counts in the warrant—the first and the fourth being virtually the same, and (2) that as to each of them the demurrer should have been sustained, and judgment entered accordingly. The evidence as to each of these charges, first and fourth, unlawful possession of materials for the manufacture of whiskey, second, unlawful manufacture of whiskey, and fifth, aiding and abetting in the unlawful manufacture of whiskey, tends to show no more than an expressed intent on the part of defendant to set up a whiskey still in the

vicinity where the still in question was found. Such an intent alone is not sufficient for a conviction even of an attempt to commit the offense charged. See *S. v. Addor,* 183 N. C., 687, 110 S. E., 650; *S. v. Burgess,* 186 N. C., 467, 119 S. E., 820. Moreover, though the evidence shows that three weeks thereafter, a still was set up in the approximate location to which the expressed intent related, there is no direct evidence to connect defendant with it. And the circumstances fail to meet the legal requirements for a conviction. "When the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis." *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868, and cases cited. See also *S. v. Madden,* 212 N. C., 56, 192 S. E., 859; *S. v. Miller,* 220 N. C., 660, 18 S. E. (2d), 143.

But as to the third count charging defendant with the unlawful possession of intoxicating whiskey for the purpose of sale, the evidence that defendant, who resided four miles away from the still, came to the still and got one-half gallon of nontax-paid whiskey and left, is sufficient to make a *prima facie* case of unlawful possession of it for the purpose of sale. G. S., 18-11, formerly C. S., 3411 (j). The case of *S. v. Suddreth,* 223 N. C., 610, 27 S. E. (2d), 623, is distinguishable in factual situation. Therefore, demurrer to the evidence as it relates to this count was properly overruled.

There is a general verdict of guilty as charged. Such a verdict on a warrant or bill of indictment containing several counts charging offenses of the same grade and punishable alike, as in the instant case, is a verdict of guilty on each and every count. *S. v. Toole,* 106 N. C., 736, 11 S. E., 168; *S. v. Sheppard,* 142 N. C., 586, 55 S. E., 146; *S. v. Poythress,* 174 N. C., 809, 93 S. E., 919; *S. v. Coleman,* 178 N. C., 757, 101 S. E., 261; *S. v. Switzer,* 187 N. C., 88, 121 S. E., 43; *S. v. Maslin,* 195 N. C., 537, 145 S. E., 3.

When the offenses are distinct, and there is a general verdict, as in the case in hand, the court can impose a sentence on each count. *S. v. Toole, supra; S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590; *S. v. Moschoures,* 214 N. C., 321, 199 S. E., 92; *S. v. Fields,* 221 N. C., 182, 19 S. E. (2d), 486.

If the verdict on either count be free from valid objection, and having evidence tending to support it, the conviction and sentence for that offense will be upheld. *S. v. Miller,* 29 N. C., 275; *S. v. Baker,* 63 N. C., 276; *S. v. Toole, supra; S. v. Sheppard, supra; S. v. Avery,* 159 N. C., 495, 74 S. E., 1016; *S. v. Pace,* 210 N. C., 255, 186 S. E., 366; *S. v. Epps,* 213 N. C., 709, 197 S. E., 580; *S. v. Johnson,* 220 N. C., 252, 17 S. E. (2d), 7; see also *S. v. Gordon, ante,* 304.

Applying these principles to the case in hand, we have here a warrant containing five counts charging offenses of the same grade and punishable alike. The verdict is general and, hence, it is a verdict finding the defendant guilty on each and every count. As to four of the counts there is insufficient evidence to support a verdict of guilty. But as to one, the third, the evidence is sufficient to support a conviction therefor. The court below could only sentence defendant upon the conviction on the third count. It appears, however, that the court in pronouncing judgment treated the counts severally, *S. v. Jarrett, supra; S. v. Fields, supra,* and that the sentence pronounced was upon the conviction on a count which is not supported by evidence, and the prayer for judgment was continued as to the only count supported by evidence. There may not be a new trial, *S. v. Toole, supra,* but the sentence imposed will be set aside and the case remanded for judgment upon the verdict on the third count, that is, upon the verdict convicting the defendant of unlawful possession of intoxicating liquor for the purpose of sale. *S. v. Miller, supra.*

Error and remanded.

STATE v. MACEY GRAHAM.

(Filed 24 May, 1944.)

Criminal Law § 8—

One who aids and abets another in the commission of a misdemeanor is, under the common law, a principal and may be convicted as such.

APPEAL by defendant from *Burney, J.,* at January Term, 1944, of BLADEN. No error.

Criminal prosecution on warrant charging (1) unlawful manufacture of intoxicating liquor; and (2) unlawful possession of materials for the purpose of manufacturing intoxicating liquor.

This and a companion case (No. 651) against Chesley Graham came on for hearing in the court below on appeal from the county court. The two causes were consolidated for trial.

On 31 July, 1943, the officers of Bladen County found an illicit still in operation at DeVane's landing in said county. There was evidence tending to show that this defendant was seen carrying three or four barrels in the direction the still was found; that he was present helping in the work at the time the still was installed; and that he employed and paid one of the parties found at the still by the officers.

As to this defendant, there was a general verdict of guilty as charged. From judgment on the verdict he appealed.

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

Wm. F. Jones for defendant, appellant.

BARNHILL, J. On *certiorari* issued from this Court the clerk of the Superior Court of Bladen County has certified that the original record, due to inadvertent omissions, is defective. He has also certified a corrected record including a copy of the warrant on which this defendant was tried. This effectively disposes of some of the assignments of error.

There are no exceptions to the admission or rejection of evidence, and there was no motion to dismiss as in case of nonsuit under G. S., 15-173.

The defendant contends that there was error in the charge in that the court (1) submitted to the jury for consideration against this defendant evidence which was incompetent as against him and which had in fact been excluded; (2) submitted a charge of "aiding and abetting" when no such charge is contained in the warrant; and (3) so stated the contentions as to present a powerful "summing up" on behalf of the State, amounting to an expression of opinion.

The court instructed the jury that it might return a verdict of guilty or not guilty of (1) manufacturing illegal whiskey; (2) aiding and abetting in the manufacturing of illegal whiskey; or (3) possessing materials for the purpose of manufacturing intoxicating liquor. And later:

"So I instruct you, Gentlemen, that if the State has satisfied you from the evidence and beyond a reasonable doubt that Macey Graham, on July 31, 1943, did manufacture illegal whiskey (or that he did aid and abet others in the manufacture of illegal whiskey) as that term has been defined to you by the Court, then it will be your duty to render a verdict of guilty of manufacturing illegal whiskey."

Defendant excepts for that the warrant does not charge aiding and abetting. The exception cannot be sustained.

One who aids and abets another in the commission of a misdemeanor is under the common law a principal and may be convicted as such. Furthermore, even if the statute, sec. 26, ch. 1, Public Laws 1923; G. S., 18-28, creates the separate and independent offense of "aiding and abetting" there was no verdict thereon, and the defendant has suffered no harm. We may add, however, that we do not accept defendant's view as to the force and effect of the instruction.

The court summarized the evidence fairly and impartially. Its statement of the contentions was brief and to the point. Those of the defend-

ant were as fully and fairly reviewed as were those of the State. In this respect the charge presents no just cause for complaint by the defendant.

The other exceptions likewise fail to disclose any substantial merit. Discussion thereof would serve no useful purpose. The verdict and judgment must be sustained.

No error.

M. C. KEMP AND WILLIE DAVIS v. T. J. FUNDERBURK AND VEDA CROOM FUNDERBURK, HIS WIFE, THOMAS HARLEE, G. W. BELL, TRUSTEE, AND FAYETTEVILLE BUILDING & LOAN ASSOCIATION.

(Filed 24 May, 1944.)

1. Reformation of Instruments § 2: Fraud § 2—

In an action to reform an instrument based on false and fraudulent representations, the complaint must allege (1) that the representation was false; (2) that the person making the statement, or the person or persons responsible for it, knew it to be untrue or had a reckless disregard as to its truth or falsity; (3) that the statement was intended to mislead the plaintiff and induce him to act upon it; and (4) that the plaintiff did rely on the statement and acted upon it and has been damaged thereby.

2. Pleadings §§ 3a, 20—

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the Court, we are directed by statute to construe such allegations liberally with a view to substantial justice between the parties. G. S., 1-151.

3. 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 facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted.

4. Reformation of Instruments § 6—

In a suit to reform an instrument on account of false and fraudulent representations made by defendants, where plaintiffs allege in their complaint that they were directed by defendants to deal with defendants' attorney, who prepared the papers, such attorney is not a necessary party to the action, for if false representations were made by such attorney, defendants would be liable for the acts of their agent.

5. Same—

In an action to reform a deed, all parties, claiming an interest in the land, or any part thereof, purported to be conveyed by the instrument to be reformed and whose interests may be affected by the reformation thereof, are necessary parties to the action.

APPEAL by defendants from *Nimocks, J.*, at December Term, 1943, of CUMBERLAND.

Civil action to reform a deed and to convert it into a mortgage or similar security.

Plaintiffs allege that they employed the defendant Harlee to negotiate a loan from the defendant T. J. Funderburk, the proceeds of the loan to be used to pay certain accrued taxes and other indebtedness which constituted liens against plaintiffs' property, said loan to be secured by a first mortgage or deed of trust on the land described in the complaint, and to be payable one year thereafter. Plaintiffs further allege that the defendant Funderburk agreed to make the loan on the terms and conditions above set forth and directed plaintiffs to deal with his attorney. Thereafter said attorney prepared the papers and assured plaintiffs that they were security for the repayment of the moneys aforesaid, one year thereafter, and the plaintiffs, who are colored and have but little education, relying on such assurance, executed the same; but plaintiffs have recently discovered that said paper writing is in fact a deed of conveyance to T. J. Funderburk. Further, "That by reason of the false and fraudulent representations to plaintiffs as hereinbefore set out and with the fraudulent intent and design on the part of the defendants Funderburk and Harlee, on which representations the plaintiffs relied, they were cheated and defrauded of their aforesaid property to their great damage," etc.

Plaintiffs also allege that on or about 27 November, 1942, the defendant T. J. Funderburk and wife executed a deed to the defendant Thomas Harlee, who had acted as agent in procuring the aforesaid loan in June, 1942, purporting to convey to him a part of the lands described in the aforesaid deed, and that the said Harlee thereafter borrowed from the Fayetteville Building & Loan Association the sum of $600.00, secured by a deed of trust on said premises.

The defendants T. J. Funderburk and wife, Veda Funderburk, and Thomas Harlee, filed demurrers to the complaint for that:

1. The complaint fails to state a cause of action in that there is no allegation of any false or fraudulent representations made by these defendants to the plaintiffs.

2. That the attorney alleged to have made the false representations is a proper and necessary party defendant.

3. That Thomas Harlee is an improper party defendant, for that it is alleged that he was the agent of plaintiffs.

Demurrers overruled, defendants appeal, assigning error.

J. O. Talley and Robert H. Dye for plaintiffs.
Malcolm McQueen for defendants.

DENNY, J. Does the complaint state a cause of action bottomed on false and fraudulent representations, and, if so, should the attorney referred to therein be made a party defendant?

In an action to reform an instrument based on false and fraudulent representation, the complaint must allege (1) that the representation was false; (2) that the person making the statement, or the person or persons responsible for it, knew it to be untrue or had a reckless disregard as to its truth or falsity; (3) the statement was intended to mislead the plaintiff and induce him to act upon it; and (4) that the plaintiff did rely on the statement and acted upon it and has been damaged thereby. *Ward v. Heath,* 222 N. C., 470, 24 S. E. (2d), 5; *Stone v. Milling, Co.,* 192 N. C., 585, 135 S. E., 449; *Evans v. Davis,* 186 N. C., 41, 118 S. E., 845; *Bell v. Harrison,* 179 N. C., 190, 102 S. E., 200; *Walsh v. Hall,* 66 N. C., 233.

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the Court, we are directed by statute to construe such allegations liberally with a view to substantial justice between the parties. G. S., 1-151; C. S., 535; *Hawkins v. Land Bank,* 221 N. C., 73, 18 S. E. (2d), 823.

"The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted. . . ." *Mallard v. Housing Agency,* 221 N. C., at p. 338, 20 S. E. (2d), 281, and the cases there cited.

We think the complaint herein, when construed in conformity with the authorities cited, does state a cause of action.

The appellants further contend that the attorney referred to in the complaint is a necessary party defendant. The contention is untenable. The plaintiffs were directed to deal with Mr. Funderburk's attorney, and if false representations were made by him to the plaintiffs, while acting as agent of the defendants as alleged, the defendants are liable for the acts of their agent. *Qui facit per alium facit per se.* The action may be brought against the principals only. *Griffin v. Lumber Co.,* 140 N. C., 514, 53 S. E., 307; 2 Am. Jur., sec. 436, p. 344.

The appellants have abandoned the contention that the defendant Harlee is an improper party. We think it not amiss to state, however, that in an action to reform a deed, all parties claiming an interest in the land or any part thereof, purported to have been conveyed by the instrument sought to be reformed, and whose interest will be affected by the reformation of the instrument, are necessary parties to the action. *First Nat. Bank v. Thomas,* 204 N. C., 599, 169 S. E., 189; G. S., 1-57; C. S., 446.

The demurrers were properly overruled.

Affirmed.

THOMAS J. HILL ET AL. v. GEORGE L. STANSBURY ET AL.

(Filed 24 May, 1944.)

1. Judgments § 22h—

Where there is a want of jurisdiction over the person, the cause, the process, or the subject matter, the whole proceeding is said to be *coram non judice* and is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose.

2. Public Officers §§ 7a, 8—

In an action by taxpayers against public officers, G. S., 128-10, to recover public funds unlawfully expended, the plaintiffs disclaiming in their complaint any right personally to participate in the recovery, after recovery, consent judgment dismissing appeals, and payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is without jurisdiction, G. S., 7-65, to order payments, out of the recovery, of such petitioner's expenses and counsel fees.

APPEAL by Guilford County and Commissioners of Guilford County from *Sink, J.*, at Chambers in Greensboro, 15 October, 1943. From GUILFORD.

The plaintiffs, citizens and taxpayers of Guilford County, brought this action, together with two others, reported in 221 N. C., 340, and 223 N. C., 193, under authority of G. S., 128-10 (formerly C. S., 3206) to recover of defendants, County Commissioners, for the benefit of Guilford County, on account of public funds unlawfully expended, etc., the plaintiffs disclaiming any right personally to participate in the recovery.

Judgment was finally awarded the plaintiffs, for and on behalf of the county, in the sum of $16,396.51. Both sides noted an appeal, which they later abandoned and entered consent judgment dismissing the appeals before the resident judge of the Twelfth Judicial District at chambers on 18 September, 1943. The amount of the judgment was thereupon paid to the clerk of the Superior Court of Guilford County.

Thereafter the plaintiff, Thomas J. Hill, filed petition before the resident judge of the district requesting that he be reimbursed for expenses and counsel fees. After notice to the county attorney and county commissioners, an order was made by the resident judge on 15 October, 1943, directing that the petitioner be paid out of the funds derived from the judgment in this case, the sum of $460.65, and that his attorneys be compensated out of said funds in the amount of $3,000.00.

By permission (similar to that granted in the case of *Moreland v. Wamboldt,* 208 N. C., 35, 179 S. E., 9), Guilford County and the Commissioners of Guilford County prosecute this appeal from the order, assigning errors.

Brooks, McLendon & Holderness, York & Boyd, and Andrew Joyner, Jr., for plaintiffs, appellees.

Thomas C. Hoyle and Hines & Boren for defendants, appellants.

STACY, C. J. It is provided by G. S., 128-10 (formerly C. S., 3206), that the citizen and taxpayer who sues in an action like the present and recovers, "shall receive one-third part, up to the sum of five hundred dollars, of the amount recovered, to indemnify him for his services, but the amount received by the taxpayer and citizen as indemnity shall in no case exceed five hundred dollars." In the instant case, however, the complaint alleges "the plaintiffs disclaim any right personally to participate in the proceeds of any recovery that may be had in the suit." Hence, no provision was made in the judgment entered in the cause for indemnifying the plaintiffs for their services. Nor was any mention made of the matter in the consent judgment dismissing the appeals which was approved by the resident judge of the district on 18 September, 1943.

The petition filed by Thomas J. Hill before the resident judge at chambers for expenses and counsel fees bears verification 17 September, 1943, and is marked "Filed, this Oct. 15, 1943." The question raised at the threshold of the hearing on the petition was the jurisdiction and authority of the resident judge to entertain the petition or to act upon it. We agree with the appellants that he had none. G. S., 7-65 (formerly C. S., 1438); 14 Am. Jur., 362, *et seq.* His jurisdiction over the matter, if at any time he had any, ended with the signing of the consent judgment dismissing the appeals. 21 C. J. S., 147; McIntosh on Procedure, sec. 518.

Where there is a want of jurisdiction either over the person, the cause, or the process, it is the same as if there were no court. Proceedings so had are said to be *coram non judice,* and are void. *Monroe v. Niven,* 221 N. C., 362, 20 S. E (2d), 311; *Greene v. Stadiem,* 197 N. C., 472, 149 S. E., 685; *S. v. Baxter,* 208 N. C., 90, 179 S. E., 450; *Grumon v. Raymond,* 1 Conn., 40, 6 Am. Dec., 200. "Where there is no jurisdiction of the subject matter the whole proceeding is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose." *High v. Pearce,* 220 N. C., 266, 17 S. E. (2d), 108.

It follows, therefore, that the order entered on the petition is without force or effect. It may be disregarded. McIntosh on Procedure, 460.

Error.

STATE v. KEITH WAYNE TODD.

(Filed 24 May, 1944.)

Homicide §§ 16, 27d—

In a homicide case where an intentional killing is established, the law presumes malice from the use of a deadly weapon and the defendant is guilty of murder in the second degree, unless he can satisfy the jury, from the evidence offered, of 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.

APPEAL by defendant from *Burney, J.*, at January Term, 1944, of CUMBERLAND. No error.

The defendant was charged with the murder of one James L. Faison. The death of deceased resulted from a pistol shot fired by the defendant. The State's evidence tended to show that the shooting while unpremeditated was intentionally done without sufficient provocation to mitigate or excuse it. The defendant testified that the deceased assaulted him with a knife, and that he shot in self-defense.

The jury returned verdict of guilty of murder in the second degree, and from judgment imposing sentence the defendant appealed.

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

C. W. Gold, Oates, Quillin & MacRae, and R. Glenn Cobb for defendant.

DEVIN, J. The defendant's only assignment of error is to the following portion of the judge's charge to the jury: "When an intentional killing is admitted or established, the law presumes malice from the use of a deadly weapon and the defendant would be guilty of murder in the second degree unless he can satisfy the jury of the truth of the facts, not beyond a reasonable doubt nor by the greater weight of the evidence but simply satisfy the jury of facts which justify his act or mitigate it to manslaughter and the burden is on the accused in such case to establish such facts to the satisfaction of the jury unless they arise out of the evidence against him."

This statement of a principle of law appropriate to the definition of murder in the second degree was amplified and pointed to the facts in evidence in this case by the following instruction: "If you find from the evidence beyond a reasonable doubt or if you find from the admissions of the prisoner that he shot and killed the deceased, James L. Faison, on the 25th day of October, 1943; that he killed him intention-

ally and that he killed him with a deadly weapon, then the prisoner is guilty of murder in the second degree and if you so find it will be your duty to render a verdict of guilty of murder in the second degree against the defendant, unless he has established, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to the satisfaction of the jury from the evidence he has offered or from the evidence offered against him, the legal provocation which will take from the crime the element of malice, presumed from killing with a deadly weapon, and thus reduce it to manslaughter, or which will excuse it altogether on the grounds of self-defense."

The charge of the court was in accord with well settled principles of law, and the exception thereto cannot be sustained. *S. v. Quick,* 150 N. C., 820, 64 S. E., 163; *S. v. Sheek,* 219 N. C., 811, 15 S. E. (2d), 282; *S. v. Beachum,* 220 N. C., 531, 17 S. E. (2d), 674; *S. v. Prince,* 223 N. C., 392.

In the trial we find

No error.

H. W. HUNTER, MRS. L. O. ELLIS, EMMA WOODWARD AND EARL S. BLAND, v. BOARD OF TRUSTEES OF THE RETIREMENT SYSTEM OF THE CITY OF WILMINGTON, NAMELY, EDGAR L. YOW, RICHARD S. ROGERS AND J. R. BENSON.

(Filed 2 June, 1944.)

1. Retirement System §§ 7b, 8b—

The employees of the consolidated Board of Health of New Hanover County, Public-Local Laws 1913, ch. 316, are joint employees of the city of Wilmington and county of New Hanover, and the Trustees of the Retirement System of the city of Wilmington may be compelled, by *mandamus,* to accept from such employees the payments required by ch., 708 S. L., 1943, and to place the names of such employees upon the pension rolls of such retirement System.

2. Retirement System § 7b—

The Wilmington Public Library is an agency of the city of Wilmington, controlled by, and entirely dependent upon, the city for its existence, Private Laws 1907, ch. 138, and Private Laws 1921, ch. 5, and therefore the employees of the said library are employees of the city of Wilmington and as such are entitled to the benefits of the Retirement System under the provisions of ch. 708, S. L., 1943.

3. Same—

The Associated Charities of the city of Wilmington is a private corporation, in no way controlled or dependent upon the city of Wilmington, although it receives some voluntary aid from said city; and the employees

of said Associated Charities are not, therefore, entitled to the benefits of the Retirement System, S. L., 1943, ch. 708.

4. Retirement System §§ 7b, 8b—

The Alcoholic Beverage Control Board of New Hanover County, Public-Local Laws 1937, ch. 49; Public-Local Laws 1937, ch. 471, is in no way under the control or management of either the city of Wilmington or New Hanover County, and its employees are not employees of said city and county and are not entitled to the benefits of the Retirement System. S. L., 1943, ch. 708.

DENNY, J., concurring.

STACY, C. J., joins in concurring opinion.

BARNHILL, J., dissenting.

APPEAL by plaintiffs, Mrs. L. O. Ellis and Earl S. Bland, and by the defendants, from *Burney, J.,* at Chambers in Wilmington, 25 March, 1944. From NEW HANOVER.

This was a civil action originally instituted by H. W. Hunter against the Board of Trustees of the Retirement System of the city of Wilmington, created by chapter 708, Session Laws, 1943, to obtain a writ of *mandamus* to compel the secretary of said board of trustees to accept funds deducted from the salaries of the employees of the consolidated Board of Health of New Hanover County, and to compel said trustees to treat said employees as members of said Retirement System and eligible for the benefits thereof. Thereafter Mrs. L. O. Ellis, Miss Emma Woodward and Earl S. Bland, representing respectively the employees of the Associated Charities of Wilmington, the Wilmington Public Library and the Alcoholic Beverage Control Board of New Hanover County were, upon petition, made parties plaintiff and adopted the complaint filed and filed supplemental complaints.

After the pleadings had been filed, by consent of the parties, the cause came on for hearing before the resident judge of the 8th Judicial District at chambers, at which hearing the parties agreed that the court could hear the evidence, find the facts and determine the law arising thereon.

The court entered judgment granting the *mandamus* sought to H. W. Hunter and other employees of the Consolidated Board of Health of New Hanover County and to Miss Emma Woodward and other employees of the Wilmington Public Library, and dismissed the action of Mrs. L. O. Ellis on behalf of herself and other employees of the Associated Charities of Wilmington and the action of Earl S. Bland on behalf of himself and other employees of the Alcoholic Beverage Control Board of New Hanover County.

From the judgment of Burney, J., the plaintiffs, Mrs. L. O. Ellis and Earl S. Bland, and the defendants, respectively, appealed, assigning errors.

F. C. Paschall for plaintiffs Ellis and Bland, appellants.
R. M. Kermon for plaintiff Hunter, appellee.
F. C. Paschall for plaintiff Woodward, appellee.
Wm. B. Campbell for defendants, appellants.

SCHENCK, J. This case may be more clearly understood by discussing the individual appeals taken therein *seriatim.*

First: The appeal of defendants from judgment allowing the *mandamus* sought to H. W. Hunter and other employees of the consolidated Board of Health of New Hanover County. It is the contention of the defendants, appellants, that the court erred in holding that the employees of the Consolidated Board of Health of New Hanover County are joint employees of the city of Wilmington and county of New Hanover, and thereupon adjudging that the trustees of the Retirement System of the city of Wilmington be required to accept from such employees the payments required by chapter 708, Session Laws, 1943, and to place the names of such employees upon the pension rolls of the Retirement System of the city of Wilmington. We are of the opinion that this contention is not sustained by the record.

Chapter 316, Public-Local Laws 1913, is "An Act to Consolidate The Health Departments of The City of Wilmington and The County of New Hanover." Prior to its enactment the city of Wilmington maintained a Health Department, and the county of New Hanover also maintained the New Hanover County Board of Health, authorized by chapter 62 of Public Laws 1911. Both of these bodies were authorized and charged with the duty of making such regulations governing health and sanitation as were necessary to safeguard the welfare of the people in their respective municipalities. To enable the better enforcement of such regulations the above mentioned Act of 1913 was made law. It provides that the body politic thereby created, the Consolidated Board of Health of New Hanover County, is empowered to control, and is invested with the care and responsibility of, the health and sanitary interests and conditions of the county of New Hanover, and shall assume all the duties and powers imposed by law upon the council of the city of Wilmington, with reference to the health and sanitary conditions of said city, and that all salaries, fees and expenses necessary and required to carry out the provisions of the Act shall be contributed and paid by the city of Wilmington and the county of New Hanover in proportion of two-thirds part by the city of Wilmington and one-third part by the county of New Hanover.

The Act further provides that the County Board of Health is to furnish the city of Wilmington and the county of New Hanover, on first

Monday in June of each year, a statement of disbursements made by the County Board during the preceding 12 months and a statement of the requirements for the ensuing 12 months and specifically provides that the council of the city of Wilmington and the board of commissioners of the county of New Hanover at the time designated by law for levying taxes, shall make a levy on all real and personal property sufficient to raise the revenue required to meet and pay each year respectively the said amounts so required; and further, that said city council and county board may reduce the amount asked for if they deemed the amount excessive; and to safeguard the amounts paid by the city council and county board it is provided that they shall pay only one-twelfth of their respective portions each month. The Board of Health of New Hanover County operates under a contract with the State Board of Health, and the employees of the county board are therefore operating under the Merit System of certain departments of the State of North Carolina, as provided by chapter 378, Public Laws 1941, and for this reason neither the city nor county have jurisdiction over their salaries. The contract between the County Board of Health and the State Board of Health is, however, approved both by the mayor of the city of Wilmington and the chairman of the Board of Commissioners of the county of New Hanover, showing a recognition of the consolidated Board of Health as a joint operation. Subsection (b), sec. 7, ch. 708, Session Laws, 1943, and subsection (b), sec. 7, ch. 669, Session Laws, 1943, provide that where employees are employed jointly by the city and county, the deduction from salaries and benefits derived shall be in proportion to the portion of the salaries paid by the city and county respectively.

It being the duty of the city of Wilmington and the county of New Hanover, under ch. 316, Public Laws 1913, to appropriate all salaries, fees and expenses necessary to carry out the provisions of the Act, it would seem that the employees of the consolidated Board of Health of New Hanover County, created by the Act, would be joint employees of such city and county within the legislative intent, and we therefore hold there was no error in the holding of his Honor below to this effect.

Second: Appeal by defendants from judgment allowing the *mandamus* sought to Miss Emma Woodward and other employees of the Wilmington Public Library.

It is the contention of the defendants, appellants, that the court erred in holding that the employees of the Wilmington Public Library were employees of the city of Wilmington, and thereupon adjudging that the trustees of the Retirement System of the city of Wilmington be required to accept from such employees payments required by ch. 708, Session Laws, 1943, and to place the names of such employees upon the pension

rolls of such Retirement System of the city of Wilmington. We are of the opinion that this contention is not sustained by the record.

The present Wilmington Public Library was created pursuant to ch. 138, Private Laws 1907. Section 1 of this Act makes it mandatory upon the Board of Aldermen of the city of Wilmington to elect five persons as trustees to control and maintain a free library. Section 2 vests the trustees with power to operate a free library. Chapter 5, Private Laws 1921, removes the limitation of appropriations to the library by the city. The Wilmington Public Library is governed by three trustees appointed by the councilmen of the city of Wilmington, and any vacancy occurring among the trustees is filled by the said councilmen. The furniture and equipment of the City Library is the property of the city, and is all housed in quarters in the City Hall, which quarters are furnished free of charge by the city to the library. The councilmen of the city of Wilmington appropriate $5,000.00 a year, in equal monthly installments, to the Wilmington Public Library for its upkeep and maintenance, and the trustees, through their secretary, reports to the city councilmen all receipts and disbursements. The employment of and salaries of employees are passed upon by the trustees. The commissioners of New Hanover County appropriate $1,000.00 annually for the operation of a bookmobile throughout the county, which is supervised and controlled by the said trustees of the Wilmington Public Library. This bookmobile, however, is a distinct and separate operation carried on by said trustees. The appropriation by the city councilmen to the Wilmington Public Library is made from the city's general tax fund. The trustees appointed by the city councilmen exercise absolute authority and control over the Wilmington Public Library, its personnel, payment of salaries and policies of operation.

The law under which the library is created makes its establishment mandatory upon the city government, and the city is obeying the mandate of the law when it pursues the method it has pursued in establishing and operating the library. The Wilmington Public Library as created and operated is but an agent of the council of the city of Wilmington to carry out the mandate of the law. The library is entirely dependent upon city government for its functioning and very existence. Since the Wilmington Public Library is but an agent of the city of Wilmington, under its complete control, it follows that the employees of the library are employees of the city.

We are therefore of the opinion that there was no error in the holding of his Honor below that the employees of the Wilmington Public Library were employees of the city of Wilmington, and as such were eligible to the benefits of the Retirement System under the provisions of ch. 708, Session Laws, 1943.

Third: Appeal by plaintiffs' Mrs. L. O. Ellis, from judgment denying the *mandamus* sought to her and other employees of the Associated Charities of the city of Wilmington.

It is the contention of Mrs. L. O. Ellis, appellant, that the court erred in holding that the employees of the Associated Charities of the city of Wilmington are not employees of the city of Wilmington and thereupon adjudging that the trustees of the Retirement System of the city of Wilmington are not required to accept from said employees any amount deducted from their salaries, or to admit their names upon the pension roll of such system, under the provisions of chapter 708, Session Laws, 1943. We are of the opinion that the contention is not sustained by the record.

The Associated Charities of the city of Wilmington is a private corporation, with its charters duly recorded in New Hanover County, wherein its powers are delineated. It functions with a president and other officers provided by a Board of Directors, none of whom is chosen by the city of Wilmington, and no city official is a member of the board. The corporation performs all of its duties and functions in aid of the poor, indigent and needy solely by virtue of authority of its charter, and not under any authority vested in it by either the city or county. The salaries of the plaintiff Ellis and others are determined by its board of directors. While it is true the Associated Charities submits a budget to the city and county, such budget is only recommendatory in its nature, as it is followed, modified or disregarded at the discretion of the city and county. All funds appropriated to the corporation by the city or county, or derived from other sources, are disbursed by its officers and board of directors. Neither the number of employees, nor the amount of their salaries, nor their duties nor any function performed by them are determined by the city or county.

Under the facts enumerated we are of the opinion that there was no error in the holding of his Honor below that the employees of the Associated Charities of the city of Wilmington were not employees of the city of Wilmington, and therefore were not eligible to the benefits of the retirement system under the provisions of ch. 708, Session Laws, 1943.

Fourth: Appeal by the plaintiff, Earl S. Bland, from judgment denying the *mandamus* sought to him and other employees of the Alcoholic Beverage Control Board of New Hanover County.

It is the contention of Earl S. Bland, appellant, that the court erred in holding that the employees of the Alcoholic Beverage Control Board of New Hanover County are not employees of the county of New Hanover and thereupon adjudicating that the trustees of the Retirement System of the city of Wilmington are not required to accept from said

employees any amount deducted from their salaries or to admit their names upon the pension roll of such system, under the provisions of ch. 708, Session Laws, 1943. We are of the opinion that the contention is not sustained by the record.

The Alcoholic Beverage Control Board of New Hanover County was created by ch. 49, Public Laws 1937. This Act invests the control of the county board in the State Board of Alcoholic Beverage Control. It appears from section 10 of the 1937 Act that all powers exercised by the county board are subject to approval of the State Board, and by subsection (j) of section 4 of said Act the State Board is specifically granted discretionary powers to approve or disapprove all regulations of the county board as to the operation of county stores. There is no authority whatsoever vested in the city of Wilmington or county of New Hanover to control the Alcoholic Beverage Control Board of New Hanover County, to determine the number of its employees, to fix their salaries, or to assign their duties, or to in any way interfere with the discretionary powers vested in the State and County Boards of Alcoholic Beverage Control.

The only relation between the Alcoholic Beverage Control Board of New Hanover County and the city of Wilmington and the county of New Hanover is that by virtue of ch. 471, Public-Local Laws 1937, provision is made that the city shall receive two-thirds and the county one-third of the net profits realized by the discretionary operation of liquor stores within the city of Wilmington, and that the other municipalities in New Hanover County and the county shall receive certain percentages of such profits from stores operated in other municipalities in the county. Neither the city nor the county determine who shall be or how many employees there shall be of the Alcoholic Beverage Control Board of New Hanover County; neither fix their salaries nor determine their duties, nor in any wise exercise any control over them.

Under the facts as delineated, we are of the opinion that there was no error in the holding of his Honor below that the employees of Alcoholic Beverage Control Board of New Hanover County were not employees of the county of New Hanover, nor of the city of Wilmington, and were therefore not eligible to the benefits of the Retirement System under the provisions of ch. 708, Session Laws, 1943.

The judgment of the Superior Court is
Affirmed.

DENNY, J., concurring: Since the enactment of chapter 316, Public-Local Laws 1913, the Board of Health of New Hanover County has been charged with the duty and responsibility of the control and maintenance of the health program for said county, including the municipalities

therein, as provided in chapter 62, Public Laws of 1911, and the amendments thereto. While the 1913 Act purported to transfer certain duties and responsibilities, from the city council of the city of Wilmington to the County Board of Health, no legislation was required to effectuate such a transfer, since under the provisions of chapter 62, Public Laws 1911, it was within the discretion of the city council of the city of Wilmington whether or not the city would maintain a health department. By the enactment of chapter 316, Public-Local Laws 1913, no new agency was created but in practical effect the City Health Department was abolished and the city of Wilmington authorized and directed to bear four-fifths of the expenses of the County Board of Health, now alleged and admitted to be two-thirds.

A State-wide Retirement System for Local Government Employees was created by the General Assembly of 1939, chapter 390, which Act was amended by chapter 357, Public Laws 1941. The 1941 Act contains the following provision: ". . . Provided, further, that employees of welfare of (and) health departments whose compensation is derived from both State and local funds may be members of a North Carolina Local Government Employee's Retirement System to the extent of that part of their compensation derived from a county, city or town." It will be noted that while employees of welfare and health departments may receive compensation from State and local funds, the participation in a North Carolina Local Government Employees' Retirement System is limited to the compensation derived from the local funds.

Section 9-A of chapter 357, Public Laws 1941, was amended by 1943 Session Laws, chapter 258, by adding to said section the following: ". . . Provided, further, that this section (requiring a vote) shall not apply to the County of New Hanover or the City of Wilmington, and the Commissioners of the County of New Hanover and of the City of Wilmington are hereby authorized, empowered and directed to appropriate a sufficient amount to put into effect the retirement of employees, both elective and appointive, of the County of New Hanover and the City of Wilmington."

Chapter 669, Session Laws, 1943, created a Retirement System for the employees of New Hanover County, and Chapter 708, Session Laws, 1943, created a Retirement System for the employees of the city of Wilmington. Section 7 (b) of both Acts are identical, except in one deductions are to be made by the county and in the other by the city. Section 7 (b) of chapter 708 reads as follows: "In case of employees employed jointly by the county and city, their proportion of pay roll deductions by the city for the benefit of the retirement fund and, in case of retirement, the proportion paid to them from the retirement fund

shall bear the same relation to their total salary as that part of their salary paid by the city bears to the total salary received by them."

I think it was the legislative intent that the employees of the Board of Health of New Hanover County should participate in these Retirement Systems in proportion to the percentage of their salaries paid by New Hanover County and the city of Wilmington. Such an interpretation is in harmony with the declared policy of the State, as set forth in chapter 357, Public Laws 1941, and quoted herein.

In the case of *Callihan v. Board of Education,* 222 N. C., 381, 23 S. E. (2d), 297, it was held that Callihan was an employee of the Board of Education of Robeson County, and that said board was liable with its insurance carrier, under the Workmen's Compensation Act, for the death of Callihan, a teacher of vocational agriculture in said county. The majority opinion does not affect the Callihan decision in any respect, since that decision was bottomed on section 22, chapter 358, School Machinery Act of 1939, the pertinent part of which is as follows: ". . . The county and city administrative units shall be liable for Workmen's Compensation for school employees whose salaries or wages are paid by such local units from local funds, and such local units shall likewise be liable for Workmen's Compensation of school employees employed in connection with teaching vocational agriculture, home economics trades and industrial vocational subjects, supported in part by State and Federal funds, which liability shall cover the entire period of service of such employees. Such local units are authorized and empowered to provide insurance to cover such compensation liability and to include the cost of such insurance in their annual budgets."

The State and Federal Governments are protected from liability in connection with their contributions to local funds for the teaching of agriculture and other vocational subjects by the express provisions of the statute.

The question is not whether those employed by the Board of Health of New Hanover County are "employees" of the city of Wilmington in a technical sense, but whether they come within the purview of the Retirement Acts and were intended to come within their terms. I think so.

STACY, C. J., joins in this opinion.

BARNHILL, J., dissenting: The majority opinion holds that employees of the Board of Health of New Hanover County are employees of the city of Wilmington within the meaning of chapter 708, Session Laws, 1943, which defines an employee of said city as "anyone in the employ of the city, whether elected or appointed." Sec. 8. In this I am unable to concur.

The health program of North Carolina is operated as a State-wide system with the several counties and some municipalities acting through boards of health as local administrative agencies charged with certain specified duties. Ch. 62, Public Laws 1911. The New Hanover County Board of Health was organized under this Act. In 1913 the Legislature invested the then existing Board of Health of New Hanover County "with the immediate care and responsibility of the health and sanitary interests and conditions of said county, including the City of Wilmington and the Town of Wrightsville Beach, and the due enforcement of all laws with reference thereto." It divested the city of Wilmington of all powers and duties theretofore vested in it in respect to health matters and decreed that "all duties and powers imposed by law upon the Council of the City of Wilmington with reference to the health and sanitary conditions of said city are hereby transferred to and invested in said County Board of Health." Sec. 2, ch. 316, Public-Local Laws 1913. It further enacted "that said County Board of Health shall . . . elect a Superintendent of Health and such assistants, officers, and servants as they shall deem necessary for the enforcement of all health and sanitary laws within said county, including the City of Wilmington and the Town of Wrightsville Beach, and to prescribe the duties of such officers, servants, and helpers so appointed and elected, fix their salaries and compensation, and pass all necessary rules, regulations, and acts with reference thereto." Sec. 3. It was given power to remove any officer or employee for cause. Sec. 9.

The city of Wilmington is required to contribute four-fifths of the necessary expense, including salaries and fees, required for carrying out the provisions of the Act. Sec. 4. To this end the County Board of Health is required to furnish the council of the city of Wilmington and the Board of Commissioners of New Hanover County a yearly statement in detail of all disbursements made by it for the preceding twelve months and at the same time to furnish said bodies a budget listing in detail all estimated expenses and requirements for the ensuing twelve months. The council of the city of Wilmington and the Board of Commissioners of New Hanover County are fixed with authority to review said request for funds for the ensuing year and to reduce the amount asked for if, in the judgment of the council or the board, the amount is excessive or not required for the public needs. It is thereupon made the duty of the council of the city of Wilmington to levy, assess, and collect a tax on the property within the city of Wilmington sufficient to meet its contribution. Sec. 5. It is likewise required to pay over, on the first of each month, one-twelfth of the contribution thus required. Sec. 6.

The city now has no power to employ a servant or agent to engage in the discharge of the duties imposed on the County Board of Health. It

cannot participate in their selection or exercise any degree of control over their activities. They are not, in my opinion, "in the employ of the city." In holding otherwise the majority disregard both the usual and ordinary meaning of the term "employee" and the definition contained in the statute. Instead, the term is given an exceptional meaning which goes far beyond that usually accorded it. So that now the city is without statutory authority to act in respect to the health and sanitary conditions in the city. Even its ordinances are made subordinate to the rules and regulations of the County Board of Health. Yet, those persons engaged in health work—work in which the city cannot engage—are none the less employees of the city. Thus, through its employees, it does what it is expressly forbidden to do. There is nothing in the statute which justifies this exceptional construction.

The authority of the city to maintain an independent board of health has been withdrawn. Its sole prerogative in this respect is to make a contribution, under legislative compulsion, toward the expense incurred by the County Board of Health and to levy and collect a tax sufficient to provide the required contribution. The State has adopted this method of financing the health program in New Hanover County. Under it the council of the city of Wilmington is the agency designated to levy a tax and collect a part of the required revenue. This is the full extent of its authority.

The County Board of Health is an independent governmental agency. Its jurisdiction is coterminous with the county lines. Its revenue is derived by taxation, and the county and city are made the taxing agencies. In no sense, however, is it county or city or agent of either. It is exclusively an agent of the State.

The Federal Government makes contributions to at least eleven State agencies. The State Government makes contributions to help defray expenses of some local agencies. Do these contributions by the Federal Government convert State employees into Federal employees and local agency employees into State employees? We have answered "no." *Callihan v. Board of Education,* 222 N. C., 381. If, however, the majority opinion avails, the answer is yes.

Bridges v. Charlotte, 221 N. C., 472, 20 S. E. (2d), 825, is not in point. The factual situation in that case is quite different. Teachers are expressly designated as employees entitled to the benefits of the Retirement Act. Local boards supplementing the State's school salary schedule and term are required to pay their proportionate part of the assessment for this purpose. The City Board of Education of Charlotte, as the local administrative agency, comes within this category. It included this item in its budget, and the governing board of Charlotte, as

the agency designated to raise by taxation funds required by the school board, levied the required tax. Certain taxpayers sought an injunction.

We held that the local school administrative unit is a part of the State-wide system; that it is under the duty to provide its part of the assessment necessary to maintain the retirement fund; that a tax therefor is authorized; and that the governing board of Charlotte, the agency designated to raise the fund by taxation, must levy a tax sufficient to provide the same.

The teachers were there treated as employees of the local school administrative unit. The governing board of Charlotte was required to levy the tax as the agency designated for that purpose. There is no suggestion in that case that the teachers are employees of the city of Charlotte.

I have some doubt about the soundness of the contention that employees of a local library operated by a private corporation are employees of the city. However, my doubt is not of such nature as to compel me to debate the question. I am content to acquiesce in the view of the majority.

I vote to modify in accord with what I have heretofore said and to affirm.

STATE DISTRIBUTING CORPORATION v. TRAVELERS INDEMNITY COMPANY.

(Filed 2 June, 1944.)

1. Insurance § 12—

In the field of insurance a "binder," or a "binding slip," is merely a written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk of the insurer, or until the issuance of a formal policy.

2. Same—

When the contract of insurance is finally complete, it is customarily embodied in a formal written instrument, termed a "policy." This instrument merges all prior agreements touching the transaction and upon accepting it the insured is conclusively presumed, in the absence of fraud, to have given his assent to all of its terms.

3. Same—

It is incumbent upon an applicant for insurance, who receives a policy which does not conform, as to terms, to the agent's representations, to notify the company, within a reasonable time, of his refusal to accept the policy. And if an applicant receives and retains, without objection, policies made and sent to him, it is regarded as an acceptance.

4. Same—

Reasonable time begins to run on receipt of the policy. What is a reasonable time seems to depend upon the circumstances of the case. A delay of four and a half to five months has been held unreasonable.

BARNHILL, J., dissenting.

DEVIN and SEAWELL, JJ., join in dissenting opinion.

APPEAL by defendant from *Harris, Resident Judge,* in Chambers, by consent, upon agreed statement of facts in case duly pending and at issue, 12 February, 1944, in WAKE.

Civil action on alleged contract of robbery and burglary insurance, and for recovery of loss sustained.

In the trial court counsel for plaintiff and for defendant filed with the court an agreed statement of facts substantially as follows:

1. Plaintiff is a corporation with its principal office and place of business located at 108 S. Blount Street, in the city of Raleigh, North Carolina.

2. Defendant, a foreign corporation, with its principal office and place of business in the city of Hartford, Connecticutt, was authorized to engage, and did engage in the indemnity insurance business in the State of North Carolina on the dates hereinafter stated, and I. J. Dowdy, Jr., of the city of Rocky Mount, N. C., was a duly licensed agent and representative of it, with power and authority to enter into contracts of insurance for, and on behalf of it.

3. On 21 December, 1939, plaintiff through its manager applied to Dowdy, agent of defendant, for a policy of robbery insurance by letter reading as follows: "Please put a binder effective immediately covering robbery insurance for State Distributing Company, for $1,000 on the outside, and $1,300 on the inside," and "a day or two thereafter by telephone conversation the plaintiff amplified said application to said I. J. Dowdy by applying for a policy of burglary insurance in addition to the policy of robbery insurance above mentioned."

4. Dowdy, defendant's agent, bound plaintiff in accordance with said letter of 21 December, 1939, and the telephone request above mentioned, and on 27 December, 1939, wrote a letter to plaintiff advising that said binder for robbery insurance had been put into effect—the letter reading in essential part as follows: "Thank you for your letter of December 21, 1939, requesting that we cover you in the amount of $1,300 for burglary and robbery insurance inside your premises and $1,000 robbery and hold-up insurance away from your premises. We have put this coverage in effect immediately. I am requesting one of the Company representatives to call on you the next time they are in Raleigh, as we will need additional information to enable us to issue the policy itself, however,

in the meantime, you may be sure you are covered as requested." And at the same time Dowdy wrote defendant at Charlotte, N. C., requesting it "to handle in the manner suggested," and forwarded to it a copy of his said letter to plaintiff.

5. The "letter of 27 December, 1939, from I. J. Dowdy, agent of defendant, to plaintiff constituted a binder or contract of insurance for a period of one year in accordance with the terms of said letter."

6. Under date of 29 February, 1940, defendant issued to plaintiff a policy of robbery insurance for a period of one year from 21 December, 1939, to 21 December, 1940, which policy was entitled a "robbery policy," and contained these provisions: (a) In item 4 an exception to the protection of one outside custodian which exception provided that there were covered by the policy protection for three outside custodians in the amount of $1,000 each; (b) in item 9 a declaration that "the assured has no other burglary, robbery or theft insurance except as stated herein: 'NO EXCEPTIONS' "; (c) agreement that "as respects moneys or securities, or both, . . . stated to be insured hereunder: I. To indemnify the assured for all loss . . . occasioned by Robbery Or Attempt Thereat committed . . . from a custodian outside the assured's premises . . .," and "II. To indemnify the assured for all loss . . . occasioned by Robbery Or Attempt Thereat committed . . . within the assured's premises . . .;" (d) definition of robbery as used in the policy to mean "a felonious and forcible taking of property (1) by violence inflicted upon a custodian; (2) by putting him in fear of violence; (3) by any other overt felonious act committed in the presence of a custodian and of which he was actually cognizant provided such other act is not committed by an officer or employee of the assured; (4) from the person or direct care or custody of a custodian, who, while having custody of property covered hereby, has been killed or rendered unconscious by injuries inflicted maliciously or sustained accidentally"; (e) declaration that "the statements in items numbered 1 to 16 inclusive in the declarations are declared by the assured to be true. This policy is issued in consideration of such statements and the payment of total premium in the declarations expressed"; and (f) statement on riders attached relating to amount of policy and to change of address that "nothing herein contained shall vary, alter, extend or otherwise change the condition of the policy other than as above stated."

7. Plaintiff accepted and retained said policy and on the date of loss, 5 August, 1940, still retained said policy.

8. And "on the night of August 5, 1940, and while said policy was in full force and effect, the place of business of plaintiff was broken into or otherwise entered and the cash register of plaintiff was robbed and/or burglarized of the amount of $546.78 in cash," for which loss plaintiff

made claim, and defendant denied liability therefor, and plaintiff instituted this action within the statutory period.

Upon the foregoing facts the plaintiff contends "that at the time of the said robbery and/or burglary it was covered therefor by virtue of the binder issued therefor by the defendant, and that it is, therefore, entitled to recover the amount lost by reason of said robbery and/or burglary"; and "the defendant admits the issuance of the binder for both the robbery and burglary insurance on December 27, 1939, but contends that the issuance of the robbery policy on February 29, 1940, was in substitution of the binder theretofore issued and that thereafter the binders were of no effect and that, therefore, on the date of the loss the plaintiff was not covered for the loss sustained."

By consent of counsel the cause came on for hearing upon the foregoing agreed statement of facts and the court being of opinion that plaintiff is entitled to recover of defendant for the loss sustained, entered judgment that plaintiff recover for the amount thereof, with interest and costs.

Defendant appeals therefrom to the Supreme Court and assigns error.

Bailey, Holding, Lassiter & Wyatt for plaintiff, appellee.
Joyner & Yarborough for defendant, appellant.

WINBORNE, J. The question for decision is this: Was the binder or contract of insurance against loss by burglary and robbery, as represented by the letter of 27 December, 1939, superseded by or merged into the formal policy covering robbery only, subsequently delivered, accepted and retained by the assured? In the light of well recognized principles adopted and applied in decisions of this Court an affirmative answer is dictated.

These principles of law are:

1. In the field of insurance a "binder" or a "binding slip" "is merely a written memorandum of the most important terms of a preliminary contract of insurance intended to give temporary protection pending the investigation of the risk of the insurer, or until the issuance of a formal policy. By intendment it is subject to all the conditions in the policy to be issued." Vance on Insurance, Hornbook Series, 2nd Ed., section 66, page 194, quoted and applied in *Gardner v. Ins. Co.*, 163 N. C., 367, 79 S. E., 806, and *Lea v. Ins. Co.*, 168 N. C., 478, 84 S. E., 813. See also 29 Amer. Jur., 158, Insurance, sec. 143, and 32 C. J., 1099, Insurance, sec. 183.

2. "When the contract of insurance is finally complete, it is customarily embodied in a formal written instrument, termed a 'policy.' This instrument merges all prior or contemporaneous parol agreements touch-

ing the transaction and upon accepting it the insured is conclusively presumed, in the absence of fraud, to have given his assent to all of its terms." Vance on Insurance, Hornbook Series, section 68, page 199. *Floars v. Ins. Co.,* 144 N. C., 232, 56 S. E., 915; *Clements v. Ins. Co.,* 155 N. C., 57, 70 S. E., 1076; *Wilson v. Ins. Co.,* 155 N. C., 173, 71 S. E., 79; *McNeal v. Ins. Co.,* 192 N. C., 450, 135 S. E., 300. See also 32 C. J., 1129, Insurance, sec. 233.

In the *Floars case, supra, Hoke, J.,* speaking to the subject, declared that "It is also accepted doctrine that when the parties have bargained together touching a contract of insurance, and reached an agreement, and in carrying it out, or in the effort to carry out the agreement, a formal written policy is delivered and accepted, the written policy while it remains unaltered will constitute the contract between parties, and all prior oral agreements will be merged in the written instrument . . ." And, continuing by quoting from Vance on Insurance, he says: "The rule that all prior agreements are merged in a subsequent written contract touching the same subject matter is now too well established to need support of cited authority. Therefore, when a policy of insurance, properly executed, is offered by the insurer and accepted by the insured as the evidence of their contract, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound. If any previous agreement of the parties shall be omitted from the policy, or any term not theretofore considered added to it, the parties are necessarily presumed to have adopted the contract as the final form of their binding agreement."

3. It is the duty of the applicant to communicate acceptance or rejection of the policy. In Couch's Enc. of Insurance Law, Vol. 1, page 172, sec. 94, the author states that: "There is apparently some conflict of authority as to the duty of an applicant for insurance to discover that the policy delivered to him does not conform to the proposal or agreement, and to notify the company of his rejection or acceptance of the policy as written. The weight of authority seemingly supports the rule that it is incumbent upon an applicant who receives a policy which does not conform, as to terms, to the agent's representations, to notify the company of his refusal to accept the policy. And to this end he must examine the policy within a reasonable time after it comes to hand, and promptly, upon discovering obvious departures from the agreement, rescind the transaction and give the company due notice thereof, since, if an applicant receives and retains, without objection, policies made and sent to him, it is regarded as an acceptance." The decisions of this Court are consonant with the weight of authority as above stated. *Floars v. Ins. Co., supra; Graham v. Ins. Co.,* 176 N. C., 313, 97 S. E., 6;

Arndt v. Ins. Co., 176 N. C., 652, 97 S. E., 631. See also *Rice v. Ins. Co.,* 177 N. C., 128, 98 S. E., 283.

4. Reasonable time begins to run when the applicant receives the policy. Couch's Enc. of Insurance Law, Vol. 1, sec. 94, page 173.

5. As to what is reasonable time within which to discover that the policy received differs from the one applied for, or agreed upon, these cases indicate periods of retention without objection which have been held unreasonable: *Carrigan v. Nichols,* 148 Ark., 336, 230 S. W., 9, three months; *Goldstone v. Columbia Life and Trust Co.,* 33 Cal. App., 119, 164 P., 416, four months; *Empire State Life Ins. Co. v. Beckwith,* 5 Hun (N. Y.), 122, four months; *Bostwick v. Ins. Co.,* 116 Wis., 392, 67 L. R. A., 705, 89 N. W., 538, 92 N. W., 246, four and one-half months. And this Court, while sustaining judgment of nonsuit on another ground in the *Floars case, supra,* had this to say: "There is also strong authority for the position that on the facts of this case the relief sought would not be open to plaintiff, even if there had been a mutual mistake in the preliminary bargain and with persons with full power to contract, for the reason that plaintiff accepted the policy with the alleged stipulation omitted without having read same, and held it without protest for three months . . .," and refers to *Bostwick v. Ins. Co., supra,* as "a well considered case." This headnote epitomizes the decision of the Supreme Court of Wisconsin in this respect: "If a person contracts with another for an article to be delivered or gives an order therefor, and thereafter a thing is delivered to him ostensibly in compliance with the order or fulfillment of the contract, unless, at the time thereof or within a reasonable time thereafter, he notifies such other that such article will not be accepted as satisfying the contract or order, he will be conclusively presumed to have waived all departures therein from the thing bargained for which are obvious to the senses by ordinary exercise thereof."

Applying the above principles to the case in hand: It is manifest from the complaint and the agreed facts that at the time the "binder" was given the parties contemplated the subsequent issuance of a policy of insurance covering burglary and robbery on the inside of plaintiff's premises to the extent of $1,300.

At the outset in the complaint it is alleged that "on the 21st day of December, 1939, plaintiff applied to the said I. J. Dowdy, Jr., agent of the defendant, for a policy of insurance to cover the plaintiff against burglary and robbery on premises of the plaintiff," and that "on December 27, 1939, the said I. J. Dowdy, Jr., accepted the said application of insurance and entered into a contract of insurance with the plaintiff . . ." The agreed facts indicate that the original application was for robbery insurance for $1,300 on the inside," and that plaintiff "amplified

said application . . . by applying for a policy of burglary insurance in addition to the policy of robbery insurance above mentioned." Nevertheless, the letter of 27 December, 1939, which constitutes the binding acceptance of the application, and is the temporary contract, refers to the coverage requested as "$1,300 for burglary and robbery inside your premises . . ." and says "we will need additional information to enable us to issue the policy itself, however, in the meantime, you may be sure you are covered as requested." This language of the binder, in reference to issuance of policy is in the singular. Thus it is clear that the parties had in mind a single policy of insurance covering both burglary and robbery on the inside of plaintiff's premises. The policy delivered was ostensibly pursuant to the order therefor. Moreover, the policy as delivered plainly stated that "The assured has no other burglary, robbery or theft insurance, . . .," and that "the declarations are declared by the assured to be true."

Therefore, conceding that the policy as delivered, does not cover burglary, as counsel for plaintiff concedes, and that there was a departure from the application in that respect, it was the duty of the plaintiff to examine the policy within a reasonable time after it came to hand, and promptly upon discovering the obvious departures from the agreement, to rescind the transaction and give the company due notice thereof. And having received and retained the policy, without objection, so far as the record shows, for more than five months, and until nearly two-thirds of the life of the insurance had expired, it will be conclusively presumed that plaintiff accepted the policy as written with the obvious departure from the binder or preliminary agreement.

Such being our opinion, the judgment below will be

Reversed.

BARNHILL, J., dissenting: We are met at the very threshold of this case by a fatal defect of jurisdiction. This case was pending on the civil issue docket of Wake County. The resident judge rendered judgment in chambers, adjudicating the merits of the controversy. It was not an "in chambers" or "vacation" matter, and the parties could not make it so, or confer jurisdiction, by consent. *Reaves v. Mill Co.,* 216 N. C., 462, 5 S. E. (2d), 305; *High v. Pearce,* 220 N. C., 266, 17 S. E. (2d), 108; *Dependents of Thompson v. Funeral Home,* 205 N. C., 801.

G. S., 7-65, relates only to "vacation" or "in chambers" jurisdiction. It confers concurrent jurisdiction on the resident judge only in those matters in which the Superior Court has jurisdiction "out of term." Actions pending on the civil issue docket are not included. Hence, the resident judge has no jurisdiction, and the judgment is without force in law. *Ward v. Agrillo,* 194 N. C., 321, 139 S. E., 451; *Greene v. Stadiem,*

197 N. C., 472, 149 S. E., 685; *Drug Co. v. Lenoir,* 160 N. C., 571, 76 S. E., 480; *Howard v. Coach Co.,* 211 N. C., 329, 190 S. E., 478; *Shepard v. Leonard,* 223 N. C., 110. "It is the same as if there were no court." *Hill v. Stansbury, ante,* 356; *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311.

An agreed statement of facts "is equivalent to a special verdict, and the judge may render judgment at term, or out of term by consent of the parties." McIntosh P. & P., sec. 518. But "it may be generally stated that the judge holding the courts of the district in regular succession is the only proper judge, and he has sole jurisdiction in civil actions in such district during the six months of his assignment. The resident judge has no more authority than any other judge, except when holding the courts of his district, unless specially authorized by statute." *Ibid.,* sec. 49; *Moore v. Moore,* 131 N. C., 371.

It is suggested that *Hervey v. Edmunds,* 68 N. C., 243, cited by McIntosh (sec. 518), sustains the authority of the resident judge to sign the judgment herein. An examination of the original record discloses that the judgment under attack in that case was signed by the judge of the district shortly after the adjournment of the court in which the cause was pending. At that time rotation of judges was not required. The question of concurrent jurisdiction or jurisdiction of a resident judge could not arise. In each of the other cases cited by Mr. McIntosh the judgment was signed by the judge presiding out of term by consent. Those cases are not in point.

In such matters (civil actions) jurisdiction is acquired at term. Being so acquired, any cause not requiring the intervention of a jury may be heard out of term by consent. Assignment to hold the court is what confers jurisdiction. The consent merely waives the right to have the hearing in court at term. *Edmundson v. Edmundson,* 222 N. C., 181.

Only the judge who would have had jurisdiction had the cause been submitted to a jury has authority to hear it at term or, by consent, out of term. G. S., 1-250 (C. S., 626); *Greene v. Stadiem, supra; Drug Co. v. Lenoir, supra; Moore v. Moore, supra.*

Our jurisdiction is derivative. If the court below had no jurisdiction we have none. It is the policy of the Court to decline to assume jurisdiction when none exists. We take notice of want of jurisdiction *ex mero motu, Shepard v. Leonard, supra,* even when the only defect is the failure of the record to show the organization of the court below. *Sanders v. Sanders,* 201 N. C., 350, 160 S. E., 289.

We have recently, at this term, vacated an order allowing reputable counsel compensation for services rendered on the grounds that the resident judge had no jurisdiction to sign an order in a civil action pending on the civil issue docket and, although not before us for review, we

seriously questioned his right to sign a consent judgment. *Hill v. Stansbury, supra.* In my opinion that case is controlling.

It may be suggested that there was no consent of counsel in the *Hill case, supra,* as here. But we cannot make that fact decisive without holding that consent confers jurisdiction.

No doubt legislation giving the resident judge concurrent jurisdiction in all matters not requiring intervention of a jury or in which trial by jury has been waived would promote the prompt administration of justice and would be welcomed by the profession. So far, however, the General Assembly has failed to take that course. We must, therefore, abide by the law as it is now written.

Passing the question of jurisdiction, we come to the merits of the appeal.

It is significant that the judgment under review contains no finding of fact, but merely states a single conclusion of law, *i.e.,* the defendant is indebted to the plaintiff in a specified sum.

The findings and judgment of the Superior Court are *prima facie* correct. *S. v. Jackson,* 183 N. C., 695, 110 S. E., 593. The presumption is against error, and the judgment must be sustained unless the appellant shows error as a matter of law. *Mason v. Andrews,* 193 N. C., 854, 138 S. E., 341; *Mewborn v. Kinston,* 199 N. C., 72, 154 S. E., 76; *Bell v. Smith,* 171 N. C., 116, 87 S. E., 987; *Poindexter v. Call,* 208 N. C., 62, 179 S. E., 335. If error is not shown this Court will presume that the ruling of the lower court was correct and that it found facts and inferences of fact sufficient to support its judgment. *Baggett v. Lanier,* 178 N. C., 129, 100 S. E., 254; *Jones v. Fowler,* 161 N. C., 354, 77 S. E., 415; *Holcomb v. Holcomb,* 192 N. C., 504, 135 S. E., 287; *Mewborn v. Kinston, supra.*

Here, then, we must assume that the court below inferred from the stipulated facts that the parties contemplated two separate policies and concluded that the issuance of a policy of insurance against robbery did not merge, or discharge defendant's obligation under, the binder for insurance against burglary. Under uniform decisions of this Court, if the facts agreed permit or support this inference and the resulting conclusion, the judgment should be affirmed.

But the majority reverses the court below upon the conclusion that "it is manifest" there was only one binder and the parties contemplated the issuance of only one policy. In my opinion the record fails to support this premise upon which the majority opinion is bottomed. For that reason I am unable to concur.

If we consider only paragraphs 5, 6, and 7 of the agreed facts, without reference to other facts appearing of record, this conclusion may be

sustained, although there are indications to the contrary even in these stipulations.

But in determining whether the facts agreed fail to support the judgment and, as a matter of law, require the inference that the parties contemplated one and only one policy, we should relate the facts agreed to the pleadings and construe them in the light of what is there alleged.

In so doing, facts wholly inconsistent with the conclusion of the majority are made to appear.

(1) Plaintiff applied for two policies: one for robbery (by letter), and later one for burglary (by telephone).

(2) Defendant admits a binder for robbery insurance and one for burglary.

(3) It advised plaintiff it was "covered" as requested—and the request was for two policies. (Stip. 4.)

(4) It admits that the coverage for robbery insurance was effective 21 December, 1939, six days before the letter of acknowledgment was written and prior to the time application for burglary insurance was received. (The policy issued is effective as of 21 December.)

(5) It did not issue burglary insurance for the reason it was under the impression that application therefor had been withdrawn—so it alleges in defense.

(6) The policy issued is on a form adapted for robbery insurance only.

So I construe the record.

Likewise, it is noted in the majority opinion that the letter of 27 December, 1939, uses "policy" in the singular. In this connection it must be noted also that it refers to the applications, one for robbery and another for burglary, and "binders" is used in the plural; and the letter advises "You are covered as requested."

These facts, in my opinion, justify inferences sufficient to sustain the judgment.

The policy issued is exclusively for robbery. There is no provision, space, or blank therein which may be used to include burglary coverage. There is no allegation or stipulation that any such combination policy exists. Still it is conclusively presumed that the parties contemplated issuance of that form of policy.

It is agreed that plaintiff applied for a policy of insurance against burglary *in addition to* the policy of insurance against loss by robbery theretofore applied for. But the Court concludes, as a matter of law, that only one policy was contemplated.

Defendant agreed to issue policies in accord with the applications and asserts it did not issue a policy insuring against loss by burglary for

the reason that its representative "was informed by an employee of plaintiff" that plaintiff did not desire or require burglary insurance. The Court says: "It is manifest only one policy was contemplated."

Defendant says it failed to issue burglary insurance because it was under the impression application therefor had been withdrawn. The Court says its contract so to do was merged in the robbery policy.

A policy was delivered in fulfillment of the contract for robbery insurance. Plaintiff retained the policy for five months without objection, and therefore "it will be conclusively presumed that plaintiff accepted the policy as written with the obvious departure from the binder."

Thus the plaintiff is charged with negligence. Yet he did all that he could. It was the duty of the defendant to act. It advised plaintiff there would be a delay due to the necessity of making an investigation. It issued one policy in fulfillment of the first agreement. It delayed delivery of the second policy. Plaintiff is charged with the resulting loss upon the theory that when he accepted the robbery policy he accepted it "with the obvious departure from the binder" and is now estopped to assert the contract for burglary insurance.

The agreed facts are somewhat ambiguous. It is unfortunate they were not made more definite, particularly in respect to the intent of the parties, which is material here. Certainly, in my opinion, they are not such as to warrant the conclusion, as a matter of law, that only one reasonable inference—an inference *contra* the judgment—can be drawn therefrom.

It is admitted that an agent, with full power to bind defendant in insurance contracts, received two separate applications for insurance and issued binder coverage immediately as requested. He wrote plaintiff, in response to the applications: "We have put this coverage in effect immediately," and "You are covered as requested." The defendant, acting under a misapprehension, did not issue the policy insuring against loss by burglary. Thereafter, during the effective period of the binder insurance (admittedly twelve months), plaintiff's place of business was burglarized of $546.78, which defendant has refused to pay.

It is difficult to conceive of a more elementary cause of action or to state one more clearly. Here is shown: a contract to indemnify against loss, a loss within the terms of the contract, and a refusal to discharge the terms of the contract. The defendant, having admitted issuance of the binders, both for robbery and burglary insurance, the trial judge gave judgment for plaintiff. In my opinion the inferences necessary to support such judgment are fully supported by the record. Merger is not pleaded, and the doctrine of merger is not applicable.

It is not amiss to say that in all probability the divergence of opinion arises out of a misconception of a "binder" as used in actual practice in the insurance field. This also is perhaps what led plaintiff into stipulating that the letter of 27 December constitutes a contract of insurance. The insured seldom, if ever, receives any preliminary receipt or memorandum. When insurance is applied for the agent makes a memorandum of the name, amount, and type of insurance applied for, and the location of the property. This is the binder. The insurance is effective immediately. This is what the agent meant when he advised plaintiff that he put the insurance in effect immediately. But this memorandum is not delivered to the insured. Instead, it is placed on the desk of the policy clerk for guidance in issuing the policy. Proper consideration of this practice will make clear apparent inconsistencies in the letter of acknowledgment and in the stipulations.

I vote to dismiss for want of jurisdiction. Failing in that, I vote to affirm.

DEVIN and SEAWELL, JJ., join in dissenting opinion.

WILLIAM T. DAUGHTRY, JR., v. F. D. CLINE.

(Filed 2 June, 1944.)

1. Negligence § 14—

Where plaintiff is so absorbed in the performance of his duties as to render him oblivious of danger, and this obliviousness to danger is apparent, or should, in the exercise of due care, have been apparent to the defendant, the defendant is thereby charged with the duty of using due care to avoid injuring the plaintiff, and the plaintiff is not guilty of such contributory negligence as would bar him from recovery against the defendant for not exercising due care to protect himself from the danger which was obvious or should, in the exercise of due care, have been obvious to the defendant.

2. 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 could draw no other inference. Contributory negligence can be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends only to establish it, as he thus proves himself out of court.

3. Damages §§ 1a, 13—

In an action to recover damages for injuries to plaintiff, allegedly caused by the negligence of the defendant, there is error in a charge to the jury,

on the measure of damages, which fails to limit the plaintiff's recovery for future losses to the present cash value or present worth of such losses.

BARNHILL, J., concurring.
STACY, C. J., dissenting.
WINBORNE, J., concurs in dissenting opinion.

APPEAL by defendant from *Dixon, Special Judge,* at October Term, 1943, of CUMBERLAND.

This is a civil action brought to recover damages for injuries alleged to have been caused by the negligence of the defendant in backing a truck over the plaintiff, while engaged in the construction of a taxiway at Fort Bragg, wherein actionable negligence was denied and a plea of contributory negligence interposed. The usual issues involving actionable negligence of the defendant, contributory negligence of the plaintiff, and damages were submitted to and were answered by the jury in favor of the plaintiff. From judgment predicated on the verdict the defendant appealed, assigning error.

W. C. Downing, James R. Nance, and McLean & Stacy for plaintiff, appellee.
Ruark & Ruark and Thomas W. Ruffin for defendant, appellant.

SCHENCK, J. The defendant, appellant, sets out in his brief two groups of exceptions relied upon by him for a reversal of the judgment of the court below or for the awarding of a new trial. The first group is based upon the refusal of the court to sustain the demurrer to the evidence duly lodged under G. S., 1-183, and the second group is based upon a portion of the charge relative to the third issue involving the measure of damage.

The evidence tends to show that the plaintiff, William T. Daughtry, Jr., while engaged as a civil engineer by the Government on a government project let to the defendant, F. D. Cline, for the construction of a taxiway at Pope Field, Fort Bragg, and while inspecting a sub-grade, in grading the taxiway, prior to the placing of asphalt thereon, was injured by the backing of a truck over him. It was defendant Cline's business to get the grade satisfactory for surfacing, and in order to do this it was necessary for him to sprinkle the surface with a sprinkler on trucks. While the plaintiff was "squatting down" to determine a level on the taxiway in the course of construction one Emmett Graham, who was driving a sprinkler truck for the defendant, backed said truck over the plaintiff from his rear, seriously injuring him.

The defendant, on his motion for judgment as in case of nonsuit, does not stress in his argument any contention that there was not sufficient

evidence to go to the jury upon the issue of the defendant's actionable negligence, but does seriously urge that under all the evidence the plaintiff was guilty of contributory negligence, and that the defendant's motion for dismissal should for this reason have been allowed.

While under authority of *Moore v. R. R.,* 185 N. C., 189, 116 S. E., 409, the fact that the evidence tends to show that the plaintiff might have been so absorbed in his duties as to render him oblivious of his danger, and to have thereby created the duty on the part of the driver of the truck to exercise due care to observe such danger and avoid it, we do not concur with the contention of the defendant that the evidence of the action of the plaintiff established contributory negligence as a matter of law. The fact that the evidence tends to show that the plaintiff apparently did not see or did not hear the backing truck, or certainly did not avoid the collision with it, does no more than furnish some evidence of negligence on his part, a failure to use due care for his own protection. The court apparently took this view of the case when it denied the motion to dismiss the action and submitted the issue of contributory negligence; and to the court's charge on this issue there is no exception, except as the motion to dismiss implies an exception not only to the submission of the issue, but also to all of the charge relative thereto.

There are a number of cases which hold that where a plaintiff is so absorbed in the performance of his duties as to render him oblivious of danger, and this obliviousness to danger is apparent, or should, in the exercise of due care, have been apparent to the defendant, the defendant is thereby charged with the duty of using due care to avoid injuring the plaintiff, and the plaintiff is not guilty of such contributory negligence as would bar him from recovery against the defendant for not exercising due care to protect himself from the danger which was obvious or should, in the exercise of due care, have been obvious to the defendant. *Moore v. R. R., supra; Davis v. R. R.,* 175 N. C., 648, 96 S. E., 41; *Lassiter v. R. R.,* 133 N. C., 244, 45 S. E., 570; *Brown v. R. R.,* 144 N. C., 634, 57 S. E., 397.

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. *Manheim v. Taxi Corp.,* 214 N. C., 689, 200 S. E., 382. Contributory negligence can be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends only to establish it, as he thus proves himself out of court. *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298; *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137, and cases there cited.

We do not concur with the contention of the defendant that the evidence of the plaintiff is so clear that reasonable minds could draw but the single inference of the plaintiff's contributory negligence, or that such evidence tends only to establish such contributory negligence. The exceptions to the refusal to grant the defendant's motion to dismiss under G. S., 1-183, are not sustained.

The second group of assignments of error set out in the defendant's brief are based on an excerpt from his Honor's charge on the third issue relative to the measure of damage. It is urged for error that the court charged the jury as follows: "So, gentlemen, if you come to consider that question, the third issue, you have a right to take into consideration the age of the plaintiff at the time, his physical and mental condition at the time, and his physical and mental condition since, resulting from this accident; his means and ability to engage in useful and gainful occupation for his livelihood, his ability to make money, and you may take into consideration the pain he has suffered, the loss of time, the lack of opportunity to engage in profitable employment or gainful occupation as a result of this injury. You may consider all these things and let your answer be in one lump sum, what you think would be a fair amount to fairly compensate him for his pain and suffering, physical ills and disabilities, sustained as a result of the accident; and his reduced earning capacity and inability to carry on, resulting from the accident, and say in one lump sum what would be a fair amount of award to compensate him for his injuries."

The plaintiff alleged in his complaint that he had been seriously and permanently injured, that he probably would never be able to walk again except by the use of crutches, and that he probably will continue an invalid the remainder of his life. The plaintiff introduced evidence including the testimony of Dr. R. L. Pittman, the physician who attended him, tending to substantiate the allegations made in the complaint.

The defendant contends that since the charge contains no clause limiting any recovery for any losses which might accrue in the future to the present cash value, or present worth of such losses, the excerpt assailed was error. With this contention we are constrained to agree.

While it is conceded that the excerpt from the charge under consideration may be in substantial accord with the charge in *Murphy v. Lumber Co.,* 186 N. C., 746, 120 S. E., 342, still we are unable to reconcile what is said in the case at bar with other utterances of the court upon the subject over a long period of years. In *Lamont v. Hospital,* 206 N. C., 111, 173 S. E., 46, in speaking to the subject, it is written: "This charge is defective in that it fails to limit the plaintiff's recovery for future losses to the present cash value or present worth of such losses. *Taylor v. Construction Co.,* 193 N. C., 775, 138 S. E., 129." The pertinent

decisions on the subject are assembled in *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339, and in *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690.

We conclude that we should follow the long line of decisions, which seem to be sustained by sound reasoning. We, therefore, hold that the assignment of error addressed to the charge was well taken, and entitles the defendant to a

New trial.

BARNHILL, J., concurring: In an action such as this, when evidence is offered tending to show permanent injury and a loss of capacity to earn money in the future, two questions of law immediately arise: (1) Is the loss of earning capacity an element of damage for which plaintiff is entitled to compensation; and (2) what is the rule or measure of damages to be followed in ascertaining the amount which will constitute just compensation for such loss?

Each is a part of the substantive law of the case. It is as essential that the jury be advised as to the one as the other. Hence, it is the duty of the trial judge to explain and apply both to the evidence in the case. We have repeatedly held a failure so to do is sufficient cause for a new trial.

Speaking to the subject in *Johnson v. R. R.,* 163 N. C., 431, *Walker, J.,* says: "In an action for injuries by negligence, such as this one, the plaintiff is only entitled to recover the reasonable present value of his diminished earning capacity in the future. . . . The damages to be awarded for a negligent personal injury resulting in a diminution of earning power is a sum equal to the present worth of such diminution. . . . Any other principle, if adopted, would enable a plaintiff to recover more than could possibly be earned, as no man realizes at once the full earnings or accumulations of a lifetime."

In *Taylor v. Construction Co.,* 193 N. C., 775, 138 S. E., 129, *Brogden, J.,* says: "The charge is defective because it fails to limit the damage which may accrue in the future by virtue of permanent injury to the present cash value or present worth thereof."

In *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339, it is stated: "Defendant's position in regard to limiting the damages, if any, which may accrue in the future to the present cash value or present worth of such damages is undoubtedly the correct one. . . .

"The charge is defective in that it fails to limit the plaintiff's injury to the present worth of a fair and reasonable compensation . . . for his permanent injuries, if any, resulting in the impairment of his power or ability to earn money."

And in *Lamont v. Hospital,* 206 N. C., 111, 173 S. E., 46, it is said: "This charge is defective in that it fails to limit plaintiff's recovery for future losses to the present cash value or present worth of such losses."

There are many other cases in this jurisdiction of like import. They are, in large measure, cited in the opinions above referred to. See also Anno. 77 A. L. R., 1446.

The cases cited in the dissenting opinion deal primarily with the first question and hold that loss of capacity to earn money in the future is an element of damage for which compensation is to be allowed. This is established law in this State, and it is not challenged or debated on this appeal. Likewise, Sutherland, in his work on Damages, lists future losses as one of the elements of damages for which compensation is to be had. Vol. 3, p. 221. But it must be noted that in discussing the measure of the recovery he lays down the rule that only the present cash value or present worth of future losses are to be recovered. Vol. 4, sec. 1249, p. 4728. See also Vol. 1, p. 198.

Thus, the divergence of opinion really comes to this: Is a full and correct charge on the first rule relating to the elements of recoverable damages, with the further statement "you may consider all these things and let your answer be in one lump sum, what you think would be a fair amount to fairly compensate him for his pain and suffering, physical ills and disabilities, sustained as the result of the accident; and his reduced earning capacity and inability to carry on, resulting from the accident, and say in one lump sum what would be a fair amount of award to compensate him for his injuries," a substantial compliance with G. S., 1-180; C. S., 564, rendering the rule as to the measure of damages merely secondary, and a failure to charge more fully thereon, in the absence of a prayer for instructions, harmless error?

I concur in the majority view. The rule or measure of damages to be followed in ascertaining what is just compensation for future losses is a part of the substantive law of the case. It is just as essential as the law defining the elements of recoverable damages.

Here there is error of commission as well as error of omission. The rule stated, if considered as relating to the measure of damages, is incorrectly stated. Plaintiff is entitled to recover only the present cash value of losses resulting from "the lack of opportunity to engage in profitable employment or gainful occupation" and "his reduced earning capacity and inability to carry on." Thus, there was a positive misstatement of the rule, which permitted a larger recovery than that allowed by law.

In some cases it may be held for harmless error, but in cases such as this, where the plaintiff relies very largely upon evidence tending to show future losses and in which it is apparent the jury gave considerable consideration to that line of testimony, it is essential that the judge explain

and apply the rule to the evidence in the case. A failure to do so is harmful error.

STACY, C. J., dissenting: In a warmly contested trial lasting the greater part of a week, two exceptions are presented, and one in respect of the charge on the measure of damages is held for error.

The instruction here challenged seems to have been taken from 3 Sutherland on Damages (1st Ed.), 261, and was approved by this Court in *Wallace v. R. R.,* 104 N. C., 442, 10 S. E., 552; *Clark v. Traction Co.,* 138 N. C., 77, 50 S. E., 518, 107 Am. St. Rep., 526; and *Muse v. Motor Co.,* 175 N. C., 466, 95 S. E., 900. See, also, *Patterson v. Nichols,* 157 N. C., 406, 73 S. E., 202, where the Statement is characterized as "full and comprehensive," and *Rushing v. R. R.,* 149 N. C., 158, 62 S. E., 890, where it is laid down as "the true rule." For ready comparison, the instruction approved in these cases is reproduced here:

"In this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he is entitled to recover) for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury."

Substantially the same instruction was again upheld in *Ruffin v. R. R.,* 142 N. C., 120, 55 S. E., 86; *Alley v. Pipe Co.,* 159 N. C., 327, 74 S. E., 885; *Ledford v. Lumber Co.,* 183 N. C., 614, 112 S. E., 421; and *Murphy v. Lumber Co.,* 186 N. C., 746, 120 S. E., 342. The instruction is also set out in each of these cases. The last reference to the Sutherland statement of the rule seems to be in the case of *Williams v. Stores Co.,* 209 N. C., 591, 184 S. E., 496, where the plaintiff was allowed to recover for prospective expenses for "nursing and medical services" without any reference to the present worth of such expenses, opinion by *Devin, J.* See 15 Am. Jur., 485.

Speaking to a similar instruction (as appears from the original record) in *Kennedy v. Tel. Co.,* 201 N. C., 756, 161 S. E., 396, *Adams, J.,* delivering the opinion of the Court, said: "The instruction as to damages is in substantial compliance with the law. *Ruffin v. R. R.,* 142 N. C., 120; *Wallace v. R. R.,* 104 N. C., 442. If the defendant desired a more elaborate statement of the rule in reference to the present value of the plaintiff's diminished earning capacity he should have requested an instruction to this effect. *Murphy v. Lumber Co.,* 186 N. C., 746; *Hill v. R. R.,* 180 N. C., 490."

In the instant case, just after concluding the charge on the measure of damages, the court addressed the following inquiry to counsel: "Gentlemen, are there any prayers or instructions or anything you care to have me give in the charge?" (No response.)

A like situation and a like question arose in the case of *Hill v. R. R.*, 180 N. C., 490, 105 S. E., 184. There *Walker, J.*, delivering the opinion of the Court, said: "If the defendant desired it to be stated more fully, or in any special way, he should himself have asked for an instruction sufficient to present his view, or so as to direct the attention and consideration of the jury more pointedly to the rule of damages. . . . 'A party cannot be silent under such circumstances, and, after availing himself of the chance to win a verdict, raise an objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object, where the instruction of the court is not itself erroneous.' . . . The instruction, as to damages, was somewhat general, but not inherently erroneous, and, therefore, the rule of practice, which we have just stated, should apply."

While recognizing the correctness of the present-worth rule, there are many decisions upholding recoveries in the absence of any reference to the matter by the trial court. In 77 A. L. R., 1459, the annotator makes the following statement, and cites numerous Federal and State authorities, including two from North Carolina, to support it: "The most common ground for refusing relief on appeal from a verdict rendered in the absence of a charge limiting recovery for loss of future benefit to present worth is the failure of counsel for the defendant to request such an instruction, the general instruction given being correct, and, hence, the error being one of nondirection rather than misdirection."

Not only was there no request for any elaboration of the instruction now assigned as error, but after hearing the charge and being invited to offer suggestions, the defendant remained silent and quiescent, and the law says acquiescent. *Futch v. R. R.*, 178 N. C., 282, 100 S. E., 436. "If a party desires fuller or more specific instructions, he must ask for them and not wait until the verdict has gone against him and then, for the first time, complain of the charge." *Simmons v. Davenport,* 140 N. C., 407, 53 S. E., 225; *Davis v. Keen,* 142 N. C., 496, 55 S. E., 359; *Harris v. Turner,* 179 N. C., 322, 102 S. E., 502. In *S. v. Yellowday,* 152 N. C., 793, 67 S. E., 480, it was said that this principle has been so often announced "it may be considered as thoroughly well established, if not elementary."

The precise rule of practice which the plaintiff here invokes to sustain his recovery was applied in the cases of *Hill, Murphy,* and *Kennedy, supra.* Daughtry is on all-fours with these cases. The plaintiff is not relying on "one isolated case" as the majority opinion suggests. Nor is he asking for any consideration not accorded other litigants.

The majority concedes that Murphy is a direct authority for the plaintiff's position, and while this case is singled out for disapproval, it is not alone in our Reports. It has been cited a number of times, and not until the present case has it met with disfavor. In *Johnston v. Johnston,* 213 N. C., 255, 195 S. E., 807, attention was called to the fact that the charge did not specifically refer to future losses. The same is true here.

Usually error comes from talking too much rather than too little. The defendant was apparently satisfied with the instruction at the time. The contention is not that the charge is inherently erroneous, but that it is too brief or inelaborate. The criticism appears meticulous and attenuate. The charge complies with the law as heretofore declared in a number of cases. See *Wallace, Clark, Muse, Patterson, Rushing, Alley, Hill, Ruffin, Ledford, Murphy, Kennedy, Johnston, supra,* and *Britt v. R. R.,* 148 N. C., 37, 61 S. E., 601; *Boney v. R. R.,* 145 N. C., 248, 58 S. E., 1082. Indeed, the twice-repeated expression "in one lump sum" was intended to mean, and did mean, that the award should be on the basis of "a cash settlement of the plaintiff's injuries, past, present and prospective." *Ledford v. Lumber Co., supra;* 8 R. C. L., 663. The parties evidently so understood it when they made no response to the court's inquiry. Such was its definition by the trial court in *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353, as witness the following (and only) reference to the present-worth rule in that case: "Respecting those damages which may accrue in the future, that is, their present worth, if paid to her now in a lump sum." On the whole and under the circumstances disclosed by the record, it would seem that no error has been made manifest. 77 A. L. R., 1459.

The case of *Lamont v. Hospital,* 206 N. C., 111, 173 S. E., 46, is distinguishable. There the principal element of damage was the plaintiff's claim or apprehension of prospective loss. This was stated in the charge at least three times, and so emphasized as to augment the recovery. The opinion there is grounded on argumentation as a result of the court's action. The same may be said of the other cases cited by the majority, as will appear from an examination of each of the cited cases. No such result is apparent here. See *Boney, Johnston,* and *Cole, supra.* The plaintiff was entitled to have the jury consider the depreciation of money in a war economy as well as the lessened difference between its present worth and future value. 77 A. L. R., 1439. Moreover, the facts of the two cases are quite different. Lamont belongs to one line of decisions; Daughtry to another.

Finally, with liability fairly established and some of plaintiff's witnesses now in the armed services, if a new trial is to be ordered, it should be limited to the issue of damages, as was done in *Johnson v. R. R.,* 163

N. C., 431, 79 S. E., 690; *Rushing v. R. R., supra; Tillett v. R. R.,* 115 N. C., 662, 20 S. E., 480; *Pickett v. R. R.,* 117 N. C., 616, 23 S. E., 264, and other cases. The subject case falls in the same category.

Why should the defendant, whose negligence has been established and who was silent when invited to speak about the very matter of which he now complains, be allowed "two bites at the whole cherry"?

WINBORNE, J., concurs in dissenting opinion.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, v. CAROLINA COACH COMPANY.

(Filed 2 June, 1944.)

1. Utilities Commission § 3—

The granting of a franchise for the operation of any motor vehicle upon the public highways of North Carolina, for the transportation of persons and property for compensation, must be predicated upon public convenience and necessity and a determination made by the Utilities Commission is *prima facie* just and reasonable. G. S., 62-21.

2. Same—

The Commission may, in its discretion, grant a franchise which would duplicate, in whole or in part, a previously authorized similar class of service; and, when 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, it would be its duty to do so. G. S., 62-105.

3. Utilities Commission § 4—

In the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, the appellee, on appeal to the Superior Court, is entitled to an affirmance of the decision of the Commission.

DEVIN, J., concurring in result.

SEAWELL, J., dissenting.

APPEAL by Carolina Coach Company, Protestant, from *Phillips, J.,* at March Term, 1944, of GUILFORD (High Point Division).

Proceeding before the North Carolina Utilities Commission, involving applications for franchise, by The City Transit Company, and Community Transit Lines.

The City Transit Company operates the bus service authorized by the North Carolina Utilities Commission in the city of High Point and

suburban areas. This company filed with the North Carolina Utilities Commission, on 23 January, 1943, an application to operate between High Point and Jamestown over U. S. Highway No. 70, thence over Oakdale Cotton Mills Road one mile to Oakdale Mill village and return to High Point over the same route.

The Community Transit Lines operate a passenger bus service out of High Point on Kivett Drive, a highway lying south of U. S. Highway No. 70. The company also operates a passenger bus line between Greensboro and Kernersville *via* Guilford College, Guilford College Station, Friendship (Greensboro Airport), and Oak Ridge. This company filed an application with the North Carolina Utilities Commission, 16 March, 1943, for a franchise to permit it to connect its operations on Kivett Drive with the Greensboro-Kernersville line, through Oakdale Cotton Mill village to Jamestown, crossing U. S. Highway No. 70 to Guilford College, a distance of about nine miles.

A hearing on the application of the City Transit Company was begun before the Full Commission in Raleigh on 25 February, 1943, and was concluded before one member of the Commission at High Point, on 11 May, 1943, at which time and place both applications referred to herein were consolidated for hearing by mutual consent. The Commission, on 16 June, 1943, issued its Order, the pertinent parts of which are as follows:

"*Application of City Transit Company.* This application was supported by a large number of witnesses from all points along the proposed route whose testimony was to the effect that present transportation facilities between High Point and Jamestown are inadequate; that the buses of the Carolina Coach Company are loaded to capacity by through passengers, and cannot and do not adequately serve local needs between said points, and that employees working in plants at High Point and at plants along said route between High Point and Jamestown cannot depend upon existing transportation facilities because of the present unusual congestion incident to war conditions. It also appears from the testimony that Oakdale Mill village, a community of some 400 people, located about one mile southeast of Jamestown, has no public transportation facilities. The proposed route is densely populated, and it appears from the testimony that public convenience and necessity exists for the local service proposed by this application.

"*Application of Community Transit Lines.* The applicant herein now operates out of High Point over Kivett Drive serving the section east of High Point and south of Jamestown; and also operates from Friendship to Greensboro serving the Guilford College section. Said applicant proposed to operate from its route on Kivett Drive to its route through Guilford College Station serving Oakdale Mill village, James-

town and Guilford College. The application, if granted, will co-ordinate the applicant's transportation system, give the Oakdale Mill village and the Jamestown community transportation service north and south with connections to High Point and Greensboro. It will tend to relieve the over-crowded condition of the buses of Carolina Coach Company operating through Jamestown.

"The testimony offered supports a finding of public convenience and necessity for the proposed service.

"It Is Therefore Ordered: . . . (2) That the application of K. Herman Fulk, trading as City Transit Company, for motor vehicle franchise rights to transport passengers from High Point to Jamestown over U. S. Highway No. 70, thence over an unnumbered county highway to Oakdale Cotton Mill village, and return, be and the same is hereby granted.

"(3) That the application of P. Gilmer and Mrs. P. Gilmer, trading as Community Transit Lines, for motor vehicle franchise rights to transport passengers over an unnumbered road leading from Kivett Drive through Oakdale Mill village and Jamestown to Guilford College Station, and return, be and the same is hereby granted."

In apt time the Protestant, Carolina Coach Company, filed exceptions to the findings and Order of the Commission. These were overruled and the Protestant appealed to the Superior Court of Guilford County.

At the hearing in the Superior Court, it was agreed by all parties to waive trial by jury and that the court should hear the evidence and find the facts. Accordingly, the court found the facts and entered judgment as follows:

"1. The Court finds as a fact that the Commission in granting the application as contained in the Order in this cause did not act in a capricious, unreasonable or arbitrary manner or in disregard of the law.

"2. The Court further finds as a fact that the Order of the Commission in granting the application in this cause was not unreasonable and unjust.

"It is, therefore, Ordered and Adjudged that each of the exceptions and each of the assignments of error as filed by the Carolina Coach Company is overruled and each case is dismissed as of judgment of nonsuit," etc.

Protestant, Carolina Coach Company, excepted to the signing of the foregoing judgment and appealed to the Supreme Court, assigning errors.

Gold, McAnally & Gold for City Transit Company.

Ratcliff, Vaughn, Hudson & Ferrell for Community Transit Company.

Cooper & Sanders and Bryon Haworth for Carolina Coach Company, Protestant.

DENNY, J. The appellant presents for our determination only two questions. 1. Under what circumstances should the Utilities Commission permit the establishment of a passenger bus line in North Carolina? 2. Did the court below err in granting the appellee's motion for judgment as of nonsuit?

The answer to the first question is contained in the statute, G. S., 62-105; C. S., 2613 (1). The application for a franchise to operate any motor vehicle upon the public highways of North Carolina for the transportation of persons and property for compensation, must be made to the North Carolina Utilities Commission. The Commission may, in its discretion, fix a time and place for hearing of said application. Subsection (c) of G. S., 62-105, in part, is as follows: "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"; and subsection (f) of G. S., 62-105, contains the following: "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, 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," etc.

Under the provisions of the foregoing statute, the Commission may in its discretion grant a franchise which would duplicate in whole or in part a previously authorized similar class of service, and when 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, it would be its duty to do so. The language is that the Commission may refuse to grant the additional franchises unless it is shown to the satisfaction of the Commission that certain facts exist as set forth in the statute. However, the granting of a franchise for the operation of any motor vehicle upon the public highways of North Carolina, for the transportation of persons and property for compensation, must be predicated upon public convenience and necessity. The Commission has held that the testimony offered herein supports the finding of public convenience and necessity for the proposed service to be rendered by the respective applicants, and has issued its Order accordingly.

The determination made by the Commission is *prima facie* just and reasonable. G. S., 62-21; C. S., 1098; *Utilities Com. v. Trucking Co.,* 223 N. C., 687, 28 S. E. (2d), 201. While the appellant denies the

existence of public convenience and necessity for the proposed services, it seriously contends that if the services are to be established the Commission must give it the opportunity to establish them, and only upon its failure to do so does the Commission have the right under the statute to grant the franchises sought in this proceeding. This position is based upon the contention that the services now furnished by the appellant are reasonably adequate to meet the public convenience and necessity and that it stands ready, able and willing to provide additional services, and further that the granting of the proposed franchises will result in a duplication in whole or in part of existing services. We think the contention is untenable. The facts do not warrant the conclusion that the services of the appellant are being duplicated within the meaning of this statute. The City Transit Company now operates the bus service authorized by the North Carolina Utilities Commission in the city of High Point and suburban areas. The additional franchise sought by this company would enable it to operate local buses from High Point to Jamestown over U. S. Highway No. 70, thence to Oakdale Cotton Mills, a village one mile southeast of Jamestown, and to return to High Point over the same route, a service purely local in character. The Community Transit Lines seek an additional franchise to permit it to connect its present line on Kivett Drive, east of High Point, with its Greensboro-Kernersville line, to Jamestown, crossing U. S. Highway No. 70 to Guilford College, a distance of 9.1 miles. The appellant operates a passenger service over U. S. Highway No. 70 between High Point and Greensboro, but does not render any service to the local communities to be served under the franchise sought, except by its through bus service from High Point to Greensboro over U. S. Highway No. 70, which highway passes through Jamestown. The contention that the operation of a circuitous bus line from High Point over Kivett Drive, thence to Oakdale Cotton Mills, thence to Guilford College, thence to Greensboro, over the Greensboro-Kernersville line, of the Community Transit Lines, is a duplication of the existing services of the appellant, is not persuasive, the Commission found otherwise.

We now come to the second question. At the threshold of the hearing in the Superior Court, the appellant was confronted with the determination of the Utilities Commission, which is by law presumed to be *prima facie* just and reasonable. The appellant contends that in the hearing below the court erred in requiring it to go forward with evidence since on appeals from the Utilities Commission to the Superior Court, the trial is *de novo.* In the absence of a showing that the decision of the Commission was clearly unreasonable and unjust, the appellee on appeal to the Superior Court is entitled to an affirmance of the decision of the Commission. *Corp. Com. v. R. R.,* 170 N. C., 560, 87 S. E., 785.

As pointed out in *Utilities Com. v. Trucking Co., supra, Stacy, C. J.*, speaking for the Court, said: "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." Therefore, upon appeal from the Commission to the Superior Court, the duty of going forward with evidence rests on the appellant, if the appellee elects to stand upon the presumption that the determination of the Commission is *prima facie* just and reasonable. McIntosh on Procedure, 608, where it is said: "If a plaintiff has introduced sufficient evidence of facts giving rise to a presumption, or a conclusion which the court will draw, and not the jury, . . . it is necessary for the defendant to go forward with evidence to meet this presumption; otherwise, he will lose."

On this record the trial court was justified in the conclusion reached and the judgment entered. The judgment of the court below is

Affirmed.

DEVIN, J., concurring in the result: The evidence set out in the record was amply sufficient to sustain the findings of the Utilities Commission, and equally so, on appeal, to support the judgment of the Superior Court dismissing protestant's case.

The statute (G. S., 62-21) declaring that the determination of the Commission shall be "*prima facie* just and reasonable" established a rebuttable presumption—a rule of evidence. *Meeker v. Lehigh Valley R. R. Co.,* 236 U. S., 412. Whether the presentation of the Commission's decision imposed upon appellant the burden of proof, or of going forward, the findings of the judge, who by consent was exercising also the function of a jury, was in accord with the evidence. No exception is brought forward to the failure to make specific findings of fact. In my opinion a correct result was reached. *Butts v. Screws,* 95 N. C., 215.

However, I do not agree as applicable here the statement in the opinion that "in the absence of a showing that the decision of the Commission was clearly unreasonable and unjust, the appellee on appeal to the

Superior Court is entitled to an affirmance of the decision of the Commission." This statement of law is derived from an expression in a concurring opinion in *Corporation Commission v. R. R.,* 170 N. C., 566 (565), quoted in *Utilities Commission v. Trucking Co.,* 223 N. C., 687. I do not regard this as intended to apply to a case where the appeal involves exceptions to the Commission's findings of fact.

I fear this rule would tend to render nugatory the unlimited right of appeal from an order of the Commission overruling exceptions to its finding of fact, accorded by the statute to "any party affected thereby," which this Court has construed to mean a trial *de novo.* G. S., 62-20; *Utilities Commission v. Coach Co.,* 218 N. C., 233, 10 S. E. (2d), 824.

SEAWELL, J., dissenting: The protestant was entitled to a hearing *de novo* upon the merits—not a mere jaculation from one court to another, in which that hope was born a-dying. *Corp. Com. v. Cannon Mfg. Co.,* 185 N. C., 17, 116 S. E., 178. The kind of hearing afforded on this appeal might have been had upon *certiorari* without any statutory appeal. It was neither *de novo* nor upon the merits. The merits are bound up in a factual, not a legal, situation, to be determined upon the existence or nonexistence of public convenience and necessity, which is made the basis of an initial franchise, as well as of the power of the Commission to grant competitive rights where a franchise has already been given. The presumption of *prima facie* reasonableness of the Commission's order or determination (G. S., 62-21) is to be considered as bearing on the *quantum* of evidence necessary to establish the affirmative of that issue. *Meeker & Co. v. Lehigh Valley R. Co.,* 236 U. S., 412, 430, 59 L. Ed., 644; *Utilities Commission v. Trucking Co.,* 223 N. C., 687, 28 S. E. (2d), 201.

In the present case the gravamen of the controversy did not engage the attention of the court. The inquiry here was directed entirely to the question whether the Commission had departed from the judicial function, had violated the law, had acted "arbitrarily" or "capriciously," or had made an unreasonable order—and unreasonableness was obviously understood as coupled with capriciousness, or exceeding some measure of tolerance left undefined.

I could agree with *Mr. Justice Devin* that a correct result had been reached in the case if it were the province of this Court to act as jurors. But it is not competent for us to say that there is evidence to support the finding when there is no appropriate finding to support.

If, in a case of this kind, it becomes the uniform practice to frame the issue upon the statutory presumption, rather than upon the facts or findings from which the appeal was taken and to which the original

inquiry was directed, it is scarcely worth while for any litigant to concern himself further after his initial defeat.

Of course, since the trial judge was court and jury, no issue was formally stated, but a perusal of the judgment clearly indicates the diversion from the real issues involved in the controversy. If, in a case of this sort, the issue is to be framed around the statutory presumption alone, the whole purpose of appeal upon the facts is defeated.

There should be a new trial upon the merits of the case.

ARCHIE ELLEDGE, GUARDIAN FOR RALPH MASON SNOW, v. ARCHIE PARRISH AND WIFE, JENNIE PARRISH, RALPH MASON SNOW AND MAUDE SNOW.

(Filed 2 June, 1944.)

1. Descent and Distribution § 3: Wills § 34—

"Bodily heirs," in the strict technical sense of *issue*, are not limited to the immediate issue, or children, of the first taker, but include the rest of his lineal descendants in indefinite succession.

2. Estates § 5: Wills § 34—

A devise to one and his "bodily heirs," if the testatrix intended to use the term in its strict technical sense, would violate the rule against perpetuities, or might create a fee tail, and in either case a fee simple would vest in the first taker.

3. Wills § 31—

The courts are not required to indulge the presumption of technical use of words against the testamentary intent, when such intent may be reasonably ascertained from a contextual construction of the will.

4. Wills § 33c—

By a devise of a life estate to trustees for the benefit of a son and "whatever remains after his death shall go to his bodily heirs and if they are under age, at the time of my son's death, a guardian shall be appointed for the minor heirs of my son," and providing further, "in case my son and his bodily heirs should die leaving part of my estate, then I will that my nephew and his wife receive whatever remains," the only child of such son receives an unqualified remainder in fee after the life estate of his father, which vests in the only such child living at the death of testatrix for the benefit of himself and his class, subject to be defeated, in favor of the nephew and his wife, only upon the contingence of the death of such child before his father.

APPEAL by defendants Archie Parrish and wife, Jennie Parrish, from *Sink, J.*, at March Term, 1944, of FORSYTH.

Lizzie Sapp died 5 January, 1934, leaving a last will and testament in which, amongst other provisions, are the following pertinent to this controversy:

"Third: That none of my real estate be sold, except a two-acre plat of land on the North side of the Southern Railway, adjoining the lands of Kerners', Hester and the Cemetery, which may be sold by my Executors, if necessary, to be used for the purpose of a cemetery. The remainder of my real estate be held in trust, by my Executors for the benefit of my son, William V. Snow, during his lifetime, same to be sold only in case of necessity for his support. Whatever remains after his death, shall go to his bodily heirs and if they are under age, at the time of my son's death, a guardian shall be appointed for the minor heirs of my son, William V. Snow."

"Ninth: That in case my son, William V. Snow, and his bodily heirs should die, leaving part of my estate, then I will and desire that my nephew, Archie Parrish and his wife, Jennie Parrish, receive whatever remains."

William V. Snow died 2 September, 1936, survived by Ralph Mason Snow, his son and only issue, who was born 17 September, 1924, and still survives.

This proceeding is brought by Archie Elledge, Guardian of Ralph Mason Snow, under the foregoing will, to convert a portion of the lands described in the will into funds for the support of his ward.

In his petition the guardian alleges that all of the personalty of the estate coming into his hands under the will has been exhausted; and alleges that, under a proper construction of the will, his ward now has a fee simple title to the land devised in trust for the benefit of his father, William V. Snow, and that the portion thereof described in the petition should now be sold for his maintenance and support.

The respondents, resisting the proceeding, contended that Ralph Mason Snow has only a life estate in the properties, with remainder to them in fee; and denied the right of the petitioner to have any of the property sold for the benefit of his ward.

Upon the hearing of the matter, Judge Sink construed the will as conferring upon Ralph Mason Snow an estate in fee in all of the real estate that had been put in trust for his father, William V. Snow, and ordered the lots described in the petition to be sold as prayed for by the guardian. The defendants Parrish appealed.

Ingle, Rucker & Ingle for defendants, Archie Parrish and wife, Jennie Parrish, appellants.

Ratcliff, Vaughn, Hudson & Ferrell for plaintiff, appellee.

SEAWELL, J. Notwithstanding the more rigorous position taken in the answer to the petition, counsel for appellants in their brief here seem to concede that, if necessary, the real estate in controversy might be sold under the provisions of the will for the maintenance and support of petitioner's ward, Ralph Mason Snow. In this view, the appellants would be interested only in preserving to themselves what might be left of the estate after reasonable satisfaction of the burdens placed upon it by the will for the necessary support of Ralph Mason Snow during a life tenancy. Since no question has been raised as to the reasonableness or necessity of the sale for the purpose indicated, we come near to having an academic question laid on the table in the closing phase of the controversy—since decision need not necessarily rest on a determination of the nature of the estate conferred on Ralph Mason Snow by the will. However, the controversy resolved itself into a difference between the parties in the construction of the will. The judgment was rendered upon the theory that Ralph Mason Snow had a fee simple title to the realty in controversy, and declares that appellants have no interest therein. To avoid the probability of further litigation and appeal, we feel that it would not be amiss to settle this basic question upon the present appeal.

The solution to the problem presented on appeal depends upon the significance which must be attached to the term "bodily heirs" as used in paragraphs 3 and 9 of the will.

Certainly, if we can conceive the testatrix as using the expression *"bodily heirs"* in the strict technical sense of *issue,* the devise would not be limited to the immediate issue, or children, of William V. Snow, the first taker, but would include the rest of his lineal descendants in indefinite succession. *Albright v. Albright,* 172 N. C., 351, 90 S. E., 303. In that case, the appellants would take, if at all, upon the contingency of an indefinite failure of issue of William V. Snow; and since that event would not necessarily happen within the limits of the rule against perpetuity—life or lives of persons in being and twenty-one years and some months thereafter—the executive limitation over to appellants would be void; or if, by construing these terms technically, we could come to the conclusion that the effect of the limitation to the bodily heirs of William V. Snow is to create an estate in tail, the statute would convert this into an estate in fee in Ralph Mason Snow, the first taken in the line of the indefinite succession. G. S., 41-1; *Starnes v. Hill,* 112 N. C., 1, 16 S. E., 1011; *Hodges v. Lipscomb,* 128 N. C., 57, 63, 38 S. E., 281; *Revis v. Murphy,* 172 N. C., 579, 90 S. E., 573; *Keziah v. Medlin,* 173 N. C., 237, 91 S. E., 836.

It is to be doubted whether under the facts of this case the Court would be justified in delving deeply into the learning respecting perpe-

tuities, entails, or the policy of the laws which have been devised in the interest of the early vesting of estates and freer alienation.

In our opinion, the testatrix did not intend a disposition of her property which would violate the rule against perpetuities or entail the estate —not because of a conscious restraint from these prohibited practices, but because her care was for the more immediate objects of her bounty. There are certain expressions in both the 3rd and 9th paragraphs of the will which can hardly be reconciled with the theory that testatrix intended to exert a posthumous control over the succession for an indefinite period.

In the 3rd paragraph she provides: "Whatever remains after his death shall go to his bodily heirs and *if they are under age, at the time of my son's death,* a guardian shall be appointed for the minor heirs of my son, William V. Snow." The 9th paragraph is as follows: *"That in case my son, William V. Snow, and his bodily heirs should die,* leaving part of my estate, then I will and desire that my nephew, Archie Parrish and his wife, Jennie Parrish, receive whatever remains." It will be observed that she first refers to bodily heirs—that is, the class of bodily heirs of which she is thinking—as possibly being under age *at the death of her son,* and provides that a guardian be appointed for them; and again she refers to the death of her son, William V. Snow, and his bodily heirs, certainly not with any conception that this might occur generations apart, or at a remote time, but in such time that, if surviving them, appellants might receive whatever remains. Clearly she did not have in mind a lineal descent which might sweep down through succeeding generations.

The alternative to this view is that she used the term "bodily heirs" in a nontechnical sense, as meaning the children of William V. Snow, rather than in the strictly technical sense, which would mean his lineal issue.

Often, where a devise is found to create an estate in tail or to offend the rule against perpetuities, it will be discovered that such disposition of the property was really the intent of the donor; but where that result must be reached solely by assuming that the testator used the critical words in their strict technical significance, we are not required to indulge the presumption of technical use against the testamentary intent, when it may be reasonably ascertained from a contextual construction. *Daniel v. Bass,* 193 N. C., 294, 136 S. E., 733; *Albright v. Albright, supra,* and cases cited. In this case we are satisfied that the testatrix used the term "bodily heirs" as *descriptio personarum*—meaning the children of her son, William V. Snow—rather than as a technical term qualifying the estate and setting up an indefinite succession. *Starnes v. Hill, supra.*

We come, then, to consider the nature of the estate conferred upon Ralph Mason Snow. In item third of the will, the testatrix devised to the children of William V. Snow an unqualified remainder in fee after the life estate of the father, which vested in the only such child living at the death of the testatrix for the benefit of himself and his class. To give this devise the character of a life estate, we should have to refer to the limitation over to the Parrishes in paragraph 9—and to deduce, *ipso facto,* that the testatrix intended it to take place upon the death of Ralph Mason Snow in any event. However, the appellants do not take absolutely, but upon a contingency. That contingency is expressed in paragraph 9 as follows: "That in case my son, William V. Snow, and his bodily heirs should die, leaving part of my estate, then I will and desire that my nephew, Archie Parrish and his wife, Jennie Parrish, receive whatever remains." That both William V. Snow and his son, Ralph Mason Snow, should die in the course of human events was certain, and did not need to be expressed as a contingency; that they should die at the same time was highly improbable. What, then, is the significance of the contingency as thus expressed? Is the order in which they might die of significance? We think that it was the intention of the testatrix, although imperfectly expressed, that appellants should take only upon the death of William V. Snow without living issue. Moreover, her son, William V. Snow, and her grandson, Ralph Mason Snow, seemed to be the primary care of the testatrix, and no reason is apparent why she should cut the succession, in the interest of a collateral family branch, and deprive the grandson of the privilege of transmitting the inheritance. We are, therefore, of the opinion that Ralph Mason Snow, under sections 3 and 9, took a defeasible estate in fee, to be defeated only upon the contingency of his death before his father; upon this contingency, the appellants would be entitled to succeed under paragraph 9. That contingency did not happen; on the contrary, Ralph Mason Snow survived his father and his estate was thereby confirmed as an absolute estate in fee.

The conclusion reached in the court below was correct. The judgment is

Affirmed.

PAULINE CAULDER, BY HER NEXT FRIEND, MRS. ARCHIE TOWNSEND, v. S. T. GRESHAM, JR.

(Filed 2 June, 1944.)

1. Automobiles § 18g—

Where defendant leaves his truck unattended, partly on a paved or improved portion of a State Highway, between sunset and sunup, without displaying flares or lanterns not less than two hundred feet to the front and rear of the vehicle, it is an act of negligence, G. S., 20-161, and the driver of the car in which plaintiff was riding, traveling at about 30 to 35 miles per hour on his right side of the road, under conditions which made it impossible for him to see more than a few feet ahead, although apparently guilty of negligence, is not under the duty of anticipating defendant's negligent parking, so that the concurrent negligence of the two made the resulting collision inevitable and an exception to the denial of a motion of nonsuit cannot be sustained.

2. Negligence §§ 6, 7, 8—

Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause; but where the second actor does not become appraised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties.

3. Automobiles § 12a: Negligence § 20—

On the issue of contributory negligence, evidence of speed at the time of the accident is substantive, while evidence of prior speed is only corroboratory, so that a remark of the court—"I think it immaterial"—on overruling an objection to evidence of speed prior to the accident, if error, is not of such import as to require a new trial, when contributory negligence must be conceded.

4. Trial § 49—

A motion to set aside a verdict, as excessive and against the weight of the evidence, is addressed to the sound discretion of the trial court and is not subject to review in the absence of abuse.

APPEAL by defendant from *Burgwyn, Special Judge,* at November Term, 1943, of ALAMANCE. No error.

Civil action to recover damages for personal injuries sustained in an automobile-truck collision.

Prior to 6:00 a.m., on Sunday, 6 December, 1942, defendant's driver stopped his oil tanker truck on Highway 70, headed west, about two miles west of Burlington, to look after a spare wheel. The engine would not start. He left the truck off the pavement except that the left rear

trailer wheels were about two feet on the pavement, and the left rear corner of the trailer extended about 4½ feet over the pavement, which was 22 feet wide. The driver went to Greensboro, leaving the truck unattended.

About 6:00 a.m., plaintiff and five companions were on their way to Pilot Mountain on an automobile driven by one Frank Elkins, traveling 30 or 35 miles per hour. It was before daylight, the weather was foggy, and a light "blowing" rain was falling so that Elkins could not see ahead much more than the length of his car. There were two flare pots. One was burning dimly, but the one to the rear of the truck was not lighted. Elkins did not see the truck until he was within a car length. He put on his brakes, but could not stop. He ran into the rear of the truck, knocking it several feet ahead. Plaintiff suffered certain personal injuries.

When the cause came on for trial in the court below issues tendered by defendant were submitted to the jury. They were answered in favor of plaintiff. Judgment was entered on the verdict, and defendant appealed.

Thos. C. Carter and John H. Vernon for plaintiff, appellee.
Cooper & Sanders for defendant, appellant.

BARNHILL, J. The defendant's driver left his truck unattended, partly on the paved or improved portion of a State Highway between sunset and sunup without displaying flares or lanterns not less than two hundred feet to the front and rear of the vehicle, in violation of the provisions of G. S., 20-161. That this was an act of negligence is not seriously contested.

The driver of the car in which plaintiff was riding was operating his automobile at 30 or 35 miles per hour, under conditions which made it impossible for him to see more than a few feet ahead. He was outrunning his lights. Although the jury found otherwise, that he was guilty of negligence seems to be apparent.

Was the negligence of Elkins, the operator of the passenger car, such as to constitute, as a matter of law, the sole proximate cause of the injury sustained by plaintiff? If so, judgment of nonsuit should have been entered.

The rule controlling the determination of this question is stated by *Stacy, C. J.*, in *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88, and may be properly divided into two parts:

(1) Where a second actor (Elkins) has become aware of the existence of a potential danger created by the negligence of an original tort-feasor,

and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor (defendant) is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause; but

(2) Where the second actor (Elkins) does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties.

See also *Kline v. Moyer,* 325 Pa., 357, 191 Atl., 43, 111 A. L. R., 406; Green, Rationale of Proximate Cause (ch. 5, sec. 2), 142.

A line of our decisions represented by *Powers v. Sternberg, supra,* falls within the first section. *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637, and like cases come within the second.

Applying this rule to the facts appearing of record, it becomes evident that this case falls within the second category.

Elkins was not under the duty of anticipating defendant's negligent parking of his truck in violation of the statute and in such manner as to partially block that portion of the highway he was required to use. *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239. He did not become aware of the situation thus created before it was too late for him to avoid a collision. The concurrent negligence of the two made the accident inevitable. *Cole v. Koonce, supra,* in which the factual situation is strikingly similar, is controlling. Exception to the denial of the motion to dismiss as in case of nonsuit cannot be sustained.

In cross-examining Elkins, witness for plaintiff, the defendant, for the purpose of testing the credibility of his statement as to his speed, questioned him as to the time which elapsed between the time he started on the trip and the time of the accident, and also as to the distance traveled. The witness stated he drove through Burlington. Counsel then asked him if it was not one and one-half miles through Burlington. Plaintiff objected. The court overruled the objection, but remarked: "I think it is immaterial." Defendant assigns this as error for that it constituted a prejudicial expression of opinion.

The examination was directed to the issue of contributory negligence. Evidence of speed at the time of the accident was substantive. Evidence of prior speed, at most, only corroboratory. On this record, negligence on the part of Elkins may be conceded. Had the jury answered this issue against the plaintiff, the result would have been the same. Hence, the error, if error at all, is not one of such import as to require a new trial.

The motion to set aside the verdict "as excessive and against the weight of the evidence" was addressed to the sound discretion of the trial judge. No abuse of discretion is made to appear. The assignment of error directed to the denial of this motion is without merit.

We have carefully examined the other exceptive assignments of error brought forward in defendant's brief. In them we find no cause for disturbing the verdict. In the trial below there was

No error.

T. C. PARHAM v. C. F. HENLEY AND WIFE, CATTIE HENLEY; W. H. HENLEY AND WIFE, MAUDE HENLEY; O. L. HENLEY AND WIFE, EDNA HENLEY; MRS. BESSIE PURVIS AND HUSBAND, F. F. PURVIS; MRS. EVA INMAN AND HUSBAND, JOE INMAN; MRS. HELEN TROLLINGER AND HUSBAND, JOHN W. TROLLINGER; MRS. ADA RATLEY AND MRS. EMMA E. WASHBURN AND JOHN DOE, HER HUSBAND, IF ANY, AND HER DEVISEES AND HEIRS AT LAW, AND REPRESENTATIVES, IF SHE BE DECEASED; ELIZABETH PARHAM CREECH AND HUSBAND, E. B. CREECH; WILLIE DELL PARHAM ADAMS AND HUSBAND, DALLAS ADAMS, AND T. C. PARHAM, JR.

(Filed 2 June, 1944.)

1. Adverse Possession § 4a—

The possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for twenty years. G. S., 1-40.

2. Estates § 9a—

Where a deed to lands creates an active trust for the benefit of the grantor for life and at his death the trustee, after payment of his debts, is empowered to sell the remaining property and divide the proceeds among named remaindermen, any proceeds of such realty sold will be stamped with the character of realty in determining the relationship between such remaindermen. And such equitable remaindermen are tenants in common, the remainder vesting absolutely in them upon the death of the grantor.

3. Curtesy § 1—

When a married woman, who is one of several owners of an equitable remainder in lands, has children, her husband as father of such children acquires an estate by the curtesy initiate in his wife's interest therein and, upon her death intestate, an estate by the curtesy consummate.

APPEAL by plaintiff from *Carr, J.*, at October Civil Term, 1943, of ORANGE.

Civil action to have trust deed canceled of record and removed as cloud upon plaintiff's title.

From the admission in the pleadings and the evidence offered on the trial these pertinent facts are shown in the record:

1. On 20 April, 1933, J. K. Reynolds, being the owner of a certain tract of land in Orange County, North Carolina, which he had acquired in the year 1921, executed and acknowledged a deed to Eliza Parham, Trustee, which was filed for record in the office of the Register of Deeds of Orange County, 9 February, 1934. The description of real estate contained in this deed covered certain hotel property and lots in the State of Florida, and concluded with these words, "together with all other pieces or parcels or interest in or to real estate to which I am now seized or in which I now hold an interest." And it also contained these provisions:

"To have and to hold the same unto the said Mrs. Eliza Parham, party of the second part herein as Trustee, but not individually, as hereinafter set forth. During the lifetime of the grantor herein, J. K. Reynolds, the said Mrs. Eliza Parham as trustee as above set forth, to have the absolute custody and control of the property herein mentioned with power to sell, manage or dispose of in any manner as in her judgment shall be best, the proceeds of which from either rentals, sales or from any other manner derived from the said property to be used for the care, support and as the property of the said J. K. Reynolds, and upon the death of the said J. K. Reynolds, the grantor herein, and the payment of his just debts and funeral expenses, the said Trustee hereinbefore mentioned shall have the power and authority as said Trustee to sell and dispose of any part or all of the said property hereinbefore conveyed, then remaining in her hands as Trustee, and shall divide equally the proceeds from the said sale of such property as then remains, among the said C. F. Henley, W. H. Henley, Mrs. Eliza Parham, O. L. Henley, Mrs. Bessie Purvis, Mrs. Ada Ratley, Mrs. Eva Inman, Mrs. Helen Trollinger and Mrs. Emma E. Washburn in equal parts or portions, share and share alike.

"The purpose of this indenture being to secure to the grantor herein the income and revenue or proceeds of sale of above described property for and during his lifetime and to permit the said Trustee to administer and control the said property to the best of her knowledge and ability toward that purpose and after the death of said grantor to assure and secure a legal and equitable division between the other parties hereinbefore named.

"The said Mrs. Eliza Parham, the Trustee hereinbefore named, is hereby specifically given and empowered with full and complete power and right to at any time sell, assign, transfer, mortgage, incumber, lease or sublet for any term of years, any or all of said property should the same be in her opinion for the best interest of the said estate or the said

grantor herein, and shall especially have power and authority to lease or sub-let any part or all of the said premises for a term of years which in her opinion shall be best for the said estate of the said grantor herein."

2. After the trust deed was executed, J. K. Reynolds, who was then in Florida, sent for T. M. Armstrong, who was looking after the Orange County farm, and told him that he had appointed Mrs. Parham trustee of his property and Armstrong saw the said deed, and he continued to look after the land.

3. The *cestuis que trustent* in said deed, except Eliza Parham, are defendants in this action. Eliza Parham died 8 July, 1936, survived by her husband, the plaintiff, and three children, two daughters and a son, who are defendants in this action—the oldest born 28 January, 1908, the next 13 November, 1913, and the youngest 30 August, 1921. There has been no administration upon her estate, nor has there been a successor trustee appointed.

4. On 28 June, 1934, after the trust deed above referred to had been executed and registered in Orange County, J. K. Reynolds executed a general warranty deed to plaintiff, T. C. Parham, who was the husband of said Eliza Parham, purporting to convey to him by specific description the said Orange County tract of land. The recited consideration is $100.00, and an agreement upon the part of Parham to care for the grantor in manner specified. This deed was acknowledged on 28 June, 1934, and registered 2 July, 1934.

5. After the deed from J. K. Reynolds was executed in 1934, plaintiff, who resided in Robeson County, North Carolina, notified Armstrong that the place had been deeded to him, and undertook to sell it to him, and exercised other acts of ownership over the farm, and Armstrong continued in possession through the year 1940, since which time S. E. Teer has rented it from plaintiff.

6. J. K. Reynolds died on 8 November, 1936. Original summons in this action was issued 10 April, 1943, and served on original defendants. By order dated 23 July, 1943, the children of Eliza Parham were made parties defendant and served with summons dated 24 July, 1943.

There was judgment as of nonsuit at the close of plaintiff's evidence, and he appeals to Supreme Court and assigns error.

Louis C. Allen for plaintiff, appellant.
Graham & Eskridge for defendants, appellees.

WINBORNE, J. The sole argument and contention of appellant on this appeal is that there is error in the judgment as of nonsuit from which the appeal is taken in that he has ripened title to the land in question by seven years adverse possession under color of title. G. S., 1-38. In

the light of the relationship of the parties as to the property involved, we are unable to agree that there is error. The statute relating to seven years adverse possession under color of title is inapplicable. Twenty years adverse possession would be necessary. G. S., 1-40. *Winstead v. Woolard,* 223 N. C., 814, 28 S. E. (2d), 507.

First: The deed from J. K. Reynolds to Mrs. Eliza Parham, Trustee, creates an active trust, *Fisher v. Fisher,* 218 N. C., 42, 9 S. E. (2d), 493; *Deal v. Trust Co.,* 218 N. C., 483, 11 S. E. (2d), 464. J. K. Reynolds is the beneficiary of the trust during his lifetime, and at his death, Mrs. Eliza Parham, individually, C. F. Henley, and the others named, are to take as the ultimate beneficiaries or remaindermen, share and share alike. Compare *Pritchard v. Williams,* 175 N. C., 319, 95 S. E., 570. While it is provided that upon the death of J. K. Reynolds, and the payment of his just debts and funeral expenses, the trustee shall have power to sell any of the property conveyed then remaining in her hands as trustee and shall divide the proceeds among the named remaindermen, any proceeds of the realty will be stamped under the law with the character of realty in determining the relationship between such remaindermen. *Lafferty v. Young,* 125 N. C., 296, 34 S. E., 444; *Linker v. Linker,* 213 N. C., 351, 196 S. E., 329. The remaindermen take severally "share and share alike." Thus as respects the equitable remainder in the realty conveyed, the deed created in and among them the relation of tenants in common. This remainder vested absolutely in them upon the death of J. K. Reynolds on 8 November, 1936.

Second: At the time J. K. Reynolds executed the deed to Mrs. Eliza Parham, Trustee, she was the wife of the plaintiff and to their union three children had been born alive, and were then living. Hence, under the law the plaintiff as the husband of Mrs. Parham acquired under said deed a right of curtesy initiate in that portion of the proceeds of the sale of real property covered by the deed of trust to which his wife would be entitled. This was his relationship to the property at the time the deed was made to him by J. K. Reynolds on 28 June, 1934, and upon the death of his wife on 8 July, 1936, this right became an estate by the curtesy consummate. Thereafter he and his children stood in relation to such portion of the proceeds of the realty in the place and stead of his deceased wife, that is, as tenants in common with the other named remaindermen, and the right to receive and possess it became absolute upon the death of J. K. Reynolds. Therefore, as against the remaindermen as tenants in common twenty years adverse possession would have been necessary to ripen title in plaintiff. *Winstead v. Woolard, supra.* If it be conceded that the acts of ownership of the plaintiff, and his exercise of control over the property in question constituted

adverse possession, which it is unnecessary to decide, the time elapsing before the institution of this action is inadequate.

Hence, the judgment below is

Affirmed.

JOHN K. VOEHRINGER, JR., v. LOUIS H. POLLOCK AND ADA S. POLLOCK.

(Filed 2 June, 1944.)

1. **Attachment § 7—**

Where service is by attachment of property and publication, no summons is required. In such cases it is a useless formality to issue a summons and have the sheriff make the return not to be found.

2. **Attachment §§ 7, 13, 14—**

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. G. S., 1-449.

3. **Attachment § 7—**

While the order of publication of service may be obtained at the time the warrant of attachment is issued, a delay from 18 February to 3 March following does not oust the jurisdiction of the court.

4. **Attachment § 3—**

Where defendants in attachment, who have a voting residence in this State, have resided in a distant state for some time, are conducting there large business interests and will continue in such distant state for an indefinite time, apparently in order to avoid service of process here, they are nonresidents within the meaning of the attachment statutes.

5. **Specific Performance §§ 1, 4: Attachment § 2—**

An action for specific performance, under our statute authorizing service by publication, is in the nature of an action *in rem*, and a contract for the conveyance of real property may be enforced against a nonresident. G. S., 1-98.

APPEAL by defendants from *Sink, J.*, in Chambers, 10 March, 1944. From GUILFORD.

Civil action instituted by plaintiff in the Superior Court of Guilford County, 18 February, 1944, for specific performance of a contract to convey real estate situate in Guilford County, North Carolina.

Summons and warrant of attachment, directed to the sheriff of Guilford County, were delivered to him, accompanied by an affidavit to the

effect that defendants were nonresidents of the State of North Carolina and were then residing in the State of Florida. Whereupon, the sheriff or his deputy endorsed on the summons "Defendants not to be found in Guilford County," and levied on the real estate described in the complaint by entering the levy upon the warrant of attachment. On the same day, to wit, 18 February, 1944, N. D. McNairy was appointed temporary receiver of the property levied upon under the warrant of attachment. Thereafter, on 3 March, 1944, upon the affidavit of plaintiff, order of service of the summons on the defendants by publication, was obtained.

On 3 March, 1944, defendants, through their attorneys, entered a special appearance and made a motion to dismiss on the ground that the proceedings were void and irregular, and that the attempted service of summons upon them was defective, null and void, and that the warrant of attachment had not been properly levied.

On 10 March, 1944, his Honor entered the following order:

"This cause coming on to be heard and being heard before the Honorable H. Hoyle Sink, Resident Judge of the Twelfth Judicial District, on the special appearance and the motion of the defendants, Louis H. Pollock and Ada S. Pollock, to dismiss this proceeding and to vacate the attachment for the reasons set forth in the said motion, and the court, having heard the affidavits of the parties and the argument of counsel, finds the following facts:

"That the defendants, Louis H. Pollock and Ada S. Pollock, have a voting residence in the County of Buncombe, State of North Carolina, but the said defendants have resided in the State of Florida for a period of time and that they were not residing or living in the State of North Carolina at the time this proceeding was instituted.

"The Court further finds as a fact that the defendants are operating large apartments and hotel rooms at Palm Beach, in the State of Florida, and that they are at the present time residing in the State of Florida for the purpose of operating the said apartments and that their residence in the State of Florida will continue for an indefinite period of time.

"The Court further finds as a fact that the defendant, Louis H. Pollock, has refused to accept registered mail sent to him by the plaintiff and that the said defendant is remaining out of the State of North Carolina in order to avoid service of process.

"The Court further finds that all proceedings in connection with the institution of this case were regular and in compliance with the laws of the State of North Carolina.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the motion of the defendants to dismiss this proceeding and to vacate the attachment be, and it is hereby denied.

"IT IS FURTHER ORDERED that N. D. McNairy continue to act as temporary receiver of the property described in the complaint, which is known as 102 South Elm Street, until the further orders of this Court."

To the signing of the foregoing order, defendants excepted and appealed to the Supreme Court.

Herbert S. Falk for plaintiffs.
Stern & Stern for defendants.

DENNY, J. The appellants contend there was irregularity in the issuance and return of the summons in this action, as well as a defective levy of the warrant of attachment.

Under the decisions of this Court, where service is by attachment of property and publication, no summons is required. In such cases it is considered a useless formality to issue a summons and have the sheriff make the return that the defendant is not to be found. *Bethell v. Lee,* 200 N. C., 755, 158 S. E., 493; *Mohn v. Cressey,* 193 N. C., 568, 137 S. E., 718; *Jenette v. Hovey,* 182 N. C., 30, 108 S. E., 301; *Mills v. Hansel,* 168 N. C., 651, 85 S. E., 17; *Grocery Co. v. Bag Co.,* 142 N. C., 174, 55 S. E., 90; *Best v. Mortgage Co.,* 128 N. C., 351, 38 S. E., 923; McIntosh on Procedure, 926. Hence, in the instant case it was unnecessary to have a summons issued.

The regularity of the issuance of the warrant of attachment is not challenged, but the appellants contend that a sheriff cannot make a valid levy under a warrant of attachment on real property without going on the property. This contention cannot be sustained. When a warrant of attachment is directed to a sheriff, he is liable for the execution of the process in the same manner as prescribed by law for a levy under an execution. G. S., 1-449; C. S., 807. A levy on real property is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court derived from a levy under a warrant of attachment dates from the levy, but the lien becomes effective as to third parties, when certified to the clerk of the Superior Court and indexed in the manner prescribed in the statute. G. S., 1-449; C. S., 807. *In re Phipps,* 202 N. C., 642, 163 S. E., 801; *Evans v. Alridge,* 133 N. C., 378, 45 S. E., 772; *Pemberton v. McRae,* 75 N. C., 497; *Bland v. Whitfield,* 46 N. C., 122; McIntosh on Procedure, 934 and 936.

The appellants further contend that since the warrant of attachment was issued 18 February, 1944, and a levy thereunder was attempted on the same day, the order of publication of service should have been obtained at the time the warrant of attachment was issued and not on 3 March, 1944. It would have been proper, under the facts set forth in this record, to have obtained the order of publication at the time of the

issuance of the warrant of attachment; however, the delay from 18 February, 1944, to 3 March, 1944, did not oust the jurisdiction of the court, which it obtained when the levy was made. *Jenette v. Hovey, supra; Mills v. Hansel, supra.*

The appellants insist they are residents of the city of Asheville, Buncombe County, North Carolina, and that their absence from the State is temporary, and that service by publication is null and void. In view of the facts set forth in the record, the decision of the court to the effect that the appellants are nonresidents within the meaning of the attachment statute, is in accord with the decisions of this Court. See *Brann v. Hanes,* 194 N. C., 571, 140 S. E., 292, and the cases cited therein.

It is further contended by the appellants that this is an action *in personam* and that constructive service by publication is ineffective for any purpose. We do not so hold. An action for specific performance under our statute authorizing service by publication is in the nature of an action *in rem,* and a contract for the conveyance of real property may be enforced against a nonresident. In such cases the court has the power to determine who is entitled to the property and to vest title by decree in the party entitled to the same. G. S., 1-98; C. S., 484; *Foster v. Allison Corp.,* 191 N. C., 167, 131 S. E., 648; *White v. White,* 179 N. C., 592, 103 S. E., 216; *Bynum v. Bynum,* 179 N. C., 14, 101 S. E., 527; *Johnson v. Whilden,* 166 N. C., 104, 81 S. E., 1057; *Lawrence v. Hardy,* 151 N. C., 123, 65 S. E., 766; *Vick v. Flournoy,* 147 N. C., 209, 60 S. E., 978; *Long v. Insurance Co.,* 114 N. C., 465, 19 S. E., 347; *Watters v. Southern Brighton Mills et al.,* 168 Ga., 15, 147 S. E., 87; *Boswell's Lessee v. Otis et al.,* 9 Howard, 336, 13 Law Ed., 165; *Pennoyer v. Neff,* 95 U. S., 714, 24 Law Ed., 565.

The judgment of the court below is

Affirmed.

STATE v. WILLIE POWELL ROBINSON AND JOHN HENRY BENSON.

(Filed 2 June, 1944.)

1. Criminal Law § 17—

A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime sufficiently charged in the indictment or information.

2. Criminal Law § 61e—

The court is not authorized to inflict punishment beyond the bounds prescribed by the statute under which the warrant or indictment was drawn.

APPEAL by defendants from *Sink, J.*, at January Term, 1944, of FORSYTH.

The defendants were brought to trial before the municipal court of the city of Winston-Salem upon separate warrants, each of which charged that the defendants, "did unlawfully and wilfully promote, set on foot, carry on publicly or privately a certain lottery where a game of chance is played, against the Statute," etc. The defendant Willie Powell Robinson pleaded not guilty but was convicted and sentenced by the recorder to six months in jail to be worked on the roads under control of the State Highway and Public Works Commission. The defendant John Henry Benson entered a plea of *nolo contendere* and was sentenced by the recorder to six months in jail, to be worked on the roads under control of the State Highway and Public Works Commission. From their respective sentences defendants appealed to the Superior Court.

The cases came on for trial at the 10 January Term, 1944, of Superior Court of Forsyth, when and where each of the defendants entered a plea of guilty. Whereupon the court pronounced judgment that the defendant Benson "be confined in the common jail of Forsyth County for a period of twenty (20) months and assigned to work on the public roads under the control and supervision of the State Highway and Public Works Commission," and that the defendant Robinson "be confined in the common jail of Forsyth County for a period of twenty-two (22) months and assigned to work on the public roads of North Carolina under the control and supervision of the State Highway and Public Works Commission."

From the sentences pronounced and judgments entered the defendants appealed to the Supreme Court, assigning errors.

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

Phin Horton, Jr., A. B. Cummings, and Richmond Rucker for defendants, appellants.

SCHENCK, J. It appears that the warrants upon which these defendants were brought to trial are practically in the words of G. S., 14-290, which, in part, reads: "If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; . . . shall

be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding six months, or both, in the discretion of the Court. . . ."

Since the sentences imposed below of imprisonment of twenty (20) and twenty-two (22) months, respectively, are in excess of the limitation of punishment set forth in the statute, not exceeding six months imprisonment, there were errors in the judgment below.

It is contended on the part of the State that the pleas of guilty entered by the defendants were to the offense delineated in G. S., 14-291 (1), which, in part, reads: "If any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the state, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court."

The contention of the State cannot be sustained, since the statute upon which it relies inveighs against the selling, bartering, or causing to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery," and no such charge is made in the warrant upon which the defendants entered pleas of guilty.

G. S., 14-290, refers to persons who promote, make or draw, publicly or privately, a lottery, by whatever name, while G. S., 14-291 (1), deals only with those persons who shall "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order," etc. Thus it is apparent that the two statutes not only act upon different persons and serve purposes which are not the same but also they deal with different conditions. One inveighs against trafficking in lottery tickets and the other is designed to effect those persons engaged in promoting a particular kind of lottery.

"A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the *crime sufficiently charged in the indictment or information.*" (Italics ours.) 14 American Jurisprudence, Criminal Law, par. 272, p. 952.

The court was not authorized to inflict punishment beyond the bounds prescribed by the statute under which the warrant was drawn. In entering pleas of guilty the defendants admitted only the acts charged, and can be punished only for such acts.

In view of the errors above indicated, it follows that the cases must be remanded to the Superior Court for judgments within the limitations of

G. S., 14-290, under which the warrants, upon which the pleas were entered, were drawn.

Error and remanded.

STATE v. PAUL OLDHAM.

(Filed 2 June, 1944.)

1. Criminal Law § 52b—

The general rule on a demurrer to the evidence is that only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State.

2. Same—

In cases where the evidence of guilt is purely negative in character, positive and uncontradicted evidence in explanation, which clearly rebuts the inference of guilt and is not inconsistent with the State's evidence, should be taken into consideration on motion to nonsuit.

3. Same—

The evidence must do more than raise a suspicion or conjecture in regard to the essential facts of the case: *Holding* evidence in a prosecution for vagrancy insufficient to support a conviction.

APPEAL by defendant from *Phillips, J.*, at December Term, 1943, of FORSYTH. Reversed.

The defendant was charged with vagrancy. The jury returned verdict of guilty, and from judgment imposing sentence, defendant appealed.

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

John D. Slawter and Richmond Rucker for defendant.

DEVIN, J. The defendant assigns error in the ruling of the court below in denying his motion for judgment of nonsuit. He contends that the evidence offered by the State was insufficient to sustain a conviction for vagrancy as charged in the warrant under which he was put to trial.

The statutory definition of vagrancy (G. S., 14-336) includes seven classes: "1. Persons wandering or strolling about in idleness who are able to work and have no property to support them. 2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work. 3. All persons able to work having no property to support them and who have not some visible and

known means of a fair, honest and reputable livelihood. 4. Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property. 5. Professional gamblers living in idleness. 6. All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor children, except of male children over eighteen years old. 7. Keepers and inmates of bawdy-houses. . . ."

The warrant charged vagrancy under each classification save the seventh. However, it was not contended there was any evidence to support the charge as defined in the 4th, 5th or 6th class. So that the only question is whether there was evidence to support the charge under either of the first three. From the descriptive words contained in these three clauses it appears that a vagrant is substantially defined as a person able to work who spends his time in idleness or immorality, having no property to support him, and without some visible and known means of fair, honest and reputable livelihood.

According to the record before us, the only evidence offered by the State came from two police officers, who testified that the defendant, about the time charged in the warrant, spent much of his time in and around the bus station and near-by cafe in Winston-Salem; that when questioned defendant said he was not working and did not intend doing so, that he had an income, and that he owned a home on Lexington Road. It was further testified by one of the officers that defendant was often seen in the evening at the bus station in the company of a woman who would come on the bus from East Bend, a town some 19 miles away, and who would return on the bus leaving about 9:30; that thereafter defendant would be seen in the bus station with another woman. The witness testified he had seen him talk to several different ones, but had never seen him go off with the women, nor had he seen the men he talked to go off with the women. The defendant was able to work.

The defendant offered evidence tending to show that he and the woman identified as coming from East Bend, Pauline Smitherman, were married shortly after the time about which the officers testified, and are now living in East Bend; that defendant's home where he lived up to the time of his marriage was worth $1,500 to $1,800, and that at the time he was arrested he had the sum of $700.00 in cash; that he was working for his wife's father, who had a store in East Bend, making trips to and from Winston-Salem.

The general rule on a demurrer to the evidence is that only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State. *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *Gregory*

v. Ins. Co., 223 N. C., 124, 147 A. L. R., 283. However, in vagrancy cases where the evidence of guilt is purely negative in character, positive and uncontradicted evidence in explanation which clearly rebuts the inference of guilt and is not inconsistent with the State's evidence should be taken into consideration on motion to nonsuit. *Jacobs v. State,* 1 Ga. App., 519, 57 S. E., 1063; *Baugh v. State,* 32 Ga. App., 496, 123 S. E., 923; *Mooney v. State,* 32 Ga. App., 734, 123 S. E., 734; *People v. Sohn,* 269 N. Y., 330, 199 N. E., 501; 66 C. J., 411. Applying this rule in this case, we think the evidence insufficient to sustain a conviction. "The evidence must do more than raise a suspicion or conjecture in regard to the essential facts of the case." *S. v. Oxendine,* 223 N. C., 659.

The motion for judgment of nonsuit should have been allowed.

Reversed.

HERMAN B. MEISELMAN v. PHIL WICKER ET AL.

(Filed 2 June, 1944.)

Insurance § 11—

Where an agent or broker undertakes to procure insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the obligation he has assumed, and within the amount of the proposed insurance, he may be held liable for the loss properly attributable to his negligent default.

APPEAL by defendants from *Nimocks, J.,* at October Term, 1943, of CUMBERLAND.

Civil action to recover damages for negligent failure to keep plaintiff's theatre equipment insured against loss by fire.

The plaintiff operates two moving pictures theatres, one in Fayetteville and the other in Rockingham. The defendants are engaged in selling theatre supplies and equipment. In 1939, the plaintiff purchased valuable equipment from the defendants under conditional sales contract, and installed it in his theatres. The defendants carried insurance on their interest in the property.

The complaint alleges:

1. That on 13 February, 1941, the defendants agreed to provide the plaintiff with repair or replacement insurance against loss by fire up to $4,000.00 on his property in the Rockingham theatre for a period of one year; that premiums were to be paid at intervals of 90 days under an extended coverage arrangement, and bills rendered therefor as other items in the open account between the parties.

2. That defendants provided insurance for the first three quarters of the year in accordance with their agreement, but failed to provide any during the last quarter.

3. That on 26 January, 1942, plaintiff's equipment in the Rockingham theatre was destroyed by fire, and that he suffered a loss of $4,000.00.

Upon denial of liability and issues joined, the jury returned a verdict for the plaintiff, and fixed his damages at $3,000.00.

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

W. Louis Ellis, Jr., and James R. Nance for plaintiff, appellee.
Stern & Stern and Rose, Lyon & Rose for defendants, appellants.

STACY, C. J. The plaintiff grounds his action on the principle announced in *Elam v. Realty Co.*, 182 N. C., 599, 109 S. E., 632, 18 A. L. R., 1210, that where an agent or broker undertakes to procure insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the obligation he has assumed, and within the amount of the proposed insurance, he may be held liable for the loss properly attributable to his negligent default. See, also, *Boney v. Ins. Co.*, 213 N. C., 563, 197 S. E., 122; Anno. 18 A. L. R., 1214; 8 Am. Jur., 1043.

It is alleged that the plaintiff relied on the defendants to see that his property in the Rockingham theatre (also in his Fayetteville theatre) was insured against loss by fire as per agreement and according to the usual course of dealing between them. This is denied by the defendants, but the direct conflict in the evidence has been resolved against them. The jury might have taken either view of the matter. After all, the case presents little more than a controverted issue of fact, determinable alone by the twelve. The plaintiff's evidence tends to establish liability; the defendants' just the reverse. The conflict is sharp and irreconcilable.

The defendants advance the theory that if the agreement were to provide "repair or replacement insurance," as alleged, no demand has been made on them to repair or to replace the property, and therefore the plaintiff has no cause of action or right of recovery. This contention apparently arises from a misconception of the gravamen of the complaint. The plaintiff is not seeking to recover on the contract, which would have existed had the policy been procured, but for negligent failure to provide the insurance as agreed. Hence, a different situation arises; likewise, a different cause of action, for which the plaintiff sues.

The principal exception urged by the defendants is the one addressed to the court's failure to sustain the demurrer to the evidence and dismiss the action as in case of nonsuit. The ruling is supported by the record. None of the exceptions can be sustained.

As no reversible error has been made to appear, the verdict and judgment will be upheld.

No error.

STATE v. RALPH RIVERS.

(Filed 2 June, 1944.)

Homicide § 25—

In a prosecution for murder, the evidence tending to show that the prisoner killed deceased, while the two were quarreling over some trivial matters, defendant admitting the killing but alleging that he shot deceased to repel an assault, the issue is for the jury and demurrer to the evidence was properly overruled. G. S., 15-173.

APPEAL by defendant from *Carr, J.*, at November Term, 1943, of ALAMANCE.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Haywood Loy.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for not less than four nor more than six years.

The defendant appeals, assigning errors.

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

P. W. Glidewell, Sr., for defendant.

STACY, C. J. The record discloses that on 15 May, 1943, the defendant shot and killed his father-in-law at the defendant's home near Burlington, Alamance County, while the two were quarreling over some trivial domestic matters. The defendant admitted firing the shot which killed the deceased, but he says he shot to repel an assault without any felonious intent. The issue was for the jury under the evidence disclosed by the record, and they have found an unlawful killing or manslaughter. The demurrer to the evidence was properly overruled. G. S., 15-173 (formerly C. S., 4643); *S. v. Johnson,* 184 N. C., 637, 113 S. E., 617; *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155.

The remaining exceptions are to portions of the charge. No authority is cited in support of the defendant's position, and we have found no error in the trial. The verdict and judgment will be upheld.

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1944

JOHN B. PEEL AND WIFE, LIZZIE PEEL; ED 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 20 September, 1944.)

1. Boundaries §§ 2, 3a: Deeds § 12—

A general description giving the boundaries of a tract of land is not too vague to permit the reception of parol evidence to explain, locate, or make certain the calls or descriptive terms used in the deed, but never to enlarge, supplement, or add to the same.

2. Boundaries § 3e—

When land is described as adjoining or bounded by certain other tracts, and (1) there are certain other identifying terms such as "known as the A tract"; or (2) there are references to an identifiable muniment or source of title, such as the same land conveyed by B to C; or (3) the land is designated by such a term as the home place of D; or (4) adjoining landowners are named and it is shown that grantor has no other land in the vicinity which may be embraced within such bounds, G. S., 39-2, the description is not void for vagueness and it may be aided by parol evidence.

3. Same—

When, however, the general description would apply to one tract as well as to another, or the land in controversy is not a distinct tract, or is a part of a larger tract, the description is void and cannot be aided by evidence *aliunde*.

4. Boundaries § 3a: Deeds § 12—

At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed. Failing in this, the deed is void.

APPEAL by plaintiffs from *Johnson, Special Judge,* at February Term, 1944, of BEAUFORT. New trial.

Petition for partition in which the defendants answered, pleading sole seizin. The plaintiffs are heirs at law of one R. C. Peel, deceased. The defendants claim title to the land in question 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. Thus he owned all the land lying between Military Road on the north, the John Peel land on the east, Pamlico River on the south, and the Griffin land on the west.

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 and extending over into the second tract 30 feet. On the same date he executed and delivered to his son, Samuel Peel, a deed containing the description as follows:

"In Beaufort County, N. C., adjoining lands of John Peel, Griffin and others, bounded as follows: Beginning on Griffin's line 30 ft. from the high-water mark; thence an easterly course, 30 ft. from the water to John Peel's line; thence beginning at a stake on this line 300 ft. from John Peel's line and running a northerly course to the Military Road, to a stake 300 ft. from John Peel's line; thence with said line to the river, containing 22 acres more or less."

The petitioners, contending that R. C. Peel died intestate, seized and possessed of the second tract 60 feet wide extending along the banks of the Pamlico River, instituted this action for the partition thereof. Said tract is 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 land; and on the south by Pamlico River."

On a former appeal, *Peel v. Calais,* 223 N. C., 368, this Court reversed judgment of nonsuit and remanded the cause for a new trial.

When the cause again came on for trial in the court below, the documentary evidence relating to the title was offered. In addition thereto,

defendants offered evidence tending to show that "the high-water mark" referred to in the deed of R. C. Peel to Samuel Peel related to the high-water mark of Pamlico River; that the Griffin property bounded the whole tract, made up of the two parcels, on the west from Pamlico River to Military Road, and that the John Peel land bounded the whole tract on the east from the river to the Military Road. Issues were submitted to and answered by the jury as follows:

"1. Does the deed of R. C. Peel and wife, Medora Peel, to Samuel Peel, dated December 28, 1910, registered in Book 167, page 68, embrace and convey the land in controversy, indicated on the Lewis map by the figures 2-9-8-1? Answer: Yes.

"2. Do the mortgage deed made by Carnie Bullock to H. B. Thompson, registered in Book 250, page 472, and said Thompson's foreclosure deed to Medora Peel, registered in Book 274, page 280, embrace that portion of the land in controversy indicated on the Lewis map by the figures 6-9-8-X; and do said mortgage and deed convey all right, title and interest that Carnie Bullock may have had in that part of the land in controversy so indicated on the Lewis map by the figures 6-9-8-X? Answer:

"3. Have the defendants for more than seven years next before the commencement of this action been in the open, notorious, continuous, adverse possession, under known and visible lines and boundaries and under colorable title, of that part of the land in controversy as indicated on the Lewis map by the figures 2-6-X-1? Answer:"

The record discloses that the court also prepared a separate set of issues, some of which were answered by it, as follows:

"1. Does the deed of R. C. Peel and wife, Madora Peel, to Samuel Peel, dated December 28, 1910, registered in Book 167, page 68, embrace and convey the lands in controversy, indicated on the Lewis map by the figures 2-9-8-1? Answer: (Submitted to jury on separate paper.)

"2. If not, does the deed of R. C. Peel to Madora Peel, dated February 21, 1940, recorded in Book 219, page 273, embrace and convey that part of the land in controversy indicated on the Lewis map by the figures 2-6-X-1? Answer: Yes, by the Court.

"3. Does the deed of Madora Peel and Samuel Peel and wife to Isabelle C. Calais, dated March 4, 1932, registered in Book 290, page 591, embrace that part of the land in controversy indicated on the Lewis map by the figures 2-6-x-1; and does said deed convey all right, title and interest which Madora Peel may have had in said portion of the land in controversy so indicated by the figures 2-6-x-1? Answer: Yes, by the Court.

"4. Have the defendants for more than seven years next before the commencement of this action been in the open, notorious, continuous

adverse possession, under known and visible lines and boundaries and under colorable title, of that part of the land in controversy as indicated on the Lewis map by the figures 2-6-x-1? Answer: (Submitted to jury on separate paper.)

"5. Do the mortgage deed made by Carnie Bullock to H. B. Thompson, registered in Book 250, page 472, and said Thompson's foreclosure deed to Madora Peel, registered in Book 274, page 280, embrace that portion of the land in controversy indicated on the Lewis map by the figures 6-8-8-X; and do said mortgage and deed convey all the right, title and interest that Carnie Bullock may have had in that part of the land in controversy so indicated on the Lewis map by the figures 6-9-8-X? Answer: (Submitted to jury on separate paper.)

"6. Does the deed of Madora Peel and Samuel Peel and wife to Isabelle C. Calais, dated March 4, 1932, and registered in Book 290, page 591, embrace that part of the land in controversy indicated on the Lewis map by the figures 6-9-8-X; and does said deed convey all the right, title and interest which Madora Peel may have acquired under the mortgage of Carnie Peel and the foreclosure deed of H. B. Thompson, mortgagee in and to that portion of the land in controversy indicated on the Lewis map by the figures 6-9-8-X? Answer: Yes, by the Court.

"7. Does the deed of Madora Peel and Samuel Peel and wife to Isabelle C. Calais, registered in Book 290, page 591, convey any and all the right, title and interest of Samuel Peel and wife in and to the land in controversy indicated on the Lewis map by the figures 2-9-8-1? Answer: Yes, by the Court. See allegation of Petition."

Upon the coming in of the verdict, judgment was entered decreeing that plaintiffs have no right, title or interest in or to the land in controversy. Plaintiffs excepted and appealed.

John H. Bonner and H. S. Ward for plaintiffs, appellants.
Grimes & Grimes and Rodman & Rodman for defendants, appellees.

BARNHILL, J. The particular description in the Samuel Peel deed, as it relates to the land in controversy, is patently defective. *Peel v. Calais*, 223 N. C., 368. There are two lines which may be fitted to the land in controversy but there is no attempt to close the calls so as to embrace the same. The defendants must resort to the general description "a certain tract of land in Beaufort County, N. C., adjoining the land of John Peel, Griffin and others." Hence the exceptions entered by plaintiffs and presented on this appeal challenge the sufficiency of the evidence *aliunde* to support the verdict on the first issue.

G. S., 8-39; C. S., 1783, authorizes parol evidence to identify land sued for and to fit a vague description contained in the muniment of

title to the land alleged to be conveyed thereby. Even so, it was held in *Blow v. Vaughn,* 105 N. C., 198, 10 S. E., 891, and *Wilson v. Johnson, ibid.,* 211, 10 S. E., 895, that descriptions of land such as "adjoining the lands of A, B, and others, containing 25 acres more or less" are too vague and indefinite to be aided by parol proof. Following these decisions the Legislature in 1891 enacted Chapter 465, Public Laws 1891 (now G. S., 39-2), and this Court, independently of the statute, in *Perry v. Scott,* 109 N. C., 374, 14 S. E., 294, disapproved the decisions in these two cases and expressly held that a general description giving the boundaries of the tract of land is not too vague to permit the reception of parol evidence to explain, locate, or make certain the calls or descriptive terms used in the deed, but never to enlarge, supplement, or add to the same.

Subsequent opinions of this Court, applying the principles enunciated in the *Perry case, supra,* and the proviso of the statute, G. S., 39-2, C. S., 992, have established well-recognized rules controlling decision as to the sufficiency of parol evidence offered in aid of an ambiguous general description and to fit such description to the land in controversy.

When land is described as adjoining or being bounded by certain other tracts, and (1) there are certain other identifying terms such as "known as the Sellars tract," *Euliss v. McAdams,* 108 N. C., 507, 13 S. E., 162, "a part of the Mary A. Bissett estate," owned by grantors, *Bissette v. Strickland,* 191 N. C., 260, 131 S. E., 655, "the Abby Dough tract," *Bailey v. Hayman,* 218 N. C., 175, 10 S. E. (2d), 667; or (2) there are references to an identifiable muniment or source of title such as "the same land that James Peel conveyed to Hiram Edgerton by deed," *Moore v. Fowle,* 139 N. C., 51, 51 S. E., 796, "being the land conveyed by E. W. Davis to Joseph Morton *et al.,*" school committee, etc., *Hudson v. Morton,* 162 N. C., 6, 77 S. E., 1005; or (3) the land is designated by such terms as the "Home Place" of grantors, *Lewis v. Murray,* 177 N. C., 17, 97 S. E., 750, "my farm," *Sessoms v. Bazemore,* 180 N. C., 102, 104 S. E., 70; or (4) adjoining landowners are named and it is shown that the grantor does not have any other land in the same vicinity which at all corresponds to or may be embraced within such bounds, G. S., 39-2; *Perry v. Scott, supra; Patton v. Sluder,* 167 N. C., 500, 83 S. E., 818; *Self Help Corporation v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889, the description is not void for vagueness and it may be aided by parol evidence.

When, however, the general description would apply to one tract as well as to another, or the land in controversy is not a distinct tract, or is a part of a larger tract, the description is void and cannot be aided by evidence *aliunde. Perry v. Scott, supra,* and cases cited; *Katz v. Daughtrey,* 198 N. C., 393, 151 S. E., 879.

At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed. Failing in this, the deed is void.

Other authorities are gathered and discussed in the following cases: *Euliss v. McAdams, supra; Stewart v. Cary*, 220 N. C., 214, 17 S. E. (2d), 29; *Self Help Corporation v. Brinkley, supra; Bailey v. Hayman, supra.*

Consideration of the general description relied on by defendants in the light of these principles of construction leads us to the conclusion that it has not been aided or explained by the oral testimony so as to fit it to the *locus in quo.* The description contains no identifying term other than two adjoining tracts. It may be fitted to the whole tract or to the tract first conveyed to R. C. Peel as well as to the *locus. Katz v. Daughtrey, supra.* The property in controversy is not the only land which would at all correspond to the description contained in the deed.

The deed does not purport to convey two separate tracts of land. Yet the disputed river tract is separated and cut off from the main body of land therein conveyed by the first call for a line from a point in the Griffin line to a point in the John Peel line.

Under the circumstances of this case, the acreage call is not of material significance. The tract on Military Road conveyed in the deed contains 20.41 acres and that tract together with the disputed land is less than twenty-two acres. While acreage may at times be material, it is not sufficient here to overcome the vagueness and uncertainty in other respects.

When R. C. Peel conveyed a part of his land to his daughter and a part to his son Samuel Peel, he reserved the western section. Later he conveyed this part from Military Road to the river and including more than one-third of the disputed tract to his wife Medora. This, it would seem, indicates a lack of intent to include the river tract in the Samuel Peel deed.

The indicated defects are of such nature as to render the description entirely too vague and uncertain to permit the conclusion that it includes the thirty-foot strip on the river.

It follows that the court erred in declining to give the peremptory instruction on the first issue requested in apt time by plaintiffs.

The court answered the third of the issues prepared for its own use "Yes." Exception thereto cannot be sustained.

In 1932 Samuel Peel and wife and Medora Peel executed deed to Isabelle Carter Calais in which the description includes the thirty-foot strip on the river. This deed clearly embraces the land between the points 2-6-X-1 on the map. This is a part of the land conveyed to Medora Peel by R. C. Peel in 1920.

But plaintiffs insist that the fee simple title thereto vested in Medora was not conveyed. This contention is based on language contained in the deed as follows:

"Medora Peel for and in consideration of $5.00 hereby joins in the execution of this deed for the purpose of releasing the above tract of land from a certain indebtedness to her, which is duly registered in the office of Register of Deeds of Beaufort County and also to release any right, title and interest she may have therein."

This language is not only sufficient to release her indebtedness against the land described, a part of which she did not own, but also to convey all right, title and interest she had in the premises. Certainly it is not in conflict with the general granting clause in the deed. As, on this record, she owned the land indicated in the issue, 2-6-X-1 on the Lewis map, her deed conveyed quitclaim title thereto.

Issue No. 4 on the list prepared by the court for its own use, being No. 3 on the list submitted to the jury, was not answered either by the court or the jury. Exception thereto presents no question for decision.

Adverse possession, even under color of title, does not ripen title as against tenants in common under twenty years. Even so, we only review decisions of the trial courts. Hence the plea of ownership by adverse possession under the deed of 1932 from Samuel Peel and others to Isabelle Carter Calais remains open for future determination.

For the reasons stated, the judgment entered must be vacated and the cause remanded for further proceedings in accord with this opinion.

New trial.

LEE E. KNOTT v. MRS. ALICE CUTLER.

(Filed 20 September, 1944.)

1. Specific Performance § 1—

Specific performance does not follow as a matter of course merely by establishing the existence and validity of the contract involved. It is not a matter of absolute right even though a legal right to damages for breach of the contract may exist, and it may be refused where the defense is not such as would warrant a rescission of the contract.

2. Same—

As a general rule, when it appears that a contract was unfairly procured by overreaching or overkeenness on plaintiff's part, or was induced or procured by means of oppression, extortion, threats, or illegal promises on his part, the plaintiff cannot obtain specific performance.

3. Specific Performance § 1—

A binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced; and mere inadequacy of price, without more, will not as a rule prevent the application of this principle.

APPEAL by plaintiff from *Carr, J.*, at April Term, 1944, of BEAUFORT.

This is an action for specific performance, based upon a contract executed by the defendant on 5 May, 1943, for the conveyance of certain real estate in consideration of the payment by the plaintiff of $600.00 to the defendant, at the time of the execution of the contract and the further payment of the sum of $1,700.00 upon the delivery of a good and sufficient deed on or before 10 June, 1943. The contract also provided for the sale and delivery of certain personal property described therein. By agreement of counsel, the title to the personal property will be governed by the right of the plaintiff to enforce the conveyance of the real property described in the contract, by specific performance, and the title to said personal property shall pass under the terms of such judgment as the Court may enter in this action, in the same manner as the land itself.

On 17 May, 1943, the defendant executed a Supplemental Agreement and Bill of Sale, in consideration of $239.06, wherein she agreed to permit the plaintiff the use of a pack house and stables situate upon her lands, until 17 May, 1944, and it is stated in the Agreement that these buildings are located "on the land of Mrs. Alice Cutler which it was not contracted to convey to the said L. E. Knott by contract heretofore entered into." Certain fertilizer, tobacco sticks and other items of personal property were transferred to plaintiff under the terms of this Bill of Sale.

The defendant admitted the execution of both of the foregoing instruments, but alleged and testified she was informed by plaintiff that they were leases and she denied she ever agreed to sell the plaintiff any property, real or personal; that she did not read the contracts but relied upon the plaintiff's representations. She further testified that the checks she received from the plaintiff were in payment of rent on the leased premises and for the use of her personal property, including the pack house and stables.

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

"1. Was the contract dated 5 May, 1943, and offered in evidence executed by the defendant, as alleged in the complaint? Answer: Yes.

"2. If so, was the execution of the same procured by the fraudulent misrepresentation of the plaintiff, as alleged in the answer? Answer: No.

"3. What was the fair market value of the property described in the complaint at the time the contract sued on was executed? Answer: $5,250.00."

Plaintiff moved for judgment on the verdict, decreeing specific performance of the contract, upon the payment of the balance of $1,700.00 by the plaintiff to the defendant. The motion was denied; whereupon the court signed the following judgment:

"This cause coming on to be heard before the undersigned Judge at the April, 1944, Term of Superior Court of Beaufort County, and a jury, and the issues having been submitted to and answered by the jury at said term as set out in the record, and it having been agreed by counsel for both plaintiff and defendant that judgment might be entered at the May, 1944, Term of the Court of said County, the Court, upon its own motion, finds the following facts:

"1. The plaintiff and the deceased husband of the defendant had business dealings with each other for a number of years prior to the husband's death and the defendant's husband sold most of his tobacco at the warehouse of the plaintiff in Washington, N. C., for several years prior to his death.

"2. The husband of the defendant died 21 May, 1942.

"3. Some time after his death defendant and plaintiff had a conversation in which plaintiff requested of her that if she should ever desire to sell her place that he would like to have the first chance at it.

"4. In the fall of 1942, plaintiff and his partner in business purchased some tobacco from the defendant and sold it at a substantial profit, and, at the suggestion of plaintiff's partner, plaintiff and his partner went to defendant's house and presented her with the sum of $50.00 as a gift, stating to her that they had made some profit on the tobacco and for that reason wanted to present her with such gift.

"5. Except for the business transaction between the plaintiff and the defendant as set out in finding of facts numbers 3 and 4, there have been no business dealings of any kind between the plaintiff and the defendant prior to the negotiations leading to the execution of the contract dated 5 May, 1943.

"6. The defendant rented her land to a tenant for the year 1943, and after the tenant had started preparations for the crop he broke his leg and was unable to continue his work as a tenant on the place, and defendant then consulted with the plaintiff and discussed with him the sale of her property.

"7. Plaintiff is a man of wide business experience, being the owner of farm lands and interested in the operation of a tobacco warehouse and other business enterprises in the City of Washington, North Carolina,

and has a knowledge of the value of farm land in Beaufort County. Defendant is an elderly woman, of little, if any, business experience and has had no experience in the sale or purchase of farm lands and her knowledge of the value of farm lands is very limited.

"8. The defendant, by reason of the dealings she has had with the plaintiff, had utmost confidence in him.

"9. Plaintiff did not make any statements to the defendant as to what a fair price for said property was, but, after discussing the sale with the defendant, plaintiff told her that he would pay her $2,300.00 for the property, and defendant asked him if he could not pay as much as $2,500.00, whereupon he stated that $2,300.00 was as much as he would put in it.

"Upon the issues answered by the jury, the foregoing findings of fact, and upon all the facts and circumstances surrounding the making of the contract, the Court is of the opinion that it would be inequitable and unjust to the defendant to allow the plaintiff's prayer for specific performance of the contract:

"It is, Therefore, Ordered, Adjudged and Decreed by the Court that the plaintiff's prayer for specific performance be denied; that the action be dismissed and plaintiff be taxed with the costs.

LEO CARR, *Judge Presiding.*"

Plaintiff appeals, assigning error.

H. C. Carter for plaintiff.
Rodman & Rodman, J. D. Paul, and H. S. Ward for defendant.

DENNY, J. It is regrettable that the defendant entered into an agreement for the sale of her property for a consideration less than half of its fair market value. Nevertheless, neither the jury nor the trial judge found that the execution of the agreement for the sale of the property was procured by the fraudulent misrepresentation of the plaintiff. Therefore, the sole question for our determination is whether or not, under the facts and circumstances disclosed on this record, the plaintiff is entitled to a decree for specific performance, or should he be left to his remedy at law for damages? The facts certainly do not warrant the cancellation or rescission of the contract in equity. Do the facts, on the other hand, entitle the plaintiff to a decree for specific performance, under the rules and principles of equity as administered in this jurisdiction?

It is said in 49 Am. Jur., sec. 8, p. 13: "Assuming that the contract in question in an action for specific performance is one of the class of contracts of which specific performance may be granted because of inadequacy of the remedy at law, the granting of the decree of specific

performance is not a matter of absolute right. As the rule is usually stated, the granting of relief by a decree requiring specific performance of a contract rests in the sound discretion of the court before whom the application is made, which discretion is to be exercised upon a consideration of all of the circumstances of the case, with a view of subserving ends of justice. This discretion of a court of equity to grant or withhold specific performance of a contract is not an arbitrary or capricious one, but is a judicial discretion to be exercised in accordance with settled rules and principles of equity, and with regard to facts and circumstances of the particular case. The remedy of specific performance will be granted or withheld by the court according to the equities of the situation as disclosed by a just consideration of all the circumstances of the particular case, and no positive rule can be laid down by which the action of the court can be determined in all cases. . . . Accordingly, the rule is well settled that equitable relief by way of specific performance does not follow as a matter of course merely by establishing the existence and validity of the contract involved. . . . Specific performance is not a matter of absolute right even though a legal right to damages for breach of the contract may exist, and it may be refused even though the defense is not such as would warrant the rescission of the contract." Likewise, it is held in the same authority, sec. 51, p. 66: "As a general rule, when it appears that a contract was unfairly procured by overreaching or overkeenness on the plaintiff's part, or was induced or procured by means of oppression, extortion, threats, or illegal promises on his part, the plaintiff cannot obtain specific performance. These matters need not be of such character as would justify a court of equity in rescinding the contract or a court of law in refusing relief. There is a difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract and that which will induce a court to withhold its aid. Relief may be denied upon ground that the contract is harsh, unjust, or oppressive, regardless of any actual fraud, and regardless of the fact that the contract is valid."

Should specific performance be denied in this case on the ground that the contract is harsh, unjust or oppressive, regardless of the absence of fraud in its procurement? It must be conceded, we think, that the only evidence of harshness or oppression is the inadequate consideration. And the mere fact that the consideration is inadequate will not warrant a finding that the contract is harsh, unjust or oppressive, unless the inadequacy is so great as to amount to evidence of fraud. 49 Am. Jur., sec. 65, p. 80. *Barnett v. Spratt,* 39 N. C., 171; *Heyward v. Bradley,* 170 F., 325; *Eyre v. Potter,* 15 How., 42, 14 L. Ed., 592. A bad bargain, in the absence of fraud, will not relieve the defendant from the specific performance of her contract. *Rodman v. Robinson,* 134 N. C.,

503, 47 S. E., 19; *Whitted v. Fuquay,* 127 N. C., 68, 37 S. E., 141; *Moore v. Reed,* 37 N. C., 580.

As to when specific performance will be enforced in this jurisdiction, the rule is clearly stated in *Combes v. Adams,* 150 N. C., 64, 63 S. E., 186, where *Hoke, J.,* speaking for the Court, said: "It is accepted doctrine that a binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced. *Rudisill v. Whitener,* 146 N. C., 403; *Boles v. Caudle,* 133 N. C., 528; *Whitted v. Fuquay,* 127 N. C., 68. This last decision being to the effect that mere inadequacy of price, without more, will not as a rule interrupt or prevent the application of the principle." This doctrine or principle has been cited with approval in *Ward v. Albertson,* 165 N. C., 218, 81 S. E., 168; *Thomason v. Bescher,* 176 N. C., 622, 97 S. E., 654; and *Harper v. Battle,* 180 N. C., 375, 104 S. E., 658.

It must be conceded that the defendant made a bad bargain and that the consideration is inadequate, but, since the agreement for the sale of the property was not procured by fraud on the part of the plaintiff, it is a binding agreement, and we believe the ends of justice will be subserved by granting a decree of specific performance. To deny a decree of specific performance in this case would in all probability not be advantageous to the defendant, since she would be liable in damages to the plaintiff for the difference between the contract price and the value of the property. *Rodman v. Robinson, supra.*

This cause is remanded to the end that a decree for specific performance may be entered, in accord with this opinion.

Error and remanded.

PEOPLES BANK & TRUST COMPANY, GUARDIAN AND ADMINISTRATOR OF W. L. GROOM, v. TAR RIVER LUMBER COMPANY, A CORPORATION.

(Filed 20 September, 1944.)

Receivers § 12a: Corporations § 34—

Upon objections filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence, or findings, the objections alleging facts which if true would constitute a valid defense to such claim, there is error in the trial court's denial of a motion to set aside the allowance of such claim and refusal to grant a hearing on the objections. G. S., 55-153.

APPEAL by movent S. T. Anderson from *Thompson, J.,* at June Term, 1944, of NASH. Error and remanded.

Motion in the cause made by S. T. Anderson to set aside so much of a previous order of the court as approved the allowance of a claim by the receivers of defendant Lumber Company.

This case was here at Spring Term, 1944, and is reported *ante,* 153. On that appeal error was found and the cause remanded for further consideration of the matters presented by the motion of S. T. Anderson to vacate the order allowing the claim of the W. L. Groom Estate represented by plaintiff Bank. Upon the consequent hearing, the court below, after considering the motion, and the record and affidavits offered, again denied the motion, largely on the ground that S. T. Anderson was estopped to contest the claim of the Groom Estate, and that no meritorious defense to the allowance of that claim had been shown.

The movent excepted to this ruling and appealed.

F. S. Spruill for appellee.
John F. Matthews and G. M. Beam for appellant.

DEVIN, J. The order to which movent's motion was directed approved the allowance by the receivers of defendant Lumber Company of the claim of W. L. Groom, represented by plaintiff Bank, to the amount of $87,000, a sum so large compared with available assets in the hands of the receivers that if allowed movent's personal claim would be greatly diminished.

The validity of the order in so far as it approved this allowance is assailed by the movent on the ground that it was entered without notice, was contrary to the course and practice of the court and irregular, and was ineffective to determine the matters in controversy. He asks that the order be set aside to the extent that he be permitted to file exceptions to the allowance of this claim *nunc pro tunc,* and have the issue adjudicated in accordance with the provisions of the statute. 2 G. S., 55-153.

In order to determine the question presented by the appeal it is necessary to examine the entire record and review the procedure in chronological order.

On 2 April, 1941, plaintiff Bank, as guardian of W. L. Groom, instituted action against defendant Tar River Lumber Company, alleging defendant's insolvency and an indebtedness to Groom of $97,000. J. P. Bunn and Thorp & Thorp were the attorneys representing plaintiff. Using the complaint as an affidavit, application was made to the court for the appointment of a receiver. Thereupon the court appointed J. P. Bunn and W. L. Thorp, of plaintiff's counsel, temporary, and later permanent, receivers. Summons and complaint having been served on defendant Lumber Company, the latter through its attorneys, Battle,

Winslow & Merrell, filed answer, verified by S. T. Anderson, secretary of the Lumber Company, in which the allegations of indebtedness to Groom were denied and the statute of limitations pleaded as to part of this claim. It was admitted that the defendant Lumber Company was presently unable to meet its obligations.

On 4 September, 1941, the receivers made report that claims of Groom $87,000, S. T. Anderson $8,500, Anderson Sisters $2,990, had been filed, and recommended that these be allowed as general claims. Receipt of copy of this report was acknowledged by Battle, Winslow & Merrell, attorneys for S. T. Anderson and Anderson Sisters, and by the trust officer of plaintiff Bank.

On 4 October, 1941, upon petition of the receivers, the court appointed K. D. Battle and I. D. Thorp attorneys for the receivers.

On 9 October, 1941, Judge Carr, upon the receivers' report, made an order allowing the claims of Groom, Anderson and Anderson Sisters in the above amounts. It was found that after paying taxes and preferred claims a balance of $9,241.59 remained, and a dividend of 6% was ordered.

On 7 August, 1942, I. D. Thorp and K. D. Battle filed petition for allowances as attorneys, setting out that services performed for the receivers and for which they asked compensation included services rendered the receivers from the beginning of the litigation, before and in anticipation of their formal appointment by the court. Allowances were accordingly ordered by Judge Bone stating "The court ratifies the action of the receivers in availing themselves of the use of the attorneys prior to the actual appointment thereof."

On 8 August, 1942, S. T. Anderson, through his attorney, I. T. Valentine, petitioned for and obtained leave to sue the receivers, and filed complaint alleging validity of his claim for unpaid salary, and alleging invalidity of the claim of Groom. To this complaint the receivers through Thorp & Thorp, attorneys, answered alleging validity of the Groom claim. At May Term, 1943, Anderson took a voluntary nonsuit, and at the same term, through J. F. Matthews, attorney (Valentine having entered U. S. Army), filed motion upon notice in the original cause that so much of the order of 9 October, 1941, as allowed the Groom claim be vacated as irregular and contrary to the course and practice of the courts.

In his affidavit in support of his motion, S. T. Anderson, after setting out in detail the facts hereinbefore referred to, alleged, among other things, that he had employed Mr. Battle to represent him and file his claim with the receivers; that the order of 9 October, 1941, was made without notice to him, and without his knowledge or consent; that the receivers in recommending, and, likewise, the court in ordering allow-

ance of the Groom claim, were inadvertent to the denial of this indebtedness in the answer and to the objection to its allowance; that as soon as he learned of the order of 9 October, 1941, he took steps seeking to have it vacated; that conceding the good faith of the attorneys appearing in the cause, they had as a matter of fact appeared in dual capacities contrary to the policy of the courts, rendering the acts done and permitted in consequence irregular and void; that the order was made by Judge Carr in the cause without hearing any evidence when there was an issue of fact as to the validity of the Groom claim raised by the pleadings. Movent set out in detail the facts upon which he relied to show the invalidity of the Groom claim and such as would constitute a meritorious defense thereto. These included allegations, (a) that the claim was represented by notes issued without authority of defendant Lumber Company in renewal of notes barred by statute of limitations; (b) that Groom was advanced by the defendant Lumber Company large sums to pay obligations of Swansboro Lumber Company on which Groom was endorser, and that large sums were paid by the defendant Lumber Company to Groom as dividends when the Company was not financially able to do so, which sums so wrongfully received should be pleaded as a setoff by the receivers; (c) that Groom drew more than $100,000 as salary when no services were rendered. He asked that so much of the order of 9 October, 1941, as allowed the Groom claim be set aside and that he be permitted to file exceptions to this claim as filed.

In view of the matters alleged by the movent with reference to the attorneys, at the request of the receivers the court appointed F. S. Spruill to represent the receivers in connection with this motion. Answer to the motion was filed and upon the hearing Judge Williams denied the motion. Upon appeal, error was found and the cause remanded (*ante*, 153). In view of the opinion of this Court, the receivers asked the Superior Court for advice, and were advised that as receivers they had no official interest in the motion and were not required to resist it, and F. S. Spruill was relieved of further duties as their attorney. However, the plaintiff Bank, representing the Groom Estate through Mr. Spruill as their attorney, answered the motion, setting up that Anderson was estopped by reason of an agreement which he had entered into that Groom's claim be fixed at $87,000 in consideration of certain payments to Anderson of $2,602.75 which he received as well as dividends on his claim.

Plaintiff Bank filed a further answer to the motion in which it referred to its proposal that the order of 9 October, 1941, be vacated if Anderson would refund the $2,602.75 received under the alleged agreement, and noted Anderson's refusal to make such refund. In further answer to the allegations in the motion contained in the clause designated (a),

respondent Bank alleged the notes were duly authorized, were for value, and carried on the books of the corporation; and that Anderson as secretary, stockholder and director having witnessed and sealed the notes and authorized their execution was estopped to deny their validity; (b) that the transactions with Swansboro Lumber Company were authorized by stockholders and directors of both companies, including Anderson, and that all dividends were authorized by the Board of Directors, including Anderson, who voted for and received dividends thereunder and is now estopped to complain; that no dividends were paid since 1929; (c) that salary paid Groom was duly authorized by the directors, including Anderson, and he is now estopped to complain.

Minutes of Board of Directors of Tar River Lumber Company and Swansboro Lumber Company, and affidavits and audits were offered in evidence.

The court below, upon consideration of the motion and this evidence, in the judgment made reference to an alleged agreement between Anderson and representatives of the Groom Estate, which was denied by Anderson, and announced that the order of 9 October, 1941, would be set aside if Anderson would refund to the Groom Estate the sum of $2,602.75 received by him, and upon Anderson's refusal to do so entered the following order: "The court being of opinion that S. T. Anderson should not be permitted to retain benefits received under an alleged agreement which he disavows and repudiates, but should be required to restore the Groom Estate to *status quo* by restoring those benefits before being permitted to proceed with his motion herein; it is therefore hereby ordered and adjudged that S. T. Anderson's motion to set aside the October 9, 1941, order be and the same is hereby denied, both in the discretion of the court and as a matter of law."

The court further concluded that Anderson did not have a meritorious defense to the Groom claim and found the facts contrary to Anderson's allegations and in accord with plaintiff's answers as set out in the paragraphs designated (a), (b) and (c), and held that in each instance Anderson, having been a party to the several transactions as stockholder, director and secretary-treasurer of the defendant Lumber Company, was estopped to complain.

We have found it necessary to set out the facts appearing in the record at some length. However, it is apparent that the order of 9 October, 1941, was improvidently entered for that an adjudication was made of material and controverted issues of fact without consent, evidence or finding. While the attorneys were acting in utmost good faith, they were in several instances appearing in dual capacities, and were inadvertent to all the circumstances which now appear, as indeed were the able and conscientious judges who made the orders in question.

Nor do we think the motion should now be denied upon a finding and adjudication that the movent by virtue of his relationship to the defendant Lumber Company and its transactions was estopped to contest the validity of the Groom claim. He should not be denied a hearing because he declined the plaintiff's proposition to refund money alleged to have been received pursuant to an agreement which he denied, in the absence of evidence, admission or finding that such an agreement had been made. There was no adjudication by the court as to the irregularities complained of in movant's motion.

It is apparent that if the Groom claim alleged in the original complaint and denied in the answer of the defendant Tar River Lumber Company was in fact invalid and this claim constituted ninety per cent of the total indebtedness, then the Lumber Company may not have been insolvent, and the corporation had an interest adverse to that of the plaintiff Bank, vitally affecting the receivership. It was upon this controverted claim that the receivership was ordered.

While the court found Anderson had no meritorious defense to the Groom claim, we think the movent has set up facts in his motion and offered evidence on the hearing which if true would constitute a valid defense to the claim. The question is not whether there was any evidence to the contrary, but whether an apparently good defense has been shown. *Glisson v. Glisson,* 153 N. C., 185, 69 S. E., 55; *Cayton v. Clark,* 212 N. C., 374, 193 S. E., 404; *Simms v. Sampson,* 221 N. C., 379 (389), 20 S. E. (2d), 554.

There is error in the ruling below. On this record we think that so much of the order of 9 October, 1941, as approved and allowed the Groom claim should be set aside, and the movent S. T. Anderson permitted to file exceptions to the receivers' report, to the end that proper proceedings be undertaken to determine the issues raised as to this claim, as provided in 2 G. S., 55-153, or in any manner to which the parties may agree.

Error and remanded.

WASHINGTON COUNTY v. ANNIE B. BLOUNT AND HUSBAND, E. R. BLOUNT, WILLIAM BEST AND S. PAILIN.

(Filed 20 September, 1944.)

Process §§ 1, 3, 4—

Clerical errors or omissions in the copy of a summons delivered to a defendant will not affect the jurisdiction of the court, when they consist of mere irregularities, such as the want of the signature of the officer who issues it, the omission of the date of the summons, or the failure to endorse thereon the date and place of service. Such errors do not mislead or prejudice defendants.

APPEAL by defendants from *Thompson, J.*, at April Term, 1944, of WASHINGTON.

This is a tax foreclosure proceedings, instituted 25 January, 1940.

The Sheriff of Washington County served the original summons and a copy of the complaint on the defendants Annie B. Blount and E. R. Blount, on 27 January, 1940, by delivering a copy of the summons and a copy of the complaint to each of the aforesaid defendants. *Alias* summons was issued and served on William Best. S. Pailin was not to be found and was served by publication. No answers were filed.

On 28 April, 1940, the Clerk of the Superior Court entered an interlocutory judgment against the defendants for unpaid delinquent taxes, in the sum of $387.81, in which judgment said sum was declared a lien on the land described in the complaint and a commissioner was appointed to sell the land to satisfy the lien. The commissioner sold the property on 17 June, 1940, to Washington County, the last and highest bidder, for $387.81, which sale was duly confirmed. The commissioner executed a deed to Washington County on 15 July, 1940, which deed was filed for registration on 30 August, 1940. Thereafter, by deed dated 28 June, 1941, the Board of Commissioners of Washington County, N. C., conveyed the land in controversy to W. Blount Rodman and D. J. Brinkley, which conveyance was filed for registration on 30 August, 1941.

The defendants filed a motion in the cause before the Clerk of the Superior Court, more than one year after the execution of the commissioner's deed, to set aside the interlocutory judgment, the sale, the decree confirming the sale, and to declare null and void the commissioner's deed and the deed from the Board of Commissioners of Washington County to W. Blount Rodman and D. J. Brinkley, on the ground that the defendants, Annie B. Blount, E. R. Blount and William Best, had not been served with summons as required by law, in that the copies of the summons delivered to them by the Sheriff of Washington County at the time of the purported service, were not dated or signed by the Clerk. The

respondents, W. Blount Rodman and D. J. Brinkley, and Washington County, filed answers to the motion. The hearing on the motion was held 27 April, 1942. The Clerk found certain facts, those pertinent to this appeal follows: "That the copies of the summons served on the defendants, Annie B. Blount, E. R. Blount and William Best, were not signed by the Clerk, nor was the date of the issuance given."

The attorneys for the respondents moved to amend the copies of the summons served on the defendants; whereupon the court in its discretion ordered that the copies of the summons served on said defendants, Annie B. Blount, E. R. Blount and William Best, be amended by inserting therein the date of issue and that the Clerk of the Superior Court sign the said copies. The relief sought by the defendants was denied. Upon appeal to the Superior Court, his Honor adopted the findings of fact, as found by the Clerk of the Superior Court, and likewise ordered the amendments as requested in respondents' motion and denied the motion of the defendants.

The defendants appeal to the Supreme Court, assigning error.

Margaret Johnson and Z. V. Norman for plaintiff.
P. H. Bell for defendants.

DENNY, J. This appeal turns upon the question whether or not the failure of the Clerk of the Superior Court to sign and date the copies of the summons delivered to these appealing defendants, was a mere clerical error or one affecting the jurisdiction of the court.

Where the statute requires service of summons by delivery of a copy of the original writ to the defendant, such copy should, as a matter of course, conform exactly to the original, but frequently errors and omissions occur in the preparation of copies and it becomes necessary for the courts to determine the effect of particular clerical errors and omissions. In such cases it seems to be the general rule to disregard a clerical error or an omission where the party served has not been misled. Clerical errors or omissions in the copy of a summons delivered to a defendant will not affect the jurisdiction of the court, when they consist of mere irregularities, such as the "want of the signature of the officer who issued it, the omission of the date of summons, or the failure to endorse thereon the date and place of service," 50 C. J., sec. 79, p. 484. 49 Am. Jur., sec. 19, p. 20; *Lyon v. Baldwin,* 194 Mich., 118, 160 N. W., 428; *Flanery v. Kuska,* 143 Minn., 308, 173 N. W., 652; *Harris v. Taylor,* 148 Ga., 663, 98 S. E., 86; *Mayerson v. Cohen,* 108 N. Y. S., 59; *Cochran v. Davis,* 20 Ga., 581.

G. S., 1-89; C. S., 476, prescribes the contents of a summons, and G. S., 1-97; C. S., 483, prescribes how it shall be served. A summons

must be returnable before the Clerk, and must command the Sheriff or other proper officer to summons the defendant, or defendants, to appear and answer the complaint of the plaintiff within thirty days, not from the date of the issuance of the summons, but within thirty days after its service upon the defendant or defendants, and must contain a notice stating in substance that if defendant or defendants fail to answer the complaint within the time specified, the plaintiff will apply to the Court for the relief demanded in the complaint; and must be dated on the date of its issue and signed by the Clerk of the Superior Court having jurisdiction to try the action. Summons must be served within ten days after date of issue, except in actions for tax foreclosures and special improvement foreclosures, in which actions service may be made within sixty days after the date of its issue. The Sheriff or other officer serving a summons shall note in writing upon the copy of a summons delivered to a defendant, the date of service; but, failure to comply with this requirement shall not invalidate the service. The service of a summons is accomplished by the delivery of a copy of the original writ to the defendant in person, or to his qualified agent, as specified in G. S., 1-97.

In the instant case, the appellants were served in the manner prescribed by law and a copy of the complaint delivered to each of them, except the copies of the summons delivered to them were not dated and signed by the Clerk. How could they have been misled? The original summons was in proper form, dated 25 January, 1940, and signed by the Clerk of the Superior Court. All the material information contained in the original summons appeared in the copies served on the defendants. There is no contention that they were not fully informed as to the nature of the action, before whom the summons was returnable, and when and where it was returnable. The appellants are relying upon mere irregularities or technicalities, which in nowise misled them.

Moreover, in the case of *Hooker v. Forbes,* 202 N. C., 364, 162 S. E., 903, where the Clerk of the Superior Court failed to sign the original summons and judgment by default final had been taken, the trial judge permitted a correction by amendment *nunc pro tunc* and declined to set aside the judgment, and this Court affirmed the decision.

The appellants contend, however, the judgment herein is void and rely upon *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311, and *Harrell v. Welstead,* 206 N. C., 817, 173 S. E., 283. We do not so hold. In *Monroe v. Niven, supra,* there had been no service, while in *Harrell v. Welstead, supra,* the action was pending in Currituck County, but the Standard Oil Company of New Jersey, a defendant, had been served with a summons commanding it to appear and file answer in Pasquotank County. The judgment in each case was held void, and properly so. In

Monroe v. Niven, supra, the defendants had not received any notice of the pending action, while in *Harrell v. Welstead, supra,* there was a fatal variance between the place where defendant was commanded to appear and file its answer and the place where the suit was actually pending. These cases are not in point.

We hold that the omissions in the copies of the summons delivered to appellants were harmless irregularities and did not mislead or prejudice the appellants nor affect the jurisdiction of the court, hence the judgment of the court below is

Affirmed.

R. H. EDNEY AND WIFE, EVELYN E. EDNEY, v. HAYWOOD POWERS.

(Filed 20 September, 1944.)

1. Deeds § 16—

While the owner of real estate has the right to restrict the use of the property by covenants and agreements in his conveyance thereof, the universal interpretation of such restrictions has been in favor of the free and untrammeled use of the property and against any restriction upon the use thereof, and any doubt arising or ambiguity appearing will be resolved against the validity of the restriction.

2. Deeds §§ 16, 17—

Restrictions in a deed to real estate for a term of 21 years, against its use for other than residential purposes and also against subdivision or sale to certain persons, are void after the expiration of the time stated, even though denominated covenants running with the land.

APPEAL by defendant from *Pless, J.,* at July Term, 1944, of BUNCOMBE.

This is a civil action wherein the plaintiffs filed complaint alleging that the defendant entered into a contract with them whereby the defendant agreed to purchase of the plaintiffs for an agreed amount certain lots of land, namely: Lots Nos. 10, 11, and 12 of Block "F" of E. W. Grove's Kimberly lands, plat of which is recorded in Plat Book 3, at page 16, office of Register of Deeds for Buncombe County, and that notwithstanding deed had been tendered by the plaintiffs to the defendant for said land, the defendant had failed to carry out the terms of said contract by declining to accept said deed tendered to him by the plaintiffs and refusing to pay to the plaintiffs the balance of the purchase price agreed upon, and prayed the court to enforce specific performance of said contract.

The defendant filed answer wherein he admitted he had declined to accept the deed tendered to him by the plaintiffs and refused to pay the balance of the purchase price named in the contract, alleging that a free and clear title could not be given by the plaintiffs to the lands described in the contract for the reason that said lands were impressed and encumbered by certain restrictions contained in the deeds constituting the chain of title of the plaintiffs.

The plaintiffs filed reply alleging that the restrictions referred to in the answer had expired by the limitation of time contained therein.

After the pleadings were filed, and prior to the trial, it was stipulated that the case should be heard by the court as a controversy without action upon an agreed statement of the facts.

The court rendered judgment to the effect that upon tender to him by the plaintiffs of a duly executed deed for the land involved the defendant should accept such deed and pay to the plaintiffs the balance of the purchase price agreed upon. To this judgment the defendant in apt time objected and preserved exception and appealed to the Supreme Court.

Harkins, Van Winkle & Walton for plaintiffs, appellees.
John C. Cheeseborough for defendant, appellant.

SCHENCK, J. According to the agreed statement of facts, E. W. Grove and his wife, on 12 December, 1922, executed and delivered to the predecessors in interest of the plaintiffs deeds for the lands involved in this action, which said deeds were duly registered in the office of the Register of Deeds for Buncombe County on 13 January, 1923. The contract between the plaintiffs and defendant sought to be specifically performed in this action was entered into 3 April, 1944. More than 21 years elapsed between the execution of the said deeds by Grove and his wife to the predecessors in interest of the plaintiffs and the execution of said contract between the plaintiffs and the defendant, and between the execution of said deeds and the institution of this action.

The deeds from E. W. Grove and his wife to Mary L. Bush, a predecessor in title to the plaintiffs, each contained, *inter alia,* as to the lands thereby conveyed, the following restrictions: "Shall not, during the term of 21 years be used for any purpose other than the construction and maintenance of private residences thereon . . . and further, shall not, during the term of 21 years from date hereof, subdivide, sell, or convey all or any part or parcel of said lot, less than the whole thereof . . . and will not during said term, lease, sell or convey said land, or any part thereof, or any building thereon, to a negro or person of any degree of negro blood, or any person of bad character."

The question posed by this appeal simply involves a construction of the provisions in the deeds from Grove and his wife to the predecessors in interest of the plaintiffs.

It is the contention of the plaintiffs that the provisions placing certain restrictions upon the use of the lands conveyed, contained in the deeds from Grove and his wife executed in December, 1922, had expired by the limitation of time (21 years) therein contained when the contract involved in this action was entered into in April, 1944, and were at such time null and void.

It is the contention of the defendant that the provisions in the deeds from Grove and his wife prevent the defendant's having assurance that he is free to use said property as he desires; more especially that provision which reads: "That the foregoing covenants shall be covenants running with the land and shall be kept by the party of the second part, her heirs and assigns forever"; that if the provisions and restrictions are covenants running with the land they are binding upon the plaintiffs, and would be binding upon the defendant if he accepted deed from the plaintiffs. While the owner of real estate has the unquestionable right to restrict the use of the property by covenants and agreements in his conveyances thereof, the universal interpretation of the courts of such restrictions in deeds has been in favor of the free and untrammeled use of the property and against any restriction upon the use thereof, and that any doubt arising or ambiguity appearing will be resolved against the validity of the restriction upon and in favor of the extended use of the property. As was said in the case of *Underwood v. Herman* (N. J.), 89 Atl. Rep., 21: "It is well settled that in cases where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, 'to doubt is to deny' . . . courts of equity do not aid one man to restrict another in the uses to which he may put his land, unless the right to such aid is clear."

"Inventions and new wants reflect themselves in the uses of land, and it is for the best interest of the public that the free and unrestricted use shall be enjoyed, unless such use is restricted in a reasonable manner consistent with the public welfare. The construction of deeds containing such restrictions or prohibitions as to the use of lands by the grantees, in the case of doubt, as a general rule, ought to be strict and in favor of a free use of such property and not to extend such restrictions." *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697.

The law apposite to the interpretation of the restrictions here presented is clearly summarized, with citations of authorities, in 26 C. J. S., at page 567, as follows: "When there is substantial and reasonable doubt concerning whether a restriction is perpetual or of limited duration, the doubt will be construed against one claiming perpetual restriction; and

such words as 'at any time,' 'ever,' 'never,' and 'forever' appearing in restrictions most give way to a particular specification of their duration."

Twenty-one years having expired between the time E. W. Grove and his wife delivered their deeds, containing the restrictions under consideration, to the predecessors in interest of the plaintiffs and the execution of the contract between the plaintiffs and the defendant to sell and purchase and the institution of this action, the restrictions in said deeds had become inoperative by the lapse of time, and his Honor was correct in holding that the defendant should carry out and perform the terms of said contract and that upon tender to him, the defendant, by the plaintiffs of a duly executed deed for the lots of land described in the contract, he should accept the same and pay to the plaintiffs the balance of the purchase price contracted.

The judgment of the Superior Court is

Affirmed.

MRS. CLARA BOURNE, ADMINISTRATRIX OF THE ESTATE OF FREDERICK T. BOURNE, DECEASED, v. SOUTHERN RAILWAY COMPANY.

(Filed 20 September, 1944.)

1. Trial § 22a: Judgments § 33a—

Although a judgment of nonsuit does not necessarily decide the merits of the cause of action, it is a final judgment in that it terminates the action. If there is no appeal or if the nonsuit is sustained on appeal, plaintiff, if he would prosecute his claim further, must institute a new action. G. S., 1-25.

2. Trial § 25—

When a defendant, at the close of plaintiff's evidence, moves for judgment dismissing the action as of nonsuit, he in effect submits to a voluntary nonsuit on any counterclaim set up by him.

APPEAL by defendant from *Nettles, J.*, at April Term, 1944, of BUNCOMBE. Affirmed.

Civil action under the Federal Employers' Liability Act for damages for wrongful death heard on motion to dismiss for that another action by the same parties for the same cause of action is now pending in the same court.

The plaintiff instituted suit against the defendant in the Superior Court of Buncombe County, 16 October, 1941, and filed complaint setting out a cause of action for damages for wrongful death arising out of the negligence of the defendant.

Defendant answered denying negligence on its part and pleading a counterclaim, alleging it had been damaged by the negligence and wrongful conduct of plaintiff's intestate while wrongfully acting as engineer. Plaintiff replied thereto.

The case was heard before Clement, J., at the April, 1943, Term of the Superior Court of Buncombe County. At the close of the evidence for plaintiff, the defendant moved for judgment as in case of nonsuit. The motion was sustained and judgment was entered "that the action be, and the same is hereby nonsuited and dismissed at the cost of the plaintiff." The judgment contains further provision as follows: "The Court of its own motion orders a mistrial as to the counterclaim and continues the same."

The plaintiff excepted and appealed to the Supreme Court, and her appeal was dismissed at the Fall Term, 1943.

The plaintiff, on 5 October, 1943, instituted this action against the defendant, setting out in her complaint substantially the same cause of action as alleged in the original suit. The defendant answered and pleaded: (a) the pendency of another action, and move for dismissal for that reason, and (b) *res adjudicata* by virtue of the judgment in the first cause. It also denied any negligence on its part and reasserted its counterclaim for damages sustained.

The motion of defendant to dismiss the action for that there is another action pending came on to be heard in the court below and was overruled. Defendant excepted and appealed.

Jordan & Horner and Williams & Cocke for plaintiff, appellee.

W. T. Joyner and Jones, Ward & Jones for defendant, appellant.

BARNHILL, J. Is the original action, *non constat* the judgment of nonsuit, still pending in the Superior Court of Buncombe County? The court below answered no. We concur.

"Nonsuit" is a process of legal mechanics. The case is chopped off. *Corcoran v. Transportation Co.,* 57 S. E., 962. It is a judgment of dismissal. *Anderson v. Distributing Co.,* 55 S. W. (2d), 688. It dismisses the action. Cyclopedic Law Dic., 2nd Ed. (Callaghan). Although it does not necessarily decide the merits of the cause of action, it is a final judgment in that it terminates the action itself.

"Nonsuit is the name of a judgment given against the plaintiff when he is unable to prove a case . . ." *Cooper v. Crisco,* 201 N. C., 739, 161 S. E., 310. "A nonsuit is but like the blowing out of a candle, which a man at his own pleasure may light again." *Hickory v. R. R.,* 138 N. C., 311, 50 S. E., 683. If there is no appeal or if the nonsuit is

sustained on appeal, plaintiff, if he would prosecute his claim further, must institute a new action. G. S., 1-25, C. S., 415.

The words "new action," "new suit," and "original suit" as used in this statute, G. S., 1-25, clearly import that a judgment of nonsuit terminates the original action. They indicate a difference in the two actions though the causes may be identical. *Cooper v. Crisco, supra.* The distinction is observed in decisions referring to the causes of action in the respective suits, to a restatement of the same cause in the latter action, and to "another action," "second action," the "former action," and a "subsequent action." See *Cooper v. Crisco, supra,* and cases cited.

The fact that defendant had pleaded a counterclaim does not affect the finality of the judgment. When the defendant, at the close of the evidence for plaintiff, moved for judgment dismissing the action as of nonsuit, it in effect submitted to a voluntary nonsuit on its counterclaim. *Gruber v. Ewbanks,* 199 N. C., 335, 154 S. E., 318.

It cannot put its adversary out of court and at the same time retain the cause in court. *Morse v. Turner,* 92 S. E., 767. It elected to move for a dismissal of the action by judgment of nonsuit and it announced at the time that upon the granting of the motion it would submit to voluntary nonsuit on its counterclaim. The motion was granted and judgment of dismissal was entered. Thus plaintiff's action and defendant's counterclaim fall together.

The court may have committed error in dismissing the action while the counterclaim was pending. If so, it was error and no more. The judgment was entered at the instance and upon the motion of defendant. It is not now in a position to insist that the action is still pending.

While there is some division of opinion on this question, the weight of authority is in accord with this conclusion. *Morse v. Turner, supra; Lumber Co. v. Dalrymple,* 21 Atl., 949; *McClellan's Adm'r v. Troendle,* 99 S. W., 329; *Rice-Stix Dry Goods Co. v. Friedlander Bros.,* 122 S. E., 890; *Hodges v. GMAC,* 141 So., 783; *Bell v. Leiendecker,* 170 So., 386; *Finch v. Ekstrom,* 1 Pac. (2d), 516; *Whitaker v. Wright,* 129 So., 889; *Crocker v. Chillingworth,* 143 So., 346; *McMillan v. Lorimer,* 107 So., 239; *Picard Const. Co. v. Board of Com'rs.,* 109 So., 816; *Erskine v. Gardiner,* 110 So., 97; *Miller v. Davis,* 217 N. W., 904; *Chavez v. Ade,* 34 Pac. (2d), 670; *Gafford v. Twitty,* 115 S. E., 105; *State v. C. S. Jackson & Co.,* 82 So., 213; *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.,* 158 Pac., 477.

The judgment below is

Affirmed.

PAGE C. KEEL v. WILLIE BAILEY.

(Filed 20 September, 1944.)

1. Husband and Wife § 14: Estoppel §§ 1, 2—

Where the title to land is vested in husband and wife as tenants by entirety, and the husband conveys the land to his wife and then survives her, he and those claiming under him, as his heirs at law as well as others standing in privity to him, are estopped by his deed to claim the land.

2. Same—

A deed by husband to wife, intending to convey and conveying in fee land held by such husband and wife by entireties, is an estoppel against the husband, his heirs and others standing in privity to him, although the deed contains no technical covenants.

APPEAL by plaintiff from *Thompson, J.*, at June Term, 1944, of WILSON.

Civil action for recovery of land and for damages.

Plaintiff alleges (1) ownership in fee of a certain tract of land in Wilson County, North Carolina, (2) unlawful possession thereof by defendant, and (3) damages. Defendant denies title of plaintiff as well as other material allegations, and by way of further answer and defense sets up various grounds—estoppel, etc.

Upon the trial below the evidence offered by the parties shows these undisputed facts:

1. Both plaintiff and defendant claim title to land in question from a common source, Robert Bailey and wife, Bettie Bailey, who held the title as tenants by the entirety.

2. In 1931 Bettie Bailey executed a deed to Robert Bailey covering the land in question. This deed was acknowledged in compliance with provisions of G. S., 52-12, formerly C. S., 2515.

3. Thereafter, on 25 January, 1932, Robert Bailey alone executed a deed to his wife, Bettie Bailey. This deed, registered 25 January, 1932, recited that the consideration for it is the cancellation of a judgment in the principal sum of about $6,900.00 taken before the Clerk of Superior Court of Nash County in favor of his wife, Bettie Bailey, and "with the intent and purpose of paying and discharging the said judgment above referred to and of conveying to and vesting in her . . . an estate in fee and severalty in said lands freed from all incidents of the joint estate or the estate by the entirety." And the deed is in fee simple form but contains no covenants of warranty.

4. Bettie Bailey died on 15 July, 1935, leaving a last will and testament in which, after providing for payment of all her just debts, she

devised and bequeathed all of the property, real, personal and mixed, of which she should die seized and possessed, wherever situate, in equal shares to her daughter, two sons, including defendant, and a foster son, for and during the term of their natural lives, with the provisions as to the remainder which are not necessary to be stated here.

5. On 22 August, 1935, Robert Bailey instituted two actions, one in Nash County Superior Court and the other in Superior Court of Wilson County, against the devisees under the will of Bettie Bailey, including defendant, and the administrator of her estate, for the purpose of vacating upon the ground of fraud the judgment, the cancellation of which was the consideration for his deed to Bettie Bailey, described in paragraph above, but which had not been canceled of record, and to vacate that deed for failure and lack of consideration and other causes. The action in Wilson County related to land in question. Defendants therein, after being served with summons, answered denying the allegations upon which the cause of action was based. And thereafter at November Term, 1935, of Wilson County Superior Court, judgment was entered dismissing the action. In this judgment it is recited that "it appearing to the court that the plaintiff desires to take a voluntary nonsuit in this case and further, as evidenced by his signature hereto, he agrees that he will not in the future prosecute any action or proceeding whatsoever against the defendants, their heirs, assigns, executors or administrators on account of any of the matters and things set forth in the complaint or involved in this action."

6. Thereafter, to wit, on 30 March, 1936, there was entered of record a deed of trust from Robert Bailey to C. C. Pierce, Trustee, bearing date 17 August, 1935, and purporting to convey the land in question as stated in brief of plaintiff, as security for two notes for $500 each payable to his several counsel representing him as fees in two actions including that referred to in preceding paragraph.

7. Pursuant to foreclosure of the deed of trust described in preceding paragraph, C. C. Pierce, Trustee, executed a deed to plaintiff Page C. Keel, dated 4 January, 1941, and registered 25 August, 1941.

Defendant offered the oral testimony of defendant in part as follows: ". . . I am the Willie Bailey mentioned in the will. Bettie Bailey was my mother. Robert Bailey was the husband of Bettie Bailey. I moved on this land in the fall of '36. My mother died 15 July, 1935. She was in possession at the time of her death. She came in possession of it in 1932. I went in possession of it after her death. I have been on this land about 8 years, I reckon. I moved there in the fall of '36 and have been farming ever since. . . ."

The case was submitted to the jury upon these issues, which, under peremptory instruction, were answered as shown:

"1. Is the plaintiff the owner of, and entitled to, the possession of the land in controversy? Answer: No.

"2. Is the defendant in the unlawful possession of any of the land in controversy? Answer: No."

From judgment in accordance with the verdict, plaintiff appeals to Supreme Court and assigns error.

Keel & Keel for plaintiff, appellant.

Adams & Spruill and Thorp & Thorp for defendant, appellee.

WINBORNE, J. The correctness of the judgment below, with which we agree, may safely rest upon the settled principle of law in this State that where the title to land is vested in husband and wife as tenants by the entirety, and the husband conveys the land to his wife, and then survives her, he and those claiming under him as his heirs at law, as well as others standing in privity to him, are estopped by his deed to claim the land. *Capps v. Massey,* 199 N. C., 196, 154 S. E., 52; *Willis v. Willis,* 203 N. C., 517, 166 S. E., 398.

And there is authority for the position that this principle of estoppel applies when the deed shows that the grantor intended to convey and the grantee expected to acquire the particular estate, although the deed contains no technical covenants. *Capps v. Massey, supra; Willis v. Willis, supra.* See also *Weeks v. Wilkins,* 139 N. C., 215, 51 S. E., 909; *Crawley v. Stearns,* 194 N. C., 15, 138 S. E., 403; *Williams v. R. R.,* 200 N. C., 771, 158 S. E., 473; *Woody v. Cates,* 213 N. C., 792, 197 S. E., 561.

The deed from Robert Bailey to Bettie Bailey, under whom defendant claims, comes within the letter of this principle. The intent that this deed should convey an estate in fee is clearly expressed. Robert Bailey was estopped by his deed from claiming the land, and the plaintiff, standing in privity to him, is likewise estopped thereby.

Having reached the above conclusion, other questions stated and debated in briefs on this appeal become immaterial.

Judgment below is

Affirmed.

LESTER COKER, HENRY COKER, AND MRS. LENA ARMSTRONG, v. JESSE M. COKER.

(Filed 20 September, 1944.)

1. Judgments § 22b—

Where plaintiffs, in an independent action to set aside a former judgment, allege that they did not consent to such judgment and failed to offer evidence under the belief that the issue was to be answered by consent in their favor, their remedy, if any, is by motion in the cause; and it is permissible for the trial court to treat the action as a motion in the cause, rather than dismiss it.

2. Same: Trial §§ 19, 20—

On a motion in the cause to set aside a former judgment, the evidence raises questions of fact for the court to decide and not issues of fact for the jury; and the facts found, when supported by competent evidence, are conclusive.

3. Attorney and Client §§ 6, 7—

Counsel employed to conduct litigation has complete authority over the suit, the mode of conducting it, and all that is incident to it, and other matters which properly belong to the suit, and the management and conduct of the trial. As to the ordinary incidents of the trial counsel is under no obligation to consult his client, who must, if aggrieved by his conduct, look to his counsel for recompense.

APPEAL by plaintiffs from *Thompson, J.*, at April Term, 1944, of EDGECOMBE. Affirmed.

In 1932 Spear Coker died, leaving a paper writing, purporting to be a will, in which he devised all his property to his wife. He had no children. Plaintiffs, collateral heirs at law, filed a caveat. They were represented by V. E. Fountain, attorney. The cause came on for trial in 1935. Caveators offered no evidence. The issue of *devisavit vel non* was answered in favor of propounders and judgment sustaining the will was entered.

Thereafter, in 1943 this action was instituted. Plaintiffs, in their complaint, assert two separate alleged causes of action: (1) in ejectment, (2) to set aside the verdict and judgment in the caveat proceeding. The only defect alleged in the verdict and judgment sustaining the will of Spear Coker is in the following language:

"It is the fact that the said issue, as the plaintiffs are informed and believe, was submitted to the jury and that such submission to the jury of the issue was made before all of the evidence in the action to caveats, said Will had been actually tendered or offered in evidence. The plaintiffs further allege that the issue was submitted to the jury and the answer made to said issue under the belief at that time that said issue

was to be answered yes, or in the affirmative, by the consent of the plaintiffs in this action who were, as will appear from the caveat and the entire proceeding, the persons and parties who were or claimed to be the heirs at law of said Spear Coker, deceased."

Plaintiffs further allege that they did not consent that the issue should be answered in the affirmative or that judgment sustaining the will should be signed.

When the cause came on to be heard in the court below, evidence directed to the alleged second cause of action was offered. Upon conclusion of the evidence the court found the facts including in substance the following:

In the caveat proceeding caveators, plaintiffs herein, were represented by V. E. Fountain, Esq., with full authority to conduct the trial. All parties were present at the trial. Mr. Fountain became convinced that evidence for the caveators was not sufficient to support the allegation of mental incapacity of the testator. He so advised his clients and informed them that propounders might agree to pay the costs if caveators did not further contest the will. Plaintiffs reluctantly agreed and consented to the arrangement which was approved by propounders. The trial proceeded, the caveators offering no evidence, and the will was probated in solemn form.

Having found the facts, the court entered judgment that the defendant is the owner of the land in controversy; that plaintiffs take nothing; and that the action be dismissed at the cost of plaintiffs. Plaintiffs excepted and appealed.

T. T. Thorne for plaintiffs, appellants.
Gilliam & Bond for defendant, appellee.

BARNHILL, J. It clearly appears on the face of the complaint and from admissions made at the trial that the plaintiffs are not entitled to recover in ejectment until and unless the judgment in the caveat proceeding is vacated and set aside. They admit the judgment sustaining the will. Hence, at the time of the trial below they had no cause of action in ejectment.

Plaintiffs, in their second cause of action, seek to attack the former judgment by independent action rather than by a motion in the original cause. On the facts alleged their remedy, if any, is by motion in the cause. McIntosh, N. C. P. & P., 744, sec. 656; *Horne v. Edwards,* 215 N. C., 622, 3 S. E. (2d), 1; *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5; *Rosser v. Matthews,* 217 N. C., 132, 6 S. E. (2d), 849; *Wynne v. Conrad,* 220 N. C., 355, 17 S. E. (2d), 514; *Cox v. Cox,* 221 N. C., 19, 18 S. E. (2d), 713; *Monroe v. Niven,* 221 N. C., 362, 20

S. E. (2d), 311. The court below, rather than dismiss, treated it as such. This was permissible. *Finance Co. v. Trust Co.,* 213 N. C., 369, 196 S. E., 340, and cases cited.

Being a motion to set aside the former judgment, the evidence raised questions of fact for the court to decide and not issues of fact for the jury. *Cleve v. Adams,* 222 N. C., 211, 22 S. E. (2d), 567.

The facts found, being supported by competent evidence, are conclusive. They are amply sufficient to sustain the judgment entered thereon.

No fraud or bad faith on the part of counsel in the former action is asserted. There is no evidence that the issue of *devisavit vel non* was answered by consent. It was answered by the jury under the instructions of the court on the evidence offered. The evidence tends to show nothing more than that counsel, over the protest of his clients, decided to offer no evidence of mental incapacity of the testator. There was evidence of assent on the part of the plaintiffs and evidence *contra.* The court found as a fact that caveators were fully advised of the course counsel proposed to follow and that they assented.

Counsel employed to conduct litigation has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, *calling no witnesses,* and other matters which properly belong to the suit, and the management and conduct of the trial. *Bank v. McEwen,* 160 N. C., 414, 76 S. E., 222. He has the free and full control of the case in its ordinary incidents, and as to those incidents is under no obligation to consult his client. *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955.

The attorney may exercise his discretion in all the ordinary occurrences which take place in a cause and may make stipulations, waive technical advantages, and generally assume the control of the action. Weeks, Attorneys at Law, p. 385; *Gardiner v. May, supra; Harrington v. Buchanan,* 222 N. C., 698, 24 S. E. (2d), 534. If the clients are aggrieved by his conduct in such matters, they must look to him for recompense.

The judgment below must be

Affirmed.

R. A. LINDSEY ET AL. v. W. L. SPEIGHT ET AL.

(Filed 20 September, 1944.)

1. Contracts § 21: Trial § 38—

In an action to recover on a special contract and also upon a *quantum meruit*, it is permissible under our practice to allow plaintiff to abandon his special contract, and to recover on *quantum meruit* for the reasonable value of his services.

2. Brokers and Factors § 12—

With the allegations of special contract aside, the rule is that, where a broker is "the procuring cause of the sale," he is entitled to recover the reasonable value of his services.

3. Same—

A broker is not entitled to recover in *assumpsit* simply because of effort expended. His effort must have resulted in a sale, or in the procurement of a purchaser, ready, willing and able to buy on the terms authorized.

4. Same—

In an action by plaintiff for the reasonable value of his services in securing a purchaser for the property of defendant, who had listed such property with the plaintiff for sale, where there is evidence that plaintiff was the procuring cause of the sale, a motion for judgment of nonsuit was properly overruled.

5. Trial § 22a—

On motion to nonsuit, the plaintiff is entitled to every fact and inference of fact pertaining to the issue involved, which may be reasonably deduced from the evidence.

6. Same—

Defendant's evidence is not available to him, on motion to nonsuit, except to explain or make clear that which has been offered by plaintiff.

APPEAL by defendants from *Thompson, J.*, at April Term, 1944, of EDGECOMBE.

Civil action by broker to recover commission for procuring purchaser of land to whom conveyance was afterwards made.

Plaintiff declares on special contract, 5% of purchase price, and *quantum meruit*. Sale of the land is admitted, but defendants deny liability for commission, claiming a direct sale to the purchaser.

From verdict and judgment for plaintiff, the defendants appeal, assigning errors.

George M. Fountain for plaintiff, appellee.

H. H. Phillips for defendants, appellants.

STACY, C. J. After abandoning his allegations of special contract, the plaintiff recovered in the court below on *quantum meruit* or for the reasonable value of his services. This is permissible under our practice. *Lipe v. Trust Co.,* 206 N. C., 24, 173 S. E., 316; *Hayman v. Davis,* 182 N. C., 563, 109 S. E., 554; *Bryan v. Cowles,* 152 N. C., 767, 68 S. E., 205; *Reams v. Wilson,* 147 N. C., 304, 60 S. E., 1124. In *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331, the plaintiff declared on a special contract, void under the statute of frauds, and was allowed to recover in *assumpsit* on *quantum meruit.* The procedure also finds support in what was said in *Lipe v. Trust Co.,* 207 N. C., 794, 178 S. E., 665.

For about three years, the defendant, W. L. Speight, had been trying to sell his wife's farm in Edgecombe County. He spoke to C. J. Weeks about it on several occasions. Weeks offered him $13,500 for the farm, which he refused. On 18 October, 1943, Speight listed the property with the brokerage firm of R. A. Lindsey & Company for sale at $15,000. Lindsey approached Weeks about a sale, and Weeks said he would give $100 an acre for 135 acres. This was the same offer which he had previously made to Speight and which Speight had rejected. Lindsey communicated Weeks' offer to Speight and recommended its acceptance. Speight did not commit himself at the time. On a second occasion Weeks told Lindsey he would pay $13,500 for the farm, if it had a tobacco allotment of 7½ acres, and would keep his offer good if the allotment were increased to 10 acres. This was communicated to Speight, who said he thought he could get the allotment increased. The next thing Lindsey knew of the matter Speight had sold to Weeks for $13,500.

The defendants concede, in their brief, that Lindsey's testimony, standing alone, may be sufficient to justify the jury in finding "Lindsey was the procuring cause of the sale," but it is earnestly contended the showing made by plaintiff, taken in connection with the defendants' evidence, is insufficient to support a recovery. Both Speight and Weeks testified that Lindsey had nothing to do with the sale; that it was a direct purchase by Weeks from the defendants. *Realty Co. v. Giles,* 217 N. C., 796, 9 S. E. (2d), 370, and cases there cited. On cross-examination, however, Weeks stated: "The only offer I made to him (Speight) was during the last of October or the first of November, 1943." This was after the property had been placed in the hands of the plaintiff for sale. Thus, in defendant's own evidence there appears some equivocation. Moreover, the defendant's evidence is not available to him on motion to nonsuit, except "to explain or make clear that which has been offered by the plaintiff." *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *Gregory v. Ins. Co.,* 223 N. C., 124, 25 S. E. (2d), 398.

With the allegations of special contract aside, the rule seems to be that where a broker is "the procuring cause of a sale," he is entitled to recover the reasonable value of his services. *House v. Abell,* 182 N. C., 619, 109 S. E., 877; *Trust Co. v. Goode,* 164 N. C., 19, 80 S. E., 62. Here the issue was one of fact for the jury. 8 Am. Jur., 1088. The case as made readily survives the demurrer. On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved, which may reasonably be deduced from the evidence. *Plumidies v. Smith,* 222 N. C., 326, 22 S. E. (2d), 713.

True it is, a broker is not entitled to recover in *assumpsit* simply because of effort expended. *Trust Co. v. Adams,* 145 N. C., 161, 58 S. E., 1008. Such effort on his part must have resulted in a sale, or in the procurement of a purchaser, ready, able and willing to buy on the terms authorized. *Olive v. Kearsley,* 183 N. C., 195, 111 S. E., 171; *Crowell v. Parker,* 171 N. C., 392, 88 S. E., 497; *Abbott v. Hunt,* 129 N. C., 403, 40 S. E., 119. In the instant case, there is evidence to permit the inference that plaintiff was the procuring cause of the sale. This defeats the motion for judgment of nonsuit.

The remaining exceptions are without substantial merit. They are not sustained. The verdict and judgment will be upheld.

No error.

ELLEN L. DOWNING, ADMINISTRATRIX OF HESTER HAUGHTON, DECEASED, v. MELVIN DICKSON, CALVIN HALL, MILTON COX, ROBERT ALLEN AND THURMAN RIDDICK, TRUSTEES OF MORNING STAR A. M. E. ZION CHURCH, ROPER, N. C., AND THURMAN RIDDICK AND MAGGIE RIDDICK, HIS WIFE, INDIVIDUALLY.

(Filed 20 September, 1944.)

1. Lost or Destroyed Instruments §§ 2, 3—

If the original instrument cannot be produced and it becomes necessary to offer secondary evidence of its contents, such contents, including the course of its legal operation, must be established by the testimony of one who has first-hand knowledge of the subject, for hearsay is not competent.

2. Same—

"First-hand knowledge," required to prove a lost instrument, does not necessarily imply testimony of verbal precision; but it is necessary to prove the execution of the paper, its delivery, its loss, the material parts, and its legal operation.

3. Lost or Destroyed Instruments § 3: Trial § 22b—

In an action to set up an alleged lost mortgage and to foreclose same, where there is no evidence of who signed the mortgage, or of the authority of anyone to sign it, and a total absence of evidence of the execution of the mortgage, the allowance of a motion for judgment as in the case of nonsuit was correct.

APPEAL by plaintiff from *Thompson, J.,* at April Term, 1944, of WASHINGTON.

This was an action to set up an alleged lost mortgage, and to foreclose same.

When the plaintiff had introduced her evidence and rested her case the defendants moved for judgment as in case of nonsuit, which motion was allowed, and plaintiff excepted and appealed to the Supreme Court. G. S., 1-183.

H. S. Ward for plaintiff, appellant.

W. L. Whitley and P. H. Bell for defendants, appellees.

SCHENCK, J. In *Powers v. Murray,* 185 N. C., 336, at p. 338, 117 S. E., 161, it is written: "If the original (instrument) cannot be produced and it becomes necessary to offer secondary evidence of its contents, such contents, including of course its legal operation, must be established by the testimony of one who has 'first-hand knowledge on the subject'; for hearsay based upon statements made by third parties is not deemed sufficient to impart competent and correct information of the matter in dispute. *Propst v. Mathis,* 115 N. C., 527. This 'first-hand knowledge' does not necessarily imply testimony of verbal precision, but it should embrace entirety of parts. Aside from the practical impossibility of recalling the identical words of a lost deed, they are not essential in proof of the contents. But it is necessary to prove the execution of the deed, its delivery, its loss, the material parts, and its legal operation."

The evidence offered by the plaintiff in this action fails absolutely to prove the execution of the mortgage sought to be set up, and the evidence of its delivery, material parts and legal operation is very scant, if indeed extant.

The plaintiff is forced to bottom her case upon the testimony of the witness A. L. Alexander, who testified in effect that Hester Haughton, the plaintiff's intestate, prior to her death, showed him a mortgage for the purpose of letting the witness issue a fire insurance policy on the property covered thereby for the amount of the indebtedness evidenced thereby and that he wrote and delivered to her a fire insurance policy for

$1,200.00 "to cover the indebtedness on the church." On cross-examination: "I said I saw a mortgage in the box. I don't know who signed the mortgage . . . I tell the Court and jury that I don't know who signed the note and mortgage I saw. I don't know who probated the paper I saw. . . . That I do not know anything about it. I didn't have anything to do with it and ain't got anything to do with it now. . . . I did not read it and cannot recite any of its terms or provisions."

In the absence of any evidence of who signed the mortgage involved, or of the authority of anyone to sign it, and of the total absence of the execution of the mortgage alleged to have been lost and sought to be set up and foreclosed, the action of his Honor in allowing the motion of the defendants for a judgment as in case of nonsuit was correct.

The plaintiff in her brief filed in this Court practically concedes that she has not successfully maintained her alleged action to set up a lost instrument, but insists that she was entitled under the evidence offered to have the case presented to the jury on the issue of simple indebtedness of the defendants to the plaintiff. This notwithstanding the fact that it appears from the record that the case was tried upon the theory of setting up a lost instrument in the court below. But, however this may be, in order to prove an allegation of indebtedness the evidence must be positive, and not merely speculative, and such was not the evidence in this case. The most direct and practically the only evidence on this point was that of the same witness Alexander who testified: "She (the intestate) asked me to look at the mortgage and see what indebtedness they owed her and the best I recollect it was between eleven and twelve hundred dollars. I wouldn't say positively," and such information as the witness had was gleaned from an alleged mortgage the valid execution of which was not proven.

The judgment of the Superior Court is

Affirmed.

HELEN H. ELDRIDGE, ADMINISTRATRIX OF A. DANIEL ELDRIDGE, DECEASED, v. CHURCH OIL COMPANY, INC., AND CHURCH OIL COMPANY, A PARTNERSHIP, GULF OIL CORPORATION, AND T. P. MAYBERRY.

(Filed 20 September, 1944.)

Master and Servant § 21b: Trial § 22b—

In an action to recover damages for alleged wrongful death of plaintiff's intestate, the evidence tending to show that a fight occurred at a filling station between plaintiff's intestate and the operator of the filling station, in the presence of an agent of defendants, who was there to

deliver oil for his principals, and the operator, fleeing from plaintiff's intestate, seeking the aid of the defendants' agent to expedite his retreat, climbed into the defendants' truck, whereupon defendants' agent drove the truck off, in an effort to help the operator escape, and thus fatally injured plaintiff's intestate, who was on the running board fighting the operator through the window of the truck, judgment of nonsuit was proper.

APPEAL by plaintiff from *Clement, J.*, at January Term, 1944, of SURRY. Affirmed.

Action for wrongful death alleged to have been caused by negligent or willful conduct attributable to each of the named defendants. Defendant Mayberry answered, but defendants Gulf Oil Corporation and Church Oil Company demurred to the complaint on the principal ground that it failed to state facts sufficient to constitute a cause of action as to either of these demurring defendants.

The demurrers were sustained and plaintiff appealed.

Wm. M. Allen and Hoke F. Henderson for plaintiff.
Folger & Folger and Hutchins & Parker for defendants.

DEVIN, J. The facts set out in the complaint, the sufficiency of which is challenged by the demurring defendants, may be briefly stated as follows: Defendant Gulf Oil Corporation is engaged in the sale and distribution of gasoline, and defendant Church Oil Company is the wholesale distributor of its products in the locality referred to. It is alleged that a truck used in delivering gasoline by defendant Oil Companies was operated by one Lowery, the employee of Church Oil Company, which in turn was agent and distributor of Gulf Oil Corporation; that defendant Mayberry, also alleged to have been the agent of the Oil Companies, operated a gasoline service station. On the occasion of the injury complained of, it is alleged that Lowery with the truck was at Mayberry's service station and "was there to deliver products of Gulf Oil Corporation, through its agent Church Oil Company," to the service station from the truck; that plaintiff's intestate and Mayberry became engaged in a personal altercation in the service station resulting in a running fight which was continued outside. Mayberry being pursued by plaintiff's intestate, requested Lowery to get him away from the station. Thereupon Lowery "by concert of action and understanding engaged in a conspiracy to protect said Mayberry from physical combat" with intestate, and "entered said altercation on side of and with Mayberry," and got into the cab of the truck and started the motor and allowed Mayberry to get into the cab while plaintiff's intestate was in the door and on the running board, and then without regard to the safety

of plaintiff's intestate and while he and Mayberry were engaged in a struggle put the truck in motion, and, though he saw Mayberry strike plaintiff's intestate causing him to lose balance and fall under the truck, continued the operation of the truck and ran over and fatally injured plaintiff's intestate.

While there are repeated allegations in the complaint that Lowery was at the time and with respect to this transaction the agent of defendant Oil Companies, and that his action in the premises was in the scope and course of his employment by them, these may be regarded as the conclusions and deductions of the pleader, but the Court must look to the essential facts set out rather than to the qualifying phrases. Viewed in this light, we reach the conclusion that the facts alleged fail to show that the tortious conduct of Lowery in the operation of the truck in the manner detailed was within the scope or course of his employment or in the furtherance of the business of either defendant Oil Company. It seems a fight occurred at a filling station to which Lowery had gone to deliver gasoline. The station operator, fleeing from his adversary, sought Lowery's aid to expedite his retreat. Lowery's prompt response to this request resulted in running over and injuring plaintiff's intestate. The transaction as stated was entirely foreign to the business of Lowery's principals, and cannot be held in law to impose liability upon either.

The ruling below in sustaining the demurrers is supported by numerous decisions of this Court. *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Jackson v. Scheiber,* 209 N. C., 441, 184 S. E., 17; *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 817; *Snow v. DeButts,* 212 N. C., 120, 193 S. E., 224; *Parrott v. Kantor,* 216 N. C., 584, 6 S. E. (2d), 40; *Hammond v. Eckerd's,* 220 N. C., 596, 18 S. E. (2d), 151.

The distinction is pointed out in *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145, and *Ashley v. Chevrolet Co.,* 222 N. C., 25, 21 S. E. (2d), 834.

Judgment affirmed.

IN RE WILL OF MAGGIE NIPSON LOMAX.

(Filed 20 September, 1944.)

1. Evidence § 46—

While considerable latitude is permitted in the reception of opinion evidence as to mental capacity from witnesses who base their opinion on personal association, this rule should not be expanded to include mere expressions of opinion not based on circumstances importing mental incapacity.

2. Wills § 23b: Evidence § 45a—

A mere abstract statement by a witness that a person under investigation, in his opinion, was or was not competent to make a will, or a contract or a deed, is improper and inadmissible. Capacity to make a will or contract is not a simple question of fact but a conclusion which the law draws from certain facts gained from personal observation as a predicate for the expression of opinion.

APPEAL by propounder from *Nettles, J.*, at April Term, 1944, of BUNCOMBE. New trial.

Issue of *devisavit vel non* decided in favor of caveators.

The decedent, an unmarried colored woman, had worked for many years as a chambermaid in an Asheville hotel and had accumulated an estate of some ten thousand dollars. In August, 1940, she suffered a slight stroke and ceased her employment. In January, 1941, she went to the office of an attorney and gave directions for the preparation of her will, and on 8 January, 1941, signed it in the attorney's office, retaining the will in her possession. She was then 72 years of age. The will contained many bequests of various kinds of property to some twenty-five persons, some of them relatives. She left surviving two sisters and a number of nieces and nephews. The propounder B. R. Quick was named executor. Caveat was filed by certain nieces and nephews. Maggie Lomax died in January, 1944.

The validity of the paper writing propounded as the last will and testament of Maggie Nipson Lomax was contested on the ground of mental incapacity. An issue addressed to this determinative question was submitted to the jury in the following form: "At the time of signing and executing said paper writing, did Maggie Nipson Lomax have sufficient mental capacity to make and execute a valid last will and testament?" To this the jury answered "No."

In support of their contention caveators over objection were permitted to ask and the witnesses to answer the following questions:

Witness Frank Stephens: Q. "Do you think she was capable of disposing of her property by will, realizing the consequences and effect of her acts in 1941? A. No. At the time of her death Maggie had a home and two lots on Biltmore Avenue, a home on Pine Grove, and the house she sold on Livingston Street which is not paid for. She should have between $6,000 and $7,000 in cash money. She had two diamond rings, a lot of silverware and chinaware."

Witness Edgar Penland: Q. "State whether or not Maggie in your opinion was mentally capable of disposing of her property by will 8 January, 1941. A. She was not."

Witness Melvin Cannon: Q. "In your best judgment, do you think she was capable of disposing of her property? A. No, sir. Q. About January 8, 1941? A. No, sir."

Witness John Ward: Q. "In your opinion, did Maggie Lomax at the time have sufficient mental capacity to make a will? A. At that particular time in my opinion she did not."

Witness Nora Fair: Q. "Did she know what property she had? A. I don't know. Q. In December, 1940, or January, 1941, did Maggie Lomax have mental capacity to make a will disposing of her property? A. No, I don't think so."

Witness Gladys Thomas: Q. "From your conversation with Maggie Lomax in 1940 and 1941, do you have an opinion as to whether or not she was able mentally to dispose of her property by will? A. I have. Q. Describe her mental condition the latter part of 1940 and early part of 1941. A. Her mentality was not good because—I said that I don't think her mind was good because she would tell one thing and she would tell you the same thing several times. In my judgment I don't think she was capable of making a will January 8, 1941."

From judgment for caveators on the verdict propounder appealed.

Cecil C. Jackson and George F. Meadows for caveators.
Carl W. Greene for propounder.

DEVIN, J. While considerable latitude is permitted in the reception of opinion evidence as to mental capacity from witnesses who base their opinions upon personal association, transactions and conversations (*In re Rawlings' Will,* 170 N. C., 58, 86 S. E., 794), this rule should not be expanded to include mere expressions of opinion not based on circumstances importing mental incapacity, nor should the witnesses be permitted to answer questions as to whether the person whose mental capacity is the subject of inquiry had sufficient mental capacity to make a will or execute a deed, when neither by the question nor by instructions of court or counsel have the witnesses been apprised of what is in law meant by, or required to constitute, mental capacity sufficient to make a will.

To ask a witness whether in his opinion the person under investigation was or was not competent to make a will is improper for the reason that such question assumes the witness knows, or leaves to him to determine for himself, what is or should be the proper test of mental capacity to execute a valid will. Rogers Expert Testimony, 3rd Ed., sec. 206. The obvious objections to allowing a witness to answer the general question as to whether or not a person was capable of making a will or

contract have led the courts generally to exclude the conclusions of witnesses in answer to such questions.

"By all courts a mere abstract statement that the person was or was not 'capable' of making a will or a contract or a deed seems to be held improper; but there is a great contrariety of ruling upon other forms of statement." Wigmore Ev., sec. 1958. Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. Lawson Expert & Opinion Ev., page 155. Hence, the witness must state the facts gained from personal observation as a predicate for the expression of his opinion. *Turner v. Am. Security & Tr. Co.,* 213 U. S., 257; Smoot Law of Insanity, sec. 599.

Failure to observe this rule, in the admissions of the evidence elicited by the questions objected to in the case at bar, has, we think, prejudiced the propounder's cause. Several non-expert witnesses were permitted to say the decedent at the time of executing the paper writing propounded did not have mental capacity to make a will, apparently without understanding what degree of mental capacity was necessary to constitute legal competency.

While the court in his charge to the jury properly defined mental capacity in accordance with the decisions of this Court (*Carland v. Allison,* 221 N. C., 120, 19 S. E. (2d), 245; *In re Broach's Will,* 172 N. C., 520, 90 S. E., 681; *In re Thorp,* 150 N. C., 487, 64 S. E., 379), we think there was prejudicial error in the admission of testimony, necessitating a new trial, and it is so ordered.

New trial.

ROBERT (BOBBY) GIBBS v. EMPLOYERS MUTUAL LIABILITY AND INSURANCE COMPANY OF WISCONSIN.

(Filed 20 September, 1944.)

Insurance § 43—

A policy of indemnity, insuring a corporation and an individual from liability for damages sustained in the operation of a truck, when used commercially and principally in connection with the business of the manufacture of paper, does not cover personal injuries to an employee of the individual, caused by the negligent operation of the truck in question while being used by the said individual and his employee to haul for hire the potatoes of their neighbor.

APPEAL by plaintiff from *Carr, J.,* at May Term, 1944, of BEAUFORT.

Civil action to recover on automobile insurance policy as indemnity for liability of employer of plaintiff for personal injuries sustained.

Plaintiff, having obtained judgment against his employer, William Russ, Jr., for damages for personal injuries sustained in the overturning of an automobile truck operated by Russ, in hauling Irish potatoes, and having failed to collect judgment against Russ therefor, brings this action upon a certain "standard combination automobile insurance policy" issued by defendant, and by a fire insurance company not involved in this controversy, in which these items appear:

"1. Name of insured NORTH CAROLINA PULP COMPANY AND WILL RUSS . . . Insured is: (x) Individual . . . Business or occupation of the named insured: PAPER MFRS."

4. The description of the Chevrolet truck.

5. "The purposes for which the automobile is to be used are: (x) Commercial . . . (b) The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes."

The policy further provided defendant agrees "with the insured named in the declarations made a part hereof . . . subject to the limits of liability, exclusions, conditions and other terms of this policy" that it "shall be the insurer with respect to coverages A, B, C and H, and no other." Under caption "INSURING AGREEMENTS" these coverages are separately stated. The one involved here is "Coverage A—Bodily Injury Liability To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages . . . because of bodily injury . . . sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile." And under the caption "EXCLUSIONS" this provision appears "This policy does not apply: (d) under coverages A and C, to bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the automobile."

The defendant admits the execution of the policy but denies liability.

When the case came on for hearing in Superior Court the parties, through their respective counsel, waived a trial by jury and agreed that the court might find the facts and submitted to the court stipulation of facts which the court adopted as facts found, upon which judgment as of nonsuit was entered.

Pertinent portions of the facts stipulated are as follows: (1) The policy of insurance sued upon in which "it appears on its first page to have been issued to North Carolina Pulp Company, a corporation, and Will Russ," as described hereinabove. (2) The Pulp Company purchased and hauled pulpwood to be manufactured into paper. Russ, a

farmer, living in Beaufort County, used the truck to haul pulpwood to the company's factory. But Russ was using and driving the truck to haul, for pay, the potatoes of his neighbors at the time of the injury to plaintiff for which the judgment was obtained against Russ. Plaintiff was first employed by Russ to cut pulpwood, but at the time of the injury he was employed and paid by Russ to handle the potatoes, and he was not then engaged in hauling pulpwood.

Plaintiff appeals to Supreme Court and assigns error.

H. S. Ward for plaintiff, appellant.
Z. V. Norman for defendant, appellee.

WINBORNE, J. The question presented is whether plaintiff, as employee of William Russ, is covered by the provisions of the policy of indemnity upon which suit is based.

The parties debate in this Court the force and effect of subsection (d) of the clauses of EXCLUSIONS. While the language there used appears to be clear and unambiguous, we are of opinion that the first hurdle plaintiff must mount is whether William Russ, separately and individually, is covered by the policy. The policy insures North Carolina Pulp Company and William Russ from liability for damage sustained in the use of the truck in question when used commercially and principally in the business occupation of the insured as stated in Item 1, that is, in or in connection with manufacture of paper—an undertaking in which the insured, the Company and Russ, were jointly interested. The hauling of Irish potatoes in which Russ was engaged for pay at the time of the injury was in no way connected with the commercial enterprise covered by the policy. It was so adjudged in the case of *Gibbs v. Russ,* 223 N. C., 349, 26 S. E. (2d), 909. There it is stated that "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." Hence, it is clear that the coverage of the policy in question does not extend to the liability of Russ individually in the operation of the truck in a business in which the Pulp Company had no interest.

But if the policy did so extend, the plaintiff must hurdle the exclusion clause providing that the policy does not apply "to bodily injury to an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the automobile." And defendant cites very respectable authority to sustain the validity of this provision. See *Associated Indemnity Corp. v. Wachsmith,* a decision by the Supreme Court of the State of Washington, reported in 99 P. (2d), 420, 127 A. L. R., 531, and

Ætna Casualty & S. Co. v. Howell, 108 F. (2d), 148, cited in annotation 127 A. L. R., 542. Compare *Hunt v. Casualty Co.,* 212 N. C., 28, 192 S. E., 843.

The judgment below must be

Affirmed.

EDNA KERLEY, ADMINISTRATRIX OF THE ESTATE OF L. L. KERLEY, DECEASED, v. STANDARD OIL COMPANY OF NEW JERSEY AND F. M. FLETCHER.

(Filed 20 September, 1944.)

1. Removal of Causes § 1—

The Federal Courts have final authority in matters of removal.

2. Same—

When a petition for removal is filed in the State Court and denied, the movent may either (1) file his record in the Federal Court, subject to plaintiff's right to make a motion to remand, or (2) appeal to this Court and thence to the highest Federal Court.

3. Removal of Causes § 4b—

In deference to the final authority in the Federal Court, it is not the practice of the State Court to pass upon and determine issues of fact bearing upon the removal, when the joinder of parties is challenged as fraudulent. When the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State Court decide the question on the face of the record, taking for that purpose the allegations of the petition to be true.

4. Same—

The petition is insufficient if it merely denies the allegations of the complaint. The movent who has challenged the jurisdiction because of fraudulent joinder has the duty of positively stating the facts in support of his petition.

5. Same—

When removal is made to the Federal Court upon a petition alleging fraudulent joinder, the plaintiff may make a motion to remand, whereupon the Federal Court will hear and determine the issues of fact relating thereto and make its decision accordingly.

APPEAL by defendant Standard Oil Company from *Alley, J.,* 20 May, 1944, in Chambers. From HAYWOOD.

Plaintiff Administratrix sued the defendants for damages arising out of an injury to her intestate, resulting in death, alleged to have been caused by the negligence of the defendants. The injury and death came

about through an explosion of a gasoline tank in the plant of the corporate defendant at Waynesville, N. C., due to leakage of gasoline, oil and explosive vapors, and their exposure to ignition. The defendant Fletcher is described as the "District Manager" of his codefendant, charged with the duty of supervision, inspection and careful operation of the plant. It is alleged in the complaint that the Standard Oil Company is a corporation under the laws of New Jersey (the defendant claims it is a Delaware Corporation), and Fletcher is stated to be a resident of North Carolina.

The corporate defendant, in apt time, filed its petition and undertaking, and made a motion for removal to the Federal District Court on the ground of diversity of citizenship between the plaintiff and the defendants, and claimed that the resident defendant, Fletcher, was fraudulently joined as a party defendant solely for the purpose of lending specious support to the jurisdiction of the State Court; whereas, in fact, the said Fletcher was in nowise responsible for the injury to plaintiff's intestate. The defendant avers that Fletcher was merely a *District Sales Manager* for the company, without any duties connected with the operation of the plant, its maintenance or inspection (the duties of which position are set up with particularity), and that he was not present when the intestate received his injury and, in fact, did not in any way contribute thereto.

The lower court denied the petition, and the Standard Oil Company appealed.

Jones, Ward & Jones and Williams & Cocke for plaintiff, appellee.

Edwin S. Hartshorn and Morgan & Ward for defendant Standard Oil Co., appellant.

SEAWELL, J. The Federal Courts have final authority in matters of removal under 28 U. S. C. A., sec. 71; U. S. Constitution, Article III, sec. 2; *Road Improvement District v. St. Louis S. W. R. Co.,* 257 U. S., 547, 66 L. Ed., 364; *N. C. Public Service Co. v. Southern Power Co.,* 282 F., 837, 33 A. L. R., 626. When a petition for removal is filed in the State Court and denied, the movant may pursue either of two courses: He may file his record in the Federal Court, subject to the plaintiff's right to make a motion to remand; Judicial Code, sec. 28 (28 U. S. C. A., sec. 71); *Metropolitan Casualty Ins. Co. v. Stevens,* 312 U. S., 563, 85 L. Ed., 1044; or he may appeal to this Court from the adverse ruling, and if again unsuccessful, prosecute his appeal to the highest Federal Court, where, if there should be found error in the State Court, the proceedings taken in that Court meanwhile are of no effect. *Metro-*

politan Casualty Ins. Co. v. Stevens, supra. The defendant chose to appeal from the ruling of the State Court.

In deference to the final authority which resides in the Federal Court, it is not the practice of the State Court to pass upon and determine issues of fact bearing upon the removal, when the joinder is challenged as fraudulent. The Court will only examine the record to see if the facts upon which the State jurisdiction is challenged are sufficient to justify removal, taking the allegations of the petition to be true.

"When the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State Court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true." *Crisp v. Fibre Co.,* 193 N. C., 78, 85, 136 S. E., 238; *Edwards v. R. R.,* 212 N. C., 61, 65, and cases cited, 192 S. E., 855; *Clevenger v. Grover,* 211 N. C., 240, 243, 189 S. E., 782; *Cox v. Lumber Co.,* 193 N. C., 28, 31, 136 S. E., 254; *Johnson v. Lumber Co.,* 189 N. C., 81, 83, 126 S. E., 165; *Cogdill v. Clayton,* 170 N. C., 526, 87 S. E., 338; *Stevens v. Lumber Co.,* 186 N. C., 749, 752, 120 S. E., 329; *Crawford v. Sears, Roebuck & Co.,* 216 N. C., 789, 4 S. E. (2d), 334; *Wilson v. Republic Iron & S. Co.,* 257 U. S., 92, 97, 66 L. Ed., 144, 148.

It has been stated that the petition is insufficient if it merely denies the allegations of the complaint; *Chicago-Rock Island Ry. v. Whiteaker,* 239 U. S., 421, 60 L. Ed., 360; and there has been some divergence of views as to the significance of this rule. But an examination of all the authorities leads to the conclusion that such observations are merely directed to the substance and sufficiency of the petition with respect to its particularity in setting forth the facts. *Fenner v. Cedar Works,* 191 N. C., 207, 131 S. E., 625. The movant who has challenged the jurisdiction because of fraudulent joinder of parties has the duty, at least, of positively stating the facts in support of his petition. *Fenner v. Cedar Works, supra; Crisp v. Fibre Co., supra; Cogdill v. Clayton, supra.*

When removal is made to the Federal Court upon petition of the defendant alleging fraudulent joinder, then, at the option of the plaintiff, a motion to remand may be made, and upon such motion, the Federal Court will hear and determine the issues of fact relating to the removal upon the allegation of fraudulent joinder, and make its decision accordingly. *Chesapeake & Ohio R. Co. v. Cockrell,* 232 U. S., 146, 58 L. Ed., 544; *Wilson v. Republic Iron & S. Co., supra.* A useless and unseemly conflict between the courts with respect to the jurisdiction is thus avoided. Should the cause be remanded, the jurisdiction of the State Court is restored.

The matters considered here are more fully discussed, with copious citations of authority, in *Crisp v. Fibre Co., supra,* and the rules and principles there announced are controlling here. The facts stated in the petition are sufficient to justify removal.

There was error in denying the defendant's petition, and the judgment is

Reversed.

STATE v. WEAVER OGLE.

(Filed 20 September, 1944.)

1. Automobiles § 32e—

Evidence showing that one driving an automobile, with knowledge of the danger, heedlessly cut in front of another motor vehicle, traveling in the same direction and immediately in his rear, thereby causing a collision and damage, is sufficient to be submitted to the jury in a criminal prosecution for reckless driving.

2. Same—

Where two motor vehicles are traveling very near each other, on the same road and in the same direction, the lead car being on the right-hand side of the road and the rear car being a little behind and to the left—or "nearly side by side"—and there is evidence that the lead car turned to the left, which the driver thereof denied, causing the rear car to strike and injure a pedestrian, the evidence is insufficient to be submitted to a jury in a criminal charge of reckless driving against the driver of the lead car.

APPEAL by defendant from *Nettles, J.,* at May-June Term, 1944, of MADISON.

Criminal prosecution tried upon indictment charging the defendant with (1) reckless driving, and (2) assault with a deadly weapon, to wit, an automobile, with intent to kill.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Eight months on the roads.

The defendant appeals, assigning errors.

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

Guy V. Roberts and Jones, Ward & Jones for defendant.

STACY, C. J. The record discloses that on the night of 7 August, 1943, about 10:30 or 11:00 p.m., Charles Thomas, Jr., while standing with three companions on a highway bridge over Bull Creek in Madison

County, was seriously injured as a result of the collision between two automobiles, one driven by Weaver Ogle and the other by Vernon (Buster) Cody. Both Ogle and Cody were returning from Marshall to their respective homes on the Bull Creek road, which road intersects the Marshall-Mars Hill highway about fifty feet east of the bridge on which the accident occurred.

As the two cars approached the bridge, going in the same direction, the Ogle car was in front on its right side of the road, and the Cody car was close behind and somewhat to the left of the lead car, or "nearly side by side" as some of the witnesses put it. They were traveling at an estimated speed of 15 to 20 or 35 to 40 miles an hour, and neither operator had a driver's license. Both cars were equipped with lights and brakes. Both drivers saw the boys on the north side of the bridge. Ogle waved at them as he was passing. It seems that the running board of the Cody car brushed against one of the boys, Wayne Gosnell, and then the front of the Cody car struck the left rear fender of the Ogle car, which caused it, the Cody car, to swing around and hit the Thomas boy, breaking his leg. Cody says he struck the Ogle car because Ogle turned to the left without any signal. This is denied by Ogle and other witnesses. Nevertheless, taking Cody's statement as true, this one circumstance would seem to be insufficient to convict Ogle of reckless driving. *S. v. Folger,* 211 N. C., 695, 191 S. E., 747. His conduct may be such as to import civil liability, G. S., 20-154, but we think it falls short of criminality. *S. v. Lowery,* 223 N. C., 598, 27 S. E. (2d), 638; *S. v. Cope,* 204 N. C., 28, 167 S. E., 456; *S. v. Stansell,* 203 N. C., 69, 164 S. E., 580; *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155.

Of course, if Ogle, with knowledge of the danger, heedlessly cut in front of the rear car and thereby caused the collision, as the State contends, the case was properly submitted to the jury. *S. v. Satterfield, supra.* However, the record is barren of any evidence to support this contention. Cody had given no signal that he wanted to pass. Indeed, he says: "I was not trying to pass him. . . . He turned across in front of me and I didn't have time to stop. . . . The cars hit on the side; they didn't hit on the tail end. . . . I was not behind him; I was by the side of him. . . . The cars went twelve or fifteen feet after they came together." Cody knew that Ogle intended to turn left into the Bull Creek road about fifty feet east of the bridge. Cody himself intended to pull into the filling station on his left at the end of the bridge. It thus appears that Cody was driving too near the Ogle car and was on his left side of the bridge at the time of the collision. See *Austin v. Overton,* 222 N. C., 89, 21 S. E. (2d), 887, and authorities there cited.

The case against Ogle is hardly sufficient to survive the demurrer. G. S., 15-173.

Reversed.

STATE v. VERNON (BUSTER) CODY.

(Filed 20 September, 1944.)

1. Judgments § 17b: Criminal Law §§ 54b, 60—

The rule, both in civil and criminal actions, is that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court.

2. Criminal Law § 54b—

Where an indictment contains several counts and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates.

3. Criminal Law §§ 60, 85—

A judgment in a criminal prosecution, in excess of the statutory penalty, will be stricken out on appeal, and the cause remanded for proper judgment.

APPEAL by defendant from *Nettles, J.,* at May-June Term, 1944, of MADISON.

Criminal prosecution tried upon indictment charging the defendant with (1) reckless driving, and (2) assault with a deadly weapon, to wit, an automobile, with intent to kill.

Verdict: Guilty.

Judgment: Eight months in county jail to be assigned to work the roads under supervision of the State Highway and Public Works Commission.

The defendant appeals, assigning errors.

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

George M. Pritchard for defendant.

STACY, C. J. This is a companion case to *S. v. Ogle,* herewith decided, the two having been consolidated for trial, as they arise out of the same transaction, and were heard together on appeal. To avoid repetition, reference is made to the *Ogle case* for statement of the facts.

The case against Cody readily survives the demurrer. He was in position to appreciate the danger of his negligent driving. As to him

the case was properly submitted to the jury. *S. v. Wilson,* 218 N. C., 769, 12 S. E. (2d), 654.

The defendant contends, however, that the general verdict of "guilty," without specifying the count, is too indefinite to support a judgment. The second count in the bill seems to have been disregarded on the hearing. The case was tried on the first count alone. It is the rule with us, both in civil and criminal actions, that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *S. v. Whitley,* 208 N. C., 661, 182 S. E., 338; *S. v. Jones,* 211 N. C., 735, 190 S. E., 733; *S. v. Morris,* 215 N. C., 552, 2 S. E. (2d), 554; *S. v. Bentley,* 223 N. C., 563, 27 S. E. (2d), 738. And further, "where the indictment contains several counts, and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates." *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500. It is clear from the record that the verdict speaks of the first count only. *S. v. Morris, supra.*

For the first offense of reckless driving the allowable penalty is not more than six months imprisonment, or a fine of not more than $500. G. S., 20-180. It may be more for a second or subsequent conviction, but there is no evidence of a former conviction here. Hence, the judgment is in excess of the statutory limit. It will be stricken out and the cause remanded for proper judgment.

Error and remanded.

STATE v. JAMES PATTERSON.

(Filed 20 September, 1944.)

1. Extradition § 8—

Upon indictment, prosecution, and conviction of defendant for manslaughter and judgment of imprisonment to be suspended upon payment by defendant of $500.00 to relatives of the deceased and the costs of the action, where defendant made the payments required, including the expenses of the sheriff in going to a distant state and returning defendant without extradition, there is error in an order of the court that the State pay such expenses of the sheriff under G. S., 15-78.

2. Criminal Law § 65½—

Expenses for returning persons charged with crime to this State from points outside the State, without extradition, are not denominate allowable costs under G. S., 6-1.

APPEAL by the State from *Alley, J.,* at April Term, 1944, of CHEROKEE.

The defendant James Patterson was convicted of manslaughter at the April Term, 1944, of Superior Court of Cherokee County and was sentenced to serve two years in the common jail, to be assigned to work under the supervision of the State Highway and Public Works Commission, the prison sentence to be suspended upon condition that the defendant pay $500.00 to the relatives of the deceased, Avery Beaver, and the costs of the action. The defendant paid into the office of the Clerk the $500.00 for the use and benefit of the relatives of the deceased, and $196.00 to cover the bill of costs in the case, and was released. The bill of costs so paid included $106.10 which had been paid by the county of Cherokee to the sheriff of said county, for expenses incurred by said sheriff in making a trip to the State of Ohio for the purpose of returning the defendant to North Carolina for trial, and actually so returning the defendant.

Thereafter his Honor signed an order to the effect that neither Cherokee County nor the defendant were liable for the $106.10, and directing that the State of North Carolina pay such expense, closing said order with these words: "And the Court being of the opinion that under Section No. 4556 (24) of the Consolidated Statutes that said expenses should not be taxed as a part of the costs in said action, nor taxed against Cherokee County, the crime charged being a felony, and that the State of North Carolina under said Section No. 4556 (24) should pay said expense, the Court being of the opinion that there is no good reason why the State should not pay said expenses on account of the defendant having waived the State not having had to go to the trouble of getting requisition. Therefore, it is ordered and adjudged by the Court that the State of North Carolina do pay said expense, of L. L. Mason, Sheriff, of $106.10, as authorized under Section No. 4556 (24)."

To the foregoing order of the court the State in apt time noted an objection and exception, and appealed to the Supreme Court, assigning error.

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

J. D. Mallonee for defendant Patterson, appellee.

SCHENCK, J. We are constrained to hold that the order directing that the State pay the expense of returning the defendant from Ohio to North Carolina was unauthorized in this case and therefore in error.

It appears in the record that no requisition was applied for and none issued by His Excellency, the Governor, and that the defendant Patterson waived extradition and voluntarily returned with the sheriff to North Carolina.

The statute, C. S., 4556 (24) (now G. S., 15-78), mentioned in the order as authority for its issuance refers to the payment of expenses in cases of extradition, and no others. It reads in part: "When the crime shall be a felony, the expenses shall be paid out of the state treasury, on certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. . . ." There was no certificate of the Governor for the reason that the case was never before His Excellency.

G. S., 6-1 (C. S., 1225), which sets forth the items allowed as costs, enumerates: "actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same," and does not include expenses for returning defendants to this State from points without the State.

The order appealed from by the State, being without authority, was in error, and therefore, is

Reversed.

STATE v. SAM JONES.

(Filed 20 September, 1944.)

Criminal Law § 80—

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of Attorney-General, after the court has examined the record proper for errors on its face.

DEFENDANT gave notice of appeal from *Bone, J.*, at June Term, 1944, of HALIFAX.

Motion by State to docket and dismiss defendant's appeal.

PER CURIAM. The defendant was convicted of murder in the first degree. Sentence of death by asphyxiation was imposed. Defendant gave notice of appeal to the Supreme Court, but no case on appeal was served within the time agreed upon in the court below, and no steps have been taken to perfect the appeal.

The Attorney-General moves to docket and dismiss the appeal. This motion must be allowed, but, according to the rule of the Court in capital cases, we have examined the record to see if any error appears. We find no error in the record. Appeal dismissed.

Judgment affirmed.

R. L. WILLIAMSON v. ALICE WILLIAMSON, EXECUTRIX OF J. P. WILLIAMSON, DECEASED, AND ALICE WILLIAMSON, INDIVIDUALLY.

(Filed 27 September, 1944.)

1. Judgments §§ 2, 3—

The power of the court to sign a consent judgment, or to approve a compromise agreement of the parties, depends upon the unqualified consent of the parties, leaving nothing more to be ascertained by the court. Such consent must still subsist at the time the court is called upon to exercise its jurisdiction.

2. Same—

A consent judgment may not be signed *nunc pro tunc* over the objection of one of the parties.

APPEAL by plaintiff from *Pless, J.*, at June Term, 1944, of RUTHERFORD.

Stover P. Dunagan for plaintiff, appellant.
J. S. Dockery for defendant, appellee.

SEAWELL, J. There was pending in the Superior Court of Rutherford County an action for the foreclosure of a tax lien brought by the plaintiff, R. L. Williamson, against J. P. Williamson and wife, Alice Williamson. Pending its hearing, there was a compromise agreement between the parties which took the form of a consent judgment, to be subsequently signed by the clerk of the Superior Court upon condition that the plaintiff had meantime complied with the terms of the agreement which, upon the undisputed facts, meant the payment of a balance of $50.00. That judgment was never signed by the clerk—but meantime, the plaintiff remained in possession of the land. Some seven years after the agreement had been made between the parties, plaintiff gave notice to Mrs. J. P. Williamson that he would move in the Superior Court at a stated day to have the judgment signed by the court.

Upon the hearing of this motion, Judge Pless conceiving the matter still to be before the clerk of the court, sent the motion back to that official for his action.

At the hearing before the clerk, the defendant, Mrs. Alice Williamson, acting as executrix of J. P. Williamson and in her individual right, opposed the motion, withdrew consent, and thereupon the clerk declined to sign the judgment.

On the appeal to the Superior Court, Judge Pless presiding, the action of the clerk of the court in refusing to sign the judgment was upheld, and plaintiff appealed.

There are two outstanding reasons why the judgment of the Superior Court confirming the action of the clerk in refusing to sign the judgment must be sustained. The first is that the compromise agreement or consent judgment of the parties was transmitted to the clerk to be signed only upon condition. How the satisfaction of that condition should be ascertained is not clear; nor is it material, since unqualified consent of the parties, leaving nothing more to be ascertained by the court, is essential. The acceptance of such consent and its promulgation *is the judgment of the court. It is an undisputed fact, however, that* no compliance was ever made with the conditions precedent to the signing of the judgment. The second reason is that the consent of the parties must still subsist at the time the court is called upon to exercise its jurisdiction and sign the consent judgment. *Lynch v. Loftin,* 153 N. C., 270, 69 S. E., 143; *Rodriguez v. Rodriguez, ante,* 275, 29 S. E. (2d), 904.

We deem it unnecessary to go into an extended analysis of the nature of consent judgments, or to burden the opinion with a restatement of the holdings of the court on that subject. The principle requiring the consent to be outstanding at the time the judgment is signed or rendered arises from the fact that the agreement of the parties is extrajudicial at the time of its making and at all times until the agreement is presented to the court for its adoption and promulgation. In law it was not so presented until the final hearing of the motion by the clerk under the order of Judge Pless, and, therefore, not until after consent had been withdrawn.

Bearing generally upon the nature of consent judgments, see *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209; *Jones v. Grigg,* 223 N. C., 279, 25 S. E. (2d), 862; *Edmundson v. Edmundson,* 222 N. C., 181, 22 S. E. (2d), 576.

The judgment could not have been signed *nunc pro tunc,* since the clerk had neither the duty nor the authority to sign it in the first instance.

The judgment of the court below is

Affirmed.

STATE v. FUSCHEL McMAHAN.

(Filed 27 September, 1944.)

1. Criminal Law § 52b—

On motion to nonsuit a criminal case, the evidence will be considered in its most favorable light for the prosecution.

2. Husband and Wife § 28: Parent and Child §§ 2, 14—

The law presumes the legitimacy of a child born in lawful wedlock, and this includes one of antenuptial conception.

APPEAL by defendant from *Pless, J.*, at March Term, 1944, of YANCEY.

Criminal prosecution tried upon indictment charging abandonment and nonsupport of defendant's wife and child.

The evidence discloses that Aileen Riddle, age 19, had been a patient in the State Hospital at Morganton, N. C. She had been released from that institution about a year and a half or two years, when she became pregnant. Her father had a conversation with the defendant about her condition, and the defendant agreed to marry her and to take care of her. The father accompanied his daughter and the defendant to Greenville, S. C., where they were married. He further testified: "I went with them and they were married and come back and he dodged her out and never did live with her and in four days her mind got bad until I had to take her back to the hospital. It was four or five days when she was taken back. He has not contributed anything to her support since their marriage. A child has been born to Mrs. Fuschel McMahan since she entered the hospital, born in the hospital. The child is eight months old the 16th of this month (April, 1944). The child is at my house with its grandmother. I have supported the child since its birth. Fuschel McMahan has contributed nothing to the support of the child since its birth. Fuschel McMahan has known my daughter all of their lives. They went to school together. I lived in the same community. He knew when he married my daughter that she had been a patient at the State Hospital at Morganton. . . . It was four or five months after the marriage that the child was born."

Verdict: "Guilty as charged." Judgment: Imprisonment in the common jail of Yancey County for a period of twelve months; assigned to work under the supervision of the State Highway and Public Works Commission. Judgment suspended upon condition that defendant pay the costs, and certain stipulated sums for the benefit of the child in question.

The defendant appeals, assigning errors.

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

Charles Hutchins for defendant.

DENNY, J. The first and second exceptions are directed to the refusal of his Honor to allow the defendant's motion for judgment of nonsuit, made at the close of the State's evidence and renewed at the close of all the evidence. The defendant contends the evidence is not sufficient to be submitted to the jury upon the question of the willful abandonment of his wife and the failure to provide adequate support for his wife and child. He further contends there is no evidence tending to show that he is the father of the child.

The evidence is to the effect that the defendant married Aileen Riddle, "dodged her out and never did live with her"; that she gave birth to a child four or five months after the marriage, and that the defendant has never contributed anything to the support of his wife, or child.

On a motion to nonsuit, the evidence will be considered in its most favorable light for the prosecution. *S. v. Andrews,* 216 N. C., 574, 6 S. E. (2d), 35; *S. v. Adams,* 213 N. C., 243, 195 S. E., 822.

The two elements of the offense—willful abandonment and failure to support—are charged in the bill of indictment, and the State's evidence is sufficient to support the verdict. *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756. The contention that there is no evidence to show that the defendant is the father of the child in question is without merit. The law presumes the legitimacy of a child born in lawful wedlock, and this includes one of antenuptial conception. *West v. Redmond,* 171 N. C., 742, 88 S. E., 341. These exceptions cannot be sustained.

While the remaining exceptions are without substantial merit, the brief does not comply with Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562, and they are, therefore, deemed abandoned.

In the trial below, we find

No error.

STATE v. MAY HARRILL.

(Filed 27 September, 1944.)

Prostitution § 5b—

Testimony, tending to show the reputation of the house of defendant and of persons residing in or frequenting the same, is made competent by statute in cases of prosecution for prostitution. G. S., 14-206.

APPEAL by defendant from *Pless, J.*, at May Term, 1944, of RUTHERFORD. No error.

The defendant was charged with prostitution. The jury returned verdict of guilty, and from judgment imposing sentence, defendant appealed.

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

Hamrick & Hamrick and T. J. Moss for defendant.

DEVIN, J. The record discloses that there was sufficient evidence offered by the State to carry the case to the jury on the charge of engaging in prostitution as defined by the statute. G. S., 14-203. There was general verdict of guilty. The defendant offered no evidence.

Exception was noted to the admission by the court, over objection, of testimony tending to show the bad character of the three women who resided in the house occupied by the defendant. This testimony, together with evidence of the reputation of the house, is made competent by statute in cases of prostitution. G. S., 14-206; *S. v. Waggoner,* 207 N. C., 306, 176 S. E., 566; *S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601.

The exception that the judge's charge did not comply with G. S., 1-180, cannot be sustained. *S. v. Dilliard,* 223 N. C., 446.

In the trial we find

No error.

STATE v. CHARLES ALEXANDER.

(Filed 27 September, 1944.)

Criminal Law § 80—

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of the Attorney-General, after the Court has examined the record and finds no error.

MOTION by the State to docket and dismiss appeal.

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

PER CURIAM. The defendant Charles Alexander was tried before his Honor, Burgwyn, Special Judge, and a jury at the August Term, 1944, of Halifax, upon a bill of indictment charging statutory rape. The

jury returned a verdict of "Guilty of Rape as charged in the bill of indictment." Thereupon judgment was rendered sentencing the defendant to death by asphyxiation as by law prescribed. From this judgment the defendant gave notice of appeal to the Supreme Court. However, no case on appeal has been docketed in this Court and no case on appeal has been filed in the office of the clerk of the Superior Court of Halifax County. The time allowed for perfecting an appeal has expired, and the attorney representing the defendant has notified the Attorney-General that the appeal has been abandoned, since "there is nothing from which to appeal."

The defendant having failed to file proper case on appeal, and his attorney having given notice that he had abandoned the appeal, the Attorney-General moves that the case be docketed here and the judgment of the Superior Court affirmed under Rule 17.

Before ruling on this motion, it being in a capital case, we have carefully examined the record and find therein no error. The motion of the Attorney-General to docket and dismiss the appeal is, therefore, allowed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 453.

Appeal dismissed. Judgment affirmed.

STATE v. JAMES TAYLOR.

(Filed 27 September, 1944.)

Criminal Law § 80—

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of the Attorney-General, after the Court has examined the record and finds no error.

Motion by the State to docket and dismiss appeal.

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

Per Curiam. The defendant James Taylor was tried before his Honor J. Paul Frizzelle and a jury at July Term, 1944, of Wake Superior Court upon a bill of indictment charging him with the murder of one J. L. Taylor. The jury returned verdict of guilty of murder in the first degree, as charged in the bill of indictment. Thereupon judgment was rendered sentencing the defendant to death by asphyxiation, as provided by law. From this judgment defendant gave notice of appeal

to the Supreme Court. However, no case on appeal has been docketed in this Court and no case on appeal has been filed in the office of the clerk of the Superior Court of Wake County. The time agreed upon for perfecting appeal has expired, and the attorney representing the defendant has notified the clerk of the Superior Court of Wake County that he does not intend to pursue the appeal, finding in the record no ground therefor.

The defendant having failed to file proper case on appeal and his attorney having given notice that he had abandoned the appeal, the Attorney-General moves that the case be docketed here and the judgment of the Superior Court affirmed under Rule 17.

Before ruling on this motion, we have carefully examined the record and find therein no error. The motion of the Attorney-General to docket and dismiss the appeal is, therefore, allowed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Appeal dismissed. Judgment Affirmed.

RICHARD P. PACKARD v. F. C. SMART AND WIFE, LOTTIE SMART.

(Filed 11 October, 1944.)

1. Easements § 2—

Whoever purchases lands, upon which the owner has imposed an easement of any kind or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created, of which he has notice.

2. Same—

While no easement or *quasi*-easement will be created by implication, unless the easement be one of strict necessity, this rule means only that the easement should be reasonably necessary to the just enjoyment of the properties affected thereby.

3. Same—

When one conveys part of his estate, he impliedly grants all those apparent or visible easements upon the part retained, which were at the time used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use thereof.

4. Same—

Easements created by implication or estoppel do not necessarily stem from a common ownership.

5. Same—

Where adjoining properties of separate owners have been developed in relation to each other, so as to create cross easements in the stairways, hallways, or other private ways serving both properties, such easements, if open, apparent and visible, pass as an appurtenant to the respective properties, and are binding on grantees although not referred to in the conveyance.

6. Same—

One who purchases lands with notice, actual or constructive, that it is burdened with an easement takes the same subject to the easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement. He has no greater right than his grantor. The rule applies whether the sale is voluntary or involuntary.

APPEAL by defendants from *Pless, J.*, at May-June Term, 1944, of HENDERSON.

This is an action for equitable relief. The complaint, in substance, alleges:

That the plaintiff and defendants are the owners of contiguous lots on the west side of Main Street in the city of Hendersonville, the plaintiff's lot being No. 8 and the defendants' lot being No. 7 of what is known as the Bell and Gregory subdivision. That each lot has a frontage of 20 feet on Main Street and a depth of 103 feet, each bordering on an alley on the rear and that the plaintiff's lot lies south of the defendants' lot. That in the year 1924, the plaintiff and one B. L. Foster entered into a parol agreement to construct an Arcade Building on the entire area of both lots to be two stories in height, 40 feet in width, 103 feet in length and to have an eight-foot hallway in the center of the first and second floors, the center of the hallway to run with the boundary line between the two properties. That the structure and arrangement of the rooms, shops, etc., on both sides of the hallways were to be identical in size, form, and arrangement and the first floor was to consist of stores, rooms, and shops facing on Main Street or the arcade or hallway; and on the second floor all rooms were to be used either as offices or apartments and were to open into the upstairs hallway. That it was further agreed that the entire width of the hallways of both floors was to be for the use and benefit of both sides of said building and that each of the parties was to have the right to the full use, enjoyment and benefit of that part of each hallway lying on the land of the other.

The complaint further alleges that the plaintiff and the said Foster constructed a building in substantial compliance with said agreement at a cost of more than $50,000 and that the hallways were constructed as agreed upon, and that the front and rear doors of the lower hallway

were common doors and were locked and unlocked by common keys, and that the upstairs hallway extended from a common window in the front to a common window in the rear. That the plaintiff and the said Foster, by reason of their mutual promises, made the outlay above mentioned and that said agreement was to the mutual advantage of both in the construction and use of said building.

It is further alleged that the legal effect of said parol agreement was to create in equity reciprocal easements by estoppel in favor of each party against the half of each hallway on the land of the other and that said estoppel would operate so long as the building remained on the property.

It is also alleged that the structure of the building and of the hallways, stores, shops, offices, and apartments were sufficiently open and visible to indicate the existence of reciprocal easements on both halves of said hallways and to put prospective purchasers on notice of the benefits and burdens arising from the joint use of the property.

It is further alleged that the defendants became the owners of the Foster lot in May, 1935, by deed from Hendersonville Building & Loan Association, and that said defendants by said deed acquired all the right, title and interest of the said B. L. Foster in said lot, and that by accepting said deed became entitled to the alleged mutual rights and obligated to perform the alleged mutual burdens in the hallways as set forth above.

It is further alleged that in the month of December, 1941, the defendants erected solid walls about one inch thick and about 7 feet high extending the length of said hallways, just on their side of the division line; that the one on the first floor extends approximately from the center of the common doorway at the front of the building to the common doorway at the rear and that the one on the second floor extends from the approximate center of the common hall window in the front to the approximate center of the common hall window in the rear.

It is further alleged that the erection of said walls by the defendants was unlawful and wrongful, in that it deprives the plaintiff of the full use of the hallways and interferes with the light and ventilation; that they also create an unsightly appearance because of the alleged manner in which they were constructed, and that the plaintiff is being irreparably damaged by reason thereof.

The plaintiff further alleges that the alleged estoppel created, as he contends, between him and the said Foster is binding upon the defendants and that the construction of said walls was and is a continuing trespass upon his rights and that he is entitled to a mandatory injunction to compel their removal.

A demurrer interposed in the court below was overruled. Defendants appeal, assigning error.

R. L. Whitmire for plaintiff.
Arthur J. Redden for defendants.

DENNY, J. The demurrer admits the material facts alleged in the complaint. Hence, it becomes necessary for us to determine whether or not the construction of the building as described in the complaint, pursuant to a parol agreement created reciprocal or cross easements as to each owner, in the hallways of the building. If so, are the defendants, the present owners of the Foster property, bound by said easements?

In the case of *Reid v. King,* 158 N. C., 85, 73 S. E., 168, the plaintiff had constructed a party wall pursuant to a parol agreement with one Thompson, the owner of an adjoining lot. It was agreed that Thompson should have the right to use the party wall if and when he should construct a building adjacent thereto, at which time he should reimburse Reid for one-half the cost of the wall. It was further agreed that if Thompson should sell the lot without constructing a building thereon, he would inform his grantee of the party wall agreement. Thompson sold his lot to one King and informed him of the terms of his agreement with plaintiff. King erected a building on the lot and used the party wall, but refused to reimburse Reid for one-half of the cost thereof. An action was instituted for the recovery of one-half of the cost of the wall, and the Court held the defendant obligated to pay his pro rata part of the cost—not by reason of the agreement, but from the nature of the relation, or *quasi ex contractu;* and the Court said: "The effect of such an agreement is to create cross easements as to each owner, which binds all persons succeeding to the estates to which the easements are appurtenant, and a purchaser of the estate of the owner so contracting would take it burdened with the liability to pay one-half the cost of the wall, whenever he availed himself of its benefits. 88 Mo., *supra* (p. 498). The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created, of which he has notice. 88 Mo., *supra*. *Lord Cottenham* said, in *Tulk v. Moxhay,* 2 Phil. (Eng. Ch.), 774: 'If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.' But although the covenant, when regarded as a contract, is binding only

between the original parties, yet in order to give effect to their intention it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the rights and be subject to the obligations which the title or liability to such easements creates. A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate of which he had notice when he became the purchaser. 88 Mo., *supra; Spencer's case,* 1 Smith L. C. (6 Ed.), p. 167. See also *Spaulding v. Grundy,* 126 Ky., 510, and cases cited; *Richardson v. Tobey,* 121 Mass., 457; 30 Cyc., 788 and 795. . . . The statute of frauds does not apply. The equity arises regardless of any promise except, perhaps, that which is fairly implied by law. 20 Cyc., 282; *Pitt v. Moore,* 99 N. C., 85; *Ray v. Honeycutt,* 119 N. C., 510; *Tucker v. Markland,* 101 N. C., 422."

In the instant case, the original parties agreed, for all practical purposes, to substitute common hallways on both floors of the building in lieu of a party wall and constructed the building accordingly. For approximately seventeen years the entrances, stairway and hallways were used as contemplated by the original builders and so used for six years by these defendants.

The greater weight of the authorities seem to hold that no easement or *quasi*-easement will be created by implication, unless the easement be one of strict necessity, but we think that means only that the easement should be reasonably necessary to the just enjoyment of the properties affected thereby, and it is so stated in Thompson on Real Property, Vol. 1, sec. 409 (369), p. 668, citing many cases, among them *Bowling v. Burton,* 101 N. C., 176, 7 S. E., 701. This is in accord with the decision of this Court in the case of *Ferrell v. Trust Co.,* 221 N. C., 432, 20 S. E. (2d), 329, in which we held: "It is a general rule of law that where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part," citing numerous authorities.

The fact that the title to the Foster property, now owned by the defendants, and the title to the property of the plaintiff, were not vested in a common owner at the time of the construction of the building involved herein, is immaterial. Easements created by implication or

estoppel do not necessarily stem from a common ownership. But where adjoining properties of separate owners have been developed in relation to each other, so as to create cross easements in the stairways, hallways, or other private ways, serving both properties, such easements, if open, apparent and visible, pass as an appurtenant to the respective properties, and are binding on grantees, although not referred to in the conveyance. This view is in accord with many authorities from other jurisdictions.

In 19 C. J., sec. 137, p. 934, it is said: "If a building consisting of several apartments is so constructed that all the occupants must enter and depart by the same hall and stairway these become a way of necessity upon the sale or lease of part of the building." Also sec. 145, p. 939, where it is stated: "One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. He has no greater right than his grantor to prevent or obstruct the use of the easement. The rule applies whether the sale is voluntary or involuntary. Frequent applications of the rule are found in the case of private rights of way, stairways, and water rights." *Welfare B. & L. Asso. v. Kreiger*, 226 Wis., 105, 275 N. W., 891.

In the *Appeal of Clelland, et al.,* 133 Pa., 189, 19 A., 352, the facts and holding of the Court are succinctly stated in the syllabus, as follows: "The owners of adjoining lots built a single building covering both lots. The only access to the upper stories was by stairs which were altogether on one lot. *Held,* that the erection of such building constituted an executed license, in the nature of an easement, on the part of the owner of said lot, allowing the owner of the other lot to use such stairs." It is stated in the opinion of the Court that "The building being cast by common consent in its present permanent form, neither party can revoke the arrangement, upon the faith of which the money of the other has been expended. Each and every part is affected with what, in its nature, is a permanent servitude, so long as the building itself stands. It cannot be changed from its present form, nor the right of common access now provided for, be interfered with, at the will of either party, but only by the common consent of all." A similar conclusion is reached by the Court in the case of *Binder v. Weinberg,* 94 Miss., 817, 48 Southern, 1013. The factual situation was similar to the instant case, and while the Court held the evidence insufficient to create an "easement of strict necessity," it did hold: "That the appellee is estopped, by equitable considerations, from obstructing this common hallway with this new

room. It is plain that the original verbal agreement between the parties who built the party wall, and the common hallway above and on the party wall, expressly stipulated that each of the parties was to have the use of the entire hallway, that the light and ventilation of that hallway were not to be interfered with by either, and that the plan of the two buildings, as related to the party wall, and also the common hallway, the way in which both were constructed, and the use to which the common hallway was to be put by both, involved a unity of design; that design being that each party should have full use of the whole common hallway, and derive the full benefit of unobstructed light and air and passageway therein. This is clear from the evidence. The evidence of the appellee himself plainly shows that he had occupied an office in this building for five years as a tenant, from its original construction, and that prior to his purchase he was thoroughly conversant with the plans of this building, and that he knew, when he purchased the building, that the wall was a party wall, that the stairway leading up to the hallway was a party stairway, that the stairway in the rear was also a party stairway, and that the hallway, at the time he purchased it, was and had been used all the while and owned as a party hallway, ever since the building was erected. . . . It is further evident, from the verbal agreement, that the appellant had put his money into the construction of this common hallway, as well as of the party wall, upon the faith of that verbal agreement that he should have the use of the whole of the common hall, just as his cobuilder should have the use of the whole common hallway, and that it was the purpose of this verbal agreement that this common hallway should be left entirely unobstructed to be used, according to the agreement, only as a common hallway. It was the plain purpose and plan, as shown by the construction and building of the party wall and common hallway, that the common hallway should be so used by both in its full extent, and should not be obstructed in any part of it."

It is also stated in 26 C. J. S., sec. 43, p. 707: "If a building is so constructed that all the occupants must enter and depart by the same hall and stairway, an easement for the use of the hall or stairway is impliedly granted on the sale or lease of part of the building." To the same effect is the holding in the case of *Forde v. Libby,* 22 Wyo., 464, 143 Pac., 1190, where it is stated: "Where owners of adjoining lots orally agreed upon a private way between their lots and constructed their improvements with relation thereto, each was estopped from disputing the other's right to such way, and that estoppel extended to their grantees,

who took with notice of the way, although it was not expressly reserved." *Wright v. Barlow,* 169 Okla., 472, 37 Pac. (2d), 958.

We think the demurrer was properly overruled.

Affirmed.

IN THE MATTER OF THE ADOPTION OF AUGUSTUS REYNOLDS MORRIS, MINOR, BY WILLIAM TAZEWELL MORRIS AND EVELYN BAILEY MORRIS, HIS WIFE.

(Filed 11 October, 1944.)

1. Adoption § 9—

A proceeding relating to the custody of a child may be for the minority of the child and may be modified from time to time; whereas that for adoption for life terminates the relationship between the natural parents and the child.

2. Adoption § 3—

The statute, G. S., 48-10, providing that in all cases where the juvenile court has declared the parent unfit to have the care and custody of his or her child, such parent shall not be a necessary party to any proceeding for the adoption of the child, was intended to apply only to final, absolute and unconditional determination of unfitness, and not to a judgment of unfitness retained "for further orders as the continued welfare of said child and changing conditions may require."

3. Judgments § 30—

No question becomes *res judicata* until settled by a final judgment.

APPEAL by respondent Edith Morris Muhler from *Nettles, J.,* at April Civil Term, 1944, of BUNCOMBE.

Proceeding for adoption for life of Augustus Reynolds Morris, a child born 2 December, 1934.

These pertinent facts, appearing in the record on this appeal, are sufficient and necessary to present the determinative question on the appeal:

In a proceeding entitled "In the Matter of Augustus Reynolds Morris," in the Domestic Relations Court of Buncombe County, upon petition of W. T. Morris, paternal uncle, and regarding the custody of Augustus Reynolds Morris, minor child of Ben W. Morris and Edith Sluder Morris, who were then divorced, and after notice to the respondents, "Mr. and Mrs. Charles Muhler," the judge of said court entered an order on 2 June, 1942, in which after reciting that no evidence had been presented in support of contentions of respondents that Charles Muhler had obtained a divorce from his wife, and was lawfully married to Edith

Sluder Morris, the mother of Augustus Reynolds Morris, it is found as a fact that "The respondents are not fit or suitable persons to maintain a home and have the custody of said child unless lawfully married to each other, which marriage they have failed to establish," and thereupon committed the said child "to the care, custody and control of the said W. T. Morris upon conditions that the said W. T. Morris and his wife shall continue to furnish and maintain a suitable home for said child and therein properly maintain, support and educate him."

Subsequently, on 31 March, 1943, the judge of said Domestic Relations Court, acting upon petition filed 16 March, 1943, entered a judgment in which, among other things, it is recited that Edith Sluder Morris and Charles W. Muhler were married on 21 September, 1942; that on 13 May, 1942, the court took jurisdiction of the child, and upon the finding of fact that his mother, Edith Sluder Morris, and the said Charles W. Muhler were not fit and suitable persons to have the custody of said child, committed him to the care, custody and control of W. T. Morris and his wife, Evelyn B. Morris, upon certain conditions, with which they have faithfully complied; and that, though "the respective homes presently offered said child by the petitioners and the respondents in this proceeding are physically sufficient and proper homes," the "child has received better care, has shown more progress and has been happier since May 13, 1942, while residing in the home of W. T. Morris and wife, Evelyn Morris, with his brother, William T. Morris, than he had experienced prior thereto while residing alone with his mother, Edith Sluder Morris, and the said Charles W. Muhler, and the general welfare of the said child will be best served and promoted by his remaining with his brother in the home and under the custody and control of the said W. T. Morris and wife." And, thereupon, the court denied the petition of the mother and her husband for that (1) the court has jurisdiction of said child and his custody, and (2) the order of 2 June, 1942, ought not to be set aside, and ordered that the child remain in the home and under the care, custody and control of W. T. Morris and his wife, "subject to the further orders" of the court, and upon certain conditions, among which the mother was given the privilege of visiting the child at his home at reasonable intervals and under proper circumstances, and of taking the child from time to time for short day visits with her. And the court retained jurisdiction of the child and of the parties to the proceeding "for such further orders as the continued welfare of said child and changing circumstances may require." From neither of the foregoing orders was an appeal taken. But later the mother petitioned for modification of the order of 31 May, 1943, with regard to the time she should take the child, upon which petition the judge of the Domestic

Relations Court entered order on 24 September, 1943, from which the mother appealed.

On such appeal the judge of Superior Court, after finding certain facts, including unfitness of mother "at this time" and of her husband to have care and custody of the child, affirmed and approved "in all respects" the said orders of 31 May, 1943, and 24 September, 1943, "with the following clarification and none other namely": Then follows provision for the mother having the child with her between the hours 9 a.m. and 7 p.m. on Saturdays, except on Christmas Day, 1943, he should remain at the home of W. T. Morris until 11 o'clock in the morning.

In the meantime and on 2 June, 1942, after the order regarding the custody of the child had been entered by the judge of the Domestic Relations Court of Buncombe County as aforesaid, the said W. T. Morris and his wife, designated as William Tazewell Morris and Evelyn Bailey Morris, filed a petition before the clerk of the Superior Court of Buncombe County for the adoption of the said Augustus Reynolds Morris for life.

In this petition it is alleged, among other things, "that the father of said child has given his consent to the adoption, and the mother of said child has been adjudged as a not fit or suitable person to maintain a home and have the custody of said child." Summons in this adoption proceeding was duly issued 2 June, 1942; the service of same was accepted by Ben Morris, the father of the minor; and *alias* summons regularly and consecutively issued for the mother therein named Edith Morris Muhler, was duly served upon her with copy of petition, on 5 November, 1942, and she filed answer to the petition on 2 December, 1942.

In the answer so filed Edith Morris Muhler, protesting the said proposed adoption of Augustus Reynolds Morris, her minor son, then living with the petitioners at their home in Asheville, denies all other material allegations of the petition. She avers particularly that "the petitioners do not have the lawful custody of and care of the said minor child," and further answering the petition she as respondent avers among other things, briefly stated, that prior to 1937 Ben Morris, the father of Augustus Reynolds Morris and another son born of their marriage, abandoned her and them and "failed, neglected and refused to support" them, and that she had the sole care and custody of said child; that on 27 June, 1939, in the General County Court of Buncombe County she obtained an absolute divorce from said Ben W. Morris, and because of things alleged the Superior Court has sole jurisdiction of the matters relating to the care and custody of the minor child, Augustus Reynolds

Morris; that the purported order made by the Domestic Relations Court on 2 June, 1942, is void and of no effect for that said court had no jurisdiction to make such order or to take any action with relation to the care and custody and tuition of said minor child of respondent; and that she is now married, has a comfortable home and is financially and otherwise able to care for and furnish a good home and tuition for said minor, and it would be unconscionable and contrary to law to take him from her in disregard of her rights.

When the adoption proceeding, continued from time to time, came on for hearing on 15 March, 1943, the clerk, being of opinion that under the provisions of G. S., 48-10, the said Edith Morris Muhler is not a necessary party to such proceedings "in view of the adjudication of the judge of the Domestic Relations Court" as above recited in order of 2 June, 1942, declined to hear the testimony which petitioners and respondents were prepared to offer, touching upon the subject of the fitness and unfitness of the mother to have the custody of the child and tentatively approving the adoption of the child as prayed, and entered an interlocutory order to that extent and giving the care and custody of the child to the petitioners W. T. Morris and wife, Evelyn Morris. Upon hearing on appeal therefrom by the mother, the judge of Superior Court, on 12 June, 1943, approved and affirmed the interlocutory order of the clerk entered 15 March, 1943, and remanded the case to the clerk for further proceedings according to law.

Thereafter, on 16 March, 1944, the mother of the child, petitioning for a hearing on the averments in her answer renewed her tender of testimony in support thereof. Nevertheless, the petition therefor was denied and final order of adoption as prayed was signed by the clerk on 16 March, 1944. The mother excepted thereto and appealed therefrom. On such appeal the exception was overruled, and the final order of adoption as entered by the clerk was in all respects confirmed, approved and adopted by the judge of Superior Court in judgment entered 15 April, 1944. The mother, Mrs. Edith Morris Muhler, appeals therefrom to Supreme Court and assigns error.

Williams & Cocke for petitioners.
Smathers & Meekins and E. L. Loftin for respondent.

WINBORNE, J. Any question as to the constitutionality of the statute, G. S., 48-10, need not be debated or decided here. The appeal turns upon decision on this question: Is the appellant, the mother of the child sought to be adopted, concluded under the facts of record on this appeal from asserting in this adoption proceeding her rights as the natural

parent of such child, by the finding of the judge of the Domestic Relations Court of Buncombe County in a proceeding relating to the care and custody of her child, regarding her unfitness to have the custody of the child?

The clerk of the Superior Court of Buncombe County, in deference to the provisions of G. S., 48-10, held that it is conclusive on her and the judge of the Superior Court affirmed the decision of the clerk. The appellant assigns this as error. We are of opinion that the assignment is well taken.

The statute regarding necessary parties to proceeding for the adoption of minors, G. S., 48-4, provides that: "The parents . . . must be . . . parties of record" to such proceeding, "provided . . . that when such parent . . . has consented to an adoption as specified in G. S., 48-5, he shall not be a necessary party of record" to the proceeding. This statute has been treated and applied in these cases: *Truelove v. Parker,* 191 N. C., 430, 132 S. E., 295; *In re Shelton,* 203 N. C., 75, 164 S. E., 332; *Ward v. Howard,* 217 N. C., 201, 7 S. E. (2d), 625; *In re Holder,* 218 N. C., 136, 10 S. E. (2d), 620; *Moseley v. Deans,* 222 N. C., 731, 24 S. E. (2d), 630.

But in another section of the statute, G. S., 48-10, in deference to which the clerk acted, it is provided that "In all cases where a juvenile court has declared the parent or parents or guardian unfit to have the care and custody of such child, or has declared the child to be an abandoned child, such parent, parents, or guardian shall not be necessary parties to any action or proceeding under this chapter nor shall their consent be required." The chapter referred to is that relating to the adoption of minors.

In considering the application of this last section it is pertinent to look to the nature and effect of proceedings relating to the custody of minors, and the nature and effect of proceedings for the adoption of minors.

As to the former: Domestic Relations Courts where established are vested with all the power, authority and jurisdiction theretofore vested by law in the juvenile courts of North Carolina, and in addition thereto such Domestic Relations Courts shall, among other things, have exclusive original jurisdiction over "all cases involving the custody of juveniles, except where the case is tried in Superior Court as a part of any divorce proceeding." G. S., 7-103. The statute gives to juvenile courts exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at the time within the respective districts "who is in such condition or surroundings or is in such improper or insufficient guardianship or control as to endanger the morals, health, or

general welfare of such child." This jurisdiction when obtained in the case of any child shall continue for the purposes of the statute on "Child Welfare" during the minority of the child, unless a court order be issued to the contrary. G. S., 110-21. This section of the statute imposes upon the court the constant duty to give to each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the State.

Moreover, it is provided by another section of the statute, G. S., 110-36, that any order or judgment made by the court in the case of any child shall be subject to such modification from time to time as the court may consider to be for the welfare of the child, except in certain case not pertinent here.

On the other hand, a proceeding for adoption is before the clerk of the Superior Court, G. S., 48-1. An order granting letters of adoption shall state whether it is for the minority or for the life of the child, and shall have the effect forthwith to establish the relationship of parent and child between the petitioner and the child. G. S., 48-6. And when a child is duly adopted pursuant to the provisions of the statute the adoptive parents shall not thereafter be deprived of any rights in the child at the instance of the natural parent, or otherwise, except in the fashion and for the same causes as are applicable in proceeding to deprive natural parents of their child. G. S., 48-14.

Thus it is seen that the result of a proceeding relating to the custody of the child may be for the minority of the child and may be modified from time to time, whereas that for adoption for life terminates the relationship between the natural parents and the child, and is permanent and continues for the life of the child. They are entirely separate and distinct proceedings—the judgment in the one being subject to modification, and in the other, final.

Bearing in mind these principles, what then did the Legislature intend by the wording in the statute, G. S., 48-10, that in all cases where the juvenile court has declared the parent unfit to have the care and custody of such child, such parent shall not be a necessary party to any proceeding for the adoption of the child, nor shall his or her consent to the adoption be required?

As we construe the language used, it was intended to apply in all cases where a juvenile court (in this case the Domestic Relations Court) has made final, absolute and unconditional determination of the unfitness of the parent to have the care and custody of the child.

When so considered and applied the language used in the several orders of the judge of the Domestic Relations Court and the reservation by it of jurisdiction of the child and of the parties to the proceeding "for

further orders as the continued welfare of said child and changing conditions may require," set forth in order of 31 May, 1943, approved by judge of Superior Court, do not constitute a final and conclusive adjudication of the unfitness of the parent. Indeed, the original order has been modified to the extent of finding that the home offered by the mother is "physically sufficient and proper" and of giving her partial custody of the child. No question becomes *res judicata* until it is settled by a final judgment.

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.

ELLEN E. PINNELL v. COOK DOWTIN AND ELIZABETH DOWTIN.

(Filed 11 October, 1944.)

1. Estates § 9a—

An estate in remainder is an estate limited to take effect in possession immediately after the expiration of the prior estate created at the same time and by the same instrument. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determinates, universally distinguishes a vested remainder from one that is contingent.

2. Same—

Vested remainders are those by which the present interest passes, though to be enjoyed in the future, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. The person entitled has an immediate fixed right of future enjoyment, which may be transferred, aliened, and charged, much in the same manner as an estate in possession.

3. Same—

A devise to testator's wife, during her lifetime and widowhood, and at her death or remarriage, the lands to become at once the property of testator's children, creates a vested remainder in the children.

APPEAL by defendants from *Bone, J.*, at May Term, 1944, of WARREN.

This was a suit in ejectment instituted by the plaintiff against the defendants to recover the possession of and to have the plaintiff declared the owner of a certain parcel of land in Shocco Township, Warren County, North Carolina, described as follows: "Beginning at an iron in

D. P. Limer's line on the North side of Highway No. 59, and running thence S. 27 E. 3116 feet along the line of E. H. Pinnell to a stake, corner with J. R. Jones estate; thence S. 83-15′ W. 423 feet with J. R. Jones Estate to Richneck Branch; thence continuing with J. R. Jones estate, S. 66-45 E. 393 feet, S. 57-45 W. 67 feet to a sycamore, corner with Lot No. 2 (Helen Dowtin); thence with Lot No. 2 (Helen Dowtin) N. 17 W. 3125 feet to the center of Highway No. 59, a new corner in D. P. Limer's line; thence with D. P. Limer, crossing the Highway N. 84-45 E. 350 feet to the place of beginning, containing 41 acres, as per survey of E. P. Fitts, Surveyor, June 21, 1943, and being Lot No. 1 in the division of the lands of Cook Dowtin, deceased, as will appear from Report of Commissioners in that special proceeding in Superior Court of Warren County entitled 'Ellen E. Pinnell, et al. v. Helen Dowtin' and Plat of said surveyor recorded in office of Register of Deeds of Warren County, North Carolina, in Plat Book 3, page 67," wherein the plaintiff alleges and contends that the defendants are in the wrongful and unlawful possession of said land and wrongfully and unlawfully refuse to surrender the same, and the defendants, in answer, allege and contend that they are in the rightful possession of said land by reason of the fact that the defendant Cook Dowtin (the younger) is a tenant in common of said land with his brothers and sisters, by inheritance from his late father, George W. Dowtin, and by virtue of the will of the late Cook Dowtin (the elder).

The case came on for trial and the parties, plaintiff and defendants, waived trial by jury and agreed that the court might find the facts and enter judgment thereon.

The court found, *inter alia,* that Cook Dowtin (the elder) died in Warren County prior to 25 January, 1922, seized and possessed of a certain tract of land in Shocco Township, Warren County, containing 65 acres, which was conveyed to him by deed of Walter B. Boyd and wife, dated 1 November, 1900, recorded 27 December, 1900, in Book 65, page 5, office of Register of Deeds of Warren County, that the said Cook Dowtin (the elder) left a last will and testament which was duly admitted to probate in the office of the clerk of the Superior Court of Warren County in Book of Wills 53, at pages 289 *et seq.,* which said will contained, among others, the following item, to wit: "First: I give and devise to my wife Emily Dowtin for her ease and benefit during her lifetime and widowhood all my real estate, consisting of Sixty-five (65) acres of land, more or less, situate in the aforesaid County of Warren (Shocco Township), but she will not have any power or authority to sell it or mortgage it in any way, at her death or remarriage the aforesaid land which is situate on the public road leading from the Turnpike

to Warrenton by Bridle Creek Fort, and bounded by the adjoining land of Crute, Pinnell, and Jones, and land formerly owned by Watkins, but now owned or occupied by E. Hunter Pinnell, shall become at once the property of my two children, George W. Dowtin and Helen Dowtin, as follows. My son George W. Dowtin shall have forty (40) acres of the land aforesaid, he and his heirs forever, his portion to be on the Easterly side with frontage on the public road aforesaid, and to include the dwelling house in which I now reside, with its appurtenances, and my daughter Helen Dowtin shall have twenty-five acres on the Westerly side of it, with a frontage on the aforesaid public road, her and her heirs forever;" that Emily Dowtin, widow of Cook Dowtin (the elder) survived George W. Dowtin, the son of her and of Cook Dowtin, the testator, and died in possession of the land mentioned in the will of her late husband, which was the same as the land described in said deed from Walter B. Boyd and wife to Cook Dowtin (the elder); that George W. Dowtin on 3 December, 1926, being at that time a widower, executed to C. A. Tucker, trustee, a deed of trust to secure $375.00 due C. E. Jackson, which deed of trust purported to convey "land . . . left me by my father, containing 40 acres undivided interest in the tract of 65 acres," and being the same land devised in remainder in the said first item of the will of Cook Dowtin to George W. Dowtin; that George W. Dowtin died intestate 3 September, 1933; that pursuant to the power of sale contained in the said deed of trust to him from George W. Dowtin, C. A. Tucker, Trustee, sold the land therein described and executed trustee's deed therefore to the plaintiff, Ellen E. Pinnell, on 10 April, 1935, which is duly recorded under date of 29 April, 1935, in Book 132, at page 336, Record of Deeds for Warren County; that Ellen E. Pinnell, after the death of Emily Dowtin, instituted in May, 1943, a partition proceeding to divide the lands involved between herself and Helen Dowtin, mentioned in the will of Cook Dowtin as his daughter, that neither of the defendants was a party to this proceeding; that the proceeding was regular in all respects, and the report of the commissioner duly confirmed by the clerk of the court of Warren County, and in said partition proceeding twenty-seven (27) acres were allotted to Helen Dowtin, and forty-one (41) acres were allotted to Ellen E. Pinnell; prior to and at the time of the death of Emily Dowtin the defendants in this action, Cook Dowtin (the younger) and Elizabeth Dowtin, child and widow of the late George W. Dowtin, respectively, and grandchild and widow of child of the late Cook Dowtin (the elder), respectively, were in possession with Emily Dowtin of the lands described in the complaint; upon the foregoing agreed facts the court adjudged that Ellen E. Pinnell was owner in fee and entitled to the immediate possession of the land

described in the complaint. To the judgment predicated upon the foregoing agreed facts the defendants objected, preserved exception and appealed to the Supreme Court.

Julius Banzet for the plaintiff, appellee.
Gholson & Gholson for defendants, appellants.

SCHENCK, J. The decision of this case turns upon the ruling upon appellants' first exceptive assignment of error which assails the following portion of his Honor's judgment: "Upon the foregoing agreed facts the Court doth adjudge that the plaintiff, Ellen E. Pinnell, be and she hereby is declared to be the owner in fee simple and entitled to the immediate possession of the land and premises described in the complaint . . ."

The defendants, appellants, contend that George W. Dowtin received no interest under the will of his father, Cook Dowtin (the elder) for the reason that George W. Dowtin predeceased Emily Dowtin, his mother and widow of Cook Dowtin, and that under the provisions of said will George W. Dowtin was to receive no interest in the land during the widowhood of Emily Dowtin, and such being the case the deed of trust executed by George W. Dowtin to C. A. Tucker, Trustee for C. E. Jackson, and the subsequent foreclosure thereof, and deed of the trustee to Ellen E. Pinnell conveyed no title.

On the contrary, the plaintiff, appellee, contends that the deed of trust executed by George W. Dowtin to C. A. Tucker, Trustee for C. E. Jackson, and the subsequent foreclosure deed from Tucker, Trustee, to Ellen E. Pinnell, conveyed a good indefeasible title to said Ellen E. Pinnell to the land therein described.

It is apparent that the question posed by this appeal is: Was George W. Dowtin authorized by the will of his father, Cook Dowtin (the elder), to encumber with the deed of trust the lands therein described, during the widowhood of his mother, Emily Dowtin? His Honor held that he was so authorized, by holding that Ellen E. Pinnell, who claimed through and under such deed of trust was the owner and entitled to the possession of the land conveyed thereby. The correctness of this holding depends upon whether under the will of Cook Dowtin (the elder) George W. Dowtin took a vested remainder, after the particular estate for her widowhood devised to Emily Dowtin. If he took such a vested remainder then George W. Dowtin was authorized to convey his title to the trustee in the deed of trust, and upon the foreclosure of such deed of trust the deed given by the trustee to the plaintiff Ellen E. Pinnell conveyed to her a valid title, and his Honor's judgment was

correct. If on the other hand George W. Dowtin took only a contingent remainder, contingent upon his surviving the widowhood of his mother, Emily Dowtin, then the deed of trust he executed conveyed no title, since George W. Dowtin predeceased Emily Dowtin, the holder of the particular estate, and his Honor's judgment was in error.

We are of the opinion, and so hold, that the will of Cook Dowtin (the elder) devised to George W. Dowtin a vested remainder, and, therefore, his Honor's judgment was correct.

"Vested remainders, or remainders executed, are those by which the present interest passes to the party, though to be enjoyed in the future, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in praesenti,* though it is only to take effect in possession and permanency of the profits at a future period, and such an estate may be transferred, aliened and charged, much in the same manner as an estate in possession, as distinguished from one which is vested in interest." *Richardson v. Richardson,* 152 N. C., 705, 68 S. E., 217.

"What, then, is a vested and what a contingent remainder? An estate in remainder is an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument. 23 R. C. L., 483, sec. 5. . . . It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that, every remainder for life or in tail is and must be liable; as the remainderman, may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." Fearne on Remainders, Vol. 1, p. 216; *Power Co. v. Haywood,* 186 N. C., 313, 119 S. E., 500.

The portion of the will before us for interpretation reads: "I give and devise to my wife Emily Dowtin for her ease and benefit during her lifetime and widowhood all my real estate, . . . but she will not have any power or authority to sell it or mortgage it in any way, at her death or remarriage the aforesaid land . . . shall become at once the property of my two children, George W. Dowtin and Helen Dowtin . . ." These devises to the children of the devisor after the expiration of the particular estate devised to the wife of the devisor for her widowhood, would seem to meet the tests of a vested remainder in that the remaindermen created thereby had "the present capacity of taking effect in possession, if the possession were to become vacant," by the termination of the widowhood of the particular tenant.

Since George W. Dowtin took a vested remainder by the will of Cook Dowtin (the elder), and since George W. Dowtin executed the deed of trust by, through and under which the plaintiff claims title, his Honor was correct in holding that the plaintiff was the owner and entitled to the possession of the land involved.

The judgment of the Superior Court is

Affirmed.

E. N. MOORE AND WIFE, FLORENCE W. MOORE, H. B. MOORE AND WIFE, ESTHER R. MOORE, BETH MOORE HUNTER (WIDOW), SALLIE H. LEGGETT AND HUSBAND, L. W. LEGGETT, ELIZABETH HYMAN (UNMARRIED), EMILIE HYMAN (UNMARRIED), W. D. HYMAN AND WIFE, HILDA E. HYMAN, AND E. P. HYMAN AND WIFE, BESSIE E. HYMAN, v. MARTHA NORMAN (PATTIE) BAKER (WIDOW), SALLIE BAKER EVERETT AND HUSBAND, B. B. EVERETT, AND JOHN B. CHERRY, AND SUSIE HYMAN BOWDEN.

(Filed 11 October, 1944.)

1. Partition §§ 1a, 4a—

Ordinarily, remaindermen are not bound by a partition by the life tenants alone. But when the life estates are created by will and the power to partition is vested in the first takers or executors and the respective shares of the life tenants pass to the children of the first taker, the remaindermen are not necessary parties to a partition proceeding.

2. Partition §§ 10, 11: Wills § 34—

When a will provides for partition among life tenants and the respective shares of the life tenants pass to their children, a partition by court proceeding is not essential, and the assessment of an owelty charge against one share in favor of another is not a fatal departure from the power conferred by the will. Whether the executors or life tenants are the donees of the power to divide is immaterial, where the sole surviving executor was a party to the partition deed of the life tenants.

3. Partition § 10: Wills § 34—

Where the partition of lands, authorized by a will, was made by deed of the sole surviving executor and the life tenants named in the will, the children of each life tenant taking their parents' share as remaindermen, and no complaint is voiced for sixty years, protest by remaindermen is too late.

APPEAL by plaintiffs from *Bone, J.*, at June Term, 1944, of HALIFAX. No error.

Petition for partition in which the defendants Everett pleaded sole seizin, here on two former appeals, *Moore v. Baker,* 222 N. C., 736; *ante,* 133.

S. R. Spruill, a resident of Halifax County, died in the year 1877 seized and possessed of real property located in Halifax, Martin, and Bertie counties. He left a last will and testament, the material part of which reads as follows:

"I give, devise and bequeath the whole of my estate, both real and personal to my three daughters, Frances Elizabeth, Martha Norman and Susan Amelia, during the time of their natural lives.

"No part of my estate is to be divided until the marriage of all of my three daughters, or in case of the death of one before marriage, then upon the marriage of the others. When the last one shall be married my estate shall be divided between my said daughters who may then be living, and the issue of such as may then be dead leaving issue, the said issue to take *per stirpes* and not *per capita.* The share of each one of my said daughters shall upon her death go to her children and their heirs absolutely. Until the marriage of the last one of my said daughters my estate shall be held as common stock."

The will designated the three daughters and John H. Everett as the persons to make settlement of testator's estate. The daughter Frances Elizabeth and John H. Everett qualified. John H. Everett died 2 October, 1882, leaving Frances Elizabeth as the sole surviving executrix.

Frances Elizabeth married E. P. Hyman in 1879. She died in March, 1936, leaving surviving six children, the plaintiffs, Sallie H. Leggett, Elizabeth Hyman, Emilie Hyman, W. D. Hyman, and E. P. Hyman, and the defendant, Susie Hyman Bowden.

Susan Amelia married H. B. Moore in 1879. She died 6 February, 1935, leaving surviving three children, the plaintiffs, E. N. Moore, H. B. Moore, and Beth Moore Hunter.

Martha Norman married L. J. Baker in 1881. She died after the institution of this action, leaving surviving one child, the defendant Sallie Baker Everett.

The three daughters having married prior to 22 December, 1882, they, with the joinder of their respective husbands, on said date executed a deed of partition in which reference was made to the will of S. R. Spruill and the directions for partition therein contained. The property allotted to Martha Norman Baker was made subject to an owelty charge of $100 in favor of Frances Elizabeth Hyman and an owelty charge of $1,800 in favor of Susan Amelia Moore. The share allotted to Susan Amelia Moore was subject to an owelty charge of $100 payable to Frances Elizabeth Hyman. Each daughter went into possession of the share thus allotted to her.

Frances Elizabeth Hyman and her husband conveyed the share allotted to her to L. J. Baker and R. E. Robertson by deed dated 2 January,

1911. Her children joined in the execution of the deed. Her youngest child became twenty-one years of age in 1917. Later R. E. Robertson conveyed his one-half interest therein to L. J. Baker, father of the defendant Sallie Baker Everett. She, as his sole surviving child, inherited the property. Susan Amelia Moore and her husband conveyed the land allotted to her to John A. Grant by deed dated 8 December, 1904.

This proceeding was instituted 4 February, 1942. While all the land of which S. R. Spruill died seized and possessed is described in the petition, neither the grantees of Frances Elizabeth Hyman and husband nor the grantees of Susan Amelia Moore and husband are made parties to the proceeding.

The defendants Everett, answering the petition, pleaded sole seizin under the deed of partition and by adverse possession. They likewise pleaded the twenty-year statute of limitations and laches on the part of the plaintiffs.

When the cause came on for trial in the court below, issues were submitted to the jury as follows:

"1. Are the defendants, B. B. Everett and wife, Sallie Baker Everett, solely seized of the lands set out and described in subsections 1 and 2 of the petition, as alleged in the Answer?

"2. Is plaintiffs' action barred by the twenty year statute of limitations, as alleged in the Answer?

"3. Are the plaintiffs estopped by their laches and conduct from maintaining this action, as alleged in the Answer?"

The court below gave a peremptory instruction in favor of the defendants upon each of the issues submitted. The jury answered each issue "yes." There was judgment on the verdict and plaintiffs appealed.

I. T. Valentine, in absentia, and Wilkinson & King for plaintiffs, appellants.

Irwin Clark, R. O. Everett, and Albion Dunn for defendants, appellees.

BARNHILL, J. While the petition describes all the land of which the testator died seized and possessed, it does not appear that those now in possession of the tract allotted to Mrs. Moore were made parties to this proceeding. Defendant Sallie Baker Everett is now in possession of the Hyman share. So that in fact this proceeding is prosecuted for the purpose of asserting title as tenants in common to the Martha Norman Baker and the Hyman parcels as described in the partition deed.

Plaintiffs, remaindermen, were not parties to the partition deed executed by the life tenants. It does not appear that any of them were

in esse at that time. Certainly most of them were still unborn. Are they bound by the partition deed and now estopped thereby to assert title to the land in controversy? This is the primary question presented on this appeal.

Ordinarily, remaindermen are not bound by a partition by the life tenants alone. But when the life estates are created by will and the power to partition is vested in the first takers or executors and the respective shares of the life tenants pass to the childern of the first taker, the remaindermen are not necessary parties to the partition proceeding.

We are constrained to hold that the facts appearing on this record invoke the application of the latter rule. *Collier v. Paper Corporation,* 172 N. C., 74, 89 S. E., 1006; *Interior & W. V. R. Co. v. Epling,* 73 S. E., 51 (W. Va.); *Lamkin v. Hines Lumber Co.,* 124 S. E., 694 (Ga.).

In the devise to his daughters for life with remainder to the children of each *per stirpes,* testator provided that: (1) the property was not to be divided but was to be held as common stock during the spinsterhood of the daughters or either of them; (2) upon the marriage of the last daughter the property was to be divided; (3) upon the death of either daughter, her share was to go to her children and their heirs absolutely. *Greene v. Stadiem,* 198 N. C., 445, 152 S. E., 398.

Thus there was a specific direction for a division at a specified time coupled with the gift. The division was to be had upon the marriage of the last daughter—a time when it was impossible to ascertain who might take in remainder. The children of each daughter were to take her share. The respective shares in severalty were to pass to the children of the first taker. The division was to be made among the life tenants and the children succeeded to the shares so allotted. *Collier v. Paper Corporation, supra.*

"The will gave to each daughter a life estate in the parcel that should fall to her in the equal division which the testator directed should be made among them. As to the parcel so allotted each daughter for life, her children were to take in remainder. . . . And clearly, those remainders reasonably refer to the parcels of land as allotted to the daughters." *Interior & W. V. R. Co. v. Epling, supra.*

Whether the executors or the life tenants are the donees of the power to divide is, on this record, immaterial. The sole surviving executrix was a party to the partition deed which made specific reference to the directions contained in the will. The deed was likewise executed by each of the life tenants.

It was not essential that the partition be had by court proceeding. Partition by deed is a recognized method of effectuating a separation of interest in property held in common. *Collier v. Paper Corporation, supra.*

Nor was the assessment of an owelty charge against one share in favor of another a fatal departure from the power conferred in the will. The will contemplated an equal partition according to value. *Lee v. Montague,* 173 N. C., 226, 91 S. E., 834. Oftentimes such cannot be had in kind without injury to the parties. Equality in value must be afforded by the assessment of an owelty charge. G. S., 46-10 (C. S., 3222). There is no allegation or proof of mutual mistake or fraud. Hence, if there was inequality in value of the lands allotted to the respective life tenants by the partition, they alone could complain of it. *Collier v. Paper Corporation, supra.* The children of each take what their mother agreed to accept.

The partition was had in 1882. Each life tenant immediately entered into possession of the share allotted to her. No protest or complaint was voiced by either of them. Protest now by the remaindermen, sixty years after the partition, comes too late, if, indeed, the right of protest ever rested in them.

Plaintiffs have little cause to complain. The Hyman children executed a deed to the share allotted to their mother. The youngest Hyman child became of age in 1917. No one of them sought to disavow the validity of their deed before the institution of this action. Thus they ratified the partition agreement. The Moore children, knowing that their mother had conveyed the parcel received by her, delayed action after her death until any possibility of bringing that share into hotchpot to assure a present equal partition had expired. "We waited until the last minute before seven years ran out" after the death of the mother. Even then they did not make the mother's grantee a party to the proceeding. Their present position is untenable and could not be sustained in any event.

The court below, in its charge, correctly construed the rights of the parties. The verdict and judgment must be sustained.

No error.

STATE OF NORTH CAROLINA, ON THE RELATION OF E. M. UNDERWOOD, AS CLERK OF THE SUPERIOR COURT OF LEE COUNTY, v. W. G. WATSON, STANDARD ACCIDENT INSURANCE COMPANY, AND THE NATIONAL BANK OF SANFORD.

(Filed 11 October, 1944.)

1. Clerks of Superior Courts § 23c—

Our statute, G. S., 2-22, gives the incoming clerk of the Superior Court the right to demand of his predecessor in office, and to recover, any

money in the hands of the outgoing clerk by virtue or under color of his office, which includes amounts paid to such clerk for the use of various individuals.

2. Same—

In an action by a clerk of the Superior Court against his predecessor in office for money wrongfully detained, the law allows interest by way of damages on any recovery. G. S., 109-37.

3. Pleadings § 24½: Indictment § 17—

A bill of particulars is not evidence but is filed so as to advise the defendant of the various items making up the total claimed by the plaintiff, who must recover, if at all, on the strength of the evidence offered. An attack on such bill has no place in the pleadings.

4. Clerks of Superior Courts § 23e—

Where a clerk of the Superior Court brings an action against his predecessor in office to recover funds wrongfully withheld, allegations by defendant of misconduct of other officers, in failing to pay over moneys to defendant, should be stricken. There is no liability by defendant for funds he never received.

APPEAL by plaintiff and by defendant Watson from *Bone, J.*, at July Term, 1944, of LEE. Modified and affirmed.

Civil action instituted by relator clerk against his predecessor in office and his surety for an accounting heard on motion of plaintiff to strike portions of defendant Watson's further answer.

This cause was here on former appeal from order entered on motions to strike allegations in the pleadings. *S. v. Watson,* 223 N. C., 437. The essential facts are there stated.

After the opinion on the former appeal was certified down, the plaintiff filed an amended or substitute complaint. Defendant Watson filed an amended answer in which he alleges certain further defenses. Plaintiff filed written motion to strike (1) all three paragraphs of the first further defense, and (2) a portion of paragraph 1 and all of paragraph 2 of the second further defense.

Bone, J., heard the motion at the July Term, 1944, Lee Superior Court, and at the conclusion of the argument, by consent, took the matter under advisement with authority to render judgment out of term *nunc pro tunc*. Pursuant to said agreement he entered judgment 31 July, 1944, (1) denying the motion to strike the three paragraphs constituting the first further defense, and (2) striking a part of paragraph 1 and all of paragraph 2 of the second further defense. Both plaintiff and defendant Watson excepted and appealed.

Plaintiff here interposes a demurrer *ore tenus* to defendant's first further defense for that the facts alleged do not constitute a valid defense.

Teague & Williams and Gavin, Jackson & Gavin for plaintiff.
K. R. Hoyle, J. G. Edwards, and S. R. Hoyle for defendant.

BARNHILL, J. Defendant's first further defense seems to set forth two contentions by way of defense: (1) the plaintiff is without legal capacity to sue for the several amounts which came into the hands of Watson, clerk, by virtue of his office to the use of various individuals and (2) the plaintiff is not entitled to recover damages for the wrongful detention of any such amount.

The court below, being of the opinion that this Court, on the former appeal, purposely left these questions open for decision at the time of the trial, declined to strike. In this it acted under a misapprehension. Both questions were decided.

Speaking to the first question, the Court said: "Our statutes provide two separate and distinct remedies . . . one in behalf of the clerk against his predecessor in office to recover possession of . . . money in the hands of the outgoing clerk by virtue or under color of his office." Speaking to the second, we said: "The court correctly declined to strike the allegations of damages . . . the law allows interest by way of damages on money wrongfully detained. . . . 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."

There was error in the order declining to strike the allegations contained in the first further defense. They fail to state or set out facts sufficient to constitute a valid defense. The demurrer interposed in this Court is sustained.

That portion of the first paragraph of the second further defense plaintiff seeks to strike is nothing more than an attack upon the method and manner of preparation of the bill of particulars filed under order of court and plaintiff's method of bookkeeping and auditing. It has no proper place in the pleadings.

The bill of particulars is not evidence. It was filed so as to advise the defendant of the various items which go to make up the total amount claimed by plaintiff. If plaintiff recovers at all, he must recover on the strength of the evidence offered. Defendant has denied that he is indebted to plaintiff in any amount. Under this denial and his further affirmative allegations of nonliability, he may attack any charge or debit relied on by plaintiff and prove any payment made for which he has not received credit. He has the right also to deny receipt of any one or all of the several amounts listed in the bill of particulars or to allege that, having received the same, he has duly accounted therefor. But the allegations stricken cannot be so construed.

The second paragraph charges that there were grave irregularities in the settlement of the accounts of defendant's predecessor in office; that such irregularities have continued in the handling of funds which have never come into the hands of defendant; and that many funds which should have been cleared through the clerk's office were handled by the county auditor whose methods of bookkeeping have created fictitious and false shortages.

These allegations have no relation to the issues here involved. They do not constitute an admission or denial of liability for funds wrongfully detained. Nor are they allegations by way of confession and avoidance.

The defendant has to account only for funds which came into his hands by virtue and under color of his office. He has denied the allegations of indebtedness and affirmatively asserted the falsity and lack of merit of plaintiff's claim. The misconduct of other officers may have harassed and embarrassed him in the discharge of his duties, but such misconduct does not fix him with liability for funds he has never received. The issues are drawn. It is not necessary to encumber the pleadings with the irrelevant allegations plaintiff seeks to have stricken. In granting the motion, the court below committed no error.

The order entered must be modified in accordance with this opinion.

Modified and affirmed.

IN THE MATTER OF THE WILL OF M. L. WILSON.

(Filed 11 October, 1944.)

Estates § 9e: Insurance § 24d—

A life tenant of realty has an insurable interest therein, and nothing else appearing, such tenant for life is entitled to the full amount collected upon a policy of insurance thereon taken out by him, and the remaindermen have no interest in such insurance.

APPEAL by claimants from *Rousseau, J.*, at April Term, 1944, of MITCHELL.

This proceeding began as a caveat to the will of M. L. Wilson, and pending the hearing, by agreement of parties, it was extended to embrace the present controversy. The facts are not in dispute.

M. L. Wilson was in possession of certain lands of his deceased wife as tenant by curtesy, having therein a life estate; while the heirs at law of the deceased wife, including the present claimants, were remainder-

men. During his life tenancy, Wilson insured the dwelling on the premises for $2,000 and the household contents for $500, loss payable to him. The house and contents were destroyed by fire, and the loss damage was collected by Wilson and deposited in the bank in his own name.

Wilson died, leaving a will in which he gave all his personal property, in general terms, to his son, Lane A. Wilson, without specific reference to the insurance money. He assigned several reasons for preferring his son; amongst others, that he expected Lane to take care of him during the remainder of his life, and that his deceased wife had intended to give him the home in Bakersville, but died before carrying out this intention.

There was found in the bank the major part of the insurance money, to wit, $2,000, which went into the hands of the executor. Of this amount, Mrs. Ethel Blevins and Winifred and Barbara Garvin claim two-thirds—that is, $1,333.30; Mrs. Blevins as daughter and heir at law of Mrs. Wilson, and the others as the heirs at law of Viola Garvin, a daughter of Mrs. Wilson. The other third, it is conceded, belongs to Lane A. Wilson, but as heir at law, not as legatee.

Under the agreement, claim for the said amount was filed with the executor of Wilson's will; and under stipulations of pertinent facts, the court proceeded to the hearing. From the ensuing adverse judgment, finding that the insurance money went under the will and that they had no interest therein, claimants appealed.

John C. McBee and Watson & Fouts for petitioners, appellants.
Charles Hutchins and C. P. Randolph for appellee.

SEAWELL, J. The contentions of the appealing claimants, called caveators in the record, may be stated succinctly as follows:

The insurance, under the circumstances outlined, must be presumed to have been made in the interest of all those having an interest in the property—both the tenant for life, who took out the insurance, and the remaindermen. Therefore, the loss paid must stand for the realty and go to the claimants, as heirs at law, in proportion to their interests; and the life tenancy having fallen in without any use having been made of the insurance, they are now entitled to their respective shares. They contend that this view is strengthened by the fact that their estate is one of greater dignity than that of the life tenant, and perhaps of greater money value, and that the amount of insurance taken out was apparently sufficient to cover the actual value of the property, both to the life tenant and to the remaindermen. It is further pointed out that the

testator made no specific reference to the insurance money in his will, and that it is found in the bank intact. Moreover, it is argued that the policy itself designates the property as "occupied by owner as family dwelling" and that, since there is nothing to distinguish him as life tenant, it must have been the intent of the parties to the contract of insurance to insure the whole property for the interest of both the life tenant and the remaindermen.

In support of this position, counsel cites *In re Haxall v. Shippen,* Leigh's Reports (Va.), Vol. X, 536—a case in many respects factually similar to the case at bar, and which might be at least persuasive, if the question were open here; but we fear that it is not.

Houck v. Ins. Co., 198 N. C., 303, 151 S. E., 628, cited in appellants' brief, is, we think, eliminated as an authority in this case by the statement of fact on p. 304:

". . . the said N. F. Houck informed the agent of the defendant company of the true conditions of the title to said land and house, and requested said agent to issue a policy which would protect all persons *who were interested in said house, in the event the same should be damaged or destroyed by fire.*"

It is to be noted that the controversy in that case arose over a restriction in the policy to the effect that the policy should be void "if the insured was not the owner in fee simple of said land, or was not the sole and unconditional owner of said house" (loc. cit. *id.,* p. 304); and the issue turned on whether the insurance company had knowledge of the facts; also, on the insurability of plaintiff's interest; and there was no controversy over the issue presented here.

We think the legal question raised in the present case was definitely settled in *Stockton v. Maney,* 212 N. C., 231, 193 S. E., 137, in which the factual situation seems practically identical with that now presented in the case at bar. In that case, *Mr. Justice Connor* (who also wrote the opinion in *Houck v. Ins. Co., supra*), speaking for the Court, said:

"As such tenant for life, James W. Burleson had an insurable interest in the dwelling house which was located on one of the lots situate in the town of Barnardsville and which was owned by Miria E. Burleson in fee at her death. 26 C. J., p. 34, sec. 17.

"Nothing else appearing (*Houck v. Ins. Co.,* 198 N. C., 305, 15 S. E., 628; 21 C. J., p. 954, sec. 92 [9]), the policy of insurance which James W. Burleson procured to be issued to him on the dwelling house, insured only his interest in said dwelling house. It did not insure the plaintiff, as remainderman. When the dwelling house was destroyed by fire, the amount due under the policy was paid to James W. Burleson, to cover his loss. The plaintiff had no interest in said amount, and therefore, in

no event, in the lots purchased by James W. Burleson and paid for by him out of said amount. See *Batts v. Sullivan,* 182 N. C., 129, 108 S. E., 511."

The cautious statement found in this quotation—"nothing else appearing"—no doubt had reference to fundamental differences in fact or law, such as appear in the *Houck case, supra,* and cannot be expanded to cover minor distinctions which do not affect the principle.

Notwithstanding the able manner in which the arguments were presented, we are unable to avoid the conclusion that the case at bar is controlled by *Stockton v. Maney, supra,* and, therefore, the judgment of the court below must be

Affirmed.

W. G. WATSON v. LEE COUNTY AND K. E. SEYMOUR, CHAIRMAN, G. J. CASEY, JOHN T. SALMON, JOHN W. GARNER, AND J. M. WILCOX, COMPOSING THE BOARD OF COMMISSIONERS OF LEE COUNTY.

(Filed 11 October, 1944.)

1. Pleadings §§ 14, 15—

A demurrer, on the ground that the complaint does not state a cause of action, may be interposed at any time in either trial or appellate court. Even after answering, a defendant may demur *ore tenus,* or the court may raise the question *ex mero motu.*

2. Pleadings § 20—

A plaintiff's demurrer to the answer searches the record and calls into question the sufficiency in law of the complaint, for an insufficient complaint cannot afford a basis for attack upon the answer.

3. Taxation § 40b: Clerks of Superior Court § 19½—

In an action by an ex-clerk of the Superior Court against the county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned over to the county, is demurrable as not stating a cause of action, the county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. G. S., 105-391 (k), 105-391 (s).

4. Same—

Since there is no obligation on a county to pay any advance cost or fees accrued in a tax foreclosure suit unless cast, the voluntary payment to the clerk of the Superior Court of certain amounts, less than the fees fixed by statute, does not constitute grounds for an action against the county for the remainder of the total amount of such fees.

APPEAL by plaintiff from *Bone, J.*, at July Term, 1944, of LEE.

Action to recover of defendant Lee County fees alleged to be due plaintiff as former clerk of the Superior Court. Plaintiff's demurrer to the answer was overruled and plaintiff appealed.

K. R. Hoyle, J. G. Edwards, and S. R. Hoyle for plaintiff.
Teague & Williams and Gavin, Jackson & Gavin for defendants.

DEVIN, J. The appeal in this case brings up for our consideration questions relating to the sufficiency of the pleadings. The plaintiff demurred to the answer on the ground that the defenses sought to be interposed to his complaint were insufficient in law and in substance. The court below, being of opinion the demurrer should be overruled, so adjudged, and the plaintiff appealed.

This action in its present form was instituted in consequence of the decision in *State ex rel. E. M. Underwood v. W. G. Watson and others,* 223 N. C., 437. It appears from the facts recited in that case that W. G. Watson had been removed as clerk of the Superior Court of Lee County, and that in the action against him and the surety on his bond for money and property withheld he had attempted to file a cross complaint against the county for balance alleged to be due him by the county on account of fees as clerk of the court. The cross complaint having been stricken out, the plaintiff brings this action to recover on this claim.

The plaintiff's complaint in this action is practically identical with his cross complaint in the former action, with the exception of an additional paragraph. In the first paragraph the plaintiff alleges in substance that during his term of office as clerk from 1928 to 1941 Lee County instituted 4,701 tax foreclosure suits which were prosecuted to final judgment, and that Lee County became indebted to him "as clerk for his legal fees for services therein" in the sum of $46,193.50. The docket numbers and dates of the tax foreclosure suits are set out. In the second paragraph it is alleged that in the audits heretofore caused to be made by Lee County of the clerk's office and funds the credit given plaintiff of $9,564.06 was for only a portion of the fees due him, leaving $36,629.06 unpaid. In the third paragraph of the complaint reference is made to certain audits and bill of particulars. From an examination of the record in the former suit when it was here at Fall Term, 1943, it appears that the bill of particulars and audits mentioned in this paragraph were involved only in the former suit, which was instituted in the name of *State ex rel. E. M. Underwood against W. G. Watson,* and the surety on his official bond, for the purpose of recovering money and property withheld by Watson as former clerk, and are pertinent to the

present action only as showing credits given for fees in tax foreclosure suits.

The defendant Lee County demurred to the complaint as insufficient and on the ground that the audits referred to did not show any amount due plaintiff by the county, but showed the payments referred to were made in full satisfaction. This demurrer was overruled by Judge Parker. The defendants excepted, and, having reserved right to have their exception heard if and when the case reached the Supreme Court, filed answer.

Defendants in their answer admitted the plaintiff was clerk from 1928 to 1941, and that Lee County during this period instituted many tax foreclosure suits, but denied any indebtedness to the plaintiff on account of the fees alleged; that the fees due the clerk on tax foreclosure suits are and were fixed by law, and imposed no liability upon the county therefor.

Defendants, however, alleged that in June, 1935, the Board of County Commissioners had entered into an agreement with plaintiff to pay the sum of $1.50 per suit in full settlement for all tax suits instituted by Lee County, and plaintiff agreed to accept this amount in full compensation for his services in such tax foreclosure suits, and that he has received full credit and compensation therefor for all suits instituted during his term of office, and that plaintiff has been paid and has received the amount agreed upon, in full and complete settlement, satisfaction and accord for all fees and services rendered by him in said suits, and is now estopped to make further claim. The defendants further alleged that, while the county does not now contest plaintiff's right to receive what has been paid him, they aver Lee County was not and is not indebted to plaintiff in any sum whatsoever for costs in said suits, and that he is not entitled to maintain an action for the same.

In a further defense defendants allege plaintiff has filed no claim for the indebtedness alleged in the complaint with defendant county or its treasurer; that his claim is barred by the two years and three years statutes of limitations, and that, since the costs in tax foreclosure suits if and when paid pass through the hands of the clerk or the commissioners appointed by him, his failure to collect the costs accruing to him would be attributable to his negligence and laches.

The plaintiff demurred to the answer as insufficient to constitute a valid defense to plaintiff's claim. The principal grounds of objection are: (1) that the defense is based on an agreement to pay the clerk as and for his fees in cases instituted in the Superior Court less than the amounts fixed by statute, and that such agreements are against public policy and void, and that receipt by plaintiff of less than legal fees does

not estop him from claiming the balance due; (2) that the two years statute on this record does not apply, for that it appears from the answer and exhibits that the matter of his claim was before and considered by defendants from time to time up to the time of his removal from office, and payments and credits thereon were acknowledged by defendants to and including year 1941; (3) that no facts appear in the answer upon which to base the allegations that plaintiff was guilty of laches or negligence.

In this Court the defendants demurred to the complaint and moved to dismiss on the ground that it did not state facts sufficient to constitute a cause of action. In view of the antecedent proceedings in the cause, may this Court now consider the defendants' demurrer to the complaint on this ground? We think so. It is the rule prevailing in this jurisdiction that a demurrer on the ground that the complaint does not state a cause of action may be interposed at any time in either trial or appellate court. It was said in *Snipes v. Monds,* 190 N. C., 190, 129 S. E., 413: "Even after answering in the trial court, or in this Court, a defendant may demur *ore tenus,* or the Court may raise the question *ex mero motu* that the complaint does not state a cause of action." *Garrison v. Williams,* 150 N. C., 674, 64 S. E., 783; *Aldridge Motors v. Alexander,* 217 N. C., 750, 9 S. E. (2d), 469; *Jones v. Furniture Co.,* 222 N. C., 439, 23 S. E. (2d), 309. In *Elam v. Barnes,* 110 N. C., 73, 14 S. E., 621, *Clark, J.,* used this language: "The Court here will look into the record, and if there is a want of jurisdiction or a failure to state a cause of action, it will *ex mero motu* dismiss the action, for such defect cannot be waived."

The reason of the rule is that if the basis of the action, the statement of the cause of action in the complaint, is defective in substance and insufficient, the action itself must fail, and when this is brought to the attention of the Court it will so declare.

We are not inadvertent to another rule of pleading, that plaintiff's demurrer to the answer searches the record and calls into question the sufficiency in law of the plaintiff's own pleadings, the reason being that an insufficient complaint cannot afford a basis for attack upon the answer. 41 Am. Jur., 456; 49 C. J., 443; McIntosh, p. 468; *Watertown Milk Producers Co-operative Association v. Van Camp Packing Co.,* 199 Wis., 379, 77 A. L. R., 391; *Cleveland Wrecking Co. v. Aetna Oil Co.,* 287 Ky., 154, 137 A. L. R., 352 (358). In *Hull v. Hull,* 225 N. Y., 342 (350), it was held that the plaintiff's demurrer to the answer, on the ground of insufficiency, privileged the defendant "to attack the sufficiency of the complaint under the familiar rule that such a demurrer searches the record for the first fault in pleading, and reaches back to condemn the first pleading defective in substance."

However, without undertaking to apply the rule last referred to, we think the question of the sufficiency of the complaint is presented, and after an examination of its allegations we reach the conclusion that it fails to state facts sufficient to constitute a cause of action, and that the defendants' demurrer filed in this Court should be sustained. This is so for two reasons: (1) The general statute fixes the fees of the clerk and in ordinary civil actions authorizes him to require of plaintiff payment thereof in advance (G. S., 2-26; G. S., 2-30). But a different provision is made in respect to tax foreclosure suits. Prosecution bonds are not required of the plaintiff county, nor may the clerk demand his fees in advance. It is made mandatory that the costs shall be taxed against the defendants in each case, and "after and when collected shall be paid to the officers entitled to receive the same." The amount of the fees in some years was reduced to one-half the statutory fees in other cases. The statutes relating to costs in tax foreclosure suits as codified in 3rd Volume of General Statutes, contain the provision that "upon collection of said costs, either upon redemption or upon payment of the purchase price at foreclosure sale, the fees allowed officers shall be paid to those entitled to receive the same." G. S., 105-391 (k). "After delivery of the deed and collection of the purchase price, the Commissioner shall apply the proceeds as follows: (1) to payment of all costs of action . . ." G. S., 105-391 (s); Public Laws 1929, ch. 334; Public Laws 1931, ch. 260; Public Laws 1933, ch. 148; Public Laws 1933, ch. 560. Thus it appears that the County of Lee, in instituting tax foreclosure suits, was under no obligation to pay the costs in advance, or ever unless finally cast. The clear implication is that the clerk's fees should be received by him only when and if collected from the defendants or from proceeds of foreclosure sales. Only in the event of judgment in favor of a defendant would the costs be taxed against the county. It is alleged here that all the suits instituted by Lee County were prosecuted to judgment against the various defendants. Since there was no obligation on the county to pay any of the costs or the fees which might or had accrued to the clerk, its voluntary payment of certain amounts to the clerk, less in the aggregate than the fees fixed by statute for those suits, may not be said to constitute grounds for an action against the county for the remainder of the total amount of fees. There is no allegation of valid contract by the county to pay his fees in these suits, and plaintiff declares only on the obligation of the county as plaintiff in the suits to pay all his fees.

(2) There is no allegation in the complaint, or admission in the answer by way of aider, that in any of the suits the costs including clerk's fees were collected and turned over to the county. In the absence

of such an allegation we do not discover grounds of liability to the plaintiff. In the complaint it is alleged simply that the tax foreclosure suits were reduced to judgment and docketed. Whether there were redemptions, payments, or foreclosure sales completed does not appear. It is true the defendants say in their answer that since the disbursement of the proceeds of foreclosure sales must come under the supervision of the clerk, he would be guilty of laches in not securing his fees therefrom, but there is no averment that in any specific suit this occurred. There is no allegation in the complaint or admission in the answer that by purchases at foreclosure sales the county became liable to the clerk for his fees, or had failed to pay same.

Whether the plaintiff's failure to allege in his complaint that before suit he had presented his claim, as required by G. S., 153-64, is supplied and aided by the allegations in the answer we need not decide.

The plaintiff has argued here with much force that any agreement between plaintiff and defendants whereby the plaintiff should receive as fees for the services required of him as a public officer in tax foreclosure suits instituted by the county a compensation less than that fixed by statute would be void as against public policy. This view is supported by the decisions in most jurisdictions and by text writers. 17 C. J. S., 588; 43 Am. Jur., 159; 70 A. L. R., 972 (annotation); 118 A. L. R., 1458; *Glavey v. U. S.,* 182 U. S., 595. And these authorities are equally in support of the view that the officer is not thereby estopped to claim the full compensation fixed by statute, less the amount received. *Salley v. McCoy,* 182 S. C., 249, 189 S. E., 196. However, since there is no allegation here that defendant county was obligated to pay the clerk's fees in the first instance, or that it withheld his compensation and paid him a less sum, or contracted to do so, the principle asserted is not called into operation by the facts alleged in the complaint or answer.

Since we are of opinion that the complaint is insufficient and that the defendants' demurrer thereto should be sustained, it is unnecessary to decide other questions raised by plaintiff's demurrers to other defenses set up in the answer, or rule on plaintiff's motions to strike portions of the answer.

The demurrer to the complaint is sustained and the cause remanded to the Superior Court of Lee County where the plaintiff may have leave to amend as provided by statute, if so advised. G. S., 1-131; G. S., 1-141; *Cody v. Hovey,* 216 N. C., 391, 5 S. E. (2d), 165; *Cody v. Hovey,* 217 N. C., 407, 8 S. E. (2d), 479.

Demurrer to complaint sustained.

THEODORE R. ANGE, CLARA E. ANGE AND HENRY L. ANGE v. A. LLOYD OWENS, MILDRED OWENS AND EDWARD L. OWENS.

(Filed 11 October, 1944.)

1. **Constitutional Law § 4a—**

The Legislature has no power to validate a void judgment, or indeed to give validity of any sort to a proceeding absolutely void.

2. **Judgments § 22h: Clerks of Superior Court § 3—**

The former statute, Michie's Code, sec. 597 (b), providing that no judgment shall be entered by the clerk except on Monday, unless otherwise provided, makes void and of no effect such judgment of the clerk on any other day. G. S., 1-215, and 1-215.1 have changed this requirement.

3. **Adverse Possession § 13f: Judgments § 22h—**

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status, as to any title by adverse possession must be determined by the twenty-year statute, G. S., 1-39, rather than the seven-year statute, G. S., 1-38.

APPEAL by defendants from *Thompson, J.*, at January Term, 1944, of WASHINGTON.

This action was brought by the plaintiffs to clear the title of their interests in certain lands described in the complaint and to have adjudged the several interests of the parties plaintiff and defendant therein as tenants in common.

Since it appeared to the court that the rights respectively of the plaintiffs and the defendants depended upon the validity of a certain deed under which the defendants claim, made under an order of court in a tax foreclosure proceeding theretofore pending in Washington County, in which proceeding the persons now before the court were parties or to which they were privies, the court below treated the present action as a motion in that cause, and by the acquiescence of the parties, proceeded to find the facts and to enter his judgment.

Upon these facts it appears that all of the parties claim under Levi H. Ange, who owned the disputed lands in fee, which, upon the death of Levi, descended to his children, Henry, Theodore, Clara and Lucy, subject to the dower interest of his widow, Cornelia, which has now terminated.

Some time in 1931, Lucy Ange Radford and her husband conveyed an undivided one-fourth interest in the land to A. L. Owens, now deceased, to whom A. Lloyd Owens, Edward L. Owens, and Mildred Owens, the defendants, are heirs at law.

Shortly before the death of A. L. Owens, Sr., Edward L. Owens instituted an action in Washington County against the plaintiffs herein, and also his father, A. L. Owens, as codefendant, and others, to foreclose a tax lien on these lands, claiming that he had purchased the same at a tax sale for taxes for the year 1930.

It appears that at the foreclosure sale one E. G. Arps bid off the land as agent for A. L. Owens, Sr. The sale was confirmed, and in the judgment of confirmation, it was ordered that the commissioner make a deed to the lands to the said E. G. Arps, which was done. Arps conveyed the lands, without consideration, to A. L. Owens, who went in possession thereof.

The defendants claim sole seizin to the entire land through this deed to Arps—*mesne* conveyance to A. L. Owens, Sr., and inheritance from him.

It is found as a fact, and not disputed, that the judgment ordering the sale was rendered on Friday, 24 March, 1933, and the judgment confirming the foreclosure sale and ordering deed made to Arps was rendered on Tuesday, 16 May, 1933. Neither judgment, therefore, was rendered on Monday as required by the statute, but respectively on Friday and Tuesday. It is the contention of the plaintiffs that the judgments are, therefore, void. The defendants contend that they are valid, or that, at most, they were merely irregular and that this irregularity was cured by the statute, G. S., 1-215.1.

There are also questions raised as to laches of the plaintiffs in failing to apply for relief promptly, of the bar of statutes of limitations; and as to the trust arising by virtue of the fact that A. Lloyd Owens, Sr., a cotenant, bought the land for his own benefit. The basis of decision does not require them to be set out in detail.

Rodman & Rodman for defendants, appellants.

John A. Mayo, Junius D. Grimes, and Z. V. Norman for plaintiffs, appellees.

SEAWELL, J. As the case hinges on the question whether these judgments are absolutely void or merely irregular, it will not be necessary to consider other contested features.

The law has undergone various changes with respect to the days on which the clerk might render judgment under the jurisdiction given him by the Civil Procedure Act of 1921 (Extra Session) and amendments. At the time the judgments challenged by the plaintiffs as void were rendered—respectively, Friday, 24 March, 1933 (ordering sale), and Tuesday, 16 May, 1933 (confirming sale and ordering deed made)—

section 597 (b) of Michie's Code, chapter 92, s. 10, Extra Session of 1921, chapter 68, Public Laws of 1923, fixed the time for entry of such judgments. It reads in part as follows: "No judgment shall be entered by the clerk, except as herein otherwise provided, except on every Monday of each month." No other provision of the law at that particular time authorized the rendition of a judgment of this sort on any other day.

As to whether a judgment of this sort, rendered by the clerk of the court on any other day except the Mondays designated by the statute, is void or irregular is no longer an open question here. In *Beaufort County v. Bishop,* 216 N. C., 211, 4 S. E. (2d), 525, *Mr. Justice Winborne,* speaking for the unanimous Court, said:

"In the present case the clerk, by entering two decrees, one on 10 February, 1939, and the other on 21 February, 1939, has undertaken to confirm the sale and to order title made and executed. The first of these orders was on Friday, and the second on Tuesday. Therefore, the clerk having undertaken to act at a time when he had no jurisdiction to act, the purported orders of confirmation are void and give no force or validity to the deed of the commissioner purporting to be executed thereunder. *McCauley v. McCauley,* 122 N. C., 288, 30 S. E., 344."

That G. S., 1-215.1, chapter 301, sec. 4, Public Laws of 1943, was directly intended to cover a situation of this kind, and to validate judgments thus rendered, there can be no question. However, it is well understood that the Legislature has no power to validate a void judgment, or indeed to give validity of any sort to a proceeding absolutely void, since "*ex nihilo nihil fit* is one maxim which admits of no exceptions." *Chemical Co. v. Turner,* 190 N. C., 471, 130 S. E., 154.

We have considered the question of the bar of the statute of limitations, and are of opinion that in this case, since the defendants hold under a void deed as color of title and must, for the purposes of this motion, be regarded as tenants in common with the plaintiffs, their status as to any title by adverse possession under color they may now assert must be determined by G. S., 1-39, rather than G. S., 1-38. The requisite twenty years has not expired. Whether any statute of limitations is available to defendants during the pendency of the foreclosure proceeding, it is unnecessary for us to decide.

The judgment from which appeal is taken was correct and is

Affirmed.

STATE v. LUCILLE DEGRAFFENREID.

(Filed 11 October, 1944.)

1. Jury § 1—

The judge shall decide all questions as to the competency of jurors, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law.

2. Same—

Upon challenge for cause, in a murder trial, of a juror, who had formed some opinion adverse to the prisoner, where such juror states that he could render a fair and impartial verdict entirely in accordance with the law and the evidence, uninfluenced by any previously formed opinion, the court is justified in a finding of indifferency.

3. Same—

Objection to a juror for alleged bias or misconduct, during the trial of a murder case, is addressed to the court's discretion, and an adverse ruling, upon evidence and findings by the court below, will not be disturbed.

APPEAL by defendant from *Bone, J.*, at July Term, 1944, of LEE.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Ollie Moore.

Upon the trial, and after the defendant had exhausted her peremptory challenges, B. M. Pattishall was called as a juror and accepted by the solicitor. He was challenged by the defendant for cause, *propter affectum,* in that he had formed an opinion adverse to the defendant from two or three articles published in *The Sanford Herald.*

On being questioned by defendant's counsel, the prospective juror stated that it would require evidence to remove the unfavorable impression from his mind. Whereupon the court propounded a number of inquiries, ending with the following:

Q. "Is your mind in such a state that you can hear the evidence of the witnesses and the charge of the court as to the law and render a fair and impartial verdict based solely upon the evidence and the charge of the court without being influenced by what you read in the newspaper or any impression that you got from it?"

A. "I think so."

Q. "Are you sure of that?"

A. "I think so."

The challenge to the juror was thereupon overruled. Exception. Counsel for defendant then asked the court to excuse the juror in his discretion. The request was declined.

After the evidence was in, and before the argument had been completed, counsel for defendant notified the court, in chambers, in the presence of the solicitor, that one of the jurors, J. P. Smith, had been heard, during the noon recess, to express an unfavorable opinion and bias against the defendant, both on account of her testimony and her race. The court stated that the matter would be investigated, after verdict, if adverse to the defendant.

Verdict: Guilty of murder in the second degree.

The court then examined into the alleged bias or misconduct of the juror, J. P. Smith, and found on sufficient evidence (1) that the juror had not discussed the matter as alleged; (2) that he had not made the statements reported to defendant's counsel; (3) that the juror was impartial and had committed no impropriety in regard to the case. Whereupon the motion to set aside the verdict was denied. Exception.

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.

W. D. Siler and 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, and again at the Fall Term, 1943, reported in 223 N. C., 461, 27 S. E. (2d), 130. It is here now on questions of alleged jury defect and bias or misconduct.

First, in respect of the challenge to the juror Pattishall, it is observed that while he had formed some opinion adverse to the defendant, he further stated he could render a fair and impartial verdict entirely in accordance with the law and the evidence, uninfluenced by any previously formed opinion. This suffices to support the court's finding of indifferency. *S. v. English,* 164 N. C., 497, 80 S. E., 72. Similar rulings, under almost identical circumstances, were upheld in the cases of *S. v. Dixon,* 215 N. C., 438, 2 S. E. (2d), 371; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154; *S. v. Foster,* 172 N. C., 960, 90 S. E., 785; and *S. v. Banner,* 149 N. C., 519, 63 S. E., 84.

It is provided by G. S., 9-14, that the judge "shall decide all questions as to the competency of jurors," and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. *S. v. Winder,* 183 N. C., 776, 111 S. E., 530; *S. v. Bailey,* 179 N. C., 724, 102 S. E., 406; *S. v. Bohanon,* 142 N. C., 695, 55 S. E., 797; *S. v. Register,* 133 N. C., 747, 46 S. E., 21; *S. v. DeGraff,* 113 N. C., 688,

18 S. E., 507; *S. v. Green,* 95 N. C., 611. The ruling in respect of the impartiality of the juror Pattishall presents no reviewable question of law. *S. v. Bailey, supra; S. v. Bohanon, supra.*

Second, as bearing on the alleged bias or misconduct of the juror Smith, it is enough to say the ruling of the trial court, on the evidence and facts found therefrom, puts an end to the matter. *S. v. Montgomery,* 183 N. C., 747, 111 S. E., 173; *S. v. Tilghman,* 33 N. C., 513. It accords with what was said in *S. v. DeGraff, supra,* in respect of a situation quite similar to the one here presented. The motion was addressed to the court's discretion. *S. v. Maultsby,* 130 N. C., 664, 41 S. E., 97; *S. v. Council,* 129 N. C., 511, 39 S. E., 814; *S. v. Lambert,* 93 N. C., 618; *S. v. Miller,* 18 N. C., 500. The exception based on this part of the record is not sustained. *S. v. Boggan,* 133 N. C., 761, 46 S. E., 111; *S. v. Harper,* 101 N. C., 761, 7 S. E., 730; *S. v. Godwin,* 27 N. C., 401.

As no reversible error has been made to appear, the verdict and judgment will be upheld.

No error.

GEORGE W. SANDLIN v. JOHN G. YANCEY ET AL.

(Filed 11 October, 1944.)

1. Pleading § 13½—

A complaint is not to be overthrown by demurrer, if in any portion or to any extent, it states facts sufficient to constitute a cause of action.

2. Same—

Upon the examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, G. S., 1-151 (C. S., 535), and every reasonable intendment and presumption given the pleader, and the demurrer overruled unless the pleading is wholly insufficient.

3. Contracts § 23—

A complaint, alleging breach of a contract between plaintiff and defendant, whereby plaintiff and another were to survey lands purchased by defendant, divide the same into lots and sell the lots, the proceeds to be used first to pay the purchase price for the lands, all costs and expenses and taxes and the remaining lands held by defendant for the benefit of all three parties to the contract, that all costs, expenses and taxes have been paid according to the contract, that defendant holds the remaining lands claiming same as sole owner, and plaintiff asking for an accounting, states a cause of action and there was error in sustaining a demurrer.

APPEAL by plaintiff from *Pless, J.,* at June Term, 1944, of McDOWELL.

Civil action to impress trust upon "balance of lands left" after payment of purchase price, interest and costs, and for an accounting.

The complaint, in summary, alleges:

1. On 12 April, 1924, pursuant to agreement between the plaintiff, D. W. Adams and John Yancey, the said John Yancey purchased several tracts of land in McDowell County for $70,000, the avowed purpose being "to subdivide it into lots and sell said lots to prospective purchasers."

2. Contemporaneously with the execution of the deed of conveyance, the said parties entered into a written contract by the terms of which the plaintiff and D. W. Adams were "to survey and subdivide said land into lots" and sell the same, the proceeds thus obtained to be used, first, to "pay back" to John Yancey the money advanced by him as the purchase price of the land, with interest; second, to pay all costs, including taxes, said costs to be borne equally by the three parties to the contract; and, then, "the residue or balance" of the net profits to be divided equally among them.

It was further stipulated that after the purchase money with interest thereon had been paid back, and all costs paid, including taxes, the said John Yancey "is to hold any balance of the said lands in his name" until either or both of the other parties "shall call for a deed or a division of the remaining lands, and in the event a division is asked for" the said John Yancey "agrees to execute deed to D. W. Adams for one-third interest in said lands left, as aforesaid, and to George W. Sandlin one-third interest in the lands left, as aforesaid."

3. The plaintiff and D. W. Adams surveyed the land, subdivided it into lots, and over a period of years sold many of them and surrendered the proceeds thereof to John Yancey in accordance with the agreement; that later by mutual consent, rather than sacrifice the property on a depressed market, the development was held in abeyance to await a more favorable time.

4. In 1934, John Yancey purchased the interest of D. W. Adams in the contract aforesaid, and thereafter the plaintiff and John Yancey continued under its terms.

5. John Yancey died in 1941, leaving a last will and testament in which he devised the lands in question to his three daughters, defendants herein.

6. The plaintiff and the defendants herein continued their operations under the contract aforesaid until 21 October, 1943, when plaintiff was notified by the defendants that they did not desire to continue the arrangement further; that the defendants are now claiming the land as sole owners to the exclusion of plaintiff's interest therein.

Wherefore, plaintiff prays for declaration and impression of trust and for an accounting.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. G. S., 1-127, clause 6. Sustained; exception.

The plaintiff appeals, assigning error.

Paul J. Story for plaintiff, appellant.

W. R. Chambers and W. D. Lonon for defendants, appellees.

STACY, C. J. Conceding that the complaint contains no allegation of any valuable equity in "the balance of the said lands," after the repayment of the purchase price, with interest and costs, except by inference perhaps, to which a trust, if declared, could attach under the principles announced in *Peele v. LeRoy,* 222 N. C., 123, 22 S. E. (2d), 244, and cases there cited, still we think the allegations are broad enough to withstand the demurrer, at least to the extent of calling for an accounting.

It is not contended that the title to the lots heretofore sold could be disturbed, or that plaintiff's equity attaches until after the purchase money, with interest, etc., has been repaid from the sale of lots. Only after this has been done was it agreed that John Yancey should stand seized of "the remaining lands" to the use of all the parties—each to be entitled to one-third interest in the "lands left."

The complaint is not to be overthrown by demurrer, if in any portion or to any extent, it states facts sufficient to constitute a cause of action. *Cotton Mills v. Mfg. Co.,* 218 N. C., 560, 11 S. E. (2d), 550; *Pearce v. Privette,* 213 N. C., 501, 196 S. E., 843. It must be fatally defective before it will be rejected as insufficient. *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874. "Upon examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, C. S., 535, and every reasonable intendment and presumption will be given the pleader, and the demurrer overruled unless the pleading is wholly insufficient"—First headnote, *Leach v. Page,* 211 N. C., 622, 191 S. E., 349.

Viewing the complaint with the degree of liberality which the law requires, G. S., 1-151, it appears sufficient to survive the demurrer.

Reversed.

MRS. GOLIE D. GUNTER v. CURTIS V. DOWDY, HOWARD N. BUTLER AND ROSCOE WILLIAMS.

(Filed 11 October, 1944.)

1. Judgments § 22b—

The clerk of the Superior Court has authority, upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from an irregular judgment or one taken against him by mistake, inadvertence, surprise, or excusable neglect; and, on appeal in such cases from the clerk, the judge shall hear and pass upon the matter *de novo*, finding the facts and entering his judgment accordingly. G. S., 1-220.

2. Judgments § 22e—

Where plaintiff issued summons and filed complaint, serving both on defendant, who in apt time employed an attorney to make answer and resist the suit, and judgment by default was taken by plaintiff, no answer having been filed in consequence of the illness and death of the wife of defendant's attorney and the prolonged illness of the attorney himself, such circumstances constitute excusable neglect under G. S., 1-220.

3. Judgments § 22c—

On motion, within the year, to set aside a judgment by default or excusable neglect, the findings by the court are conclusive when supported by competent evidence.

4. Judgments § 22e: Attorney and Client § 7—

Excusable neglect of an attorney, who fails to file an answer for the defendants, may not be attributable to his clients.

APPEAL by plaintiff from *Parker, J.*, at March Term, 1944, of CHATHAM.

This is an appeal by the plaintiff from a judgment of the judge presiding vacating a judgment by default made by the clerk that the plaintiff was the owner of the land described in the complaint.

The plaintiff instituted this action in Chatham County against the defendant and on 8 March, 1943, in the absence of any answer, obtained from the clerk by default a judgment adjudicating her to be the owner of the land described in the complaint, and that any claim of title thereto by the defendants was wrongful and cast a cloud upon plaintiff's title. Subsequently the defendants by proper motion applied to the clerk to have said default judgment vacated on account of excusable neglect, and the clerk allowed said motion and vacated said default judgment on 28 January, 1944; whereupon the plaintiff appealed from the order of the clerk vacating his former default judgment to the judge presiding, who rendered judgment at the March Term, 1944, of Chatham, vacating the former judgment by default entered by the clerk and from

this action of the judge presiding the plaintiff appealed to the Supreme Court, assigning errors.

K. R. Hoyle for plaintiff, appellant.
Walter D. Siler for defendants, appellees.

SCHENCK, J. The question posed by this appeal is: Was the clerk authorized to vacate his former judgment by default adjudging the plaintiff to be the owner of the land described in the complaint, and was the judge presiding authorized, on appeal from the clerk, to vacate said judgment by default? We are of the opinion, and so hold, that both the clerk and the judge presiding were so authorized.

The answer to the question posed lies in G. S., 1-220 (formerly C. S., 600), which reads: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion *de novo.*"

The judge in his judgment found as facts that the appeal was taken from the order of the clerk vacating his former order by default; that the plaintiff caused summons to issue against the defendants, which summons with copies of the complaint were duly served on the defendants; that judgment by default, in the absence of answer, was entered by the clerk adjudging plaintiffs to be the owner of the land described in the complaint; that defendants in apt time employed W. P. Horton, an attorney, to file answer for them and do such other things as were deemed necessary for their defense, and made him aware of their defense to the action, but owing to the illness and death of said attorney's wife and the prolonged illness of the attorney himself no answer was filed; that the defendants have, *prima facie,* a good title to the land involved; that the clerk entered order vacating his former order by default adjudging plaintiff to be the owner of the land involved; that the failure of defendants' attorney, W. P. Horton, to file answer, under the circumstances of this case, constituted excusable neglect. Since there was supporting evidence of each of the findings of fact of the judge such findings are conclusive. *Lumber Co. v. Cottingham,* 173 N. C., 323, 92 S. E., 9; *Weil v. Woodard,* 104 N. C., 94, 10 S. E., 129; *Gaylord v. Berry,* 169 N. C., 733, 86 S. E., 623; *Manning v. R. R.,* 122 N. C., 824, 28 S. E.,

963; and *Stith v. Jones,* 119 N. C., 428, 25 S. E., 1022. Since the failure to file an answer was due to the excusable neglect of the attorney employed in apt time by the defendants, and since the defendants made such attorney aware of their defense to the action, any failure or neglect of the attorney to file the answer could not be attributable to the defendants. *Schiele v. Ins. Co.,* 171 N. C., 426, 88 S. E., 764; *English v. English,* 87 N. C., 497; *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269; *Mann v. Hall,* 163 N. C., 50, 79 S. E., 437.

We hold that the judge presiding was authorized to enter the judgment appealed from, and that his conclusion that the failure to file answer was due to excusable neglect of defendants' attorney, and that such neglect was in nowise attributable to the defendants themselves is sustained by the facts found, which findings were supported by competent evidence, and for these reasons the judgment of the judge presiding should be affirmed. It is so ordered.

Affirmed.

STATE v. CLARENCE PARKER AND EDWARD TART.

(Filed 11 October, 1944.)

1. Criminal Law § 1b—

An attempt to commit a crime is an indictable offense, and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making the specific charge, or on one which charges a complete offense. G. S., 15-170.

2. Same—

An attempt is an overt act in part execution of a crime, which falls short of actual commission, but which goes beyond mere preparation to commit.

3. Receiving Stolen Goods § 2—

An unlawful attempt to feloniously receive stolen property, knowing it to have been stolen, is composed of two essential elements: (1) guilty knowledge at the time that the property had been stolen; and (2) the commission of some overt act with the intent to commit the major offense.

4. Receiving Stolen Goods § 6—

In a prosecution for larceny and receiving, where the State's evidence tended to show that strangers to defendants stole a barrel of molasses, hid it among some trees in a pasture, offered to sell it to defendants, who agreed to buy at a price considerably below the market and went in the nighttime to inspect and remove their purchase and were in the act of having it rolled out to their truck when the officer arrived, there is sufficient evidence to convict of an attempt to feloniously receive stolen

property, knowing it to have been stolen, and motion of nonsuit, G. S., 15-173, was properly refused.

APPEAL by defendants from *Johnson, Special Judge,* at April Term, 1944, of JOHNSTON. No error.

Criminal prosecution under a bill of indictment charging "larceny and receiving" of one barrel of molasses.

There was no evidence that these defendants stole the barrel of molasses described in the bill. The evidence offered was submitted to the jury on the second count and on the lesser offense of attempt to commit the felony charged. The jury returned the verdict "Guilty of an attempt to feloniously receive stolen property knowing that the same had been stolen." There was judgment on the verdict and defendants appealed.

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

Claude C. Canaday for defendant, appellant, Clarence Parker.

J. R. Barefoot for defendant, appellant, Edward Tart.

BARNHILL, J. An attempt to commit a crime is an indictable offense, and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making the specific charge, or one which charges a completed offense. G. S., 15-170 (C. S., 4640); *S. v. Colvin,* 90 N. C., 718; *S. v. Addor,* 183 N. C., 687, 110 S. E., 650; *S. v. Carivey,* 190 N. C., 319, 129 S. E., 802; *S. v. Batson,* 220 N. C., 411, 17 S. E. (2d), 511. While this is conceded, defendants insist that their demurrers to the evidence under G. S., 15-173 (C. S., 4643) should have been sustained.

An unlawful attempt to feloniously receive stolen property, knowing it to have been stolen, is composed of two essential elements: (1) guilty knowledge at the time that the property had been stolen, *S. v. Spaulding,* 211 N. C., 63, 188 S. E., 647; *S. v. Morrison,* 207 N. C., 804, 178 S. E., 562; *S. v. Batson, supra;* and (2) the commission of some overt act with the intent to commit the major offense. *S. v. Addor, supra; S. v. Batson, supra.*

"In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense at-

tempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." 8 R. C. L., 279.

It is an overt act in part execution of a criminal design which falls short of actual commission but which goes beyond mere preparation to commit. *S. v. Addor, supra; S. v. Carivey, supra; S. v. Batson, supra.*

Consideration of the evidence offered in the light most favorable to the State leads us to the conclusion that there was evidence of each constituent element of the crime of which defendants were convicted, sufficient in probative force to sustain the finding and verdict of the jury.

Two young men, strangers to defendants, stole a barrel of molasses, carried it to the pasture of one McLamb, and concealed it in a bunch of gum trees inside the pasture, and covered it with hay and green limbs. They approached defendants who agreed to buy. They arranged to go in the nighttime to inspect or remove the molasses. When they got to or near the gate to the pasture, they turned off the automobile lights. Seeing McLamb coming down the road, they immediately left, drove around, and came back some time later. The larceners then proceeded to roll the barrel of molasses out from the place of concealment towards the pasture gate where the automobile had stopped when "Mr. Brad (the officer) sort of interferes a little bit and we takes off."

These circumstances are such as to charge defendants with notice that they were dealing with stolen property. They are sufficient to sustain the finding that they did know.

There is testimony in the record tending to show that defendants went to inspect the molasses preliminary to a decision to buy it. But there is also evidence that they had bought it at a price considerably below its market value and then in the nighttime went to the place of concealment and were in the act of having it rolled out to their truck. What is more natural than to assume from these circumstances that they were in the act of receiving the property when the officer arrived? All that prevented consummation was the hasty action of the officer. This was more than an act of mere preparation. It was an act that amounted to the commencement of the consummation, an act apparently adapted to produce the result intended. *S. v. Addor, supra.* Thereafter they attempted to get possession of the property, claiming it as their own.

The evidence was sufficient to support the finding that defendants, with the intent to feloniously receive stolen property, knowing it to have been stolen, made an attempt so to do within the meaning of the law.

The one other exception brought forward fails to disclose prejudicial error.

The verdict and judgment must be sustained.

No error.

STATE v. PAUL EDWARDS.

(Filed 11 October, 1944.)

1. Criminal Law § 29b—

In a prosecution for incest, G. S., 14-178, and for carnal knowledge of a female under sixteen years of age, G. S., 14-26, allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge.

2. Same—

The general rule is that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, where the two are disconnected and in no way related; but there is an equally well established exception to this rule, that proof of the commission of like offenses may be competent to show intent, design, guilty knowledge or identity of person or crime.

3. Criminal Law § 2—

Intent is one of the elements necessary to sustain a charge of an attempt to commit a criminal offense.

APPEAL by defendant from *Parker, J.*, at June Term, 1944, of JOHNSTON. No error.

The defendant was indicted for incest, and also for carnal knowledge of a female under sixteen years of age. G. S., 14-178, and G. S., 14-26. The unlawful acts charged were alleged to have been committed on defendant's daughter Margaret Mae Edwards, who was then fourteen years of age. By consent the two bills of indictment were consolidated and tried together. The jury returned verdict of guilty of attempt to commit both offenses. From judgment imposing sentence the defendant appealed.

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

Levinson & Pool for defendant.

DEVIN, J. There was evidence sufficient to warrant submission of the case to the jury for an attempt to commit the offenses charged in the bills of indictment. The only assignment of error brought forward is to the ruling of the court below in admitting in evidence, over objection, the testimony of another daughter of the defendant, an older sister of Margaret Mae Edwards, that within the past three years the defendant several times had made to her improper advances of a similar nature. This testimony was admitted by the court solely for the purpose of showing intent or guilty knowledge on the part of the defendant, and the jury was so instructed. In this ruling we find no error.

Undoubtedly the general rule is that evidence of a distinct substantive offense is inadmissible to prove another and independent crime where the two are disconnected and in no way related, but there is an equally well established exception to this rule that proof of the commission of like offenses may be competent to show intent, design, guilty knowledge, or identity of person or crime. *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186; *S. v. Harris,* 223 N. C., 697; Wigmore, secs. 300-306.

Here, in addition to evidence of incestuous attempts upon the person of the State's witness by her father, it was competent for the State to offer evidence tending to prove similar attempts and advances to another daughter for the purpose of showing the intent as well as the unnatural lust of the defendant in attempting to commit the crimes charged in the bills of indictment. Intent is one of the elements necessary to sustain a charge of an attempt to commit a criminal offense. *S. v. Batson,* 220 N. C., 411, 17 S. E. (2d), 511; *S. v. Addor,* 183 N. C., 687, 110 S. E., 650; *S. v. Hewett,* 158 N. C., 627, 74 S. E., 356.

In *S. v. Ballard, post,* 855, a similar case recently decided by this Court, the admissibility of evidence of this character was upheld.

In the trial we find

No error.

STATE v. JAMES STEWART.

(Filed 11 October, 1944.)

1. Automobiles § 36—

In a criminal prosecution for the operation of a motor vehicle after the operator's license had been revoked, where the State's evidence tended to show that defendant was tried and convicted in recorder's court, for operating a motor vehicle while under the influence of intoxicants, as James Stewart had his license revoked for one year, that the records show no license issued to James Stewart but show one to James Tyree Stewart of the same county as defendant, who admitted that his name

was James Tyree Stewart when the highway patrolman went to take up his license, and that defendant was seen operating a motor vehicle upon the public highway within one year of such conviction and there had been no reinstatement of the revocation, there is sufficient evidence to sustain a conviction and motion for nonsuit, G. S., 15-173, was properly refused.

2. Same—

Evidence, that defendant had been convicted in recorder's court on an indictment for operating an automobile while under the influence of intoxicants, was competent and pertinent on the question as to whether a driver's license issued to defendant had been legally revoked. G. S., 20-17.

APPEAL by defendant from *Bone, J.*, at January Term, 1944, of HARNETT.

Criminal prosecution upon warrant charging that defendant "did unlawfully and willfully operate a motor vehicle upon the public roads and highways after his operator's license had been revoked," tried in Superior Court upon appeal thereto by defendant from judgment of recorder's court of Harnett County.

Verdict: Guilty.

Judgment: Six months in jail to be assigned to work the roads.

Defendant appeals to the Supreme Court and assigns error.

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

Neill McK. Salmon for defendant.

WINBORNE, J. The defense of defendant is predicated upon the theory that the State has never issued to him a driver's license to operate an automobile on the public highways, and, hence, there could not have been a revocation of something that never existed. Upon this theory the defendant in the first instance presses for error the refusal of the court to grant his motions aptly made for judgment as in case of nonsuit. G. S., 15-173. We are of opinion, however, that the evidence is sufficient to take the case to the jury.

In this connection the evidence for the State tends to show these facts: That on 24 September, 1943, defendant was seen operating a motor vehicle upon the public highways of Harnett County; that a revocation of license was issued against James Stewart under date 4 February, 1943, for one year ending 4 February, 1944, for conviction in Dunn recorder's court, and on 24 September, 1943, there had been no reinstatement on that revocation; that the records show no entry of a license being issued to James Stewart, but did show issuance of a license

to James Tyree Stewart, whose address was given at the time as Erwin, North Carolina, Box 293; that when the State patrolman went to take up the license, pursuant to revocation, defendant said that his name was James Tyree Stewart, and on being told that his driver's license had been revoked he stated to the patrolman that he had lost his license; that the patrolman read a notice of revocation to him; that James Stewart, the defendant in the present prosecution, is the person tried in the recorder's court of Dunn on 4 February, 1943, upon charge of operating a motor vehicle while under the influence of intoxicating beverage.

On the other hand, defendant as witness for himself testified: "My name is James Felton Stewart but they call me 'James.'" He denied that he told the patrolman (1) that his name was James Tyree Stewart or (2) that he had lost his license. He admitted that he was tried in Dunn for reckless driving and was found guilty and that the court ordered his driver's license revoked. He stated that he had never applied to the authorities, local or otherwise, for any license to operate an automobile in this State.

This evidence presents an issue for the jury.

Defendant next contends that the court erred in permitting a witness for the State to testify that the defendant was tried in the recorder's court of Dunn on 4 February, 1943, on indictment for operating an automobile while under the influence of intoxicating beverage. This evidence was pertinent to the question as to whether a license issued to defendant had been legally revoked. G. S., 20-17. For this purpose it was competent.

Other assignments have been considered. We find no sufficient ground upon which the judgment below should be disturbed.

No error.

STATE v. HILL ALLEN.

(Filed 11 October, 1944.)

Bastards § 2—

Willfulness is an essential element of the offense of failure to support an illegitimate child, G. S., 49-2, and a verdict—"guilty of failure to support and maintain his bastard child"—is insufficient to support a judgment.

APPEAL by defendant from *Rousseau, J.*, at March Term, 1944, of WILKES.

Criminal prosecution upon bill of indictment charging that defendant willfully failed, refused and neglected to support and maintain his illegitimate child. G. S., 49-2.

Verdict: Guilty of failure to support and maintain his bastard child.

Judgment: Pronounced.

To the refusal of the court to set aside the verdict and to order a new trial, and to judgment pronounced, defendant excepts and appeals to the Supreme Court and assigns error.

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

J. Allie Hayes and Trivette & Holshouser for defendant.

WINBORNE, J. Willfulness is an essential element of the offense with which defendant is charged and for which he was tried in Superior Court. G. S., 49-2. *S. v. Moore,* 220 N. C., 535, 17 S. E. (2d), 661; *S. v. Clarke,* 220 N. C., 392, 17 S. E. (2d), 468; *S. v. Tyson,* 208 N. C., 231, 180 S. E., 85, and other cases. This element is lacking in the verdict as returned. Hence, the verdict is insufficient to support a judgment. *S. v. Cannon,* 218 N. C., 466, 11 S. E. (2d), 301; *S. v. Lassiter,* 208 N. C., 251, 179 S. E., 891; *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249; *S. v. Parker,* 152 N. C., 790, 67 S. E., 35.

If the verdict had been simply "Guilty" or "Guilty as charged," it would have been sufficient. But as was said by *Stacy, C. J.,* speaking for the Court in the *Lassiter case, supra,* "When the jury undertakes to spell out its verdict without reference to the charge, as in the instant case, it is essential that the spelling be correct."

There will be a

Venire de novo.

STATE v. DEWEY F. INMAN AND RUSSELL A. STARK.

(Filed 18 October, 1944.)

1. Courts § 9—

The Articles of War—92 referring to murder and rape, and 93 referring to various crimes (including robbery)—do not confer upon military courts an exclusive jurisdiction to try members of the U. S. Army for such offenses committed within the State and beyond the exclusive territory under the immediate control of the military authorities, even in time of war, the State courts and military courts having concurrent jurisdiction of such offenses.

2. Criminal Law § 68b—

Upon the arrest and indictment for rape and robbery of members of the U. S. Armed Forces by State authorities, the crimes allegedly having been committed beyond the territory under the immediate control of the military authorities, an appeal by defendants from an adverse ruling on their objection to the jurisdiction is premature. The practice is to note the objection and preserve the exception upon appeal from the final judgment. G. S., 15-180; G. S., 15-181.

3. Criminal Law § 67—

Appeals in criminal cases in this jurisdiction are wholly statutory.

4. Prohibition, Writ of, § 2—

The writ of prohibition is considered discretionary and has been uniformly denied where there is other remedy.

APPEAL by defendants from *Bone, J.*, at July Term, 1944, of LEE.

Dewey F. Inman and Russell A. Stark are, and were at all times hereinafter mentioned, enlisted men in the United States Army, serving in the 87th Infantry Division, 517th Parachute Infantry, at Camp Mackall in Richmond County. While on a furlough permitting them to go beyond the bounds of the military establishment, they entered Lee County, North Carolina, some fifty miles from Camp Mackall. They are charged with having committed the crimes of rape upon the person of Mrs. Louise Burns and of highway robbery of jewelry and money from the person of the said Burns. Upon the warrant charging these offenses, they were arraigned before the county recorder's court of Lee County for a preliminary hearing. At that hearing demand was made for the surrender of the prisoners to the military authorities for trial by court martial under the Articles of War. The recorder, sitting as a committing magistrate, conceiving that the matter would be more properly addressed to the Superior Court, denied the request; and finding probable cause, sent the case on to the Superior Court for trial, remanding the prisoners to jail. Bills of indictment were found in the Superior Court, charging each of the defendants with the crimes of rape and robbery from the person, as above stated.

At the ensuing regular term of the Superior Court of Lee County, Judge Walter J. Bone presiding, the prisoners were brought into open court, attended by their counsel. At that time Lt. Col. George W. Weeks, JAGD, Staff Judge Advocate of the 87th Infantry Division, made and filed in writing a request for the release of the prisoners to the military authorities.

STATE OF NORTH CAROLINA
LEE COUNTY

IN THE SUPERIOR COURT OF
LEE COUNTY

STATE
vs.
DEWEY INMAN
RUSSELL STARK

REQUEST FOR RELEASE OF MILITARY PERSONNEL TO MILITARY AUTHORITIES

Lieutenant Colonel George W. Weeks, Staff Judge Advocate, 87th Infantry Division, under the authority imposed upon him by military law, hereby requests the immediate release of Private Dewey Inman and Private Russell Stark, 517th Parachute Infantry, Camp Mackall, North Carolina.

WHEREAS, Private Dewey Inman and Private Russell Stark are members of the military service, 517th Parachute Infantry, and have been in the military service prior to the date of the alleged commission of the offense charged and,

WHEREAS, Private Dewey Inman and Private Russell Stark are now in confinement in the County Criminal Court of Lee County, charged with rape and,

WHEREAS, Private Dewey Inman and Private Russell Stark, members of the military service, Army of the United States, did not plead guilty to the offenses,

Now, therefore, I, Lieutenant Colonel George W. Weeks, Staff Judge Advocate, 87th Infantry Division, Fort Jackson, South Carolina, pursuant to Title 10, Par. 1546, do request the return to military control of Private Dewey Inman, 517th Parachute Infantry, and Private Russell Stark, 517th Parachute Infantry, members of the military service, Army of the United States, and that they be placed in the custody of Lieutenant Colonel George W. Weeks, Staff Judge Advocate.

GEORGE W. WEEKS,
Lt. Col., J.A.G.D.,
Staff Judge Advocate,
87th Infantry Division.

Judge Bone denied this request.

At the same time, Inman and Stark filed separate pleas to the jurisdiction, of which the following is a copy of the plea of Inman:

NORTH CAROLINA IN THE SUPERIOR COURT
LEE COUNTY

STATE
vs. PLEA TO THE JURISDICTION
DEWEY F. INMAN

The defendant above named, to wit: Dewey F. Inman before plea and before any trial was entered into in this cause, objects and excepts to the jurisdiction of this Court to further proceed with this matter or to entertain the same in any way, for that:

1. The alleged offense occurred while a state of war existed between the United States of America, Japan, Germany and other Nations, and the defendant is a member of the Armed Forces of the United States and is a soldier regularly enlisted and drafted in the Army of the United States.

2. That heretofore the United States by and through its proper constituted authorities have asserted primary jurisdiction of any offense committed by the defendant (and said defendant denies that he is guilty of having committed any offense): and the United States Army through its duly constituted authorities and the Military Authorities of the United States have asserted prior and primary and paramount jurisdiction, and demanded the person of this defendant of the authorities of Lee County, to try and to give him a trial for said alleged offense under Military Law; and for said reason this Court and any Civil Court is without any jurisdiction to hear and determine this action and is without jurisdiction to further proceed with, hear or determine this cause.

This July 20, 1944.

DEWEY F. INMAN, by K. R. HOYLE, Attorney.

Filed July 20th, 1944 at 11:30 A.M.
E. M. UNDERWOOD, Clerk of Superior Court.

Stark's plea is identical in character.

Thereupon, Judge Bone entered the following order:

STATE OF NORTH CAROLINA IN THE SUPERIOR COURT
LEE COUNTY JULY TERM, 1944

THE STATE OF NORTH CAROLINA
vs.
DEWEY F. INMAN and RUSSELL A. STARK, Defendants
ORDER

The defendants, Dewey F. Inman and Russell A. Stark, through their counsel file a written plea to the jurisdiction of this Court, which plea is among the papers in this case and speaks for itself as to its contents. Upon said motion the Court finds that the facts alleged in the first paragraph thereof are true. The Court further finds that no written request has been filed with this Court by the military authorities for the release or surrender of the defendants, and further, that no oral request for such release for surrender has been made by any of the military authorities to the Judge Presiding over the present Term.

Counsel for the defendants contended that a request was made for the release or surrender of said defendants when the preliminary hearing was held in the County Criminal Court for Lee County, and proposed to offer some evidence in support of such contention. The Court declines to hear such evidence as being of the opinion that is unnecessary to make any find(ing) as to what occurred before the committing Magistrate at the preliminary hearing, in the absence of any written request having been filed by the military authorities, declines to hear such evidence, and that the defendants except.

Further, when the present term convened on Monday morning, it was stated to the Court by counsel for the defendants that the military authorities would desire to be heard upon the motion or request for release or surrender of the defendants. Whereupon the Court set Tuesday morning, July the 18th, at 9:30 a.m. as the time for the hearing of such motion or request if the military authorities desired to make such. At said time, to wit: Tuesday morning, July the 18th, at 9:30 a.m., no written request for the release or surrender of the defendants was made by any military authority and no such authority appeared in Court for the purpose of making any such motion or request. Later counsel for the defendants stated that he had communicated with Colonel George W. Weeks at Fort Jackson, South Carolina, Judge Advocate of the 87th Division, United States Army, and that said Army Officer having advised him that he had not been prepared to make or file any request for the surrender or release of the defendants on Tuesday morning, July

the 18th, but that he would do so on Thursday morning, July the 20th, at or about 9:30 a.m. if such time met the convenience of the Court, and thereupon the Court set said time for the hearing of such motion or request. Upon the time set, neither said Army Officer, nor any other military authority, appeared to make any request orally or to file any written request for the surrender or release of the defendants.

The Court denies the plea to jurisdiction by the defendants through their counsel and to this ruling the defendants except. The foregoing motion or plea to the jurisdiction was filed before defendants were called upon to plead to the bill of indictment.

WALTER J. BONE, Judge Presiding.

Thereupon, Inman and Stark again filed separate pleas to the jurisdiction. The following is a copy of the plea of Inman:

NORTH CAROLINA IN THE SUPERIOR COURT
LEE COUNTY

STATE
v. } PLEA TO THE JURISDICTION
DEWEY F. INMAN

The defendant above named, to wit: Dewey F. Inman before plea to Bill of Indictment in any way; and before any trial was entered into in this cause, objects and excepts to the jurisdiction of this Court to further proceed with this matter, or to entertain jurisdiction of the same in any way, for that:

1. The alleged offense occurred while a state of war existed between the United States of America, Japan, Germany and other nations, and the defendant is a member of the Armed Forces of the United States, and is a soldier regularly enlisted and drafted in the Army of the United States.

2. That heretofore the United States by and through its properly constituted authorities have this day in writing asserted paramount primary jurisdiction of any offense committed by the defendant (and said defendant denies that he is guilty of having committed any offense); and the United States Army, through its duly constituted authorities and the Military authorities of the United States, have asserted paramount jurisdiction and demanded the custody of the person of this defendant from the Courts and authorities of Lee County, to try, and to give him a trial for said alleged offense by Court-Martial under Military Law; and for said reason under Federal Statute Law, this Court and any Civil Court of North Carolina is now without any jurisdiction to

hear and determine this action; and is without jurisdiction of defendant's person, or to further proceed with, hear or determine this cause. This plea is filed after the written request of the Army authorities was filed at 4 p.m.; which is made a part of this plea; and before any hearing thereon.

DEWEY F. INMAN, by K. R. HOYLE, Attorney.

Filed 7/20/44 at 4 o'clock p.m.
E. M. UNDERWOOD, Clerk of Superior Court.

The plea of Stark is identical in character.

Thereupon, Judge Bone entered the following order:

NORTH CAROLINA — IN THE SUPERIOR COURT
LEE COUNTY — JULY TERM, 1944.

STATE
v.
DEWEY F. INMAN
RUSSELL A. STARK

ORDER OVERRULING DEFENDANTS' SECOND OBJECTION AND EXCEPTION TO JURISDICTION SUPERIOR COURT

After Lieut. Col. George W. Weeks, Staff Judge Advocate, 87th Division, United States Army, had appeared in Lee Superior Court and 2:30 p.m. in open Court and filed the written request that the Superior Court of Lee County surrender or deliver defendants to him for the purpose of trial as to said alleged offenses by the United States Army Military Authorities by Courts-Martial, the defendants each filed in open Court a second plea and objection and exception to the jurisdiction of the Superior Court of Lee County to further hear and entertain a prosecution of defendants which was marked by the Clerk "Filed July 20, 1944 at 4:00 P. M."; the grounds of said motion being as set out in said paper writing; upon consideration thereof,

IT IS ORDERED:—Said Plea and objection be and the same is overruled and denied; and the defendants each objected and excepted.

WALTER J. BONE, Judge Presiding.

The plea

From this the defendants appealed, and the following appeal entry was made:

APPEAL ENTRIES:

Defendants DEWEY F. INMAN and RUSSELL A. STARK, each having objected and excepted to His Honor Walter J. Bone, having overruled

and denied their separate objections and exceptions to the jurisdiction of the State Courts of North Carolina retaining their persons from the military authorities of the United States Army; and retaining or attempting to retain further jurisdiction of these cases after assertion of prior and paramount jurisdiction of these cases by the United States Military authorities; and to the further holding of these defendants for trial by said State Court, after demand made for their persons on said State Courts by the United States Military authorities of the United States Army, for the purpose of trial of said defendants by said Army Military authorities, for the offenses with which said defendants stand charged; and to each of said orders; and to each of said orders overruling these said defendants separate motions and pleas to the jurisdiction of said Courts of the State of North Carolina, and their said separate motions and pleas to the jurisdiction of said Courts of the State of North Carolina, and their said separate motions as renewed and second time overruled and denied, to the further jurisdiction of said State Court over them, or to hold and try them, or either of them; appealed to The Supreme Court of North Carolina, from each and every of said orders, and the denial of each and every of said Motions and pleas to the jurisdiction.

Thereafter, upon notice to Hon. Walter J. Bone, Judge, and Hon. W. Jack Hooks, Solicitor of the Fourth Judicial District, and to Hon. Harry McMullan, Attorney-General of the State of North Carolina, the defendants filed in this Court a petition for a writ of prohibition directed to the Superior Court of Lee County, setting up *in extenso* the facts and proceedings above noted and asking that the said court be prohibited from proceeding further in the case, setting up as grounds therefor that the request or demand made by Lieutenant Colonel Weeks, Staff Judge Advocate, deprived the Superior Court of its jurisdiction and that the prisoners were in danger of being deprived of their rights, liberties, and possibly life, by the action of a court without jurisdiction. Incorporated in this petition (by reference) as exhibits were the various requests, objections and orders.

The Attorney-General for the State filed an answer to the petition.

The matter was then heard by this Court in its regular order, upon the record, oral argument, and briefs.

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

K. R. Hoyle for the defendants, appellants.

SEAWELL, J. While the defendants were under indictment in the Superior Court of the County of Lee for the alleged crimes of rape and robbery from the person, committed in that county, Lt. Col. Weeks, the Staff Judge Advocate of the 87th Infantry Division of the U. S. Army, of which the prisoners were members, belonging to the 517th Parachute Infantry, located at Camp Mackall in Richmond County, appeared and requested "the immediate release" of the prisoners, and that they be placed in his custody, as authorized agent of the military authorities. It does not appear that at this time any military court had taken cognizance of the crimes alleged to have been committed, or that any such proceeding was contemplated; nor does the request for the "release of military personnel to military authorities" appear to have been based upon any principle other than the mere right to exclusive military control of the prisoners as members of the Army.

Title 10, paragraph 1546, (AW 74), to which reference is made in the request for release, is the provision which requires surrender to civil authorities of persons subject to military law, under certain conditions, reading in part as follows:

"When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct."

In construing the provisions of this section, in *Caldwell v. Parker,* 252 U. S., 376, 64 L. Ed., 621, the Court came to the conclusion that the Articles of War—92 referring to murder and rape, and 93 referring to various crimes (including robbery)—did not confer upon military courts an exclusive jurisdiction to try members of the U. S. Army for such offenses committed within the State and beyond the exclusive territory under the immediate control of the military authorities, even in time of war, but that the State Courts and the military courts had a concurrent jurisdiction of such offenses.

It is of interest, although not essential to decision here, that the Court further suggested: ". . . it is indeed open to grave doubt whether it was the purpose of Congress, by the words 'except in time of war,' or the cognate words which were used with reference to the jurisdiction conferred in capital cases, to do more than to recognize the right of the military authorities in time of war, within the areas affected by military operations, or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified."

Whether this latter intimation of the highest Federal Court would be followed were the matter again presented to it, we have no means of knowing—a State Court opinion, *McKittrick v. Brown* (Mo.), 85 S. W. (2d), 385, 390, is cited as holding *contra;* but it is clear that *Caldwell v. Parker, supra,* does mean to hold that, under the circumstances of this case, if the military court, or Court Martial, has any jurisdiction of the alleged offenses under Articles 92 and 93 of the Articles of War—which specifically cover these offenses—the jurisdiction is concurrent with that of the State Court. See, also, *U. S. v. Hirsch* (D. C. N. Y. 1918), 254 F., 109; *Ex Parte Koester,* 206 Pac., 116, 56 Cal. Ap., 621. The expression "except in time of war" seems to be relied on for the use of the statute contrariwise—that is, as specific authority for a demand by the military authorities upon the State authorities for the surrender to them of prisoners who are held under indictment in the State Court for the alleged offenses. It would seem that whatever right the military authorities have to demand the release of these prisoners into their custody must come from other principles, which might positively support their superior right to the custody and control of the men when properly asserted, rather than upon such negative-pregnant implication. *U. S. v. Matthews,* 49 F. Supp. (District Court U. S., Md., Ala., March 17, 1943); CP—Application of Baer (1943), 180 Misc., 330, 41 N. Y. S. (2d), 413. We have no intention of stating that they have no such right—we do not believe that we have reached a point where it is necessary for us to consider that question; but we do point out that the demand for military custody of the prisoners does not imply that there is any purpose to try them by court martial for the alleged offense.

Passing now the fact that we are not informed from the record or from the written request of the Staff Judge Advocate, Lt. Col. Weeks, of the specific purpose for which custody of the defendants is requested, other than the general one of mere exclusive military control; and expressing no opinion on the situation thus produced, we come to the question whether the objections taken to the order of Judge Bone are available to the defendants, conceding the purpose of the demand is to secure their custody for trial by the military court.

Certainly, the defendants have no right to choose the jurisdiction in which they shall be tried. After making demand upon the State Court for the release of the prisoners, the military authorities took no further action and do not join the defendants in this appeal or in the petitions for the writ of prohibition. We do not intimate that they were required to do so in order to protect any right they may have to the custody of the prisoners, nor do we indicate any opinion as to the method by which such custody might be acquired. Such matters have usually been settled upon the principle of comity, where, as here, the State and military courts have concurrent jurisdiction of grave crimes. See Digest of Opinion of the Judge Advocate General, 30 July, 1942, 1 Bull. J. A. G. 163, sec. 432 (5); Schiller, Military Law, p. 62.

Certainly, the grave danger to peace and order in communities accessible to large military establishments, in which areas soldiers under furlough or leave visit freely on week-ends, and where no military control exists, is a matter for serious consideration; the more so if the civil courts in such areas are to be deprived of their jurisdiction of the offenses or the offenders, although fully functioning throughout the area as in times of peace. The relatively small number of serious crimes committed under such conditions reflects credit on the personnel of the Army; but nevertheless, the draft is no respecter of persons, and it is a matter of common knowledge that they do occur. The destruction of civil jurisdiction in such areas raises a serious question of crime control and the administration of justice. However this may be, the defendants stand alone in this Court and upon the sole contention that the demand made for the release of the prisoners to the military authorities *eo instante* divested the State Court of its jurisdiction. They contend that they now face the danger of trial by a court having no jurisdiction and the possibility of execution under its judgment.

Even if we conceded that the effect of the request for the release of the defendants to the military authorities was to terminate the jurisdiction of the State Court—a conclusion which at present we are unable to reach—nevertheless, the attempted appeal of the defendants from the adverse rulings on their objections to the jurisdiction is premature. The practice is to note the objection to the jurisdiction and preserve the exception upon appeal from the final judgment. Appeal in criminal cases is wholly statutory, and our statute, G. S., 15-180; G. S., 15-181, does not provide for an appeal in such cases except from a final judgment. *S. v. Cox,* 215 N. C., 458, 2 S. E. (2d), 370; *S. v. Blades,* 209 N. C., 56, 182 S. E., 714; *S. v. Rooks,* 207 N. C., 275, 176 S. E., 752; *S. v. Nash,* 97 N. C., 514, 2 S. E., 645; *S. v. Hazell,* 95 N. C., 623, 624.

While recognized in this jurisdiction, the writ of prohibition is considered discretionary and has been uniformly denied where there is other remedy. *Perry v. Shepherd,* 78 N. C., 83; *R. R. v. Newton,* 133 N. C., 136, 137, 45 S. E., 549; *S. v. Whitaker,* 114 N. C., 818, 19 S. E., 376. The defendants' apprehension that they may suffer penalties of a judgment rendered by a court without jurisdiction is not well founded, provided they should be under the necessity of presenting the question upon a timely appeal.

On the motion of the Attorney-General,

The appeal, as to both defendants, is dismissed;

The petitions for writ of prohibition are denied.

J. N. JOHNSON, JR., v. I. B. NOLES AND WIFE, VARA E. NOLES.

(Filed 18 October, 1944.)

1. **Contracts § 12—**

   The effect of a waiver is to release one of the parties from the terms of the original proposition and substitute for it other terms. If this be done by language, the terms of the new proposition are to be ascertained by the words used; if by conduct the law gives to such conduct a construction which secures a fair and just result.

2. **Contracts § 18: Specific Performance § 3—**

   An extension of the time for tender of the balance of the purchase price of land and for the acceptance of the deed by plaintiff, given by defendants, not for the benefit and accommodation of the plaintiff, but in order that defendants may give a good deed with full covenants and warranty, which defendants could not then do, is valid and binding on the parties though not in writing and without additional consideration.

3. **Frauds, Statute of, § 1—**

   A suitor will not be permitted to make use of the statute of frauds, not to prevent a fraud upon himself, but to commit a fraud upon his adversary.

4. **Specific Performance § 3: Contracts § 16—**

   He, who would insist on strict performance of a contract, must not himself be the cause of the breach.

5. **Specific Performance § 4: Contracts § 16—**

   Where one party to an option to purchase land is ready, able and willing and offers to perform his part and the other party refuses to comply with the terms thereof, tender of the balance of the purchase price and demand for a deed are unnecessary.

6. Specific Performance § 4—

Issues approved in a suit for specific performance of a contract to convey land.

APPEAL by defendants from *Bone, J.*, at March Term, 1944, of JOHNSTON.

This is an action for specific performance. The defendants, on 23 September, 1943, gave the plaintiff and his heirs and assigns an option to purchase a certain tract of land described therein and owned by the defendants, for the sum of $6,000.00 One thousand dollars to apply on the purchase price was paid at the time of the execution and delivery of the option. Upon the payment of an additional sum of $5,000.00, on or before 9 October, 1943, the defendants bound themselves to deliver to J. N. Johnson, Jr., or his heirs and assigns, at his or their request, a good and sufficient deed with full covenants and warranty, for said land. The defendants met J. N. Johnson, Sr., father of the plaintiff, in the office of I. R. Williams, attorney at law, in the town of Dunn, on 9 October, 1943, for the purpose of complying with the terms of the option. It is alleged, and J. N. Johnson, Sr., testified, that the plaintiff, through him as his agent, was ready, able and willing to pay the balance of the purchase price on 9 October, 1943, and that he so advised the defendants. However, Mr. Williams, who had been employed by J. N. Johnson, Sr., to investigate the title to the property, informed the defendants that there were certain defects in the title and it would require several days to clear them up. It was pointed out that a certain dower interest was outstanding and it would be necessary to obtain a deed releasing this dower interest, and further that no final judgment had been entered in a certain special proceedings which also affected the title. Whereupon, Mr. Williams suggested that the matter be continued for a few days to give him time to clear the title. J. N. Johnson, Sr., suggested that it be continued until 15 October, 1943, and that they meet in the town of Benson on that date. The testimony for the plaintiff is to the effect that Mr. Noles agreed to the extension of time in order that he might give a good deed, and agreed to meet Messrs. Johnson and Williams in Benson, 15 October, 1943, at 3:00 p.m., to close the transaction; that he stated he did not want to give a bad deed and requested Mr. Williams "to clear up the title for him as he knew more about it than anyone else and for him to go ahead." The defendants do not deny the defects in the title, nor the request for additional time in which to cure them, but they do deny they verbally extended the option to 15 October, 1943. However, at the time and place suggested for the meeting on 15 October, 1943, Mr. Noles appeared and stated "I have decided to back out; I will not trade." Whereupon, I. R. Williams tendered in cash to

defendants the balance of the purchase price, and demanded deed to J. N. Johnson, Sr., and his wife Vara Wood Johnson. The defendants declined to accept the balance of the purchase money and refused to execute a deed for the land.

Plaintiff alleges and testified that after obtaining the original option, his father, J. N. Johnson, Sr., was his agent and was acting for him in the tender of the balance of the purchase price and in demanding a deed to the premises.

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

"1. Did the defendants execute and deliver to the plaintiff the option in writing as described in the complaint? Answer: Yes.

"2. Was the plaintiff ready, able and willing to pay the balance of $5,000.00 and take said deed according to the terms and conditions of said option on 9 October, 1943? Answer: Yes.

"3. Were the defendants able, ready and willing to comply with the terms of said option and deliver a good and sufficient warranty deed with full covenants and warranty on or before 9 October, 1943, according to the terms set out in the option? Answer: No.

"4. Did the defendants consent and agree with the plaintiff to extend the time for the performance of said contract from 9 October, 1943, to 15 October, 1943, in order that certain defects in the defendants' title to said lands might be corrected, as alleged in the complaint? Answer: Yes.

"5. Did the plaintiff on 15 October, 1943, tender to the defendants the payment of $5,000.00 and demand deed for the land in question? Answer: Yes.

"6. Did the defendants violate the terms of said option and refuse to deliver to the plaintiff a deed conveying said lands according to the terms of their contract as alleged in the complaint? Answer: Yes."

Accordingly, a decree for specific performance was entered, and from which the defendants appeal to the Supreme Court, assigning errors.

Wellons, Martin & Wellons for plaintiff.
Ezra Parker and J. R. Barefoot for defendants.

DENNY, J. The first and second assignments of error are directed to the refusal of his Honor to allow the defendants' motion for judgment of nonsuit, made at the close of plaintiff's evidence and renewed at the close of all the evidence.

The defendants contend that the option was a unilateral contract, and in order for the plaintiff to avail himself of the benefits thereof he was required to comply unconditionally with the terms of the option. There-

fore, they insist that it was not enough for the plaintiff to be ready, able and willing to pay the balance of $5,000.00 and take a deed, according to the terms of the option, on 9 October, 1943, but the actual tender and demand for a deed was the only means of acceptance that could bind the defendants, and, in support of their position, they are relying on *Trogden v. Williams,* 144 N. C., 192, 56 S. E., 868, and *Hardy v. Ward,* 150 N. C., 385, 64 S. E., 171. In both of the above cases, however, it will be noted that the plaintiffs attached conditions not embraced within the terms of the respective options, instead of accepting and complying with them according to their terms. Furthermore, both cases hold a tender unnecessary if waived. In *Trogden v. Williams, supra,* the Court said: "The effect of a waiver is to release one of the parties from the terms of the original proposition and substitute for it other terms. If this be done by language, the terms of the new proposition are to be ascertained by the words used; if by conduct the law gives to such conduct a construction which secures a fair and just result."

An extension of the time for tender of the balance of the purchase price, and for the acceptance of the deed by plaintiff, was given by the defendants, according to the plaintiff's allegations and testimony, not for the benefit or accommodation of the plaintiff, but in order that the defendants might give a good deed with full covenants and warranty, which they could not do on 9 October, 1943. Even so, the defendants contend, if these allegations are conceded to be true, the extension was in parol, without consideration, and void, citing *Cummins v. Beaver,* 103 Va., 230, 48 S. E., 891. The facts and circumstances as shown upon this record do not sustain the position taken by the defendants.

The principle laid down in *Alston v. Connell,* 140 N. C., 485, 53 S. E., 292, is controlling in the instant case. There the plaintiff had arranged, or was arranging, to raise the necessary funds in order to comply with the terms of the option, when he was notified and requested by the defendant that a postponement was desired for a year and the plaintiff agreed to the extension. Within the time fixed in the parol extension, the plaintiff tendered to the defendant the money required by the written agreement and the same was refused. We quote at some length from the able and exhaustive opinion of *Hoke, J.,* speaking for the Court: "The plaintiff, having consented to the delay at the request of Thomas Connell, will be taken to have been ready and willing to perform at the time stipulated in the written agreement; having tendered the amount due within the period fixed by the postponement, he is in no default, and the extension having been given at Thomas Connell's request and for his convenience, when the extended agreement itself and all the circumstances clearly implied that he regarded it as a valid and binding con-

tract and that he intended to live up to its terms, the law will not permit him now to repudiate its obligations, invoke for his protection the statute of frauds and defeat the plaintiff's recovery, who has forborne a timely performance by reason of Thomas Connell's request and in reasonable reliance on his assurance. This position is in accord with sound principles of justice and is well sustained by authority. In *Hickman v. Haines,* Law Reports, 10 C. P., at p. 603, it is said: 'The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance is to say the least very startling, and if well founded will enable the defendants in this case to make use of the statute of frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine.' . . . In *Clarno v. Greyson,* 30 Oregon, 111, it is said: 'That an owner of land, who would insist upon strict performance by a prospective purchaser as a condition precedent to an action by the latter for the specific performance of an option to purchase, must not himself be the cause of the breach;' and in the opinion of the Court by *Wolverton, J.,* at p. 127, it is said: 'Another proposition insisted upon, which is sound in law and based on good morals, is that he who would insist on strict performance must himself not be the cause of the breach. His own wrong can never operate under the sanction of law to his advantage. This may be regarded as fundamental and no authorities are necessary to support it.' In *Barton v. Gray,* 57 Mich., 630, it is held that: 'The defense urged is not open to defendant for another reason: "No person can be heard to complain of an injury caused by the act or conduct of a party to which he has consented, and no one who causes or sanctions the breach of an agreement can recover damages for its nonperformance or interpose it as a defense to an action upon the contract."' In *Thompson v. Poor,* 147 N. Y., at p. 409, *Andrews, J.,* says: 'It makes no difference, as we contend, what the character of the original contract may be—whether one within or without the statute of frauds—the rule is well understood that if there is forbearance at the request of a party, the latter is precluded from insisting on a performance at the time originally fixed by the contract as a period for action.'" *Dixson v. Realty Co.,* 204 N. C., 521, 168 S. E., 827; *S. c.,* 209 N. C., 354, 183 S. E., 382. We think his Honor properly submitted the case to the jury.

Other assignments of error are directed to the insufficiency of the issues submitted by the Court, to the charge bearing on the questions of tender on 9 October, 1943, and the variance of the terms of the option by J. N. Johnson, Sr., in demanding a deed not to J. N. Johnson, Jr.,

the plaintiff, but a deed to himself and wife. We think the issues submitted to the jury cover all the pertinent questions raised by the pleadings which are necessary to a proper adjudication of this controversy. *Bailey v. Hassell,* 184 N. C., 450, 115 S. E., 166. The jury found the defendants did consent and agree with plaintiff to extend the time for the performance of the contract, from 9 October, 1943, to 15 October, 1943, in order that certain defects in defendants' title to said land might be corrected. This finding is supported by the evidence. Therefore, the tender of the balance of the purchase price, on 15 October, 1943, was a compliance with the terms of the option. *Alston v. Connell, supra.*

We need not consider whether the request for a deed to J. N. Johnson, Sr., and his wife Vara Wood Johnson, was a variance of the terms of the option or not, since the evidence discloses that before the tender was made on 15 October, 1943, and a deed requested, the defendant I. B. Noles announced his refusal to comply with the terms of the option. Thereafter, the tender of the balance of the purchase price and a demand for the deed was unnecessary. It is enough that plaintiff is ready, able and willing and offers to perform in his pleading. *Bateman v. Hopkins,* 157 N. C., 470, 73 S. E., 133; *Ward v. Albertson,* 165 N. C., 218, 81 S. E., 168; *Headman v. Commissioners,* 177 N. C., 261, 98 S. E., 776. The defendants did not bottom their refusal to comply with the terms of the option on the fact that the deed was not to be executed to the plaintiff, and that he had made no written assignment of the option; in fact, there is no evidence that the defendants ever read the deed or knew its contents. They decided not to trade. There was a consideration of one thousand dollars paid for the option, and the offer to sell could not be withdrawn until the expiration of the time fixed therein, including the time agreed upon by any extension thereof. *Winders v. Kenan,* 161 N. C., 628, 77 S. E., 687.

A careful consideration of all the exceptions and assignments of error, leads us to the conclusion that in the trial below there was no prejudicial error.

No error.

PERCY B. HOLDEN v. W. L. TOTTEN, NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM AND H. K. COBB, SHERIFF OF GREENE COUNTY.

(Filed 18 October, 1944.)

1. Judgments §§ 22b, 22h—

A void judgment may be attacked at any time and any place where it might injure or defeat a substantial right; and, ordinarily, the aid of the law to prevent its enforcement may be invoked in the jurisdiction where the injury is threatened.

2. Quieting Title § 1: Judgments § 22h—

An action to quiet title or to remove a cloud from title is equitable in its nature, and now may be maintained to remove from title a cloud created by the apparent lien of an invalid judgment docketed in the county where the land lies. G. S., 41-10.

3. Quieting Title § 2—

In an action to remove a cloud from plaintiff's title, allegedly caused by a judgment against plaintiff docketed in the county in which the land is situated, where the evidence tends to show that the judgment recited that it was rendered at a certain term before a specified judge, when it was actually signed by a different judge at a subsequent term, there is sufficient evidence to justify the continuance of an injunction to the hearing.

APPEAL by defendant W. L. Totten from *Frizzelle, J.,* 29 April, 1944, in Chambers. From GREENE.

The plaintiff instituted the present action in the Superior Court of Greene County to remove a cloud from the title of his lands in Greene County, attacking the judgment below mentioned as void or fully satisfied, and constituting no lien upon said lands, and sued out a restraining order to prevent enforcement of the said judgment.

The following appeared in the evidence at the hearing:

On 25 October, 1934, the North Carolina Joint Stock Land Bank of Durham caused to be docketed in the office of the clerk of the Superior Court of Durham County a purported judgment, as follows:

NORTH CAROLINA IN THE SUPERIOR COURT
DURHAM COUNTY

North Carolina Joint Stock Land Bank
v.
Sol Cherry and wife, Emma May Britt Cherry, W. M. Warren and Percy B. Holden.

JUDGMENT.

This cause coming on to be heard before His Honor, Judge G. V. Cowper, at the October Term of Court at Durham, North Carolina, and it appearing that the summons in this action together with the verified complaints have been returned as personally served on each of the defendants and that the defendants have failed to file an Answer to the matters and things alleged in the Complaint within the time required by law, the satisfactory proof of the cause of action having been made to the Court; it is ordered and adjudged that the plaintiff recover of

the defendants the sum of Two Thousand Two Hundred Sixty-Three and 39/100 Dollars ($2,263.39), with interest on same from January 10, 1933, together with the costs of this action.

E. H. CRANMER,
Clerk of Superior Court.

Done this 25th day of October, 1934.

Thereafter, to wit, on 25 May, 1935, a transcript of said judgment was docketed in the Superior Court of Greene County, as follows:

NORTH CAROLINA — IN THE SUPERIOR COURT
DURHAM COUNTY

North Carolina Joint Stock Land Bank of Durham
v.
Sol Cherry and wife, et als.
} TRANSCRIPT OF JUDGMENT.

Judgment in the above entitled action was rendered for the plaintiff before the Judge holding the October Term of Superior Court, 1934, Durham County. Upon the hearing of allegations and proofs on motion of plaintiff's attorney, judgment was rendered in favor of the North Carolina Joint Stock Land Bank of Durham, the above named plaintiff, against Sol Cherry and wife, Emma May Britt Cherry, W. M. Warren and Percy B. Holden, the defendants, in the sum of $2,263.39, with interest from June 10, 1933. Cost $10.80 and .95.

I, James R. Stone, Assistant Clerk of the Superior Court of said County, do hereby certify that the foregoing is a true and perfect Transcript from the Judgment Docket in my office.

(See Judgment Docket No. 15, page 125.)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County in my office in Durham, N. C., on the 22 day of May, 1935.

JAMES R. STONE,
Assistant Clerk of Superior Court.

Filed May 25, 1935.

Recorded May 25, 1935.

J. E. MEWBORN,
Clerk Superior Court of Greene County.

Thereafter, on 12 July, 1935, the following transcript was sent from the office of the clerk of the Superior Court of Durham County to the

office of the clerk of the Superior Court of Greene County, and there docketed:

In accordance with Section 636 of the Revisal of 1905, I do hereby certify that the following entry was made on the 10th day of July, 1935, relative to the satisfaction of the judgment in the above entitled action, a transcript of which was sent to your County to be docketed on the 22nd day of May, 1935, which entry of satisfaction you are also required by said section to make in such Judgment on your Judgment Docket and file this Certificate with said transcript on file in your Office Judgment as to W. M. Warren satisfied, July 10th, 1935.

NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, N. C.
By: J. S. PATTERSON, Attorney.

Witness: A. J. GRESHAM, Deputy.

DURHAM COUNTY *ss*

I, A. J. Gresham, Deputy Clerk of the Superior Court of said County, do hereby certify that the foregoing is a true and perfect transcript from the Judgment Docket in my office.

Witness my hand and official seal at office in Durham, N. C., this 10th day of July, 1935.

A. J. GRESHAM, C. S. C.,
Deputy.

Filed July 12, 1935.
Recorded: July 13, 1935.
J. E. MEWBORN, Clerk Superior Court.

It was in evidence and not disputed that Warren had not been served with summons.

It further appeared that Judge G. V. Cowper held the term of Durham County Superior Court beginning on 22 October, 1934, and ending on 27 October, and that Judge Cranmer held the court during the following week from 29 October. In putting the judgment upon the Minute Docket, the clerk of the Superior Court of Durham County testified that, aware of these facts, he had eliminated from the written judgment the name of Judge Cowper, placing in its stead the name of Judge Cranmer, and also struck out Clerk and substituted therefor Judge under the signature of Judge Cranmer. He testified that Judge Cranmer actually signed the judgment as it was handed up to him as he would sign a judgment by default, without hearing evidence. He further

testified that it was from this Minute Docket the transcript was sent to Greene County.

At the hearing on the order to show cause on the restraining order, the defendant moved to dismiss the action for that the Superior Court of Greene County had no jurisdiction, and the motion was denied. The injunction was continued to the hearing, and defendant W. L. Totten objected, excepted and appealed.

J. Faison Thomson and Kenneth A. Pittman for plaintiff, appellee.

Bennett & McDonald for defendant, appellant.

SEAWELL, J. Four questions were raised and argued here: (a) Whether the Superior Court of Greene County had jurisdiction in the matter; (b) whether the judgment signed by Judge Cranmer is void; (c) whether the entry made on the judgment docketed canceling the judgment as to W. M. Warren had the effect of releasing the other defendants; and (d) whether, under all the evidence, such a judgment constituted a cloud on the title.

We do not consider it proper to go any deeper into the merits of these questions than may be necessary to decide as to the propriety and validity of the order continuing the injunction to the hearing. We are, however, of the opinion that the allegations and supporting evidence are sufficiently meritorious to justify the continuance of the injunction—in protection of the *res*—until the matters can be more fully heard and determined by the trial court.

As to the jurisdiction of Greene County Superior Court to entertain this case and grant injunctive relief, we think it proper to say that, while we leave to the court below to say upon its hearing whether the judgment here challenged is of that character, a void judgment may be attacked at any time and any place where it might injure or defeat a substantial right; *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311; *Clark v. Carolina Homes,* 189 N. C., 703, 128 S. E., 20; *Hargrove v. Wilson,* 148 N. C., 439, 62 S. E., 520; and, ordinarily, the aid of the law to prevent its enforcement may be invoked in the jurisdiction where the injury is threatened.

An action to quiet title or to remove a cloud from the title is equitable in its nature, and may now be maintained to remove from the title a cloud created by the apparent lien of an invalid judgment docketed in the county where the land lies, the original statute having been enlarged by amendment to that effect by chapter 763, Public Laws of 1903. G. S., 41-10, par. 2, and historical annotations.

Originally, such an action could only be maintained as against a contrary claim for an interest in the land. In enlarging the statute to cover the subject indicated, the statute now provides:

"In any case in which judgment has been or shall be docketed, whether such judgment is in favor of or against the person bringing such action, or is claimed by him, or affects real estate claimed by him, or whether such judgment is in favor of or against the person against whom such action may be brought, or is claimed by him, or affects real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section."

Treated as such an interest or claim of interest in the land, the venue is as laid down in G. S., 1-76 (1). See further annotations G. S., 41-10.

We have no doubt that had the sole relief sought been to declare the judgment here attacked void, an action for that purpose might have been brought in Durham County Superior Court, where the challenged judgment was rendered. This, however, does not affect the jurisdiction in the Superior Court of Greene County upon the cause of action stated in the complaint.

This question of jurisdiction has been directly raised here, and we have felt it consistent with the practice of the Court to deal with it, since, as the cause is determinable on that point, it would end the controversy. As to other matters, we express no opinion, except to say that there appears sufficient merit in plaintiff's cause to justify the continuance of the injunction to the hearing.

Therefore, the order to that effect by Judge Frizzelle is

Affirmed.

ALICE H. MOORE v. LENWOOD R. MOORE.

(Filed 18 October, 1944.)

1. Actions §§ 9, 11: Judgments § 17a—

A civil action is commenced by the issuance of summons, G. S., 1-88, and is deemed to be pending until its final determination by judgment. G. S., 1-208.

2. Clerks of Superior Court § 3: Judgments § 22h: Trial § 22a—

In an action by a wife against her husband for separate maintenance and counsel fees wherein the judge has made an order for subsistence and counsel fees pending further orders, a judgment of the clerk, upon findings of fact that the parties had resumed marital relations and dismissing the action as of voluntary nonsuit, is a nullity and void upon its face. It is manifestly not voluntary. G. S., 1-209.

3. Clerks of Superior Court § 3—

Clerks of the Superior Court are courts of very limited jurisdiction, having only such jurisdiction as is given by statute.

4. Pleadings §§ 6, 16c—

Where it is made to appear that a former action is pending between the same parties and upon substantially the same causes, when a second action is commenced, on appropriate plea by answer or demurrer, the court will dismiss the latter action.

APPEAL by defendant from *Frizzelle, J.*, at Chambers in New Bern, North Carolina, on 9 March, 1944. From PAMLICO.

Civil action for (1) divorce from bed and board, (2) separate maintenance, (3) establishment of property rights, and (4) alimony and allowance for counsel fees *pendente lite.*

The record and statement of case on appeal disclose these pertinent facts:

1. On 11 April, 1941, plaintiff, Alice H. Moore, instituted an action in Superior Court of Pamlico County against her husband, the defendant Lenwood R. Moore, for allowance for subsistence and counsel fees. In her complaint the plaintiff alleged that defendant separated himself from, and abandoned her on 13 February, 1941, and committed adultery, and failed to provide her and child, under adoption, with necessary subsistence according to his means and condition in life. The prayer for relief is that she have judgment not only allowing subsistence and counsel fees, but "such other and further relief as she may show herself to be entitled to, and recover her cost." The complaint is verified in accordance with provisions of G. S., 50-8, and not as permitted under G. S., 50-16, in actions for alimony without divorce. Defendant was served with summons and filed answer admitting marriage, but denying allegations as to adultery. Upon hearing of the cause at April Term, 1941, of said Superior Court, before Carr, J., presiding, the court ordered that defendant pay (1) the sum of three ($3.00) dollars per week for the necessary subsistence of plaintiff until the further order of the court, and (2) the sum of fifty ($50.00) dollars on account of reasonable counsel fees (temporary).

Thereafter, on 16 February, 1944, the clerk of said Superior Court entered a judgment as follows:

"This cause coming on to be heard and being heard by Alice G. McCotter, Clerk of the Superior Court, Pamlico County, and it appearing to the Court that the above entitled action was instituted in the Superior Court of Pamlico County on the 11th day of April, 1941, and an order was entered therein by His Honor, Judge Leo Carr; and it further appearing to the Court that a short time after said Order was

entered, providing for payment of counsel fees and maintenance and support for the plaintiff by the defendant, the plaintiff and defendant resumed the marital relations and continued to live together as husband and wife until the............day of January, 1944.

"It is thereupon considered by the Court and adjudged that the action be, and it is hereby dismissed as of voluntary nonsuit."

2. In the meantime on 4 February, 1944, upon motion of defendant a second action, instituted 29 January, 1944, in which plaintiff was seeking against defendant substantially the same relief as that asked for in the former action instituted 11 April, 1941, was dismissed.

3. And further, on 16 February, 1944, after the clerk had signed the judgment of 16 February, 1944, as above set forth, summons in the present action issued out of Superior Court of Pamlico County against defendant and was served upon him on 18 February, 1944—the purpose of the action and the grounds upon which it is based being substantially the same as in the action instituted 11 April, 1941, in which the judgment of the clerk was entered as aforesaid. In complaint filed it is alleged that a voluntary nonsuit in the original action has been entered by the clerk of Superior Court of Pamlico County. In answer thereto defendant avers that he has fully complied with order signed at Spring Term, 1941, and "that the plaintiff has attempted to take a nonsuit of the original cause of action," and prays that plaintiff take nothing by this action and that the former order be sufficient at present for maintenance and support of plaintiff.

Thereafter, on 23 February, 1944, defendant entered a special appearance and moved to dismiss this action on the grounds that at Spring Term, 1941, of Superior Court of Pamlico County plaintiff secured an order for alimony and counsel fees on the same cause of action which she is now asking new order for alimony and counsel fees; and that while plaintiff has attempted to take a nonsuit in the original action, defendant has duly excepted to the order of nonsuit signed by the clerk and appealed to Superior Court. The court being of opinion that the question attempted to be raised here can only be raised by a plea in abatement, denied the motion. Exception.

Thereafter, on 2 March, 1944, at hearing at Kinston, N. C., defendant filed plea in abatement of this action for that there is another action pending in Superior Court of Pamlico County between the same parties, in which action plaintiff is there seeking substantially the same relief as the plaintiff is seeking in this action, and in support of the plea offered the summons, issued 11 April, 1941, and the complaint, and answer, and order of Carr, J., awarding plaintiff $3.00 per week as alimony and $50.00 counsel fees, as aforesaid. Ruling on the plea, hav-

ing been deferred at hearing in Kinston, was denied on hearing at New Bern on 9 March, 1944. Exception. And, thereupon, Frizzelle, resident judge of the district, before whom the cause was being heard on motion for alimony *pendente lite* and counsel fees for prosecution of this action, and upon facts found, entered an order that pending the final hearing of the cause defendant will pay to plaintiff for her maintenance and subsistence ten ($10.00) dollars per week, beginning 16 March, 1944, and to plaintiff's counsel the sum of $200.00—the allowance to counsel to be taken into consideration by the trial judge and credited on allowance made for counsel fees at the final hearing of the cause. Exception.

Defendant appeals to Supreme Court and assigns error.

W. F. Ward and R. E. Whitehurst for plaintiff, appellee.
Z. V. Rawls for defendant, appellant.

WINBORNE, J. The contention of defendant, appellant, that the court erred in denying his plea in abatement is well taken.

In this State a civil action is deemed to be pending from the time it is commenced until its final determination. *McFetters v. McFetters,* 219 N. C., 731, 14 S. E. (2d), 833, and authorities there cited. A civil action is commenced by the issuance of a summons. G. S., 1-88. The final determination is by judgment. G. S., 1-208.

In the light of these principles the question is whether the purported judgment of nonsuit signed by the clerk of Superior Court of Pamlico County is a judgment within the meaning of the statute, G. S., 1-208. We hold that it is void upon its face.

The clerks of the Superior Court are courts of very limited jurisdiction—having only such jurisdiction as is given by statute. *Beaufort County v. Bishop,* 216 N. C., 211, 4 S. E. (2d), 525; *McCauley v. McCauley,* 122 N. C., 288, 30 S. E., 344; *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579. See also *Ange v. Owens, ante,* 514. Under the statute, G. S., 1-209, conferring on the clerks of the Superior Court authority to enter judgments of nonsuit, the authority is limited to judgments of voluntary nonsuit. And the wording of the judgment by which the clerk undertook to dismiss the action commenced on 11 April, 1941, shows that it is entered upon findings of fact, and, hence, manifestly is not a voluntary judgment. Therefore, the clerk, having undertaken to enter a kind of judgment which she had no jurisdiction to enter, the judgment so entered is void and is a nullity, and may be so treated at all times. *Clark v. Carolina Homes,* 189 N. C., 703, 128 S. E., 20; *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Casey v. Barker,* 219 N. C., 465, 14 S. E. (2d), 429. Thus there has been no final determi-

nation of the action in which the clerk attempted to enter judgment. That action between the same parties and upon substantially the same cause as the present action was pending when the present action was commenced and is still pending. When this is made to appear to the court by appropriate plea, answer or demurrer, and all material questions and rights can be determined therein, the latter action will be dismissed. *Alexander v. Norwood,* 118 N. C., 381, 24 S. E., 119; *Emry v. Chappell,* 148 N. C., 327, 62 S. E., 411; *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545; *Morrison v. Lewis,* 197 N. C., 79, 147 S. E., 729; *Underwood v. Dooley,* 197 N. C., 100, 147 S. E., 686; 64 A. L. R., 656; *Construction Co. v. Ice Co.,* 190 N. C., 580, 130 S. E., 165; *Johnson v. Smith,* 215 N. C., 322, 1 S. E. (2d), 834. Compare *Kesterson v. R. R.,* 146 N. C., 276; 59 S. E., 871; *Cook v. Cook,* 159 N. C., 46, 74 S. E., 639; *Brock v. Scott,* 159 N. C., 513, 75 S. E., 724; *Barnett v. Mills,* 167 N. C., 576, 82 S. E., 826; *Reed v. Mortgage Co.,* 207 N. C., 27, 175 S. E., 834.

The judgment from which this appeal is taken will be set aside. The Action abates.

ARLIE W. BROWN v. ORA BROWN.

(Filed 18 October, 1944.)

Divorce § 14: Contempt § 2b—

A husband cannot be adjudged in contempt of court for failure to comply with the provisions of a separation agreement, entered into prior to the institution of an action in which a divorce was granted the parties on the grounds of two years separation, which judgment provided that it should not affect or invalidate the separation agreement.

APPEAL by movant Ora Brown from *Armstrong, J.,* at September Term, 1944, of WATAUGA. Affirmed.

Motion in the cause by Ora Brown, defendant in the action, that the plaintiff Arlie W. Brown be punished for contempt for failure to comply with the provisions of a deed of separation entered into between the parties prior to the institution of the divorce action above styled.

The deed of separation, entered into 6 January, 1940, provided for certain payments to be made by Arlie W. Brown to his wife Ora Brown. Thereafter, on 12 January, 1942, Arlie W. Brown instituted action for absolute divorce against his wife on the ground of two years' separation. In his complaint the plaintiff, after setting out his cause of action, stated he did not intend by this action to be relieved of his obligation contained

in the separation agreement. The defendant Ora Brown filed a cross bill for absolute divorce on the ground of adultery. The verdict was in favor of plaintiff on both causes of action. The judgment recited the verdict and dissolved the bonds of matrimony theretofore existing between the parties, on the ground of two years' separation. In the judgment it was further ordered that "this judgment shall not affect or invalidate the deed of separation made and entered into by and between the plaintiff and defendant."

Thereafter, at September Term, 1944, Ora Brown, the defendant in the action, moved in the cause upon affidavit alleging that plaintiff Arlie W. Brown had failed to comply with the terms of the deed of separation. She prayed that he be adjudged in contempt.

The court found the facts substantially as stated, and further that plaintiff had failed and refused to comply with the terms of the deed of separation, and that he was financially able to do so.

Upon these findings, however, the court held the movant not entitled to an order adjudging the plaintiff in contempt. The movant Ora Brown appealed.

Trivette & Holshouser for plaintiff.
Gilreath & Story for defendant.

DEVIN, J. The ruling of the court below, that plaintiff Arlie W. Brown could not be adjudged in contempt for failure to comply with the provisions of a separation agreement entered into prior to the institution of the divorce action, must be upheld under the authority of *Davis v. Davis,* 213 N. C., 537, 196 S. E., 819.

The husband's obligation to make certain payments to his wife was based upon the contract entered into between them, and was not required of him by the valid judgment or order of a court having jurisdiction. Hence there was no willful disobedience of a court order or judgment such as would empower the court to attach him for contempt. G. S., 5-1 (4). The reference to the deed of separation in the complaint constituted an acknowledgment of the obligation, and in the judgment it was merely recited that the divorce judgment should not affect or invalidate the deed of separation. See also G. S., 50-11. The separation agreement is apparently still in effect, but compliance therewith may not be compelled by contempt proceedings in this action. In *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278, cited by appellant, the contempt proceedings for failure to make certain payments were predicated upon a valid judgment and willful disobedience thereof.

Judgment affirmed.

C. L. HARDY AND L. A. MOYE, PARTNERS, TRADING AS C. L. HARDY & COMPANY, v. MISS MAYONA MAYO.

(Filed 1 November, 1944.)

1. Pleadings § 21—

After the time for answering a pleading expires, no amendment thereto may be made as a matter of right, and a motion to amend is then addressed to the sound discretion of the court and a decision thereon is not subject to review, except in case of manifest abuse.

2. Adverse Possession § 4a—

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.

3. Estoppel § 1: Equity § 2—

Where there was a conveyance in 1906 of a one-half undivided interest in lands, the deed reciting that grantee and associates would construct a railroad line through part thereof and build a station in the vicinity and that the lands so conveyed were to be laid off and plotted into lots, which were to be sold for the benefit of the parties to the deed, all of which was done except that only a few of the lots were sold, one of the heirs of grantor, who had for more than 20 years recognized grantee's title in court pleadings and deeds, is estopped by record and laches to deny the validity of the 1906 deed.

4. Deeds § 12: Boundaries § 2—

The description of lands in a deed of trust is sufficient, where it sets out the property as a one-half undivided interest in 35 acres, part of the old W tract, adjoining F, S, D, and others, beginning at the forks of the H and G roads, on the west side of the H road in the fork and running to where it will intersect the northeast corner of the D land, thence west with the D land far enough to make (using the G road as the northern boundary) 35 acres, reference being made to the grantor's deed by the parties thereto and book and page where recorded, less certain lots by numbers sold prior to the execution of the said deed of trust.

APPEAL by respondent from *Williams, J.*, at June Term, 1944, of GREENE.

Special proceedings, instituted 20 May, 1941, for the partition of a 35-acre tract of land situate in Greene County, in which the petitioners claim a one-half undivided interest. Respondent filed answer denying plaintiffs have any interest in the said land, pleads sole seizin, and alleges the conveyance from L. A. and L. S. Mayo to the Macclesfield Company hereafter described, and upon which petitioners rely, as a link in the chain of their title, is null and void, and that the Macclesfield Company and subsequent purported holders of title through said company hold

the same in trust for the respondent. Additional facts pertinent to this appeal are as follows:

1. It is admitted that the respondent is the owner of a one-half undivided interest in the land in controversy.

2. In 1906 L. A. Mayo and his wife, L. S. Mayo, executed a conveyance to Macclesfield Company, a corporation, for a one-half undivided interest in the aforesaid tract of land, which instrument was duly recorded as provided by law, 17 June, 1906. The deed contained the following provisions:

"Whereas Henry Clark Bridgers of Tarboro, North Carolina, is going to construct or cause to be constructed an extension of the East Carolina Railway from Farmville to Hookerton and it will cross the lands of L. A. Mayo. . . . And Whereas L. A. Mayo is desirous of giving to the said Henry Clark Bridgers or his heirs or assigns one-half interest which said interest is to be joint in thirty five acres of land which said thirty five acres of land is to be laid off and plotted into a town site and said lots are to be held in Joint interest by said L. A. Mayo and said Henry Clark Bridgers or assignee and are to be (sold) at a price agreed on by said L. A. Mayo and said Henry Clark Bridgers. And the proceeds of said sale are to be divided equally between said L. A. Mayo and said Henry Clark Bridgers. And Whereas the said Henry Clark Bridgers is interested in and is an officer in the Macclesfield Company, a Corporation. . . . Now therefore in consideration of the foregoing premises and the further consideration of One Dollar paid receipt whereof is hereby acknowledged and the further consideration of the said Henry Clark Bridgers . . . causing to be located a Station and a Station house built either on the hereinafter described land or on the lands adjoining it the said L. A. Mayo and L. S. Mayo his wife have given and granted bargained and sold aliened and conveyed and do by these presents give and grant bargain and sell and alien and convey unto the said Macclesfield Company," etc. Thereafter the railroad was built as contemplated, the depot located on lands adjoining the above tract, and the land in controversy platted into lots.

3. The Macclesfield Company instituted a special proceedings against L. A. Mayo and wife, L. S. Mayo, for the partition of the property on 3 February, 1917. Answer was filed by respondents denying the petitioners owned any interest in the land by reason of the failure of the petitioners to develop the property as contemplated under the provisions contained in the aforesaid conveyance. Mrs. Mayo died intestate in the year 1918, and L. A. Mayo died intestate in the year 1920. The petitioners took a voluntary nonsuit at the December Term, 1921, of the Superior Court of Greene County.

4. The only children and heirs at law of L. A. Mayo and his wife, L. S. Mayo, were R. E. Mayo, L. A. Mayo, J. W. Mayo, W. L. Mayo, and the respondent Mayona Mayo.

5. By special proceedings for partition, instituted in Pitt and Greene counties, R. E. Mayo and W. L. Mayo were allotted a tract of land in Pitt County and J. W. Mayo, L. A. Mayo and Mayona Mayo were allotted the Whitley tract of 225 acres in Greene County.

6. In December, 1921, L. A. Mayo, guardian of J. W. Mayo, instituted a special proceedings in the Superior Court of Greene County and alleged in his petition that L. A. Mayo, J. W. Mayo and Mayona Mayo were the owners of and in possession jointly with J. H. Bridgers, or the Macclesfield Company, of the 35-acre tract near the town of Maury; and further alleged that L. A. Mayo and Mayona Mayo had entered into an agreement with Bridgers, or the Macclesfield Company, to offer lots for sale included in the 35-acre tract, and owned by all of them, and prayed the court for authority to execute deeds on behalf of said minor, J. W. Mayo. Judgment authorizing the sale of said lots and the execution of deeds on behalf of said minor, was signed 15 December, 1921, by the clerk of the Superior Court and affirmed by the judge on 16 December, 1921. Thereafter, on 17 December, 1921, this respondent joined in the execution of a deed conveying a one-half undivided interest in three lots, situate within the boundaries of the 35-acre tract, to the Macclesfield Company, and the deed recites the Macclesfield Company is already the owner of the other one-half interest in said lots.

7. In the year 1922, L. A. Mayo, Mayona Mayo and J. W. Mayo, by his guardian, L. A. Mayo, instituted a special proceedings to partition among themselves the Whitley land, of which the 35-acre tract in controversy is a part. It is expressly set forth in the proceedings that the petitioners own only a one-half undivided interest in the 35-acre tract and that "the other one-half undivided interest being the interest of H. C. Bridgers."

8. The respondent purchased her present interest in the 35-acre tract of land from one of the other Mayo heirs, and the same was conveyed to her by deed dated 16 November, 1934, and in which it is stated: "The interest conveyed is a one-half undivided interest."

9. The Macclesfield Company, on 1 July, 1932, executed a deed of trust to John Hill Paylor, Trustee, on certain lands including the one-half interest in the said 35-acre tract, which deed of trust was duly foreclosed and the petitioners purchased the property at the foreclosure sale. The following description appears in the deed of trust and in the Trustee's deed executed 1 December, 1934, to petitioners:

"Also one-half undivided interest in thirty-five (35) acres of land being part of the Old Whitley tract and joins the lands of J. T. Friz-

zelle, Mrs. L. A. Spivey, T. M. Dail and others, said 35 acres beginning at the fork of the road on the west side of the Lizzie and Hookerton Road at a point where the Greenville and Snow Hill Road crosses the Lizzie and Hookerton Road and running in a direct line to where it will intersect with the northeast corner of T. M. Dail lands; thence west along with Dail land for enough to make (using the Snow Hill and Greenville Road as the northern boundary) 35 acres reference being made to deed from L. A. Mayo and wife L. S. Mayo to The Macclesfield Company recorded in Registry of Greene County in Book 38, at page 572, less those certain lots heretofore conveyed; and a one-half undivided interest in Square D, Lots 1 and 2

"Square E—Lots 1-24 inclusive
H—8, 9, 10, 13, 14, 15 and 16
I—5-12 inclusive
F—1-24 inclusive
B—4-12 inclusive

Also Lots 2 and 3 Square A and Lot 1 in Square B conveyed by L. A. Mayo and others to The Macclesfield Company January 19, 1922 in Registry of Greene County Book 130, at Page 254, reference is made to map of the property of Mrs. L. A. Mayo recorded in Book 101 at page 257 and to map of the Whitley farm recorded in Map Book 1 at page 12."

The respondent alleges that not only the lots previously conveyed by the Macclesfield Company were excepted from the deed of trust and the Trustee's deed, but also all the lots thereafter described in said instrument.

10. When the case was called for trial, the respondent moved the court for permission to file an amendment to her answer, alleging title by adverse possession for more than 20 years. Motion denied. Exception.

11. The jury returned a verdict to the effect that petitioners and respondent are tenants in common, as alleged in the petition. From judgment entered on the verdict, respondent appeals to the Supreme Court, assigning error.

J. Faison Thomson and John Hill Paylor for plaintiffs, petitioners.
Charles F. Rouse for defendant, respondent.

DENNY, J. The first exception is directed to his Honor's refusal to permit the respondent to amend her answer by alleging title by adverse possession for more than 20 years. The exception cannot be sustained. After the time for answering a petition or complaint has expired, the

respondent or defendant may not as a matter of right, file an amended answer. The right to amend after the time for answering has expired, is addressed to the discretion of the court, and the decision thereon is not subject to review, except in case of manifest abuse. *Lumber Co. v. Wilson,* 222 N. C., 87, 21 S. E. (2d), 893; *Cody v. Hovey,* 219 N. C., 369, 5 S. E. (2d), 165; *Osborne v. Canton* and *Kinsland v. Mackey,* 219 N. C., 139, 13 S. E. (2d), 265; *Biggs v. Moffitt,* 218 N. C., 601, 11 S. E. (2d), 870. Moreover, in the case of *Winstead v. Woolard,* 223 N. C., 814, 28 S. E. (2d), 507, *Justice Winborne,* speaking for the Court, said: "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," citing numerous authorities.

The respondent, within twenty years from the institution of this proceedings, as a party in special proceedings and in conveyances, has expressly recognized and asserted that the title to a one-half undivided interest in the land now in controversy was in the Macclesfield Company. And more than twenty years elapsed between the death of Mr. and Mrs. Mayo and the institution of this proceedings, during which period the respondent and her predecessors in title did not claim any interest in the said land, save and except a one-half undivided interest therein. The amendment, had it been allowed, under the evidence disclosed herein, would not have aided the respondent.

We deem it unnecessary to discuss the remaining exceptions *seriatim.* The contention that under the pleadings, the respondent should have been permitted to prove fraud or breach of trust by petitioners' predecessors in title, cannot be sustained. We think the title to a one-half undivided interest in and to the 35-acre tract referred to herein, passed to Macclesfield Company under the deed from L. A. Mayo and wife, L. S. Mayo, executed and recorded in 1906, and that under the facts disclosed the respondent is estopped by record and laches to deny the validity of said deed. *Moore v. Baker, ante,* 498; *Huffman v. Pearson,* 222 N. C., 193, 22 S. E. (2d), 440; *Harshaw v. Harshaw,* 220 N. C., 145, 16 S. E. (2d), 666; *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421; *Thomas v. Conyers,* 198 N. C., 229, 151 S. E., 270; *Fort v. Allen,* 110 N. C., 183, 14 S. E., 685; *Stewart v. Mizell,* 43 N. C., 242.

The respondent also attacks the sufficiency of the description in the deed of trust and the Trustee's deed to convey to petitioners all the interest of the Macclesfield Company, conceding the validity of its title. The description complained of is set forth in paragraph 9 of the state-

ment of facts hereinabove. We think the position is untenable and that the description is sufficient to include all the right, title and interest in and to the 35-acre tract of land in controversy, which was conveyed to Macclesfield Company by the conveyances referred to herein, less any lots conveyed by Macclesfield Company prior to the execution of the said deed of trust, 1 July, 1932.

A careful consideration of the remaining exceptions leads us to the conclusion that no prejudicial error was committed in the trial below which would warrant a disturbance of the verdict.

No error.

JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION, v. ETHEL BOOGHER, ELISE BOOGHER, LYLES HARRIS AND WESTERN CAROLINA HILLS, INC.

(Filed 1 November, 1944.)

1. **Mortgages §§ 39b, 39f—**

Recitals, in a foreclosure deed from a trustee under a deed of trust to secure a debt, that after due advertisement as in said deed prescribed and by law provided, the trustee did expose to public sale the lands hereinafter described, are *prima facie* evidence of the correctness of the facts therein set forth.

2. **Evidence § 6—**

The burden of proof of the issue remains on the party who asserts the affirmative thereof, and this burden never shifts.

3. **Same—**

The most that a *prima facie* case does, when made out, is to warrant but not compel a verdict. A *prima facie* case is only evidence, stronger, to be sure, than ordinary proof, and the party against whom it is raised is not bound to overthrow it by the greater weight of the evidence. He may introduce evidence to overcome it; or he may go to the jury upon it and combat it as insufficient proof of the ultimate facts, in which case he risks an adverse verdict.

BARNHILL, J., dissenting.

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

APPEAL by defendants from *Warlick, J.,* at April Term, 1944, of WATAUGA.

This is an action in ejectment wherein the plaintiff seeks to be declared the owner of and entitled to recover the possession of a certain lot of land in the town of Blowing Rock, county of Watauga, described as

follows: "Beginning at a stone on Main Street and runs north 88 deg. West 100 feet to a stake; thence North 9 deg. East 100 feet to a stake; thence South 88 deg. East 100 feet to a stone; thence South 9 deg. West 100 feet to a stone on corner, known as Lot No. 1 in Abernathy Plat, and being the lands on which is located the house known as Hob Nob Inn."

The plaintiff alleges and contends that the defendants were formerly the owners of the *locus in quo*; that they executed a deed of trust thereon to Julian Price, Trustee, to secure a loan from the Jefferson Standard Life Insurance Company of $1,500.00; that J. E. Holshouser was substituted for Julian Price as trustee in said deed of trust; that there was default in the payment of the loan, and the insurance company called upon the substituted trustee to foreclose the deed of trust, which said substituted trustee did; that at the foreclosure sale, duly conducted on 10 May, 1943, the insurance company became the last and highest bidder for the property described in said deed of trust, including the *locus in quo*; that said substituted trustee executed and delivered to the insurance company a foreclosure deed therefor, containing among other recitals the following: ". . . after due advertisement as in said deed prescribed and by law provided, the said J. E. Holshouser, substituted trustee, did on the 10th day of May, 1943, at the courthouse door of Watauga County, in Boone, North Carolina, at 11:00 a.m., expose to public sale the lands and property hereinafter described," and, notwithstanding the said company has demanded possession of said land, the defendants refuse to surrender the same.

While the defendants admit the execution and delivery of the deed of trust on land including the *locus in quo* to Julian Price, Trustee for the Jefferson Standard Life Insurance Company, and the substitution of J. E. Holshouser as trustee therein, the default in the payment of the loan for which the deed of trust was given to secure, and that a purported foreclosure sale was held on 10 May, 1943, by the said substituted trustee and in pursuance thereof deed was executed and delivered to the Jefferson Standard Life Insurance Company, they aver and contend that said purported foreclosure sale was void for the reason that it was not advertised as by the provisions of the said deed of trust provided and as by law required, and that consequently said foreclosure deed was void and conveyed no title to the grantee therein, the Jefferson Standard Life Insurance Company.

The court submitted certain issues arising upon the adverse allegations of the plaintiff and defendants, the first of which reads: "1. Was the property described in the complaint advertised for sale as provided in the deed of trust executed to the Jefferson Standard Life Insurance

Company?" The answers to the other issues submitted were made to turn upon the answer to the first issue.

The jury answered the first issue in the affirmative, and the court entered judgment in favor of the plaintiff, from which the defendants appealed, assigning errors.

Trivette & Holshouser and Smith, Wharton & Jordan for plaintiff, appellee.

John W. Aiken for defendants, appellants.

SCHENCK, J. On the first issue submitted the court repeatedly charged the jury to the effect that the burden of proof on the first was upon the defendants to satisfy the jury by the greater weight of the evidence, or by the preponderance of the evidence, that the issue should be answered in the negative as they, the defendants, contended it should be answered. Among similar instructions, the court told the jury for its guidance: "And I instruct you, gentlemen, if you are satisfied from the evidence and by its greater weight or preponderance thereof, the burden being on the defendants, that this notice or a copy thereof of like character with the notices posted elsewhere and published in a newspaper, was not published by posting to the world at Holshouser's store in Blowing Rock, until the 12th of April, 1943, then I instruct you that would not be a valid posting, and if you so find from the evidence and by the greater weight or preponderance thereof, you should answer the first issue No, the burden being on the defendants." And also, "Such a showing, gentlemen, as I have already told you, constitutes a *prima facie* case that the sale was made, the burden being on the defendants to show that the sale was made under an improper posting, that the posting was not properly done, and that the terms required in the deed of trust were not met."

Such instructions, together with others of like import, are made the bases of exceptive assignments of error, and we are constrained to hold that such assignments are well taken.

While it is true the recitals in the foreclosure deed from the substituted trustee to the last and highest bidder at the foreclosure sale, that is, the deed from Holshouser, Trustee, to the Jefferson Standard Life Insurance Company, are *prima facie* evidence of the correctness of the facts therein set forth, and the burden of proving otherwise is on the person attacking the sale, in this case the defendants, *Dillingham v. Gardner,* 219 N. C., 227, 13 S. E. (2d), 478, still the burden of proof of the issue remains on the plaintiff who asserts the affirmative thereof, and this burden never shifted to the defendants. The defendants had a

right to introduce evidence to rebut the *prima facie* case made out by the recitals in the trustee's deed or to decline to introduce evidence and thereby assume the risk of an adverse verdict on plaintiff's evidence. The most that a *prima facie* case does, when made out, is to warrant but not to compel a verdict. *Mfg. Co. v. R. R.,* 222 N. C., 330, 23 S. E. (2d), 32. ". . . the *prima facie* case is only evidence, stronger, to be sure, than ordinary proof, and the party against whom it is raised by the law is not bound to overthrow it and prove the contrary by the greater weight of evidence, but if he fails to introduce proof to overcome it, he merely takes the chance of an adverse verdict, and this is practically the full force and effect given by the law to this *prima facie* case. He is entitled to go to the jury upon it and to combat it, as being insufficient proof of the ultimate fact under the circumstances of the case, but he takes the risk in so doing, instead of introducing evidence." *Brock v. Ins. Co.,* 156 N. C., 112 (116), 72 S. E., 213. See also *Speas v. Bank,* 188 N. C., 524 (530), 125 S. E., 398.

The rule with us is stated in *Cotton Oil Co. v. R. R.,* 183 N. C., 95, 110 S. E., 660, and again in *Mfg. Co. v. R. R., supra,* and is taken from 1 Elliott on Evidence, 139, as follows: "The burden of the issue, that is, the burden of proof in the sense of proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced."

Since there must be a new trial for the errors indicated in the charge, it becomes unnecessary to comment upon the other interesting questions posed by the appellants' brief.

New trial.

BARNHILL, J., dissenting: The defendants admit the mortgage, the foreclosure sale, and the foreclosure deed from the trustee to the plaintiff. Nothing else appearing, this would entitle plaintiff to judgment.

But the defendants plead by way of affirmative defense that the foreclosure sale was not duly and properly advertised as by law required.

Upon whom rests the burden of proof on the issue of fact thus raised by the defendants' plea of inadequate advertisement? The court below held that the burden rested upon the defendants and so instructed the jury. In my opinion this was in accord with the uniform decisions of this Court and the judgment below should be affirmed.

A purchaser at a foreclosure sale is protected by the presumption of regularity in the execution of the power of sale contained in the deed of trust. *Biggs v. Oxendine,* 207 N. C., 601, 178 S. E., 216; *Berry v. Boomer,* 180 N. C., 67, 103 S. E., 914; *Cawfield v. Owens,* 129 N. C., 286; *Jenkins v. Griffin,* 175 N. C., 184, 95 S. E., 166; *Lumber Co. v. Waggoner,* 198 N. C., 221, 151 S. E., 193; *Elkes v. Trustee Corporation,* 209 N. C., 832, 184 S. E., 826; *Phipps v. Wyatt,* 199 N. C., 727, 155 S. E., 721; *Dillingham v. Gardner,* 219 N. C., 227, 13 S. E. (2d), 478; 37 Am. Jur., 146.

If there is any failure to advertise properly, the burden is on the attacking party to show it. *Cawfield v. Owens, supra; Jenkins v. Griffin, supra; Berry v. Boomer, supra; Lumber Co. v. Waggoner, supra; Elkes v. Trustee Corporation, supra;* 37 Am. Jur., 146.

Biggs v. Oxendine, supra, is substantially on all fours. There, *Brogden, J.,* speaking for the Court, says: "The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face; and if there is any failure to advertise properly, the burden is on the attacking party to show it." The charge of the court below was in accord with this rule. Hence, I vote to affirm.

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

S. H. GRADY v. J. HOWARD FAISON, ADMINISTRATOR OF THE ESTATE OF BETTIE KORNEGAY FAISON, DECEASED.

(Filed 1 November, 1944.)

1. Trial § 54—

Findings of fact by a referee, approved by the judge, trial by jury having been waived by the parties, are unassailable when supported by competent evidence.

2. Trial § 22a—

The refusal of defendant's motion for nonsuit, and his failure to offer evidence, should not be considered as conclusively establishing the credibility of plaintiff's evidence. G. S., 1-183.

3. **Executors and Administrators § 15d—**

Failure to prove a special contract, between plaintiff and defendant's intestate for compensation to plaintiff for personal services by a devise of real and personal property, will not prevent plaintiff from maintaining his claim for compensation upon an implied promise to pay what these services were reasonably worth.

4. **Same: Limitation of Actions § 2e—**

In the absence of a special contract to compensate plaintiff for his services to defendant's intestate, by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years.

5. **Specific Performance § 3: Frauds, Statute of § 13—**

In a suit to enforce specific performance of an oral contract to convey land, the denial of the contract in the answer raises the defense of the statute of frauds.

6. **Specific Performance § 1—**

Specific performance of an oral contract to devise real property is unenforceable, as is also an indivisible contract to devise real and personal property.

7. **Executors and Administrators § 15d—**

The relationship of plaintiff, an adult nephew, to the defendant's intestate, an elderly aunt, in an action for compensation for personal services, is not sufficient to raise the presumption of gratuitous services.

8. **Contracts §§ 5, 22—**

Evidence of the performance of valuable services at the request of, or knowingly accepted by another, raises the implication of a promise to pay what the services are reasonably worth.

APPEAL by plaintiff and defendant from *Frizzelle, J.*, at April Term, 1944, of DUPLIN. Affirmed on both appeals.

This was an action to recover for services to defendant's intestate. It was alleged that the services were rendered in consequence of decedent's contract to compensate plaintiff therefor by a devise of real and personal property.

Compulsory reference was ordered. The referee reported findings of fact and conclusions of law to the effect, (1) that the decedent did not enter into the special contract alleged; (2) that there was an implied promise on the part of decedent to pay plaintiff the reasonable worth of the services rendered; (3) but that plaintiff was only entitled to recover the reasonable value of such services as were rendered within three years of the death of the intestate; and (4) that the reasonable value of plaintiff's services for the three years' period was $1,500.

Plaintiff filed exceptions to the referee's report on the ground that he should have found there was a special contract between intestate and

plaintiff as alleged, or, failing that, the three years' statute of limitations should not have been applied, and that the value of the services rendered within the three years' period was greater than that allowed.

Defendant excepted to the referee's report on the ground that there was no competent evidence to support the finding that plaintiff was entitled to recover anything on his claim, and that plaintiff's action should have been nonsuited.

On the hearing jury trial was waived, and the court, after consideration of the pleadings, evidence, report of referee and exceptions thereto, sustained, approved and confirmed each of the referee's findings of fact and conclusions of law, and overruled all exceptions thereto, and entered judgment that plaintiff recover of defendant administrator $1,500.

Both plaintiff and defendant appealed.

Oscar B. Turner, L. A. Wilson, and H. E. Phillips for plaintiff.

J. Faison Thomson, Rivers D. Johnson, and Beasley & Stevens for defendant.

DEVIN, J. The plaintiff grounded his action for compensation for services to the defendant's intestate upon an alleged special contract or agreement to compensate him therefor by devising to him all the property, real and personal, she might own at her death. However, the referee who heard all the evidence found as a fact that the decedent and plaintiff did not enter into the special contract alleged. This finding, which is supported by evidence, was approved and confirmed by the trial judge, and hence the conclusion on this point must be regarded as unassailable. *Dent v. Mica Co.,* 212 N. C., 241, 193 S. E., 165. The suggestion that the refusal of defendant's motion for nonsuit, and his failure to offer evidence should be considered as conclusively establishing the credibility of plaintiff's evidence, is not in accord with the statutory proceedings prescribed by G. S., 1-183.

But failure of proof of a special contract would not prevent plaintiff from maintaining his claim for compensation for his services to decedent upon the implied promise to pay what these services were reasonably worth. *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Lipe v. Trust Co.,* 206 N. C., 24, 173 S. E., 316; *Price v. Askins,* 212 N. C., 583, 194 S. E., 284; *Daughtry v. Daughtry,* 223 N. C., 528. Upon this phase of the case the plaintiff excepted to the ruling of the trial court in confirming the conclusion of the referee that in the absence of a special contract to compensate plaintiff for his services by will effective at her death, the statute of limitations would bar all claim for services except those rendered within three years. This ruling was a logical sequence

of the finding that there was no contract to postpone payment of compensation until her death, such as would arrest the running of the statute, and hence the ruling must be upheld as correct. *Miller v. Lash,* 85 N. C., 54; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Lipe v. Trust Co.,* 207 N. C., 794, 178 S. E., 665.

The complaint was not demurrable. *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331. Denial of the contract in the answer raised the defense of the statute of frauds. *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439. Specific performance of an oral contract to devise real property is unenforceable, *Daughtry v. Daughtry,* 223 N. C., 528, as is also an indivisible contract to devise real and personal property. *Neal v. Trust Co., ante,* 103. Plaintiff's action was not for specific performance of the alleged contract, but in the last analysis for the value of his services for the entire period during which they were performed. *Norton v. McLelland,* 208 N. C., 137, 179 S. E., 443. While there was a failure of proof that there was such a contract as was alleged in the complaint, evidence in regard to it, though insufficient to prove the contract, would be available to support the position that the services were of value, and that compensation therefor was within the contemplation of the parties. *Neal v. Trust Co., supra; Hager v. Whitener,* 204 N. C., 747, 169 S. E., 645.

Plaintiff also excepted to the amount fixed by the referee as the reasonable worth of his services during the last three years of the life of defendant's intestate. He contends the amount is insufficient. However, this was a matter to be determined by the referee from the evidence, and his finding approved by the judge will not be disturbed.

On the plaintiff's appeal the judgment is affirmed.

DEFENDANT'S APPEAL.

The defendant's appeal presents the question whether there was any competent evidence to support the finding that plaintiff was entitled to recover anything on his claim for services to defendant's intestate. He contends his motion for judgment of nonsuit should have been sustained.

It may be observed that the relationship of the plaintiff, an adult nephew, to the decedent, an elderly aunt, was not sufficient to raise the presumption of gratuitous service. *Francis v. Francis,* 223 N. C., 401; *Landreth v. Morris,* 214 N. C., 619, 200 S. E., 378. And the general rule would apply that evidence of the performance of valuable services at the request of, or knowingly accepted by another, raises the implication of a promise to pay what the services are reasonably worth. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540.

An examination of the testimony produced before the referee, as it appears of record, leads to the conclusion that there was some evidence to support the finding, both as to the service rendered and its value. True some of the evidence related to a period more than three years before the death of the intestate, and much of it was lacking in detail and in definiteness of description, but we think it does appear that services were requested by decedent and rendered by plaintiff in supervising her farm and transacting her business affairs, assisting in repairs, harvesting and marketing crops, negotiating and conducting sales of timber, and that evidence of these services was coupled with expressions on the part of decedent of appreciation of plaintiff's faithful services, and her dependence on his help in many matters, and of her expectation of compensating him therefor.

The defendant noted exception to the ruling of the referee, approved by the judge, as to the admission, over objection, of several matters of testimony, but these, we think, were not of sufficient moment to require setting aside the result, and there was competent evidence to support the finding and judgment. On the defendant's appeal the judgment is affirmed.

On plaintiff's appeal: Affirmed.

On defendant's appeal: Affirmed.

W. S. BAILEY v. E. D. INMAN AND WIFE, BETTIE INMAN.

(Filed 1 November, 1944.)

1. Usury § 2—

To constitute a usurious transaction, corrupt intent to take more than the legal rate of interest is an essential element.

2. Usury § 5: Equity § 1a—

Where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury.

APPEAL by plaintiff from *Armstrong, J.*, at April Term, 1944, of CABARRUS.

Civil action for specific performance.

These facts are uncontroverted:

On 13 August, 1938, plaintiff and defendants entered into a written contract by the terms of which defendants agreed to sell and convey to

plaintiff, and plaintiff agreed to purchase and accept deed from defendants for a certain house and lot in Cabarrus County, North Carolina. The agreed purchase price was $850.00, payable $150.00 in cash, receipt of which was acknowledged by defendants, and balance in installments of $12.00 every 28 days beginning 20 August, 1938, "until the full sum of $700.00 has been paid. Interest to run at the rate of 6% per annum and is to be included in the $12.00, that is $8.00 of the $12.00 that is paid every 28 days is principal and $4.00 of the $12.00 that is paid every 28 days is interest,"—the plaintiff being directed by defendants to pay said amounts to G. H. Hendrix, of Concord, their agent.

Plaintiff alleges in his complaint: (1) That he has paid to defendants the sum of $551.00 on the principal of the contract, and $244.00 as interest thereon, which is more than six per cent per annum and as a result the contract is fraught with usury and is violative of C. S., 2306, G. S., 24-2, providing penalty for usury, and on that account pleads forfeiture of interest on the contract, refund of which with statutory penalty thereon is demanded; (2) that he has fully performed his part of the contract of 13 August, 1938, and is entitled to deed for the house and lot to which same relates; and (3) that though demand therefor has been made by him, defendants fail and refuse to execute and deliver deed in accordance with provisions of the agreement. Thereupon plaintiff prays judgment against defendants for specific performance, and for recovery of the amount of interest paid on the contract, plus the statutory penalty thereon for usury, or $488.00 less a balance of $149.00 due the defendants, or the net sum of $339.00.

Defendants, by answer filed, deny that any usury has been charged, and aver (1) that the balance of principal and interest has not been paid, and (2) that they stand ready and willing to make and execute to the plaintiff a good warranty deed free from all encumbrances to the property described in the contract upon payment of said $700.00 with interest at the rate of six per centum per annum.

Upon the trial in Superior Court plaintiff offered evidence tending to show: That between the dates of 20 August, 1938, and 22 July, 1943, he had made forty payments of $12.00 each, and twenty-one payments of $15.00 each, for total of $795.00, as shown by Building and Loan pass book, series 80, dated 2 October, 1937, for twelve shares in the name of E. D. Inman, one of defendants; that the reason he had paid $15.00 at times and $12.00 at others was because under the contract he was to pay $12.00 every four weeks, and if he had paid it every month it would not have averaged that much; that the way he paid it was to meet Mr. Inman's obligation to the Building and Loan; and that he took the money to Mr. Hendrix and wasn't concerned with how he credited it to Mr. Inman.

Plaintiff testified on cross-examination: "I knew I had paid the $700.00. I had paid $95.00 interest." He was also asked this question: "You know you still owe about $100.00, $98.50 after you take off 6% interest?" (Objection by plaintiff overruled. Exception.) In answer thereto, he said: "I don't know that I do. I know there is some more."

Motion for judgment as in case of nonsuit was allowed at close of plaintiff's evidence. Plaintiff appeals therefrom to Supreme Court and assigns error.

B. W. Blackwelder for plaintiff, appellant.
Hartsell & Hartsell for defendants, appellees.

WINBORNE, J. Plaintiff's challenge to the correctness of the judgment of the Superior Court fails for these reasons:

(1) The contract of sale and purchase alleged to be usurious clearly states that the balance of $700.00 of the purchase price is payable in installments of $12.00 every 28 days until the full sum of $700.00 be paid—interest to run "at the rate of 6% per annum." While there is a breakdown and spread of the twelve dollar payments into principal and interest, there is nothing in the contract to show that it was the intention to take or to charge a greater rate of interest than the legal rate of six per cent per annum. To constitute a usurious transaction, corrupt intent to take more than the legal rate of interest is an essential element. *Doster v. English,* 152 N. C., 339, 67 S. E., 754; *Riley v. Sears,* 154 N. C., 509, 70 S. E., 997; *Monk v. Goldstein,* 172 N. C., 516, 90 S. E., 519.

(2) But if it be conceded that the contract of sale and purchase be susceptible to the interpretation that usurious interest was contemplated. this is an equitable proceeding for specific performance of a contract to convey land, and the record and evidence fail to show that plaintiff has paid or offered to pay the balance of principal with interest at the legal rate. While plaintiff here contends that he has paid the $700.00 balance of principal, he admits in his testimony that he has paid only $95.00 as interest and that he still owes "some more." Indeed, in arriving at the net sum for which judgment is prayed in the complaint, plaintiff adds the amount of alleged forfeited interest and the amount of statutory penalty for usury, and deducts "a balance of $149.00 due the defendants."

"The principle is well settled by numerous decisions of this Court that where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt with interest at the legal rate. In such case he is not entitled to the

benefit of the statutory penalties for usury." *Connor, J.*, in *Smith v. Bryant,* 209 N. C., 213, 183 S. E., 276. See also *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334; *Miller v. Dunn,* 188 N. C., 397, 124 S. E., 746; *Jonas v. Mortgage Co.,* 205 N. C., 89, 170 S. E., 127; *Mortgage Co. v. Wilson,* 205 N. C., 493, 171 S. E., 783; *Kenny v. Hotel Co.,* 208 N. C., 295, 180 S. E., 697; *Buchanan v. Mortgage Co.,* 213 N. C., 247, 195 S. E., 787.

No argument is stated, nor authority cited in support of other assignment. Hence, same is deemed abandoned. Rule 28, Rules of Practice in Supreme Court, 221 N. C., 544, at 562.

The judgment below is
Affirmed.

STATE v. TOM KEG MULL, HERMAN LAFEVERS AND LESTER MULL.

(Filed 1 November, 1944.)

1. Robbery § 1b—

Force or intimidation, occasioned by the use or threatened use of firearms, is the main element of the offense of robbery with firearms. G. S., 14-87. It is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show it was the property of the person assaulted or in his care, and had a value.

2. Same—

Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there is no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge.

APPEAL by defendants from *Warlick, J.*, at Special Criminal Term, March, 1944. From BURKE.

Criminal prosecution tried upon indictment charging the defendants, and another, with robbery with firearms in violation of G. S., 14-87.

The bill charges that on 6 October, 1943, the defendants committed an assault upon one Cleveland Whisenant with a pistol and shotgun, and "did place him in bodily fear and endanger his life and did . . . rob him of the sum of two dollars in money, the property of the said Cleveland Whisenant, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The evidence on behalf of the State tends to show that on the night of 6 November, 1943, Cleveland Whisenant, accompanied by his two sons, stopped his automobile on a public road in Burke County to repair a punctured tire.

The defendants, also driving in a car, stopped some distance away, got out, and Lester Mull went forward, drew his pistol on Cleveland Whisenant and with threatening language demanded some gas or gas tickets. He was followed shortly by the other defendants, one of whom had a gun strapped on his back. Lester Mull then took Whisenant to a bridge near-by and got $2.00 from him. Upon their return Lester Mull said to Whisenant in the presence of the others, "We need $1.00 more." To this, Whisenant replied, "I have already given you $2.00." He further stated that he had no gas tickets or coupons; that he had to go to the Ration Board to get gas for the trip he was then on. Whereupon, someone remarked, "We better not take his tickets." Soon thereafter Whisenant was assaulted and knocked to the ground. The defendants picked him up and put him in his car and searched his pockets. He died on the way to the hospital (not from the assault, but from natural causes or over-exertion perhaps). The evidence also tends to show that Tom Keg Mull and Herman LaFevers had been drinking.

The deceased, who lived in Asheville, was in Burke County with his family to attend the funeral of his brother-in-law. He did not know the defendants.

There was evidence on behalf of the defendants tending to show that Berle Rector, who ran away and has not been apprehended, and not Lester Mull, was the one who got the money.

Verdict: As to Loy Rector, "not guilty." As to Tom Keg Mull, Herman LaFevers and Lester Mull, "guilty of robbery with firearms as charged in the bill of indictment."

Judgment: Imprisonment in the State's Prison for not less than 5 nor more than 7 years.

The defendants appeal, assigning errors.

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

Russell Berry and S. J. Ervin, Jr., for defendants.

STACY, C. J. The only serious exception appearing on the record is the one addressed to the following excerpt from the charge:

"I instruct you that money is personal property; and I further instruct you that under the law as it applies, gas tickets or coupons are recognized as personal property, and that the taking of them is a breach of the statute as charged against the defendants."

The alleged vice of this instruction is, that it enlarges upon or departs from the bill of indictment, which specifies the property taken as "two dollars in money" and makes no reference to any gas tickets or coupons.

In short, the defendants say they were charged with one offense, and under the court's instruction may have been convicted of another. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6.

The State offers three suggestions in support of the charge and in reply to the criticism of the defendants: first, the exact description of the property is not material; secondly, there is no evidence of any gas tickets or coupons being taken; and, finally, the error in the charge, if any, is cured by the verdict which limits the taking to the "two dollars in money" since it declares the defendants "guilty of robbery with firearms as charged in the bill of indictment."

Initially, it should be observed that the bill charges robbery from the person by the use or threatened use of firearms of two dollars in money the property of Cleveland Whisenant. The gist of the offense, as thus alleged, is the accomplishment of the robbery by the use or threatened use of firearms. *S. v. Keller,* 214 N. C., 447, 199 S. E., 620. Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense. G. S., 14-87; *S. v. Sawyer, ante,* 61, 29 S. E. (2d), 34; *S. v. Burke,* 73 N. C., 83. "In such case it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show it was the property of the person assaulted or in his care, and had a value." *People v. Nolan,* 250 Ill., 351, 95 N. E., 140, 34 L. R. A. (N. S.), 301, Ann. Cas. 1912 B 401; 46 Am. Jur., 154.

Secondly, there was no objection on the trial to the evidence tending to show that gas tickets or coupons were demanded in addition to the money. Apparently the kind and value of the property taken was not regarded as capitally important. In this respect the trial seems to have proceeded in accordance with precedent. *S. v. Sawyer, supra.* "In robbery the kind and value of the property is not material, because force or fear is the main element of the offense." *S. v. Burke, supra.* The fact that the bill contains no reference to gas tickets or coupons appears not to have been mooted on the trial. It may have been discovered later.

Nevertheless, without definite ruling on the question of enlargement upon or departure from the bill, we think the case may be made to rest on the suggestion that the verdict conforms to the charge and the evidence. The indictment has been established on the record. The matter now debated was unnoticed at the time of trial. The defendants have had a full and open hearing, with no suggestion of surprise, and it is not perceived wherein they have been prejudiced. A new trial would only result in giving them another "bite at the cherry."

The jury was instructed that an attempt to commit the crime charged "is a misdemeanor." *S. v. Jordan,* 75 N. C., 27. However, it will be

noted that by the terms of the statute, one who "unlawfully takes or attempts to take personal property" in the circumstances named, or who "aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony." G. S., 14-87. Thus it would appear that this particular instruction was more favorable to the defendants than they had a right to expect.

A careful perusal of the entire record leaves us with the impression that the verdict and judgment should be upheld.

No error.

STATE v. WILLIE LENNON EDWARDS.

(Filed 1 November, 1944.)

1. Criminal Law §§ 1a, 28a—

The prosecution has the burden of proving the *corpus delicti,* that is, a crime has been committed, before the jury may proceed to inquire as to who committed it.

2. Same—

To show the death of deceased, without establishing the felonious cause of the death, or the identity of the defendant as the person who caused the death, or circumstances from which these facts might reasonably be inferred, falls short of proving the *corpus delicti* of the crime of which the defendant has been convicted.

APPEAL by defendants from *Williams, J.,* at April Term, 1944, of PITT.

The defendant was tried upon a bill of indictment charging him with the murder of one Will Cox, at which trial the solicitor for the State announced that he would not ask for a verdict of guilty of murder in the first degree but would ask for a verdict of guilty of murder in the second degree or of manslaughter as the evidence warranted. When the State had produced its evidence and rested its case the defendant moved to dismiss the action or for judgment of nonsuit, which motion was overruled, and the defendant introduced his evidence and again moved for judgment of nonsuit after all the evidence in the case was concluded, which motion was again overruled, G. S., 15-173, to which ruling the defendant objected and excepted.

There was a verdict of guilty of manslaughter and from judgment of imprisonment predicated thereon the defendant appealed, assigning errors.

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

Harding & Lee and Charles L. Abernethy, Jr., for defendant, appellant.

SCHENCK, J. The first and decisive question posed by this appeal is: Was the evidence insufficient to be submitted to the jury, or, should the court have sustained the defendant's motions for judgment of nonsuit duly made when the State had produced its evidence and at the conclusion of all the evidence? We are constrained to hold that the answer is in the affirmative.

The evidence tended to prove that Will Cox, the deceased, was first missed on a Sunday in March, 1933, that a searching party was organized to find him, and that on the following Saturday, a week later, the dead body of Will Cox was found in the woods; that the condition of the body indicated the deceased had been dead for several days; that an examination was made of the body by the coroner, A. A. Ellwanger, and Dr. J. L. Winstead, both of whom testified to the effect that they found no scars or bruises on the body at any place, no bones broken, and no evidence of mashed skull, or of foul play; that the body was in a state of decomposition at the time the examination was made after it was found in the woods. There was evidence that an ax and a quilt were found at a still about two miles from where the body was found and that on the ax and on the quilt was what appeared to be blood, and that both the defendant and the deceased had been seen at the still the day the deceased disappeared, and that the defendant had been heard to say that he struck the deceased once, and that the defendant left the searching party and went to Baltimore, Maryland, a day or two before the body was found. However, there is no evidence that the defendant struck the deceased with an ax, or that the deceased was struck with an ax, or that the deceased's death was caused by being struck with anything. "The prosecution has the burden of proving the *corpus delicti,* that is, a crime has been committed, before the jury may proceed to inquire as to who committed it." 22 C. J. S., Criminal Law, par. 567, page 883.

"Proof of a charge, in criminal causes, involves the proof of two distinct propositions: first, that the act itself was done, and secondly, that it was done by the person charged, and by none other—in other words, proof of the *corpus delicti* and of the identity of the prisoner. Hence, before there can be a lawful conviction of a crime, the *corpus delicti*—that is, that the crime charged has been committed by someone—must be proved. Unless such a fact exists there is nothing to investigate.

Until it is proved, inquiry has no point upon which it can concentrate; indeed, there is nothing to inquire about." 7 R. C. L., 774.

To show that the deceased was dead, without establishing the felonious cause of the death, or the identity of the defendant as the person who caused the death, or circumstance from which these facts might reasonably be inferred, falls short of proving the *corpus delicti* of the crime of which the defendant has been convicted. *S. v. Church,* 202 N. C., 692, 163 S. E., 874.

The motion for judgment of nonsuit should have been allowed. It will be sustained here as provided by G. S., 15-173.

Reversed.

MRS. VERNIE TOWE (WIDOW), MRS. GLADYS L. BANKS (GUARDIAN OF VAUGHTIE LUCILLE TOWE, MINOR), DAUGHTER OF WILLIAM E. TOWE, DECEASED (EMPLOYEE), v. YANCEY COUNTY (EMPLOYER), SELF-INSURER.

(Filed 1 November, 1944.)

1. Master and Servant § 39g: Sheriffs § 2—

Deputy sheriffs were not included as employees of the sheriff or of the county within the meaning of the N. C. Workmen's Compensation Act as originally enacted.

2. Sheriffs § 2—

A deputy sheriff, although appointed by the sheriff and acting for him, is considered a public officer; and his compensation as fixed by statute, whether fees or salary, is for public service.

3. Master and Servant § 39g: Constitutional Law § 8—

Public Laws 1939, ch. 277, now G. S., 97-2, including deputy sheriffs, and persons acting as deputy sheriffs, within the term "employee" as used in the N. C. Workmen's Compensation Act, is consonant with Art. I, sec. 7, and with Art. II, sec. 29, of the N. C. Constitution.

APPEAL by defendant from *Pless, J.,* at January Term, 1944, of YANCEY.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendant to claimants for compensation for death of William E. Towe.

The North Carolina Industrial Commission finds as a fact that William E. Towe came to his death on 13 June, 1940, as result of injury by accident arising out of and in the course of his employment as deputy sheriff of Yancey County, and awarded compensation.

This award was affirmed by judgment of Superior Court. Defendant appeals to Supreme Court and assigns error.

Charles Hutchins and R. W. Wilson for plaintiff, appellee.
Watson & Fouts for defendant, appellant.

WINBORNE, J. This appeal involves only question of the constitutionality of chapter 277, Public Laws 1939.

By this Act the General Assembly amended the North Carolina Workmen's Compensation Act, Public Laws 1929, chapter 120, now chapter 97 of the General Statutes of North Carolina, so as (1) to include deputies sheriff and all persons acting in capacity of deputy sheriff within the meaning of the term "employee" as used in the act, (2) to declare that "for the purposes of this law" the board of commissioners in each county of the State shall be considered as "employer" of all deputies sheriff and of persons serving or performing the duties of a deputy sheriff, and (3) to fix as basis for compensation under the Workmen's Compensation Act for all such deputies sheriff and such persons a minimum amount per week, but specifying that the Act shall not apply to fourteen counties named therein.

The attack upon the constitutionality of the Act is upon the ground that it violates (1) Article I, section 7, of the North Carolina Constitution, which provides that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services," and (2) Article II, section 29, of said Constitution, which inhibits the enactment of private or special legislation.

In this connection these principles are appropriate: A deputy sheriff is a deputy of the sheriff, one appointed to act ordinarily for the sheriff, and not in his own name, person or right, and, although ordinarily appointed by the sheriff, is considered a public officer. Deputies sheriff were not included as employees of the sheriff or of the county within the meaning of the North Carolina Workmen's Compensation Act as originally enacted. See *Borders v. Cline*, 212 N. C., 472, 193 S. E., 826; *Styers v. Forsyth County,* 212 N. C., 558, 194 S. E., 305. And the compensation of a deputy sheriff is for public service, and, whether on basis of fees or salary, is fixed by statute. *Borders v. Cline, supra,* and cases cited. This the General Assembly has the power to do. *Borders v. Cline, supra,* and cases cited. *Hill v. Stansbury,* 223 N. C., 193, 25 S. E. (2d), 604.

Therefore, any benefits which deputies sheriff and persons acting in the capacity of deputy sheriff may receive under the Act in question are conferred by reason of public service, and in this light the Act is consonant with the provisions of Article I, section 7, of the Constitution.

Furthermore, the fixing of compensation of sheriff and deputy sheriff is not included among the subjects enumerated in Article II, section 29, of the Constitution, relating to which the General Assembly shall not pass any local, private or special act or resolution. Thus, there is in this section no inhibition against the passing of a local, private, or special act fixing such compensation unless the act in question comes within the subject of "regulating labor, trade, etc.," against which there is an inhibition. But as a deputy sheriff is a public officer, the Act conferring benefits upon deputies sheriff in consideration of public service is not a regulation of labor or trade.

Moreover, there is no provision in the Constitution requiring the compensation of public officers in the various counties to be uniform throughout the State.

The judgment below is

Affirmed.

STATE v. JOHN EMERY, BILL EMERY AND LEROY TURNER.

(Filed 8 November, 1944.)

1. **Constitutional Law § 1—**

The will of the people, as expressed in the Constitution, is the supreme law of the land and is subject to change only in the manner prescribed.

2. **Constitutional Law § 3a—**

In searching for this will or intent of the people, as expressed in the Constitution, all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purpose of the instrument.

3. **Same—**

The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.

4. **Jury § 1: Constitutional Law § 27—**

A jury, as understood at common law and as used in our Constitutions, signifies twelve good (or free) and lawful men in a court of justice, duly selected and impaneled in the case to be tried. Women are excluded from juries *propter defectum sexus*, and aliens and persons under 21 years of age are not competent to serve.

5. **Statutes §§ 5a, 5b—**

Every statute is to be interpreted in the light of the Constitution and the common law and as it was intended to be understood at the time of its enactment.

6. Jury § 1—

Jury service is not a right or privilege guaranteed to anyone. It is an obligation imposed by law upon those who come within a designated class possessing the prescribed qualifications. Women have not yet been assigned to jury duty in this jurisdiction.

7. Same: Constitutional Law § 27—

The General Assembly is at liberty to impose the burden of jury service on some and relieve others of the obligation, provided the classification is not in derogation of the 14th Amendment to the Constitution of the U. S. or of our own Constitution. Classification by races would be unlawful, while there is no objection to classification on the basis of sex.

8. Same—

With us liability to jury duty is not an incident to the right of suffrage and the 19th Amendment to the Constitution of the U. S. has no bearing on the right of women to serve on juries in North Carolina.

9. Jury § 2—

The failure, of a defendant in a criminal prosecution to exhaust his peremptory challenges, does not affect his rights to attack an illegally constituted jury.

DEVIN, J., dissenting.
SEAWELL, J., dissenting.

APPEAL by defendants from *Pless, J.,* at January-February Term, 1944, of POLK.

Criminal prosecution tried upon indictment charging the defendants and another, in six counts, with violations of the prohibition laws.

Upon the trial, after the regular panel of jurors and most of the male bystanders had been exhausted, the sheriff called from among the bystanders two women of good moral character, freeholders and residents of the county, and they were accepted by the solicitor as satisfactory jurors. The defendants moved the court to excuse both women from jury service for the reason that they were not qualified, because of their sex, to serve as petit jurors. Overruled; exceptions. Peremptory challenges were still available to the defendants, but were not used to stand the women aside, as the defendants did not wish unnecessarily to exhaust their challenges. Practically all remaining bystanders, not previously called, were women.

There was a general verdict of guilty as to each of the defendants, which they moved to set aside principally upon the ground of jury defect. Overruled; exceptions.

From the judgments pronounced, the defendants appeal, assigning errors.

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

J. E. Shipman and Phillip C. Cocke for defendants.

STACY, C. J. The questions here posed are (1) whether a jury of ten men and two women suffices as a jury of "good and lawful men" within the meaning of Art. I, sec. 13, of the Constitution; and (2) whether trial by such jury complies with "the law of the land" and accords with "the ancient mode of trial by jury" vouchsafed in Art. I, secs. 17 and 19, of the Constitution. While these are questions of first impression, the construction heretofore placed on the subject sections of the Constitution would seem to point to negative answers.

The pertinent clauses follow:

"No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." Declaration of Rights, Art. I, sec. 13.

"No person ought to be . . . deprived of his . . . liberty or property, but by the law of the land." Declaration of Rights, Art. I, sec. 17.

"In all controversies at law respecting property, the ancient mode of trial by jury . . . ought to remain sacred and inviolable." Declaration of Rights, Art. I, sec. 19.

The will of the people as expressed in the Constitution is the supreme law of the land. *Warrenton v. Warren County,* 215 N. C., 342, 2 S. E. (2d), 463. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. *Elliott v. Board of Equalization,* 203 N. C., 749, 166 S. E., 918; *Reade v. Durham,* 173 N. C., 668, 92 S. E., 712. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected. *Noscitur a sociis* is a rule of construction applicable to all written instruments. 11 Am. Jur., 663; 25 R. C. L., 995.

In numerous decisions, it has been said that the word "jury," as here used, is to be given the signification which it had when the Constitution was adopted, *i.e.,* a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. *S. v. Rogers,* 162 N. C., 656, 78 S. E., 293, 46 L. R. A. (N. S.), 38, Ann. Cas. 1914 A, 867; *S. v. Berry,* 190 N. C., 363, 130 S. E., 12; *S. v. Scruggs,* 115 N. C., 805, 20 S. E., 720; *S. v. Stewart,* 89 N. C., 564; *People v. Powell,* 87 Cal., 348; 31 Am. Jur., 557; 11 Am. Jur., 684. The jury is to be composed of twelve "good (or free) and lawful men"—*liberi et legales homines. S. v. Dalton,* 206 N. C., 507, 174 S. E., 422.

From ancient times or from the earliest period in the history of the common law, grand and petit juries have consisted exclusively of men. 3 Bl. Com., 352. Women were excluded *propter defectum sexus.* 3 Bl. Com., 362; 4 Id., 395. Blackstone says: "Under the word 'homo,' also, though a name common to both sexes, the female is, however, excluded *propter defectum sexus* (because not of the male sex)," except in cases of writs *de ventre inspiciendo.* 3 Blk. Com., 362, 35 C. J., 245; *People v. Lensen,* 34 Cal. App., 336, 167 Pac., 406; *S. v. James,* 96 N. J. L., 132, 114 Atl., 553, 16 A. L. R., 1141; *S. v. Mittle,* 120 S. C., 526, 113 S. E., 335. Such was the general understanding and meaning of the word "jury" at the time of the adoption of the Constitution in 1868. *S. v. Dalton, supra; S. v. Rogers, supra.* So much so that in Art. I, sec. 13, it is spelled out as "a jury of good and lawful men." True, the number is not mentioned, yet it would hardly be doubted that what the framers had in mind was "a jury of twelve good and lawful men." And the cases so hold. 31 Am. Jur., 625.

At common law a person under 21 years of age was not competent to serve as a juror, and so we have held that the presence of a minor on a grand jury renders its returns quashable, and this without any statute by our Assembly prescribing the age for jurors. *S. v. Griffice,* 74 N. C., 316. Likewise, under the common law an alien was not qualified to serve as a juror, and so we have held, quite recently, that a jury composed of eleven citizens and one alien was not a lawful jury, and this without any statute making alienage a disqualification for jury service in this State. *Hinton v. Hinton,* 196 N. C., 341, 145 S. E., 615.

It follows, therefore, that until the common-law disqualification of sex is removed from our law, women are not required to assume the obligation of jury service. They were ineligible for such service at the time of the adoption of the Constitution in 1868, and the same law which then obtained still subsists. 31 Am. Jur., 594.

"It is elementary that a jury, as understood at common law and as used in our Constitutions, Federal and State, signifies twelve men duly impaneled in the case to be tried." *S. v. Rogers, supra; Traction Co. v. Hof,* 174 U. S., 91; *Patton v. United States,* 281 U. S., 276, 74 L. Ed., 854, 70 A. L. R., 263.

It is a cardinal principle, in the interpretation of constitutions, that they should receive a consistent and uniform construction, so as not to be given one meaning at one time and another meaning at another time, even though circumstances may have so changed as to render a different construction desirable. The will of the people as expressed in the organic law is subject to change only in the manner prescribed by them. *S. v. Knight,* 169 N. C., 333, 85 S. E., 418; 11 Am. Jur., 659.

In support of a different view, it is suggested that by statute, even prior to the adoption of the Constitution, the original jury list was to be selected from the names of all such "persons" as have paid the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. G. S., 9-1. And further that in the construction of statutes, "every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary." G. S., 12-3.

Without conceding the present pertinency of these statutory provisions, it would seem that the contextual use of the words "good and lawful men" and "the ancient mode of trial by jury" in the above sections of the Constitution clearly shows a contrary intent. *Re Opinion of Justices,* 237 Mass., 591, 130 N. E., 685. In at least three states, California, Massachusetts and Texas, similar arguments have been considered and rejected. *People v. Lensen, supra; Com. v. Welosky,* 276 Mass., 398, 177 N. E., 656; *Glover v. Cobb,* 123 S. W. (2d), 794.

To say that the law-making body in 1855, thirteen years prior to the adoption of the Constitution, intended to impose, and did impose, upon women the obligation of jury duty, which the framers of the Constitution must have had in mind, and which we are just now finding out—89 years later—may reveal some ingenuity or enterprise, but the idea could hardly be expected to prevail. In addition to the lateness of the discovery, which alone invites scrutiny, it seems to involve a novel use of the rules of construction.

Every statute is to be considered in the light of the Constitution and with a view to its intent. *Belk Bros. Co. v. Maxwell,* 215 N. C., 10, 200 S. E., 915, 122 A. L. R., 687; *S. v. Humphries,* 210 N. C., 406, 186 S. E., 473. "The intention of the law-makers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute though not within the letter. A thing within the letter is not within the statute if not also within the intention." *Uphoff v. Industrial Board,* 271 Ill., 312, 111 N. E., 128, L. R. A., 1916 E, 329, Ann. Cas., 1917 D, 1. To like effect is the opinion in *Kearney v. Vann,* 154 N. C., 311, 70 S. E., 747. All agree that a statute is to be interpreted as it was intended to be understood at the time of its enactment, and usually with reference to the common law then existent. 50 Am. Jur., 224.

The pertinent considerations were before the Court in *S. v. Mitchell,* 202 N. C., 439, 163 S. E., 581, where *Adams, J.,* delivering the opinion,

said: "Before the adoption of our Constitution it was declared that all such parts of the common law as were theretofore in use within the State and were not destructive of, repugnant to, or inconsistent with the freedom and independence of the State and its form of government and not otherwise provided for, abrogated, repealed, or become obsolete, were in full force within the State. This statute is now in effect. C. S., 970. It is generally conceded that so much of the common law as is in force by virtue of this provision is subject to legislative control and may therefore be modified or repealed. But there are parts of the common law which are not subject to modification or repeal by the Legislature because they are imbedded in the Constitution. . . . It is held, also, that as a rule statutes are to be construed with reference to the common law in existence at the time of their enactment. *Kearney v. Vann,* 154 N. C., 311."

It is contended, however, that since 1868 the public policy of the State has undergone a change in respect of the rights of women, which should carry with it an elimination of the disqualification for jury service *propter defectum sexus. Patton v. United States, supra.* The position is that women are now politically the peers of men, and hence they should be permitted to serve on juries. *S. v. Chase,* 106 Or., 263, 211 Pac., 920. But jury service is not a right or privilege guaranteed to anyone. *S. v. Walker,* 192 Iowa, 823, 185 N. W., 619; 35 C. J., 245. It is an obligation imposed by law upon those who come within a designated class possessing the prescribed qualifications. 31 Am. Jur., 650. Women have not yet been assigned the duty of serving on grand or petit juries in this jurisdiction.

The General Assembly is at liberty to impose the burden of jury service on some and relieve others of the obligation, provided the classification is not in derogation of the 14th Amendment to the Constitution of the United States or of our own Constitution. *Norris v. Alabama,* 294 U. S., 587, 79 L. Ed., 1074; *S. v. Peoples,* 131 N. C., 784, 42 S. E., 814. Of course, to single out the members of one race for jury duty and exclude those equally qualified of another would be an unwarranted discrimination of which members of the excluded race could rightfully complain when called upon to answer or go to trial on an indictment in the courts. *Carter v. Texas,* 177 U. S., 442, 44 L. Ed., 839; *Neal v. Delaware,* 103 U. S., 370, 26 L. Ed., 567; *Strauder v. W. Va.,* 100 U. S., 303, 25 L. Ed., 664; *S. v. Henderson,* 216 N. C., 99, 3 S. E. (2d), 357. But classification on the basis of sex, applicable alike to all races, is after the manner of the common law and has persisted throughout the history of the State. *S. v. Sims,* 213 N. C., 590, 197 S. E., 176; 35 C. J., 245.

Moreover, the suggested interpretation of the statute, if constitutionally permissible, would require the commissioners of the several counties as well as the Federal authorities to place the names of all women, otherwise qualified, upon the jury list for jury service, both State and Federal. See *United States v. Roemig,* 52 Fed. Supp., 857, and cases there cited; Anno. 82 L. Ed., 1058; 31 Am. Jur., 620; 35 C. J., 259. This would lead to quite an innovation in the practical administration of the law which has heretofore prevailed from time immemorial. Long acquiescence in the practical interpretation of a statute is entitled to great weight in arriving at its meaning. It is not thought the real intent of the enactment could have been so generally misunderstood or overlooked for years on end. Then, too, if some of the jurors may be women, all may be women. *Harper v. State,* 90 Tex. Cr. R., 252, 234 S. W., 909. A jury of women, or a jury of men and women, could hardly have been in mind when the only jury known at the time was a jury of "good and lawful men"—*liberos et legales homines juratos.* Taylor's Law Glossary; 11 Am. Jur., 683. In *Whitehurst v. Davis,* 3 N. C., 113, where a caveat was tried by thirteen jurors, the Court observed: "It may be said, if thirteen concur in a verdict, twelve must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode may cause a departure in other instances, and in the end endanger or prevent this excellent institution from its usual course. Therefore, no such innovation should be permitted." It were better that the controlling voice should speak again before adopting an interpretation which would impose the obligation of jury service on all women, otherwise qualified, under the provisions of this ancient statute. Obviously, we should think, some exemptions would want to be provided, and other changes made. Anno. 82 L. Ed., 1058.

It is also suggested that the 19th Amendment to the Constitution of the United States, adopted in 1920, may have some bearing upon the question. The effect of this amendment was to eliminate any discrimination in the right of citizens to vote on account of sex. Consequently, the franchise has been extended to both sexes equally in this State. Ch. 18, P. L. Ex. Ses. 1920. With us, however, liability to jury duty is not an incident to the right of suffrage, as in some of the States. *S. v. Walker, supra; People v. Barltz,* 212 Mich., 580, 180 N. W., 423, 12 A. L. R., 520; *Parus v. District Court,* 42 Nev., 229, 174 Pac., 706, 4 A. L. R., 140; *Com. v. Maxwell,* 271 Pa., 378, 114 Atl., 825; Anno. 71 A. L. R., 1336; 31 Am. Jur., 653. It is a far cry from elector to juror. The qualifications of the one are quite different from those of the other. While they may have some requirements in common, they are not correla-

tive or necessarily coexistent or coextensive. 35 C. J., 245. The right to vote and the eligibility for jury service are different subjects, requiring different regulations. *Glover v. Cobb, supra.* One may be a qualified elector and yet not a qualified juror, and *vice versa.* The election laws are inapplicable to the subject of jury duty. *People v. Barnett,* 319 Ill., 403, 150 N. E., 290; *United States v. Roemig, supra.*

Our attention has been called to the many cognate decisions in other states. They reflect a variety of views, depending in each case on the Constitution and laws of the state. "In some states jury duty on the part of women is made compulsory, in others it is optional, and in others women are expressly made ineligible." 35 C. J., 245. We have found no case, however, in a state with constitutional and statutory provisions similar to ours, where a contrary conclusion has been reached. As pointed out in some of the cases, if the law has been changed, the time and manner of its change ought to be discoverable. We have been unable to find any modification of the common law, here prevailing, as it pertains to the specific matter under review. Hence, it is to be regarded as in full force and effect. G. S., 4-1; *S. v. Mitchell,* 202 N. C., 439, 163 S. E., 581. The same thought has been expressed in the States of California, South Carolina and Texas. *People v. Lensen, supra; S. v. Mittle, supra; Glover v. Cobb, supra.*

As a dernier resort, the point is made that a contrary legislative intent may be extracted from ch. 30, Public Laws 1921. This act deals only with titles or designations, and not with the qualifications for the offices and positions mentioned therein. To declare, as the statute does, that the words "governor," "senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," "auditor," and others of like character, "shall when applied to the holder of such office, or occupant of such position, be words of common gender and that they shall be a sufficient designation of the person holding such office or position, whether the holder be a man or woman," is not to say that male and female alike shall be eligible to hold such office or position with no regard to the prescribed qualifications therefor. To impute such a purpose to the act would result in eliminating all qualifications for such offices or positions, save that of "man" or "woman." The proposed construction imports a meaning which the statute does not disclose.

Whether we consider the law outmoded, regard it archaic, or think it should be changed, is neither controlling nor important in its determination. It is ours to declare the law as we find it, and no more. "It is ours to construe the laws and not to make them"—*Hoke, J.,* in *S. v. Barksdale,* 181 N. C., 621, 107 S. E., 505. The law as written is not to be altered or amended by interpretation. *Freight Discrimination Cases,* 95 N. C., 434.

Mr. McIntosh, in his valuable work on North Carolina Practice and Procedure, states the whole case in a single sentence: "Women are not recognized in this State as subject to, or entitled to, serve on juries, and whether they could be so recognized by statute without a change in the Constitution has not been decided." N. C. Practice and Procedure, 592.

The question is not whether women are competent to serve on juries, but whether they are presently eligible to do so. They may be ever so competent, and yet not eligible. Eligibility is prescribed by law. Competency is another matter. The right to vote, or to hold office, is not the test of jury qualification. The judge on the bench may not be eligible to serve as a juror, and generally he is not. It is no impeachment of citizenship to be disqualified for jury service, or to fall outside the class designated for such service.

In considering the broader implications of the case, it may be well to remember that the defendants are on trial, and not the women of the State. Our concern is with the right of the defendants to be tried by a jury of "good and lawful men" as the law provides. This is the crux of the matter. In *Hinton v. Hinton, supra, Brogden, J.*, delivering the opinion of the Court, observed: "It is clear, therefore, that the law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law." And in *S. v. Griffice, supra, Bynum, J.*, speaking to an indictment by an exceptionable grand jury, put it this way: "The defendant must have the right to have the accusation against him performed by men unexceptionable in respect of qualification."

Finally, the view is advanced that the exceptions should be overruled as harmless since the defendants failed to use all of their peremptory challenges. *S. v. Dixon,* 215 N. C., 438, 2 S. E. (2d), 371; *S. v. Levy,* 187 N. C., 581, 122 S. E., 386; *S. v. Upton,* 170 N. C., 769, 87 S. E., 328; *S. v. English,* 164 N. C., 497, 80 S. E., 72; *S. v. Lipscomb,* 134 N. C., 689, 47 S. E., 44; *S. v. Lambert,* 93 N. C., 618. In reply, the defendants say (1) that they are not required to exhaust their peremptory challenges except in cases of generally qualified jurors; (2) that the principle of waiver is inapplicable to the facts of the instant record as they were compelled, over objection, to choose between the women jurors in the box and other prospective women jurors; and (3) that in no event should a rule of practice prevail over a constitutional provision, or form over substance. *S. v. Camby,* 209 N. C., 50, 182 S. E., 715; *S. v. Hill,* 209 N. C., 53, 182 S. E., 716; *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394. The rationale of the pertinent decisions would seem to support the defendants' view in respect of the sufficiency of the exceptions. *Hinton v. Hinton, supra; Harper v. State, supra.*

Venire de novo.

DEVIN, J., dissenting: The question here is not whether jury duty generally shall be imposed on women, but whether the two women who served on the jury in the case at bar were disqualified solely by reason of sex. Admittedly they were both more than twenty-one years of age, taxpayers, freeholders, and intelligent. Their service on the jury was authorized by statute. The statute regulating the qualification and selection of jurors uses the word "person" (G. S., 9-1, *et seq.*), and it is specifically declared by legislative enactment that the word "juror" shall be a word of common gender and applicable to man or woman alike. G. S., 12-3 (13). The only ground, then, upon which these women can be held disqualified for jury service is that these statutes conflict with the Constitution (Art. I, sec. 13), which declares that no person shall be convicted of crime but by the unanimous verdict of "good and lawful men." The reference in Art. I, sec. 19, to "the ancient mode of trial by jury" relates only to "controversies at law respecting property," and the evident meaning is that trial by jury is the ancient mode.

Is the word "men," as used in sec. 13, to be restricted in meaning to males, or may it be interpreted as applicable also to women? In my opinion the latter view should prevail.

It was urged on the argument by the defendants that, when the framers of the Constitution wrote "good and lawful men," they had in mind only males as competent jurors, and that, therefore, this legislative intent gives to the language used a fixed and unyielding interpretation, now controlling. Let us examine this contention.

The Constitution in which this section is incorporated was framed, adopted and ratified in 1868. When the framers wrote the words "good and lawful men" they must be understood to have had in mind also the then existing legislative interpretation and meaning of the words used. At that time the statute in effect, the Revised Code of 1855, ch. 108, declared that "every word imputing the masculine gender only shall extend to and be applied to females as well as males." The statute then in force construing the meaning of words must be held to shed light on the intent of the framers of the Constitution in the use of those words. The words "good and lawful men" were adapted from the ancient Latin phrase *"liberi et legales,"* meaning freemen and those legally qualified. There is no record that the question of the competency of women as jurors was considered in the Constitutional Convention of 1868 in this connection. Equally so there appears no purpose to disqualify them, and in attempting an interpretation of the intent of the framers of the Constitution we can only do so by consideration of the language used in the light of existing law with which they are presumed to have been acquainted.

Upon another ground, also, I think the language of the Constitution should not be held to a rigid and inelastic construction when it conflicts with the progress of human thought and changing social conditions. It should be more liberally construed so as to meet the needs of a complex and growing civilization. I think this section of the Constitution is capable of the reasonable interpretation, in accord with modern thought, which would not disqualify women for this important service. I think it should be given this interpretation in the light of the progressive changes in the status of women and their equal share with men in the powers and responsibilties of government and justice. I do not think the courts should be restricted to the mere ascertainment of what we think now was in the minds of the framers of the Constitution who, however wisely they laid the foundations, could not envision the limitless future, else we should be fettered by the dead hand of the past.

We must not be inadvertent to the fact that constitutions in this country were created by the people for their own welfare. Both the Constitution of the United States and of North Carolina begin with the words, "We the people . . . do . . . ordain and establish this Constitution." The application of the purpose of written constitutions to all the changing and unforeseen human relationships and achievements of succeeding generations can be attained only by liberal interpretation or wise amendment. As expressed by *Justice Brogden* in *Walker v. Faison,* 202 N. C., 694, 163 S. E., 875, "The law is designed to march with the advancing battalions of life and progress and to safeguard and interpret the changing needs of a commonwealth."

It is held that the disqualification of women for jury service derives from the Constitution, and it is suggested that notwithstanding the 19th Amendment to the Federal Constitution, and the unfettering of women's civil, property and political rights, no steps have been taken to extend to her specific legal qualification for the jury. But it will be recalled that the Legislature in 1921, following the giving of equal suffrage to women, declared that the word "juror" when used in the statutes meant women as well as men, and later the Attorney-General promulgated an opinion and legal advice that women were not disqualified for jury service. In many counties this was accepted and acted upon as a correct interpretation of the Constitution and laws, and women were permitted to serve as jurors. Many of the Superior Court judges have so held. In some counties the names of qualified women are included in the jury lists. So that if we should hold now that women were qualified to serve on the jury, it would effect no change, but would only give added authority to a practice already grown up. The apprehension that to hold women not disqualified for jury service might result in the practical

difficulties suggested in the opinion, is met by the proof that in many states and in some counties in North Carolina women do serve on the jury without detriment to the administration of justice or to the efficiency of the courts.

The question here is not whether women should be required to serve on the jury, but are they disqualified for such service solely on account of sex? To hold them incapable would seem to me to turn the leaf backward instead of forward. The disqualification of sex is outmoded. Women are in the Army, Navy and Marine Corps. They work in factories, shops, on farms, equally with men. They drive buses, trucks, and street cars. They are members of the police force. They are teachers, writers, nurses, physicians. Their work is interwoven with that of men in all forms of business and professional life. They serve in the legislative and executive branches of the government. They practice law at the bar and sit on the bench. One of the highest judicial positions in America, that of Judge of the Circuit Court of Appeals of the United States, is ably filled by a woman. But in North Carolina she would be disqualified to decide an issue of fact in a case involving a petty misdemeanor, solely on the ground that she is a woman. There is an old maxim that when the reason of a law fails the law itself should fail.

Nor do I think that the intent of the framers of the Constitution of 1868, in this respect, is to be ascertained by recurrence to the common law, to the exclusion of more recent statute law, or that the meaning of the word "jury," in the good year 1944, is to be interpreted in the light of the practice in those ancient times. True the common law is still in force in North Carolina, but only in so far as it has not been repealed, become obsolete, or found inconsistent with our institutions (G. S., 4-1). And when by ch. 30, Public Laws 1921, it was declared that the word "juror" should, "when applied to the occupant of such portion," be a "word of common gender" and "a sufficient designation of the person holding such portion, whether the holder be a man or woman," this legislative declaration may not be overlooked. That the Legislature meant something by this Act is apparent, and it is equally clear that the Legislature has power to change or abrogate any part of the common law, unless restrained by some provision of the Constitution. It is a rule of universal application that no statute ought to be held in violation of the Constitution unless it so appears beyond a reasonable doubt. Applying this rule, the statute declaring the word juror applicable to women as well as men should not be held in conflict with the constitutional provision that a jury be composed of good and lawful men, unless clearly necessary to do so. If there is a reasonable doubt about the proper interpretation, it should be resolved in favor of upholding the legislative declaration that juror means woman as well as man.

Though the letter of the Constitution uses the word "men," its spirit is broad enough to include women on an equal plane. St. Paul said, "The letter killeth, but the spirit giveth life." 2 Cor. 3:6.

I favor the view that the word "men" as used in the Constitution, Art. I, sec. 13, should be interpreted as a word of common gender, and hence that the trial and judgment below, in all other respects free from error, should not be overthrown because an able Superior Court judge held that women were not disqualified by sex from serving on a trial jury.

SEAWELL, J., *dissenting:* I do not believe that any member of this Court would now care to assert that women are not fitted by intelligence and character to serve on juries. Also, it would be difficult, without begging the question at issue, to point out any incident of citizenship in which women are not now the equals of men. Therefore, the holding to the contrary is based at best on a technicality of the law from which the validity of reason and propriety has long since departed.

To reach that result we are under the necessity of going far back into the common law and following the narrowest rules of construction, to the exclusion of others commonly applied to the Constitution as an expression of fundamental principles of government—rules which are intended to make of the Constitution a living thing, prospective in its application, applicable to the needs of humanity and the changed conditions of society where it is possible for the provisions to be so construed.

"The courts are not inclined to adopt such technical or strained construction as will unduly impair the efficiency of the Legislature to meet responsibilities occasioned by changing conditions of society. It is proper to assume that a constitution is intended to meet and to be applied to new conditions and circumstances as they may arise in the course of the progress of the community." 11 Am. Jur., Constitutional Law, sec. 51. *Jenkins v. State Board of Elections,* 180 N. C., 169, 104 S. E., 346.

Concededly, we may resort to contemporaneous law and conditions for definitions of terms used in the Constitution where the meaning is ambiguous; and we may likewise resort to the *specific intent* of the framers of the Constitution where there is no doubt as to that intent. These are the so-called rules of historical construction. Too narrowly followed, both of them have the vice of laying the dead hand of the past upon the living present. And we gain nothing from such a reference when, at the most, intent is merely assumed from custom or usage; and where, as here, such custom or usage is adequately attributable to other disqualifying conditions, it affords no aid to construction.

The Constitution, Article I, sec. 13—the section with which we are immediately concerned—provides that "no person shall be convicted of

any crime but by the unanimous verdict of a jury of good and lawful men in open court." It may be considered with the provisions of Article I, sec. 19, since they both came out of a common mold. The latter section provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of people and ought to remain sacred and inviolable." Magna Charta, Bill of Rights, Constitution of 1776, Constitution of 1835, Constitution of 1868.

The expression originally used in the sources from which we obtained it was *"liberi et legales homines,"* and it has always been conceded that the term which we now translate as "men" is a generic word, including both men and women. It is not, *per se,* an ambiguous or equivocal term, depending for its sense—as to which sex is meant—upon the context. It is an inclusive term, and nothing else appearing, means both sexes. It is so used in all the laws which have been devised for the government of humankind from the beginning. It is uniformly so used in all the provisions of our Constitution, except where it has been necessary to express a distinction between the sexes. Where this has been necessary, appropriate words plainly expressing males or females, according to the intent, have been used. Such distinguishing words are used with regard to suffrage. Art. VI, sec. 1. The latter, of course, was automatically amended by the Nineteenth Amendment to the Federal Constitution.

To construe as meaning *males* a phrase which, *ipsissimis verbis,* speaks to the contrary, resort has been made to the common law as defining the sort of jury intended by the Constitution, with the contention that it necessarily implies trial by a male jury. I pass, for the present, the outstanding fact that there has always been accorded to the Legislature, and to the courts, a reasonable discretion in determining what common law incidents of jury trial are essential to be preserved, in the light of our existing political and social development, with its radical changes of condition, and the further fact that many of the common law incidents of such trial, once so important, have been outmoded and systematically abandoned. When we go to the root of appellants' contention, I think we shall find that it has little or no basis in historical fact.

To exclude women from service on the jury upon the theory of historical interpretation, it must appear that the framers intended to use this word in the Constitution as applicable to men only—with the purpose of excluding women. But the history of the origin of this institution and its adoption into our Constitution makes it clear that those who variously and repeatedly used the formula now under review had no such intent in mind. The circumstances under which the expressions were formulated precluded consideration of the distinction now con-

tended for. The simple fact is that exclusion of women from jury service came from the common law, and not from the wording of the Bill of Rights or of the Constitution. The fact that the Constitution itself did not plainly say a jury of males, as it did in conferring the right of suffrage, also strongly indicates that if there was any ideology on the subject, it was activated only in the common law, not the Constitution, and should disappear when the disqualifications finding expression in the common law had been removed.

Mr. Justice Holmes, referring to the Constitution, said: "Continuity with the past is only a necessity and not a duty." Holmes, Collected Legal Papers (1920), 211. When that necessity arises, the past must speak in a clear voice before it is allowed to modify and restrict the plain language of the Constitution and reverse the meaning of its ordinary words in a manner to affect the citizenship of more than one-half of our present population and of generations which are to follow.

When we are called upon to invoke history for definition of a term of vital significance, it is imperative that we see that history in its proper perspective. There can be no guidance for the present unless we thoroughly understand the essence of the things men struggled for in those remote times and give them credit for some sense of moral and legal values—credit for the thing they had in mind, rather than what a convenient ideology may now place there. Going back to Magna Charta—and most writers regard this document as not only guaranteeing trial by jury, but as paramounting the principle of trial by peers—no student of either legal or political history would make the mistake of contending that the issue between King John and his rebellious subjects was whether jury trial should be by males exclusively, or that such a question had anything to do with the guarantee of jury trial in the Bill of Rights, or in any other source from which we have inherited or drawn the constitutional formula under review. The thing which they intended to put beyond question was the broad fundamental principle of jury trial, to which all other matters were subordinate. No necessity arose for making any distinction between the sexes in such a procedure—the disabilities under which woman rested, her inequality with man before the law, the whole body of inequity and injustice which burdened her and prevented her from being *liber et legalis homo,* or the peer of any man, took care of that event without the necessity of constitutional inhibition. No such question had ripened into issue when our constitutions, including the Constitution of 1868, were adopted. It would be worse than idle to call up the framers of these constitutions now as witnesses to their intent or to speculate what they would have done if such question had arisen. It simply did not arise, and there was no occasion for them to give expres-

sion to such a distinction or any ideologies they may have had upon the subject within the frame of the Constitution. This should leave the Constitution receptive and adaptive to the changed status of woman before the law, and in the capacities of her citizenship.

But if we could suppose that the common law, in consideration of the low esteem in which woman was held in those times, really had in mind that juries should be composed of males, is this decisive of the question before us? Manifestly not. We still must consider what order of importance that incident has in the scheme of common law jury trial as a means of protection of the liberties and properties of the citizen.

I have referred to the fact that the Legislature and the courts have always been accorded the discretion, within reason, to appraise the incidents of trial by jury at common law and determine those which are essential to be preserved in the light of existing conditions. That power has been too often and too fully exercised by the Legislature in times past to be now gainsaid and is inherent in this Court upon review. The reasonable test has been whether preservation of the particular detail is essential to the security of the liberties and property rights which it was the purpose of the Constitution to guarantee and which were committed to the jury for determination. No one will be so hardy as to assert that the presence of women on juries would imperil these guarantees. Many would refer to the high moral standards of the average woman and the stake she has in the broad questions of preserving law and order and morality, property rights, and those liberties in which she is so much interested as definitely contributing to the contrary result. It has not escaped the attention of the courts that the importance of this common law jury feature is still further reduced because no reason can be assigned for its origin or its retention other than the barbarous view of the inferiority of women which manifested itself in civil and political oppression so akin to slavery that we can find no adequate word to describe her present status of equality with men except emancipation—a term which is in common use in the courts and in the legal profession, and with informed laymen.

I note in the main opinion the following: "We have found no case, however, in a State with constitutional and statutory provisions similar to ours, where a contrary conclusion has been reached. . . ." Such a matter depends on the extent of the research made and the correct appraisal of cases in those jurisdictions where, with constitutions comparable to ours on the point at issue, arguments such as have been advanced in the main opinion have been presented and rejected. Students of law, to whom a dissenting opinion is mainly directed, will make that investigation and form their own conclusion.

However this may be, the courts which have dealt with this question have, with marked uniformity, refused to regard the custom of an exclusively male composition of juries as an essential of jury trial necessary to be preserved within the definition imposed on the Constitution by the common law. It has been classed with those features originally thought so important, but now decayed and abandoned as unfitted to the necessities of modern conditions, although the constitutions have remained the same. *Comrs. v. Maxwell,* 271 Pa., 378, 114 Atl., 825; *S. v. James,* 96 N. J. L., 132, 114 Atl., 553, 16 A. L. R., 1141; *S. v. Manuel,* 41 Cal. App., 153, 182 Pac., 306; *S. v. Walker,* 192 Iowa, 823, 185 N. W., 619; *Com. v. Valotta,* 279 Pa., 84, 123 Atl., 681; *Moore v. S.,* 197 Ind., 640, 151 N. E., 689; *Wilkinson v. S.,* 197 Ind., 642, 151 N. E., 690; *Palmer v. S.,* 197 Ind., 625, 150 N. E., 917. In *Parus v. District Ct.* (1918), 42 Nev., 229, 174 Pac., 706, where an amendment to the Constitution permitted women to vote, it was held that eligibility to jury service followed. In this case we find the following reference to citation from Blackstone: "Nor can we, with any degree of logical force, exclude women from this class upon the basis established by Blackstone, *propter defectum sexus,* because we have eliminated the spirit of this term from our consideration of womankind in modern political and legal life." I have not room for a further quotation from this illuminating and forceful opinion.

In the case of *In re Opinion of Justices,* 237 Mass., 591, 130 N. E., 685 (cited in the main opinion), the House of Representatives of the State of Massachusetts presented to the Supreme Judicial Court of that State a query respecting the power of the General Court to enact a bill making women liable to jury service. The first question was: "Under the existing Constitution and laws of the Commonwealth and the Constitution of the United States, are women liable to jury duty?" That was answered in the negative, not because of the Constitution, but because the statute law would not permit it. The second question was: "If the first question be answered in the negative, has the General Court the constitutional power to enact legislation so that women may be made liable to jury duty?" The Supreme Court answered that question in the affirmative. After noting the fact that numerous common law requirements as to jury trial had been modified or discarded by legislation or by rule, or by custom, the Court said:

"No reason based on the Constitution is perceived why women, when they become qualified to vote under the Nineteenth Amendment to the Federal Constitution, should not also be eligible to jury service, if the General Court so determines. In numerous particulars of a minor nature the trial by jury as it existed at the adoption of the Constitution

has been altered. Other changes by legislative enactment have been proposed of such vital character as to be beyond the power of the General Court . . . As a result of our constitutional history and practice respecting trial by jury it follows that a change by an amendment to the Constitution in the qualifications of the electorate, such as that wrought by the Nineteenth Amendment, by its own force authorizes the General Court to make a corresponding change in the qualifications of jurors . . . The second question is answered in the affirmative."

When *Commonwealth v. Welosky,* 177 N. E., 656, 276 Mass., 398, came on for a hearing, there had not been made any change in the statute under which women were excluded from voting, and the gist of that decision lies in the statement that the Federal Amendment "did not operate to extend the scope of G. L. C. 234, sec. 1, beyond its previous limit so as to make women liable to jury service *without further legislative action.*" The opinion of the Court with respect to the constitutional question as formerly stated in *In re Opinion of Justices, supra,* was unaltered.

People v. Lensen, 34 Cal. Ap., 336, 167 P., 406, cited in the main opinion as rejecting the affirmative of the question presented here, was decided 18 July, 1917, several years before the Federal Amendment to the Constitution was adopted. (It went into effect 26 August, 1920.)

Notwithstanding that opinion, by a mere change in the statute law, women were permitted to serve as jurors in California; *People v. Manuel, supra;* and the revised view of the Constitution and the law is summed up thus:

"Considered as jurors, the law makes no distinction between men and women. Subject to qualifications applicable alike to each, they are equally competent to act as jurors."

The law and Constitution of the State of California is fully discussed in *U. S. v. Charles Spencer Chaplin,* 54 Fed. Sup., 682, District Court S. D. Cal. Central Div., 26 February, 1944. Quoting *People v. Shannon* (1928), 203 Cal., 139, 263 Pac., p. 522, 523, it is said:

"There is nothing in the state or Federal Constitutions, or in any statute, which guarantees one accused of a crime a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. *People v. Durrant,* 116 Cal., 179, 199, 48 Pac., 75. He cannot complain if he is tried by an impartial jury and can demand nothing more."

See, also, *Re U. S. v. Roemig,* D. C., 52 Fed. Sup., 857, where the statute law was followed without deference to the suggestion that the common law required a male jury.

In *S. v. James, supra,* cited in the main opinion, the defendant challenged his conviction because the jury commissioners failed to select any woman for jury duty. The objection was held not to be good, not on constitutional grounds, but because the statute in terms provided for men only and the Nineteenth Amendment to the Federal Constitution did not have the effect of depriving the statute of its force, since states still had the right to legislate as to the qualification of jurors. Pending the trial of this case and before the hearing in the appellate court, the statute was changed to include women, and the Court animadverts on this. As to the statute, the Court, which theretofore had adhered to a strict definition of the common law jury as reflected in the Constitution, had this to say: "But our constitutional provisions in nowise trammel legislative power with reference to the qualifications of jurors." And referring to the Nineteenth Amendment, said: "The spirit of equality of the sexes which it breathes moved the legislature of New Jersey in 1921 to amend our act concerning jurors so as to include within the description of persons liable to be summoned as grand and petit jurors, women as well as men." Loc. Cit. A. L. R., pp. 1145, 1146.

It is further held in the main opinion that our present jury statute, by reason of its supposed enactment with reference to the common law, must also necessarily be construed as referring to a jury of *males* only, although it does not refer to "men" in any of its parts, but, on the contrary, deliberately and consistently uses the word "persons"—and definitely requires the jury to be drawn from the taxpayers, amongst whom are certainly thousands of women citizens. The question of the jury statute has arisen so frequently in the several states where women are now permitted to vote, and has been so frequently decided upon the view that the statute, unless it, in terms, provides for male jurors only, offers no barrier to eligibility of women, that it seems unnecessary to give that argument any further space.

S. v. Sims, 213 N. C., 590, 197 S. E., 176, is no authority with respect either to eligibility of women on the jury or to the effect of their former exclusion. It expressly declines to pass upon the Constitution in this respect, saying:

"We are of the opinion, and so hold, that the defendant in this case, being a male person, cannot raise the question as to whether women may serve on the jury by a motion to quash the bill of indictment; and since it is not properly raised, we are not called upon to decide the question suggested in appellant's brief."

By statutory construction the term men, as used in our statute, is construed to mean both male and female, except where by the context it must be construed to mean males; and the argument that the common

law is superior in force to such a statute is distinctly novel, even if the statute on juries had used that word instead of *person.* Pertinent to this question, both as it applies to the Constitution and to the statute law, is *Cleveland, C., C. & St. L. Ry. Co. v. Wehmeier*, 170 N. E., 27 (Ohio, 1929), loc. cit. 28, 29, as follows:

". . . the makers of the Constitution only considered qualified jurors, as recognized at the time, and, by the term 'jury of twelve men,' they were undoubtedly preserving the common law jury *composed of twelve qualified jurors.* This construction is justified in the light of the use of the word 'men.'

"Since the world began, in all writings concerning the human race, the word 'man' or 'men' has been used in a generic sense, or as representing the human race. The courts in construing the term have given it a generic or restricted meaning, as denoted or indicated by the context and the object sought to be obtained. . . . Applying this definition, and the rule as to the object sought, we find here in section 5 of the Constitution, in question, that the object was to secure a jury of twelve qualified jurors."

Thus, women were permitted to vote, since they were made electors by the Nineteenth Federal Amendment.

Manifestly, the question before us must be settled upon broader grounds of political propriety and the fairness of justice to the times in which we live and in a manner not only to do justice to the enlarged citizenship of the State, but to avail ourselves of its aid in matters affecting the equal administration of justice for all the people. It has been suggested that jury service is not a privilege of women; in the same sense, it is not the privilege of men, since neither can men nor women force themselves into the jury box without previous selection, under any legal procedure of which I know. In any other sense, it is emphatically a privilege of citizenship, since every citizen has, and ought to have, an equal right with every other citizen to participate in every service required or permitted in the administration of justice by the people. When their own rights and liberties are involved, that privilege takes on the color of right, and their exclusion is an unwarranted discrimination and may result in an intolerable injustice.

I have not attempted, of course, an exhaustive catalog of the jurisdictions in which the courts have settled the question now before us contrary to the contentions of the appellants and *contra* the conclusion reached in the main opinion. I have discussed some typical cases and called attention to the holding in some of these cases as to which I think there is a manifest misapprehension in the main opinion, and cited others which are typical of the majority holdings on this subject. I do

not regard citations from our own reports in which the common law jury has been referred to as a jury composed of "twelve men" as of any significance upon the question now before us, since manifestly no distinction of sex was implied. Some jurisdictions—and they are few—may be cited in support of the view adopted in the main opinion. I feel under no obligation to the narrower reasoning upon which these decisions are based, especially the result of funneling through the Constitution, as a necessity of today, those common law disqualifications of women, now meaningless, so that even the memory of her former political degradation is sufficient to exclude her from a tribunal clothed with the power of passing upon her liberty and property rights, and those of her fellow women.

The validity of precedent as a factor in judicial decision depends upon the soundness of its philosophy, the logic of its application to existing conditions. In the present situation we are certainly not forced to draw our precedents from concepts of law and society which were better forgotten. As I have said, in most jurisdictions of this country, since the adoption of the Nineteenth Amendment to the U. S. Constitution, women are eligible to serve on juries. An examination of the authorities cited will show that this change has commonly been accomplished without amendment to the Constitution; 31 Am. Jur., Jury, sec. 127; although statutes in some instances have had to be amended. Since then women have filled offices in all the states of the Union and in the National Government, from Cabinet Member, U. S. Senator, Governor, Judge, Member of the Legislature, on down to local administrative officers. They also serve in the U. S. Army and Navy, and not a few of them have made the supreme sacrifice in the cause of their country. They pay taxes, but their right to sit upon the jury drawn from the taxpayers is denied. Their liberties and property rights are passed upon by male juries from which they are excluded. The argument for the perpetuation of this intolerable situation rests upon the narrowest of bases. No proponent of that view has attempted to go further than to show that a jury of males was an incident of common law jury and a matter of immemorial custom. None has attempted to justify it as applied to the conditions which now confront us. No one has gainsaid the proposition, so often reiterated in judicial discussions on this subject, that it is not now a fundamentally important incident to be observed, that it goes with other outmoded practices with which the Legislature and the courts have freely dealt as unfitted to present governmental and social necessities.

The most insistent argument advanced in behalf of appellants is that women have never been permitted to serve on juries. Which goes to show that an attitude is more formidable than an argument. "My grand-

sire never shot at such a mark in his life—and neither will I." Ivanhoe, Chapter 13.

The question before us should be settled upon a broader and more discriminating appreciation of the fundamental purposes of jury trial as a part of the judicial investigation, in protecting the rights and liberties committed to that tribunal for determination, without paramounting circumstances and details which must necessarily lose their importance with the changing conditions of society and government. Only in this way may a provision of the Constitution which, in the words it employs, speaks as of today be kept to its true intent as a living principle and an instrument of justice in the lives of people today and tomorrow. That, as I read it, is the controlling principle of decision in a great majority of the well considered judicial opinions which have dealt with this subject. I am in accord with them. I think the defendant has had a fair trial under the Constitution and the laws, and his conviction should be upheld.

ELIZABETH EZZELL, LOU COX, MATT BREWER, DOCKERY BREWER, DENNIS BREWER, ANNIE ELIZA ASHFORD, ADDIE EVA BEST, ADA HARGROVE; HELEN DOBBERSON, AND HATTIE MAE BREWER; AND J. H. LEWIS, ADMINISTRATOR D. B. N., C. T. A., OF PETER BREWER, DECEASED, v. EVANDER MERRITT; AND A. K. PARKER, ADMINISTRATOR OF JAMES I. GAINEY, DECEASED.

(Filed 8 November, 1944.)

1. Pleadings § 16a—

No general rule has or can be adopted with regard to multifariousness of parties and causes.

2. Same—

The court should allow the joinder of all parties interested in the subject of action and whose presence is necessary to a complete settlement of the controversy. G. S., 1-68, 1-69, 1-73.

3. Same—

The statute extends to plaintiffs the right to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, arising out of the same subject of action, so that the court may dispose of the whole controversy, and its incidents and corollaries, in one action. G. S., 1-123.

4. Same—

In an action by heirs at law to recover for the estate of their father money, allegedly due on a verbal promise of defendant, who purchased the

share of one of such heirs, to pay to the estate the same amount as a note of such heir, secured by mortgage on her share of her father's land and payable personally to the executor of her father's estate, who died prior to the suit, there is no error in making the administrator, *c. t. a.* and *d. b. n.* of the father's estate a party plaintiff and the administrator *c. t. a.* and *d. b. n.* of the deceased executor a party defendant.

5. Pleadings § 13½—

A demurrer may not be entertained after answer filed, unless by leave of court the answer is withdrawn, because a defendant is not permitted to answer and demur to one cause of action at the same time. But this rule does not apply when objection is entered to the jurisdiction or to the complaint for failure to state a cause of action.

APPEAL by plaintiffs from *Williams, J.*, at September Term, 1944, of SAMPSON.

Civil action to recover the balance of the purchase price of certain land for the benefit of the heirs of one Peter Brewer.

Peter Brewer died in 1928, leaving a will under which James I. Gainey, one of the executors, qualified and died without fully administering said estate and filing a final account, but while acting as such executor the real estate was divided among the devisees of Peter Brewer according to the will.

Elizabeth Ezzell, one of the daughters and devisees, was allotted the tract of land which she later sold to the defendant, Evander Merritt. On 19 December, 1928, James I. Gainey loaned Elizabeth Ezzell $350.00, at 6% interest, from funds belonging to the estate and took her note for the same, payable to him personally, on 15 December, 1929, secured by her mortgage on the allotted land, also made to him personally. No payment was made on this indebtedness and taxes amounting to approximately $150.00 accumulated against the land up to the time Elizabeth Ezzell sold the land to Merritt.

The plaintiffs allege the terms of the sale were that Evander Merritt should pay Elizabeth Ezzell $50.00, assume the accumulated and unpaid taxes and in addition thereto, pay the heirs of Peter Brewer (of whom she was one) an amount equal to the principal and interest represented by the note and mortgage executed to James I. Gainey; and for said consideration, she was to make, and did make, him a deed for the land on 7 January, 1943. Merritt, plaintiffs allege, has paid the $50.00 and substantially all of the accumulated taxes, but has failed and refused to pay the heirs of Peter Brewer the amount of money he agreed to pay to them.

The defendant, Evander Merritt, filed an answer denying any agreement to pay the additional sum of $350.00, with interest, as alleged by

plaintiffs. The case came on for trial at the February Term, 1944. During the progress of the trial, the presiding judge being of the opinion an administrator *d. b. n., c. t. a.,* of the estate of Peter Brewer should be appointed and made a party to the action, in order to protect the defendant against a claim on the part of the estate, ordered a mistrial to that end. Whereupon, at March Term, 1944, an order was made making J. H. Lewis, administrator *d. b. n., c. t. a.,* of Peter Brewer, a party plaintiff with leave to file complaint, and also making A. K. Parker, administrator of the estate of James I. Gainey, a party defendant, against whom summons should issue with copy of the original complaint and copy of the complaint of J. H. Lewis, administrator *d. b. n., c. t. a.*

Thereafter J. H. Lewis, administrator *d. b. n., c. t. a.,* of the estate of Peter Brewer, filed a complaint in which he adopted the allegations of the original complaint in each and every particular, and further alleged that the estate of James I. Gainey has no interest in or claim to any part of the recovery sought, nor any interest in the note and mortgage executed by Elizabeth Ezzell, and demanded judgment to the end that he, as administrator *d. b. n., c. t. a.,* of the estate of Peter Brewer, might receive and administer any sum recovered.

A. K. Parker, administrator of the estate of James I. Gainey, deceased, filed an answer admitting every material allegation of the foregoing complaint.

The defendant, Evander Merritt, without obtaining permission to withdraw his answer to the original complaint, for the purpose of demurring, filed a demurrer to both complaints, upon the ground of a misjoinder of parties and causes of action.

His Honor sustained the demurrer and dismissed the action. Plaintiffs appeal, assigning error.

Faircloth & Faircloth for plaintiffs.
A. McL. Graham for defendant.

DENNY, J. The following provisions are contained in G. S., 1-68: "All persons having an interest in the subject of the action, and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided. If, upon the application of any party, it shall appear that such joinder may embarrass or delay the trial, the court may order separate trials or make such other order as may be expedient." G. S., 1-123, reads in part as follows: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—1. The same transaction, or transaction connected with the same subject of action."

It is often exceedingly difficult to determine what parties may be joined as plaintiffs as well as what causes of action may be joined under the provisions contained in the foregoing statutes. "No general rule has been or can be adopted with regard to multifariousness." *Craven County v. Investment Co.,* 201 N. C., 523, 160 S. E., 753.

The action here is not for the foreclosure of the mortgage deed executed by Elizabeth Ezzell, on 19 December, 1928, nor for a judgment on the note secured thereby, but is based upon an alleged parol agreement to pay to the heirs of Peter Brewer a sum of money equal to the principal amount for which the aforesaid note was executed, together with interest thereon at the rate of 6% per annum from the date of its execution. The plaintiffs, heirs of Peter Brewer, in their complaint allege the possession of the note and mortgage and their readiness to surrender to the defendant Merritt said instrument upon the payment of the balance of the purchase money for the land conveyed, alleged to be due under said parol agreement.

J. H. Lewis, administrator *d. b. n., c. t. a.,* of the estate of Peter Brewer, alleges no claim against the defendant Merritt in this action, save and except that alleged by his co-plaintiffs, which claim is bottomed on the alleged parol agreement hereinabove set forth, and not upon the note and mortgage securing the same, owned by said estate.

It is clear, however, that if the contract was made as alleged, it was the purpose of Elizabeth Ezzell to obtain from the defendant Merritt, an additional sum of money for the benefit of all the heirs of Peter Brewer, equal to the amount due on the note and mortgage which purports to be a lien on the land purchased by said defendant. The administrator *d. b. n., c. t. a.,* of the estate of Peter Brewer was made a party, not upon motion of the plaintiffs who are heirs of Peter Brewer, nor for their benefit, but the court *ex mero motu,* ordered that an administrator *d. b. n., c. t. a.,* of the estate of Peter Brewer should be appointed and made a party plaintiff, in order to protect the defendant Merritt against a claim on the part of the estate, based on the note and mortgage in event of a recovery on the alleged parol agreement.

The defendant Merritt further contends that in making A. K. Parker, administrator of the estate of James I. Gainey, a party defendant, there is also a misjoinder of parties and causes of action.

G. S., 1-69, reads in part as follows: "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved."

The note and mortgage were both executed to James I. Gainey individually, and not to him as administrator of the estate of Peter Brewer, as they should have been. Gainey's administrator is made a party defendant for the purpose of showing such fact, and by his answer he admits the allegations as to the ownership of the note and mortgage, and, as administrator of the estate of James I. Gainey, disclaims any interest therein.

In *Insurance Co. v. R. R.*, 179 N. C., 255, 102 S. E., 417, a demurrer *ore tenus* was sustained in the court below, but the court allowed a motion to amend and make new parties, and to consolidate five pending actions. One of the plaintiffs disclaimed any recovery for itself, except that through it its co-plaintiffs might be reimbursed. An appeal was taken from these orders, and this Court said: "The amendment merely brings in other parties interested in this fund, and whose presence is necessary to a complete settlement of the controversy. This prevents the trial of numerous actions when the entire matter can be determined in one action. The object of consolidating two or more actions is to avoid a multiplicity of suits, to guard against oppression or abuse, to prevent delay, and especially to save unnecessary cost or expense; in short, the attainment of justice with the least expense and vexation to the parties litigant. Consolidation, however, is improper, where the conduct of the cause will be embarrassed, or complications or prejudice will result, which will injuriously affect the rights of a party." G. S., 1-73; *Craven County v. Ins. Co., supra.*

In *Young v. Young,* 81 N. C., 91, the Court in considering the same questions involved herein, quoted from *Hamlin v. Tucker,* 72 N. C., 502, as follows: "The purpose being to extend the right to plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, arising out of the same subject of action, so that the court may not be forced to take 'two bites at a cherry,' but may dispose of the whole subject of controversy, and its incidents and corollaries in one action."

We think the additional parties necessary to a complete determination or settlement of the questions involved. We see no reason why the joinder of these parties should embarrass or injuriously affect the rights of the defendant Merritt. There is but one cause of action alleged against him, the other matters alleged are incidental.

Moreover, conceding but not deciding that there is a misjoinder of parties and causes of action, an answer has been filed to the original complaint and that answer has not been withdrawn by leave of court, which must be done before a demurrer can be entertained. "Generally

speaking, a demurrer may not be entertained after the answer is filed unless by leave of court the answer is withdrawn, because a defendant is not permitted to answer and demur to one cause of action at the same time. *Finch v. Baskerville,* 85 N. C., 205; *Moseley v. Johnson,* 144 N. C., 257; *Rosenbacher v. Martin,* 170 N. C., 236. But this ruling does not apply when objection is entered to the jurisdiction of the court or to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. C. S., 518, and cases cited." *Cherry v. R. R.,* 185 N. C., 90, 116 S. E., 192.

For the reasons stated, we think the demurrer should have been overruled.

Reversed.

ED N. VANCE v. E. C. GUY ET AL.

(Filed 8 November, 1944.)

1. Minerals and Mines § 3: Adverse Possession § 13c—

Where a plaintiff's deed ostensibly conveys the land in fee, the title to the mineral rights having been previously reserved and separated from the surface rights by a predecessor in title, plaintiff is remitted to a claim of adverse possession under his deed as color of title for seven years to establish his right to the minerals in question.

2. Minerals and Mines § 6: Adverse Possession § 20—

Where plaintiff's surface rights to lands are conceded and the mineral rights alone are involved in a claim of adverse possession, it would seem that some appropriate limitation on the use of the words "lands" and "some part of the land" might be in order in the charge to the jury on the law as to the possession of mineral rights which will ripen into title. Especially since plaintiff is not claiming any mineral rights in part of the property embraced in his deed.

3. Evidence § 6—

A *prima facie* case means and means no more than evidence sufficient to justify, but not to compel an inference of liability, if the jury so find. It furnishes evidence to be weighed, but not necessarily to be accepted by the jury.

4. Evidence § 6: Appeal and Error § 39g—

The rule as to burden of proof constitutes a substantial right, and error in respect thereof usually entitles the party aggrieved to a new trial.

5. Adverse Possession §§ 17, 20: Appeal and Error § 39e—

In a sharply contested action on the question of adverse possession, where the court instructed the jury that the plaintiff had the burden of the issue, which never shifts, but when the actor has gone forward and

made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts as to him, there is reversible error.

6. Adverse Possession § 8—

Where the title deeds of two rival claimants to land lap upon each other, and neither is in actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title.

7. Same—

If one of rival claimants be seated on the lappage and the other not, the possession of the whole interference is in the former.

8. Same—

If both rival claimants have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other.

9. Adverse Possession § 9b—

Where one enters upon real estate under adverse deed or title, possession so taken will be construed to extend to the boundaries of the deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title, unless at the same time the true owner be in the possession of a part of the estate, claiming title to the whole, in which event his seizin will extend by operation of law to all not in the actual close or occupancy of the party entering and claiming under a defective title.

10. Trial § 33—

An exception cannot be sustained where it is directed to a contention which was not seasonably called to the court's attention and opportunity afforded to correct it.

11. Adverse Possession § 2—

In actions involving the title to real property, where the State is not a party, other than trials of protested entries laid for the purpose of obtaining grants, title is conclusively presumed to be out of the State, and neither party is required to show such fact, though either may do so.

APPEAL by defendants from *Blackstock, Special Judge,* at April Term, 1944, of AVERY.

Civil action to recover for minerals wrongfully mined and taken from plaintiff's property.

Upon denial of liability and assertion of right, issues of ownership, trespass, willfulness and damages were submitted to the jury and answered in favor of the plaintiff, the value of the minerals at the mine after separation from the realty being fixed at $80,000.00

From judgment under G. S., 74-32, for double the value of the minerals as determined by the jury, the defendants appeal, assigning errors.

Walter C. Berry, Burke & Burke, Charles Hughes, and S. J. Ervin, Jr., for plaintiff, appellee.

J. V. Bowers, Proctor & Dameron, John C. McBee, and J. C. B. Ehringhaus for defendants, appellants.

STACY, C. J. This is the same case that was before us at the Fall Term, 1943, reported in 223 N. C., 409, 27 S. E. (2d), 117, with sufficient statement of the facts, to which reference may be had to avoid repetition. The first appeal was from a judgment in favor of the defendants. The present appeal is from a judgment in favor of the plaintiff.

The plaintiff claims title to the minerals in question under a deed from The Plumtree School for Boys which purports to convey to the plaintiff in fee simple 375 acres of land in Avery County. This deed was executed and registered in 1925. It recites a consideration of $6,000. Plaintiff testified that he had been in possession of the land since the date of his deed, claiming the minerals as well as the surface, and that he had operated three mica mines on the northern portion of it, disclaiming, however, any interest in the minerals on 68 acres of the land. This action was instituted in August, 1941.

It was made to appear on the hearing that while plaintiff's deed ostensibly conveys the land in fee, the title to the mineral rights on the portion here in controversy had previously been reserved and separated from the surface rights by predecessors in title, and plaintiff was therefore remitted to a claim of adverse possession under his deed as color for seven years to establish his right to the minerals in question. *Davis v. Land Bank,* 219 N. C., 248, 13 S. E. (2d), 417; *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352; 36 Am. Jur., 432. In this connection, and speaking to the burden of proof, the court instructed the jury that the plaintiff had the burden of the issue, which never shifted, but "when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him." The inexactness of this instruction may well have been the determining factor on the trial, as the plaintiff's claim of adverse possession was sharply contested. *Locklear v. Savage,* 159 N. C., 236, 74 S. E., 347; 1 Am. Jur., 915.

The defendants were not compelled to go forward or lose their case, simply upon a *prima facie* showing by the plaintiff. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. A "*prima facie* case" means and means no more than evidence sufficient to justify, but not to compel an inference of liability, if the jury so find. It furnishes evidence to be weighed,

but not necessarily to be accepted by the jury. It simply carries the case to the jury for determination, and no more. *McDaniel v. A. C. L. Ry.*, 190 N. C., 474, 130 S. E., 208. "A *prima facie* showing merely takes the case to the jury, and upon it alone they may decide with the actor or they may decide against him, and whether the defendant shall go forward with evidence or not is always a question for him to determine" —*Varser, J.*, in *Hunt v. Eure,* 189 N. C., 482, 125 S. E., 484.

The rule as to the burden of proof constitutes a substantial right, for upon its application many cases are made to turn, and error in respect thereof usually entitles the party aggrieved to a new trial. *Fisher v. Jackson,* 216 N. C., 302, 4 S. E. (2d), 847; *Williams v. Ins. Co.,* 212 N. C., 516, 193 S. E., 728; *Hosiery Co. v. Express Co.,* 184 N. C., 478, 114 S. E., 823.

Furthermore, in several instances the jury was instructed that "an adverse claim to land" would ripen into a perfect title, by virtue of the statute of limitations, where the possession relied upon is "actual possession of some part of the land." Then again, "actual possession of land consists in exercising dominion over it, in making the ordinary use of it, and in taking the profits of which it is susceptible in its present condition." And further, "the possession which will ripen into a title must be indicated by such acts as are sufficient to notify mankind that the party in possession is claiming the land as his own, and must be so repeated as to show that they are done in the character of owner and not of an occasional trespasser."

While these are recognized expressions, quite proper in ordinary actions of trespass or ejectment where no distinction is made between surface rights and mineral rights, still on the instant record where plaintiff's surface rights are conceded and the mineral rights alone are involved in the claim of adverse possession, it would seem that some appropriate limitation on the use of the words "land" and "some part of the land" might have been in order. Especially so, since the plaintiff is not claiming any mineral rights in part of the property, 68 acres, embraced within the boundaries of his deed. It is conceded that the defendants are in possession of the mineral rights on this 68 acres. They claim title to the mineral rights, not only in the 68 acres, but also in the entire 375-acre tract—sole owners of the northern part and half-owners of the southern part—under conveyances embracing a much larger territory and senior in point of time to plaintiff's deed. This, of course, brings into the case a question of lappage, which has been the subject of much debate. *Berry v. Coppersmith,* 212 N. C., 50, 193 S. E., 3; *Shelly v. Grainger,* 204 N. C., 488, 168 S. E., 736; *Penny v. Battle,* 191 N. C., 220, 131 S. E., 627; *Currie v. Gilchrist,* 147 N. C., 648, 61 S. E., 581.

The following pertinent rules have been established by the decisions:

1. Where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. *Penny v. Battle, supra.*

2. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. *Shelly v. Grainger, supra; Currie v. Gilchrist, supra.*

3. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. *McLean v. Smith,* 106 N. C., 172, 11 S. E., 184; *Asbury v. Fair,* 111 N. C., 251, 16 S. E., 467.

Here, the defendants take the position that the entire boundary of the 375-acre tract constitutes the lappage; and so they assert ownership and possession of the mineral rights in the whole tract under alleged superior titles and by virtue of their mining operations and admitted possession of the minerals on the 68 acres, and deny plaintiff's mining operations were of such character and extent as to amount to any adverse possession. *Currie v. Gilchrist, supra;* 1 Am. Jur., 915. The plaintiff, on the other hand, claims the mineral rights adversely by reason of alleged mining operations under color of his deed. Also, in reply to the contrary position, the plaintiff asserts that the doctrine of constructive possession cannot avail the defendants beyond the boundaries of the 68-acre tract, because they hold the mineral rights on this tract under a separate conveyance. *Lumber Co. v. Cedar Works,* 168 N. C., 344, 84 S. E., 523; *Basnight v. Meekins,* 121 N. C., 23, 27 S. E., 992; *Carson v. Burnett,* 18 N. C., 546. The defendants counter by saying they are not remitted entirely to the doctrine of constructive possession, and finally they invoke the doctrine of *possession pedis,* and if need be the doctrine of subsequent entry and ouster, against the plaintiff's claim of constructive possession. *Hunnicutt v. Peyton,* 102 U. S., 333, 26 L. Ed., 113; 1 Am. Jur., 856. In further reply, the plaintiff says his claim of adverse possession had already ripened into a perfect title before the defendants acquired their deeds.

We omit any discussion of the evidence offered by the opposing parties to support their respective contentions, so as not to prejudice either on the further hearing.

It is generally held for law that where one enters upon real estate under adverse deed or title, possession so taken will be construed to extend to the boundaries of the deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title,

unless at the same time, the true owner be in possession of a part of the estate, claiming title to the whole, in which event his seizin will extend by operation of law to all not in the actual close or occupancy of the party entering and claiming under a defective deed or titles. *Clarke's Lessee v. Courtney,* 30 U. S., 319, 8 L. Ed., 140. Both parties cannot be seized at the same time of the same estate under different titles, and so the law declares the seizin of all not in the actual occupancy of the adverse party to be in the one who has the better title.

Exception is also taken to the following expression in the charge: "Plaintiff therefore contends the defendants have failed to establish paper-title to the minerals and mining rights because they have not gone on back to the State." While this exception in the form presented cannot be sustained, as it is directed to a contention which was not seasonably called to the court's attention and opportunity afforded to correct it, *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360, nevertheless it may be appropriate to say 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. G. S., 1-36; *Ramsey v. Ramsey, ante,* 110, 29 S. E. (2d), 340; *Ward v. Smith,* 223 N. C., 141, 25 S. E. (2d), 463; *Dill-Cramer-Truitt Corp. v. Downs,* 195 N. C., 189, 141 S. E., 570; *S. c.,* 201 N. C., 478, 160 S. E., 492.

There are other matters appearing on the record which have been urged with confidence and manifest research. They are put aside because of the necessity of awarding a new trial for error in the charge, as indicated, and the probability that they may not arise on the future hearing.

Another trial seems necessary. It is so ordered.

New trial.

PURE OIL CO. OF THE CAROLINAS v. F. J. BAARS ET AL.

(Filed 8 November, 1944.)

1. Contracts § 9—

Where a contract is entire, whether in one or several instruments, the whole contract stands or falls together.

2. Mortgages § 24: Specific Performance § 1—

Upon conveyance of real and personal property by plaintiff to defendants, who as part of the same transaction and at the same time gave plaintiff an option to repurchase the said property and executed to plaintiff's attorney, as trustee, a deed of trust thereon securing a debt, plain-

tiff having exercised its option, in a suit for specific performance, judgment was properly entered for plaintiff.

3. Equity § 1a—

If defendants would avoid their contract of option, given to plaintiff on certain property at the time the property was acquired and as part of the same transaction, they must surrender the property so acquired. He who seeks equity must do equity.

APPEAL by defendants, F. J. Baars and J. A. Harrell, individually and as partners composing the firm of Duplin-Pender Oil Company, from *Frizzelle, J.*, at March Term, 1944, of DUPLIN.

Civil action for specific performance of option and contract to convey land and partnership properties.

The suit was originally instituted against F. J. Baars, individually, and as a member of the partnership, Duplin-Pender Oil Company, composed of F. J. Baars and J. A. Harrell. At the instance of Baars, an order was entered making J. A. Harrell, the other member of the partnership, and W. F. Wimberly, Trustee in deed of trust, parties defendant. They came in voluntarily and filed answers before the referee, after an order of compulsory reference had been entered in the cause.

Over a period of years, the plaintiff had built up an oil business in Duplin and Pender counties, with its bulk plant at Wallace, N. C., from which it distributed its petroleum products to 35 filling stations scattered throughout the territory. From 1934 to 1939, J. A. Harrell was agent and manager in charge of plaintiff's business and operated it on a commission basis.

On 14 March, 1939, Harrell and Baars formed a partnership under the name of Duplin-Pender Oil Company and took over the business on a "jobber basis," or as distributors, pursuant to agreement evidenced by the following executed instruments:

1. Deed from plaintiff to partnership for bulk station and plant at Wallace, exclusive of storage tanks.

2. Option from partnership to plaintiff to purchase the property at any time within one year, with automatic renewal from year to year, subject to cancellation on 60-days' written notice prior to expiration of the then current period.

3. Deed of trust from partnership to W. F. Wimberly, Trustee, to secure indebtedness to plaintiff of $11,663.27. The trustee was and is attorney for plaintiff.

4. Lease agreement from plaintiff to partnership for all service stations in the territory owned or held by it under lease.

5. Distributors' sales agreement.

Within eleven months the partnership fell behind in its open account with the plaintiff to the amount of approximately $7,000. Whereupon, on 23 January, 1940, the parties entered into a further agreement permitting the plaintiff to exercise its option to purchase the property, to be avoided, however, upon payment of the open account on or before 2 February, following. The open account was not paid within the time specified, so J. A. Harrell and wife executed to plaintiff deed for one-half undivided interest in the partnership property. The defendant, F. J. Baars, declined to sign deed for his one-half interest in the property in accordance with the agreement of 23 January, because "my wife would not sign it and I decided not to sign it." This suit is to enforce compliance.

Both Baars and Harrell now take the position that the agreement of 23 January, 1940, is voidable, because of the relation of mortgagor and mortgagee, existing between the parties at the time—the deed of trust being in fact a mortgage since the trustee named therein was and is attorney for plaintiff—and the option given to the plaintiff runs counter to the rule against perpetuities, and is therefore void. For these reasons Harrell says he is not estopped by his deed for one-half undivided interest in the partnership property. They set up counterclaim for return of the property and for an accounting.

The referee found the facts in favor of the plaintiff, and recommended judgment accordingly.

The defendants, Baars and Harrell, filed exceptions, tendered issues and demanded a jury trial.

The court held that the defendants were not entitled to a jury trial, overruled their exceptions to the report of the referee and entered judgment confirming the report.

The defendants, F. J. Baars and J. A. Harrell, appeal, assigning errors.

R. Gregg Cherry, R. D. Johnson, and John G. Dawson for plaintiff, appellee.

Beasley & Stevens for defendants, F. J. Baars and J. A. Harrell, appellants.

STACY, C. J. It is conceded that the right to a jury trial has been preserved and that it should be accorded, unless upon the whole record the plaintiff is entitled to recover in accordance with the ruling below.

The allegations of imposition rest upon the legal effect of naming plaintiff's attorney trustee in the deed of trust, and the significance of the automatic renewal provision in the option to purchase. The defend-

ants say that the trustee is a representative of the plaintiff, which converts the deed of trust into a mortgage as a matter of law, *Mills v. B. & L. Asso.,* 216 N. C., 664, 6 S. E. (2d), 549, and that the automatic renewal provision in the option to purchase does violence to the rule against perpetuities and renders the option void. *Starcher v. Duty,* 61 W. Va., 373; *Barton v. Thaw,* 246 Pa. St., 348.

The defendants seem to overlook the fact that, with their written consent, the option was exercised on 23 January, 1940, and one of the appellants, J. A. Harrell, has already complied with this agreement. Baars at first put his declination on the ground that his wife would not sign the deed and that he had also decided not to sign it. He now gives a different reason for his refusal. *McAden v. Craig,* 222 N. C., 497, 24 S. E. (2d), 1.

Moreover, the option is an integral part of the transaction, and it would be inequitable to allow the defendants to claim the property under deed from the plaintiff and at the same time annul the essential terms of its acquisition. If the option is to go out, so must the deed which induced it. *Wooten v. Walters,* 110 N. C., 251, 14 S. E., 734. The result, therefore, would be the same whether upheld or rejected. As the defendants have already made their choice by the agreement of 23 January, 1940, no useful purpose would derive from executing a circular performance in the courts.

The defendants themselves confirm the conclusion that the several instruments, which were executed contemporaneously and which pertain to the same transaction, are to be considered as competent parts of the understanding between the parties. Harrell and Baars both say the instruments are "all a part of one and the same transaction." *Peeler v. Peeler,* 202 N. C., 123, 162 S. E., 472; *Perry v. So. Surety Co.,* 190 N. C., 284, 129 S. E., 721. Where a contract is entire, the whole contract stands or falls together. *Dolan v. Lifsey,* 19 Ga. App., 518, 91 S. E., 913. If the defendants would avoid the option, and call this equity, then they must do equity by surrendering the property which they acquired at the time of the transaction. *Ferguson v. Blanchard,* 220 N. C., 1, 16 S. E. (2d), 414. It will not do to affirm the contract in part and repudiate it in part. This was the conclusion of the referee which the trial court upheld.

The correct result seems to have been reached in the court below. It will not be disturbed.

Affirmed.

W. M. GOODSON, J. L. GOODSON, J. F. GOODSON, J. R. GOODSON, BESSIE DRUM, IDA JONES AND J. C. GOODSON v. MATTIE LEHMON, WILLIAM LEHMON AND WIFE, CONNIE LEHMON; LIZZIE BEAL, ELLA PAINTER, MOLLIE CALDWELL, ET AL.

(Filed 8 November, 1944.)

1. **Insane Persons § 5—**

G. S., ch. 35, defines four several classes of persons for whom a guardian may be appointed, but it creates one cause and one cause only for such appointment. That cause is mental incapacity or want of understanding.

2. **Insane Persons § 4—**

A verdict and judgment in an inquisition, where the jury found and the court adjudged that, "due to old age and other physical infirmities," G was incapable of looking after or managing her own affairs—and nothing more, constitutes no evidence, conclusive or otherwise, of the mental incapacity of G.

APPEAL by defendants from *Blackstock, Special Judge,* at July Term, 1944, of CATAWBA. Reversed.

Civil action to set aside a deed of conveyance for mental incapacity and fraud.

In 1938 Bessie Drum and Ida Jones, two of the plaintiffs herein, filed a petition before the clerk of Superior Court of Catawba County, seeking to have Julia Goodson declared incompetent for want of understanding to manage her own affairs. At the hearing, 22 October, 1938, an issue was submitted to and answered by the jury as follows:

"Is Julia Goodson incapable of looking after or managing her own affairs due to old age and other physical infirmities?

"Answer: Yes."

Thereupon the clerk, reciting the verdict, adjudged "that said Julia Goodson is incapable to look after and manage her own affairs due to old age and other physical infirmities, and in accordance with Section 2285 of the North Carolina Code, a guardian should be appointed to manage her property and affairs." No guardian was appointed.

On 12 August, 1939, the said Julia Goodson appeared and filed a motion in the cause for the appointment of a receiver of her property. She alleges in her motion that plaintiff J. F. Goodson has wrongfully acquired possession of her personal property and one tenant house and refuses to make any accounting, and that it is necessary to have a receiver to acquire possession thereof.

On 19 August, 1939, the judge, for the purpose of the motion, found the facts alleged to be true and entered an order appointing Fred Wright

receiver. The name of Fred Wright has been stricken from said order. At what time and by whom this was done does not appear.

On 17 November, 1939, plaintiff J. F. Goodson, against whom the allegations of misconduct in respect to the property of Mrs. Goodson had been made, filed bond with the clerk and assumed the duties of receiver. This was without appointment or authorization.

On 4 August, 1941, Julia Goodson executed and delivered to defendants, Mattie Lehmon (her daughter) and William Lehmon (her grandson), a deed conveying the real property described in the complaint. The deed recites that it is executed pursuant to a prior agreement between grantor and her husband and the grantees in consideration of services, etc., in looking after and living with the grantors in their old age.

Mrs. Goodson died 8 March, 1942, and on 5 July, 1943, this action to invalidate the deed was instituted.

At the hearing the plaintiffs offered the record of the inquisition proceedings, including the receivership motion and reports filed by J. F. Goodson, Receiver, together with proof of their authenticity, and rested.

Defendants moved to dismiss as in case of nonsuit. The motion was overruled and defendants excepted.

Thereupon, the court submitted one issue to the jury, to wit:

"1. Was the deed made by Mrs. Julia A. Goodson on the 4th day of August, 1944 (*sic*), to Mattie Lehmon and William Lehmon, inoperative and void?" and instructed the jury: "if you believe all of the evidence in this case, the testimony of the witnesses and the other evidence, and find the facts to be as the evidence tends to show, then it will be your duty to answer the issue Yes."

The jury answered the issue as instructed by the court. There was judgment on the verdict and defendants appealed.

John C. Stroupe and Wade H. Lefler for plaintiffs, appellees.

Harvey A. Jones, Fred D. Caldwell, and John W. Aiken for defendants, appellants.

BARNHILL, J. G. S., chapter 35, defines four several classes of persons for whom a guardian may be appointed but it creates one cause and one cause only for such appointment. That cause is mental incapacity or want of understanding. *In re Worsley,* 212 N. C., 320, 193 S. E., 666; *In re Anderson,* 132 N. C., 243.

While the statute, G. S., 35-2, recognizes that mental deterioration or disintegration may, and sometimes does, follow as a result of old age, physical infirmities and disease, it does not make physical incapacity

alone, however complete, grounds for the appointment of a trustee or guardian. The court is authorized to step in and delegate the power to manage the property of another only when that person has lost his mental capacity to do so in his own behalf.

The verdict and judgment in the inquisition proceedings relied on by plaintiffs contain no suggestion of mental incapacity or want of understanding. The jury found and the court adjudged that, "due to old age and other physical infirmities," Mrs. Goodson was incapable of looking after or managing her own affairs—and nothing more. This verdict and judgment constitute no evidence, conclusive or otherwise, of the mental incapacity of the deceased at the time she executed the deed in controversy.

The motion for the appointment of a receiver was made by Mrs. Goodson and was based on the allegation that one of plaintiffs had wrongfully acquired possession of her property. It has no bearing on the question here presented.

The inquisition proceedings together with the accompanying motion for the appointment of a receiver was all the evidence offered by plaintiffs. Hence, the defendants were entitled to have the cause dismissed as of nonsuit as they in apt time requested.

The plaintiffs cite and rely on *Sutton v. Sutton,* 222 N. C., 274, 22 S. E. (2d), 553. That case is clearly distinguishable. There the respondent in the inquisition proceedings was adjudged "incompetent from want of understanding." Here it was not so found or adjudged.

For the reasons stated the judgment below is

Reversed.

LILLIAN COLEY, BY AND THROUGH HER NEXT FRIEND, A. E. COLEY, v. E. E. PHILLIPS.

(Filed 8 November, 1944.)

1. Evidence § 42b—

For a declaration to be competent as part of the *res gestæ,* at least three qualifying conditions must concur: (a) The declaration must be of such spontaneous character as to preclude the likelihood of reflection and fabrication; (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom; (c) and must have some relevancy to the fact sought to be proved. If not of this character, its mere nearness to the transaction in point of time has no significance.

2. Same: Negligence § 13b—

In an action, by the next friend of an infant eight years of age against defendant, to recover for injuries sustained in a collision with defendant's

automobile, allegedly caused by the negligence of the defendant, who pleaded contributory negligence, evidence that the child's mother came, half crying, upon the scene within two minutes of the accident, and said, "I have told her about crossing that highway a number of times," is not competent as part of the *res gestæ*, and there could be no imputed negligence.

3. Negligence § 20—

In the court charge, in an action to recover for personal injuries, allegedly caused by negligence of defendant—Upon the issue of contributory negligence the test is: Did plaintiff fail to exercise that degree of care which a reasonably prudent person would have exercised or employed under the same or similar circumstances to avoid injury and was such failure proximate cause of the injury? That is what is negligence for defendant. The corresponding negligence of plaintiff is called contributory negligence. We refer to it as negligence when alleged against the defendant, and contributory negligence when alleged against plaintiff—whose negligence need only to contribute as proximate cause, to defeat recovery—there is no reversible error, when the same was rendered harmless by more particular instructions given thereafter.

APPEAL by defendant from *Stevens, J.*, at February Civil Term, 1944, of WAKE.

Bunn & Arendell for appellee, plaintiff.
John W. Hinsdale for appellant, defendant.

SEAWELL, J. This action was brought by the plaintiff, through her next friend, to recover for an injury sustained in a collision with defendant's automobile, alleged to have been caused by the negligence of the defendant. In his answer, the defendant pleaded contributory negligence on the part of the plaintiff—at the time a child eight years of age.

There is much conflicting evidence as to the behavior of both plaintiff and defendant in the unfortunate experience, but the sufficiency of the evidence to go to the jury, both on the issue of defendant's negligence and that of contributory negligence of plaintiff, is not questioned. Both issues were submitted to the jury, and answered in favor of the plaintiff.

The defendant's appeal involves only two exceptions: The one to the exclusion of evidence supposed to be material on the issue of contributory negligence; and the other, to an instruction to the jury on the same subject. Other exceptions are abandoned or are formal.

(1) It was in evidence through defendant's witness, Finley, that "a few seconds" after the child was hit the father came up out of the field, and "within two minutes" the mother came and was half crying. The witness was asked: "What did the mother say, if anything?" This was excluded on plaintiff's objection. If permitted to answer the witness would have said: "The mother stated, 'I have told her about crossing

that highway a number of times.'" The defendant contends that this statement, made by the stricken mother within two minutes of the occurrence, is a part of the *res gestæ;* and is material, as showing that the child was negligent on this occasion, or had been guilty of violating repeated warnings.

Since the mother, according to the evidence, did not see the collision at all, and knew nothing about the circumstances, or the behavior either of the child or the defendant, it is difficult, indeed, to see how the declaration was "the facts talking through the party"—to use the shorthand expression of the test as given in 32 C. J. S., p. 45, sec. 417, and in 20 Am. Jur., p. 556, sec. 662, and in *Batchelor v. Atlantic Coast Line R. Co.,* 196 N. C., 84, 144 S. E., 542. If the mother was attempting to say she had performed her own duty, that fact had no relation to the issue; if she intended to admit or suggest the negligence of the child, not only was she not competent to do so in this way, but she could only have been a party "talking about the facts" and facts of which she knew nothing.

For a declaration to be competent as part of the *res gestæ,* at least three qualifying conditions must concur: (a) The declaration must be of such spontaneous character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabrication; 32 C. J. S., pp. 45, 46, *supra;* instinctive rather than narrative; *Queen v. Ins. Co.,* 177 N. C., 34, 97 S. E., 741; *Summerrow v. Baruch,* 128 N. C., 202, 38 S. E., 861; (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom; *Queen v. Ins. Co., supra;* and (c) must have some relevancy to the fact sought to be proved. It must be remembered that to be admissible the declaration must be *a part* of the *res gestæ* —not merely *amongst* the *res gestæ*—that is, it must be so interwoven into the transaction that it may be vested with the significance of a fact—that is, one of the *"res gestæ"* or "things done." They are called "verbal facts" or "verbal acts." 20 Am. Jur., Evidence, sec. 664. If not of this character, its mere nearness to the transaction in point of time has no significance.

No rule of universal application can be devised as to the time element; but the principle of relevancy to the fact sought to be proved by it admits of no relaxation. *Holmes v. Wharton,* 194 N. C., 470, 140 S. E., 93, 76 A. L. R., 1125 (Anno.).

When the mother arrived, the transaction out of which the injury arose was a *fait accompli*—she was not then, and had not been, any part of it in the sense that the facts might speak through her. In this particular instance the declaration, if it had any significance beyond a mere

fear that her cautions had been disregarded, merely expressed an opinion which would have been incompetent even if presented in the form of testimony. *Field v. North Coast Transportation Co.* (Wash., 1931), 76 A. L. R., 1114. No allegation of contributory negligence on the part of the mother has been made in the answer, and there is no evidence of any. There could be no imputed negligence.

(2) The court instructed the jury as to what constituted contributory negligence, as follows:

"Upon the issue of contributory negligence the test is: Did the plaintiff fail to exercise that degree of care which a reasonably prudent person would have exercised or employed under the same or similar circumstances to avoid injury and was such failure to do so the proximate cause of the injury sustained? That is what is negligence for the defendant. The corresponding negligence of the plaintiff is called contributory negligence. We refer to it as negligence when alleged against the defendant. When alleged against a plaintiff we call it contributory negligence." The defendant objects to the interpolation of the sentence: "That is what is negligence for the defendant," contending that it is ambiguous and misleading.

The purpose of the court doubtless was to simplify the definition of contributory negligence of the plaintiff by similarizing it to the negligence of which the defendant might be charged. The same comparison has frequently been made by this Court in the interest of clarity; *Liske v. Walton,* 198 N. C., 741, 153 S. E., 318; *Templeton v. Kelley,* 215 N. C., 577, 2 S. E. (2d), 696; *Sebastian v. Horton Motor Lines,* 213 N. C., 770, 197 S. E., 539. Whatever inexactness or confusion might have resulted from the form in which this general instruction was given was rendered harmless by the more particular instruction later given to the jury, appearing on p. 57 of the record, and applied to the facts on the issue of contributory negligence:

"Now, this issue presents for your consideration and determination the question of fact as to whether or not the plaintiff, Lillian Coley, is guilty of what the law calls contributory negligence. The defendant in this case alleges that the plaintiff was guilty of contributory negligence, that is, that the plaintiff was negligent and that such negligence on the part of the plaintiff was a proximate cause of the plaintiff's injury. The plaintiff, of course, denies this. The law contemplates that every person having the capacity to exercise reasonable care for his own protection against injury will do so. If he fails to exercise such care and such failure concurring and co-operating with the actionable negligence of the defendant contributes to the injury complained of as a proximate cause, then he is guilty of contributory negligence; so, in this case she would be."

Considering that the plaintiff was a child eight years old, this instruction is more favorable to the defendant than he could have demanded, without a proper explanation, which the court later on gave.

The exceptions disclose

No error.

STATE v. J. C. PENNELL.

(Filed 8 November, 1944.)

1. Homicide § 11—

If an unprovoked attack is made upon one in his own place of business and the person assaulted fights only in self-defense, he is not required to retreat, regardless of the nature of the assault.

2. Homicide §§ 11, 27f—

In a prosecution for homicide, where the court in its charge to the jury places upon the defendant the duty to retreat and avoid the difficulty unless the assault committed on the premises of defendant is, or appears to be, felonious in intent, there is reversible error.

3. Homicide § 11—

If the prisoner stood entirely on the defensive and would not have fought but for the attack and the attack threatened (or reasonably appeared to him to threaten) death or great bodily harm, and he killed to save himself, then it is excusable homicide, although the prisoner did not run or flee out of his own house.

APPEAL by defendant from *Warlick, J.*, at February Term, 1944, of CALDWELL. New trial.

Criminal prosecution on bill of indictment for the murder of one John Kincaid.

Defendant operates a mercantile store in Lenoir, Caldwell County, and Kincaid was a customer. On 18 December, 1943, Kincaid went to defendant's store three times. Each time he and others in the store drank wine furnished by defendant. On the third trip, about six o'clock, after those present had a drink, defendant and Kincaid had an argument over the amount of Kincaid's charge account. In the course of the difficulty defendant shot and killed Kincaid.

When the case was called for trial, the solicitor announced he would not seek a verdict of murder in the first degree but would ask for a verdict of murder in the second degree or manslaughter, as the jury might determine on the evidence. There was a verdict of guilty of manslaughter and from the judgment pronounced on the verdict the defendant appealed.

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

W. H. Strickland for defendant, appellant.

BARNHILL, J. The evidence relied on by the State tends to show that the defendant became angered because Kincaid questioned the amount of his charge account. He cursed deceased, ordered him out of the store, began to strike him over the head with a pistol, and when deceased resisted the assault, defendant shot and killed him.

The defendant, on the other hand, offered testimony tending to show that Kincaid became angry when defendant spoke to him about his account; that Kincaid was a large man about 47 years of age and the defendant is an old man and much smaller; that Kincaid knocked defendant down behind his counter and was advancing on him, striking him, when defendant managed to get his pistol and shoot his assailant. Upon this testimony he bases his plea of self-defense.

Defendant's plea and the evidence offered in support thereof rendered it essential that the court in its charge explain to the jury the law of self-defense and apply it to the evidence offered. In undertaking to do so the court instructed the jury in part as follows:

"Now, Gentlemen, there is a distinction in the law which apparently seems to be reasonable and which is supported by a number of authorities, between assault with felonious intent, and assaults without felonious intent. For instance, in an assault without a felonious intent, a 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 with force and give blow for blow."

This was followed by the instruction that if the assault was murderous or defendant apprehended it so to be, he, being in his home or place of business, was under no obligation to flee.

Thus the court placed upon the defendant the duty to retreat and avoid the difficulty unless the assault was, or appeared to be, felonious in intent.

Defendant was in his own place of business. If an unprovoked attack was made upon him and he only fought in self-defense, he was not required to retreat, regardless of the nature of the assault. *S. v. Anderson,* 222 N. C., 148, 22 S. E. (2d), 271; *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526; *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Bost,* 192 N. C., 1, 133 S. E., 176; *S. v. Harman,* 78 N. C., 515.

Of course there are other facts at issue. Did defendant provoke the assault or willingly engage in the affray? If the assault was unprovoked

and the defendant was without fault, did he employ excessive force in repelling the attack? These and other controverted questions are for the jury to decide. Even so, "if the prisoner stood entirely on the defensive and would not have fought but for the attack, and the attack threatened (or reasonably appeared to him to threaten) death or great bodily harm, and he killed to save himself, then it was excusable homicide, although the prisoner did not run and flee out of his house." *S. v. Harman, supra.*

Hence, on this record, the doctrine of retreat is not applicable to the facts in the case. The charge thereon must be held for reversible error.

New trial.

WILLIE C. DIXON, ADMINISTRATRIX OF B. B. DIXON, DECEASED, v. THE TOWN OF WAKE FOREST.

(Filed 8 November, 1944.)

1. **Municipal Corporations § 12—**

A municipality is not liable for the negligence of its officers and servants in the performance of purely governmental duties imposed solely for the benefit of the public.

2. **Same—**

A town is under no duty to provide a person, confined in its brick jail without accessible windows, with someone to look out for him and is not liable in damages for death of such prisoner from burns and suffocation, occasioned by a fire of unknown origin breaking out in such prisoner's cell during the night.

APPEAL by defendant from *Harris, J.*, at October Term, 1943—judgment rendered 6 May, 1944, on decision, out of term and out of district by consent.

Civil action for recovery for alleged wrongful death, G. S., 28-173—heard upon demurrer to complaint.

Plaintiff in complaint filed alleges substantially these facts:

1. That B. B. Dixon, the intestate of plaintiff, came to his death on 10 May, 1942, by reason of burns and suffocation when fire ignited and burned inflammable matter in the cell of the prison or lockup maintained by defendant, the Town of Wake Forest, a municipal corporation, in which prison or lockup he had been placed by the night policeman of said town at a time when he, the intestate, was "in a helpless and mentally irresponsible condition."

2. That the said prison or lockup which the defendant maintained at that time, and in which it undertook to confine all such persons as in the

judgment of its police officers it was proper to so confine, was located at the rear of the ground floor of a brick building and over a basement in which the town truck, and coal, and other materials were stored, and consisted of two cells and a passageway, with no windows or other openings to which a prisoner locked in either cell might gain access in order to save himself from suffocation; that there was in the cell, in which intestate of plaintiff was confined, a "quantity of inflammable material consisting of two cotton mattresses and blankets"; and that there were no attendants provided by defendant to release a prisoner, particularly one in an irresponsible condition, such as was the plaintiff's intestate, in the event of a fire in the prison.

3. That the town of Wake Forest, with population of 2,000 inhabitants, "with one of the largest educational institutions in the State within its corporate limits, and with a large cotton mill in close proximity thereto," is "well able not only to provide for the patrol of its streets and other police duties, but to . . . provide an attendant for its prison where irresponsible persons are habitually imprisoned."

4. That the death of intestate of plaintiff was the direct and proximate result of the negligence of defendant (a) in so constructing the prison that a person locked therein could not, in case of fire, escape therefrom or gain access to a window or other opening in order to save himself from death by burning or suffocation, and (b) in failing to provide proper attendants for the safeguard and protection of those confined in the prison or lockup in which there were inflammable materials, when the defendant could reasonably foresee that a person in an irresponsible condition such as was the intestate of plaintiff at the time of his incarceration would likely set fire to the prison, or otherwise injure himself.

Defendant demurs to the complaint for that it does not state facts sufficient to constitute a cause of action in that:

"1. The alleged negligent acts of this defendant were governmental in their nature and were done in the exercise of judicial, discretionary or legislative authority, or in the discharge of a duty imposed solely for the benefit of the public.

"2. That the alleged negligence of this defendant is a conclusion of law and not facts; and

"3. That no alleged act of this defendant can, upon the face of the complaint, be held to constitute the proximate cause of any injury the plaintiff may have sustained."

From judgment overruling the demurrer, defendant appeals to Supreme Court and assigns error.

Hill Yarborough and Gholson & Gholson for plaintiff, appellee.

Lawrence Harris and Smith, Leach & Anderson for defendant, appellant.

WINBORNE, J. Judgment of the court below in overruling the demurrer to the complaint runs counter to the principles of law enunciated and applied in numerous decisions of this Court, as most recently stated in *Parks v. Town of Princeton,* 217 N. C., 361, 8 S. E. (2d), 217, where the authorities are assembled.

The factual situations in the *Parks case, supra,* and in the case of *Nichols v. Fountain,* 165 N. C., 166, 80 S. E., 1059, 52 L. R. A. (N. S.), 942, Ann. Cases 1915 (d), 152, 8 N. C. C. A., 872, are in material aspects very similar to that in the present case and the principles there applied are controlling here. Hence, on the authority of these cases, and the cases therein cited, the demurrer should have been sustained.

The judgment below will be

Reversed.

STATE v. JAMES W. BUCHANAN.

(Filed 8 November, 1944.)

Criminal Law § 80—

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of the Attorney-General, after the Court has examined the record and finds no error.

MOTION by the State to docket and dismiss appeal under Rule 17.

PER CURIAM. On the motion to dismiss the following facts are made to appear:

The defendant was tried before Bobbitt, Judge, and a jury at the June Term, 1944, Superior Court of Mecklenburg County, on a bill of indictment charging the capital felony of rape. There was a verdict of guilty of rape as charged in the bill of indictment and from the sentence of death pronounced on the verdict of the jury the defendant gave notice of appeal to the Supreme Court. No case on appeal has been docketed in this Court and no case on appeal has been filed in the office of the clerk of the Superior Court of Mecklenburg County. The time allowed by the Court, on agreement of counsel, for perfecting the appeal has expired and counsel for defendant has informed the clerk of the Superior

Court of Mecklenburg County that they do not intend to perfect the same.

The defendant having failed to file proper case on appeal and his counsel having given notice that they have abandoned the appeal, the Attorney-General moves that the case be docketed here and the judgment of the Superior Court be affirmed under Rule 17. The motion must be allowed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455; *S. v. Alexander, ante,* 478; *S. v. Taylor, ante,* 479.

As is customary with us on a motion to dismiss an appeal in a criminal prosecution in which the defendant has been convicted of a capital felony, we have carefully examined the record proper and find that it fails to disclose any error.

Appeal dismissed. Judgment affirmed.

STATE v. GEORGE WALTER BROOKS.

(Filed 8 November, 1944.)

Criminal Law § 80—

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of the Attorney-General, after the Court has examined the record and finds no error.

MOTION by State to docket and dismiss appeal.

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

No counsel contra.

PER CURIAM. At a regular term of the Superior Court of Mecklenburg County held on 12 June, 1944, for the trial of criminal cases exclusively, the defendant George Walter Brooks was tried upon an indictment charging him with the statutory crime of rape. There was verdict of guilty of rape as charged in the bill of indictment, upon which judgment of death as required by law was pronounced by the court on 15 June, 1944.

From this judgment defendant gave notice of appeal to the Supreme Court, and upon affidavit and certificate in compliance with the statute, G. S., 15-181, an order was entered on 15 June, 1944, permitting the defendant to appeal "his case *in forma pauperis,* without giving security for costs." By consent, defendant was allowed sixty days in which to

prepare and serve case on appeal, and the State was allowed thirty days after such service in which to file exceptions or countercase.

The clerk of said Superior Court certifies, under date of 20 October, 1944, that "no case on appeal has been filed in this office and that the time or extension of time allowed by the Court, or agreed upon by counsel, for perfecting the appeal has expired, and the appeal has not been perfected," and that he is informed by counsel for defendant "that they do not intend to perfect the said appeal."

The Attorney-General moves to docket and dismiss the case under Rule 17 of the Rules of Practice in the Supreme Court. 221 N. C., 544, at 551.

In the absence of apparent error upon the face of the record the motion is allowed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455; *S. v. Robinson,* 212 N. C., 536, 193 S. E., 701; *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507; *S. v. Blue,* 221 N. C., 36, 18 S. E. (2d), 697; *S. v. Alexander, ante,* 478.

Appeal dismissed. Judgment affirmed.

J. J. WHITEHURST AND JAMES H. REAVES v. FCX FRUIT AND VEGETABLE SERVICE, INC., FARMERS COOPERATIVE EXCHANGE AND NORTH CAROLINA COTTON GROWERS COOPERATIVE ASSOCIATION.

(Filed 22 November, 1944.)

1. Contracts § 6: Evidence § 39—

A contract (except when forbidden by the statute of frauds) may be partly written and partly oral and in such cases the oral part of the agreement may be shown. However, it is the settled rule that a contemporaneous parol agreement is inadmissible to contradict that which is written.

2. Contracts § 12: Evidence § 40—

The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument required any modification to be in writing, and also where the contract provided that no agent should have the right to change or modify the same.

3. Corporations § 23: Contracts § 23—

The mere fact that one corporation owns all of the capital stock of another corporation, the board of directors of both being the same, nothing else appearing, is not sufficient to render the parent corporation liable for

the contracts of its subsidiary. In order to establish such liability there must be additional circumstances showing fraud, actual or constructive, or agency.

APPEAL by defendants from *Dixon, Special Judge,* at March Term, 1941, of WAYNE.

Civil action to recover a balance of $39,424.04, alleged to be due under contract.

Before the trial below, a voluntary nonsuit was taken as to the defendant, N. C. Cotton Growers Cooperative Association.

J. J. Whitehurst, one of the plaintiffs, on 30 May, 1941, executed a Marketing Agreement, as follows:

"MARKETING AGREEMENT FOR FCX FRUIT AND VEGETABLE SERVICE, INC.

"The undersigned grower, hereinafter referred to as the Grower, agrees to deliver to FCX Fruit & Vegetable Service, Inc., hereinafter referred to as the Cooperative, the Irish potatoes produced by the Grower for sale during the five year period 1940-1944 inclusive, subject to cancellation any year by written notice to the Cooperative during the month of January of such year.

"Annual cancellation privileges are applicable to both the Grower and the Cooperative.

"The Irish potatoes delivered by the Grower to the Cooperative are to be handled in accordance with the By-Laws of the Cooperative and other rules and regulations established by the Cooperative. If the Grower is not already a member of the Cooperative, he agrees to pay $2.00 as membership fee in the Cooperative. If, at the time the potatoes are ready for marketing, the Grower can sell same at a price greater than the amount that it appears he can obtain for the same through the Cooperative, the Grower can sell his potatoes to or through other persons, provided he pays to the Cooperative an amount equal to one cent per bag or one and one-half cents per barrel for all potatoes sold by the Grower to or through persons other than the Cooperative; and the Grower hereby agrees to make such payment to the Cooperative for all potatoes sold to or through other persons in order to help pay the expenses that might be incurred by the Cooperative in arranging for the services provided in this and similar agreements with other growers, said payment to be made by the undersigned Grower immediately upon his selling any Irish potatoes to or through any person other than the Cooperative.

"This instrument contains all of the conditions and terms of the agreement between the parties hereto and cannot be amended or changed except by a paper writing signed by both parties.

"The Grower, upon request of the Cooperative, agrees to furnish the Cooperative with the actual number of acres planted in Irish potatoes each year that this contract is in effect.

"Read and signed by the Grower on 30 day of May, 1941.

J. J. WHITEHURST (SEAL), Grower,
P. O. Address—Mt. Olive, N. C.

"Witness: C. C. HILTON.

"Executed by the Cooperative on..........day of....................., 19.......

FCX FRUIT & VEGETABLE SERVICE,
INC., by M. G. Mann, (s)
Secretary."

During the seasons of 1941 and 1942, Whitehurst marketed potatoes under the above agreement.

On or about 16 April, 1943, J. J. Whitehurst executed the following contract:

"MARKETING SALES AGREEMENT.

"The undersigned Grower, hereinafter referred to as the Grower, and the FCX Fruit & Vegetable Service, Inc., hereinafter referred to as the Cooperative, enter into the following sales Agreement:

"The Grower agrees to deliver to the Cooperative the first 50 cars of U. S. No. 1 Irish Cobbler Potatoes grown or handled by him during the 1943 marketing season. The potatoes to be Federal and State inspected with inspection certificate reading fairly clean, grade defects within tolerance, and showing not over ½ of 1% decay. The potatoes to be packed in new burlap, cotton, or mesh bags, branded or properly tagged, and to be loaded and stacked with the proper care in refrigerator cars containing 300 bags to the car on or before June 20, 1943.

"Upon delivery of the inspection certificate and bill of lading to the Cooperative, in accordance with the above conditions, the Cooperative agrees to pay the Grower on an f.o.b. acceptance basis the Eastern North Carolina OPA established ceiling price of $2.40 cents per bag that has been established for U. S. No. 1 Cobbler potatoes, less the Cooperative's marketing service charge of .05 cents per bag, payment to be made by check from the Cooperative's office at Washington, North Carolina.

"In event the ceiling price of U. S. No. 1 Cobbler potatoes is raised or lowered, the Cooperative will pay the Grower the ceiling price in effect at time of shipment with the Cooperative's marketing service charge remaining at .05 cents per bag.

"The Grower agrees to furnish the Cooperative with the car numbers and dates that each car is ready for shipment immediately upon com-

pletion of the loading and inspection thereof, and further agrees to make shipment to any destination requested by the Cooperative.

"This agreement entered into under seal on this 16th day of April, 1943.

(Signed) FCX FRUIT & VEG. SERVICE (SEAL)
By C. C. HILTON.

"Signed:
J. J. WHITEHURST (SEAL)."

It is alleged that in the execution of the foregoing agreement, J. J. Whitehurst was acting for himself and his co-plaintiff, James H. Reaves.

The plaintiffs allege that the FCX Fruit & Vegetable Service, Inc., in the execution of the contract, dated 16 April, 1943, was acting as agent for itself and its co-defendant, and that the defendants are jointly liable to the plaintiff for the contract price of said potatoes.

The plaintiffs allege they shipped 86 carloads of potatoes, pursuant to the 1943 agreement, and allege that the defendants purchased 83 cars of said potatoes at $2.84 per bag and 3 cars at $2.40 per bag, less a deduction of $15.00 per car by the defendants for handling charges.

The defendants allege that only three cars of potatoes were delivered under the 1943 agreement, on or before 20 June, 1943, and that all the potatoes handled by the defendant FCX Fruit & Vegetable Service, Inc., for J. J. Whitehurst, over and above the aforesaid three cars, were handled in strict compliance with the Marketing Agreement executed in 1941.

The defendants further allege that the FCX Fruit & Vegetable Service, Inc., is a separate and distinct corporation from the defendant, Farmers Cooperative Exchange, and was organized for the specific purpose of aiding and assisting growers of Eastern North Carolina in the marketing of their Irish potatoes, and that its co-defendant is in no way connected with the defendant, FCX Fruit & Vegetable Service, Inc.

The pertinent part of the testimony is as follows:

1. That after Whitehurst received the proposed agreement, dated 16 April, 1943, and before the execution thereof, Whitehurst and Reaves entered into a partnership agreement to handle potatoes during the 1943 season.

2. That the potato crop in 1943 was late, on account of a freeze which occurred about 20 April, and because of the lateness of the crop, the plaintiffs, Whitehurst and Reaves, on or about 8 June, 1943, made a trip to Washington, North Carolina, to see C. C. Hilton, Director-Manager of the FCX Fruit & Vegetable Service, Inc., about the delivery of potatoes under their contract. Whitehurst testified: "We discussed the lateness of the crop with Mr. Hilton and he told us the potato

crop was late in general over the belt and he didn't see as that would make much difference, that he had to take care of his customers, especially last year when it was seller's market instead of buyer's market, said 'We might need him later on another year.' Mr. Reaves asked him before we left about the size and grade of the potatoes and the extent they would take Victory grade, and maybe a car or two of Victory grade had moved from the Mt. Olive section, and his answer was that others took them and they would have to do likewise."

Mr. Reaves testified: "About 8th June, before any potatoes were purchased by us or any potatoes were delivered to FCX, Mr. Whitehurst and myself went to Washington, North Carolina, to Mr. Hilton's office. The sole purpose of our visit was to find out how we stood on the contract. Since there had been a frost, we knew we could not fill the contract by the date limit, and we talked to Mr. Hilton, and during the conversation we told him there was no way we could fill the contract by 20th June, and wanted to know just where we stood on it, and Mr. Hilton's answer to that was that he wanted the potatoes, and it would be no penalty to them to have them late, as the whole section was late, and he wanted every potato that we would let him have, and that his Board of Directors had authorized and directed him to get potatoes to protect their trade during 1943; that it was the seller's year, and if he let the trade get away from him, when it got to be the buyer's year again, that they would go to the same place they got them in 1943, and that he would reduce the charge from five cents to four cents per bag on the potatoes we shipped him, making them net $2.80 per bag. . . . I told Mr. Hilton that they were loading potatoes in Mt. Olive under what they called the Victory grade, and Victory grade is field run. I told him I had 135 bags planted myself, and was seriously considering digging them right away while I could move my potatoes under the Victory grade and asked him if he wanted them if I did and he said 'Yes.' He said, 'Since others were taking them that way he would take them.' He stated to us that he would give $2.84 less his charge for Victory grade potatoes." The plaintiff Reaves further testified to the effect that he and Whitehurst had previously dealt with Mr. Hilton, as Manager of Farmers Cooperative Exchange; that they had bought a truck load of seed potatoes the spring before, and Mr. Whitehurst issued his check in the sum of $294.25, payable to Farmers Cooperative Exchange, and that he (Reaves) delivered the check to Mr. Hilton in Greenville, N. C., and Mr. Hilton delivered the seed potatoes to Mr. Whitehurst. Mr. Whitehurst corroborated this testimony, and testified further that he had made payments of money to Mr. Hilton for the Farmers Cooperative Exchange, that Mr. Hilton fixed the prices on goods or merchandise sold to him by the Farmers Cooperative Exchange,

that Mr. Hilton wrote him letters on the stationery of the Farmers Cooperative Exchange, that the letter transmitting the 1943 contract was written on such stationery from Greenville, N. C., and that each envelope containing invoices and bills of lading covering the 86 cars of potatoes shipped during the 1943 season was addressed to the Farmers Cooperative Exchange, Washington, N. C.

3. The ceiling price was $2.70 to the grower and $2.84 to the buyer per hundred pounds for U. S. No. 1 Irish Cobbler potatoes from 16 June through 26 June, 1943, inclusive. During the aforesaid period the plaintiffs shipped 86 carloads of Irish potatoes to consignees designated by Mr. Hilton or Mr. Pendulik, an employee of the FCX Fruit & Vegetable Service, Inc., according to plaintiff's testimony. Each car contained 300 bags of Irish potatoes, weighing 100 pounds per bag. The potatoes were officially inspected and the inspector's reports forwarded to the Washington, N. C., office of the FCX Fruit & Vegetable Service, Inc. All these shipments of potatoes, except the last 8 carloads shipped on 26 June, 1943, were invoiced to Farmers Cooperative Exchange, Washington, N. C., at the ceiling price of $2.84 and mailed, together with the bills of lading to Farmers Cooperative Exchange, Washington, N. C. The 8 cars shipped on 26 June, 1943, were invoiced to Farmers Cooperative Exchange, Washington, N. C., the car numbers given but no price designated, and mailed together with the bills of lading to the Farmers Cooperative Exchange, Washington, N. C.

In each of the bills of lading, the Farmers Cooperative Exchange is the consignor, the Farmers Cooperative Exchange is the consignee in 37 of the bills of lading and the destination Greenwich Yard, Pa. The Farmers Cooperative Exchange is the consignee in 35 additional bills of lading, destination Portsmouth, Ohio. The Atlantic Commission Co., c/o A. & P. Tea Co., is consignee in 10 of the bills of lading, destination various points, while the Quarter Master Center, Nashville, Tenn., is consignee in 1, Greenburg Produce Co., Greenburg, Pa., is consignee in 2 and Kroger Grocery & Baking Co., Toledo, Ohio, is consignee in 1. None of the shipments were rejected by the defendants or other consignees.

4. There is evidence to the effect that reference to both defendants, FCX Fruit & Vegetable Service, Inc., and Farmers Cooperative Exchange, were frequently abbreviated by the letters "FCX," and that they had some common employees (but by no means all); that the FCX Fruit & Vegetable Service, Inc., sold many of its deliveries to Farmers Cooperative Exchange; that on some occasions at height of season, remittance would be made from the Washington office by check of Farmers Cooperative Exchange, but the two companies were separate corporations engaged largely in different fields of activity. However, it

is admitted the Farmers Cooperative Exchange was incorporated for the purpose of purchasing supplies for farmers, such as feeds, seeds and fertilizer, and selling and marketing farm produce.

Nelson Ricks testified that he sold 9 cars of potatoes to the Farmers Cooperative Exchange in June and July, 1942, and the terms were cash f.o.b. Mt. Olive.

The evidence also discloses that the FCX Fruit & Vegetable Service, Inc., is a small concern with a capital stock of $2,000.00, and has an estimated worth of $2,000.00; that all the stock is owned by the Farmers Cooperative Exchange, a corporation worth many thousands of dollars, and both corporations have the same directors.

5. The defendants deny any agreement or consent to waive the time of delivery of potatoes under the 1943 contract and deny that Whitehurst and Reaves requested an extension of the time. Testimony was offered to the effect that Whitehurst and Reaves on their visit to Washington, North Carolina, on 8 June, 1943, discussed only the possibility of reducing the handling charges from 5 to 4 cents per bag of potatoes and the grades that would be acceptable under the contract. Mr. Hilton testified that as to grade, he told them they would accept the inferior grades if other concerns accepted them, but as to a reduction in the handling charge he would have to consult others and advise them. He further testified that he did not authorize the use of the name of Farmers Cooperative Exchange in the bills of lading, but, on the contrary, when he received the first invoice and bills of lading he called Whitehurst over the telephone and instructed him to use the name of FCX Fruit & Vegetable Service, Inc., as consignor and consignee unless otherwise instructed. Whitehurst testified that Hilton made no request to discontinue the use of the name of the Farmers Cooperative Exchange, in the bills of lading and invoices, but that he talked with Hilton and Pendulik many times daily during the shipping season and each shipment was made in accordance with the instructions given him by them.

6. The balance alleged to be due when this action was instituted was $57,549.13. The plaintiffs were indebted to defendants in the sum of $3,970.25 for potato bags, and the defendant FCX Fruit & Vegetable Service, Inc., tendered checks to plaintiffs aggregating $14,154.84, the net balance due according to its contention. By agreement of counsel, plaintiffs accepted and cashed the above checks without prejudice to their claim for the balance of $39,424.04.

7. Prior to the institution of this action, the FCX Fruit & Vegetable Service, Inc., remitted to Whitehurst and Reaves for 5 cars of potatoes at $2.84 per bag less $15.00 per car for handling, a total of $4,185.00, and on 24 June, 1943, Whitehurst and Reaves, by J. J. Whitehurst, drew a draft on Farmers Cooperative Vegetable Service, Washington,

N. C., for $5,000.00, and the FCX Fruit & Vegetable Service, Inc., paid the draft by check on 28 June, 1943. Thereafter, on 29 June, 1943, J. J. Whitehurst drew a draft on Farmers Fruit & Vegetable Exchange, Washington, N. C., and the FCX Fruit & Vegetable Service, Inc., paid the draft on 1 July, 1943, by check, designating that it was in payment of Whitehurst and Reaves' draft.

8. The FCX Fruit & Vegetable Service, Inc., set up a counterclaim against the plaintiffs, alleging J. J. Whitehurst did not ship to it all the potatoes grown by him in 1943. Plaintiffs offered evidence to the effect that all potatoes grown by J. J. Whitehurst in 1943 were shipped to the defendants.

At the conclusion of all the evidence, the defendants and each of them, renewed their motion for judgment of nonsuit. Motion denied and defendants except.

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

"1. Did the plaintiff, J. J. Whitehurst, acting for himself and James Reaves, enter into a written contract with the defendant, FCX Fruit & Vegetable Service, Inc., dated April 16, 1943, as alleged in the complaint? Answer: Yes.

"2. Did the defendant FCX Fruit & Vegetable Service, Inc., waive the provisions of said written contract, as to the time of delivery, as to the number of cars of potatoes to be delivered, and as to the grade of potatoes delivered, as alleged in the complaint? Answer: Yes.

"3. Did the defendant, Farmers Cooperative Exchange, Fruit & Vegetable Service, Inc., after the written contract was entered into, contract and agree to pay for the 86 carloads of potatoes as alleged in the complaint? Answer: Yes.

"4. Was the FCX Fruit & Vegetable Service, Inc., at the time of said contracts and waivers, the duly authorized and acting agent of Farmers Cooperative Exchange (FCX), in making said contracts and waivers? Answer: Yes.

"5. In what amount, if any, is the defendant, FCX Fruit & Vegetable Service, Inc., indebted to the plaintiffs? Answer: $20,000.00.

"6. In what amount, if any, is the defendant Farmers Cooperative Exchange, indebted to the plaintiffs? Answer: $20,000.00.

"7. In what amount, if any, is the defendant, FCX Fruit & Vegetable Service, Inc., entitled to recover against J. J. Whitehurst on its counterclaim? Answer: None."

From judgment rendered on the verdict, defendants appeal to the Supreme Court, assigning error.

J. Faison Thomson and Royall, Gosney & Smith for plaintiffs.

L. Bruce Gunter, Paul B. Edmundson, and J. C. B. Ehringhaus for defendants.

DENNY, J. There are 113 exceptive assignments of error set forth in this record and obviously it would be impractical to discuss them *seriatim.*

Exceptions 1 to 35, and 37 to 49, inclusive, were taken during the introduction of testimony on the theory that parol evidence was inadmissible to amend, alter, vary or contradict a written contract, and therefore inadmissible. They present but one point and may be considered together.

A contract (except when forbidden by the statute of frauds) may be partly written and partly oral and in such cases the oral part of the agreement may be shown. *Mfg. Co. v. McPhail,* 181 N. C., 205, 106 S. E., 672. However, it is the settled rule that a contemporaneous parol agreement is inadmissible to contradict that which is written. *Insurance Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Miller v. Farmers Federation,* 192 N. C., 144, 134 S. E., 407; *Mfg. Co. v. McPhail, supra; Farquhar Co. v. Hardware Co.,* 174 N. C., 369, 93 S. E., 922; *Cherokee County v. Meroney,* 173 N. C., 653, 92 S. E., 616.

The exclusion of parol evidence on the theory that it is inadmissible to amend, vary or contradict a written instrument has no application to subsequent agreements which change or modify the original contract. *Insurance Co. v. Morehead, supra; Grubb v. Motor Co.,* 209 N. C., 88, 182 S. E., 730; *Roebuck v. Carson,* 196 N. C., 672, 146 S. E., 708; *Lane v. Engineering Co.,* 183 N. C., 307, 111 S. E., 344; *Mfg. Co. v. McPhail, supra; McKinney v. Matthews,* 166 N. C., 576, 82 S. E., 1036; *Freeman v. Bell,* 150 N. C., 146, 62 S. E., 682.

The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. *Mfg. Co. v. Lefkowitz,* 204 N. C., 449, 168 S. E., 517; *Bixler v. Britton,* 192 N. C., 199, 134 S. E., 488. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing. *Allen v. Bank,* 180 N. C., 608, 105 S. E., 401. It has likewise been sustained where a contract contained a provision to the effect that "No salesman or agent of the company shall have the right to change or modify this contract." *Mfg. Co. v. Lefkowitz, supra.*

We think the evidence relative to the extension of the time for delivery of the potatoes under the 1943 agreement, the number of cars to be shipped and the change in grade, was properly admitted. The defendants contend that the acceptance of potatoes from the plaintiffs after 20 June, 1943, has no bearing on the question of waiver as to time of delivery since, as they contend, they were compelled to accept all the potatoes tendered after that date under the terms of the 1941 agreement.

We do not so construe that agreement. That was a grower's contract and under its terms the FCX Fruit & Vegetable Service, Inc., was not required to accept from J. J. Whitehurst any potatoes other than those grown by him. There is no evidence that Whitehurst grew more than a small proportion of the potatoes shipped by him and his partner, Reaves, in 1943, but, on the contrary, the defendants knew Whitehurst and Reaves were buying potatoes and paying the net ceiling price to the farmers of $2.70 per bag. Furthermore, the testimony of Mr. Hilton, manager of the defendant, FCX Fruit & Vegetable Service, Inc., tends to confirm the contention of the plaintiffs that he agreed to waive the 1943 contract provision as to grade. These exceptions cannot be sustained.

The 36th and 50th exceptions are to the refusal of his Honor to grant the defendants' motions for judgment as of nonsuit at the close of plaintiffs' evidence and renewed at the close of all the evidence. The defendants are relying on the inadmissibility of parol evidence to modify the 1943 agreement, to sustain these exceptions, but in view of our decision relative to the admissibility of this testimony, these exceptions cannot be sustained on that ground. However, the defendant, Farmers Cooperative Exchange, Inc., urgently insists that the evidence, if admissible, is insufficient to sustain a verdict against it, and that its motion for judgment as of nonsuit should have been granted.

The mere fact that the Farmers Cooperative Exchange, Inc., owns all the capital stock of the FCX Fruit & Vegetable Service, Inc., and the further fact that the members of the board of directors of both corporations are the same, nothing else appearing, is not sufficient to render the parent corporation liable for the contracts of its subsidiary. In order to establish liability on the part of the parent corporation on such contracts, there must be additional circumstances showing fraud, actual or constructive, or agency. 13 Am. Jur., sec. 1384, p. 1217. Here plaintiffs are relying on agency.

The evidence discloses that the plaintiff Whitehurst, under the grower's agreement of 1941, executed by him and the FCX Fruit & Vegetable Service, Inc., invoiced potatoes during the 1941 and 1942 seasons to Farmers Cooperative Exchange, Washington, N. C., and that remittances on such invoices or in the payment of drafts on the Farmers Cooperative Exchange, Inc., were made by the FCX Fruit & Vegetable Service, Inc. The evidence is in sharp conflict as to whether or not the plaintiffs were instructed by the defendants to make the shipments in 1943 in the name of the Farmers Cooperative Exchange, Inc., and in 72 instances to make them to it. The 1943 agreement, however, required the plaintiffs to make shipment to any destination requested by the Cooperative. There is evidence that all written communications from

FCX Fruit & Vegetable Service, Inc., to plaintiff in 1943, were written on the stationery of the Farmers Cooperative Exchange, Inc., and that all invoices and bills of lading for the 86 cars of potatoes shipped by plaintiffs in 1943, were mailed to Farmers Cooperative Exchange, Inc., Washington, N. C., and that frequently both defendants were designated by the letters "F.C.X."; that they had some common employees and that on some occasions the Farmers Cooperative Exchange, Inc., remitted by its check for purchases made by the FCX Fruit & Vegetable Service, Inc. Plaintiffs testified that Mr. Hilton was a common employee and that in dealing with them he had acted as agent for both defendants. Whatever may have been the relationship of the defendants to each other, it is not denied that the invoices and shipments were made as set forth in the statement of facts herein, and no shipment was rejected by the defendants or either of them. We do not think the exceptions to the failure to nonsuit the plaintiffs as to the defendant Farmers Cooperative Exchange, Inc., can be sustained. We think the evidence sufficient on the question of agency to warrant its submission to the jury.

Exceptions 51 to 70, inclusive, are abandoned—Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 563.

The remaining exceptions are to the charge and to the refusal of the court to set the verdict aside and to the signing of the judgment.

We have carefully examined these exceptions and the argument of counsel in support thereof, but we think the charge contains no prejudicial error which would warrant a disturbance of the verdict below.

In the trial below, we find

No error.

P. P. JOHNSTON v. EDWIN GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 22 November, 1944.)

1. Taxation §§ 15, 7—

While a sales tax and a use tax may bring about the same result, they are different in conception. A sales tax is a tax on freedom of purchase and, when applied to interstate transactions, runs counter to the commerce clause of the Federal Constitution and is void. Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. These taxes, taken together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased.

2. Taxation §§ 4, 15—

Where one is engaged within this State in a regular business of soliciting orders for tailor-made clothing on commission, part of which he collects at the time the order is taken, and the clothes are shipped by the maker, who collects the balance of the price, directly to the purchaser, such transaction is subject to the use tax and the solicitor is a retailer and an agent for collecting the use tax, for which he is liable on his failure to do so. G. S., 105-219, 105-220, 105-223.

3. Taxation §§ 15, 7: Sales § 11—

The title to merchandise, sold and shipped from without this State to a person within the State, does not pass to the purchaser, when the shipment is C.O.D., until delivery by the carrier, who is an agent of the seller, hence a sales tax on such transaction would not contravene the commerce clause of the U. S. Constitution.

APPEAL by plaintiff from *Grady, Emergency Judge,* at September Civil Term, 1944, of WAKE. Affirmed.

Civil action to recover taxes paid under protest.

The parties waived trial by jury and submitted the controversy to the judge presiding on the following agreed statement of fact:

"FIRST: The plaintiff is a resident of the City of Charlotte, Mecklenburg County, North Carolina. The defendant is a resident of the City of Raleigh, Wake County, North Carolina, and is the duly appointed, qualified and acting Commissioner of Revenue of the State of North Carolina. This action is against the defendant in his official capacity.

"SECOND: Continuously since 1 July, 1933, the plaintiff has maintained in Charlotte a place for the transaction of his business, which was as follows:

"Plaintiff was a representative of two tailoring establishments which are situated in Chicago, Illinois, *i.e.,* The Federal Tailoring Company, 119 South Wells Street, Chicago, and Jerome Tailoring Service, 402 South Market Street, Chicago. Neither of these establishments had any property within the State of North Carolina, except the samples consigned to plaintiff as hereinafter stated, or was qualified to do business therein. Plaintiff advertised his business as 'Chicago Woolen Mills,' and offered to the public to take orders for men's clothing. Plaintiff kept in his place of business samples consigned to him by the Chicago tailoring establishments. Customers desiring to have clothing made would come to plaintiff's place of business or would leave notice with, or telephone, plaintiff to come to their homes. At either his place of business or the home of the customer, plaintiff would exhibit the samples which had been furnished him by the Chicago tailoring companies, and from these samples the customer would select a sample or samples of

the desired material. Plaintiff would then measure the customer for the desired clothing, entering the measurements on printed forms similar to the forms hereto attached and marked 'Exhibit A.' Thereupon plaintiff would collect from the customer a partial payment of the purchase price, which was in all cases less than the commission to which plaintiff was entitled for the sale. Plaintiff would then send the order for the clothing to one of the two Chicago tailoring companies, where the clothing was made and sent direct to the customer through the United States mails as a C.O.D. transaction. Periodically, the Chicago tailoring companies would remit to plaintiff the amount of commission to which he was entitled. Plaintiff did not deliver any clothing ordered or collect any money except the original down payment.

"THIRD: In October, 1942, the defendant, through one of his auditors, W. R. Ward, examined the records of plaintiff and assessed plaintiff with use tax under the asserted authority of Schedule I of the Revenue Act of 1939, as amended. The use tax was computed on the basis of 3% of the purchase price of each suit or other article of clothing shipped to customers in North Carolina in the manner outlined in paragraph 2. The assessment was as follows:

Total amount of tax	$ 62.68
Add: Penalty	6.27
Add: Interest	2.51
Total tax, penalty and interest	$ 71.46

This assessment covered the period from 1 July, 1941, to 30 September, 1942.

"FOURTH: Upon the refusal of plaintiff to pay said use tax assessment, the defendant issued execution against plaintiff's property. Plaintiff thereupon paid under protest said tax assessment of $71.46, and duly made demand for a refund thereof. Defendant refused to refund the amount of the assessment and still refuses to do so. Plaintiff has complied with all requirements of law governing his right to institute this action to recover said assessment.

"FIFTH: The sole question for the determination of the Court is whether the assessment of use tax against plaintiff referred to in paragraph 3 was in all respects lawful and valid. If said assessment was for any reason not lawful and valid, and plaintiff was not liable to defendant for said sum of $71.46, or any part thereof, judgment should be rendered that plaintiff have and recover of defendant the sum of $71.46 (or any lesser sum found by the Court to be proper), together with interest thereon at the rate of 6% from 8 February, 1944, until

paid, and for the costs of this action. However, if the Court should find that said tax assessment was in all respects lawful and valid, and that plaintiff was liable to defendant for said taxes, penalty and interest in the amount of $71.46, judgment should be rendered that plaintiff take nothing by this action, and that defendant have and recover his costs."

The court, being of the opinion that the tax was lawfully levied and collected, rendered judgment that plaintiff recover nothing and that his action be dismissed. Plaintiff excepted and appealed.

Murray Allen and Thaddeus A. Adams for plaintiff, appellant.

Attorney-General McMullan and Assistant Attorney-General Adams for defendant, appellee.

BARNHILL, J. Plaintiff maintains a place of business in Charlotte, N. C., conducted under a trade name of his own choosing. His business is to sell tailor-made clothing on commission. His method is to take orders, make the necessary measurements and forward the order to the tailoring company which furnished the sample selected by the customer. It does not appear that orders were subject to acceptance by the tailoring companies. Plaintiff collects a "down payment" which ordinarily is less than his full commission. The tailoring companies with which plaintiff is associated and to which he sends orders periodically make settlement with plaintiff for unpaid commissions due.

Is plaintiff a "retailer" within the meaning of the North Carolina statute, G. S., ch. 105, Art. 8, Schedule I, and if so, is the tax imposed a tax upon the privilege of doing interstate business? These are the questions plaintiff poses by this appeal.

Every retailer engaged in the business of selling or delivering tangible personal property for storage, use, or consumption in this State is required at the time of selling or delivering such tangible personal property or collecting the sales price thereof to add to the sales price the amount of the tax imposed for the storage, use or consumption thereof within this State. When so added, said tax is made a part of the purchase price as the debt of the purchaser to the retailer until paid. The retailer is made liable for the collection thereof and for its payment to the commissioner "notwithstanding (a) that the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the retailer at a point outside of this state as a result of solicitation by the retailer through the medium of a catalog or other written advertisement, or (b) that the purchaser's order or the contract of sale is made or closed by acceptance or approval outside of this state or before said tangible personal property enters this state, or (c) that

the purchaser's order or the contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this state and shipped directly to the purchaser from the point of origin, or (d) that said property is mailed to the purchaser in this state from a point outside this state or delivered to a carrier at a point outside this state, f.o.b., or otherwise, and directed to the purchaser in this state, regardless of whether the cost of transportation is paid by the retailer or by the purchaser, or (e) that said property is delivered directly to the purchaser at a point outside this state, if it is intended to be brought to this state for storage, use, or consumption in this state." G. S., 105-223.

" 'Retailer' means and includes every person engaged in the business of making sales of tangible personal property, or peddling the same, or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use, or consumption in this state," G. S., 105-219 (g), and " 'Engaged in business in this state' shall mean the selling or delivering in this state or any activity in this state in connection with the selling or delivering in this state of tangible personal property for storage, use, or consumption in this state," G. S., 105-219 (j).

Thus, under the specific definitions contained in the Act, the plaintiff is a retailer who made sales of tangible personal property for storage, use, or consumption in the State. In construing the Act these definitions are controlling. *Morris v. Chevrolet Co.,* 217 N. C., 428, 8 S. E. (2d), 484; *In re Steelman,* 219 N. C., 306, 13 S. E. (2d), 544; *Collins v. Texas,* 223 U. S., 288; *Tieman v. Red Top Cab Co.,* 117 Cal. App., 40; *South Shore Country Club v. People,* 228 Ill., 75; *State, ex rel. Baker v. Grange,* 200 Ind., 506; 50 Am. Jur., 262.

He is engaged in regular, continuous, persistent solicitation of orders for merchandise at a fixed place of business within this State. It would be indeed a strained and unusual construction of his activities to say that he is not engaged in business in this State, subject in all respects to the laws of this State.

The Act clearly constitutes the plaintiff an agent for the collection of the tax and renders him liable for failure to do so. This was a proper exercise of the legislative function. *Oil Co. v. Johnson,* 292 U. S., 86, 78 L. Ed., 1141; *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U. S., 62, 83 L. Ed., 488.

He is a resident of this State engaged in the business of taking orders and making sales of tangible personal property for use or consumption within the State. As a result of his activities, merchandise was actually delivered to and received by purchasers within North Carolina for use or consumption within the State. He failed to add the use tax to the

purchase price of such articles and to collect the same or provide for its collection upon delivery of the purchased property.

It follows that under the express terms of the Act he is liable for the tax assessed against him and collected by the Commissioner of Revenue.

But plaintiff stressfully contends that even though, under the terms of the Act, he is liable for the tax imposed, it is not collectible for the reason that it imposes a burden on interstate commerce. That is, he contends that his transactions are interstate in nature and quality and are not taxable by the State.

The soundness of this contention depends upon whether the tax is a sales tax and therefore, in so far as it affects interstate commerce, void, *McLeod v. Dilworth Co.,* 88 L. Ed., 910, or a tax on the enjoyment of the thing purchased after it has come to rest within the State. *General Trading Co. v. State Tax Commission,* 88 L. Ed., 914. The whole question is discussed by the Supreme Court of the United States with full citation of authority in the *McLeod case, supra,* and the *General Trading Co. case* just cited.

While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events.

A sales tax is a tax on the freedom of purchase and, when applied to interstate transactions, it is a tax on the privilege of doing interstate business, creates a burden on interstate commerce and runs counter to the commerce clause of the Federal Constitution. It is conceded that a statute undertaking to impose such a tax is void and the tax is uncollectible. *Western Live Stock v. Bureau,* 303 U. S., 250, 82 L. Ed., 823, 115 A. L. R., 944; *McLeod v. Dilworth Co., supra,* and cases cited. Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. *McLeod v. Dilworth Co., supra,* and cases cited; *General Trading Co. v. State Tax Commission, supra,* and cases cited.

It may be said the boundary line between the two is narrow and oftentimes difficult to trace with accuracy. Even so, "A boundary line is none the worse for being narrow."

The tax is a tax on "the storage, use, or consumption in this state of tangible personal property purchased from a retailer within or without this state" and not a sales tax. G. S., 105-220. It is a compensating tax to place North Carolina manufacturers and merchants on a parity with nonresidents doing business in the State. Neither its purpose nor effect is to burden interstate commerce. Instead, it prevents undue discrimination against local retailers. Its chief function is to prevent the evasion of the North Carolina sales tax by persons purchasing

tangible personal property outside of North Carolina for storage, use, or consumption within the State. Thus it prevents unfair competition on the part of out-of-state merchants. It and our sales tax law, G. S., ch. 105, Art. 5, taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased. That is, the sales tax and the use tax are complementary and functional parts of one system of taxation.

It does not lay a greater burden on the transactions involving an interstate delivery than it does on a wholly intrastate business of the same sort. It does not segregate interstate transactions for separate or special treatment. Interstate and intrastate business reach local markets and purchasers on identical terms so far as the effect of the State taxes are concerned. Hence, it neither discriminates against nor imposes a burden upon interstate commerce.

Full and adequate protection against double taxation is provided. G. S., 105-220, 221.

We are constrained, therefore, to hold that the tax here in controversy is to be classified as a use tax and that, under controlling decisions of the U. S. Supreme Court, it is not open to attack on constitutional grounds.

That the Act provides for the assessment of the tax at the time of sale and prior to the time the purchaser comes into actual possession of the thing purchased does not alter the essential character or purpose of the tax itself for, to be effectual, the tax must be collected prior to or at the time of delivery of the merchandise for use or consumption.

Furthermore, it is to be noted that the shipments of the merchandise sold by plaintiff were C.O.D. Hence, delivery to the carrier was not delivery to the purchaser. The carrier was the agent of the seller with instructions to deliver to the purchaser only upon payment of the purchase price. Hence, the sale was completed and both possession and title passed to the purchaser within this State. In view of this circumstance, the tax might well be sustained, even if classified as a sales tax, as not contravening the commerce clause as interpreted and applied in the *McLeod case, supra.*

As the tax collected from the plaintiff comes within the designation "use tax" and the Supreme Court of the United States is now firmly committed to the validity of such a tax, *Henneford v. Silas Mason Co.,* 300 U. S., 577, 81 L. Ed., 488; *Nelson v. Sears, Roebuck Co.,* 312 U. S., 359, 85 L. Ed., 888, 132 A. L. R., 475; *Nelson v. Montgomery Ward & Co.,* 312 U. S., 373, 85 L. Ed., 897; *General Trading Co. v. State Tax Commission, supra,* we conceive no valid reason why the judgment below should not be sustained.

It is, therefore,

Affirmed.

STATE v. HARRY WEINSTEIN.

(Filed 22 November, 1944.)

1. **Larceny §§ 4, 7: Indictment § 19: Criminal Law § 52b—**

Allegations of ownership of the property described in a bill of indictment for larceny must be proven substantially as laid, else a fatal variance would result, and this would be available on a motion to nonsuit.

2. **Gifts § 1—**

In order to pass title to personal property as a gift there must have been both an intention to give and a delivery. While the delivery may be actual or constructive, the donor's surrender of the property must be complete and his control relinquished.

3. **Gifts § 2—**

When citizens of a city, in response to appeals of a Chamber of Commerce both by radio and newspaper advertisement, contributed waste paper for a charitable purpose to such Chamber of Commerce, by placing the paper in bundles on the curb in front of their residences for the convenient collection of same for donee, the title passes from the donors to donee without an immediate act of possession.

4. **Criminal Law § 52b—**

A motion for judgment of nonsuit must be denied, if there be any substantial evidence—more than a scintilla—to prove the allegations of the indictment.

5. **Same: Larceny § 7: Receiving Stolen Goods §§ 6, 8—**

Where a defendant, charged in the indictment with larceny and receiving, is found guilty on both counts and a single judgment rendered, there being evidence to support the judgment on the second count, motion for nonsuit is properly denied.

6. **Larceny § 7: Receiving Stolen Goods § 6—**

Upon an indictment for larceny and receiving, where there is evidence that, before the goods were received by defendant, repeated notice was given him that the said goods were the property of another and that same had been feloniously carried away by defendant's trucks and notwithstanding such notice defendant received the goods and was in the act of packing same for shipment when discovered and attempted to misdirect the seeking officers, there is sufficient evidence for the jury and motion to nonsuit was properly refused.

7. **Criminal Law § 32a—**

The admissibility of circumstantial evidence, otherwise competent to prove the commission of the offense and the guilty participation therein of the accused, may not be successfully questioned.

8. **Criminal Law §§ 31a, 31f: Larceny § 6: Receiving Stolen Goods § 5—**

In a criminal prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced wit-

nesses, who based their opinions on personal observation, is admissible to show a value of more than $50 to establish a felony under G. S., 14-72.

9. Larceny § 5—

The doctrine of recent possession in larceny applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have obtained unless the holder was himself the thief. The presumption is one of fact only, to be considered merely along with other evidence of guilt.

10. Larceny §§ 5, 8: Receiving Stolen Goods § 4—

A charge by the court, in a prosecution for larceny and receiving, that where property has been stolen, or so proven beyond a reasonable doubt, and some time thereafter it is found in defendant's possession, he is presumed to be the thief and the more recent the possession the stronger the presumption, is not harmful error, the court thereafter having referred to the evidence of recent possession as a circumstance which the jury had a right to consider.

APPEAL by defendant from *Hamilton, Special Judge,* at April Term, 1944, of WAKE. No error.

The defendant was charged with larceny of a quantity of waste paper of the value of $325, the property of the Raleigh Junior Chamber of Commerce, Inc., with a second count in the bill of indictment charging him with receiving said property knowing it to have been stolen.

There was evidence offered by the State tending to show that the Junior Chamber of Commerce had by extensive advertisement asked the people of Raleigh to contribute to it waste paper to be used by it for charitable purposes. By radio and newspaper advertisement the people were requested to prepare the paper in bundles and on a certain day place these bundles on the curb in the street in front of their houses so that collection thereof by the Junior Chamber could be made by use of the city trucks. The date for the collection of this paper was fixed for Sunday, 20 February, 1944, but, due to rain, by frequent radio announcement the collection was postponed until Monday, 21 February, 1:00 p.m. However, a large quantity of paper bundled and tied as requested was by numerous citizens placed on the street as a donation to the Junior Chamber of Commerce. Much of this became rain soaked.

The defendant, who is a junk and scrap dealer, offered to the Junior Chamber of Commerce $9.00 per ton for the paper to be thus contributed to it, but this offer was declined as the market price was $12 to $22.

It was testified that on Sunday afternoon it was observed that in response to the request of the Junior Chamber of Commerce, in the northwestern portion of the city alone, 60,000 to 75,000 pounds of waste

paper had been placed in bundles on the street, and that on Monday morning 40,000 or 50,000 pounds of this was missing. Numerous witnesses testified that they had donated waste paper and placed it in bundles on the curb as requested, and later recognized some of that found on Monday in defendant's possession as being that contributed by the witnesses to the Junior Chamber of Commerce for the purposes indicated. A truck identified as belonging to defendant and distinguished by an orange crush sign on it was observed gathering waste paper from the curb on certain streets. Another truck, a red truck, belonging to defendant, was found with water-soaked paper in bundles, some containing items of paper identified by witnesses as having been given by them and placed on the street for the Junior Chamber of Commerce.

Monday morning, 21 February, the defendant was notified his truck with the orange crush sign was picking up paper belonging to the Junior Chamber of Commerce on White Oak Road, but defendant denied it was there. He was then notified not to unload that truck when it came in to his place, and he agreed not to unload any trucks coming in with bundles of paper, but to notify the police department. Later he admitted the truck with the orange crush sign had come in, but misdirected the officers as to where it and the paper were. Later he led the officers to where the paper from this truck was being loaded by him into a railroad freight car for shipment. Some of the paper was identified by witnesses as that which had been contributed by them to the Junior Chamber of Commerce and placed on the street for collection. The piles of waste paper, including the paper identified, in the defendant's warehouse and in the freight car and on the truck were estimated to weigh in the aggregate some ten tons or more. The market value was $14 per ton. The paper from the truck with the orange crush sign weighed 1,350 pounds.

It also appeared that defendant tried to get the newspaper which advertised the collection of waste paper by the Junior Chamber of Commerce to insert immediately underneath that notice defendant's advertisement to the public not to give their paper away, but sell it to him. This was refused, and defendant became angry and said he was going to get his share of the paper put out on the street.

The defendant offered no evidence, and did not go on the stand.

There was a verdict of guilty on both counts, and the value of the property so found to have been stolen and received was determined to be $100.

From judgment imposing sentence the defendant appealed.

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

Thos. W. Ruffin for defendant.

DEVIN, J. At the outset the defendant assails the correctness of the judgment below on the ground that the evidence was insufficient to warrant submission of the case to the jury. He assigns as error the denial of his motion for judgment as of nonsuit. This motion was based in part upon the view that while the bill of indictment charged the larceny and receiving of waste paper, the property of the Junior Chamber of Commerce, the evidence did not show that the title to the property had ever passed to that body.

It is true the allegation of ownership of the property described in a bill of indictment for larceny must be proven substantially as laid, *S. v. Harris,* 195 N. C., 306, 141 S. E., 883, else a fatal variance would result, *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6, and this would be available on a motion to nonsuit, *S. v. Nunley, ante,* 96, but we think there is evidence to support the allegation of ownership. While the paper was contributed by numerous citizens of Raleigh, it was donated by them to the Junior Chamber of Commerce in response to its request, to be used for its charitable purposes. Pursuant to this intent and purpose the paper was placed on the street off the premises of the donors in convenient location and form for collection by the trucks of the Junior Chamber of Commerce. In order to pass the title there must have been both the intention to give and a delivery. *Newman v. Bost,* 122 N. C., 524, 29 S. E., 848; *Bynum v. Bank,* 219 N. C., 109, 12 S. E. (2d), 898; *Bynum v. Bank,* 221 N. C., 101, 19 S. E. (2d), 121. While the delivery may be actual or constructive, the donor's surrender of the property must be complete and his control relinquished. *Parker v. Mott,* 181 N. C., 435, 107 S. E., 500; *Taylor v. Coburn,* 202 N. C., 324, 162 S. E., 748; 24 Am. Jur., 742. Applying these principles, we think the evidence here, in the light most favorable for the State, tends to show relinquishment of possession and control of the property by the donors, with intent to give, by placing it off the donors' premises on the street where designated by the donee, and that this was for the purpose of completing the gift and delivering possession of the property to the Junior Chamber of Commerce. Under these circumstances we think this would evidence a divesting of the title to the property on the part of the donors, and vesting title thereto in the donee. Nor would acceptance by the donee have to be manifested by immediate possession if a later time therefor had been fixed and agreed upon by the parties. 24 Am. Jur., 735.

Was there evidence sufficient to sustain, in all other essential respects, the charge of larceny of the property described, or of receiving it knowing it to have been stolen? The rule is that the motion for judgment of nonsuit must be denied if there be any substantial evidence—more than a scintilla—to prove the allegations of the bill. *S. v. Shermer,*

216 N. C., 719, 6 S. E. (2d), 529. The testimony does not show that the defendant personally participated in the taking or removal of any of the property alleged. *S. v. King,* 222 N. C., 239, 22 S. E. (2d), 445. Whether evidence that his trucks operated by his employees were used in taking and carrying away the property, together with evidence of his recent possession of the stolen goods as an incriminating circumstance, should be held sufficient to warrant submission to the jury of the count of larceny, on the theory that he advised and procured the taking with felonious intent, need not be decided, as there is sufficient evidence, we think, to support the charge that the goods described were feloniously taken and carried away, and that the defendant received them with knowledge at the time that they had been so stolen. If so, this would be sufficient to prevent a nonsuit. There were two counts in the bill in the usual form for larceny and receiving, and the jury found the defendant guilty on both counts. A single judgment was rendered. As there was evidence to support the judgment on the second count, the motion to nonsuit was properly denied. *S. v. Cannon,* 218 N. C., 466, 11 S. E. (2d), 301.

Upon this point there was evidence that before the goods were received into his possession repeated notice was given the defendant that this paper was the property of the Junior Chamber of Commerce, and that it had been feloniously carried away by those operating his trucks. With this knowledge he received and appropriated the goods, took them into his possession, and was engaged in packing some of them for shipment when discovered. His statements before and at the time, as well as his effort to misdirect the seeking officers, would tend to support the charge of guilty knowledge.

Defendant assigns error in the ruling of the trial judge in admitting in evidence testimony as to the amount of paper put out on the street on Sunday for delivery to the Junior Chamber of Commerce and the amount found missing next morning. Objection to this testimony cannot be sustained. In order to show that the offense charged had been committed and as a step toward connecting the defendant therewith, it was competent for the State to show that a large amount of waste paper had been donated to the Junior Chamber of Commerce by citizens of Raleigh and placed on the street pursuant to the donee's request, and that a part of this paper was missing the next morning. The State was properly permitted to show this without attempting to account for all the missing property or showing it in defendant's possession. The admissibility of circumstantial evidence, otherwise competent, to prove the commission of the offense and the guilty participation therein of the accused may not be successfully questioned. 32 Am. Jur., 1035. Likewise, testimony as to the size, weight and condition of the bundles of

paper found in defendant's possession was competent also on the question of value. It is generally held that evidence as to size, weight, quantity and value from experienced witnesses who base their opinions upon personal observation is admissible. 20 Am. Jur., 679. It was necessary for the State to show the value of the property taken or received to be more than $50 in order to establish the commission of a felony under the statute as charged in the bill of indictment, G. S., 14-72, and it was competent for the State to show any circumstance which would throw light on the subject of inquiry.

The defendant noted exception to the following portions of the judge's charge to the jury: "There is a principle of law recognized in this jurisdiction that where property has been stolen, that is, where it is admittedly stolen or shown beyond a reasonable doubt to have been stolen, and some time thereafter it is found in the possession of one, that one is presumed to be the one who stole it and the more recent the possession from the time of the stealing, the stronger is the presumption against him." It was contended that the language used in this instruction was prejudicial to the defendant in that it was susceptible of being understood as imposing a burden on the defendant not warranted by the evidence. It was urged that the ruling in *S. v. Holbrook,* 223 N. C., 622, and *S. v. Baker,* 213 N. C., 524, 196 S. E., 829, should be applied here, rather than that set out in *S. v. Williams,* 219 N. C., 365, 13 S. E. (2d), 617; *S. v. Best,* 202 N. C., 9, 161 S. E., 535; and *S. v. Anderson,* 162 N. C., 571, 77 S. E., 238.

While there is apparently a difference in the decided cases as to the application of the doctrine of recent possession in larceny, the distinction lies in the nature of the evidence upon which the instructions were given rather than in the principle involved. The applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession. "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 with his undoubted concurrence" (*S. v. Smith,* 24 N. C., 406), and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. *S. v. Baker,* 213 N. C., 524, 196 S. E., 829; *S. v. Ford,* 175 N. C., 797, 95 S. E., 154; *S. v. Graves,* 72 N. C., 482. If the circumstances are such as to exclude the intervening agency of others between the theft and the recent possession of stolen goods, then such recent possession may afford presumptive evidence that the person in possession is the thief. *S. v. Patterson,* 78 N. C., 470; *S. v. Lippard,* 183 N. C., 786, 111 S. E., 722; *S. v. McFalls,* 221 N. C., 22, 18 S. E. (2d), 700. The presumption, however, is one of fact only and is to be considered

by the jury merely as an evidential fact along with other evidence in determining the defendant's guilt. *S. v. Baker, supra.*

It will be noted that in this case there was evidence that the property was taken from the streets, and that the defendant operated trucks thereon for the collection of such property. This, with evidence that a few hours after the property was missed this identical property was found in defendant's possession, would seem to render applicable the principle of law contained in the instruction complained of. It further appears that the trial judge, after using the quoted words to which exception was noted, referred to the evidence of the recent possession of the waste paper by the defendant in this case as a circumstance which the jury had a right to consider.

While we think the possibility of misinterpretation would be avoided by treating recent possession of stolen goods merely as an evidential fact, under the evidence in this case we find no prejudicial error has been shown in the court's instruction to the jury on this point.

There was no exception to the court's charge on the second count in the bill, for receiving stolen goods knowing them to have been stolen, nor on the question of the value of the property.

In the trial we discover no error which would require setting aside the verdict and judgment.

No error.

EUNICE RANDLE, BY HER NEXT FRIEND, CLAUDE L. LOVE, v. DON B. GRADY AND WIFE, MARY M. GRADY.

(Filed 22 November, 1944.)

1. Deeds § 4—

In the purchase of land the recital, acknowledging receipt of a consideration in the deed therefor, is *prima facie* evidence of that fact and is presumed to be correct.

2. Trusts § 1a—

A person who has no title or interest in property can create no trust therein.

3. Deeds § 8—

A purchaser of real estate is charged with notice of the contents of each recorded instrument constituting a link in his chain of title and is put on notice of any fact or circumstance affecting his title which any such instrument would reasonably disclose.

4. Trusts § 15—

Where a person *in loco parentis* purchases land with consideration furnished by a child, a resulting trust arises *pro tanto.* No agreement by

the parties can destroy the effect of the legal presumption that the estate is held in trust.

5. **Trusts §§ 17, 18e—**

Where the mother of a minor holds money in bank and other personal property in her own name as trustee for said minor, without authority of law, and with such property as part payment purchases personalty and real estate, taking title in her own name as trustee for such minor, the deed reciting that the mother as such trustee is given complete control and power over the property purchased, in her discretion, to sell, mortgage and convey the same in such manner and for such purpose as the mother may deem best, she being the sole judge, and at the same time the mother as trustee for the minor gives notes and a deed of trust on the property to secure a large part of the purchase price, which deed of trust is foreclosed and all of the property lost, on suit by the minor's next friend against the purchasers of the said notes, who had secured the entire property from the purchaser at the foreclosure sale, alleging fraud and the evidence tending to show the foregoing facts, a cause of action is stated, and motion for nonsuit should have been denied.

SCHENCK, J., dissenting.

APPEAL by plaintiff from *Pless, J.*, at June Term, 1944, of HENDERSON.

Civil action for recovery of land and personal property, and of rents and profits therefrom.

Plaintiff in her complaint summarily stated makes these allegations:

1. That on 13 July, 1936, the plaintiff Eunice Randle, minor, was the owner of personal property in Henderson County, North Carolina, aggregating more than $3,000.00, some of which being money on deposit in the State Trust Company, a bank in Hendersonville, in the name of Eunice Rosalyn Randle, minor, by Mrs. Helen G. Randle, Trustee—the title of trustee being self-assumed by the said Helen G. Randle without authority of law.

2. That on said date Helen G. Randle, acting in her self-assumed title of trustee for plaintiff, the said Eunice R. Randle, minor, wrongfully and without authority of court, or otherwise, attempted to invest the said personal property of said minor in the purchase of real and personal property known as the Crystal Springs Manor in the town of Laurel Park in Henderson County, N. C., and paid $3,000.00 of the funds of said minor, taking therefor a conveyance from W. B. Hodges and wife to "Helen G. Randle, Trustee for Eunice R. Randle, minor"; and, that, likewise without any authority as provided by the laws of North Carolina, Helen G. Randle, in the capacity of, and under self-assumed title of trustee for Eunice R. Randle, minor, attempted to execute to O. B. Crowell, Trustee, a deed of trust for the benefit of

bearer or bearers of certain described notes in the sum of $12,000.00 secured by the real and personal property described in the conveyance from W. B. Hodges and wife as above set forth, which is referred to for attack.

3. That thereafter in the month of September, 1938, defendant Don B. Grady, acting for himself and his wife, and co-defendant Mary M. Grady, with knowledge of the facts hereinabove stated, purchased from W. B. Hodges the said "unlawful and fraudulent" notes made payable to bearer, and said deed of trust unlawfully executed to secure the same, and had the same transferred to defendant Mary M. Grady, and thereafter in February, 1939, defendants, with full knowledge of the facts aforesaid, wrongfully and unlawfully procured the advertisement for sale and sale of said land and personal property by O. B. Crowell, Trustee, when defendants had said property bid off in name of Mrs. Darline Chamison and deed therefor made to her, in all of which she acted for defendants, and that thereafter Mrs. Darline Chamison and husband conveyed said land and personal property to defendants by deed duly registered, said deeds being referred to for purpose of attack.

4. That by reason of the wrongful and unlawful acts hereinabove stated actively participated in by defendants and fully known to them, plaintiff has been deprived of her rightful ownership and possession of said land and personal property and defendants are now wrongfully and unlawfully claiming title to said property and are in the wrongful and unlawful possession of same.

5. That the reasonable annual rental value of said property is $3,500.00, and that plaintiff is entitled to recover therefor the sum of $14,000.00.

Whereupon plaintiff prays that she be declared the owner, and entitled to the immediate possession of said land and personal property and that she recover for rents and profits as alleged.

Defendants, in answer filed, admit the allegations of complaint as to (1) execution of deed from W. B. Hodges and wife to Helen G. Randle, Trustee for Eunice R. Randle, minor, (2) execution of deed of trust from Helen G. Randle, Trustee for Eunice R. Randle, minor, to O. B. Crowell, Trustee, and the notes secured thereby, (3) the purchase by defendants of the notes and deed of trust from W. B. Hodges, and the transfer thereof to defendant, Mary M. Grady, (4) the foreclosure sale by O. B. Crowell, Trustee, and bid by Mrs. Darline Chamison for, and at request of defendants, and (5) the subsequent execution of deed by Mrs. Chamison and her husband to defendants, but deny any wrongdoing, and all other allegations of the complaint. Defendants in further answer and defense aver upon information and belief that at the times mentioned in the complaint Helen G. Randle was the mother and natural

guardian of plaintiff, Eunice R. Randle, and other averments not necessary to decision on this appeal.

On the trial in Superior Court, plaintiff offered in evidence (1) the admissions in answer of defendants as above set forth; (2) the deed from W. B. Hodges and wife of the first part, to Helen G. Randle, Trustee for Eunice R. Randle, minor, of the second part, pertinent parts of which are as follows:

"This indenture . . .

"WITNESSETH: In Trust for Eunice R. Randle, minor child of the said Helen G. Randle, with power to the said Helen G. Randle, Trustee, to manage and control, convey, mortgage, lease, and otherwise control the land herein conveyed, and every part thereof, for the benefit of the said Eunice R. Randle, so long as the said Helen G. Randle, Trustee, shall live, unless said Trusteeship shall be otherwise terminated. The said Helen G. Randle, Trustee, shall have the right to use said land or any part or parts of it, or cause the same to be used, for such purpose and in such manner as she may deem best, and to apply the rents, profits, or the proceeds from any sale or trade, if any, for the benefit of the said Eunice R. Randle, and the said Helen G. Randle, Trustee, shall be the sole judge as to the manner in which the property should be used or as to the terms of any sale, trade, lease, or management of the property.

"WITNESSETH, That the said parties of the first part, for and in consideration of the sum of Ten Dollars and other considerations in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, etc."; (3) the deed of trust from Helen G. Randle, Trustee for Eunice R. Randle, minor, to O. B. Crowell, Trustee, and the foreclosure deed from O. B. Crowell, Trustee, to Mrs. Darline Chamison, and deed from Mrs. Chamison and husband to defendants, all for purpose of attack; (4) oral testimony that the records of the 1936 bank account of Eunice Rosalyn Randle, minor, by Mrs. Helen G. Randle, Trustee, in State Trust Company, of which W. B. Hodges was then and is now President, are lost, and (5) admissions tending to show that $3,000.00 cash was "paid on said property" on date of purchase, and other amounts, part principal and part interest, amounting to $1,520.00 on other dates, and that the records of State Trust Bank, of Hendersonville, showed account in name of Eunice Rosalyn Randle, minor, by Mrs. Helen G. Randle, Trustee, 1 July, 1936, in sum of $1,173.32, and deposits in various sums in said account during July, August, September and October, 1936—the largest amount in said account at one time being $2,006.17 on 28 September, 1936.

Motion of defendants for judgment as in case of nonsuit at close of evidence for plaintiff was allowed, and judgment was accordingly entered.

Plaintiff appeals therefrom to Supreme Court and assigns error.

Don C. Young for plaintiff.
R. L. Whitmire for defendants.

WINBORNE, J. Is the evidence offered by plaintiff sufficient to take the case to the jury? The answer is Yes, for these reasons:

1. In the deed from W. B. Hodges and wife, of the first part, to "Helen G. Randle, Trustee for Eunice R. Randle, minor," the recital of consideration "paid by the party of the second part" is *prima facie* evidence that the consideration paid was the property of the minor for whom Helen G. Randle purported to act as trustee. The consideration for a deed moves from the grantee to the grantor. And decisions of this Court are uniform in holding that in the purchase of land the recital acknowledging receipt of consideration contained in the deed therefor is *prima facie* evidence of that fact and is presumed to be correct. *Miller v. Mateer,* 172 N. C., 401, 90 S. E., 435; *Ex parte Barefoot,* 201 N. C., 393, 160 S. E., 365. See also *Barbee v. Barbee,* 108 N. C., 581, 13 S. E., 215; *Deaver v. Deaver,* 137 N. C., 240, 49 S. E., 113; *Faust v. Faust,* 144 N. C., 383, 57 S. E., 22. See also 16 Am. Jur., 653, Deeds, sec. 378.

2. If the consideraton for the deed be the property of Eunice R. Randle, minor, Helen G. Randle, as the mother of the minor, had no authority to impress upon the property of the minor an express trust, as set forth in the deed, with authority in the trustee to mortgage and convey the same. "A person who has no title or interest in property can create no trust therein." 25 C. J., 233. *Byrne Realty Co. v. South Florida Farms Co.,* 81 Fla., 805, 89 So., 318. *Sansom v. Cornelison,* 171 Ga., 764, 155 S. E., 764. Compare *N. Y. University v. Loomis Laboratory,* 178 N. Y., 137, 70 N. E., 413. In the Georgia case it is said: "The agreement between the mother of deceased father of plaintiff that the defendant and his wife should keep this money in trust for the plaintiff did not create a trust. The mother thus agreeing with the defendant had no interest in the money. She could not create a trust." But where a person *in loco parentis* purchases land with consideration furnished by a child, a resulting trust arises *pro tanto.* 65 C. J., 416—Trusts, sec. 177. Compare *Wallace v. Wallace,* 210 N. C., 656, 188 S. E., 96. Moreover, in Devlin on Real Estate, Third Ed., Vol. 2, sec. 1178, p. 2208, quoting from *Cotton v. Wood,* 25 Iowa, 43, 46, it is said: "It cannot be that the consent of the trustee to hold the title for the benefit of the *cestui que trust,* or an agreement so to do, in case of a resulting trust, will change its character. By the agreement the trustee simply assents to an obligation imposed by the law; the trust

would exist without the agreement by operation of law. The agreement cannot destroy the effect of the conditions under which the law presumes the estate is held by the trustee."

For the same reason, W. B. Hodges and wife, who were selling the property, having no title or interest in the consideration paid except in so far as it related to the purchase price of the land, would have no authority to create a trust in respect thereto.

3. "A purchaser is charged with notice of the contents of each recorded instrument constituting a link in his chain of title and is put on notice of any fact or circumstance affecting his title which any such instrument would reasonably disclose." Headnote 7, *Turner v. Glenn,* 220 N. C., 620, 18 S. E. (2d), 197. See also *Christmas v. Mitchell,* 38 N. C., 535; *Holmes v. Holmes,* 86 N. C., 205; and *Smith v. Fuller,* 152 N. C., 7, 67 S. E., 48, which are to the same effect. Applying this principle, the defendants deraigning title by *mesne* conveyances, including the deed from W. B. Hodges and wife to "Helen G. Randle, Trustee for Eunice R. Randle, minor," are charged with notice of the contents and recitals in that deed.

The judgment as of nonsuit is
Reversed.

SCHENCK, J., dissenting: This action is bottomed upon two allegations, namely, (1) that of the wrongful and unlawful conduct of Helen G. Randle, mother of the plaintiff, Eunice R. Randle, a minor, in assuming authority to manage and control the funds of the plaintiff in purchasing the property involved and in executing purchase price notes and deed of trust for the balance due thereon, and (2) that of the knowledge of the defendants of such wrongful and unlawful conduct of Helen G. Randle at the time the property involved was conveyed to them by those claiming title through the deed of trust executed by Helen G. Randle. The entire action alleged is grounded upon the theory of the wrongful and unlawful conduct of Helen G. Randle, known and participated in by the defendants, and since there is no evidence in the record to support either allegation, I am of the opinion that the judgment as in case of nonsuit was properly entered.

MRS. JESSIE M. GODFREY, AS ADMINISTRATRIX OF FRANK WILSON GODFREY, DECEASED, v. TIDEWATER POWER COMPANY, C. B. BARTLING, RALPH APPLEWHITE AND THE CITY OF NEW BERN, A MUNICIPAL CORPORATION.

(Filed 22 November, 1944.)

1. Statutes § 5a—

Where there are two provisions in a statute, one of which is special or particular, and certainly includes the matter in hand, and the other general, which, if standing alone, would include the matter and thus conflict with the particular provisions, the special will be taken as intended to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict.

2. Venue §§ 1c, 4a: Municipal Corporations § 49—

Since a municipality may act only through its officers and agents, an action against it is an action against "a public officer" within the meaning of G. S., 1-77 (2), and a proper venue against a municipality is the county where the cause of action, or some part thereof, arose, and if an action against a municipality be instituted in any other county, the municipality has the right, upon motion aptly made, to have the action removed to the proper county.

3. Same—

After the commencement of an action for damages for wrongful death in the county of which plaintiff and her intestate were residents, a municipality of another county, where the accident which caused the death took place, was brought in as an alleged joint tort-feasor on motion by the original defendant, the cause may be removed, as a matter of right, to the county in which such municipality is situated.

4. Venue § 1b—

This Court has construed G. S., 1-78 to apply to all actions against executors and administrators in their official capacity, whether upon their bonds or not.

APPEAL by the city of New Bern, a municipal corporation, from *Bobbitt, J.*, at 22 May, 1944, Regular Civil Term, of MECKLENBURG.

Civil action for recovery of damages for alleged wrongful death, G. S., 28-173, formerly C. S., 160, to which action the city of New Bern, a municipal corporation, was made a party defendant upon motion of defendant, Power Company, under G. S., 1-240, formerly C. S., 618, as amended by Public Laws 1929, chapter 68, and on its alleged cross action for contribution by the said city of New Bern as a joint tort-feasor in case it, the Power Company, be held liable. See opinion former appeal, 223 N. C., 647, 27 S. E. (2d), 736.

Pursuant thereto the city of New Bern, being served with summons, made a motion in apt time, G. S., 1-83, before the clerk of Superior

Court, G. S., 1-583, for removal of the action from the Superior Court of Mecklenburg County to the Superior Court of Craven County, North Carolina, for trial, as a matter of right.

When this motion for removal as a matter of right came on for hearing before the judge of the Superior Court to whom the city of New Bern appealed from adverse ruling of the clerk of the Superior Court, G. S., 1-583, the judge found facts substantially these:

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of Frank Wilson Godfrey, deceased, under appointment by the clerk of the Superior Court of Mecklenburg County, North Carolina, where the estate is being administered under the laws of the State of North Carolina; that at the time of his death, and for many years prior thereto, plaintiff's intestate was a resident and citizen of Mecklenburg County, North Carolina, as was the plaintiff, Mrs. Jessie M. Godfrey, at the time of the institution of this action, and now is; that the intestate of plaintiff was killed on 10 June, 1942, in Craven County, North Carolina; that this action was instituted, and summons was issued in the Superior Court of Mecklenburg County on 28 April, 1943, against defendant Tidewater Power Company, a corporation organized and existing according to law, and C. B. Bartling and Ralph Applewhite, upon whom the summons was duly served 29 April, 1943; that the answer, cross action and motion of defendant, Tidewater Power Company, to make the city of New Bern a party defendant were filed on 28 July, 1943; that before its time for answering expired, and in apt time, the city of New Bern, a municipal corporation, in Craven County, North Carolina, filed motion to remove the action to Craven County as a matter of right; and that the acts of negligence alleged in the complaint and in the cross action are alleged to have occurred in said Craven County.

Upon these facts judgment was entered denying the motion for removal and the city of New Bern appeals therefrom to the Supreme Court and assigns error.

G. T. Carswell and Helms & Mulliss for plaintiff, appellee.

E. McA. Currie, William Dunn, and R. E. Whitehurst for defendant, appellant.

WINBORNE, J. Is the city of New Bern, a municipal corporation, located in Craven County, where the plaintiff's alleged cause of action arose, entitled as a matter of right to have the action removed from Mecklenburg County, where plaintiff resides, to Craven County for trial, when the plaintiff makes no allegation and seeks no relief against the city, and it is brought into the action as a party defendant on motion

and cross action of an original defendant, Tidewater Power Company, for contribution as a joint tort-feasor in the event it, the Power Company, be held liable to plaintiff? The court below did not think so. We are of opinion, however, that the decisions of this Court construing the statutes on venue, now General Statutes 1 Civil Procedure, subsection IV, Article 7, direct an affirmative answer.

At the outset it is appropriate to note that this chapter on venue is subdivided into numerous sections, including G. S., 1-77, prescribing the place of trial for actions in many situations, and then in Section G. S., 1-82, formerly C. S., 469, Rev., 424, upon which plaintiff relies, it is provided that "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement." And in the section G. S., 1-77 (2), formerly C. S., 464 (2), Rev., 420 (2), upon which defendant, city of New Bern, relies, it is provided that actions "against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does something touching the duties of such officer" "must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law." Thus it is apparent from the wording of these sections that G. S., 1-77, relates to particular cases, and that G. S., 1-82, is intended to cover all cases for which provision is not otherwise made and it is, therefore, general in intent. Hence, in the event of conflict the former expressing a particular intention will be taken as an exception to the general provision. "It is an established canon of construction that where there are two provisions in a statute, one of which is special or particular, and certainly includes the matter in hand, and the other general, which, if standing alone, would include the same matter and thus conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict,"—*Stacy, C. J.*, in *In re Steelman*, 219 N. C., 306, 13 S. E. (2d), 544, citing *Nance v. R. R.*, 149 N. C., 366, 63 S. E., 116, among other cases.

Moreover, the decisions of this Court are uniform in holding that since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of the provisions of G. S., 1-77 (2), formerly C. S., 464 (2), Rev., 420 (2), and that a proper venue against a municipality is the county where the cause of action, or some part thereof, arose, and that if an action against a municipality be instituted in any other county the municipality has the right, upon motion aptly made, to have the action removed to the proper county. See *Jones v. Statesville*,

97 N. C., 86, 2 S. E., 346, citing *Johnston v. Comrs.,* 67 N. C., 101; *Alexander v. Comrs.,* 67 N. C., 330; *Jones v. Comrs.,* 69 N. C., 412; *Steele v. Comrs.,* 70 N. C., 137. Also see *Light Co. v. Comrs.,* 151 N. C., 558, 66 S. E., 569; *Cecil v. High Point,* 165 N. C., 431, 81 S. E., 616; *Boyd and Goforth v. Bank,* 199 N. C., 687, 155 S. E., 577; *Banks v. Joyner,* 209 N. C., 261, 183 S. E., 273; *Murphy v. High Point,* 218 N. C., 597, 12 S. E. (2d), 1. The case of *Hannon v. Power Co.,* 173 N. C., 520, 92 S. E., 353, relied upon by the plaintiff, is distinguishable.

Furthermore, in *Banks v. Joyner, supra*—a case almost identical in procedural situation as that in hand, it is said that "The order removing the case from Wilson County to Halifax County was in accord with our practice so long as the town of Weldon, located in Halifax County, remained a party defendant . . ." There, as appears in the original record on appeal, the plaintiff instituted the action in Wilson County, of which she was a resident, on a cause of action for personal injury allegedly sustained through the actionable negligence of the intestate in an automobile accident in the town of Weldon in Halifax County. The plaintiff named as the sole defendant J. C. Joyner, Administrator of the estate of J. J. Amerson, deceased. Amerson was a resident of Wilson County and letters of administration were issued out of the Superior Court of that county. In apt time the named defendant moved to make the town of Weldon a party defendant (1) for exoneration for that the injury of which plaintiff complained was solely and proximately caused by the negligence of the town of Weldon in the manner alleged, and (2) for contribution for that if the defendant be held negligent, the negligence of the town of Weldon was a proximate cause of the injury sustained by the plaintiff, thereby entitling the defendant to invoke against the town the provisions of C. S., 618, as amended by Public Laws 1929, chapter 68, now G. S., 1-240. Whereupon, the town was made a party defendant, and accordingly in answer filed the original defendant set up cross action against the town. The town made a motion, in apt time, to remove the action to the county of Halifax. The motion was allowed and the case removed. When the case came on for trial, the demurrer *ore tenus* of the town was sustained. Then motion of the plaintiff to remand the case to Wilson County for trial was allowed, and defendant administrator appealed. Two questions were involved on the appeal, one as to correctness of the ruling in sustaining the demurrer, and the second as to correctness of the order remanding the case to Wilson County for trial. This Court, after saying that the order removing the case from Wilson County to Halifax County was in accord with our practice so long as the town of Weldon, located in Halifax County, remained a party defendant, continued by saying, "But when the demurrer was sustained, and the action dismissed as to

the town, the ground and reason for the removal ceased, . . ." If what is said there was the law in that case, no sufficient reason appears why it should not be the law here, and so long as the city of New Bern remains a party to this action the case is properly triable in Craven County.

And, too, it is significant to note that the order of removal in *Banks v. Joyner, supra,* was in an action against an administrator when there was then in effect another section of the venue statute, C. S., 465, now G. S., 1-78, which provides that "All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or surety on the bond is in the county . . .," which this Court has construed to apply to all actions against those persons whether upon their bonds or not. See *Stanley v. Mason,* 69 N. C., 1; *Foy v. Morehead,* 69 N. C., 512; *Bidwell v. King,* 71 N. C., 287; *State Alliance v. Murrell,* 119 N. C., 124, 25 S. E., 785. Compare *Whitford v. Life Ins. Co.,* 156 N. C., 42, 72 S. E., 85.

For reasons stated, judgment below is

Reversed.

STATE v. RALPH THOMPSON, CLEVE BRYANT JOHNSON, BESSIE MAE WILLIAMS, AND ANNIE MAE ALLISON.

(Filed 22 November, 1944.)

1. Criminal Law § 33—

In the trial of a capital case, objections to confessions of defendants come too late, defendants having refused the offer of the trial judge to have their voluntariness determined in the absence of the jury, unless their involuntariness appears from the State's evidence.

2. Same—

Statements made by a defendant in a criminal prosecution while in the custody of officers, or in jail, are competent, if made voluntarily and without any inducement or fear. Likewise, a confession, otherwise voluntary, is not made inadmissible because of the number of officers present at the time it was made.

3. Same—

Where the accused persons, at the time of their arrest, were informed of the charge against them as required by G. S., 15-47, and none of them made a request to be allowed to communicate with relatives or friends or to obtain counsel, objection to the failure of the officers to inform them of the charge against them and their right to have counsel, cannot be sustained.

4. Same—

There is no set formula or exact language that must be used in warning a defendant of his rights, and the following language of officers affects in no way the voluntariness of defendants' confessions—"you need not make any statement, but any statement you make could be used for or against you," or "if you want to go ahead and tell me the truth, I will appreciate it."

5. Criminal Law § 78b—

Exceptions not set out in defendant's brief are deemed abandoned, Rule 28; and assignments of error must be brought forward and grouped in accordance with Rule 19 (3). However, as defendants have been sentenced to death, the appeal has been considered on its merits.

APPEAL by defendants, Ralph Thompson, Bessie Mae Williams and Annie Mae Allison, from *Bobbitt, J.*, at May Term, 1944, of MECKLENBURG.

Criminal prosecution tried upon indictment charging the defendants with the murder of one Mack Minyard.

After the defendants were arraigned and entered a plea of not guilty, the defendant, Cleve Bryant Johnson, through his counsel, withdrew his plea of not guilty and tendered a plea of guilty of murder in the second degree, which plea was accepted by the State.

There is evidence tending to show that about 6:00 o'clock p.m., on 27 April, 1944, the appealing defendants, together with Cleve Bryant Johnson, went to a cafe and then to the pool room on the corner of Second and Caldwell Streets in the city of Charlotte, where they spent about an hour and a half. During this time the necessity for obtaining some money was discussed. It was decided if they wanted to have a good time they must have some money, and, according to the testimony of Cleve Bryant Johnson, who testified for the State, Ralph Thompson said, "Let's get some money, if we can't get it one way we can get it another, we could try to catch a taxi." He said, "We would get some money in North Charlotte from the taxi driver." He didn't say exactly how, but said "We might rob him." Bessie Mae Williams and Annie Mae Allison both said "All right." Thereupon they went to the corner of Fourth and Brevard Streets to catch a taxi. The use of one taxi was declined because it had two men in it. About 9:00 o'clock p.m., they got in a taxi driven by Mack Minyard and directed him to go to North Charlotte. The taxi driver stopped at one place but was directed to go to another, where the occupants got out. According to the dying declaration of Minyard, he was attacked in the car and seriously cut, thereafter he got out of the car but was held by one of the men and the women kept cutting him. He was robbed and the keys to his car, together with his billfold containing his social security card, chauffeur's

license, several other cards and a photograph, were thrown away. Most of these articles were found later by the officers, after the defendant Thompson pointed out to them where he threw them. Cleve Bryant Johnson ran when the fight started, but joined the other defendants after they had left Minyard in the road in a serious condition. Minyard died on the following night as a result of his injuries.

The defendants were arrested on Saturday afternoon, 29 April, 1944. At the time of their arrest they were informed of the charge against them and immediately thereafter questioned by the arresting officers. Each one was informed that he or she need not make any statement, but that any statement made could be used for or against them, and no threats or promises were made by the officers. Each of the defendants admitted being in the taxi driven by Minyard and gave details as to what happened. Thereafter the defendants were questioned at the Rural Police Station in Charlotte, in the presence of each other before six or eight police officers. The defendants were again warned of their rights. No threats or promises were made by the officers. The defendants made no request to communicate with friends or to obtain counsel to represent them. No statement was made to the defendants by the officers relative to the employment of counsel or as to their right to have counsel if they so desired. Each defendant, in the presence of the other defendants, repeated substantially the statement made to the arresting officers.

Verdict: Guilty of murder in the first degree, as to each defendant. Verdict: Death by asphyxiation as to each defendant.

The defendants appeal, assigning errors.

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

Uhlman S. Alexander, J. M. Scarborough, and Henry E. Fisher for defendants.

DENNY, J. Exceptions one to eleven, inclusive, are directed to the admission in evidence of the confessions made by the defendants. The defendants insist in their brief that the confessions were involuntary and incompetent as evidence, for the following reasons: (1) That the defendants were in custody and that a large number of officers were present when the confessions were made; (2) that the defendants were not informed as to the charge against them and that they had a right to have counsel; and (3) that the statements made to the defendants by the officers tended to offer inducement to the defendants to make the confessions.

The defendants objected to the admission of the confessions, but declined the offer of the trial judge to have their voluntariness determined in the absence of the jury. The objection to the admission of these confessions comes too late unless their involuntariness appears from the State's evidence. *S. v. Biggs, ante,* 23, 29 S. E. (2d), 121; *S. v. Richardson,* 216 N. C., 304, 4 S. E. (2d), 852; *S. v. Alston,* 215 N. C., 713, 3 S. E. (2d), 11.

Statements made by a defendant while in the custody of officers or in jail are competent, if made voluntarily and without any inducement or fear. Likewise, a confession, otherwise voluntary, is not made inadmissible because of the number of officers present at the time it was made. *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Richardson, supra; S. v. Murray,* 216 N. C., 681, 6 S. E. (2d), 513; *S. v. Exum,* 213 N. C., 16, 195 S. E., 7; *S. v. Caldwell,* 212 N. C., 485, 193 S. E., 716; *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411; *S. v. Gray,* 192 N. C., 594, 135 S. E., 535; *S. v. Rodman,* 188 N. C., 720, 125 S. E., 486.

According to the evidence, the defendants at the time of their arrest were informed of the charge against them, as required by G. S., 15-47, formerly C. S., 4548 (a). It also appears affirmatively and uncontradicted that none of the defendants made a request to be allowed to communicate with relatives or friends or to obtain counsel. Hence, the exceptions directed to the failure of the officers to inform the defendants of the charge against them and to further inform them that they had a right to have counsel, cannot be sustained. *S. v. Exum, supra.*

Finally, it is contended by the defendants that the statements made to them by some of the officers, constituted an inducement to make the confessions, and, therefore, the confessions cannot be held to be voluntary and admissible as evidence against them. The statements relied upon to sustain the defendants' contention, are as follows: "You need not make any statement, but any statement made could be used for or against you," and as to the defendant Annie Mae Allison, one of the police officers said to her, "If you want to go ahead and tell me the truth, I will appreciate it."

Ordinarily, where a defendant is warned as to his rights, it is proper to inform him that he need not make any statement, but that whatever statement he does make may be used against him. However, there is no set formula or exact language that must be used in warning a defendant of his rights, and we do not think the statements complained of affected in any way the voluntariness of the confessions made by the defendants. *S. v. Exum, supra; S. v. Caldwell, supra.* Moreover, the confessions made by the defendants in the presence of each other, are in evidence without objection, since the exceptions thereto, as well as all

remaining exceptions, are not set out in defendants' brief. Therefore, such exceptions are considered abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 563.

The assignments of error appearing on the record are not brought forward and grouped in accordance with the requirements of Rule 19 (3), Rules of Practice in the Supreme Court, 221 N. C., 554. Since, however, the defendants have been sentenced to death, we have considered the appeal on its merits.

In the trial below, his Honor and the attorneys appointed by the court to represent the defendants, were extremely careful to safeguard the rights of the defendants, and in the trial we find

No error.

MRS. ROSA B. RAY AND HUSBAND, J. LAWRENCE RAY, v. MRS J. F. POST.

(Filed 22 November, 1944.)

Negligence § 19a—

In an action for damages to plaintiff from the negligent operation of defendant's automobile, where plaintiff's evidence, in its most favorable light, tended to show that plaintiff and her husband attempted to cross a city street near an intersection with a signal light, passing between two cars which had stopped on account of the red light, and almost immediately after coming out into the street from between the said cars, plaintiff was clipped by defendant's car and injured, without more and with no evidence as to speed, the allowance of a motion for judgment as of nonsuit was proper.

APPEAL by plaintiffs from *Blackstock, Special Judge,* at 6 March, 1944, Extra Civil Term, of MECKLENBURG.

The action was brought by plaintiffs to recover damages for a personal injury to Mrs. Ray, alleged to have been sustained through negligence of the defendant in the operation of an automobile.

The negligence specified in the complaint is that defendant operated her automobile in a careless and negligent manner and at a high, reckless and wanton rate of speed in a thickly populated section of the city of Charlotte and without slackening her speed, struck Mrs. Ray and caused the injury; that defendant, while approaching an intersection at such rate of speed, did not keep an outlook or due care for anyone in said highway, and especially, that she failed to keep such outlook for the plaintiffs.

The plaintiff, Mrs. Ray, the evidence tends to show, drove her husband's truck into the city and parked it. They then started across the

street to a drug store. In the vicinity of the accident Seigle Avenue makes a T intersection with Seventh Street, which plaintiffs endeavored to cross. The injury occurred at or near this intersection. There was no traffic light at this point.

The plaintiff, Mrs. Ray, testified:

"When I got out I parked my car on the right, right across from the drug store. There was a white line in the center of Seventh St. there. After I parked my car opposite the drug store I looked to see if the light was green—the green was on and I waited a minute till the red light come on, and when it come on I looked at Mr. Ray and said, 'Come on,' and when I looked back she was hitting me and I was about the center of the street on the white line. I didn't know what happened to me then only I was on the ground and Mr. Ray was trying to pick me up and I told him, 'Let me alone.' I believed my leg was broke and by that time there was two soldier boys come and said, 'Somebody call the ambulance.' Didn't anybody go right that minute. The man with Mrs. Post wanted to take me to the hospital and I told him he would ruin me if my leg was broke and someone called the ambulance and it wasn't but a minute getting there. I was put in the ambulance and taken to the hospital—Memorial Hospital."

"The traffic light that I looked for is up there about Seventh where Central turns out there (indicating). I looked about the light and it was green and we stopped just a minute and waited till it come on red and when it come on red, I looked at Mr. Ray and said, 'Let's go.' I looked up to see if anything was coming; I looked on the other lane too and saw nothing only the cars that was stopping for the red light. I don't know how many—I know a few stopped. I don't know whether there was a bus stopped there or not. There were cars stopped for the red light. The cars that were stopped were going east. Other cars that had to stop would be going west and the red light was on when I started from my automobile over there. I got to the center of the street. I don't know the width of the street. I think it just knocked me down when it struck me. I was suffering so I didn't realize much. Mr. Ray was walking across the street with me. He is a little hard of hearing and when I talk to him I have to talk a little loud. Just as Mrs. Post hit me I saw the car. I don't know how fast she was traveling."

On cross-examination plaintiff testified:

"I walked between the cars that was stopped. The Post car hit me right about the center of the street. I guess the cars were stopped at Seigle Street just about in the center. I don't know how many steps I took before I was clipped. I don't know how wide the street is. It was almost instantaneously. . . . I'm positive that I parked the truck opposite the drug store and was going across at the intersection. I looked to

the right, up East Seventh Street, first, before I made my step into the street, and then looked down the other way, and when I looked back she was hitting me. My husband was right with me, kind of behind me at the time. Just before I stepped out I said to my husband, 'Let's go.' I guess anybody in the car could have heard me, because he is a little deaf and I have to talk loud to him. I turned around to him and said, 'Let's go,' and stepped into the street and was clipped by the car."

J. Lawrence Ray, plaintiff, testified:

"I am the husband of Mrs. Ray and was with her when she was hurt on January 3rd. We parked our truck right in front of the drug store like on Seventh Street. The green light was on up above us a little piece and we waited until a red light came on and two or three vehicles had stopped for this red light and my wife says to me, 'Let's cross,' and we started crossing and when we did there came this car and I seen it just in time to rear back and it barely missed me a little bit and struck her. The car was parked against the curb on Seventh Street, across in front of the drug store. Between the drug store and the light other cars were stopped for the light on the same side where I were parked at. Yes, they were between my truck and the light. The red light was on when we started across the street—that would stop traffic both ways. That's the reason we started across, the traffic was supposed to be stopped coming this direction. We had gotten about the middle of the street, about the center line, when Mrs. Ray was hit. . . . There is no question in my mind that we parked the truck right opposite the drug store. There was a bus, Duke Power bus, there stopped for the red light. There was traffic from there on up to the red light that was stopped. The bus was just above me, kindly in front of me and there was another car right behind the bus. There was a little space in between there, I don't know (how) much—I suppose some 8 or 10 foot. Me and my wife walked behind the bus; I was slightly behind her. She turned and says, 'Come on, the red light's on, let's cross,' and stepped from behind the bus. . . . When she turned around and said, 'Come on,' or whatever it may be, she stepped out from behind that bus and just as she did that automobile clipped her, and I was right close behind her and it almost got me. She fell some 12 or 15 foot from me when she hit the ground, and was picked up right about the center of the street, about 12 or 15 feet from where I were at. She was back some little distance below the intersection—I would say at least 10 or 12 feet. I never measured it, being excited like I was, I can't say the amount of feet it was. I can't say whether it was in front of the beauty parlor because I weren't taking particular notice to anything like that. I don't know what part of the car struck her, I told you I didn't see it when it struck her at all."

Lt. J. P. Helms, of the Charlotte Police, testified for plaintiff: "I stepped off the measurement of Seventh Street, and know the width of the street about the distance from the signal light to where Mrs. Post's car was parked. Where the accident actually happened, I can't say but I do know where her car was parked. Seventh Street is about 42 feet in width. Mrs. Post's car was parked right about here (indicating) and I measured from there to the traffic light, that is from about 5 or 10 feet below this barber shop, from there up to about even with the Shell Service Station. That is about 275 feet. It's approximately 100 feet from the corner of Seigle and Seventh Street to where Mrs. Post's car was. That would be about 175 feet from Seigle Street to the light."

There was other evidence on the part of plaintiff, tending to show that Mrs. Ray was severely and permanently injured and that the husband sustained damage by reason of her injuries.

On the trial the husband waived right to personal recovery for hospital expenditures made by him. Where, in the opinion, unless otherwise noted, "the plaintiff" is used in the singular, it will refer to the *feme* plaintiff.

The defendant offered evidence tending to contradict, in some part, the plaintiff's evidence.

The defendant demurred to the evidence on the ground that it raised no inference of her negligence and that it disclosed, as a matter of law, that plaintiff's own negligence contributed, proximately, to her injury.

The demurrer was sustained, and plaintiffs appealed.

Jake F. Newell for plaintiffs, appellants.

J. Laurence Jones for defendant, appellee.

SEAWELL, J. Closely examining the evidence upon which plaintiff relies to establish defendant's negligence, and giving her the benefit of every inference taken in the most favorable light, as required by precedent—G. S., 1-183, anno.—we are unable to find anything which does more than to engender speculation. The mere fact of collision, standing alone, raises no inference of defendant's negligence. Blashfield, Encyc., Auto. Law, sec. 2328, and cited cases. The circumstances of the collision do not materially aid plaintiff in this respect.

There is no evidence as to the speed of the car, except possibly, that plaintiff did not see it when she looked and that it must therefore have come from a great distance in a short time. The inference insisted upon by plaintiff is that defendant must have come from the vicinity of the red light, 175 feet away—and may have crashed that light—and, therefore, must have been driving at an excessive rate. We do not regard

this evidence as being sufficiently definite in that respect to be of probative value. Plaintiff's evidence that she was "clipped" almost immediately after coming from between other cars and going into the street would rather negative the charge against defendant that she did not keep proper lookout. At any rate, the inferences as to the movements of plaintiff and those of defendant, as taken from plaintiff's evidence, are too evenly balanced to justify a conclusion that defendant was at fault. Such an inference does not arise, as we have suggested, from the mere fact of the collision.

It is ours only to apply the principles of law, no matter how much we may share in sympathy for the injury and suffering caused by this regrettable occurrence, and these require us to affirm the judgment of the trial court.

Affirmed.

JOE HEGLER, GUARDIAN, v. CANNON MILLS CO.

(Filed 22 November, 1944.)

1. Master and Servant § 40e—

Where there is friction and enmity between two employees, growing out of criticism of the work of one of them by the other and complaint thereof to the employer and the employee, whose work was criticized, assaulted his fellow worker from anger and revenge over such criticism, which resulted in the death of the one assaulted, such death occurred from an accident in the course of the employment, and there is sufficient inference that it arose out of the employment.

2. Master and Servant § 52c—

When the record is such as to permit findings either for or against a party, the determination of the Industrial Commission is conclusive on appeal.

APPEAL by defendant from *Armstrong, J.*, at April Term, 1944, of CABARRUS.

Proceeding under Workmen's Compensation Act to determine liability of defendant to Margaret Hegler, minor daughter and surviving dependent of Ernest F. Hegler, deceased employee.

In addition to the jurisdictional determinations, the essential findings of the Industrial Commission follow:

Ernest Hegler and Grady Smith were employed as scrubbers in the Cannon Mills. They worked together for about a year. Then Hegler, who was foreman of the scrubbing crew, was given other work and transferred to the supply room. Smith succeeded him as foreman of

the scrubber team. Friction developed between the two—which continued for nearly a year—because Hegler sought to direct Smith's work without authority over him, complained at the manner in which the scrubbing was done and finally reported the matter to officials of the company. This report angered Smith and he threatened to get even with Hegler, stating that he had given notice of his intention to quit the mill and "was going to kick him (Hegler) all over the cloth room" before leaving. Two days later, Smith was in the department where Hegler worked and called to him, but Hegler turned and walked in an opposite direction. Whereupon, Smith followed him, struck him on the head and injured him to such an extent that he died in a few hours as a result of the injury.

This from the record: "Q. Why did you hit him, Mr. Smith? A. I figured he didn't have anything to do with my work that I was doing. I was going ahead with it like he told me to do when he left to go to the supply room. I figured he was trying to tend to my job and his too and I figured he had enough to do with it if he had stayed away and let me alone there wouldn't have been anything of it."

The deceased and Smith never had any association, one with the other, outside the mill. They never came in contact with each other except in the mill. The Commission finds "that the accident which resulted in the death of plaintiff's deceased grew out of and was an incident to his employment."

Upon the facts found, the Commission awarded compensation, and this was affirmed on appeal to the Superior Court. From this latter ruling, the defendant appeals, assigning errors.

Bernard W. Cruse and W. S. Bogle for plaintiff, appellee.

W. H. Beckerdite and Hartsell & Hartsell for defendant, appellant.

STACY, C. J. The question here posed is whether the record permits the inference that Hegler's death resulted from an injury by accident arising out of and in the course of his employment. If so, the judgment is correct; otherwise, it should be reversed.

That the accident occurred in the course of the employment is conceded, or at least the fact is apparent. *Conrad v. Foundry Co.,* 198 N. C., 723, 153 S. E., 266. That it arose out of the employment is a legitimate inference from the record. *Ashley v. Chevrolet Co.,* 222 N. C., 25, 21 S. E. (2d), 834.

Smith was angered because the deceased criticized his work and complained about it to the officials of the company. The assault followed two days after the report to the company and was thus directly connected with the employment. The Commission so finds, and this makes

it a compensable death under the Workmen's Compensation Act. *Eller v. Leather Co.,* 222 N. C., 23, 21 S. E. (2d), 809.

It is true, the assailant had been heard to say that he was going to kick the deceased all over the cloth room before leaving, but this was because of resentment over the impeachment of his work. Undoubtedly the friction between the two employees, which continued with intermittent bickerings for nearly a year, had its origin in the employment. While the assault may have resulted from anger or revenge, still it was rooted in and grew out of the employment. Anno. 72 A. L. R., 110.

To accept the defendant's version of the matter, even though it may appear the more reasonable, would be to reject the opposing inferences which support the fact-finding body. *Kearns v. Furniture Co.,* 222 N. C., 438, 23 S. E. (2d), 310; *Lassiter v. Tel. Co.,* 215 N. C., 227, 1 S. E. (2d), 542. Where the record is such as to permit either finding, the determination of the Industrial Commission is conclusive on appeal. *Buchanan v. Highway Com.,* 217 N. C., 173, 7 S. E. (2d), 382; *Lockey v. Cohen, Goldman Co.,* 213 N. C., 356, 196 S. E., 342.

The award in *Wilson v. Boyd & Goforth,* 207 N. C., 344, 177 S. E., 178, on the facts there appearing, which was sustained on appeal, lends color to the conclusion here reached. See, also, *Anderson v. Security Building Co.,* 100 Conn., 373, 123 Atl., 843, 4 A. L. R., 1119.

Speaking to a similar situation in *Pekin Cooperage Co. v. Industrial Com.,* 285 Ill., 31, 120 N. E., 530, where a workman was injured in a quarrel with another over interference with his work, the Court said: "Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

In *Chambers v. Oil Co.,* 199 N. C., 28, 153 S. E., 594, *Brogden, J.,* put it this way: "It is a self-evident fact that men required to work in daily and intimate contact with other men are subjected to certain hazards by reason of the very contact itself because all men are not alike. Some are playful and full of fun; others are serious and diffident. Some are careless and reckless; others are painstaking and cautious. The assembling of such various types of mind and skill into one place must of necessity create and produce certain risks and hazards by virtue of the very employment itself. . . . Such risks, therefore, are incident to the business and grow out of it. In an ordinary suit for damages for personal injury the workman assumes the ordinary risks of the business,

but the Compensation Act in such case imposes the ordinary risk of the business upon the employer. That is to say, the employer and not the workman must assume the ordinary risks of the business or employment."

The judgment of the Superior Court will be upheld.

Affirmed.

UTILITIES COMMISSION v. ATLANTIC GREYHOUND CORPORATION ET AL.

(Filed 22 November, 1944.)

This case and the case of *Utilities Comm. v. Greyhound Corp., ante*, 293, were both heard at the February Term, 1944, of Wake Superior Court. They are companion cases, were so treated before the Commission and in the court below, and are controlled by the same considerations.

BARNHILL and SEAWELL, JJ., dissent.

APPEAL by defendants from *Stevens, J.*, at February Term, 1944, of WAKE.

Proceeding before North Carolina Utilities Commission.

The record discloses:

1. That on 29 November, 1943, the Utilities Commission issued "General Order No. 79," requiring the operators of Union Bus Stations, their agents and employees, on and after 15 December, 1943, to give full information to the traveling public in respect of the points and places, both intrastate and interstate, served by any and all bus companies operating in and out of said Union Bus Stations.

2. Thereafter, on 9 December Atlantic Greyhound Corporation entered a special appearance and moved to dismiss or vacate the order because issued without notice; and on the same day Carolina Coach Company filed demurrer and exceptions to the order, alleging that it was entered without notice, purports to regulate interstate commerce, and impairs the obligations of existing contracts.

3. On 14 December, motion to defer the effective date of the order pending appeal was denied because of its immediate necessity to service men traveling to and from remote sections. Exceptions were filed to this refusal.

4. On 25 January, 1944, the Commission dismissed the motion of the Atlantic Greyhound Corporation and overruled the demurrer and exceptions of the Carolina Coach Company.

In the formal opinion accompanying the rulings of the Commission, it is stated that General Order No. 79 is an administrative rule or regulation made pursuant to authority contained in sections 7 and 11 of the Bus Act, ch. 136, Public Laws 1927.

And further:

"If notice, other than the order itself, is a prerequisite to its validity, the protesting carriers cannot be inadvertent to the fact that said order arises out of a formal complaint in Docket No. 3011, a copy of which was mailed to both Carolina Coach Company and the Atlantic Greyhound Corporation. Both carriers appeared at the hearing thereon on November 18, 1943, were fully advised as to the practice of refusing to give the traveling public impartial information at the Raleigh union bus station to which said complaint related, and were given full opportunity to be heard, as the record therein will show.

"The contention that the order is an unlawful interference with interstate commerce is not supported by the decisions of either State or Federal courts. . . . *Corporation Commission v. R. R.*, 151 N. C., 447, p. 453.

"Neither is the contention that the order impairs the obligation of contracts supported by decisions of State or Federal courts. To the extent that carriers may have attempted to contract against the public interest their contracts cannot be enforced. See *In re Utilities Co.*, 179 N. C., 151."

5. Thereafter, the Greyhound and the Carolina filed notices of appeal, exceptions and assignments of error. These were certified to Superior Court of Wake County on 10 February, 1944.

6. On 29 February, 1944, the Attorney-General, representing the Commission, filed motion in the Superior Court to dismiss the appeal. This motion was allowed, from which ruling the Greyhound and the Carolina appeal, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for Utilities Commission.

Bailey, Holding, Lassiter & Wyatt and Ehringhaus & Ehringhaus for Atlantic Greyhound Corporation.

Wm. B. Umstead for Carolina Coach Company.

Tillett & Campbell for Carolina Scenic Coach Lines and Carolina Stages, amici curiæ.

STACY, C. J. This case which involves General Order No. 79, of the Utilities Commission and the case of *Utilities Commission v. Greyhound Corporation, ante,* 293, which involved an amendment to General Rule

22 of the Utilities Commission, were both heard at the February Term, 1944, Wake Superior Court. They are companion cases, were so treated before the Commission and in the court below, and are controlled by the same considerations. The differences between them are inconsequential rather than basic. It would serve no useful purpose to travel again the ground covered in the companion case. Reference to the opinion in that case will suffice for the decision here.

Affirmed.

BARNHILL and SEAWELL, JJ., dissent.

HURLEY M. WATKINS v. TAYLOR FURNISHING COMPANY, INC.

(Filed 22 November, 1944.)

1. Negligence §§ 4b, 19a—

In an action for damages from injuries to plaintiff by the alleged negligence of defendant, where all the evidence tended to show that defendant had installed two pairs of "magic eye" doors, opening from its store into the street, which were operated electrically and by compressed air and springs, that the plaintiff entered through the left side of the double door opening, the door on the left side being partially open, and that the door on the left side suddenly closed and caught plaintiff between said left door and the other door or door frame causing injury, there is a total lack of evidence of negligence and motion for judgment of nonsuit was properly allowed.

2. Negligence §§ 4b, 19c—

The proprietor of a store is not an insurer of the safety of a customer while on the premises, and the doctrine of *res ipsa loquitur* is not applicable.

3. Same—

The only duty, required of the owner of a store for the protection of his patrons, is the exercise of ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils and unsafe conditions in so far as can be ascertained by reasonable inspection and supervision.

4. Negligence § 5—

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 injuries negligently inflicted.

APPEAL by plaintiff from judgment as in case of nonsuit entered after all the evidence was in (G. S., 1-183) by *Johnson, Special Judge,* at January Term, 1944, of WAKE.

Douglass & Douglass and E. D. Flowers for plaintiff, appellant.
T. Lacy Williams for defendant, appellee.

SCHENCK, J. In this action the plaintiff seeks to recover damage for personal injuries alleged to have been caused by the negligence of the defendant in the erection, operation and maintenance of "magic eye" doors in the entrances to its store building on Fayetteville Street in the city of Raleigh. The negligence is alleged to have consisted of the defendant's having installed and invited the public to use "a new fangled electrically controlled door without any notice or warning of any kind or nature of its nature and the danger attendant upon using the door in the usual and ordinary way" and "negligently and carelessly installed an electrically controlled door with powerful springs, equipment and appliances" that would catch the body of a person entering the store between the door and the framing thereof. It is further alleged that the plaintiff entered the store of the defendant from Fayetteville Street through the door on the east side of said street and the electrically operated door suddenly closed in upon her, thereby inflicting injuries upon her.

The evidence offered by the plaintiff tended to show the erection, operation and maintenance by the defendant of two pairs of "magic eye" doors opening from the store of the defendant into Fayetteville Street, which were operated by means of electricity, compressed air and springs, and that as the plaintiff attempted to enter one of the openings on Fayetteville Street through the door on the left side of said opening, the left door, which was partially open, suddenly closed and thereby caught the plaintiff between said left door and the other door or door frame, inflicting injury upon her.

The evidence goes only so far as to show that the plaintiff entered through the left side of the double door opening, where the door on the left side was partially open, and that the door on the left side suddenly closed and caught the plaintiff between said left door and the other door or door frame.

There is a total lack of evidence of negligence in the erection, operation or maintenance of the "magic eye" doors. There is no evidence that the doors involved in the occurrence under investigation ever suddenly closed before said occurrence, or ever before caught anyone attempting to enter the store, notwithstanding the doors had been installed several months and thousands of customers had entered through the door openings.

This want of evidence of negligence could only be supplied by assuming that the mere facts of the plaintiff's being caught by the sudden closing door and the injury consequent thereupon furnish such evidence. We could hardly go so far as to make such an assumption, since we are unable to see any evidence of negligence in the facts themselves.

The proprietor of a store is not an insurer of the safety of a customer while on the premises. He owes only the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision. *Williams v. Stores Co., Inc.*, 209 N. C., 591, 184 S. E., 496. The owner of a store is not an insurer of the safety of those who enter his store for the purpose of making purchases, and the doctrine of *res ipsa loquitur* is not applicable. Before the plaintiff can recover he must, by evidence, establish actionable negligence. *Fox v. Great Atlantic & Pacific Tea Co.,* 209 N. C., 115, 182 S. E., 662; *Bowden v. Kress,* 198 N. C., 559, 152 S. E., 625; *Cooke v. Tea Co.,* 204 N. C., 495, 168 S. E., 679. "The measure of due care adopted in this State is that of the ordinarily prudent, not the perfectly prudent, man. 'No better standard has yet been devised than the care of the "ordinarily prudent man"' . . . It takes into consideration the care of carrying on, which, try as we may, we cannot wholly remove from the contract which, by being mere members, we make with society." *Griggs v. Sears, Roebuck & Co.,* 218 N. C., 166, 10 S. E. (2d), 623.

There is no evidence that the door under investigation ever suddenly closed in the manner alleged prior to the occurrence in question to the knowledge of the defendant, or, indeed ever so closed before said occurrence. Such occurrence was an unexpected event which the defendant was not required to anticipate or guard against. Persons are held liable by the law for the consequences of occurrences which they can and should foresee, and by reasonable care and prudence guard against. "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." *Osborne v. Coal Co.,* 207 N. C., 545, 177 S. E., 796.

In the absence of evidence of actionable negligence on the part of the defendant, we are of the opinion, and so hold, that the judgment of the Superior Court should be sustained; and it is so ordered.

Affirmed.

C. L. BEAM v. R. W. WRIGHT AND MARY B. WRIGHT.

(Filed 29 November, 1944.)

1. Bills and Notes §§ 25, 27—

When plaintiff declares on a past-due negotiable note, regular in form, and offers evidence of its execution by defendants, a *prima facie* case is made out, which imposes upon defendants the burden of going forward with evidence to rebut the presumption created by the statute (G. S., 25-29), or incur the risk of an adverse verdict.

2. Bills and Notes §§ 27, 29—

Where plaintiff, in an action on a note for $5,976, introduced the note and offered evidence of its execution by defendants and evidence that defendants received full and valid consideration therefor, and defendants' evidence showing that the note was payable to plaintiff personally and was given solely to cover $800 in checks drawn by defendants on the bank of which plaintiff was an officer and the note was filled in for an unauthorized amount and used illegally by plaintiff to cover up his defalcation, and all the evidence showing that plaintiff's shortages have been fully paid by his bondsman, it was error for the court to instruct the jury to answer the issue as to defendants' liability on the note in the affirmative; while a motion to nonsuit was properly denied.

3. Subrogation § 1—

Legal subrogation is a device adopted by equity to compel the ultimate discharge of an obligation by him who, in good conscience, ought to pay it. It arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable. The application of this doctrine has been expanded beyond matters of strict suretyship or priorities and is called into operation by a variety of circumstances.

4. Subrogation § 2—

It is generally held that the equitable relief of subrogation will be withheld from those who are themselves guilty of wrongful conduct with respect to the transaction in which it is invoked. One who is a mere volunteer, or who is guilty of fraud in bringing about the situation wherein he seeks the aid of equity, will not be permitted to avail himself of relief by the doctrine of subrogation. It will not be applied to a tortious transaction at the instance of the tort-feasor, nor enforced in a doubtful case when the rights are not clear.

BARNHILL, J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by defendants from *Hamilton, Special Judge,* at November Term, 1944, of CARTERET.

This was an action to recover on a note in the sum of $5,976. Defendants denied liability and pleaded want of consideration.

This case was here at Fall Term, 1942, and is reported in 222 N. C., 174, 22 S. E. (2d), 270. That appeal involved only the pleadings. On the trial below compulsory reference was ordered and both parties excepted. The referee found the defendants liable on the note sued on in the sum of $800, and plaintiff filed exceptions to the report with demand for jury trial upon issues tendered. The issues tendered and submitted to the jury on the trial were these:

"1. Are the defendants indebted to plaintiff by virtue of their promissory note, as alleged in the complaint?

"2. If so, in what sum?"

The jury answered the first issue yes, and the second issue $5,976. From judgment on the verdict defendants appealed.

A. L. Hamilton, C. R. Wheatley, and R. A. Nunn for plaintiff.

R. E. Whitehurst and L. I. Moore for defendants.

DEVIN, J. The plaintiff declared upon a past-due negotiable note, regular in form, and offered evidence of its execution by the defendants. This made out a *prima facie* case, and imposed upon the defendants the burden of going forward with evidence to rebut the presumption created by the statute (G. S., 25-29), or incur the risk of an adverse verdict. *Stein v. Levins,* 205 N. C., 302, 171 S. E., 96; *Benner v. Phipps,* 214 N. C., 14, 197 S. E., 549. In accord with this rule the plaintiff, having introduced the note in evidence, rested his case.

The defendants admitted signing the note sued on, but testified they signed it at the instance of the plaintiff who was then cashier of the bank with which they had been dealing; that when they signed the note the amount was left blank; that they were induced to sign it in that form by the insistence of the plaintiff that he needed it on account of an expected bank examination, and that it would be filled in with the comparatively small amount of checks of defendants which had been paid and held out from entry by the bank. Defendants testified the plaintiff paid nothing to them or to the bank; that all of defendants' antecedent obligations to the bank had been paid.

The transactions between plaintiff and defendants and the bank are detailed in the record, but much of this is not material to the questions presented by this appeal. However, it appears that defendants were borrowers from the bank, and that the bank in addition through its cashier, the plaintiff, had indulged the practice of paying defendants' checks drawn on the bank when they had insufficient deposits or credit therein, and holding out the checks in the bank until the defendants should execute notes to the bank to cover.

The plaintiff's contention was that in August, 1940, the defendants' unpaid notes given to cover held out checks, together with additional checks which had since been paid by the bank, had accumulated until they aggregated $5,976, and that at plaintiff's suggestion the defendants signed the note in suit in that sum, payable not to the bank but to him individually, to cover same. The plaintiff admits he paid nothing to the defendants or to the bank, but he contends that, having been subsequently found short in his accounts with the bank and convicted or pleaded guilty in the United States District Court, the surety on his fidelity bond paid to the bank the amount of his shortage which grew out of the Wright checks, and that he has agreed to reimburse the Surety Company, and is doing so by monthly payments secured by mortgage on his home. He contends that the amount for which the defendants were liable to the bank, being the same amount designated in the note, was paid by the Surety Company to the bank; that this was in discharge of the liability of the defendants, and that his, the plaintiff's, repayment to the Surety Company of this debt, which was primarily the obligation of the defendants, entitled him to be given now the status of having furnished the full consideration for the defendants' note. In other words, he contends that the consideration for the note in suit was his agreement to pay the defendants' debt to the bank; that while he did not do so at the time, he has now done so, and the full benefit agreed has inured to the defendants, and the full payment has been made by him. 10 C. J. S., 616; *Turner v. Rogers,* 121 Mass., 12; Restatement Law Contracts, sec. 75, p. 83.

It also appeared in evidence that while the transactions about the notes and held out checks were being carried on between the defendants and the bank, the plaintiff Beam was manipulating certain deposit accounts in the bank in order to cover the shortages occasioned by holding out Wright's checks; that he unlawfully took funds from the accounts of other depositors to make good these shortages, and falsified and concealed entries on the books of the bank in violation of law.

It will be noted that whatever debt defendants owed at the time was to the bank and not to the plaintiff, and that, for some reason, he had the note executed in his own name, with the agreement, as he contends, as consideration therefor that he would pay to the bank the amount designated in the note in settlement of defendants' debts to the bank.

Considering the evidence in the light of the plaintiff's contentions, the rather unusual situation shown by the record may be diagrammed like this: A being indebted to B, executes note to C upon the latter's promise to pay B. C does not himself pay the debt, but wrongfully takes money from D and pays B. Upon discovery, B returns the money to D, and thereupon E, the surety on C's bond, reimburses B, and C agrees to

reimburse E. Whereupon C sues A on the note, on the ground that consideration is now shown.

The defendants, on the other hand, offered evidence tending to show that all their notes and obligations to the bank had been paid prior to the execution of this note, and that it was only in consequence of the representations of plaintiff Beam that there were some additional checks held out, amounting to $700 or $800, and that he wished them to sign a note in order to tide him over a bank examination, that they were induced to sign the note in blank.

The defendants contend that they owe Beam nothing and never have; that Beam never paid anything to them or to the bank; that they had no transactions with Beam personally, only with the bank through him, and that the note sued on was entirely without consideration; that plaintiff's misapplication of the bank's funds began prior to the defendants' dealings with the bank, and were not connected with defendants' checks. Defendants further assert they had no knowledge that Beam was taking funds from other depositors to cover his shortages. They contend that the note being without consideration at the time of its execution, plaintiff should not now, out of circumstances showing the wrongful taking of the property of others to cover his own defalcations, be permitted to invoke an equity which would inure to his own benefit, and by this circuitous method give life to a note void for lack of consideration. The defendants also call attention to evidence that after the discovery of plaintiff's defalcation and his prosecution he offered the note now in suit to the bank and also to the Surety Company, but neither would accept it. Neither claimed any interest in it.

The defendants noted exception to the court's instruction to the jury that "under all this evidence" they should answer the first issue yes, and that they should not concern themselves with any investigation as to whether the defendants were indebted, but should consider only the second issue as to the amount.

The question in the first issue was whether the defendants were "indebted to the plaintiff by virtue of the promissory note sued on." The defendants did not deny that there were at the time of the execution of the note to plaintiff in the bank some "held out" checks which would have constituted an overdraft, but we do not understand the defendants admitted the validity of the note sued on, or their indebtedness to the plaintiff Beam thereon. This being so, their defenses that they had paid their notes and obligations to the bank, that they owed Beam nothing, that the note was without consideration and obtained for an illegal purpose (7 Am. Jur., 965), were disregarded, as was also their contention that the circumstances negatived the application of the equitable principle of subrogation in aid of a wrongdoer, and failed to

afford ground for the maintenance of a suit on this note against these defendants.

We think this assignment of error well grounded, and that the instruction to which exception was noted must be held for error. At the time it was given the note was *nudum pactum.* There was then no legal obligation on the defendants to pay Beam. The circumstances relied upon by the plaintiff to show he had eventually paid, through the Surety Company, a debt which was primarily the obligation of the defendants, are not admitted. The defendants' view is that the note was procured by the plaintiff to aid him in perpetrating a fraud on his employer and to cover up his violations of law, and that these fraudulent transactions were in no way related to the defendants' overdrafts, either in time or amount. From the defendants' standpoint and in accord with their testimony, the plaintiff's wrongful conduct was such as to deprive him of the benefit of his repayment to the Surety Company, under the principle of subrogation, for the purpose of supplying evidence of consideration for the note sued on.

We think the defendants were entitled to have this phase of the case considered by the jury on the first issue. Forced repayment by plaintiff to the Surety Company of a debt for which defendants were primarily liable would seem to entitle him to be put in the shoes of the Surety Company and to succeed to its rights if he could follow or trace the fund and show that the debt he repaid to the Surety Company, and through it to the bank, was the same debt which defendants owed to the bank. But on this point the defendants' evidence is at odds with that of the plaintiff.

In view of these conflicting claims and the evidence in support thereof we think the defendants' motion for judgment of nonsuit was properly denied. While the defendants contend the entire transaction is so tainted with illegality that no action on a note growing out of it can be maintained, we think consideration of the plaintiff's evidence in the light most favorable for him presents a different view, at least entitling him to go to the jury.

The plaintiff testified the Wrights owed the amount of the note at the time of its execution, and that the figures $5,976 were discussed with them, and that nothing had been paid thereon. According to his testimony the antecedent transactions leading up to the execution of the note were these: The defendants were large truck growers, at times needing considerable sums of money, and were borrowers of the bank. Numerous notes and renewals were given by defendants beginning in 1938. In addition the defendants' checks were honored and held out in the bank until notes could be given to cover same. The last of these notes was one for $4,700. "At that time he actually owed the bank approximately

that amount of money. The nature of it was items I had held for Mr. Wright—checks." Subsequently other checks were cashed and on 25 August, 1940, the aggregate was $5,976, for which the note sued on in that amount was given. "The $5,976 is made up of the $4,700 note and additional checks which I had cashed for Mr. Wright between the time the $4,700 note was discounted and the $5,976 note was given. Mr. Wright would come to me saying how much money he needed and how badly he needed it. He said that Mrs. Wright was in the hospital and he was trying to clear new ground and needed money to pay hospital and other bills. I advanced him the money up to $5,976, and that is what goes to make up the $5,976 note. No part of that note has been paid. I gave Mr. Wright the $4,700 note when I received the $5,976 note. I think I stamped it paid. At the time the $5,976 note was given I felt that Mr. Wright was not going to get a note discounted to take care of those items, and I made the note payable to myself because I knew that I or the bonding company would have to reimburse the bank for the money I had let Mr. Wright have, I might say illegally. I had not been authorized to make this loan. The bonding company has reimbursed the bank and to secure the bonding company I gave a mortgage on my house. I am now paying the bonding company $50.00 per month."

He testified that at the time of the execution of the $5,976 note, in addition to delivery of the $4,700 note marked paid, Wright received the checks back. "The checks I gave back were those that came to the bank on Mr. Wright that I cashed, approximately $1,200."

Plaintiff admitted that in order to cover the shortage occasioned by cashing Wright's checks he manipulated other accounts in the bank, and that he pleaded guilty to making false entries, but he contends that for his wrongdoing in this respect Wright got the benefit, while he has had to pay the penalty imposed by the law; that to deny him recovery on the note would permit Wright to escape the payment of a just debt for which the plaintiff has paid in full.

According to plaintiff's evidence the only illegality in these transactions consisted not in the consideration of the note nor in its execution, but in the means employed to provide the funds to loan to Wright, and that Wright having received the money is justly indebted therefor; that plaintiff profited nothing by these transactions, but on the other hand has paid or is paying the full amount of Wright's debt, $5,976.

In this connection it will be noted that in the case of *Covington v. Threadgill*, 88 N. C., 186, which was a suit on a note given for intoxicating liquor in violation of the express provisions of the statute then in force, it was said the sale of liquor by plaintiff to the defendant in that case was illegal, and "being thus illegal, so that no action in affirm-

ance of it can be maintained by the court, it taints and violates any contract into which it enters or forms any part of the consideration." It might be argued, however, that if plaintiff in that case had loaned the defendant money, though plaintiff had derived it from the sale of liquor to others, the principle stated in the opinion would not have prevented recovery of the debt, the vitiating influence of tainted money not going that far.

Now, on the other hand, the defendants say the facts are entirely different; that the $4,700 note was paid by defendants in cash; that at the time of the execution of the note sued on the held out checks did not amount to more than $800; that Beam's shortage in the bank was $7,600, and this was in no way related to defendants' transaction with the bank; that the note sued on was signed in blank and given for an unlawful purpose to cover plaintiff's own defalcation; that the note was without consideration, and that the consideration and the entire transaction on which he bases his suit were tainted with fraud and illegality.

The decision of these conflicting claims was for the jury.

It will be borne in mind that the plaintiff does not ground his action on subrogation. He sues at law on a promissory note. However, when absence of present consideration for the note appears, he avails himself of the aid of equity and offers evidence to show that he was compelled to and did pay the debt which was the consideration for the note, not directly, but indirectly through the Surety Company, and in discharge of the primary liability of the defendants therefor; and that, in accord with the principle of subrogation, his reimbursement of the Surety Company constitutes consideration to support the note. The defendants controvert the evidence upon which this conclusion rests, and thus the application of the equitable principles involved depends upon the determination of the disputed facts.

Legal subrogation, as distinguished from conventional subrogation, is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it. It arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable. *Trust Co. v. Godwin,* 190 N. C., 512, 130 S. E., 323; *Grantham v. Nunn,* 187 N. C., 394, 121 S. E., 662; 50 Am. Jur., 678; 60 C. J., 705; Pom. Eq., 5th Ed., sec. 1419; Sheldon on Subrogation 4; 3105 *Grand Corp. v. New York,* 288 N. Y., 178, 141 A. L. R., 1211. The application of this doctrine has been expanded beyond matters of strict suretyship or priorities, and is called into operation by a variety of circumstances. *Burgoon v. Lavezzo,* 92 F. (2), 726, 113 A. L. R., 944. The equity of subrogation and the different situations in which it has been made available as an aid to justice have been considered in numerous cases by this Court.

Boney, Ins. Comr., v. Ins. Co., 213 N. C., 563, 197 S. E., 122; *Wallace v. Benner,* 200 N. C., 124 (132), 156 S. E., 795; *Morris v. Cleve,* 197 N. C., 253, 148 S. E., 253; *Jeffreys v. Hocutt,* 195 N. C., 339, 142 S. E., 226; *Everett v. Staton,* 192 N. C., 216, 134 S. E., 492; *Trust Co. v. Godwin,* 190 N. C., 512, 130 S. E., 323; *Grantham v. Nunn,* 187 N. C., 394, 121 S. E., 662; *Caldwell v. Robinson,* 179 N. C., 518, 103 S. E., 75; *Brown v. Harding,* 170 N. C., 253, 86 S. E., 1010; *Pub. Co. v. Barber,* 165 N. C., 478, 81 S. E., 694; *Moring v. Privott,* 146 N. C., 558, 60 S. E., 509; *Liles v. Rogers,* 113 N. C., 197, 18 S. E., 104.

However, it is generally held that equitable relief on this ground will be withheld from those who are themselves guilty of wrongful conduct with respect to the transaction in which it is invoked. One who is a mere volunteer, or who is guilty of fraud in bringing about the situation wherein he seeks the aid of equity, will not be permitted to avail himself of the relief afforded by the doctrine of subrogation. *Wallace v. Benner,* 200 N. C., 124, 156 S. E., 795; 50 Am. Jur., 694-707, 4 A. L. R., 44 (annotation). It will not be applied to a tortious transaction at the instance of a tort-feasor, nor enforced in a doubtful case when the rights are not clear. 60 C. J., 702. "One who wrongfully appropriates the property of another for his own use will not receive the aid of a court of equity in any matter with which such reprehensible conduct is connected." Pom. Eq., 5th Ed., sec. 401, 4 A. L. R., 54; *Union Central L. Ins. Co. v. Drake,* 214 Fed., 536 (542); *Keystone Driller Co. v. General Excavator Co.,* 290 U. S., 240.

Without undertaking to explore all the ramifications of the principles of this equity or to define the extent of any application of these principles to the contrasting phases of the testimony in this case, we think the determination of the question of consideration and the ultimate liability of the defendants on the note in suit depends on the proper decision of the underlying and controlling facts relating to the first issue.

For the reasons given we conclude that the defendants are entitled to a new trial, and it is so ordered.

New trial.

BARNHILL, J., dissenting: On the motion to nonsuit, considering the evidence in accord with the controlling rule, these facts stand out:

1. Plaintiff was cashier of the Beaufort branch of the First-Citizens Bank & Trust Company. Over a period of time he, with the approval of the proper bank officials, had made loans to the defendants. He also from time to time paid checks of the defendants when they had no credit balance in the bank. He did not charge these to the defendants' account so as to show an overdraft but carried them as "cash items" and they are referred to in the record as "throw-out" checks. The transactions

in respect to the checks were had without the knowledge of plaintiff's superiors.

2. On 28 February, 1940, defendants had in the bank two notes, one for $1,500 and one for $2,250. The bank also held several hundred dollars of "throw-out" checks. On that date they executed and delivered to the bank their note for $4,700. The proceeds of this note were credited to their account. A few days later their account was charged with the outstanding items, including the two smaller notes or checks therefor, leaving a credit of $6.25.

3. On 26 May, 1940, plaintiff entered a credit of $3,000 on the $4,700 note. This credit is reflected on the books of the bank. No payment was in fact made. To "cover up" and conceal this false entry, plaintiff juggled and misapplied other assets of the bank. On 3 July, 1940, he entered another credit of $1,700. This was concealed on the books of the bank in the same manner by misappropriation of other assets. He then abstracted and embezzled the $4,700 note which, according to the records of the bank, had been, but was not in fact, paid.

4. On 25 August, 1940, plaintiff had in his possession this embezzled note. At that time the bank had paid and was holding "throw-out" checks of the defendants totaling $800 or more. Plaintiff demanded a note in renewal of these combined items. Thereupon, the note sued upon was executed, the consideration thereof being the embezzled note and the "throw-out" checks. The $4,700 note was canceled and delivered to defendants.

5. *Plaintiff admits that he furnished no part of the consideration of* the note and that it represents the consolidated items—the "throw-out" checks and the $4,700 note. He testified: "At the time the $5,976 note was given, I felt that Mr. Wright was not going to get a note discounted to take care of those items and I made the note payable to myself because I knew that I or the bonding company would have to reimburse the bank for the money I had let Mr. Wright have, I might say illegally."

So then plaintiff's case comes to this. Being in possession of a note unlawfully abstracted from the assets of the bank and having allowed defendants to overdraw their account, he demands and accepts a note in renewal of these items. He now sues on the note thus received to recover the amount thereof.

Will the courts aid him in his effort to convert the fruits of his embezzlement into cash and thus to reap the benefits of his unlawful conduct? In my opinion the answer should be no. Certainly this should be true as to so much of his demand as is represented by the $4,700 note. A somewhat different situation arises as to the checks.

It is argued that the note offered in evidence constituted *prima facie* evidence of the indebtedness and therefore the motion to dismiss as in

case of nonsuit cannot be sustained. But we must remember that we are considering the motion last made after plaintiff admitted he furnished no part of the consideration and had disclosed the real nature of the transaction.

When the note was offered in evidence, the signatures of defendants were not proven. Hence, the unidentified note constituted no evidence. But, passing that question, when the plaintiff went on the stand and testified, he disclosed the illegal nature of the consideration and rebutted the *prima facie* effect of the note itself as effectively as if he had then admitted that the note had been paid in full.

The court will not become a party to the enforcement of an illegal contract or a contract based on an unlawful consideration, 2 Pom. Eq. Jur. (5th), 117; 3 Pom. Eq. Jur. (5th), 645, or one which is against public policy, 3 Pom. Eq. Jur. (5th), 652, or opposed to good morals, *ibid.*, 714. The proposition is universal that no action arises, in equity or at law, from an illegal contract. *Ibid.*, 728; *Covington v. Threadgill,* 88 N. C., 186; *Fashion Co. v. Grant,* 165 N. C., 453.

"The Court will permit nothing to be done which will enable a party to collect from the other the fruits of his wrong. When he sues to recover, the law will not give him judgment." *Basket v. Moss,* 115 N. C., 448 (459); *Pierce v. Cobb,* 161 N. C., 300; *Tobacco Association v. Bland,* 187 N. C., 356; *Waggoner v. Publishing Co.,* 190 N. C., 829; *Merrell v. Stuart,* 220 N. C., 326.

The note in controversy is nothing more than a link in the chain of illegal transactions of plaintiff in misapplying and misusing the funds of the bank. Now that his misappropriations have been disclosed, he seeks to preserve his ill-gotten gains by recovering from defendants.

On his own testimony the whole transaction is steeped in fraud and illegality. The conclusion that he is now attempting to preserve the fruits of his unlawful conduct by recovering on a transaction which was illegal in its inception is inescapable. If he is permitted to do so, he will profit by his own wrong. In my opinion the court should decline to entertain his action, certainly to the extent the note represents the amount due or alleged to be due on the embezzled obligation of defendants.

But plaintiff contends that in any event he should be permitted to recover under the doctrine of subrogation; that his surety reimbursed the bank for the losses resulting from his defalcations; and that he has secured and is now repaying in monthly installments the amount thus expended by the surety company.

The uncontroverted evidence is to the effect that the bonding company made settlement on the basis of a statement of shortages furnished by the bank auditor, and this statement shows that the $4,700 note was not

included. In fact, plaintiff's shortage in large measure resulted from the misapplication of a $5,000 check. His misuse of assets of the bank is related to the $4,700 item in this manner: he took certain other assets and used them to acquire the obligation of defendants. In the settlement the surety paid the loss resulting from the original abstractions.

These facts do not invoke the application of the doctrine of subrogation even though the shortage arising out of the misappropriation of the note was a part of the settlement made by the surety company. The debt the surety company paid was the debt of the plaintiff. In reimbursing the surety company, plaintiff is paying his own debt and not the debt of the defendants. On his own admissions, he has no interest in the note sued upon and his payment to the surety company creates no right of subrogation.

It may be that the Wrights are indebted to the bank, or, perhaps, by subrogation, to the surety company. But the fact that neither the bank nor the surety company will sue is insufficient to vest in plaintiff the right to do so.

Even if we concede that in paying the surety company plaintiff is discharging an obligation on which defendants are primarily liable, he cannot resort to the equitable doctrine of subrogation. Whatever interest he has in the subject matter of this action, either direct or by subrogation, is traceable directly to his unlawful misuse and misapplication of funds of the bank which had been entrusted to his care. It is impossible to divorce the consideration of the note from its illegal inception. 12 Am. Jur., 646, sec. 152.

"He who comes into equity must come with clean hands" is a maxim so universally recognized and applied that no citation or authority is required.

"The Courts will not paddle in muddy water, but in such cases the parties are remitted to their own folly." *Waggoner v. Publishing Co., supra; Merrell v. Stuart, supra.*

Now I come to the "throw-out" checks which under the testimony of all parties form a part of the consideration of the note. The only dispute as to these items relates to the amount. But what became of them after the note of 25 August was executed remains, on this record, somewhat a mystery. They were not charged to the account of the defendants. It is not shown affirmatively that plaintiff paid the bank the sum expended in honoring them. They did not remain in the bank. But it does not appear that they were delivered either to plaintiff or to defendants.

When plaintiff honored these checks he became personally liable thereon. G. S., 53-89. If he in fact discharged this obligation in good faith out of his own funds and not by juggling accounts and entries, it

may seem to be a hardship to deny him a recovery. But he has elected to combine the legal with the illegal and immoral as the consideration of a new promise upon which he now seeks recovery. The court will not entertain the suit for the purpose of undertaking to separate the good from the bad. Instead it will leave him where his wrongful or illegal conduct has placed him.

As observed by *Lord Chief Justice Wilmot,* "No polluted hand shall touch the pure fountain of justice; and those so entering the temple will be expelled with the anathema *'Procul, O procul este, profani.'*" See *Rock v. Mathews,* 35 W. Va., 531.

"No principle is better settled than this: That if a single contract be made on several considerations, any one of which is illegal, then the whole promise is void, because every part thereof is induced and therefore affected by the illegal consideration." *Covington v. Threadgill,* 88 N. C., 186; *Wittkowsky v. Baruch,* 127 N. C., 313 (318).

For the reasons stated, I vote to reverse.

WINBORNE, J., concurs in dissent.

H. T. ATKINS, TRADING AND DOING BUSINESS AS HARPER'S LUMBER YARD, v. WHITE TRANSPORTATION COMPANY, INC.

(Filed 29 November, 1944.)

1. Trial § 22a: Appeal and Error § 40e—

When the defendant offers testimony, his exception to the court's refusal to grant his motion for judgment as of nonsuit, first entered at the conclusion of the evidence for the plaintiff, is waived and only the exception noted at the close of all the evidence may be urged and considered, and it is to be decided upon consideration of all the testimony. G. S., 1-183.

2. Same—

The rule that, upon motion for judgment as of nonsuit made at the conclusion of all the evidence, the decision is to be made upon a consideration of all the evidence, is subject to certain limitations: (a) The evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. The inferences contemplated are logical inferences reasonably sustained by the evidence in its light most favorable to plaintiff. (b) So much of the defendant's evidence as is favorable to plaintiff, or tends to explain or make clear that which has been offered by plaintiff, may be considered, but (c) That which tends to establish another and different state of facts

or which tends to contradict or impeach the evidence of plaintiff is to be disregarded.

3. **Negligence § 19b: Trial § 22c—**

A judgment of involuntary nonsuit on the grounds of contributory negligence will not be sustained or directed unless the evidence is so clear on that issue that no other conclusion seems to be permissible.

4. **Negligence §§ 5, 9: Automobiles § 9b—**

When one motor vehicle is trailing another, it is the duty of the driver of the rear vehicle to exercise ordinary care to avoid an accident by driving at a reasonable distance from the vehicle he is trailing and at a speed which will not be hazardous under the circumstances.

5. **Negligence § 19b: Trial § 22c: Automobiles § 18g—**

Where the driver of plaintiff's loaded truck, trailing defendants' bus at 25 to 30 miles per hour and within 20 feet, on a street 25 to 30 feet wide with an open space on the left of from 12 to 17 feet, saw the bus begin to stop and slammed on his brakes, as he was too near to turn aside or stop, hitting the bus with such force that the front of the truck was practically demolished and the bus was badly damaged, there was error in refusing defendants' motion for judgment as of nonsuit on the ground of contributory negligence.

STACY, C. J., concurring.

SEAWELL, J., dissenting.

SCHENCK, J., concurs in dissenting opinion.

DEVIN, J., dissents.

APPEAL by defendant from *Nettles, J.*, at April Civil Term, 1944, of BUNCOMBE. Civil action *ex delicto* to recover damages resulting from a bus-truck collision. Reversed.

On 11 October, 1943, defendant's agent was operating one of defendant's regular passenger buses on Haywood Road in West Asheville. Plaintiff's agent was operating a Chevrolet truck loaded with about 800 feet of green oak lumber just to the rear of the bus. The bus passed over the West Asheville Bridge and went about 75 feet beyond the Haywood Road-Roberts Street intersection. It stopped suddenly about 75 feet beyond the usual bus stop at Roberts Street to permit a passenger to alight. The truck collided with the rear of the bus. Considerable damage to both the bus and the truck resulted and several passengers on the bus were injured.

Plaintiff alleges negligence in the operation of the bus. Defendant denies negligence and pleads contributory negligence on the part of the truck driver. Appropriate issues were submitted to and answered by the jury in favor of the plaintiff. There was judgment on the verdict and defendant appealed.

Ellis C. Jones and Smathers & Meekins for plaintiff, appellee.
Harkins, Van Winkle & Walton for defendant, appellant.

BARNHILL, J. The primary question presented for decision is the correctness of the ruling of the court below denying defendant's motions to dismiss as in case of nonsuit.

It may be conceded that there was sufficient evidence of negligence on the part of the bus driver to repel the motion to dismiss. This narrows the inquiry to the issue of contributory negligence.

In considering a motion to dismiss as in case of nonsuit, decision is controlled by certain well-defined rules.

(1) When the defendant offers testimony, his exception first entered at the conclusion of the testimony for the plaintiff is waived and only the exception noted at the close of all the evidence may be urged or considered. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598.

(2) When, as here, the question arises on motion made at the conclusion of all the evidence, it is to be decided upon consideration of all the testimony. G. S., 1-183. This rule, however, is subject to certain limitations: (a) The evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601; *White v. R. R.,* 216 N. C., 79, 3 S. E. (2d), 310; *Coltrain v. R. R.,* 216 N. C., 263, 4 S. E. (2d), 853; *Blalock v. Whisnant,* 216 N. C., 417, 5 S. E. (2d), 130; *Barnes v. Wilson,* 217 N. C., 190, 7 S. E. (2d), 359; *Coach Co. v. Lee,* 218 N. C., 320, 11 S. E. (2d), 341; *Plumidies v. Smith,* 222 N. C., 326, 22 S. E. (2d), 713. In this connection it may be said that it is presumed reasonable men draw reasonable conclusions. So that the inferences contemplated are logical inferences reasonably sustained by the evidence when considered in the light most favorable to the plaintiff. (b) So much of the defendant's evidence as is favorable to the plaintiff or tends to explain or make clear that which has been offered by the plaintiff may be considered, but (c) That which tends to establish another and a different state of facts or which tends to contradict or impeach the evidence offered by plaintiff is to be disregarded. Otherwise, consideration would not be in the light most favorable to plaintiff. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *Harrison v. R. R., supra; Hare v. Weil,* 213 N. C., 484, 196 S. E., 869; *Sellars v. Bank,* 214 N. C., 300, 199 S. E., 266; *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421; *Funeral Home v. Insurance Co.,* 216 N. C., 562, 5 S. E. (2d), 820; *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137.

(3) A judgment of involuntary nonsuit on the grounds of contributory negligence will not be sustained or directed unless the evidence is so clear on that issue that no other conclusion seems to be permissible. *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 739; *Manheim v. Taxi Corp.,* 214 N. C., 689, 200 S. E., 382; *Godwin v. R. R., supra; Gregory v. Insurance Co.,* 223 N. C., 124. For authorities other than those cited reference may be had to the annotations following G. S., 1-183.

Giving the plaintiff the full benefit of the rules just stated, we are of the opinion the evidence is such that the motion for judgment as in case of nonsuit should have been sustained.

Plaintiff's driver was operating a loaded truck within 20 feet of the bus ahead. The street was 25 or 30 feet wide. There was an open space of 12 to 17 feet to the left of the bus, and there was no oncoming traffic. The loaded truck traveling at 20 or 25 m.p.h. could not be stopped in less than 25 or 30 feet, a distance greater than that at which the truck was trailing the bus. *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608. Plaintiff's driver saw the bus begin to stop and as it began to stop, he applied his brakes with full force. Even so, he was so near the bus and was going at such a rate of speed that he could neither turn to the left and use the available space nor stop before colliding with the bus. Instead, he struck the bus with such force that he knocked it 24 or 25 feet ahead. (Plaintiff's driver testified that the distance he knocked it was stepped off by another and defendant offered a witness who testified in explanation that it "stepped off" 24 or 25 feet.) The impact was such that the front portion of the truck was practically demolished and the bus was badly damaged, the plaintiff estimating the damage to the truck alone to be $700. After "slamming on his brakes" in attempting to stop when he saw the bus was in the act of so doing, he traveled the intervening 20 feet plus the distance the truck knocked the bus, less about 4 feet. These facts speak louder than words. *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88.

It is true plaintiff's agent testified he was traveling 20 m.p.h. 20 feet behind the bus but neither speed nor distance was measured. On this record they are matters of opinion. In any event, this fact is apparent: when the emergency caused by the sudden stopping of the bus arose, he could neither turn to the left nor stop in time to avoid a collision.

It would seem, therefore, the conclusion that plaintiff's driver was operating the truck so near to the bus and at such a rate of speed as would and did create a hazard it was his duty, in the exercise of ordinary care, to guard against and avoid is inescapable. Thus the hazard he helped to create produced the damage for which plaintiff seeks compensation. *Tarrant v. Bottling Co.,* 221 N. C., 390, 20 S. E. (2d), 565; *Sibbitt v. Transit Co.,* 220 N. C., 702, 18 S. E. (2d), 120; *Beck v. Hooks,*

supra; Godwin v. R. R., supra; Absher v. Raleigh, 211 N. C., 567, 190 S. E., 897; *Wright v. Grocery Co.,* 210 N. C., 462, 187 S. E., 564; *Austin v. Overton,* 222 N. C., 89, 21 S. E. (2d), 887.

The judgment below is

Reversed.

STACY, C. J., concurring: The force with which the plaintiff's truck ran into the rear of the bus, knocked it forward a distance of 24 or 25 feet, threw a passenger to the floor of the bus with consequent injury, and caused much damage to both vehicles, establishes beyond peradventure the negligence of the driver of the truck as a contributing cause of the collision. *Austin v. Overton,* 222 N. C., 89, 21 S. E. (2d), 887; *Pierce v. Seymour,* 222 N. C., 42, 21 S. E. (2d), 884; *Sibbit v. Transit Co.,* 220 N. C., 702, 18 S. E. (2d), 203; *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488.

Primarily, the difference of opinion here derives from this question: When and to what extent may the defendant's evidence be considered on motion to nonsuit? G. S., 1-183. Cases may be found which seem to support a complete negative, "At no time and to no extent." But the statement is too broad. "No generalization is true, not even this one."

The authoritative decisions answer:

1. When and to the extent it is favorable to the plaintiff. *Wall v. Bain,* 222 N. C., 375, 23 S. E. (2d), 330; *Tarrant v. Bottling Co.,* 221 N. C., 390, 20 S. E. (2d), 565; *Means v. R. R.,* 126 N. C., 424, 35 S. E., 813.

2. When not in conflict with the plaintiff's evidence, it may be used to explain or to make clear that which has been offered by the plaintiff. *Gregory v. Ins. Co.,* 223 N. C., 124, 25 S. E. (2d), 398; *Jeffries v. Powell,* 221 N. C., 415, 20 S. E. (2d), 561; *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769.

3. When taken in connection with plaintiff's evidence it makes manifest natural or physical circumstances which bar recovery. *Austin v. Overton, supra; Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88.

The present case falls in this category. The undisputed physical facts tell their own story. They explain and make clear the plaintiff's evidence. There can be no debate over a fact. We may contend over our ideas or opinions concerning a fact, but this would have no bearing on the fact. It would still be a fact. Natural evidence speaks its own language and is worthy of all acceptation.

4. When taken in connection with plaintiff's evidence it puts an end to the case as a matter of law. *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421; *Hare v. Weil,* 213 N. C., 484, 196 S. E., 869.

Take a case in ejectment where the plaintiff's right to recover depends on the death of an ancestor, *e.g.*, the plaintiff's brother. Plaintiff offers evidence that his brother left the community more than seven years ago and has not been heard of by those who naturally might expect to hear. *Emory v. Credle,* 185 N. C., 2, 115 S. E., 892. The plaintiff makes out a *prima facie* case and rests. The defendant then produces the plaintiff's brother who explains his absence. This would put an end to the case. *Springer v. Shavender,* 118 N. C., 33, 23 S. E., 976; 16 Am. Jur., 21.

5. The statute provides that the determination of the second motion to dismiss "after all the evidence on both sides is in" shall be "upon consideration of all the evidence." *Blackman v. Woodmen,* 184 N. C., 75, 113 S. E., 565; *S. v. Fulcher, supra.*

Here, the plaintiff's driver testifies: "I don't know how far I knocked it (the bus) but I know I hit it. The patrolman stepped off the distance, . . . 15 to 20 minutes after the time of the accident." Plaintiff's next witness, Tom Parker, says: "Mr. Duncan, Mr. Atkins and myself stepped off the distance." The defendant then makes clear the plaintiff's evidence by giving the measurements 24 or 25 feet. There is no denial of the essential facts. The attendant damage and injury, in the light of plaintiff's own evidence, leave no doubt as to what took place or the results of the collision.

A motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and to support a recovery. The question thus presented by demurrer, whether interposed at the close of plaintiff's evidence, or upon consideration of all the evidence, is to be decided by the court as a matter of law, and not by the jury as an issue of fact. Whether the evidence is such as to carry the case to the jury is always for the court to determine. A demurrer raises only questions of law. *Godwin v. R. R., supra; Ward v. Smith,* 223 N. C., 141, 25 S. E. (2d), 463.

DEVIN, J., dissents.

SEAWELL, J., dissenting: It is conceded in the main opinion that the driver of defendant's bus was proximately negligent. No other conclusion could be reached upon the evidence that he stopped the bus suddenly to let off a passenger almost midway between his regular stops, without knowing or attempting to find out whether or not he was followed by any other motor vehicle. The main opinion, however, finds the driver of the plaintiff's lumber truck guilty of contributory negligence for two reasons: (1) Because *the evidence of the defendant* is taken to show that the lumber truck knocked the passenger bus forward about 24 feet, which is held to be conclusive evidence that the truck was going at a

dangerous and unsafe rate of travel; and (2), because the driver of the truck could not stop his car by the application of his brakes in the 20 feet which he testified separated his truck from the passenger bus.

1. The reason first assigned, as far as I am able to discover, tops the record for going into the defendant's evidence and not only considering it, but balancing it against the contradictory evidence of the plaintiff upon a demurrer to the evidence.

The plaintiff's driver stated positively that he was trailing the bus at a distance of at least 20 feet, and was traveling not more than 20 miles per hour. There is nothing in the plaintiff's evidence to the effect that the bus was knocked forward 24 or 25 feet by the collision. This does occur, however, in defendant's evidence in the testimony of the driver of the passenger bus, R., p 30: "The bus was knocked about 25 feet—about the length of it." And in the testimony of W. T. Duncan, supervisor of buses for the defendant, who arrived after the collision, we find: "I observed the street *and there was dirt on the street* behind the truck. I saw some dirt at the back of the truck. This dirt was about 24 feet behind where the bus was standing." R., p. 33. That is all.

Upon this evidence the main opinion takes for true the statement of defendant's witnesses, balances it against that of the plaintiff, and discounts the plaintiff's driver's statement that he was traveling only 20 miles an hour by characterizing it as opinion evidence.

The plaintiff's evidence is not here confronted by any admitted or undisputed or explanatory fact; it is not confronted by an inescapable physical fact which should dominate the finding; indeed, it is not confronted by any fact at all—only by a supposed or assumed or inferred fact, gotten from an examination of the defendant's evidence and given credence and weight by the same comparative processes that we have ordinarily considered the exclusive function of the jury.

I can see no occasion for setting up, as categories, a summary of recent instances in which the evidence of the defendant has been called upon to aid his demurrer. They establish no distinguishing or limiting principle, and make no promise that other categories will not be provided as occasion arises. They stem from the same fundamental error—the assumption by the court of the power *to pass upon the credibility of defendant's evidence and accept it as true* and *to pass upon its weight and significance and give it effect.* Once we have discarded those restrictions on our powers, emanating as they do from the Constitution and the statute respecting appeals to this Court, and which have been until recently sacredly observed, there is no limit to which the Court may not go. However catalogued, these cases merely must be considered in terms of the absorption by the Court of the jury function.

2. Again, the plaintiff's evidence, taken in the light most favorable to the plaintiff, tends to show that the driver of the truck was proceeding along one of the principal streets of the city of Asheville, not exceeding 20 miles per hour; that the passenger bus immediately in front of him suddenly stopped without warning; that he "slammed on his brakes" as quickly as he could, turning to the left, but could not wholly avoid the collision. He is held here for contributory negligence *per se* upon the ground that he ought to have trailed the passenger bus at such a distance as would enable him to apply his brakes and stop before the collision.

At one time the law fixed the minimum distance at which one motor vehicle might follow another. The rule was impractical and was repealed. The distance to be observed is now merely a matter of ordinary care and prudence. *Smith v. Coach Co., infra.* A reference to the motor vehicle law, G. S., 20-124, will show the requirements with regard to brakes and stoppage of cars. The standard set up in the main opinion is wholly inconsistent with any possible application of that section to the exigencies of traffic. If the rule were adopted, it would be impractical for observance in lanes of traffic through Asheville or any other sizable city in the State, over routes which trucks are permitted to travel and at speeds well within the law.

Moreover, this rule would require the driver of the following motor vehicle to completely anticipate the negligence of the driver of the leading car—to be so circumspect as to avoid it. The rule applied to him is not that of the ordinarily prudent man; it makes him an insurer against a negligence which no rule of ordinary care requires him to anticipate. It gives indemnity to a kind of negligence which figures high in the statistics of urban casualties.

In a case of this kind, hardly any truth which we seek is so obvious or lies so near the surface. Almost invariably, it is caught in a web of circumstances, which must be untangled by the separation and correlation of many factors. *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637. Upon this point, I do not believe that this Court is justified in taking a case away from the jury where the factors of decision are so numerous as to require estimates, comparisons, and co-ordination, whether of time, distance, or other accompanying circumstances, in order to reach the result. As to these, it is contemplated that reasonable minds may come to different conclusions. That is why such matters are left to the unanimous verdict of twelve men rather than the decision of a divided Court. The reasoning and result reached in *Smith v. Coach Co.,* 214 N. C., 314, 199 S. E., 90, and *Holland v. Strader,* 216 N. C., 436, 5 S. E. (2d), 311, should be determinative of the present case.

SCHENCK, J., concurs in this opinion.

DAVID WARD v. ATLANTIC COAST LINE RAILROAD, A CORPORATION.

(Filed 29 November, 1944.)

1. Appeal and Error § 39d—

Where there is objection and exception to a question asked a witness, the record failing to show that the witness answered the question, error, if any, is harmless.

2. Evidence §§ 15, 27—

The weight of the evidence is for the jury, while its competency is for the court.

3. Trial §§ 29b, 33—

Any substantial errors made by the court, in the statement of the evidence or in the statement of the contentions of the parties, must be called to the court's attention at the time they are made, in order to give an opportunity for correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal.

4. Trial § 29a—

While a court's charge may be subject to some criticism, it is sufficient in substance, when read contextually, if it covers the subject and presents the issues understandably in accordance with the settled principles applicable to the case.

5. Appeal and Error § 39e—

There is nothing objectionable in a charge to the jury "that while this is a case of a colored person against a railroad, each is entitled to the same rights under our law and to a fair and impartial trial."

APPEAL by plaintiff from *Harris, J.*, at February Term, 1944, of COLUMBUS.

Civil action for recovery of damages allegedly resulting from fire set out through actionable negligence of defendant.

Plaintiff alleges in his complaint in summary these facts:

I. That on 16 March, 1943, a certain thirty-acre tract of land in Columbus County, North Carolina, of which he was then the owner, was burned over by a fire which escaped from one of defendant's locomotives operated on its line of railroad between Chadbourn and Fair Bluff in said county, and which ignited the growth on its right of way and immediately burned from said right of way and spread across the said land, seriously injuring and damaging the land and timber to the extent of six hundred dollars.

II. That the said fire and the damages therefrom to the said land and timber of plaintiff were proximately caused by the negligence of defendant in that: (a) defendant allowed its said right of way alongside of and

up to plaintiff's said land to become foul with the inflammable material thereon—so foul that when sparks from defendant's train fell thereon fire immediately sprang up and spread to plaintiff's land, and (b) the defendant failed to exercise due care (1) in the equipment of its said locomotive by failing to provide such equipment and spark arresters thereon as to prevent the falling of sparks therefrom in such quantities as to cause the said fire, (2) in the operation of its said trains so as to prevent the falling of sparks and ignited particles from its said engines on its said right of way, when it well knew, or ought to have known, of the foul condition of its right of way, and that said sparks would cause the fire to spring up and injure the property of the plaintiff, and (3) to put out said fire which had resulted from its failure to exercise due care in the operation of its trains and in the keeping of its said right of way.

Defendant, in answer filed, denies all the material allegations of the complaint.

In the trial court plaintiff offered evidence tending to show: (1) That he bought the land in question in August, 1920, and has since been in the open, notorious and adverse possession of it. (2) That on 16 March, 1943, a fire burned over all eighteen acres of woodland on said tract of land, greatly damaging the trees and undergrowth, and thereby deteriorating the value of the land to extent of $500 to $600; that the fire had burned west from the west outside of a railroad ditch, the dirt from which is thrown over toward plaintiff's land, and did not burn between the ditch and the railroad ties; that a kind of long freight train on defendant's track from Chadbourn going toward Tabor came along about two o'clock in the afternoon and a fire sprang up right after the train passed, "just as it passed," and burned through the woods, across plaintiff's land; that the fire started on plaintiff's woodland on west side of, and not far from the ditch; and that "a railroad man had burned off the railroad right of way from the ditch back to the railroad."

Then defendant offered evidence tending to show: That the engine pulling the train in question, properly operated by experienced engineer on 16 March, 1943, was properly equipped with a spark arrester in general use by railroads (Exception), and in good condition. The boiler inspector testified, without objection, that upon inspection on 11 March and again on 13 April, 1943, the spark arrester, composed of three parts, a diaphragm, table sheet and netting in front of these two to stop sparks, was such as is accepted and in general use as railroad equipment for boilers, and on former date it was in good condition, as was the ash pan, and that on latter date both the spark arrester and the ash pan were in good condition, and no repairs were made; and then explained the physics of the mechanical draft structure, and the effect of approved spark arrester upon sparks drawn against it.

Plaintiff, in rebuttal, offered a witness who testified that when train passed a point about four hundred yards before getting even with plaintiff's land, "there was fire flying out of the smokestack and coals of fire and sparks and some of them were lighting over in the field beside the railroad"; that she did not see the train stop; and that when she got up a little further and looked around, she saw the fire burning on plaintiff's land.

Then defendant offered testimony of witnesses who in response to the question, "Have you an opinion satisfactory to yourself as to the difference in value of that land before the fire and afterward?" gave opinions respectively of $5.00 per acre. Plaintiff objected to both questions and answers and moved to strike out the answer of one of the witnesses.

Upon such evidence and under charge of the court the case was submitted to the jury upon these three issues:

"Is the plaintiff the owner and in possession of the lands described in the fourth paragraph of the complaint?

"Was the plaintiff's said land injured by the negligence of the defendant, as set out in the complaint?

"What damages is plaintiff entitled to recover."

They were answered by the jury as follows: The first "Yes," the second "No," and the third, no answer.

From judgment for defendant on verdict rendered, plaintiff appeals to Supreme Court and assigns error.

Varser, McIntyre & Henry for plaintiff, appellant.
L. J. Poisson and E. K. Proctor for defendant, appellee.

WINBORNE, J. Careful consideration of the fifty-eight assignments of error treated in the brief of appellant fails to show error for which the judgment below should be disturbed.

1. The first assignment, exception one, relates to action of the court in overruling objection to a question asked the foreman of boilermakers of defendant as to what the engineer's report, which the witness did not make, showed. The record fails to show that the witness answered the question. Hence, any error in permitting the question is harmless.

2. The second and third assignments, covering exceptions 2 and 3, relate to testimony of the engineer as witness of defendant, to the effect that the engine pulling train No. 521 on day in question was equipped with a spark arrester in general use—of the type in general use by railroads. The grounds for objection are (1) that the witness was permitted to so testify without any basis for his knowledge as to other railroads, and (2) that the witness did not recollect what kind of train the defendant operated by the plaintiff's land. As to the first, the answer

of the witness tends to show knowledge. And while in the second the witness showed some lack of recollection as indicated, later in his testimony it appears that from the record he turned in on 17 March the number of the train he drove on 16 March was No. 1035. Thus it is seen that the objections go more to the weight of the evidence, which is for the jury, than to the competency of it, which is a question of law for the court.

3. The fourth and fifth assignments, covering exceptions 4, 5 and 6, relate to admission of evidence bearing upon the issue of damages. Since the jury answered the issue as to liability of the defendant in the negative, and therefore the issue as to damages was not answered, error, if any, in admitting evidence in mitigation of damages is harmless. *Allred v. Kirkman,* 160 N. C., 392, 76 S. E., 244. See also *Walker v. Walker,* 151 N. C., 164, 65 S. E., 923; and *Bird v. Lumber Co.,* 163 N. C., 162, 79 S. E., 448, where similar principles are applied.

4. Assignments 6 to 36, both inclusive, covering exceptions 7 to 37, both inclusive, are directed to the charge of the court in stating the evidence and in stating what is contended by the parties on their pleadings and on the evidence introduced. In this connection the record does not show that the attention of the court was called at the time to any error in this respect, or that any objection thereto was made at the time. It is a settled rule of practice in this State that "any substantial errors made by the court in the statement of the evidence or in the statement of the contentions of the parties, must be called to the attention of the court at the time they are made, in order to give an opportunity to make correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal," headnote 7 in *Mfg. Co. v. R. R.,* 222 N. C., 330, 23 S. E. (2d), 32.

Moreover, the record shows that the court, after stating various contentions of the parties, told the jury that if the court had left out any contention argued by counsel either for plaintiff or for defendant, or if other contentions arise in the minds of the jury from the evidence, the jury should consider same and give them the same consideration as those called to their attention by the court.

5. The next 13 assignments, Nos. 37 to 49, both inclusive, covering exceptions 38 to 50, both inclusive, are to the charge upon the law paragraph by paragraph as given by the court bearing on the second issue, that is, the issue as to negligence of defendant. Moreover, assignments 51 to 56, both inclusive, covering exceptions 52 to 57, both inclusive, are to the failure of the court to charge in specified aspects bearing on the second issue. While the charge as so given may be subject to some criticism, it is sufficient in substance when read contextually to cover the subject and to present the issue understandably, in accordance with

well settled principles applicable to such cases. See *Williams v. R. R.*, 140 N. C., 623, 53 S. E., 448; *Currie v. R. R.*, 156 N. C., 419, 72 S. E., 488; *Mfg. Co. v. R. R., supra,* and numerous other cases.

6. Assignment No. 50, covering exception 51, relates to that portion of the charge in which the court stated to the jury that while this is the case of a colored person against a railroad, each is entitled to the same rights under our law and to a fair and impartial trial—that if the plaintiff be entitled to recover against the railroad he ought to recover, and if he is not entitled to recover in law and in fact, he ought not to recover. In this we see nothing objectionable.

7. Assignments 57 and 58, covering exceptions 58 and 59, are formal.

In the judgment below there is

No error.

MOORE COUNTY v. E. J. BURNS, MRS. EMMA LEE BURNS AND H. F. BURNS.

(Filed 29 November, 1944.)

1. Taxation § 40b: Pleadings § 16a—

In a suit by a county against three defendants to foreclose a tax lien (G. S., 105-391) on five tracts of land, title to tracts 1, 2, and 3, being in E. L. for life with remainder to E. J., title to tract 4 being in E. L. in fee and the other defendants never having had any interest therein, and title to tract 5 being in E. J., and the other defendants never having had any interest therein, the joinder of the third defendant, H. F., is mere surplusage and not fatal, as he is not a necessary party; but a joint demurrer for misjoinder of parties should have been sustained, and there can be no division of the action under G. S., 1-132.

2. Pleadings § 16a—

If any one of several defendants is a necessary or proper party as to each tract of land, in a suit to foreclose a tax lien on several tracts, the complaint is not subject to attack by joint demurrer.

APPEAL by defendants from *Olive, Special Judge,* at May Term, 1944, of MOORE. Reversed.

This is an action to foreclose tax liens on five separate tracts of land under G. S., 105-391, heard on demurrer.

Tract 1. R. L. Burns and wife, Emma Lee Burns, owned Tract 1—the home place—as tenants by entirety, and she, upon his death, some time prior to 1931, became sole owner in fee, by survivorship.

Tracts 2, 3, and 4 were owned by R. L. Burns and were devised to defendant Emma Lee Burns in fee.

Tract 5, known as the Ratcliffe tract, consists of two lots of the West Carthage subdivision. It was conveyed to defendant E. J. Burns by a third party and he now owns same in fee.

Tracts 1, 2, and 3 also were conveyed to E. J. Burns and he now owns same subject to the life estate reserved by defendant Emma Lee Burns.

Tracts 1, 2, 3, and 4 were all listed for taxation from 1931 to 1941, both inclusive, in the name of R. L. Burns Estate. Since that time Tracts 1, 2, and 3 and Tract 5 have been listed by the defendant E. J. Burns, and Tract 4 by defendant Emma Lee Burns.

So then it is made to appear on the face of the complaint that (1) Mrs. Burns is the owner of Tract 4 and the defendant E. J. Burns does not now have and has never possessed any interest therein, and (2) Tract 5 is the property of the defendant E. J. Burns and the defendant Emma Lee Burns does not now have and has never possessed any interest therein.

While it is alleged that defendant H. F. Burns has "some interest" in the property, the specific allegations fail to connect him with the title of any one of the tracts.

Defendants jointly demurred to the complaint for that there is a misjoinder of parties and causes of action. The demurrer was overruled and defendants appealed.

M. G. Boyette for plaintiff, appellee.
H. F. Seawell, Jr., for defendant, appellants.

BARNHILL, J. The demurrer must be overruled if the complaint is good as to any one of the demurrants. That is, if any one of defendants is a necessary or proper party as to each tract of land, the complaint is not subject to attack by joint demurrer. *Winders v. Southerland,* 174 N. C., 235, 93 S. E., 726.

The joinder of H. F. Burns as a party defendant is not fatal. He is not a necessary party as to any one of the tracts. His joinder is mere surplusage and is not ground for demurrer by other defendants. *Sullivan v. Field,* 118 N. C., 358; *Abbott v. Hancock,* 123 N. C., 99; *Shuford v. Yarborough,* 197 N. C., 150, 147 S. E., 824; *Furniture Co. v. R. R.,* 195 N. C., 636, 143 S. E., 242.

The plaintiff contends that under section 1719, chapter 310, Public Laws 1939, now G. S., 105-391, all defendants other than H. F. Burns are necessary or at least proper parties defendant.

It may be conceded that as to Tracts 1, 2, and 3, this contention is sound. Mrs. Burns owned these tracts when a part of the tax in arrears was assessed and even now she owns a life estate therein. E. J. Burns is now the owner subject to the life estate of Mrs. Burns. Under G. S.,

105-391, both are proper parties to an action to foreclose tax liens thereon.

But Mrs. Burns owns Tract 4. E. J. Burns does not now have and never possessed any interest therein. He is neither a necessary nor a proper party to the action in so far as it relates to this tract. The same condition in reverse applies to Tract 5. Mrs. Burns has never had any interest therein. Thus the action to foreclose lien on Tract 4 does not affect E. J. Burns and the action to foreclose lien on Tract 5 does not affect Mrs. Burns. It is apparent then there is a misjoinder of actions and of parties.

There can be no division of the action under G. S., 1-132. The whole must fall. *Beam v. Wright,* 222 N. C., 174, 22 S. E. (2d), 270; *Wingler v. Miller,* 221 N. C., 137, 19 S. E. (2d), 247; *Frederick v. Ins. Co.,* 221 N. C., 409, 20 S. E. (2d), 372; *Burleson v. Burleson,* 217 N. C., 336, 7 S. E. (2d), 706; *Vollers Co. v. Todd,* 212 N. C., 677, 194 S. E., 84; *Smith v. Land Bank,* 213 N. C., 343, 196 S. E., 481; *Lucas v. Bank,* 206 N. C., 909, 174 S. E., 301; *Ellis v. Brown,* 217 N. C., 787, 9 S. E. (2d), 467; *Sasser v. Bullard,* 199 N. C., 562, 155 S. E., 248; *Shuford v. Yarborough, supra; Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Rose v. Warehouse Co.,* 182 N. C., 107, 108 S. E., 389; *Taylor v. Ins. Co.,* 182 N. C., 120, 108 S. E., 502; *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664.

As to Tract 4, E. J. Burns is not the owner or a lienholder or listing taxpayer. Nor would he be entitled to be made a party to a court action to foreclose a mortgage thereon. As to Tract 5, the same is true in respect to Mrs. Burns. Hence the complaint is not saved by the provisions of G. S., 105-391.

There was error in the order overruling the demurrer.

Reversed.

CHESTER H. PRINCE AND WIFE, MARJORIE C. PRINCE, v. J. R. BARNES AND WIFE, SADIE M. BARNES.

(Filed 29 November, 1944.)

1. Parent and Child § 1—

The law presumes that children may be born to a married couple, as long as that relation continues to exist, it matters not how old either or both may be.

2. Estates § 9a: Wills § 33c—

Where there is a devise to one for life and then to his children, such devisee takes only a life estate, and his deed will not estop the remaindermen. Upon the birth of children the fee vests in such children.

APPEAL by plaintiffs from *Bone, J.*, at October Term, 1944, of WAYNE.

This was a controversy without action (G. S., 1-250 *et seq.*) wherein judgment was rendered for the defendants and plaintiffs appealed.

John R. Hood for plaintiffs, appellants.
George E. Hood for defendants, appellees.

SCHENCK, J. The plaintiffs contracted to sell and convey to the defendants that certain lot of land described as follows: "Beginning at a cedar post on the south side of the public road, the northeast corner of Lot No. 5 and runs thence with said road S. 54 E. 646 feet to an iron stake, corner of Lot No. 2, second tract, then with No. 2, S. 34½ W. 1850 feet to an iron stake in the Edwards line; then with Edwards' line No. 83 W. 720 feet to the corner of No. 5 tract; then with No. 5, 34½ E. 2195 feet to the beginning, containing 30 acres," being Lot No. 6 in the division of the lands of the late E. C. Prince recorded in Divisions and Dowers Book No. 3, page 141, in the office of the clerk of Wayne County, and tendered the defendants a deed therefor properly executed, but the defendants declined to accept the same contending that the plaintiffs could not convey a good and indefeasible title to the property. The plaintiffs derive their title to the property through the will of the late E. C. Prince, and this controversy hinges upon the construction of that will.

The material provision of said will reads: "I hereby leave everything I possess to my mother Mrs. D. J. Prince for her life time, and at her death I leave everything I have to my Brothers and Sisters, and my nephew Rufus Prince Satterfield for their life and then to their children."

According to the facts agreed at the time of the death of the aforesaid E. C. Prince, he left surviving Mrs. D. J. Prince, his mother, two sisters, Frances Pate and Naomi P. Early, three brothers, David M. Prince, A. C. Prince and Chester H. Prince, and the nephew, Rufus Prince Satterfield; that Mrs. D. J. Prince, Frances Pate, David M. Prince, A. C. Prince and Rufus Prince Satterfield are dead; that each of the aforesaid sister, brothers and the nephew who have died, left children; that the aforesaid Naomi Early, a living sister, has children; that the plaintiffs, Chester H. Prince, age 62, and his wife, age 55, have no children.

His Honor was of the opinion that upon the facts agreed the plaintiffs could not convey a good and indefeasible title to the property involved and rendered judgment against the plaintiffs. In this judgment we concur.

While it is true, according to the facts agreed, that no children have been born to the plaintiffs, and it may be thought that in all probability none will be born to them, since the male plaintiff is 62 years of age and the *feme* plaintiff is 55 years of age, "this is a prophecy which the law values but little. The law presumes that children may be born to a married couple as long as that relation continues to exist, it matters not how old either or both may be." *Shuford v. Brady,* 169 N. C., 224, 85 S. E., 303. In case children are born to the plaintiffs then the fee is devised to said children at the expiration of the life estate of their parents. Upon such contingency happening the fee would not vest in the plaintiffs.

It is thus made plain that the plaintiffs did not take a fee simple title to the property involved under the will of E. C. Prince, but only a life estate therein. Therefore, the deed executed by the plaintiffs would not estop the remainderman from asserting title to said land after the death of the life tenants.

Upon the record we are of the opinion that the plaintiffs cannot make a good and indefeasible title to the property contracted to be sold to the defendants, and, therefore, the judgment of the Superior Court is

Affirmed.

STATE v. JAMES McLEAN, ALIAS JACK McLEAN.

(Filed 29 November, 1944.)

Burglary and Unlawful Breakings §§ 1b, 10—

In a prosecution for burglary in the first degree, the jury has the right to render a verdict of guilty of burglary in the second degree, even though the jury may find facts sufficient to constitute first degree burglary, and failure of the judge to so instruct the jury is reversible error.

APPEAL by defendant from *Phillips, J.,* at August Term, 1944, of SCOTLAND.

Criminal prosecution tried upon indictment charging burglary in the first degree.

Verdict: Guilty of burglary in the first degree. Judgment: Death by asphyxiation. Defendant appeals, assigning errors.

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

W. H. Cox and Varser, McIntyre & Henry for defendant.

DENNY, J. The defendant excepts and assigns as error the following portion of his Honor's charge: "You may render one of three verdicts—first, guilty of burglary in the first degree as charged; second, guilty of a non-burglarious breaking and entry of the dwelling house of another as charged; third, not guilty."

The defendant contends that the trial judge committed error in failing to instruct the jury that they might return a verdict of guilty of burglary in the second degree if they deemed it proper so to do, even though the facts found by them be sufficient to constitute burglary in the first degree as defined by statute. The defendant is relying upon the provisions of G. S., 15-171, formerly C. S., 4641, as amended by chapter 7, Public Laws 1941, which read as follows: "When the crime charged in the bill of indictment is burglary in the first degree the jury, upon the finding of facts sufficient to constitute burglary in the first degree as defined by statute, may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. The judge in his charge shall so instruct the jury."

The above statute was amended after the decision in the case of *S. v. Johnson,* 218 N. C., 604, 12 S. E. (2d), 278, and we think it gives to the jury the right to render a verdict of guilty of burglary in the second degree when the crime charged in the bill of indictment is burglary in the first degree, even though the jury may find facts sufficient to constitute burglary in the first degree as defined by statute. Therefore, in such cases a defendant is entitled as a matter of right, to have the jury instructed that it may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. The exception is well taken and must be sustained.

We deem it unnecessary to discuss the other assignments of error, since they may not arise upon another trial.

For the reason stated, there must be a

New trial.

MRS. VERNA L. WILSON, AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR EVANS WILSON, DECEASED, v. SHIRLEY L. MASSAGEE AND SINCLAIR REFINING COMPANY (ORIGINAL DEFENDANTS) AND SHELL OIL COMPANY, A CORPORATION, AND SOUTHERN RAILWAY COMPANY, A CORPORATION (ADDITIONAL DEFENDANTS).

(Filed 13 December, 1944.)

1. Death § 3—

The right of action for wrongful death, given under G. S., 28-173, did not exist at common law and rests entirely on the statute.

2. Master and Servant §§ 25, 31: Death § 3—

Before the Federal Employers' Liability Act was passed by Congress, the liability of common carriers by railroad, engaged in interstate commerce, for injuries to, or death of their employees while engaged in such commerce, was governed by the laws of the several states; but this Act took possession of the field of liability in such cases and superseded all state laws upon the subject.

3. Torts § 6—

The intent and purpose of G. S., 1-240, is to permit a defendant, who has been sued in a tort action, to bring into the action for the purpose of enforcing contribution, any joint tort-feasor against whom the plaintiff could have originally brought suit in the same action.

4. Master and Servant §§ 25, 31: Torts § 6—

Where plaintiff brings an action against an individual and an oil company, alleging the wrongful death (G. S., 28-173) of plaintiff's intestate, who at the time of his death was operating a railroad locomotive engaged in interstate commerce, by the negligence of the original defendants, who bring into the action the said railroad, an interstate common carrier, seeking contribution from such railroad as a joint tort-feasor under G. S., 1-240, there is no common liability to suit, between the original defendants and such railroad, which is a condition precedent to contribution, and motion of such railroad, on special appearance, to strike out the order making it a party defendant was properly allowed.

APPEAL by original defendants from *Bobbitt, J.,* at 17 October, 1944, Term of MECKLENBURG.

Civil action for recovery of damages for alleged wrongful death, G. S., 28-173, formerly C. S., 160, to which action Shell Oil Company, a corporation, and Southern Railway Company, a corporation, were made parties defendant, without notice, upon motion of original defendants Shirley L. Massagee and Sinclair Refining Company, under G. S., 1-240, formerly C. S., 618, as amended by Public Laws 1929, chapter 68, and on their alleged cross action (1) for exoneration for that the injury of which plaintiff complains was directly and proximately caused by the joint and concurrent negligence of Shell Oil Company and Southern Railway Company, and (2) for contribution for that if original defendants be held actionably negligent, the joint and concurrent negligence of Shell Oil Company and Southern Railway Company was also a proximate cause of the injury resulting in death of intestate of plaintiff, thereby entitling original defendants to invoke against Shell Oil Company and Southern Railway Company the provisions of C. S., 618, amended as above stated, now G. S., 1-240, heard upon motion of Southern Railway Company, on special appearance, to strike out the order making it a party defendant as above stated, and to dismiss the action as to it.

The complaint of plaintiff alleges, in part, and summarily stated, that the injury to and death of plaintiff's intestate proximately resulted from the joint and concurrent negligence of the original defendants, as specified, when on 29 January, 1944, at a place known as Friendship, North Carolina, about seven miles from Greensboro, on the Southern Railway track from Greensboro to Winston-Salem, North Carolina, a truck of defendant Sinclair Refining Company, driven by defendant Shirley L. Massagee and filled with gasoline, collided with a certain passenger train of the Southern Railway Company operated by said intestate as engineer.

Then the original defendants, in pertinent parts of their cross action, allege that: "2. The Southern Railway Company is a corporation organized, existing and doing business under the laws of the State of Virginia and is engaged in the operation of an interstate railway system over a considerable portion of the United States. Said company maintains a line of railway tracks from Greensboro, North Carolina, to Winston-Salem, North Carolina, over which it operates trains as a part of its interstate system of railways." And "6. The plaintiff's intestate was injured and burned in the collision referred to in plaintiff's complaint, and the death of plaintiff's intestate was caused directly and proximately by the joint and concurring negligence of the Shell Oil Company and Southern Railway Company, and not by any negligence of these defendants" in manner specified.

The grounds for the motion of the Southern Railway Company here pertinent are: "3. That, at the time and on the occasion referred to in the pleadings, the Southern Railway Company was engaged in interstate commerce and the plaintiff's intestate, as an employee of said Southern Railway Company, was employed in interstate commerce, and while so employed was operating the train referred to in the pleadings.

"4. That the rights and obligations of the plaintiff's intestate and the Southern Railway Company arose out of and are exclusively controlled and defined by the Federal Employers' Liability Act, the said Act being exclusive of all other rights and remedies between said parties in the premises.

"5. That under said Federal Act, the plaintiff's intestate is the only person having any right or remedy against the Southern Railway Company by reason of the injury or death of the plaintiff's intestate; and that, consequently, neither the Sinclair Oil Company, nor any party other than the plaintiff's intestate has any right to institute suit against the said Southern Railway Company by reason of the injury or death of the plaintiff's intestate.

"6. That any right which the plaintiff has against the Southern Railway Company, by reason of the death of her intestate, arose out of, and

is exclusively controlled by, the Federal Employers' Liability Act; that any right which the plaintiff's intestate has against the Sinclair Oil Company by reason of the things and matters alleged in the complaint arose out of G. S., 28-173, and that the Southern Railway Company and the Sinclair Oil Company could not be joint tort-feasors in reference to the plaintiff's intestate within the meaning of G. S., 1-240."

When the motion of the Southern Railway Company came on for hearing and being heard at time and place named, by consent of all parties, upon pleadings and affidavits appearing in the record, and after argument of counsel, the court finds the following facts: "1. That this action was instituted by the plaintiff, Mrs. Vera L. Wilson, as Administratrix of the Estate of Arthur E. Wilson, deceased, against Shirley L. Massagee and Sinclair Refining Company to recover damages for the alleged wrongful death of plaintiff's intestate, as appears from the complaint herein.

"2. That the original defendants above named, in their answer, set up a cross action against the Shell Oil Company and the Southern Railway Company, as appears in the record herein, and obtained an order of the Clerk dated August 24, 1944, making the said Southern Railway Company and Shell Oil Company parties defendant, and, pursuant to said order, summons was duly issued and served upon said additional defendants, and that the court has jurisdiction of said defendants.

"3. That within thirty days from the date of service of summons upon it, the said Southern Railway Company filed its special appearance and motion as appears in the record.

"4. That the above mentioned order of the Clerk making said additional defendants was entered without notice to said additional defendants.

"5. That at the time of the collision referred to in the complaint herein, and in the cross action of Shirley L. Massagee and Sinclair Refining Company against the Southern Railway Company, this being the time of the injury to the plaintiff's intestate which caused his death, the said plaintiff's intestate was in the employ of the Southern Railway Company as the engineer on the train referred to in the pleadings herein; and that at said time the said Southern Railway Company was engaged, and the plaintiff's intestate was employed, in interstate commerce."

Upon these facts and upon the pleadings, the court being of opinion that Southern Railway Company and original defendants are not joint tort-feasors within the meaning of G. S., 1-240, and consequently that the original defendants had no right to bring in said Southern Railway Company as party defendant herein, entered judgment allowing the

motion of the Southern Railway Company and striking out the order of the clerk making said company a party defendant herein, and dismissing the cross action against it.

The original defendants, Shirley L. Massagee and Sinclair Refining Company, appeal to the Supreme Court and assign error.

W. T. Joyner, John M. Robinson, and Hunter M. Jones for Southern Railway Company.

Frank H. Kennedy and Goebel Porter for Shirley L. Massagee and Sinclair Refining Company.

WINBORNE, J. The question involved on this appeal, as stated in brief of appellants, is this: "Where plaintiff sues a defendant under G. S., 28-173, alleging that her intestate was killed by the negligence of that defendant, may that defendant join as a joint tort-feasor under G. S., 1-240, a railway company by which the plaintiff's intestate was employed in interstate commerce?"

The court below answered in the negative, and we are of opinion that the answer finds support in law.

The question as stated presupposes, and rightly so from the pleadings, *Renn v. R. R.*, 170 N. C., 128, 86 S. E., 964, that at the time of injury to, and death of intestate of plaintiff, he was employed in the interstate operations of the Southern Railway Company. In the light of this fact, sufficiently appearing upon the face of the pleadings aside from any statement by affidavit, the decision turns upon the answer to this basic question: Are the original defendants, who are liable, if at all, for the death of plaintiff's intestate only by virtue of the State statute, G. S., 28-173, formerly C. S., 160; Revisal, 59, and the Railway Company, which is liable, if at all, for death of plaintiff's intestate exclusively by virtue of the Federal Employers' Liability Act, 45 U. S. C. A., sections 51-59, joint tort-feasors within the meaning of the State statute, G. S., 1-240, formerly C. S., 618, as amended by Public Laws 1929, chapter 68, providing right of contribution? An analysis of these several statutes as construed and applied by the courts indicates a negative answer.

This last statute, as it existed prior to the amendment, provided that: "In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall,

at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity."

Thus it appears that in tort actions the right of contribution among judgment debtors for payment of a judgment is limited to those persons or corporations "who are jointly and severally liable for its payment . . . as . . . joint tort-feasors." And the 1929 amendment adds these provisions: "and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint 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."

This statute as so amended in pertinent part means that in an action arising out of a joint tort wherein judgment may be rendered against two or more persons or corporations, who are jointly and severally liable, and not all who are so jointly and severally liable as joint tort-feasors have been made parties defendant, those who are sued may at any time before judgment, upon motion, have the other such joint tort-feasors brought in and made parties defendant in order to determine and enforce contribution. *Godfrey v. Power Co.,* 223 N. C., 647, 27 S. E. (2d), 736; *Freeman v. Thompson,* 216 N. C., 484, 5 S. E. (2d), 434.

The right of action for such contribution in this State is statutory, "and its use necessarily depends upon the terms of the statute." *Godfrey v. Power Co., supra,* citing *Gaffney v. Casualty Co.,* 209 N. C., 515, 184 S. E., 46. And within the meaning of the statute "common liability to suit must have existed as a condition precedent to contributon." Moreover, as stated in the *Godfrey case, supra:* "The right to 'enforce contribution' in an action like the present comes from the amendment. It is the right of one joint tort-feasor, against whom judgment has been obtained in an action arising out of joint tort, to recover of other joint tort-feasors their proportionate part of such judgment," citing *Hoft v. Mohn,* 215 N. C., 397, 2 S. E. (2d), 23. Furthermore, as there stated, the right "is rooted in and springs from the plaintiff's suit."

In this connection, as against the original defendants, the right of plaintiff to sue for the alleged wrongful death of her intestate arose only by virtue of the statute, G. S., 28-173, which provides that, "When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, . . . shall be liable to an action for damages to be brought . . . by the executor, administrator or collector of the decedent. . . . The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in the chapter for the distribution of personal property in cases of intestacy." And it is provided under this section that in all actions brought under it "the dying declarations of the decedent as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the decedent in criminal actions for homicide are now received in evidence."

The right of action given under this statute, G. S., 28-173, did not exist at common law, and rests entirely on the statute. *Broadnax v. Broadnax,* 160 N. C., 432, 76 S. E., 216; *Killian v. R. R.,* 128 N. C., 261, 38 S. E., 873; *Bolick v. R. R.,* 138 N. C., 370, 50 S. E., 689.

On the other hand, as against the Southern Railway Company the right of plaintiff to sue for the alleged wrongful death of her intestate, who at the time of his injury and death was employed in the interstate operations of the Railway Company, arose exclusively under and by virtue of the Federal Employers' Liability Act, 45 U. S. C. A., sections 51-59, which provides that: "Every common carrier by railroad while engaged in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of his surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, bolts, wharves, or other equipment." And it further provides that, "any employee of a carrier, if any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely or substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being

employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

While before this Federal Employers' Liability Act was passed by Congress the liability of common carriers by railroad engaged in interstate commerce for injuries to, or death of their employees while engaged in such commerce, was governed by the laws of the several States, the Act took possession of the field of liability in such cases and superseded all State laws upon the subject. *Mondou v. R. R.,* 223 U. S., 1, 56 L. Ed., 327, 32 S. Ct., 169, 38 L. R. A. (N. S.), 44; *Missouri, K&TR Co. v. Wulf,* 226 U. S., 570, 57 L. Ed., 355; *St. Louis IM&SR Co. v. Craft,* 237 U. S., 647, 59 L. Ed., 1160. See also among others these North Carolina cases, *Renn v. R. R., supra; Inge v. R. R.,* 192 N. C., 522, 135 S. E., 522, *certiorari* denied *R. R. v. Inge,* 273 U. S., 753, 71 L. Ed., 874, 47 S. Ct., 456; *Austin v. R. R.,* 197 N. C., 319, 148 S. E., 446; *Candler v. R. R.,* 197 N. C., 399, 149 S. E., 393; *Cole v R. R.,* 199 N. C., 389, 154 S. E., 682; *Pyatt v. R. R.,* 199 N. C., 397, 154 S. E., 847; *Wolfe v. R. R.,* 199 N. C., 613, 155 S. E., 459.

Thus the right of plaintiff to sue the original defendants for damages for the death of her intestate arose upon an entirely separate and distinct statute from that under which her right to sue the railway company arose. The plaintiff has no right, under the Federal Employers' Liability Act, to sue and maintain an action against the original defendants, nor does she have any right, under the State statute giving right of action for wrongful death, to sue and maintain an action against the railway company. Hence, plaintiff did not have a common legal right of action against the original defendants and the Railway Company.

Moreover, the beneficiaries under the two statutes are not the same. Under the State statute the amount recovered, subject to its liability for burial expenses of the deceased, is to be disposed of as provided in the chapter for the distribution of personal property in cases of intestacy. This is so, irrespective of whether the distributees shall have been dependent upon the intestate of plaintiff. Indeed, the recovery may even escheat to the University of the State, *Warner v. R. R.,* 94 N. C., 250. Dependency need not be pleaded, and evidence in that regard is incompetent. *Kesler v. Smith,* 66 N. C., 154.

On the other hand, the recovery under the Federal Employers' Liability Act is for the benefit of certain designated dependent relatives. And, "By this section if the injury to the employee results in death, his personal representative—while not given any right of action in behalf of the estate—is invested, solely as trustee for the designated survivors, with the right to recover for their benefit such damages as will compensate them for any pecuniary loss which they sustained by the death . . And if the employee leaves no survivors in any of the classes of

beneficiaries alternately designated, it necessarily follows that the personal representative cannot maintain any action to recover damages for the death, since there is no beneficiary in whose behalf such an action can be brought," *Sanford, J.*, speaking for the United States Supreme Court in *Lindgren v. United States of America,* 281 U. S., 38, 74 L. Ed., 686. Hence, dependency must be pleaded, and proven.

Furthermore, the basis of the recovery under the two statutes is fundamentally different. As stated in *Horton v. R. R.,* 175 N. C., 472, 95 S. E., 883, "Under our State statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. *Ward v. R. R.,* 161 N. C., at 186. Under the United States statute the damages are based upon the pecuniary loss sustained by the beneficiary. *R. R. v. Zachary,* 232 U. S., 248. Under the State statute the jury assesses the value of the life of the decedent *in solido,* which is disbursed under the statute of distribution. Under the United States statute, the jury must find as to each plaintiff what pecuniary benefit each plaintiff has reason to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained such pecuniary loss," citing *R. R. v. Vreeland,* 227 U. S., 59, 57 L. Ed., 417; *R. R. v. Dedrickson,* 227 U. S., 145, 57 L. Ed., 456; *R. R. v. McGinnis,* 228 U. S., 173, 57 L. Ed., 785; *R. R. v. Zachary,* 232 U. S., 248, 58 L. Ed., 591. Accordingly, the rules of evidence as to damages recoverable are different under the State and the Federal statutes. And the rules of evidence in other respects may be different in actions under the two statutes.

In summary, the intent and purpose of the statute, G. S., 1-240, is to permit a defendant, who has been sued in a tort action, to bring into the action for purpose of enforcing contribution, any joint tort-feasor, against whom the plaintiff could have originally brought suit in the same action. Therefore, since in the present action the liablity of the original defendants, and of the Southern Railway Company, if any, to the plaintiff for the death of her intestate while employed in interstate commerce, arises upon separate and distinct statutes, the former under the State statute, and the latter under the Federal statute, there is no common legal liability to suit which is a condition precedent to contribution. *Godfrey v. Power Co., supra.*

The cases of *Lackey v. R. R.,* 219 N. C., 195, 13 S. E. (2d), 234, and *Railway Co. v. Dowell,* 229 U. S., 102, 57 L. Ed., 1090, relied upon by plaintiff, are distinguishable from the present case.

Hence, the judgment below is

Affirmed.

JESSE GREENE IN BEHALF OF HIMSELF AND BESSIE HENDERSON; ALDO THOMPSON; GEORGE BROWN; ADDISON MILLER; LEROY CRAINE, JAMES GLENN; CATHERINE BYERS; JAMES DAVIS; OSCAR LOWERY; PEARL McDOWELL; MAGGIE BILLINGS; CANDIES MILLER; HELLEN SIMPSON; THOMAS JAMES; SAM ELDER; WALTER NORWOOD; ARTHUR GLENN; ISABELLE HARRIS; MAGGIE DAVIS; ROY MORROW; DAISY TWITTY AND FANNIE CROWELL, EMPLOYEES OF ANCHOR MILLS COMPANY, v. ANCHOR MILLS COMPANY, A CORPORATION.

(Filed 13 December, 1944.)

1. Master and Servant § 65—

Employees of an office building, in which is carried on no manufacture or production of goods for interstate commerce, are not within the purview of the Fair Labor Standards Act of 1938, generally known as the Wage and Hour Law.

2. Same—

By the use of the phrase *engaged in commerce* in the Fair Labor Standards Act of 1938, Congress intended that those employees only are to be included who are actually so engaged, and not those merely engaged in incidental occupations which might more or less affect it, or even more remotely aid it. And Congress thought it essential to enlarge and extend the meaning of the word "engage" so as to include employees related to manufacture or production of goods.

3. Master and Servant § 63—

There is no presumption that, when Congress adopts a new scheme for Federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Congress may choose to regulate only part of what it constitutionally can regulate leaving to the states activities which, if isolated, are only local.

APPEAL by plaintiffs from *Bobbitt, J.*, at 29 June, 1944, Term of MECKLENBURG.

This action was brought by Jesse Greene in behalf of himself and twenty-two other employees of the Anchor Mills Company, a corporation doing business in Charlotte, North Carolina, to recover sums alleged to be variously due them for unpaid overtime wages and liquidated damages, under the Fair Labor Standards Act of 1938—(29 U. S. C. A., 201, Act of June, 1938, ch. 1060, *et seq.*).

The defendant company owned and partly occupied an office building in the city of Charlotte, and rented space therein to the Bell Telephone and Telegraph Company, and other occupants. (The character of the business carried on therein by defendants and other occupants will appear from the findings of fact.) The plaintiffs, in various capacities, serviced this building as employees of the defendant.

Pertinent to the findings of fact, the complaint alleges in part:

"4. The defendant corporation operates textile mills processing cotton and other materials into yarns and other products in interstate commerce, and is engaged in interstate commerce and in the preparation of goods in interstate commerce, and was so engaged at the times mentioned herein.

"5. The defendant corporation buys cotton and other materials from outside the State of North Carolina, and has its cotton and other materials shipped into the State of North Carolina where in its mills said cotton and other materials are processed and manufactured into goods for interstate commerce, and thereafter shipped by rail, truck and otherwise to points outside the State of North Carolina.

"6. The defendant corporation owns, operates and maintains an office building in Charlotte, North Carolina, the same being known as the Johnston Building, in which said building is located the principal office of the defendant, from which it conducts its business of buying cotton and other materials from points outside the State of North Carolina, which said materials are shipped from points without said State into North Carolina, and processed, manufactured and converted in North Carolina, and shipped to points outside said State, and also in said building the defendant rents, leases and lets offices to persons, firms and corporations that are engaged in communication, interstate commerce and the production of goods for commerce and interstate commerce.

"6½. In the operation of its said office building the defendant and its tenants thereof employed the plaintiffs and the persons on whose behalf this action is prosecuted to service the said building and its tenants and their offices, and the said plaintiffs were engaged during the times set forth hereinafter in tending, caring for and servicing the said office building and the offices of the tenants thereof.

"7. In excess of twenty per cent of the office space of the defendant hereinbefore mentioned is occupied by the Southern Bell Telephone & Telegraph Company, which said Company is engaged in interstate commerce and interstate communication, as defined by the said Act."

To these allegations defendant answered:

"4. It is admitted that the defendant operates a textile plant in the Town of Huntersville, North Carolina, and is, in connection with the operation of said textile plant, engaged in interstate commerce and in the preparation of goods for interstate commerce. Except as herein admitted, the allegations of paragraph 4 of the complaint are denied.

"5. It is admitted that in connection with the operation of the aforesaid textile plant, the defendant buys some cotton and other materials from outside the State of North Carolina and has the same shipped to its aforesaid plant at Huntersville, North Carolina, and that there, said

cotton and other materials, together with cotton and materials purchased inside the State of North Carolina, are processed and manufactured into goods for sale and shipment, and that some of the goods thus processed and manufactured are shipped to points outside the State of North Carolina. Except as herein admitted, the allegations of paragraph 5 of the complaint are denied.

"6. It is admitted that the defendant owns, operates and maintains an office building in the City of Charlotte, North Carolina, known as the Johnston Building. It is admitted that the defendant rents office space in said building to a number of persons, firms and corporations. This defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations that such persons, firms and corporations are engaged in communication and interstate commerce. Except as herein admitted, the allegations of paragraph 6 of the complaint are denied.

"6½. It is admitted that the defendant in the operation of the aforesaid office building employs or has employed the plaintiff and all of the persons named in the caption to the plaintiff's complaint for the purpose of servicing and maintainng said office building. Except as herein admitted, the allegations of paragraph 6½ of the complaint are denied.

"7. It is admitted that one of the tenants in the aforesaid office building is the Southern Bell Telephone & Telegraph Company, which, as the defendant is informed and believes, is engaged in the business of furnishing facilities for communication by wire. Except as herein admitted, the allegations of paragraph 7 of the complaint are denied."

At the hearing, by stipulation, jury trial was waived and the trial judge proceeded to hear the evidence and find the facts, state his conclusions of law, and render his judgment. The findings of fact included in this judgment are as follows:

"1. This action was commenced by the issuance of summons on April 30, 1943.

"2. At the times referred to in the complaint the defendant owned the seventeen-story office building in Charlotte, North Carolina, known as the Johnston Building; and plaintiffs, under employment by the defendant, worked in the Johnston Building as building service and maintenance employees, being elevator operators, janitors and maids.

"3. The defendant operated the building as a separate department of its business and the plaintiffs had no connection with any phase of the defendant's business apart from their work as building service and maintenance employees.

"4. The occupants of the building, referred to in the evidence, may be classified as follows:

"(a) The Southern Bell Telephone & Telegraph Company occupied offices constituting approximately 30% of the entire office space in the building.

"(b) Offices of the Maryland Casualty Company, the Travelers Insurance Company, and the New York Life Insurance Company occupied the office space constituting 1¼ floors in the building.

"(c) Employees of the Illinois Central Railroad, Clinchfield Railroad and Baltimore and Ohio Railroad occupied office space of approximately three full offices in the building.

"(d) Officers of American Viscose Corporation, Armstrong Cork & Seal Company (one office), Solvay Company (two offices), Allis-Chalmers (two offices), Sinclair Refining Company, Cleveland-Cliffs Coal Company, Pitney-Bowes Postage Meter Company, Fuller Brush Company, U. S. Bobbin & Shuttle Company, Bemis Bag Company, and Stein, Hall & Company (four offices), were located in the building.

"(e) Offices of Western Union Telegraph Company, Abbott, Proctor & Paine, General Motors Acceptance Corporation, Fruit Dispatch Company, and Crescent Corporation, were located in the building.

"(f) Approximately two floors, or 2/17ths of the entire office space, in the building, were occupied by lawyers, public accountants, local insurance and real estate brokers, local finance companies, architects and a barber shop.

"(g) Offices of the defendant, Anchor Mills Company, occupied approximately one-fourth of the office space on one floor in the building.

"5. None of the occupants of the building engaged therein in the manufacture or production of goods and the space of each occupant was used solely as office space.

"6. The defendant, Anchor Mills Company, owned and operated cotton mills; and from its offices, referred to in paragraph 4 (g), as general headquarters, the defendant conducted its business affairs and exercised general supervision and control over the operations of its mills.

"7. Apart from the defendant itself, the only occupants (companies) engaged in manufacturing are those referred to in paragraph 4 (d); but the manufacturing aspects of their businesses were not conducted, supervised or controlled from the offices in the Johnston Building.

"8. The occupants of much the greater part of the office space in the building were employees of various corporations that conducted interstate business transactions and such employees were so related to interstate business transactions as to be considered engaged in interstate commerce.

"9. The services rendered by the plaintiffs in respect of the building and offices were substantially the same to all occupants, without distinc-

tion on account of the difference in the character of the business in which each occupant was engaged.

"10. The plaintiffs rendered no services to the occupants of the building apart from the servicing of the building and its offices and rendered no service in respect of any of the business transactions of the occupants.

"11. At the times referred to in the complaint the defendant paid to the plaintiffs as compensation for their services less than the amounts to which they would have been entitled had the defendant complied with the provisions of the Fair Labor Standards Act of 1938."

Thereupon, the court concluded "that the evidence, taken in the light most favorable to the plaintiffs, does not show that the plaintiffs or any of them are engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938 and that, therefore, the defendant's motion for nonsuit should be allowed and upon the facts found, no recovery can be had by the plaintiffs herein."

It was therefore adjudged that plaintiffs recover nothing, and the action was dismissed.

The plaintiffs appealed, assigning error.

J. F. Flowers and J. Louis Carter for plaintiffs, appellants.
Guthrie, Pierce & Blakeney for defendant, appellee.

SEAWELL, J. The appeal of plaintiffs calls in question the conclusion of the trial court that they are not, upon the facts of the case, within the purview of the Fair Labor Standards Act of 1938, generally known as the Wage and Hour Law; Act of 25 June, 1938, chapter 1060, 29 U. S. C. A., sec. 201, *et seq.* The benefits of this Act are extended to an employee engaged (1) "in commerce"; or (2), "in production of goods for commerce"—meaning in both instances, of course, interstate commerce. Sections 206 (a) and 207 (a). Commerce is defined as "trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof." Sec. 203 (b). The employee referred to in the second class is defined as one engaged "in producing, manufacturing, mining, handling, transmitting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof in any state.*" 203 (j).

It is not contended that plaintiff employees are engaged in any service necessary to the manufacture or production of goods intended for interstate commerce, since no manufacture or production of goods was carried on in the office building of the defendant in which they served. But it is contended that plaintiffs' duties in servicing the building bring them within the first named class as being "engaged in commerce"

because some of the occupants of the building which they serviced were so engaged. The appellants rely largely on *Kirschbaum v. Walling,* 316 U. S., 517, 86 L. Ed., 1638, in which it was held that employees performing comparable services in a "loft" building, where production of goods for commerce was carried on, were held to be within the protection of the Act.

We apprehend, however, that plaintiffs are not materially aided by *Kirschbaum v. Walling, supra.* That case and the case at bar differ in factual situation with respect to which the statute itself speaks discriminatively between the classes of employees respectively intended to be covered. The disjunctive "or" does not introduce matter explanatory or identical or interchangeable. An entirely new class is created and brought into the pale of the law by a definition far reaching in its obvious terms and in their reasonable implication—a definition significantly wanting as to the class with which we deal here, "those engaged in commerce." Our reasoning from the law and our deference to well considered cases in the Federal jurisdiction constrain us to reject the more enthusiastic construction placed upon the statute by appellants, and to hold that by the use of the phrase *engaged in commerce* the Congress did not intend to exhaust all the potentialities of coverage in the field of regulation it has thus entered, or that the description should be expanded to include employees who, like the plaintiffs, more remotely affect that commerce. *Kirschbaum v. Walling, supra,* 316 U. S., pp. 521-523, 86 L. Ed., pp. 646, 647; *McLeod v. Threlkeld,* 319 U. S., 497, 87 L. Ed., 1538. Since it took a further and more exhaustive definition to include employees of the second class mentioned, who might be said to be twice removed from the channels of commerce—those who were engaged in production of goods intended for commerce, but not yet in its flow, and those who are necessary to such production—it would seem that there was still room and occasion for a similar expansion of the class merely referred to as *engaged in commerce,* if it had been so intended. The word "necessary" is notoriously elastic—and in different connections has been used to express every shade of meaning between *exigency* and *convenience.* The Congress, in its wisdom, did not employ such a modifying word to prevent the drawing of a line between those who are actually engaged in commerce and those who more remotely affect it.

In *Kirschbaum v. Walling, supra* (loc. cit., p. 521), after a historical review of instances in which the Congress did not see fit to extend its regulation into all areas within the constitutional limit, the Court said:

"We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for Federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid

where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities, which, if isolated, are only local."

The embarrassment to local regulation of similar activities, clearly beyond the Commerce Clause and properly within the province of State action, has not infrequently been a consideration leading to more conservative measures in congressional regulation of industry and its incidents. See historic review in above citations.

Until Congress acts again and provides new definitions for those who are "engaged in commerce," or extends its categories by language which will become the dictionary of the law, we are compelled to give the language used a common sense definition, with the aid of well considered cases.

We have already observed that no definition was attempted in the statute of the phrase employed to designate this class—other than those "engaged" in commerce. There is a frank recognition in the law that those only are to be included who are actually so engaged, and not merely engaged in incidental occupations which might more or less affect it, or even more remotely aid it.

The test, as applied in *McLeod v. Threlkeld, supra* (loc. cit., p. 497, 87 L. Ed., 1543), is thus given:

"The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.'" *Stoike v. First National Bank* (1943), 290 N. Y., 195, 48 N. E. (2d), 482, 88 L. Ed., ...

It is impossible in a matter of this sort to formulate a satisfactory rule of general application, nor can we extract a principle from the decided cases that will enable us to draw the line with an exactness which will satisfy all minds. We are convinced, however, that the line must be drawn in closer proximity than these plaintiffs stand to an actual movement of some sort across State lines, within the definition of "commerce" provided in the statute, whether of things tangible or intangible. The word engaged, we think, has that connotation. It is

regrettable, of course, that because of its poverty, our language does not always afford words of absolute precision; but it is to be noted that when we come to consider those who are to come within the Act because of their connection with the manufacture or production of goods for interstate commerce, the same word "engaged" qualifies production and manufacture, and it was thought essential to enlarge and extend the meaning of that word so as to include employees related to manufacture or production of goods, as these plaintiffs now claim to be related to the movement of commerce. There is, after all, a rather wide margin standing between those who directly participate in such movement and those whose activities are more remotely ancillary thereto.

The course of decision has been very uniform in denying the application of the Act to factual situations and relations similar to those presented in the case at bar. *Lofther v. First National Bank of Chicago,* 138 F. (2d), 299 (C. C. A. 7th); *Johnson v. Dallas Downtown Development Company,* 132 F. (2d), 287 (C. C. A. 5th); *Rosenberg v. Lorenzetti,* 137 F. (2d), 742 (C. C. A. 9th); *Rucker v. First Nat. Bank of Miami, Oklahoma,* 138 F. (2d), 699 (C. C. A. 10th); *Tate v. Empire Building Corporation,* 135 F. (2d), 743 (C. C. A. 6th); *Cochran v. Florida National Banking Corporation,* 134 F. (2d), 615 (C. C. A. 5th); *Johnson v. Masonic Building Company,* 138 F. (2d), 817 (C. C. A. 5th). Amongst the State court decisions holding similarly may be cited the following: *Stoikes v. First Nat. Bank of the City of New York,* 48 N. E. (2d), 482 (N. Y.); *Cecil v. Gradison,* 40 N. E. (2d), 958 (Ohio); *Johnson v. Nat. Life Ins. Co.,* 166 S. W. (2d), 935 (Okla.); *Baum v. A. C. Office Building,* 143 P. (2d), 417 (Cal.); *Robinson v. Massachusetts Life Ins. Co.,* 158 S. E., 441 (Tenn.).

In *Walling v. Jacksonville Paper Co.,* 317 U. S., 564, 87 L. Ed., 460, the Court held that the clause "engaged in commerce" covered every employee "in the channel of interstate commerce," as distinguished from those who merely affect that commerce. This holding is cited in *McLeod v. Threlkeld, supra,* with the same distinction. This expression must be considered within the frame of its reference, and so considered, applies to those who directly participate in movements or communications within the "channels of commerce."

In *Walling v. Jacksonville Paper Co., supra,* the Court was dealing with a defendant whose employee was definitely and actually engaged in distribution well within the channels of commerce. The point to which the Court was speaking was whether an employee engaged within the State in completing the shipment, or distributing the goods so shipped, was within the channels of commerce.

There is a reference to *Walling v. Jacksonville Paper Co.,* as cited, in *Horton v. Wilson & Co.,* 223 N. C., 71, 25 S. E. (2d), 437, and neither

the expression referred to nor anything else in that case is at variance with the view here presented. In *Horton v. Wilson & Co., supra,* the defendant was engaged both in interstate commerce and in the local sale and delivery of goods acquired in interstate commerce after they had come to rest in defendant's warehouse in this State; but Horton directly participated in various ways in defendant's interstate commerce.

The judgment of the court below is

Affirmed.

STATE v. ELMER HARDIE BIGGS, JR., WILLIAM DALTON BIGGS, AND JOHN EDGAR MESSER.

(Filed 13 December, 1944.)

1. Homicide § 4d—

When the evidence offered in a criminal prosecution tends to show a homicide committed in the perpetration or attempt to perpetrate a robbery, the offense is murder in the first degree within the specific language of the statute, G. S., 14-17.

2. Homicide §§ 4d, 25: Criminal Law § 31f—

Where two witnesses saw two of the defendants enter a store, both witnesses being present, hold up the proprietor with pistols and shoot and kill him and flee, and two other witnesses saw both of these defendants run out of the store and enter and drive away in a car with the third defendant, all four of these witnesses picking out defendants from a number of prisoners in a city jail about 30 days after the homicide and positively identifying them and their car, without denial on the part of the prisoners, and other persons identifying the same defendants as the perpetrators of another hold-up just before their arrest, there is sufficient identification and evidence of murder for the jury, notwithstanding discrepancies and inaccuracies in certain particulars of the evidence, and motion for nonsuit was properly denied.

3. Homicide § 27c—

In a prosecution for murder, where all of the evidence for the State tended to show a felonious slaying committed in an attempt to perpetrate a robbery, the defendants offering no testimony, the court correctly charged the jury that, if defendants were guilty at all, they were guilty of murder in the first degree, and that the only verdict the jury could render was guilty of murder in the first degree or not guilty.

4. Criminal Law § 29b—

Evidence of a distinct substantive offense is inadmissible to prove another and independent crime, where the two are disconnected and in no way related; but there is a well established exception to this rule, that proof of the commission of like offenses may be competent to show intent, design, guilty knowledge, or identity of person or crime. And this applies

to evidence of like offenses subsequent to the offense charged, if not too remote, and notwithstanding the evidence may tend to impeach the character of defendants.

5. Criminal Law § 53b—

Concerning the necessity of the charge of the court complying with G. S., 1-180, nothing more is required than clear instructions which apply the law to the evidence and give the positions taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts.

APPEAL by defendants from *Phillips, J.*, at April Term, 1944, of GUILFORD. No error.

The defendants were charged with the murder of E. J. Swanson. The jury returned verdict of guilty of murder in the first degree as to each defendant.

This case was here at Spring Term, 1944, and is reported *ante*, 23. On that appeal error was found in the admission in evidence of certain confessions which were held not voluntary, and a new trial was ordered.

In the trial now under consideration evidence was offered by the State tending to show that the deceased was shot and killed in the perpetration or attempt to perpetrate a robbery, in which all three of the defendants participated. It is not deemed necessary to recite here all the testimony which appears of record, but a brief resume of the material evidence pertinent to the questions presented by the appeal may be stated as follows:

On the night of 19 February, 1943, between 8:30 and 9:00 o'clock, E. J. Swanson, then 67 years of age, was in his store in the village of Jamestown. There was an electric light in the store and one on the porch. Swanson's wife and a customer, O. M. Bundy, were present in the store. Two men, later identified as defendants Wm. Dalton Biggs and John Edgar Messer, came in the front door, and one of them called for a package of cigarettes. Swanson, who was behind the counter near the cash register, waited on them and made change for a dollar bill. They then asked for matches and as Swanson put the matches on the counter Wm. Dalton Biggs drew a pistol, pointed it at Bundy and told him to put his hands up, saying, "This is a hold-up." Swanson made some inarticulate sound and either sank or leaned down behind the counter, and Messer reached over the counter and shot him twice and killed him. The two defendants then ran out of the store. Two other witnesses, Doris and Mildred Ray, who lived near-by, were at this moment coming across the street to the store. They saw a blue Ford coach fifty feet from the store, and Doris Ray recognized and later identified

the defendant Elmer Biggs as the man sitting under the wheel. The moon was shining bright, the weather was warm, the glass of the automobile was down and she had a clear view of this man. Halfway across the street these witnesses heard a noise in the store, hurried to it, and saw the defendants Wm. Dalton Biggs and Messer run out, passing within ten feet of them, and get in the automobile and drive away.

It further appeared in evidence that on 31 March following, these four witnesses went to Danville, Virginia, and identified these three defendants as the men they had testified as having seen in Jamestown the night of the homicide. Defendants were then in custody and the witnesses picked them out from a group. When Mrs. Swanson told Messer and Wm. Dalton Biggs she recognized them as the ones who entered the store and shot her husband they hung their heads and said nothing. When Doris Ray told Elmer Hardie Biggs she identified him as the one she saw under the wheel of the automobile in Jamestown he asked, "Are you sure of that?" and when she said, "I am positive," he said, "Well, there is nothing else I can say."

Evidence was offered and admitted over objection that on 16 March, 1943, twenty-seven days after the homicide at Jamestown, these three defendants were observed driving a blue Ford coach automobile in Danville, Virginia, and that Elmer Hardie Biggs was under the wheel and Messer and Wm. Dalton Biggs were on the seat beside him; that shortly thereafter Messer and Wm. Dalton Biggs entered the filling station of R. F. Barber and asked for smoking tobacco. Barber waited on them, and they drew pistols on him, saying it was a hold-up, and forced him to open the cash drawer and robbed him of $140. They then backed out of the door and told Barber not to follow. They started running in the direction of the place where the other witness had seen the automobile, and Barber picked up his own pistol, ran out the back door and shot at them, and they shot back at him three times. The witnesses identified the defendants as the men they had seen on this occasion in Danville.

There was also evidence that the following morning, 17 March, Wm. Dalton Biggs was arrested in Reidsville in a blue 1938 model Ford coach, identified as the same automobile in which the defendants were seen in Danville, and Messer and Elmer Hardie Biggs were arrested 18 March, near Reidsville, in a closed paneled truck. In the truck beside them was found a photograph of Messer and Elmer Hardie Biggs, each with a pistol in his hand. There was also evidence that defendant Wm. Dalton Biggs while awaiting trial had attempted to escape from jail.

The defendants offered no evidence and did not go on the stand. The jury returned verdict of guilty of murder in the first degree as to all

three of the defendants. The court pronounced sentence of death by asphyxiation as provided by law, and the defendants appealed.

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

R. R. King, Jr., and P. W. Glidewell for defendants.

DEVIN, J. The defendants were tried under a bill of indictment charging them with the murder of E. J. Swanson. The evidence offered tended to show that Swanson was feloniously slain, and that the murder was committed in the perpetration or attempt to perpetrate a robbery. This brought the offense within the specific language of G. S., 14-17, and constituted it by force of the statute murder in the first degree. *S. v. Alston,* 215 N. C., 713, 3 S. E. (2d), 11. The question with which the defendants are chiefly concerned is whether there was sufficient evidence to connect them or either of them with the crime charged, and, if so, whether there was error in law in the trial which would entitle them to another hearing.

The defendants noted numerous exceptions in the course of the trial, and in their appeal have assigned error in many rulings of the trial court. However, these are presented in their well prepared brief in four groups which we will now consider.

1. The defendants excepted to the denial of their motion for judgment of nonsuit on the ground that the evidence of identification of the defendants by the witnesses at the scene of the homicide was insufficient to carry conviction by reason of discrepancies and inaccuracies in certain particulars pointed out, especially in the case of Elmer Hardie Biggs. But an examination of the testimony offered by the State shows that the commission of the offense charged and the identification of the defendants therewith was sufficiently definite and positive to require submission of the case to the jury as to each one of the defendants.

2. Defendants' prayer for instruction to the jury that they might render verdict of guilty of murder in the second degree was properly denied. All the testimony tended to show that the felonious slaying of the deceased was committed in an attempt to perpetrate a robbery. There was no other view presented by the evidence. This brought the crime within the statutory definition of murder in the first degree. Hence, the court correctly charged that if the defendants were guilty at all they were guilty of murder in the first degree, and that the only verdict the jury could render on the evidence was guilty of murder in the first degree or not guilty. The defendants offered no evidence and the defense was necessarily confined to contesting the credibility and weight of the State's evidence and the sufficiency of the identification of the defend-

ants as the perpetrators or active participants in the crime charged. There was no evidence upon which a verdict of guilty of murder in the second degree could properly be founded. The trial judge's ruling was in accord with the decisions of this Court. *S. v. Smith,* 223 N. C., 457; *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821; *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522; *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Myers,* 202 N. C., 351, 162 S. E., 568; *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995; *S. v. Covington,* 117 N. C., 834, 23 S. E., 337. In *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187, the same rule was declared, though it was held that under the evidence in that case a verdict of second degree was permissible.

3. The defendants excepted to evidence admitted by the court tending to show that these three defendants on 16 March perpetrated a hold-up and robbery in the same manner and by the same method as that testified as used at Jamestown. They excepted to the court's ruling in this respect and to his reference thereto in his instruction to the jury. This evidence was limited by the court, both at the time of its admission and in the charge, to be considered by the jury only upon the question of intent, guilty knowledge and identification of the defendants. We think this evidence was competent for the purpose to which it was limited. The general rule for the admission of such evidence, deducible from the decided cases, was stated in *S. v. Edwards, ante,* 527, as follows: "Undoubtedly the general rule is that evidence of a distinct substantive offense is inadmissible to prove another and independent crime where the two are disconnected and in no way related, but there is an equally well established exception to this rule that proof of the commission of like offenses may be competent to show intent, design, guilty knowledge, or identity of person or crime." *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Miller,* 189 N. C., 695, 128 S. E., 1; *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186; *S. v. Smoak,* 213 N. C., 79, 195 S. E., 72; *S. v. Payne,* 213 N. C., 719, 197 S. E., 573; *S. v. Harris,* 223 N. C., 697; *S. v. Ballard, post,* 855; Wigmore, secs. 300-306; 20 Am. Jur., 292. This rule applies equally to evidence of like offenses committed subsequent to the offense charged, *S. v. Simons,* 178 N. C., 679, 100 S. E., 239; *S. v. Flowers,* 211 N. C., 721, 192 S. E., 110, if not too remote in point of time, *S. v. Beam,* 184 N. C., 730, 115 S. E., 176. Nor is such evidence rendered incompetent on the ground that it tends to impeach the character of the defendants. *S. v. Kelly,* 216 N. C., 627, 6 S. E. (2d), 533.

Since the case at bar hinged largely upon the accuracy of the identification of these defendants as perpetrators of the attempted robbery and murder of E. J. Swanson at Jamestown, we think under the rule it

was competent for the State to show that twenty-seven days later these three defendants driving the same automobile staged a hold-up in almost the exact manner as that in which the deceased was slain; that in the Danville robbery Messer and Wm. Dalton Biggs entered the filling station, held up the proprietor with pistols, robbed his cash drawer while the other defendant, Elmer Hardie Biggs, waited in the automobile and drove them away. This evidence was competent to show the identity of the persons and the crime. *S. v. Edwards, supra.*

4. The defendants noted numerous exceptions to the judge's charge. Most of these exceptions relate to matters hereinbefore referred to. In no other particular is it pointed out that error was committed in the court's instructions to the jury. However, we have examined the entire charge with care and find no just ground for complaint on the part of these defendants. The principles of law applicable to the various phases of the evidence were correctly stated, and the evidence and the contentions of the State and defendants fairly presented. Defendants also raise the point in their brief that in charging the jury the judge did not comply with G. S., 1-180, in that he failed to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." While this Court has not hesitated to award a new trial where the provisions of this statute have not been substantially complied with, *S. v. Friddle,* 223 N. C., 258, 25 S. E. (2d), 751; *Smith v. Kappas,* 219 N. C., 850, 15 S. E. (2d), 375; *Ryals v. Contracting Co.,* 219 N. C., 479, 14 S. E. (2d), 431; *Mack v. Marshall Field & Co.,* 218 N. C., 697, 12 S. E. (2d), 235; *S. v. Greer,* 218 N. C., 660, 12 S. E. (2d), 238; *Smith v. Bus Co.,* 216 N. C., 22, 3 S. E. (2d), 362, we do not think this objection is tenable in this case. It was said in *S. v. Graham,* 194 N. C., 459 (467), 140 S. E., 26: "Concerning the necessity of declaring and explaining the law it has been held in quite a number of cases that nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts." Measured by this standard, we do not think the defendants have cause for complaint. See also *S. v. Colson,* 222 N. C., 28, 21 S. E. (2d), 808; *S. v. Puckett,* 211 N. C., 66, 189 S. E., 183; *S. v. Evans,* 211 N. C., 458, 190 S. E., 724; *S. v. Hodgin,* 210 N. C., 371, 186 S. E., 405. The exception on this point might be dismissed as broadside for failure to specify the supposed defects in the charge. *S. v. Webster,* 218 N. C., 692, 12 S. E. (2d), 272. However, we have considered the charge in the light of this criticism, and find the objection untenable.

5. Defendants also noted exceptions to the admission of evidence of the attempt of one of the defendants to escape from jail (20 Am. Jur.,

276), and to other testimony offered by the State. Most of these exceptions are involved in matters already discussed. Other assignments of error in the admission of evidence are not preserved by reference to them in the brief, and are deemed abandoned. Rule 28. But we have examined each of these exceptions and the entire evidence with the degree of care appropriate to the gravity of the case and its serious consequences to the defendants, and are unable to discover any exception which can be sustained or any ruling of the trial judge which should be held for error. As was said by the present *Chief Justice* in *S. v. Wingler,* 184 N. C., 747, "There is no error appearing in the record, except the great error of the defendant in murdering his wife; but this is a mistake which is beyond our province or power to correct."

The defendants have been represented by able counsel who have presented their cause throughout with unflagging zeal; but the jury has accepted the State's evidence as true and found the defendants guilty of a most serious crime. The evidence fully supports the verdict. The trial was in all respects fairly conducted by a competent and experienced judge, and we conclude that the defendants have no just or legal ground to complain of the result.

In the trial we find

No error.

STATE v. ROY E. SHOOK.

(Filed 13 December, 1944.)

1. Criminal Law § 32a: Assault and Battery § 10: Homicide § 18b—

Ordinarily, remoteness in time in the making of a threat otherwise admissible does not render it incompetent as evidence, but only goes to its weight and effect.

2. Same—

In a criminal prosecution for felonious assault upon an officer of the law, evidence of threats by the defendant against the officers of the law, as a class, is competent.

3. Criminal Law § 32a—

Instructions, regarding circumstantial evidence in a criminal prosecution, which adopt the formula that the jury must be satisfied beyond a reasonable doubt, do not disclose prejudicial error, even though the court failed to add that such evidence must "exclude every reasonable hypothesis of innocence," there being no special request for the judge to so instruct.

4. **Assault and Battery §§ 7c, 13—**

An objection to the charge for failing to point out, in a prosecution for secret assault with intent to kill, that if the jury found no intent to kill, defendant might be convicted of a less offense, is untenable, where the judge had already instructed the jury on the crime charged, and the lesser offenses, or degrees of guilt, of which he might be found guilty.

5. **Arrest and Bail § 1c: Homicide § 13: Assault and Battery § 7a—**

The doctrine that a man's house is his castle has no application to an officer seeking to make an arrest under a warrant charging a criminal offense. Such officer has authority to break open the doors of the dwelling occupied by the person whose arrest is directed, even during the nighttime.

APPEAL by defendant from *Dixon, Special Judge,* at August Term, 1944, of CUMBERLAND.

The defendant was indicted under a bill charging him with a felonious secret assault on one Jasper Holland, with a deadly weapon, with intent to kill, inflicting serious injury. He was found guilty of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, and sentenced to State Prison for the term of three years.

The evidence upon the trial may be summarized as follows:

Holland, with other officers, went to the home of the defendant, late in the night, to arrest him on a criminal charge under authority of a warrant then in their possession. The warrant was not in evidence, and it does not appear what crime was charged against the defendant. They searched the dwelling for him, and not finding him there, repaired to a garage, which was dug out in the hillside under the dwelling, with the front, or entrance, curtained, the curtain so divided that upon entrance of the car it would open and drop back together behind the car. Holland entered, began flashing his light around the garage, and while he was turned back toward the entrance, a gun was fired from within the garage, resulting in eleven shot wounds in Holland's hip, from which he bled freely. Holland was taken to the hospital and treated. The remaining officers returned to defendant's place, and failing to find him, "fired" tear gas into the garage.

Later, the defendant, when asked why he shot Holland, replied that he did not know "who he had shot." When arrested later and asked to go along with the officer, Shook said, "No," that he thought he would skip the country for awhile, but did not resist arrest. The defendant stated that the tear gas had made him sick and that he vomited blood all next day, but that he would have died before he would have come out. He asked the officer how the man he had shot was getting along.

There was evidence, to which defendant objected, that some nine or ten months before the shooting, defendant had said, "they would send

the God damned law up there if they wanted to, but he would kill them if they would come." That was in September, 1943. To admission of this evidence defendant excepted.

The defendant lodged an exception to the charge for that the jury was not instructed that if they found the defendant had no intent to kill, they might find him guilty of a less offense—or, as the assignment of error puts it, "of assault with a deadly weapon."

With respect to circumstantial evidence involved in the case, the following instruction was given to the jury:

"The State relies in this case upon what is known as circumstantial evidence, which is the proof of various facts or circumstances which usually attend the main fact in dispute, and therefore, tends to prove its existence or to sustain by their consistencies the hypothesis of claim. Circumstantial evidence consists in reasoning from facts, which are known or proved, to establish such facts which are conjectured to exist. This must be proven to you, and beyond a reasonable doubt by the State, before this man can be found guilty." To this defendant excepted.

The defendant further excepted to the charge as a whole because, since it did not appear affirmatively that the officers had a warrant charging a breach of the peace or graver crime, the court should have instructed the jury that the officers were trespassers and were not justified in breaking into defendant's home to arrest him.

Upon this conviction and sentence as above stated, defendant appealed.

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

Robert H. Dye for defendant, appellant.

SEAWELL, J. 1. The first challenge which the appeal makes to the validity of the trial is the admission, over objection, to threats made by defendant against officers of the law, as a class, in September preceding the trial in the following August. This threat is, in a peculiar way, anticipatory of what happened the following June: ". . . they would send the G—— d—— law up there if they wanted to, but he would kill them if they did come."

Ordinarily, remoteness in time in the making of a threat otherwise admissible does not render it incompetent as evidence, but only goes to its weight and effect. *S. v. Payne,* 213 N. C., 719, 725, 197 S. E., 573. This Court has not, in any case, fixed a limit on the time within which such threat would become inadmissible. Under varying conditions it has found threats six months, nine months, one year, two years old, and more, admissible, especially when those more remote are repeated within a more recent period. *S. v. Payne, supra,* and cases cited; *S. v. Howard,*

82 N. C., 624; *S. v. Exum,* 138 N. C., 599, 50 S. E., 283; *S. v. Wishon,* 198 N. C., 762, 153 S. E., 395. Nine months, as in the present case, have not been regarded as rendering the evidence incompetent; *S. v. Exum, supra;* and as pointed out in *S. v. Johnson,* 176 N. C., 722, 97 S. E., 14, in *S. v. Howard, supra,* threats made twelve months prior to the homicide were admitted without evidence of continuing threats. While the objection to the evidence was not on the ground that it was not directed against Holland personally, it is well to note that it was directed toward a class to which he belonged—that is, officers of the law. *S. v. Payne, supra.* The evidence was competent. In this connection we think it immaterial that the judge referred to the officers as police officers.

2. The instruction regarding circumstantial evidence, quoted in full in the statement, while not sufficiently clear and exact to be approved as a model, does not disclose prejudicial error—at least the assignment of error made by the appellant is untenable. The objection is that the judge did not add to the instruction given that, in order to justify a verdict of guilty, the circumstantial evidence must "exclude every reasonable hypothesis of innocence." That, indeed, it must do; but after all, the convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence—the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely what we sometimes refer to as direct. No set formula is required to convey to the jury this fixed principle relating to the degree of proof required for conviction.

The instruction adopts the formula most often used and to which we sooner or later all refer—proof beyond a reasonable doubt. *S. v. Crane,* 110 N. C., 530, 15 S. E., 231; *S. v. Flemming,* 130 N. C., 688, 41 S. E., 549; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *S. v. Adams,* 138 N. C., 688, 50 S. E., 765; *S. v. Neville,* 157 N. C., 591, 72 S. E., 798; *S. v. Willoughby,* 180 N. C., 676, 103 S. E., 903.

In *S. v. Adams, supra,* discussing proof by circumstantial evidence, it is said:

"Nor did the court err in refusing to give the first prayer for instruction. There is no particular formula by which the court must charge the jury upon the intensity of proof. 'No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are "fully satisfied" or "entirely convinced" or "satisfied beyond a reasonable doubt" of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a "formula" for the instruction of the jury, by

which to "gauge" the degrees of conviction, has resulted in no good.' We reproduce these words from the opinion delivered by *Pearson, C. J.*, in *S. v. Parker,* 61 N. C., 473, as they present in a clear and forcible manner the true principle of law upon the subject. The expressions we sometimes find in the books as to the degree of proof required for a conviction are not formulas prescribed by the law, but mere illustrations. *S. v. Sears,* 61 N. C., 146; *S. v. Knox, ibid.,* 312; *S. v. Norwood,* 74 N. C., 247. The law requires only that the jury shall be fully satisfied of the truth of the charge, due regard being had to the presumption of innocence and to the consequent rule as to the burden of proof. *S. v. Knox, supra.* The presiding judge may select, from the various phrases which have been used, any one that he may think will correctly inform the jury of the doctrine of reasonable doubt, or he may use his own form of expression for that purpose—provided, always, the jury are made to understand that they must be fully satisfied of the guilt of the defendant before they can convict him. In *S. v. Gee,* 92 N. C., 761, where the court below had refused to charge according to one of these supposed formulas, and told the jury that it was not a rule of law, but only an illustration, and intended to impress upon the jury the idea that they should be convinced beyond a reasonable doubt of the defendant's guilt, the Court, by *Smith, J.,* said: 'We do not see in the charge, or in the manner of submitting the case to the jury, any error of which the defendant has a right to complain.' "

In the *Flemming case, supra,* the Court approved of the following instruction:

"In this case the State relies upon both direct and circumstantial evidence, and before the State can rely upon circumstantial evidence it is necessary for the State to establish every circumstantial fact upon which it relies, beyond a reasonable doubt," and added: "In this the court followed exactly the rule laid down in *S. v. Crane,* 110 N. C., 536, which has since been more fully stated in *S. v. Shines,* 125 N. C., 730."

In *S. v. Willoughby, supra,* with respect to the addendum, the admission of which appellant points out as fatal error here, the Court said:

"It may have been well to add that the circumstances found by the jury to exist must exclude every other reasonable conclusion except the guilt of the defendant, but the failure to do so is not reversible error in the absence of a special request to so instruct the jury." There was no such request made.

Obviously, however apt the expression may be as applied to circumstantial evidence, the exclusion of every reasonable hypothesis of innocence is the equivalent of conviction beyond a reasonable doubt, involves the same mental processes, and results in the same psychological state to which we sometimes refer as satisfaction to a moral certainty.

3. The objection that the instructions were erroneous in failing to point out that if the jury found that Shook had no intention to kill Holland, they might find the defendant guilty of a less offense, is not tenable, upon reading the charge contextually, as we are required to do. *S. v. Elmore,* 212 N. C., 531, 193 S. E., 713; *S. v. Hunt,* 223 N. C., 173; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657. In the beginning of his charge, the judge instructed the jury as to the crime charged, and the lesser offenses, or degrees of guilt, of which he might be found guilty. There might have been more elaboration; but we think it must have been reasonably clear to the jury that, in the absence of an intent to kill, it would be their duty to find only an assault with a deadly weapon, or such less offense as the court distinguished in its orderly presentation, in descending scale, of the offenses and degrees of offenses of which defendant might be convicted.

4. It appears from the evidence that Holland was an officer, acting under authority of a warrant commanding him to arrest the defendant for a criminal offense. He was therefore not a trespasser in entering upon the premises of defendant in the attempt to apprehend him. In *S. v. Mooring,* 115 N. C., 709, cited by defendant, where the defendant was charged with an assault on an officer who entered the premises in an attempt to make an arrest, *Justice Avery,* writing the opinion of the Court, said:

"'The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the King.' *Commissioners v. Reynolds,* 21 Am. Rep., 510. Hence, the rules applicable where a forcible entry is effected in order to execute a *capias* issued in a civil action, do not apply in the case at bar. 1 A. & E., 722. The officer did not justify the breaking on the ground that he had a search warrant, but a warrant for the arrest of a particular prisoner, and we are not called upon, therefore, to enter into a discussion of the constitutional safeguards that protect dwelling-houses against undue search. If the officer have valid process in his hands, he does not become trespasser *ab initio* if he fail to find the accused in the house after breaking the door."

The distinction made in the cited case as to authority of the officer to enter the premises forcibly is between an officer serving civil process and one executing a criminal warrant, and does not refer to differences in the grades of offenses charged in the warrants as affecting such right. An officer in making an arrest under a warrant charging a criminal offense has the authority to break open the doors of the dwelling occupied by the person whose arrest is directed, even during the nighttime. 4 Am. Jur., Arrest, sections 83 and 84; 6 C. J. S., p. 615. Defendant's objection in this regard is not tenable.

At the conclusion of the State's evidence, the defendant demurred to the evidence and moved for judgment of nonsuit. The motion was properly overruled.

We find

No error.

E. L. RHYNE AND WIFE, MYRTLE RHYNE; P. L. SHORE AND WIFE, EMMA J. SHORE, AND PIEDMONT BUILDING AND LOAN ASSOCIATION, v. CHARLES L. SHEPPARD AND WIFE, MARGARET L. SHEPPARD.

(Filed 13 December, 1944.)

1. Pleadings § 15: Equity § 1d: Estoppel §§ 6g, 6h—

Where plaintiffs allege in their complaint that one of them built a house upon the property of defendants and that plaintiff who built the house and the other plaintiffs, his assignees, thinking the property was theirs and in good faith, paid taxes thereon and occupied the dwelling openly, notoriously and adversely for more than four years, defendants being residents of the city in which the property was located and making no objection, knowledge is at least inferentially alleged and a cause of action is stated and demurrer on that ground was properly overruled.

2. Pleadings § 16a—

In an action to recover the value of improvements made by plaintiff upon the lands of another, assignees of plaintiff are not necessary or proper parties, and demurrer for misjoinder of parties should have been sustained.

3. Betterments § 3—

Ordinarily, there can be no recovery in a common law action for improvements made on the lands of another by one who has no color of title to the premises; and there can be no color of title without some paper writing attempting to convey title. G. S., 1-340.

4. Estoppel §§ 6g, 6h: Equity § 1d: Betterments § 1—

Where one officiously confers a benefit upon another, the other is enriched but not unjustly enriched. But the recipient cannot stand by and see another confer a benefit upon him and retain the same which knowingly he has permitted to be conferred upon him by mistake.

APPEAL by defendants from *Rudisill, Special Judge,* at June Term, 1944, of GUILFORD. Modified and affirmed.

Civil action to recover the value of improvements placed on the lands of defendants. Heard on demurrer.

The facts alleged are in substance as follows:

Plaintiff E. L. Rhyne on 30 January, 1937, purchased lots 128 and 129 in the subdivision known as Anderson Heights located in or near High Point, Guilford County. He, in the mistaken belief that they

were the lots conveyed to him, immediately entered into possession of lots 120 and 121 of said subdivision. He proceeded to erect a house thereon and he and his assignees, either as actual occupants or through tenants, remained in possession thereof until possession was surrendered to defendants on their demand and proof of superior title 1 January, 1942.

Rhyne and wife, on 12 October, 1937, conveyed lots 128 and 129 to M. C. Poole and wife. Poole and wife on 24 July, 1941, conveyed same to P. L. Shore, and Shore and wife on 28 July, 1941, conveyed same by mortgage to plaintiff, Piedmont Building and Loan Association. It is alleged in this connection that each of said conveyances was executed with the honest belief that lots 120 and 121, together with the house thereon, were being conveyed and that each of said conveyances operated as an equitable assignment of Rhyne's claim for betterments or improvements.

It is further alleged:

"6. That E. L. Rhyne immediately after the purchase of Lots Nos. 128 and 129 from W. C. Idol, on January 30, 1937, in good faith entered into possession of Lots 120 and 121, under the mistaken belief that he had a good title to said lots by virtue of his deed and that the lots occupied by him were actually Lots 128 and 129, proceeded to erect a dwelling house upon what he thought to be Lots 128 and 129, but by error as to the location of said lots erroneously erected said house upon Lots Nos. 120 and 121, the property of the defendants; that upon the erection of said house, E. L. Rhyne borrowed money thereon and executed a deed of trust upon the same and went into possession thereof, and the said E. L. Rhyne and the subsequent owners, M. C. Poole and P. L. Shore, either occupied the house personally or the same was occupied by their tenants and they collected the rent thereon, listed the same for taxes, paid the taxes and were in open and notorious possession of said property, adverse to the claims of the defendants, who at all times lived and resided in the City of High Point and made no claim to the property or any objection to the occupancy of the same by the plaintiffs or their tenants until about January 1, 1942.

"8. That the plaintiffs, believing that they had good title to the property, made permanent improvements thereon, which said improvements increased the value of the property in the amount of $1,250, said improvements being betterments placed upon the defendants' lands by the plaintiffs."

Plaintiffs pray judgment for the value of improvements in the amount of $1,250 and an accounting for rents.

Defendants demurred for that (1) the complaint fails to state a cause of action in behalf of plaintiffs or either of them, and (2) there is a

misjoinder of parties for that plaintiffs other than Rhyne and wife are neither necessary nor proper parties to the action.

The court below entered its order overruling the demurrer and defendants appealed.

Roberson, Haworth & Reese for plaintiffs, appellees.
J. Allen Austin for defendants, appellants.

BARNHILL, J. The demurrer for that plaintiffs other than Rhyne and wife are neither necessary nor proper parties to this action is well founded. Conceding but not deciding that Rhyne has a right in equity to recover for improvements made on the property of the defendant, his deed for lots 128 and 129 does not operate as an equitable assignment of his claim. His right, if any, does not run with the land upon which he mistakenly thought he was building. *Lumber Co. v. Edwards,* 217 N. C., 251, 7 S. E. (2d), 497.

His vendees purchased unimproved lots upon which they and their grantors honestly believed there was a dwelling. No doubt they have an adequate remedy, but it is not by action against the defendants for improvements made by Rhyne on the property of defendants.

That brings us to this remaining question. Has plaintiff Rhyne (his wife being merely a formal party) sufficiently alleged an enforceable claim in equity?

At common law a claim for improvements was enforced by way of a setoff against the claim of the true owner for rents and profits, and ordinarily, the remedy of such a claimant was confined to a defensive setoff. He could maintain no independent action against the owner to recover compensation. 27 Am. Jur., 279; Anno. 104 A. L. R., 578.

Even then, ordinarily, there can be no recovery in a common law action for improvements made on the lands of another by one who has no color of title to the premises; *Scott v. Battle,* 85 N. C., 185; *R. R. v. McCaskill,* 98 N. C., 526; *Pritchard v. Williams,* 176 N. C., 108, 96 S. E., 733; *Rogers v. Timberlake,* 223 N. C., 59; 27 Am. Jur., 266; and there can be no color of title without some paper writing attempting to convey title. *Tate v. Southard,* 10 N. C., 119; *Williams v. Scott,* 122 N. C., 545; *Barrett v. Brewer,* 153 N. C., 547, 69 S. E., 614; *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352.

The defendants contend that Rhyne's action is a common law action for improvements and rest their demurrer on these principles of law. They insist that he has failed to state a cause of action in that the complaint not only fails to allege but specifically negatives any color of title.

This defect may be conceded. But the complaint is not to be so strictly construed. Plaintiff is not confined to a common law action for

improvements, if indeed such right may be enforced by independent action. G. S., 1-340. He may resort to the equitable doctrine of unjust enrichment frequently enforced under the doctrine of estoppel. If the complaint sufficiently states a cause of action under this principle of law, it must stand.

Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value. But he cannot retain a benefit which knowingly he has permitted another to confer upon him by mistake.

"It is said to be a very familiar rule of the law of estoppel that if the owner of an estate stands by and sees another erect improvements on the estate in good faith in the belief that he has a right to do so, and does not interpose to prevent the work, he will not be permitted to claim such improvements after they are erected." 27 Am. Jur., 275; see also Anno. 76 A. L. R., 304.

It has been held also that where one, under a mistake as to the location of his own premises, in good faith, and without inexcusable negligence, makes improvements upon the land of another, and the latter, knowing of the making of the improvements, but being himself ignorant of the mistake in location, fails to make objection, the improver may obtain suitable relief in equity. 27 Am. Jur., 276; Anno. 104 A. L. R., 597.

Equity acts in these respects upon the principle that an unjust enrichment should be prevented. 27 Am. Jur., 276; Anno. 76 A. L. R., 304.

Here the complaint alleges that Rhyne built a house upon the property of the defendants and that he and his assignees paid the taxes thereon, occupied the dwelling and remained in open and notorious possession of the property adverse to the claims of the defendants for more than four years, during which time the defendants were residents of the city in which the property was located, and notwithstanding these facts, defendants made no objection to the improvements or to the occupancy of the premises. It is not unreasonable to assume, under these circumstances, that defendants knew of the improvements and of the occupancy of the premises under claim of right. At least such fact is inferentially alleged.

We are of the opinion therefore that the complaint sufficiently sets forth a cause of action in equity in behalf of the plaintiff Rhyne.

Whether plaintiff will be able to offer evidence sufficient to support his allegations is another question. *Montgomery v. Blades,* 222 N. C., 463, 23 S. E. (2d), 844.

Judgment should be entered in accord with this opinion.

Modified and affirmed.

STATE v. WILLIAM JOSEPH DUNHEEN.

(Filed 13 December, 1944.)

1. Homicide § 4c—

When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. G. S., 14-17.

2. Homicide § 27c—

In a prosecution on an indictment for murder in the first degree, where all of the State's evidence tended to show that the accused lay in wait for the deceased, concealed behind a hedge along a street frequented by her and shot her with a gun twice as she went along with a companion, there being no evidence of a quarrel or ill feeling and the accused offering no testimony, the court's charge that the jury must return one of two verdicts, either murder in the first degree or not guilty, is without error.

3. Homicide § 27f—

Where there is an unsuccessful attempt, in a trial for murder, to bring out on cross-examination of the State's witnesses evidence of the insanity of the accused, whereupon the court gave the accused the full benefit of the plea and charged fully on insanity as a defense, there is no error of which defense can complain.

4. Criminal Law §§ 58, 82—

On suggestion by defendant's counsel here that, since the trial below on an indictment for murder, he has come into possession of material evidence tending to show the insanity of the defendant, he is at liberty to present it to the court below at the next succeeding criminal term on a motion for a new trial for newly discovered evidence.

APPEAL by defendant from *Phillips, J.*, at June Term, 1944, of GUILFORD. No error.

Criminal prosecution on bill of indictment charging the murder of one Laura Elizabeth Riley.

Defendant and the deceased had been "keeping company" for about eighteen months. On 6 May, 1944, defendant purchased a twelve-gauge shotgun and obtained five shells. He stated to the person from whom he obtained the gun and shells that he wanted them to shoot frogs and moccasins. On the night of 8 May he concealed the gun in a hedge around a mill lot on the edge of Minneola Street in the town of Gibsonville. This was the street sometimes used by the deceased in going to and from her home. At about 8:00 o'clock on the morning of 9 May he was seen stooping behind the hedge. He was also observed by other witnesses from time to time behind the hedge up to the time of the homicide. About 9:15 a.m. deceased and a companion passed along Minneola

Street within about 40 feet of the gateway to the mill and the hedge behind which the defendant was standing. As they passed, defendant shot the deceased and "He stepped back and did something to his gun and came back and shot immediately again." He was then seen leaving through the gate at or near the point he had been stooping and standing. The companion of deceased spoke to him and asked him why he shot, but he made no reply. On his way to his home he threw the gun in some weeds near the street. When apprehended and before being informed of the cause of his arrest he inquired, "Is she dead?" Later he admitted shooting once and said he recognized deceased by the red coat she was wearing. There was no evidence of any prior disagreement or ill feeling between defendant and deceased.

The jury returned for its verdict "Guilty of the felony of murder in the first degree as charged in the bill of indictment." The court pronounced judgment of death by asphyxiation. Defendant excepted and appealed.

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

W. Henry Hunter for defendant, appellant.

BARNHILL, J. In its charge the court instructed the jury in part as follows:

"(Now, gentlemen of the jury, as you find the facts to be from the evidence in this case under your oath you will return one of two verdicts. First, you will return a verdict of guilty of murder in the first degree if you find from the evidence and beyond a reasonable doubt that the defendant secured a shotgun, loaded a shotgun or had a loaded shotgun on the 9th of May, 1944, and was at the scene of the alleged killing, waylaid and secreted himself from the deceased and waited for her to come along while so secreted and while so waylaid, and when she did come along he shot her with a shotgun and she died as a result of such wound then, gentlemen of the jury, your verdict would be guilty of murder in the first degree.)

"If you fail to find from the evidence and beyond a reasonable doubt that those are the facts, that the person who did the shooting was someone else or that the defendant was not there, did not waylay the deceased, did not secret himself in the hedge and wait for her to come along and if she did come along he was not the person who shot and killed her as a result of the shooting, under those circumstances your verdict would be not guilty." The defendant excepted to that part within parentheses.

When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, the means and method used involve

planning and purpose. Hence the law presumes premeditation and deliberation. The act speaks for itself. G. S., 14-17. Is this presumption rebuttable by proof that the prisoner is of such low mentality that he is incapable of forming a fixed design to kill? This is the interesting question defendant seeks to raise on this appeal. Unfortunately for him the record fails to present the question for decision.

The defendant offered no testimony, but his counsel made a diligent effort to develop by cross-examination some evidence of insanity. As a result the record discloses the following:

The defendant was kept in a private cell for some time. A "trusty" was placed with him as guard.

A witness was asked:

"Mr. Murphy, is it not the general practice in the Sheriff's Department when a man is put in and there is a question about his sanity for them to put him in a private cell? Objection by State. Sustained. Exception."

This witness then testified:

"We have recently had some jail breaks in which prisoners charged with murder have escaped from jail. This kind of procedure in this case was a precaution to prevent a recurrence of that."

The companion of the deceased at the time of the homicide testified on cross-examination:

"No statement was made by me or by Miss Riley in the defendant's presence about how crazy he looked and acted . . . I did not make any statement after we left the carnival about leaving her with him (by herself) . . . I am sure that I did not say anything that day after we left the carnival about how he looked or acted. He acted all right at the carnival . . ."

The coroner testified:

"From my conversation with the defendant in jail, on the way back, I do not have a clear opinion as to what his mental condition was on the morning of this crime. I don't think my observation was sufficient to state medically other than just an impression, rather than a definite medical opinion.

"Q. What was your impression of his mental condition? Objection by the State. Sustained. Exception."

The record of the testimony of the father of the deceased discloses the following:

"Q. Mr. Riley, I ask you if some time during the week before this happened if you did not tell him you thought it would be a good idea for him to go back home and get him an outside job and try to regain his health? Objection by the State. Sustained. Exception."

A deputy sheriff stated on cross-examination:

"He told me at that time that he had a brother and he was in the hospital. He said he was 'in the hospital.' He did not tell me at that time that his uncle on his mother's side was in an insane asylum in Vermont. He has talked to me since and told me since. In this conversation he did not mention an uncle."

These are the only references in the record to the mental condition of the defendant. There is no evidence here of low mentality.

The rulings of the court are without error. The question asked the deputy sheriff related to a general custom at the jail and the coroner stated he had formed no opinion as to the mental condition of the defendant. What he may have said about his "impression" does not appear.

Although there was no evidence of insanity or low mentality, the court, out of an abundance of caution, desiring no doubt to protect every possible right of the defendant, gave him the benefit of his plea and charged fully on insanity as a defense. It then instructed the jury further as follows:

"But if the defendant has satisfied you from the evidence in the case, bearing in mind the rules of law the Court has heretofore given you and defined as to mental insanity, low order of intelligence, if the defendant has satisfied you from the evidence not beyond a reasonable doubt or by the greater weight of the evidence, but simply satisfied you at the time he shot and killed the deceased, if he shot and killed the deceased, that he was an insane person or was not mentally capable of forming a criminal intent and putting it into execution or that he was of such low order of mental status that he was incapable of committing this crime, that he was an insane person or insane to the extent that he was incapable of forming a criminal intent, bearing in mind the definition the Court gave you, then he would not be guilty."

Thus the court gave the defendant the benefit of the very contention made here and directed the jury to return a verdict of not guilty if they found he "was not mentally capable of forming a criminal intent and putting it into execution." Certainly on this phase of the trial defendant had no just cause to complain.

We have carefully examined defendant's other exceptive assignments of error. In them we find no cause for disturbing the verdict and judgment.

Counsel for the defendant suggests here that since the trial below he has come into possession of material evidence tending to show insanity of the defendant. If so, he is at liberty to present it to the court below at the next succeeding criminal term on a motion for a new trial for

newly discovered evidence. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *S. v. Edwards,* 205 N. C., 661, 172 S. E., 399.

In the trial below we find

No error.

W. G. BARKER v. E. P. DOWDY.

(Filed 13 December, 1944.)

1. Husband and Wife §§ 34, 40—

In a civil action for damages against defendant for alienation of plaintiff's wife's affections and for criminal conversation, where plaintiff's evidence tended to show that he was a tenant farmer with a large family and on satisfactory terms with his wife until they moved, at her instance, to a farm of defendant, in a different county, not far from the town where defendant lived and was in business, when immediately defendant began paying attentions to plaintiff's wife, who would go off with defendant in his automobile, take the children to the moving pictures and leave them there to meet her later at defendant's store, that defendant would come out to plaintiff's house often without a reason and gave plaintiff's wife presents and was seen once to kiss her, that plaintiff remonstrated with defendant and the next year removed to another county in consequence, his wife remaining with several of their children on defendant's farm; and defendant and plaintiff's wife denying all misconduct by their testimony, explaining innocently their automobile trips as on business for plaintiff and with his knowledge and that the children were left at the movies while the wife shopped, and all three parties showing evidence of good character, there is sufficient evidence to go to the jury on alienation, but all of the evidence is insufficient to support a verdict for criminal conversation.

2. Husband and Wife § 39—

As a failure to testify, in a case of alienation of affections and for criminal conversation, affords an inference against the defendant, the fact that he goes on the stand and explains suspicious circumstances will avoid such inference.

APPEAL by defendant from *Gwyn, J.,* at February Term, 1944, of MOORE.

Civil action for alienation of plaintiff's wife's affections, and for criminal conversation.

The plaintiff is 47 years of age; his wife 45. They were married 24 December, 1918, and have had 12 children; 11 now living, the oldest 24 and the youngest 6. In 1940 they were tenants on Dr. Lynn McIver's farm, and their second oldest son operated a filling station for the defendant across the street from defendant's market in Sanford. In

February, 1941, the plaintiff and his family moved to the defendant's farm, three or four miles from Sanford, and operated it as tenants during that year. The plaintiff's wife made the arrangements for the renting of the farm, as the plaintiff was then working temporarily as a carpenter at Fort Bragg.

On 1 January, 1942, the plaintiff moved to Moore County with his children, except Odell, the oldest son, and two small daughters, who, with their mother, remained on the Dowdy farm during the crop season of 1942, and until Odell was drafted into the Army. Odell rented the defendant's farm during the 1942 season, and some time during the year his 15-year-old brother, Claude, returned and stayed with their mother. The plaintiff and his wife are not now living together, and have not lived together since the plaintiff moved to Moore County.

The defendant is 48 years of age and has a large family, a wife and 9 children. He lives with his family in Sanford and runs a meat market and carries on an active slaughtering, cattle and hog business at his farm. In connection with his market he sells groceries, apples, cabbages and other produce. He also owns a blacksmith shop, and has an office on the basement floor of the Seymour Building, or Johnson Furniture Company Building, which is located on one of the principal streets in the town of Sanford.

The plaintiff's evidence tends to show that before he moved to defendant's farm, his wife seemed satisfied and their relations were entirely congenial; that immediately thereafter her attitude changed, both towards him and their children; that the defendant often came to plaintiff's home, "lots of times when he didn't have any business"; that he was around with plaintiff's wife, talking to her, and from time to time, they left the house together; that frequently they were away in defendant's automobile for several hours, without plaintiff's knowledge or consent, and that on numerous occasions the defendant brought to plaintiff's home apples and chewing gum which he gave to plaintiff's wife and children. He also gave plaintiff's wife a cow and a pig.

Plaintiff's 18-year-old daughter, Dorothy May, testified that on one occasion just before her father moved away, she saw "Dowdy kiss Mama" in the sitting room. On another occasion, in December, 1941, "he asked Mama to go to the slaughter pen with him, and they went out across the pasture and when they were out of sight I happened to glance over there and they were holding hands." (Cross-examination.) The day they walked to the slaughter pen, "they were not in the woods or anything of that sort. It is a clear open space around the house. . . . There were some eleven of us around there. . . . My father wasn't at the house; he might have been on the place. . . . The children were out

there playing and they went where they were and they all came back together."

Plaintiff's wife on three or four occasions went to Sanford with two or three of the children, ostensibly to attend a picture show, but instead she would place the children in the theatre and advise them to meet her after the show at the defendant's store. The children would go to the defendant's store after the show, without finding their mother, and after waiting an hour or more, "she would come up in the car with Mr. Dowdy; nobody else was with them." The defendant would then take plaintiff's wife and children within a short distance of their home, put them out and let them walk the rest of the way. Plaintiff's wife was often seen with the defendant in his office in Sanford. The plaintiff remonstrated with the defendant, and told him he would "give up the farm and leave. . . . I can't put up with the way you and my wife are going on. . . . You are sorrier than any Negro I ever had anything to do with. . . . Yes, I have seen you sell liquor. . . . I could have money too if I sold liquor. . . . If you want to carry a woman with you, carry your own wife."

After leaving the defendant's farm, the plaintiff made complaint to the sheriffs of Lee and Moore counties and to the chief of police of Sanford and asked them to help him "catch his wife. . . . Catch Mr. Dowdy and his wife," stating that the defendant had been "interfering with his family for the past six months." It is in evidence that plaintiff is a man of good character.

The defendant took the stand and also called the plaintiff's wife as a witness in his behalf. They denied the implications of plaintiff's evidence; explained that the trips taken were on business, some at the instance of the plaintiff; that the plaintiff knew of the small favors which the defendant showed the plaintiff and his family; that plaintiff's wife and children were driven near their home on several occasions and allowed to walk a short distance because of the muddy condition of the road, which fact was reported to the plaintiff by members of his family at the time. They both asserted that Dorothy May Barker was entirely mistaken in her testimony. Defendant specifically denied any suggestion of impropriety or remonstrance on the part of the plaintiff, and contends the plaintiff's testimony in this respect is wholly unreasonable. Plaintiff's wife testified that when she left the children in the picture show, she went shopping in Sanford; that at such times as she went into the defendant's store, or rode alone with him in his car, she went on business connected with the farm.

Evidence was elicited and offered to the effect that plaintiff's difficulty with his wife grew out of a quarrel between them in August, 1941, which

resulted in physical injury to the wife, causing her to remain in bed—plaintiff says three days, she says a week.

There is evidence of the good character of plaintiff's wife, and also of the defendant.

Motion for judgment of nonsuit renewed at the close of all the evidence. Overruled; exception.

The jury returned the following verdict:

"1. Did the defendant, E. P. Dowdy, wrongfully alienate the affections of the plaintiff's wife, as alleged in the complaint? Answer: Yes.

"2. Did the defendant, E. P. Dowdy, have immoral relations with the plaintiff's wife, as alleged in the complaint? Answer: Yes.

"3. Were the wrongful acts of defendant malicious? Answer: Yes.

"4. What amount of actual damages, if any, is the plaintiff entitled to recover of the defendant, E. P. Dowdy? Answer: $5,000.00.

"5. What amount of punitive damages, if any, is the plaintiff entitled to recover from the defendant, E. P. Dowdy? Answer: $2,500.00."

With the consent of the plaintiff, the court reduced the amount of actual damages to $4,000, and the amount of punitive damages to $1,500, and entered judgment accordingly.

Defendant appeals, assigning errors.

M. G. Boyette and H. F. Seawell, Jr., for plaintiff, appellee.
K. R. Hoyle and S. R. Hoyle for defendant, appellant.

STACY, C. J. This is the same case that was before us on demurrer to the complaint at the Spring Term, 1943, reported in 223 N. C., 151, 25 S. E. (2d), 404. It is here now on demurrer to the evidence and the validity of the trial.

Defendant insists that plaintff's own evidence shows his wife's estrangement derives from their quarrel in August, 1941; that plaintiff told the officers in January, 1942, "Dowdy had been giving him trouble with his wife" for the past six months—just the length of time following the quarrel—and that his testimony of remonstrance is too fanciful to support a verdict for alienation of affections. *Rose v. Dean,* 192 N. C., 556, 135 S. E., 348. The evidence suffices, we think, to carry the case to the jury on the first cause of action. *Johnston v. Johnston,* 213 N. C., 255, 195 S. E., 807; *Chestnut v. Sutton,* 207 N. C., 256, 176 S. E., 743; *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769.

We are constrained to agree with the defendant, however, that the evidence is wanting in sufficiency to support a verdict for criminal conversation. *S. v. Miller,* 214 N. C., 317, 199 S. E., 89; *S. v. Woodell,* 211 N. C., 635, 191 S. E., 334; *S. v. Aswell,* 193 N. C., 399, 137 S. E., 174. It does no more than raise a suspicion, which is explained by the

defendant's evidence. *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1; *Walker v. Walker,* 201 N. C., 183, 159 S. E., 363; *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 917. If the failure to testify under the circumstances here disclosed affords an inference against the defendant, and we have held that it does, *Powell v. Strickland,* 163 N. C., 393, 79 S. E., 872, *Walker v. Walker, supra,* then the fact that he goes on the stand and explains the suspicious circumstances would avoid such inference or remove any unfavorable impression that might arise from the failure to testify.

This necessitates a new trial on the first cause of action, because the first and second issues were submitted jointly to the jury, and the 3rd, 4th and 5th issues would need to be reconsidered after elimination of the second issue. *Hankins v. Hankins,* 202 N. C., 358, 162 S. E., 766; 27 Am. Jur., 129.

On first cause of action, New trial.

On second cause of action, Reversed.

JERRY RAY DAVIS, BY HIS NEXT FRIEND, JAMES T. DAVIS, v. BENJAMIN WYCHE.

(Filed 13 December, 1944.)

1. Trial § 4—

It is mandatory upon the trial judge, under the Soldiers' and Sailors' Civil Relief Act of 1940, sec. 521, 50 U. S. C. A., to grant a stay in the trial of any action in which a person in military service is involved, upon application of such person or of someone in his behalf, unless, in the opinion of the court, the ability of such person to prosecute or defend the action is not materially affected by reason of his military service.

2. Same—

The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up burdens of the nation.

3. Trial § 8—

Every party has the right, within due limitations, to be present at the trial of his cause, to be allowed to testify personally before the jury rather than through the notoriously indifferent medium of deposition, to take part in the selection of the jury, and to be personally present during the entire proceeding so that those charged with the burden of decision may observe him, either for his advantage or to his detriment.

4. Parties § 4: Insurance § 44a—

In an action to recover damages occasioned by the alleged negligent operation of a motor vehicle, the insurance company, which has issued a policy to protect an insolvent defendant, is not the real defendant in interest, the policy providing that no action shall lie against the company unless the insured shall have fully complied with all the terms of the policy, nor until the amount of insured's obligation shall have been finally determined by judgment against insured after trial, or by written agreement of the insured, the claimant and the company.

APPEAL by plaintiff from *Bobbitt, J.*, at June Term, 1944, of MECKLENBURG.

This is an action instituted in April, 1941, to recover damages for injuries alleged to have been inflicted upon the plaintiff by the defendant in negligently driving an automobile upon and against the plaintiff while he was crossng East Eighth Street in the city of Charlotte.

On 12 October, 1942, the plaintiff moved the court for an order directing the calendaring of the case for trial and determining that the defendant is not entitled to a stay of such trial. The defendant in answer to the plaintiff's motion for an order to calendar the case for trial, and to determine that the defendant is not entitled to a stay in such trial, through answer verified by his attorney, says that the defendant is in the armed forces of the United States, that the Soldiers' and Sailors' Civil Relief Act of 1940 provides that upon application to it by a person in military service the court shall stay proceedings in which such person is a party, unless, in the opinion of the court, the ability of the applicant for such stay to conduct his defense is not materially affected by reason of his military service, and in the opinion of the said attorney the defendant's ability to conduct his defense would be materially affected by reason of his military service because of his inability to be present at the trial, if such trial should at this time be ordered; whereupon defendant, through his attorney, moved the court to stay all proceedings in the action as provided by said relief act.

In support of his motion to stay proceedings the defendant, through his attorney, represented to the court that he, the defendant, was in the military service of the United States and stationed in England, that it was impossible for the defendant to attend trial, that the defendant's ability to conduct his defense would be materially affected by his absence from the trial if trial should be ordered, and to deny him the privilege flowing from attendance thereupon would be to deny him material and important rights.

The plaintiff, through his attorney, answered the motion of defendant for a stay in the trial and admitted that the defendant is in the military service of the United States but denied that his defense was materially

affected by reason thereof since his deposition had been taken and a certain stipulation as to additional testimony entered into; that the defendant carried liability insurance which fully protected him and the insurance company had fully investigated and was defending the case, and that the defendant is without substantial property and the insurance company was the real party in interest; that the plaintiff would be materially prejudiced by an indefinite stay of the trial, for that, *inter alia,* the only material witness to the accident was of draft age and his testimony was apt to be lost if an early trial was not had; the defendant in answer to the reply of the plaintiff asserted that "the question is whether or not the ability of the defendant to conduct his defense is materially affected by reason of his military service"; on 3 June, 1943, the motion of the plaintiff to calendar the case for trial was denied, "with the right of the plaintiff to renew said motion at such time as he may be advised," and on 26 January, 1944, the plaintiff renewed his motion to calendar the case for trial, and represented that the defendant was then "stationed in this country" and that the situation existing at the time of the former hearing had changed.

At the regular term, 19 June, 1944, of Mecklenburg, the judge presiding found the facts that the action was commenced in April, 1941, to recover damages for injuries alleged to have been sustained by the plaintiff on 19 October, 1940, when he was five years of age; that the defendant went into the air service, a branch of the armed forces of the United States, in February, 1941, and since that time has been continuously in the armed forces of the United States, that he was on combat duty in the air service for about a year, and is now stationed in Salina, Kansas; "and that the ability of the defendant to conduct his defense is materially affected by reason of his military service"; that the defendant had in force at the time of the plaintiff's alleged injury a policy of liability insurance and the counsel now appearing for defendant is retained by the insurance company; that the defendant was in the Carolinas in November and December, 1943, visiting his mother, upon return from overseas combat service, but that during this time was suffering from nervousness and a skin disease, and was under such physical and nervous disability as to justify a postponement or continuance of the case on that account in the event trial could otherwise have been arranged; that the defendant is presently stationed at Salina, Kansas, and currently has only one day off each two months; and upon the foregoing findings of fact, and "in its discretion," the court ordered, adjudged and decreed that trial of this action be stayed and the cause continued for trial until the inability of the defendant to conduct his defense by reason of his military service shall be removed.

To the foregoing order and judgment the plaintiff objected and appealed to the Supreme Court, assigning errors.

Robinson & Jones for plaintiff, appellant.
Frank H. Kennedy and Goebel Porter for defendant, appellee.

SCHENCK, J. This appeal poses the determinative question: Did the court err in entering, in its discretion, the order and judgment staying the trial of the action until the inability of the defendant to conduct his defense by reason of his military service was removed? We are of the opinion, and so hold, that the answer is in the negative.

The Soldiers' and Sailors' Civil Relief Act of 1940, sec. 521, 50 U. S. C. A., the interpretation of which is involved in this appeal, reads: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the Court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." Oct. 17, 1940, c. 888, sec. 201, 54 Stat., 1181.

The act provides that the court shall, on the application of a party to an action in the military service, grant a stay in the trial of such action, unless in the opinion of the court the ability of such party to conduct his case is not materially affected by reason of his military service. It was therefore mandatory upon the trial judge to grant the stay unless he was of the opinion that the ability of the defendant to conduct his defense was not materially affected by reason of his military service.

"The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner,* 319 U. S., 561, 87 Law Ed., 1587.

Although the trial judge found as a fact, upon competent evidence, "that the ability of the defendant to conduct his defense is materially affected by reason of his military service" it was not necessary under the relief act that such finding be made, it being only necessary that the court be of the opinion that the ability of the defendant to conduct his defense be materially affected by reason of his military service. *Boone v. Lightner, supra.*

It is the contention of the plaintiff that the defendant would not be prejudiced by a trial in his absence, since the defendant's deposition has been taken and is on file. While it may be true that parties to actions

are sometimes forced to trial in their absence, with only their depositions to be relied upon, we do not concur with the contention that such a situation is not prejudicial to the party so forced. Every party has a right to be present at the trial of his cause, and to be forced to trial without this right on account of absence due to military service cannot be said to be without material affect upon such cause, unless, as by the act provided, the court shall be of the opinion that such situation does not materially affect his ability to conduct his defense. In *Bowsman v. Peterson,* 45 Fed. Supp., 741, it is said: "Within due limitations, he (defendant) ought to be allowed to testify personally before the jury rather than through the notoriously indifferent medium of deposition. He should be allowed to scrutinize the jury list, to confront the jury as it is impaneled to observe the responses of its members on the *voir dire* examination, to make suggestions and have them and his preferences and his possible relation to the jurymen considered, in the very important step of peremptory challenges. He should, if reasonably possible, have the opportunity to be personally before the court and the jury during the entire progress of his trial, manifesting his interest in its event and allowing those charged with the burden of decison to observe him, either for his advantage or to his possible detriment."

Plaintiff contends that the insurance company is the real defendant in interest and seeks to ignore the defendant Wyche altogether so far as the trial is concerned. This contention is untenable, for the reason, among others, that the policy involved in this case provides that "no action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company."

In view of the trial judge's finding of fact, based upon competent evidence, that the ability of the defendant to conduct his defense was materially affected by reason of his military service, and, in the exercise of his discretion, ordering and adjudging a stay in the trial of and a continuance of the cause until the inability of the defendant to conduct his defense by reason of his military service shall be removed, we are of the opinion that the judgment of the Superior Court should be affirmed, and it is so ordered.

Affirmed.

ALICE WALKER v. HARRY WALKER.

(Filed 13 December, 1944.)

1. Divorce § 17—

Where the custody of a minor child has been awarded the mother in a divorce proceeding and subsequently, after both parents, who are proper and fit persons to have the custody of such child, have moved out of the State, the child being left by the mother with her parents, residents of this State and highly proper persons to rear the said child, upon petition of the father, in the divorce action, for custody of the child, the court has authority under the statute, G. S., 50-13, to order that the child continue in the custody of the grandparents.

2. Same—

The welfare of the child is the paramount consideration to guide the court in granting the custody and tuition of a minor child of divorced parents to the father or mother.

APPEAL by defendant, as petitioner in the cause, from *Sink, J.,* at 31 July, 1944, Term, of GUILFORD.

Civil action (1) in which judgment was entered at 16 March, 1942, Term of Superior Court of Guilford County, North Carolina, divorcing plaintiff and defendant from the bonds of matrimony existing between them on the ground of two years' separation, and awarding to plaintiff the custody of Jerry Lynnwood Walker, the minor child of plaintiff and defendant, and (2) in which defendant, after notice to plaintiff, now Alice Royal, files petition in the cause for the custody of said child.

Upon hearing on this petition before the judge resident of and holding the courts of the 12th Judicial District on 31 July, 1944, at courthouse in Greensboro pursuant to notice, as aforesaid, the parties being present in person and represented by counsel, and being heard upon the pleadings and evidence offered, the court finds these facts:

"(1) That the custody of Jerry Lynnwood Walker was awarded to his mother, the respondent, in a divorce action which was tried in the Superior Court of Guilford County on the 16th day of March, 1942.

"(2) That prior to the divorce action, to wit: on the 18th day of October, 1935, the petitioner and the respondent entered into a separation agreement by the terms of which the petitioner, among other things, obligated himself to pay the respondent the sum of $3.00 per week for the support and maintenance of Jerry Lynnwood Walker.

"(3) That thereafter, during the year 1937, the petitioner was indicted in the Municipal County Court in the City of Greensboro for the non-support of the said Jerry Lynnwood Walker, and that upon the verdict of guilty on said charge, the defendant herein was given a suspended sentence conditioned upon payment of the sum of $3.00 per week for the support of said Jerry Lynnwood Walker.

"(4) That from the evidence offered at the hearing on the motion and petition of the petitioner, it appeared that the petitioner on occasions has failed and neglected to make the payments required to be made by him.

"(5) That the petitioner is a resident and citizen of Portsmouth, Virginia, and the respondent is a resident and citizen of Christiansburg, Virginia.

"(6) That Jerry Lynnwood Walker, the son of the petitioner and respondent resides with his grandparents, Mr. and Mrs. Judd Hickman in Harnett County, North Carolina, and that said grandparents of the said Jerry Lynnwood Walker are persons of excellent character in comfortable circumstances, and that said Jerry Lynwood Walker is receiving kind, careful and proper consideration from his said grandparents; that he has been regularly sent to school and is in every way, being well provided for.

"(7) That the respondent, the mother of the said Jerry Lynnwood Walker, was and is a fit person to have the legal custody of her said child, the said Jerry Lynnwood Walker.

"(8) That the petitioner offered evidence of his present good character and further that he is now profitably employed in a lawful and gainful occupation; that he is financially able to support said child.

"(9) That both the petitioner and the respondent have re-married and that each of them maintains a home at the places where they now reside."

Upon these findings of fact, being of opinion (a) that the plaintiff, as respondent to motion in the cause, is "a fit and proper person to have the legal custody of the said Jerry Lynnwood Walker continued in her," (b) "that the best interest of said child requires that" he "be permitted to continue to reside with his grandparents, Mr. and Mrs. Judd Hickman, in Harnett County, North Carolina, (c) that defendant, as petitioner in the cause, "should be required to continue to make payments each week in the sum of at least $3.00 to Judd Hickman for the support of the said child," (d) "that said Jerry Lynnwood Walker should be allowed to visit each the petitioner and the respondent for at least one week during the year at such time as will least interfere with the education and training of said child, and is most convenient to his grandparents, Mr. and Mrs. Judd Hickman," and (e) "that both the petitioner and the respondent should have the right to visit said child at the home of his said grandparents at reasonable hours and on reasonable occasions," the court accordingly entered on 2 August, 1944, order, (1) "that the legal custody of said Jerry Lynnwood Walker be and the same is hereby continued in the respondent, the mother of the child," (2) "that said child continue to live in the home of Mr. and Mrs. Judd

Hickman, his grandparents in Harnett County, North Carolina," (3) "that both the petitioner and the respondent be permitted to visit said child in the home of his grandparents at reasonable hours and on reasonable occasions," (4) that said child be allowed to visit his father, the petitioner, and his mother, respectively, as, and under conditions specified in detail, "upon the giving of a bond in the penal sum of $200.00 on the part of the petitioner and the respondent conditioned upon the safe return of said child to the home of his grandparents in Harnett County and to the jurisdiction of the courts of North Carolina," and (5) "that the petitioner continue to make payments of at least $3.00 per week for the support and maintenance of the said Jerry Lynnwood Walker, and that said payments be made directly to Judd Hickman."

The defendant, father of the child, as petitioner in the cause, appeals to Supreme Court, and assigns error.

Wm. E. Comer for petitioner, appellant.
H. L. Koontz for respondent, appellee.

WINBORNE, J. This is the question posed by appellant: "Did the presiding judge err, in his discretion, in awarding custody of the child in question to the respondent?"

To this question the statute, G. S., 50-13, formerly C. S., 1664; Revisal, 1570, Code, 1296, in language and as applied in decisions of this Court, affords a negative answer. See *Setzer v. Setzer,* 129 N. C., 296, 40 S. E., 62; *Sanders v. Sanders,* 167 N. C., 317, 83 S. E., 489; *Story v. Story,* 221 N. C., 114, 19 S. E. (2d), 136. This statute provides that: "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best . . ." Applying this statute, the decisions of this Court hold that the question of granting the custody and tuition of the child to the father or mother is discretionary with the court. *Setzer v. Setzer, supra; Sanders v. Sanders, supra;* and *Story v. Story, supra.* The welfare of the child is the paramount consideration, or, as stated *In re Lewis,* 88 N. C., 31, "the polar star by which the discretion of the court is to be guided."

In the present case, upon the facts found, the best interest of the child expressly appears as the polar star by which the discretion of the court was guided.

Furthermore, in providing for the child to remain within and subject to the jurisdiction of the courts of this State, there is no abuse of discretion.

Affirmed.

COLLEEN D. ALLIGOOD, BY HER NEXT FRIEND, R. H. ALLIGOOD, v. J. F. SHELTON AND HATTIE D. SHELTON.

(Filed 13 December, 1944.)

1. Trial § 49—

It is within the power of the trial judge, in the exercise of his sound discretion, to set aside the verdict of the jury, in whole or in part. G. S., 1-207.

2. Same—

The discretionary action of the trial court in setting aside the verdict on the issues of damages, because excessive or contrary to the weight of the evidence, is not appealable in the absence of a denial of some legal right.

3. Same: Appeal and Error § 37b—

Where the trial court set aside that part of the jury's verdict, awarding punitive damages to plaintiff against defendants, and denied the plaintiff's motion for a new trial on the issue so set aside, there is error and the ruling of the trial court is reversed.

4. Trial § 51: Judgments § 42: Appeal and Error § 31e—

When plaintiff preserves objection and exception to the setting aside of the verdict on an issue awarding punitive damages, and subsequent to trial and judgment, defendant pays into court the full amount of the judgment rendered, which is accepted by plaintiff, with nothing in the record to show that such payment was intended or accepted as a full settlement, this Court is not required, *ex mero motu*, to dismiss the appeal, nor does such payment and acceptance preclude the plaintiff from a new trial on the issue as to which the verdict was set aside.

APPEAL by plaintiff from *Phillips, J.*, at September Term, 1944, of RICHMOND.

Plaintiff sued for damages for wrongful eviction, and for assault.

Issues were submitted to the jury and answered as follows:

"1. Did the defendants unlawfully and wrongfully evict and eject the plaintiff from the premises described in the complaint, as alleged in the complaint?

"Answer: Yes.

"2. If so, did the defendants maliciously evict and eject the plaintiff from the premises described in the complaint, as alleged in the complaint?

"Answer: Yes.

"3. What amount of actual or compensatory damages, if any, is the plaintiff entitled to recover of the defendants?

"Answer: $200.

"4. What amount of punitive damages, if any, is the plaintiff entitled to recover of the defendants?

"Answer: $400.

"5. Did the defendant J. F. Shelton unlawfully assault the plaintiff as alleged in the complaint?

"Answer: Yes.

"6. If so, at such time and place was the defendant J. F. Shelton acting as agent, servant or employee of the defendant Hattie D. Shelton, as alleged in the complaint?

"Answer: Yes.

"7. Was said assault committed in a malicious manner, as alleged in the complaint?

"Answer: Yes.

"8. What amount of actual or compensatory damages, if any, is the plaintiff entitled to recover of the defendants?

"Answer: $200.

"9. What amount of punitive damages, if any, is the plaintiff entitled to recover of the defendants?

"Answer: $400.

"10. What amount of actual or compensatory damages, if any, is the plaintiff entitled to recover of defendant J. F. Shelton?

"Answer:

"11. What amount of punitive damages, if any, is the plaintiff entitled to recover of defendant J. F. Shelton?

"Answer:

"12. Did the plaintiff wrongfully and negligently damage the personal and real property of the defendants, as alleged in the answer?

"Answer: No.

"13. What amount of damages, if any, are the defendants entitled to recover of the plaintiff on their counterclaim?

"Answer: None."

Upon the coming in of the verdict the court in his discretion set aside the answer to the 9th issue. Plaintiff excepted.

Plaintiff then filed motion in writing that the plaintiff be awarded a new trial on the 9th issue. Motion was denied and plaintiff excepted. Judgment was rendered on the verdict, reciting the issues and responses, and the ruling of the court in setting aside the verdict on the 9th issue in his discretion, and adjudging that plaintiff recover of defendants the sum of $800 and costs.

Plaintiff excepted to the denial of his motion for new trial on the 9th issue and gave notice of appeal. After the plaintiff had given notice of appeal the defendants paid the judgment in full, together with the costs of action, and the plaintiff and plaintiff's counsel accepted the full sum of the judgment.

Plaintiff appealed, assigning as error the action of the court in setting aside the verdict on the 9th issue and the denial of his motion for a new trial on the 9th issue.

George S. Steele, Jr., for plaintiff.
No counsel for defendants.

DEVIN, J. It was within the power of the trial judge in the exercise of his sound discretion to set aside the verdict of the jury, in whole or in part. G. S., 1-207. "The discretionary action of the trial court in setting aside the verdict on the issue of damages because excessive or contrary to the weight of the evidence is not appealable in the absence of a denial of some legal right. C. S., 591; *Anderson v. Holland,* 209 N. C., 746, 184 S. E., 511; *Bailey v. Dibbrell Mineral Co.,* 183 N. C., 525, 112 S. E., 29; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686. It was likewise a matter of discretion as to whether the verdict should be set aside in whole or in part. *Geer v. Reams,* 88 N. C., 197." *Hawley v. Powell,* 222 N. C., 713, 24 S. E. (2d), 523. But the refusal of plaintiff's motion for another trial on the issue so set aside was the denial of a right to which she was entitled. Hence, the ruling of the court on this point must be held for error. *Panel Co. v. Ipock,* 217 N. C., 375, 8 S. E. (2d), 243; *Bird v. Bradburn,* 131 N. C., 488, 42 S. E., 936.

While it appears from the record that subsequent to the trial and entry of judgment the defendants paid the full amount of the judgment rendered on the remaining issues, and that plaintiff accepted same, we do not regard this as requiring this Court *ex mero motu* to dismiss the plaintiff's appeal. There was no motion to dismiss the appeal on this ground. The judgment was rendered for the aggregate of the amounts determined by the answers to the 3rd, 4th and 8th issues. The amounts fixed by the jury in answer to those issues were acceptable to both sides and were no longer in dispute, but there was no judgment on the 9th issue. The defendants' payment of the amount of the judgment on the issues determined had the effect of stopping interest. There is nothing in the record to show that payment was intended or accepted as a settlement of the entire claim of plaintiff, who is under age, or for more than the sums set out in the judgment. *Garland v. Improvement Co.,* 184 N. C., 551 (556), 115 S. E., 164; *Blanchard v. Peanut Co.,* 182 N. C.,

20, 108 S. E., 332; *Mercer v. Lumber Co.,* 173 N. C., 49, 91 S. E., 588. The acceptance thereof by the plaintiff under these circumstances we do not think should be held to preclude her from a trial on the issue as to which the verdict was set aside.

There was error in the denial of plaintiff's motion for a new trial on the 9th issue, and the ruling of the trial court in that respect is

Reversed.

ANNANIAS CORNELISON AND HIS WIFE, LILLIE CORNELISON, v. MADISON HAMMOND AND HIS WIFE, TURA HAMMOND.

(Filed 13 December, 1944.)

1. **Boundaries § 9—**

Plaintiffs in a processioning proceeding, G. S., ch. 38, are bound by the call in their deed for a named corner whether it be marked or unmarked.

2. **Same—**

When a beginning corner, monument or landmark, either natural or artificial, has been lost or destroyed, or its location is uncertain, and the terminus of the first call is admitted or established, the first call may be reversed in order to find the beginning. But when, as here, the objective is the location of a lost corner of another tract called for as plaintiffs' beginning point, plaintiffs, being unable to locate the corner without resort to this rule, must look to the deeds establishing the corner for proof. Nothing else appearing, the calls and distances, in the senior description of which such corner is a part, are controlling.

3. **Same—**

Resort may not be had to a junior conveyance for the purpose of locating the corner or line referred to or described therein as being established by a previous deed or grant. Before the calls of the junior grant can be ascertained, those of the elder must be located and recourse cannot be had to the junior grant for that purpose.

APPEAL by defendants from *Bobbitt, J.,* at July Term, 1944, of RANDOLPH. New trial.

This is a processioning proceeding under G. S., ch. 38; C. S., 361 *et seq.,* to locate a disputed boundary line between adjoining property owners.

Defendants own land to the west and south of the tract owned by plaintiffs. It is alleged that there is a dispute as to the beginning point at the southwest corner of plaintiffs' land and a controversy over the location of the western and southern lines of plaintiff's tract.

The plaintiffs contend that the beginning point is at Black A on the map and that the western line extends northerly to Black B. The de-

fendants contend that the corner is at Red A and extends northerly to Red B. The controversy over the southern line centers entirely in the location of the corner. The jury fixed Black A as the beginning point and Red B as the northern terminus of the western line. From judgment on the verdict defendants appealed.

J. G. Prevette for plaintiffs, appellees.

J. A. Spence for defendants, appellants.

BARNHILL, J. The deed of plaintiffs calls for the Hammond corner as the beginning corner and the Hammond deed refers to the same point as the W. B. Lassiter corner. Location of this beginning point is the primary issue. When that is established, the location of the line will become routine.

The court held that there was no sufficient evidence that the pine at Black A, relied on by plaintiffs as the corner, is in fact a marked corner and so instructed the jury. It then gave these further instructions:

"The Court instructs you that Black E is the terminus of the first call in the deed from W. B. Lassiter to Cornelison; so the Court instructs you that in the absence of evidence tending to show a different location of the Hammond-Cornelison corner, originally the Hammond-Lassiter corner, that you would locate the beginning corner by reversing the first call in the deed from Lassiter to Cornelison . . .

"That deed calls 'Beginning at a pine, M. Hammond's corner, thence East on Hammond's line 14.14 chains to a stake on the west bank of the branch in said line;' and reversing that call and starting from the admitted corner E, and running west on Hammond's line, you would under those circumstances, go a distance of 14.14 chains to ascertain the location of the beginning point in the description, in the absence of evidence tending to show the beginning corner or the disputed corner being at a different location . . .

"Now, if you find from the evidence and by its greater weight that, by reversing the first call in the deed from Lassiter to Cornelison and running West from the established corner at (Black) E, 14.14 chains along the Hammond line, that would take you to Black A, then the court instructs you that Black A would constitute the beginning corner, unless you find from other evidence in the case that the Cornelison-Hammond corner, originally the Lassiter-Hammond corner, has its actual location at the south terminus of a marked line extending from Red B to Red A, in which event the actual location of the corner, if you find that there was such a corner at the south terminus of this line from Red B to Red A would control."

These instructions clearly permit and direct the jury to reverse the first call in a junior deed in order to establish a point fixed in a senior conveyance. It must be held for error.

The plaintiffs are bound by the call in their deed for the Hammond or Lassiter corner whether it be marked or unmarked. *Corn v. McCrary,* 48 N. C., 496; *Bowen v. Gaylord,* 122 N. C., 816; *Lumber Co. v. Hutton,* 159 N. C., 445, 74 S. E., 1056; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 547; 8 Am. Jur., 783, 785, 786, 789.

When a beginning corner, monument or landmark, either natural or artificial, has been lost or destroyed, or its location is uncertain, and the terminus of the first call is admitted or established, the first call may be reversed in order to find the beginning. *Dobson v. Finley,* 53 N. C., 495; *Norwood v. Crawford,* 114 N. C., 513; *Clark v. Moore,* 126 N. C., 1; *Hanstein v. Ferrall,* 149 N. C., 240; *Land Co. v. Lang,* 146 N. C., 311; *Gunter v. Mfg. Co.,* 166 N. C., 161, 81 S. E., 1070; *Jarvis v. Swain,* 173 N. C., 9, 91 S. E., 358; *Cowles v. Reavis,* 109 N. C., 417; *Marshall v. Corbett,* 137 N. C., 555; *Lindsay v. Austin,* 139 N. C., 463.

But when, as here, the objective is the location of a lost corner of another tract called for as plaintiffs' beginning point plaintiffs, being unable to locate the corner without resorting to this rule, must look to the deeds establishing the corner for proof. Nothing else appearing, the calls and distances in the senior description of which such corner is a part are controlling.

The corners and boundaries of an earlier grant cannot be controlled by a later grant. *Tucker v. Satterthwaite,* 123 N. C., 511. Resort may not be had to a junior conveyance for the purpose of locating the corner or line referred to or described therein as being established by a previous deed or grant. Before the calls of the junior grant can be ascertained, those of the elder must be located and recourse cannot be had to the junior grant for that purpose. *Harry v. Graham,* 18 N. C., 76; *Dula v. McGhee,* 34 N. C., 332; *Corn v. McCrary, supra; Euliss v. McAdams,* 108 N. C., 507; *Hill v. Dalton,* 136 N. C., 339; *Thomas v. Hipp,* 223 N. C., 515.

So then, on this record, if plaintiffs are unable to establish the Hammond corner by any of the usual methods of direct proof, they may resort to the rule which permits the reversal of the calls in the former senior deeds—first the W. B. Lassiter deed, and if that is unavailing, then the Hammond deed. *Deaver v. Jones,* 119 N. C., 598; *Huffman v. Pearson,* 222 N. C., 193, 22 S. E. (2d), 440.

The court below perhaps was misled by the language used in *Greer v. Hayes,* 216 N. C., 396, 5 S. E. (2d), 169, where it was stated: "As the only other natural object established or attempted to be established was the beginning point, resort must be had to the courses and distances

called for in plaintiff's deed . . ." But, in interpreting and applying the language used in that opinion, it must be borne in mind that there plaintiff's deed was the senior deed.

As the indicated error in the charge is such as to require a new trial, discussion of the questions raised by other exceptive assignments of error is unnecessary.

New trial.

STATE v. MELVIN WADE.

(Filed 13 December, 1944.)

1. Rape § 4—

One who has carnal knowledge of a female child under the age of twelve years is guilty of rape, and the fact that the offender may have believed the child was above the age of consent will not mitigate the crime. One having carnal knowledge of such a child does so at his peril.

2. Same—

A defendant on trial for the rape of a child under twelve years of age may show that the prosecutrix is above the age of consent, but he cannot prove this fact by her declaration.

APPEAL by defendant from *Phillips, J.*, at August Term, 1944, of SCOTLAND.

Criminal prosecution tried upon an indictment charging the defendant with rape.

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 Rhodes and Moody for the State.

Thos. J. Dunn for defendant.

DENNY, J. The defendant excepts and assigns as error the failure of his Honor to charge the jury that it could return a verdict under G. S., 14-26; C. S., 4209, the pertinent part of which reads as follows: "If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court," and further excepts and assigns as error the failure to submit to the jury both counts in the bill of indictment.

The first count charges the defendant with assaulting Annie Mae Terry, on 13 June, 1944, against her will and of unlawfully, willfully,

violently and feloniously ravishing and carnally knowing her. The second count charges that on 13 June, 1944, the defendant "willfully, unlawfully, feloniously and violently did carnally know and abuse one Annie Mae Terry, a female child, she, the said Annie Mae Terry, being then and there under the age of 12 years."

The mother of Annie Mae Terry testified she was born 31 March, 1935. Novella Terry, with whom Annie Mae Terry has lived since she was one year old, testified that she was present when Annie Mae Terry was born and that she was born in Robeson County, 31 March, 1935. The State also offered as corroborative evidence a certified copy of the records of Vital Statistics, tending to show that Annie Mae Terry was born in Robeson County, 31 March, 1935.

There is abundant evidence to the effect that the prosecutrix was ravished and carnally known and that the defendant is the party who ravished her and carnally knew her. The defendant testified, however, that the prosecutrix told him she was 12 years old, and in his confession to the officers shortly after his arrest, he said the prosecutrix consented for him to have sexual intercourse with her. Did this testimony of the defendant entitle him to have the court charge the jury that they might return a verdict under G. S., 14-26, the statute hereinbefore quoted? We do not think so. We think, upon the evidence disclosed on the record, it was proper to submit only the second count in the bill of indictment.

The pertinent part of the statute applicable to the facts in this case is as follows: "Every person . . . who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death."

We think the principle of law applicable to the facts in this case, together with numerous citations in support thereof, is clearly stated in 44 Amer. Jur., sec. 41, p. 926, which is as follows: "It is a well-settled rule that where the law provides that sexual intercourse with an unmarried female under a certain age shall constitute the crime of rape, ignorance of the age of the prosecutrix on the part of the defendant in a prosecution for such crime committed on a female under the prohibited age constitutes no defense, no matter whether such ignorance was based on a good faith belief that the prosecutrix was above the prohibited age, or on an exercise of reasonable care to ascertain her age, or whether the defendant was misled by her appearance or her misrepresentations. In any event, he has committed a moral wrong, and he was bound to know, at his peril, that her age was such that consent on her part would prevent the act from being rape. The fact of such belief cannot be taken into consideration in mitigation of punishment." A defendant on trial for rape may show that the prosecutrix is above the age of

consent, but he cannot prove this fact by her declarations. 52 C. J., sec. 99, p. 1074; *Bryan v. State,* 18 Ala., A, 199, 89 S., 894; *Renfroe v. State,* 84 Ark., 16, 104 S. W., 542; *Heath v. State,* 173 Ind., 296, 90 N. E., 310; *Campbell v. State,* 63 Tex. Crim. Rep., 595, 141 S. W., 232.

One who has carnal knowledge of a female child under the age of twelve years is guilty of rape, and the fact that the offender may have believed the child was above the age of consent, will not mitigate the crime. The statute does not require the State to charge or prove that a person indicted thereunder must have known the female child to have been under the age of consent; one having carnal knowledge of such a child, does so at his peril, and his opinion as to her age, is immaterial. In the case of *Heath v. State, supra,* the Supreme Court of Indiana, in considering the same question presented here, said: "The law absolutely forbids carnal intercourse with a child under 14 years of age, and no belief respecting the age of the girl, however well founded, will excuse the transgressor if at the time of the sexual act she is in fact within the prohibited age. *People v. Ratz,* 115 Cal., 132, 46 Pac., 915; *State v. Sherman,* 106 Iowa, 684, 77 N. W., 461; *Commonwealth v. Murphy,* 165 Mass., 66, 42 N. E., 504, 30 L. R. A., 734, 52 Am. St. Rep., 496; *Smith v. State,* 44 Tex. Cr. R., 137, 68 S. W., 995, 100 Am. St. Rep., 849; *State v. Houx,* 109 Mo., 654, 19 S. W., 35, 32 Am. St. Rep., 686; *Lawrence v. Com.,* 30 Grat (Va.), 845."

As required by the law, his Honor stated in his charge to the jury that the jury must find from the evidence, beyond a reasonable doubt, that the prosecutrix was under twelve years of age at the time of the offense, before a verdict of guilty could be returned under the count submitted. These exceptions and assignments of error cannot be sustained, and the remaining exceptions and assignments of error are without sufficient merit to disturb the verdict below.

No error.

STATE OF NORTH CAROLINA, ON THE RELATION OF THE NORTH CAROLINA UTILITIES COMMISSION, v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 13 December, 1944.)

1. Utilities Commission § 1—

The N. C. Utilities Commission is a court of record and authorized by law to formulate and promulgate its own rules of practice, including rules for rehearings. G. S., 62-12. It is also a court of general and original jurisdiction only as to subjects embraced within ch. 62 of the General Statutes and it does not possess the inherent powers of an appellate court.

2. Utilities Commission § 5—

The General Assembly, in lieu of giving the N. C. Utilities Commission authority to grant rehearings, expressly provided for a rehearing upon exceptions, and the Commission is not authorized to grant rehearings other than in the manner so provided. G. S., 62-20.

3. Utilities Commission § 4—

The statutory notice of appeal from the Utilities Commission to the Superior Court, G. S., 62-20, is mandatory, and the time within which such notice may be given cannot be extended by the parties of record. The Commission is a party of record, in a proceeding before it, and upon appeal becomes the party plaintiff.

4. Utilities Commission §§ 4, 5—

A court, having power to grant a rehearing, may entertain a petition to rehear, filed after the time for appeal has expired, but in considering whether or not to grant the rehearing, such consideration will not enlarge the time for appeal, if the rehearing is denied. An appeal does not lie from the denial of a petition to rehear. On the other hand, where a petition to rehear is filed before the time for appeal has expired, it tolls the running of the time and appeal may be taken within the statutory time for appeal from the date of denial of the petition for rehearing.

APPEAL by relator, Atlantic & Western Railway Company, from *Stevens, J.*, at April Term, 1944, of WAKE.

Proceeding before the North Carolina Utilities Commission.

The Norfolk Southern Railway Company filed a petition against the Atlantic & Western Railway Company before the Utilities Commission, seeking an order to compel a more favorable division of certain freight charges on shipments originating at points on Atlantic & Western Railway Company, delivered to the complaining carrier at Lillington, N. C., and moved over its lines to Varina, N. C.

The Atlantic & Western Railway Company filed its answer and the matter was heard, and on 11 August, 1943, an order was entered denying the relief sought. Thereafter, on 20 August, 1943, the petitioner filed exceptions to said order and the exceptions were overruled by the Commission on 24 August, 1943. Fourteen days later, 7 September, 1943, the Norfolk Southern Railway Company filed with the Commission a petition to rehear together with notice of appeal, with exceptions and assignments of error. The petition to rehear was filed pursuant to Rule 17 of the Rules of Practice and Procedure of the North Carolina Utilities Commission, which provides for the filing of a petition to rehear within thirty days after the issuance of final order in the case. An order was entered 8 September, 1943, to the effect that upon further consideration of the record in the proceeding and of the petition to rehear, the petition was denied, and that said record be certified and transmitted to the Superior Court of Wake County. On 10 September,

1943, notice of appeal, together with exceptions and assignments of error, were again filed with the Commission by the petitioner.

The Atlantic & Western Railway Company made a motion in the court below to dismiss the appeal on the ground that notice of appeal was not given within ten days from the date of the order overruling the exceptions to the decision of the Commission, as required by G. S., 62-20. The motion was denied, and it appealed to the Supreme Court, assigning error.

Teague & Williams and Bunn & Arendell for relator, plaintiff.
Simms & Simms for defendant.

DENNY, J. The North Carolina Utilities Commission is a court of record and authorized by law to formulate and promulgate its own rules of practice, including rules for hearings. G. S., 62-12. The appellant does not challenge the power of the Commission to formulate and promulgate rules and regulations for the orderly performance of its duties, but it does challenge the authority of the Commission to formulate and enforce rules which run counter to the express provisions of the statute. *Utilities Com. v. R. R., ante,* 283, 29 S. E. (2d), 912.

The North Carolina Utilities Commission is a court of general jurisdiction only as to subjects embraced within chapter 62 of the General Statutes. It is a court of original jurisdiction and does not possess the inherent powers of an appellate court. An appellate court, unless prohibited by statute, has the authority to grant rehearings in cases it has decided by virtue of its inherent power to modify and amend its judgments, so long as they are under its control. 3 Amer. Jur., sec. 796, p. 345.

"The general rule is that a rehearing will not be granted unless it is shown either that some question decisive of the case and duly submitted by counsel has been overlooked, or that the court has based the decision on a wrong principle of law. . . . As a general rule, a rehearing can be had only on the record as it came from the court below. Newly discovered evidence is not a ground for rehearing." 3 Am. Jur., sec. 798, p. 346, citing *United States v. Maxwell Land-Grant Co.,* 122 U. S., 365, 30 Law Ed., 1211.

The Interstate Commerce Commission apparently did not have the authority to grant a rehearing until the enactment of the Hepburn Act in 1906, expressly empowering it to do so. U. S. C. A., Title 49, sec. 16 (a).

We think the General Assembly, in lieu of giving the North Carolina Utilities Commission the authority to grant rehearings, expressly provided for a rehearing upon exceptions. G. S., 62-20; C. S., 1097. The

statute provides for an appeal to the Superior Court from a decision or determination of the Commission. But a party desiring to appeal cannot do so unless such party shall, within ten days after notice of the decision or determination, file with the Commission exceptions to the decision or determination of the Commission, which exceptions shall state the grounds of objection to the decision or determination. If any one of such exceptions shall be overruled, then such party may appeal from the order overruling the exception. The notice of appeal must be given within ten days after the decision overruling the exception.

This Court held in the case of *Corp. Com. v. R. R.,* 185 N. C., 435, 117 S. E., 563, that the statutory notice of appeal prescribed in C. S., 1097, now G. S., 62-20, is mandatory, and the time within which such notice may be given cannot be extended by the parties of record. The Utilities Commission is a party of record, in a proceeding before it and upon appeal, under the decisions of this Court, the Commission becomes the party plaintiff. *Corp. Com. v. R. R.,* 151 N. C., 447, 66 S. E., 427; *Corp. Com. v. R. R.,* 170 N. C., 560, 87 S. E., 785.

We hold that the North Carolina Utilities Commission is not authorized to grant rehearings except in the manner prescribed by the statute, G. S., 62-20. Moreover, if it were so authorized, and Rule 17 of the Rules of Practice and Procedure of the North Carolina Utilities Commission were valid, we do not think the petition to rehear was seasonably filed, since the statutory time for giving notice of appeal had expired before it was filed and the petition to rehear was not granted.

A court, having power to grant a rehearing, may entertain a petition for rehearing, filed after the time for appeal from its original order has expired, but in considering whether or not to grant the rehearing, such consideration will not enlarge the time for appeal from the original order, if the petition for rehearing is denied. Furthermore, an appeal does not lie from the denial of a petition to rehear. *Pfister v. Northern Illinois Finance Corp.,* 317 U. S., 144, 87 Law Ed., 146; *Bowman v. Loperena,* 311 U. S., 262, 85 Law Ed., 177; *Conboy v. Bank,* 203 U. S., 141, 51 Law Ed., 128; 3 Amer. Jur., sec. 435, p. 150. See also *Badger v. Daniel,* 82 N. C., 468. On the other hand, where a petition for rehearing is filed before the time for appeal has expired, it tolls the running of the time and appeal may be taken within the statutory time for appeal from the date of denial of the petition for rehearing. *Morse v. United States,* 270 U. S., 151, 70 Law Ed., 518; *U. S. v. Seminole Nation,* 299 U. S., 417, 81 Law Ed., 316.

The motion of the Atlantic & Western Railway Company interposed in the court below, to dismiss the appeal of Norfolk Southern Railway Company for failure to give notice of appeal as required by the statute, G. S., 62-20, should have been allowed.

Reversed.

OLA JOHNSON BROWN v. CAROLINA ALUMINUM CO.

(Filed 13 December, 1944.)

1. Master and Servant § 40d—

Injury by accident implies a result produced by a fortuitous cause. An accident, within the meaning of the Workmen's Compensation Act, is defined as an unlooked-for and untoward event which is not expected or designed by the person who suffers the injury.

2. Master and Servant § 40e—

On the question as to whether or not an injury by accident, under the Workmen's Compensation Act, arises out of and in the course of the employment, the words "out of" refer to the origin or cause of the accident, while the words "in the course of" have reference to the time, place and circumstances under which it occurred.

3. Master and Servant § 40f—

The fact that deceased was not actually engaged in the performance of his duties as watchman, at the time he was pushed over and injured unintentionally by a fellow employee in a hurry, does not perforce defeat his claim for compensation under the Workmen's Compensation Act. Both employees had checked in for work, were on the premises and where they had a right to be. The injury by accident arose out of and in the course of the employment.

4. Master and Servant § 52c—

The factual determinations of the Industrial Commission are conclusive on appeal to the Superior Court and in this Court.

APPEAL by defendant from *Gwyn, J.*, at February Term, 1944, of STANLY.

Proceeding under Workmen's Compensation Act to determine liability of defendant to the surviving widow, sole dependent of P. L. Brown, deceased employee.

In addition to the jurisdictional determinations, the essential findings of the Industrial Commission follow:

On the morning of 18 August, 1942, P. L. Brown, who was employed by the defendant as a watchman, checked in or punched the time clock at 5:55 a.m., went to his job and about fifteen minutes later returned to the washroom to get his flashlight and was standing on the concrete floor in a passageway three feet wide through which all employees passed upon entering the plant, when Archie B. Coggin, a fellow employee, came through the turnstile into the passageway. Brown put his hands on Coggin's shoulders and Coggin, being in a hurry, pushed him aside. Brown fell backward and hit his head on the concrete floor. He died as a result of the injury three days later. Brown's weight was from 230

to 250 pounds. His death resulted from an injury by accident which arose out of and in the course of his employment.

The Commission reached the conclusion that "the deceased, having punched the time clock, entered upon his duties and later returned to the washroom to get his flashlight, saw Archie B. Coggin, who had just passed through the turnstile and was yet within the narrow passageway and through a spirit of friendship or salutation placed his hands on Coggin's shoulder and Coggin, being in a hurry to get to the toilet, unintentionally pushed the deceased too hard causing him to fall backward and therefore the accident was due primarily to Coggin's rush rather than any playful act on the part of the deceased."

The Commission awarded compensation, and this was affirmed on appeal to the Superior Court. From this latter ruling, the defendant appeals, assigning errors.

Henderson & Henderson for plaintiff, appellee.
R. L. Smith & Son for defendant, appellant.

STACY, C. J. The deceased was employed by the defendant as a watchman in its plant at Badin. He had checked in for the day's work. *Mion v. Marble & Tile Co.,* 217 N. C., 743, 9 S. E. (2d), 501. After going to his job, he returned to the washroom to get his flashlight. He met a fellow employee in a narrow passageway near the entrance to the plant. This fellow employee, being in a hurry, sought to get by the deceased without delay. The deceased had stopped him in friendly fashion by placing his hands on his shoulders. Because of the narrow passageway, the fellow employee, in his haste, pushed the deceased too hard and caused him to fall backward and to hit his head on the concrete floor. Thus the accident may properly be denominated "an injury produced without the design or expectation of the workman." *McNeely v. Asbestos Co.,* 206 N. C., 568, 174 S. E., 509. Injury by accident implies a result produced by a fortuitous cause. *Scott v. Ins. Co.,* 208 N. C., 160, 179 S. E., 434. An "accident" within the meaning of the Workmen's Compensation Act has been defined "as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Conrad v. Foundry Co.,* 198 N. C., 723, 153 S. E., 266. The injury, therefore, was an "injury by accident." *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844.

Did the injury by accident which the deceased sustained arise out of and in the course of the employment? This is the crucial question in the case.

The words "out of" refer to the origin or cause of the accident, while the words "in the course of" have reference to the time, place and cir-

cumstances under which it occurred. *Wilson v. Mooresville,* 222 N. C., 283, 22 S. E. (2d), 907; *Conrad v. Foundry Co., supra.*

The finding that the injury by accident which the deceased sustained arose "out of" the employment is supported by a number of decisions, notably *Robbins v. Hosiery Mills,* 220 N. C., 246, 17 S. E. (2d), 20, and cases there cited. The conclusion that it occurred "in the course of" the employment also finds support among the decisions. *Hegler v. Cannon Mills, ante,* 669. It was an ordinary risk of the business which the workman was required to assume at common law, but is now imposed on the employer by the Workmen's Compensation Act. *Chambers v. Oil Co.,* 199 N. C., 28, 153 S. E., 594.

The fact that the deceased was not actually engaged in the performance of his duties as watchman at the time of the injury would not perforce defeat plaintiff's claim for compensation. *Hopwood v. City of Pittsburgh,* 152 Pa. Super., 398, 33 A. (2d), 658. He was on the premises of the defendant and at a place where he had a right to be. *Boettcher v. University of Rochester,* 43 N. Y. S. (2d), 956. Both the deceased and Coggin had checked in for the day's work. They were fellow employees. The evidence supports the finding that the injury by accident which the deceased sustained arose out of and in the course of the employment. Hence, the factual determinations of the Commission are conclusive on appeal to the Superior Court and in this Court. *Kearns v. Furniture Co.,* 222 N. C., 438, 23 S. E. (2d), 310.

The result is an affirmance of the judgment below.

Affirmed.

STATE v. CLETUS ROWELL.

(Filed 13 December, 1944.)

Criminal Law § 54a—

In a criminal prosecution it is error for the court to instruct the jury, either in the general charge or in response to an inquiry made by the jury, that they may return a verdict with recommendation of mercy, or with other words having reference, necessarily, to the judgment to be rendered by the court, where there is no discretion in the court as to the punishment to be imposed. If the jury return such a verdict voluntarily, their recommendation may be regarded as surplusage.

APPEAL by defendant from *Phillips, J.,* at August Term, 1944, of UNION.

The defendant, Cletus Rowell, was tried upon a bill of indictment charging that he "wilfully, unlawfully and feloniously and of his malice

aforethought did kill and murder one Zeb D. Benton against the form of the Statute in such case made and provided and against the peace and dignity of the State," and the jury returned for "their verdict that the defendant, Cletus Rowell, is guilty of murder in the first degree, and make a recommendation for mercy," whereupon the court pronounced judgment that the prisoner, Cletus Rowell, having "been duly convicted of the felony of Murder in the First Degree," suffer death by asphyxiation. To this judgment the defendant excepted and appealed to the Supreme Court, assigning error.

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

W. B. Love and J. F. Milliken for defendant, appellant.

SCHENCK, J. There appears in the record the following: "After the jury had spent some time in deliberation they returned to the Courtroom and the following took place:

"By the Court: Gentlemen, your officer informs me that you desire further instructions from the Court. Is that correct?

"By Spokesman for the Jury: Yes, sir, what we want to know is if we decide first degree murder can we ask for mercy?

"By the Court: You have that right.

"To this instruction by His Honor the defendant objects and excepts. Exception No. 9."

This exception is preserved and is made the basis of an assignment of error on appeal, and we are constrained to hold that this assignment is well taken and should be sustained.

The question here posed is identical with that involved in *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743, wherein *Connor, J.,* wrote: "Where a verdict of guilty is rendered by a jury, including the words, 'with recommendation of mercy,' or words of similar import, there is authority in this State for holding that such words are surplusage, and that they may be disregarded; *S. v. Stewart,* 189 N. C., 340; *S. v. Snipes,* 185 N. C., 743; *S. v. Hancock,* 151 N. C., 699; *S. v. McKay,* 150 N. C., 813. These causes are recognized by us as authorities, sustaining the holding that recommendation of mercy by the jury, in certain cases, may be disregarded as surplusage. Where the words 'with recommendation of mercy,' or words of similar import, included in, or forming a part of a verdict of guilty, are voluntary on the part of the jury, and are not so included in or made a part of the verdict, in consequence of an instruction to the jury, that they may return a verdict, with such recommendation, the words may be treated as surplusage, and the verdict received, and recorded, as a verdict of guilty. It is well, however, to be

mindful of the words of the late *Chief Justice Hoke,* appearing in the opinion written by him, in *S. v. Murphy,* 157 N. C., 615. In this opinion, writing with wisdom gained from long experience, wide observation and deep reflection, he said: 'Our trial courts should always require that juries in capital cases should definitely and expressly say of what degree of murder they convict the prisoner, and that the verdict should be recorded as rendered. In a case of this kind there should be no room for doubt or mistake.'

"We must hold that it is error for the court to instruct the jury, either in the general charge, or in response to an inquiry made by the jury that they may return a verdict with recommendation of mercy, or with other words having reference, necessarily, to the judgment to be rendered by the court, and that where under the law there is no discretion vested in the court, as to the kind or amount of punishment which may be imposed by the judgment, upon the defendant, the error is prejudicial to defendant. If the jury returns a verdict voluntarily, including the words 'with recommendation of mercy,' or words of similar import, these words may be disregarded as surplusage, if it clearly and definitely appears that the jury, upon a consideration of all the evidence, and under the instructions of the court has agreed upon the verdict as returned by them.

"The identical question presented by this appeal was considered by the Supreme Court of Colorado in *Hackett v. People,* 8 Pac., 574. The question was there presented as follows: 'The jury, after deliberating for a considerable length of time, and being brought into court at their own request, propounded the following question, "Can the jury endorse on the verdict a recommendation of mercy?" To which question, the court answered by a written instruction that they could endorse such recommendation upon their verdict should they desire so to do. Thereupon they retired and soon after returned a verdict of guilty in manner and form as charged in the indictment. They also embraced in such verdict the following: "We, the jury, recommend the defendant to the mercy of the court."' In the opinion of the Court it is said: 'Thus it appears that some of the jurors were opposed to a conviction for the grade of crime finally found in their verdict, and that they only consented thereto upon condition that the recommendation for mercy be incorporated. They must have been led to suppose, from the court's answer to their question that this might have weight in mitigating the severity of the sentence to be pronounced. Any other explanation of the proceedings would be absurd; and it must be assumed that without such belief the verdict as returned would not have been agreed upon. Yet as the law then stood, the Court was powerless to heed their suggestion. Upon a verdict in this form, it was his duty to pronounce a sentence of

imprisonment for life. The law fixed the penalty, and he could not subtract a single day. He must either set the verdict aside, and order a new trial, or enter the judgment fixed by the statute. The instruction mentioned was therefore misleading, and under the circumstances a fatal error.' See, also, *Territory v. Griego* (N. M.), 42 Pac., 80, citing with approval *Randolph v. Lampkin* (Ky.), 14 S. W., 538; *People v. Harris* (Mich.), 43 N. W., 1060; *McBean v. State* (Wis.), 53 N. W., 497. See, also, 16 C. J., 1026, sec. 2459; 30 C. J., 432, sec. 682."

For the error above indicated the defendant is entitled to a new trial, and it is so ordered.

New trial.

STATE v. JOE WATTS.

(Filed 13 December, 1944.)

1. Intoxicating Liquors §§ 4d, 9d—

In a criminal prosecution, charging defendant with the possession of whiskey for purpose of sale, where the State's evidence showed the presence of four tax-paid, unbroken bottles, containing less than a gallon of whiskey, in the cabin of defendant near his filling station, and four other tax-paid, unbroken bottles, containing four-fifths of a gallon in another cabin near-by on defendant's premises, occupied by a woman who claimed these four bottles as her own purchase for her own use, the evidence is not sufficient to make out a *prima facie* case, and defendant's motion for judgment as of nonsuit should have been allowed. G. S., 18-11, 18-32.

2. Criminal Law § 52b—

When a complete defense is made out by the State's evidence, a defendant should be allowed to avail himself of such defense on motion for judgment as of nonsuit.

3. Criminal Law § 34a—

When the State offers the declaration of a defendant which tends to exculpate him on a material point, he is entitled to whatever advantage it affords.

4. Same—

While the State in a criminal prosecution, by offering the statements of a defendant and his employee, is not precluded from showing that the facts were otherwise, no such evidence being offered by the State, the statements are presented as worthy of belief.

5. Criminal Law § 52b—

Evidence, which merely suggests the possibility of guilt or raises only a conjecture, is insufficient to require submission to the jury.

APPEAL by defendant from *Dixon, Special Judge,* at September Term, 1944, of COLUMBUS. Reversed.

Defendant was charged with possession of whiskey for the purpose of sale.

The State offered evidence from two officers tending to show that the defendant operated a filling station with two cabins in the rear. In one of these cabins, which defendant said he occupied, was a bed and a man's clothing. In this was found four bottles, each containing four-fifths of a quart of whiskey. The bottles bore proper revenue stamps with seals unbroken. In the other cabin, which defendant said was occupied by a woman employee, was found feminine apparel and four bottles, each containing four-fifths of a quart of whiskey. These also bore proper revenue stamps with seals unbroken. The woman, who had been the wife of defendant but now divorced, said the whiskey found in her cabin was hers, that she had bought it for her own use and was going to have a birthday party in a day or two. Defendant also said the whiskey in the second cabin was the woman's. The statements of the defendant and the woman were offered in the testimony of the State's witnesses. The bottles bore stamps indicating that the four bottles first discovered had been purchased on the same date two weeks before from the Wilmington A.B.C. Liquor Store, and the other four bottles, of a different brand, were purchased at same place a week later.

It also appeared that at the time of the officers' visit they saw no gasoline in the tank and only a small supply of goods in the filling station, and some beer and wine.

The jury returned verdict of guilty, and from judgment imposing sentence the defendant appealed.

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

J. W. Brown and W. F. Jones for defendant.

DEVIN, J. The defendant assigns error in the denial by the trial court of his motion for judgment as of nonsuit entered at the close of the State's evidence. He contends that there was no sufficient evidence to support the charge of possession of whiskey for the purpose of sale.

The presence of four bottles containing less than a gallon of whiskey in the cabin near his filling station which was occupied by defendant would not be sufficient to constitute *prima facie* evidence that the liquor was being kept for the purpose of sale. G. S., 18-32; G. S., 18-11; *S. v. Sudderth,* 223 N. C., 610. The fact that there were four bottles containing four-fifths of a gallon of whiskey in the other cabin on defendant's premises, is coupled with defendant's uncontradicted explanation

offered by the State that the second cabin was occupied by a woman employee who declared, as shown by the State, that the four bottles in that cabin were hers, and that she had purchased that whiskey and was keeping it for her own consumption. It was also admitted that the bottles referred to had been purchased several weeks before, at different times, that they contained different brands of whiskey, and that the seals were unbroken at time of the officers' visit.

It is an established rule that when a complete defense is made out by the State's evidence a defendant should be allowed to avail himself of such defense on a motion for judgment as of nonsuit. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769. When the State offers the declaration of a defendant which tends to exculpate him on a material point, he is entitled to whatever advantage it affords. *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91. While the State by offering the statements of the defendant and his woman employee was not precluded from showing that the facts were different, no such evidence was offered here, and this evidence was presented as worthy of belief. *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47; *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340. Hence, the State's evidence tends to negative the assumption that more than four bottles of whiskey were in the defendant's possession, and to show that the other four bottles were lawfully in the possession of another.

In the absence of evidence of possession by the defendant of more than one gallon of spirituous liquor, *prima facie* evidence of violation of the statute would be wanting. There was no other evidence to sustain the charge. There were no empty bottles "strewn around," as appeared in *S. v. Libby,* 213 N. C., 662, 197 S. E., 154, or other incriminating circumstances shown. The fact of the absence of gasoline in the filling station at the time the officers were there and scarcity of goods on the shelves might cause inquiry and arouse suspicion but must be held insufficient to afford substantial evidence of the commission of the offense charged in the warrant. "Evidence which merely suggests the possibility of guilt or raises only a conjecture is insufficient to require submission to the jury." *S. v. Todd, supra; S. v. Penry,* 220 N. C., 248, 17 S. E. (2d), 4; *S. v. Prince,* 182 N. C., 788, 108 S. E., 330.

The motion for judgment as of nonsuit should have been allowed. Judgment is

Reversed.

STATE v. CLINTON LEWIS.

(Filed 13 December, 1944.)

Assault and Battery §§ 7g, 9—

Where a male defendant is charged with an assault upon a female, G. S., 14-33, there is a rebuttable presumption that the defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the jury is not required to determine defendant's age.

APPEAL by defendant from *Burney, J.*, at January-February Criminal Term, 1944, of ROBESON.

Criminal prosecution upon a warrant, issued out of Recorder's Court of Lumberton District in Robeson County, North Carolina, charging that defendant, "a male person over the age of 18 years" did unlawfully and willfully assault one Ila Mae Holmes, "a female person," "by cursing, abusing and threatening and by twisting her arm and throwing her down causing painful bodily injuries," contrary to the form of the statute, etc., heard *de novo* in Superior Court of Robeson County upon appeal thereto by defendant from judgment of said recorder's court.

Verdict: "Guilty as charged in the warrant."

Judgment: Imprisonment in the common jail of Robeson County for a period of twelve months, to be assigned to work the roads under the supervision of the State Highway and Public Works Commission.

Defendant appeals to Supreme Court and assigns error.

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

Caswell P. Britt, T. A. McNeill, and Robert H. Dye for defendant, appellant.

WINBORNE, J. Appellant first contends on this appeal that while the warrant charges that he, the defendant, is over the age of eighteen years, there is no proof of this fact, and that, hence, there is error (1) in the refusal to grant his motions for judgment of nonsuit, G. S., 15-173, and (2) in instructing the jury: (a) that "under the evidence and the law applicable to the evidence in this case, . . . you may find the defendant guilty of an assault upon a female, he being a male person over 18 years of age . . ." (b) that "upon that evidence the State says and contends" that the jury "ought to be satisfied beyond a reasonable doubt that the defendant is guilty of an assault upon a female, he being a male person over 18 years of age," and (c) that if the jury "find from the evidence beyond a reasonable doubt that on the 22nd day of December, 1943, the

defendant, Clinton Lewis, committed an assault on the prosecuting witness, Ila Mae Holmes, as I have heretofore defined that offense to you, then it will be your duty to render a verdict of guilty against the defendant for an assault on a female, if you are satisfied beyond a reasonable doubt that defendant is over the age of 18 years." In these assignments we find no error of which defendant may properly complain.

The decisions of this Court construing G. S., 14-33, formerly C. S., 4215; Revisal, 3620, as amended, which relates to punishment for assaults, hold that "Where a male defendant is charged with an assault upon a female, there is a rebuttable presumption that the defendant is over eighteen years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury . . ." *Headnote 2 in S. v. Lefler,* 202 N. C., 700, 163 S. E., 873. And in the opinion in that case it is said that "the age of the assailant is a matter of defense," citing *S. v. Smith,* 157 N. C., 578, 72 S. E., 853; *S. v. Jones,* 181 N. C., 546, 106 S. E., 817, but that "this did not imply, however, that the jury is not required to determine the defendant's age." The subject is fully discussed in these cases. Moreover, while there is in the record on appeal no positive evidence as to the age of the defendant, it does appear that witnesses for defendant referred to him as "that man," and he is described as "a married man." And, though defendant testified as a witness on the trial below, he made no statement as to his age, and there is nothing in the record that tends to show that he contended that he was under the age of eighteen years at the date of the alleged offense.

In the light of the above settled rule of law, applicable to the facts in hand, the motions for judgment of nonsuit were properly overruled, and there is in the instructions to which the exceptions relate no error of which defendant may properly complain. The warrant charges that defendant is "a male person over the age of 18 years," and the jury finds defendant is "guilty as charged in the warrant."

Defendant next contends that there is error in portions of the charge to the jury on the plea of self-defense set up and relied upon by him, and that the court failed to charge fully on this plea. The charge as given substantially covers the subject, and is sufficient to meet the requirements of law.

Other assignments have been considered and are found to be without merit.

In the judgment below we find

No error.

STATE v. KEITH WAYNE TODD.

(Filed 13 December, 1944.)

1. Criminal Law § 68a—

It is provided by G. S., 15-179, that an appeal in a criminal case to this Court may be taken by the State in four specific instances, naming them, "and no other." An appeal by the State from a judgment granting a new trial on the ground of newly discovered evidence falls within the "and no other," albeit the State seeks to present only a question of law.

2. Criminal Law § 69: Appeal and Error § 18—

Where there is no right of appeal, a *certiorari* as a substitute therefor cannot be granted.

APPEAL by State from *Dixon, Special Judge,* at August Criminal Term, 1944, of CUMBERLAND.

At the January Criminal Term, 1944, Cumberland Superior Court, the defendant was tried upon indictment charging him with the murder of one James L. Faison, which resulted in a conviction of murder in the second degree and sentence. No error was found on appeal at the Spring Term, 1944, opinion filed 24 May, 1944, and reported *ante,* 358.

At the next succeeding term of Cumberland Superior Court (June Term) following affirmance of the judgment on appeal, the defendant filed motion for new trial on the ground of newly discovered evidence. Due to illness of the defendant and on motion of his counsel, the motion was set over to the next succeeding criminal term for hearing.

The motion then came on for hearing at the August Criminal Term, 1944, Cumberland Superior Court, and judgment was entered allowing the motion and ordering a new trial.

From this order, the State appeals, alleging want of sufficient showing of "newly discovered evidence," as that phrase is defined in the law (*S. v. Casey,* 201 N. C., 620, 161 S. E., 81), to invoke the discretionary ruling in favor of the defendant (*Stilley v. Planing Mills,* 161 N. C., 517, 77 S. E., 760).

The State also files motion for *certiorari.*

Attorney-General McMullan and Assistant Attorneys-General Rhodes and Moody for the State, appellant.

Oates, Quillin & MacRae for defendant, appellee.

STACY, C. J. The State contends that under the showing made, *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160, and at the time of the hearing, *Riddle v. Honbarrier,* 212 N. C., 528, 193 S. E., 721, the Superior

Court was without authority to entertain the motion or to grant the relief sought. The defendant contends otherwise. *S. v. Edwards,* 205 N. C., 661, 172 S. E., 399; *S. v. Casey, supra.*

However this may be, we are precluded from passing upon the merits of the matter, because the State has no right of appeal in the circumstances disclosed by the record. *S. v. McCollum,* 216 N. C., 737, 6 S. E. (2d), 503; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292. It is provided by G. S., 15-179, that an appeal to this Court may be taken by the State in four specific instances, naming them, "and no other." *S. v. Branner,* 149 N. C., 559, 63 S. E., 169. Admittedly, the present case falls within the "and no other" of the statute, albeit the State seeks to present only a question of law.

We have then a matter which comes within the inhibition of the statute, rather than within its grant. A similar situation arose in the case of *S. v. Davidson* (1899), 124 N. C., 839, 32 S. E., 957, where it was said that perhaps instances involving only questions of law were omitted from the statute by inadvertence, but the statute is the same today as it was then. "A judicial inquiry is one which investigates, declares and carries out existing law"—*Brown, J.,* in *Hudson v. McArthur,* 152 N. C., 445 (loc. cit. 454), 67 S. E., 995.

Nor is the situation saved by the application for *certiorari.* *S. v. Swepson,* 82 N. C., 541. To bring up the matter in this way would be to accomplish by indirection what the statute expressly forbids. The case is not one in which the alleged error appears on the face of the record proper, which might be corrected in our supervisory power, Const., Art. IV, sec. 8, *S. v. Lawrence,* 81 N. C., 522, but it is to review a ruling of the court entered on motion after trial. *Alexander v. Cedar Works,* 177 N. C., 536, 98 S. E., 780. This would require a "*postea* or *case* to be made up." *Ex parte Biggs,* 64 N. C., 202; *S. v. Moore,* 210 N. C., 686, 188 S. E., 421.

It results, therefore, since the case is one in which the State has no right of appeal, a dismissal must necessarily follow. *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630. "As no appeal lay, a *certiorari* as a substitute therefor cannot be granted." *Guilford v. Georgia Co.,* 109 N. C., 310, 13 S. E., 861.

Appeal dismissed.

Certiorari denied.

STATE v. EARL KIRKMAN.

(Filed 13 December, 1944.)

1. Intoxicating Liquor §§ 4d, 9d—

In a criminal prosecution for the possession of intoxicating liquor for the purpose of sale, where the evidence taken in the light most favorable to the State tended to show only that there was found in the yard of defendant's house, in which he resided with his adoptive mother, an automobile containing 42 gallons of liquor, upon which no tax had been paid, the defendant testifying that the car was not his, but was driven by a stranger, got out of order and defendant helped push it onto his premises, where it remained several days while he was away from home, and it was subsequently driven away by someone unknown to him, and the adoptive mother testifying that she did not own the automobile and did not know the owner and that she had no interest in the liquor, the refusal of defendant's motion for judgment of nonsuit, G. S., 15-173, was error.

2. Criminal Law § 52b—

Evidence sufficient to take the case to the jury, in a criminal action, must tend to prove the fact in issue or reasonably conduce to its conclusion as a fair, logical and legitimate deduction, and not merely such as raises a suspicion or conjecture of guilt.

APPEAL by defendant from *Olive, Special Judge,* at May Term, 1944, of GUILFORD.

On appeal from the municipal-county court of the city of Greensboro to the Superior Court of Guilford County, the defendant was tried upon a warrant charging that he "did unlawfully and wilfully have in his possession forty-two gallons of untax-paid intoxicating liquors, for the purpose of sale, contrary to the form of the statute and against the peace and dignity of the State," and a verdict of "guilty as charged" was rendered. From a judgment of imprisonment predicated on the verdict the defendant appealed, assigning errors.

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

Henderson & Henderson for defendant, appellant.

SCHENCK, J. The defendant, appellant, assigns as error the refusal of his motion to dismiss the action or for a judgment of nonsuit duly lodged when the State had produced its evidence and rested its case. G. S., 15-173. The defendant offered no evidence. We are constrained to hold that the refusal of the defendant's motion was error.

Taking the evidence in the light most favorable to the State, it tends to show only that there was found in the yard surrounding the house in which the defendant lived with only his adoptive mother, a Ford automobile, in the rear compartment of which was 42 gallons (seven cases) of liquor, upon which no tax, Federal or State, had been paid; that in the court below the defendant testified that the automobile was not his, and that a man, a stranger to him, was driving the automobile, which got out of order, and he, defendant, helped to push the automobile onto the premises where he lived, and that the automobile was left there for several days, during which time the defendant left and was in Norfolk; that the automobile was subsequently driven away by some unknown person.

The defendant's adoptive mother testified, as a witness for the State, that she did not own the automobile or know who did own it, and that she did not have any interest in or ownership of the liquor.

Evidence sufficient to take the case to the jury in a criminal action must tend to prove the fact in issue or reasonably conduce to its conclusion as a fair, logical and legitimate deduction, and not merely such as raises a suspicion or conjecture of guilt. *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730.

The evidence, at most, does no more than raise a suspicion of the defendant's guilt, and therefore the motion to dismiss and for judgment of nonsuit will be allowed. *S. v. Johnson, supra; S. v. Battle,* 198 N. C., 379, 151 S. E., 927; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285.

The judgment of the Superior Court is

Reversed.

STATE v. M. S. HAYDEN.

(Filed 13 December, 1944.)

1. Bastards § 2—

Willfulness of the refusal to support one's illegitimate child is an essential ingredient of the offense of failure to support in violation of G. S., 49-2, and must be proven beyond a reasonable doubt; and instructions, which fail to so charge, deprive the defendant of his right to have the jury consider his willfulness as an issuable fact.

2. Same—

In order to convict a defendant under G. S., 49-2, the burden is on the State to show not only that he is the father of the child, and that he has refused or neglected to support and maintain it, but further that his refusal or neglect was willful, without just cause, excuse, or justification, after notice and request for support.

3. Criminal Law §§ 2, 53a—

Rarely may a peremptory instruction be given to convict the defendant, if the jury finds the facts to be as testified, in cases where the substance of the offense is willfulness or a specific intent is an essential element.

APPEAL by defendant from *Phillips, J.*, at June Term, 1944, of GUILFORD. New trial.

The defendant was charged with willful failure to support his illegitimate child, in violation of G. S., 49-2.

The jury answered the issue as to paternity "yes," and found the defendant guilty as charged.

From judgment imposing sentence the defendant appealed.

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

Geo. A. Younce for defendant.

DEVIN, J. The defendant noted exception to the following instruction given by the court to the jury:

"Therefore, if you believe all the evidence and after your having answered the first issue yes, the court charges you it would be your duty, if you believe all the evidence in this case, including that of the defendant, it would be your duty to find him guilty."

In this instruction, given at the close of the court's charge to the jury, there was omission to charge that the finding of guilt must be beyond a reasonable doubt. However, in a preceding portion of the charge the court had instructed the jury to find the defendant guilty if they found all the evidence in the case to be true beyond a reasonable doubt. While the prior use of the phrase "beyond a reasonable doubt" might have obviated the necessity of repeating it in this last statement, we think the exception to the instruction complained of must be sustained on another ground. Willfulness of the refusal to support the illegitimate child is an essential ingredient of the offense charged, and this must be proven beyond a reasonable doubt. The court's instruction deprived the defendant of his right to have the jury consider the question of his willfulness as an issuable fact. *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663; *S. v. Dickens,* 215 N. C., 303, 1 S. E. (2d), 837. He had denied paternity of the child and testified that the last time he had seen the mother was long before her pregnancy or the birth of the child, and that the only notice or request for support of the child was a telephone call from the mother, according to her testimony, on the day the warrant was sworn out. In order to convict the defendant under the statute the burden was on the State to show not only that he was the father of the child, and

that he had refused or neglected to support and maintain it, but further that his refusal or neglect was willful, that is, intentionally done, "without just cause, excuse or justification," after notice and request for support. *S. v. Cook,* 207 N. C., 261, 176 S. E., 757; *S. v. Johnson,* 194 N. C., 378, 139 S. E., 697; *S. v. Whitener,* 93 N. C., 590. Rarely may a peremptory instruction be given to convict the defendant, if the jury finds the facts to be as testified, in cases where the substance of the offense is willfulness or a specific intent is an essential element. *S. v. Riley,* 113 N. C., 648, 18 S. E., 168; *S. v. Ellis, supra.*

For the error pointed out, there must be a

New trial.

MARY B. HALL v. QUEEN CITY COACH COMPANY AND GREENSBORO-FAYETTEVILLE BUS LINE, INCORPORATED, AND I. F. CHANDLER AND L. H. McNEILL.

(Filed 13 December, 1944.)

1. Injunctions § 11: Judgments § 17a: Appeal and Error § 37e—

Where the court below was not dealing with the final issue, but merely with the question whether a temporary restraining order should be continued to the hearing, and the court was not requested to find the facts in writing and did not do so, under our practice this Court will presume that, for the purpose of the order made, the court found facts sufficient to support it.

2. Pleadings § 15: Appeal and Error § 5—

Demurrer, *ore tenus,* to the complaint as not stating a cause of action, may be made and disposed of in this Court.

APPEAL by plaintiff from *Gwyn, J.,* at Chambers in Laurinburg, N. C., 1 May, 1944. From MOORE.

The plaintiff brought this action in behalf of herself and others like situated to permanently enjoin the defendants from the maintenance of a nuisance in the operation of a bus station in the town of Southern Pines, and obtained a temporary restraining order, with notice to defendants to show cause. The matter was heard before his Honor, Allen H. Gwyn, judge presiding, at Laurinburg, North Carolina, on 1 May, 1944, and, with certain modifications, the temporary restraining order was dissolved and the cause retained for final hearing.

Upon the hearing the plaintiff presented her evidence, including affidavits in support of her contention that a public nuisance, of a serious nature and injurious to her, was being maintained on defendants' prem-

ises. The defendants introduced their answers in general denial, together with other affidavits relating to the subject.

The judge was not requested to make any findings of fact for the record, and did not do so.

From the order dissolving the restraining order, the plaintiff appealed.

U. L. Spence for plaintiff, appellant.

W. E. Smith, K. J. Kindley, John M. Robinson, and Hunter M. Jones for defendants, Queen City Coach Company and Greensboro-Fayetteville Bus Line, Inc.; W. Duncan Matthews for defendant, L. H. McNeill; H. F. Seawell, Jr., for defendant, I. F. Chandler, appellees.

SEAWELL, J. The court below was not dealing with the final issue, but merely with the question whether the temporary restraining order should be continued to the hearing. As the judge was not requested to find the facts in writing, and did not do so, under our practice it will be presumed that, for the purpose of his order, he found facts sufficient to support it. Therefore, we are unable to find grounds for reversal.

However, in this Court, counsel for I. F. Chandler demurred, *ore tenus,* to the complaint as not stating a cause of action against him. Upon examination of the pleadings, we are of the opinion that the demurrer should be sustained, and it is so ordered. The action as to Chandler is dismissed.

Except as thus modified, the judgment is

Affirmed.

STATE v. CLARENCE HILL, WILEY McRAE AND JESSE WATKINS.

(Filed 13 December, 1944.)

Perjury § 3—

Where defendant in a criminal prosecution, having gone upon the stand and sworn that he was not the person served by the officer and that it was a case of mistaken identity, was convicted, a subsequent prosecution and conviction for perjury, based upon such evidence, will not be disturbed.

APPEAL by defendant from *Hamilton, Special Judge,* at February Term, 1944, of GUILFORD. No error.

Criminal prosecution on bill of indictment charging the crime of perjury.

This cause was here at the Fall Term, 1943. See *S. v. Hill,* 223 N. C., 711, where the facts are fully stated.

When the case again came on for trial in the court below there was a verdict of "guilty as charged." The court pronounced judgment on the verdict and defendant Hill appealed.

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

P. W. Glidewell, Sr., and Kermit Hightower for appellant.

BARNHILL, J. The defendant admitted he testified under oath in the original hearing that he was not the person operating a taxi stopped by an officer, that he was not present, and that he did not receive a citation at that time for speeding. His testimony in this respect was material to the issue then being tried. He insists even now it is a case of mistaken identity. Hence his trial on the charge of perjury centered around the issue of identity and that issue has been resolved against him.

The charge of the court construed in the light of the admissions made by defendant is without error. Defendant's other exceptions fail to disclose cause for disturbing the verdict. The judgment must stand.

No error.

B. M. MILLER v. CHARLIE JONES AND WES ABERNATHY.

(Filed 3 January, 1945.)

1. **Public Officers § 8: Negligence § 1a: Highways § 2—**

   An officer, charged with the performance of a governmental duty involving discretion, cannot be held for mere negligence with respect thereto, but, on the contrary, is not liable unless his act, or failure to act, is corrupt or malicious. The act or omission then, for all practical purposes, takes on the guise of a malicious tort.

2. **Master and Servant § 20: Negligence § 1a: Public Officers § 8: Highways § 2—**

   An employee, as distinguished from a public officer, is generally held individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer, although such negligence may not be imputed to the employer on the principle of *respondeat superior*, when such employer is clothed with governmental immunity.

3. **Negligence § 1a—**

   It is a broad general rule that any person, who violates a legal duty he owes to another, is liable for the natural and probable consequences of his act or omission, and exceptions to this rule should not, by mere judicial rationalization, be extended beyond the recognized public policy out of which they spring.

4. Negligence § 19a—

In an action for alleged damages to plaintiff's stock of goods by the willful, wanton, and malicious negligence of defendants, employees of the State Highway Commission, where the plaintiff's evidence tended to show that defendants, in charge of a sweeper and blower in working the highway near plaintiff's store, without warning, so used the sweeper and blower as to throw such a cloud of dirt and filth through the open windows and doors of the store that the merchandise therein was badly damaged, there is ample evidence for the jury and allowance of motion for judgment as of nonsuit, G. S., 1-183, was erroneous.

SCHENCK, J., dissenting.

DEVIN, J., dissenting.

BARNHILL, J., dissenting.

APPEAL by plaintiff from *Rudisill, Special Judge,* at February Term, 1944, of ALEXANDER.

The plaintiff brought this suit to recover damages for injury to his stock of goods and merchandise, alleged to have been caused by the negligence of the defendants.

In the complaint the plaintiff alleged, with respect to the injury and the cause thereof, that he was owner of a large store in the village of Hiddenite, in which he was engaged in the mercantile business, selling groceries, dry goods, notions, fruits, vegetables, and things of like kind, which store building was located near to the highway running through the village—the said highway being a part of the State Highway System; and that said store was fully stocked with goods and merchandise of the kind mentioned, recently bought for the fall trade. There were four doors fronting on the State Highway.

The defendants were employees of the State Highway and Public Works Commission, and were working upon the highway, sweeping the road, especially the shoulder of the road nearest to the plaintiff's store. It is complained that the dust and dirt and accumulation of filth swept up on and along the road were blown into the store as the truck or sweeper, with blower attached, passed the building, thereby doing plaintiff's stock of goods great damage, in so much that they could not be restored by cleaning to their original condition; and that the store required a general cleaning, and a great part of the stock had to be sold at a greatly reduced price because of the diminished value due to defendants' negligence and injury to the goods, and that plaintiff sustained damage in the sum of $1,200.

It is further alleged that the defendants failed to give any notice of the intended use of the said sweeper and blower past the premises so that the injury complained of might have been averted; and failed to observe the conditions of the store or notify the owner so that the injury

complained of might have been averted; and failed to observe the conditions of the store or notify the owner so that it might be closed, and that they might easily, by the exercise of proper care, have known that their acts in using the sweeper and blower past the premises, without such notice, would cause the injury complained of.

The defendants demurred to the complaint for that it failed to state that the acts of the defendants therein complained of were either corrupt or malicious. This demurrer was sustained; and, not appealing from said order, the plaintiff was permitted to amend the complaint, and did amend it, by charging that the acts were willfully, wantonly, negligently, maliciously, and heedlessly done.

Thereafter, the defendants answered separately, denying the material allegations of the complaint.

Upon the trial, the plaintiff testified substantially as follows:

That he owned and operated a mercantile business in Hiddenite on Highway No. 90; his store is located near the west side of the highway. It has four doors facing the street leading through Hiddenite—two as the main entrances of the store, and one to each of the stock rooms. There are windows in the building, and they were up at the time the sweeper and blower passed the store. Plaintiff had no notice whatever that the sweeper and blower was approaching his place until it was already there, and the dust, dirt and filth were blown into his store. It took several days to clean the store out. There was dirt and dust and filth on everything in the store. You could not see through the store at the time the dust was blowing through—you could not see the front door.

Plaintiff had no opportunity to close the doors or windows, which he would gladly have done if he had had any notice that the blower and sweeper was going to pass. He did not at any time refuse to close the doors and windows in an endeavor to protect his property, and did not tell anybody that they had more time than plaintiff had—plaintiff had none.

The first plaintiff knew that the blower and sweeper was approaching, he was sitting in his office directly in the back of the store, and the first thing he knew, he heard an awful racket and raised up, and did not know what it was. It looked more like a cyclone than anything else—he could not see the front of the store there was so much dust and filth in it. That was the first time he knew anything about it. Plaintiff ran to get the doors closed, but could not do so before the sweeper and blower passed. Plaintiff then gave an inventory of the damaged articles, and testified as to the damage.

On cross-examination, the plaintiff stated that he supposed Mr. Abernathy and Mr. Jones were using State equipment of the Highway Commission. They were preparing to give the road a bituminous treatment.

Plaintiff did not know how long afterwards they put the bituminou surface on, or hard surfaced it. The defendants were operating th sweeper and blower, Mr. Jones and Mr. Abernathy.

Plaintiff was corroborated in his evidence by Mr. Fincannon, a employee who was present at the time of the injury. There was n opportunity to close the doors or protect the stock of goods. They coul have been protected if the doors had been closed and the windows shut.

The defendants offered no evidence, but upon conclusion of the plain tiff's evidence, demurred and made a motion to nonsuit under G. S. 1-183. The demurrer was sustained, and plaintiff appealed, assignin error.

A. C. Payne and Burke & Burke for plaintiff, appellant.
E. A. Gardner and Charles Ross for defendants, appellees.

SEAWELL, J. In the court below the defendants did not challenge th sufficiency of the evidence to go to the jury or to support the allegatio of negligence, except in one respect—that it did not show any willful ness, malice or corruption on the part of the defendants. It will b seen that at a former hearing, the demurrer to the complaint for that i did not charge that the acts of the defendants were done maliciously was sustained; and instead of appealing therefrom, the plaintiff amende his complaint by so charging. That became the theory upon which th case was tried below, and upon which it was heard here. See appellees brief, p. 2: "The case came on for trial and upon the conclusion of th plaintiff's evidence, the defendant moved for judgment of nonsuit, fo that there was no evidence to sustain the allegation of 'wilful, wrongful wanton, and malicious' negligence. The Court sustained the motion o nonsuit and dismissed the action, and the plaintiff appealed to thi Court."

A further reading of the brief shows that the defense was based entirely on a misconception of *Wilkins and Ward v. Burton,* 220 N. C., 13, 16 S. E. (2d), 406, and the postulate that "it is there established that employees and agents of the State Highway and Public Works Commission cannot be held personally liable for negligence in the discharge of their governmental functions except upon allegation and proof of wantonness or corruption."

Prefacing our further discussion with the statement, which will further receive attention, that there is plenary evidence to sustain the allegation of negligence in any aspect of the case, we first pay attention to the theory advanced by the defendants themselves.

It is a rule of law that an officer charged with the performance of a governmental duty involving discretion cannot be held for mere negli-

gence with respect thereto, but, on the contrary, is not liable unless his act, or his failure to act, is corrupt or malicious. *Hipp v. Ferrall,* 173 N. C., 167, 91 S. E., 831; *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735. The act or omission then, for all practical purposes, takes on the guise of a malicious tort. The immunity thus extended to officers in the performance of a public duty grows out of a public policy which is fully explained in the two cases cited. *Hipp v. Ferrall, supra; Templeton v. Beard, supra,* and cases cited. One reason for the existence of such a rule is that it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward anyone who might be affected thereby. However, in proper cases even public officers may be liable for misfeasance in the performance of their ministerial duties where injury has ensued. Whether such liability would extend to omissions, as well as to acts of commission, in the absence of imperative legal duty, we need not now determine. *Hipp v. Ferrall,* 173 N. C., 167, 91 S. E., 831; *Hudson v. McArthur,* 152 N. C., 445, 67 S. E., 995; *Hathaway v. Hinton,* 46 N. C., 243; *Rowley v. Cedar Rapids,* 203 Iowa, 1245, 212 N. W., 158, 53 A. L. R., 375.

The suggested immunity has never been extended to a mere employee of a governmental agency upon this principle, although employed upon public works, since the compelling reasons for the nonliability of a public officer, clothed with discretion, are entirely absent. Of course, a mere employee doing a mechanical job, as were the defendants here, must exercise some sort of judgment in plying his shovel or driving his truck—but he is in no sense invested with a discretion which attends a public officer in the discharge of public or governmental duties, not ministerial in their character. In short, the defendants were not public officers, nor were they in the performance of any discretionary act. The mere fact that a person charged with negligence is an employee of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liablity for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner. The authorities generally hold the employee individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer, although such negligence may not be imputed to the employer on the principle of *respondeat superior,* when such employer is clothed with a governmental immunity under the rule. *Lewis v. Hunter,* 212 N. C., 504, 507, 508, 193 S. E., 814; *Florio v. Jersey City,* 129 Atl., 470, 40 A. L. R., 1353 (anno.); *Skerry v. Rich,* 228 Mass., 462, 17 N. E., 824; Anno. 40 A. L. R., 1358.

The State of North Carolina has adopted this view in *Lewis v. Hunter, supra,* and any extension of immunity in that respect is a matter of legislative action.

It is proper to say, however, that it is a broad general rule that any person who violates a legal duty he owes to another is liable for the natural and probable consequences of his act or omission, and exceptions to that rule should not, by mere judicial rationalization, be extended beyond the recognized public policy out of which they spring.

While the defendants have not so contended, it has been suggested that they were under the direction of superiors, who required the work to be done in a particular way. In support of this view, we have cited to us *Dorsey v. Henderson,* 148 N. C., 423, 62 S. E., 547, in which the city was held not to be liable in damages for the act of cutting down the level of the street in front of plaintiff's store. That case merely decided that a municipal corporation "has authority to grade its streets and is not liable for consequential damage, *unless the work was done in an unskillful and incautious manner,*" citing *Meares v. Wilmington,* 31 N. C., 73. The case proceeds entirely upon the principle that a municipality is under no liability to adjacent owners for changing the grade of the street, in the absence of a statute fixing such liability, and that any injury arising from this cause is *damnum absque injuria.* No question of negligence is involved, and there was no consideration of the doctrine of immunity as we have discussed it, the nonliabilty of the defendant town dependng upon an entirely different principle.

There is no evidence in the record whatever that the defendants were in the actual supervision of their employers, the Highway Commission, or any superior officer or agent thereof, or that any such person was present. The inferences from the whole evidence are directly contrary to such assumption. They were in the performance of a mechanical task, in which it is to be supposed that they were skilled, and were in direct charge of operations. The exigencies of the affair in Hiddenite were not to be controlled from Raleigh or by any officer or functionary whatever two hundred miles from the scene of action; and the presumption that any of those officers had directed the defendants to perform a lawful act in an unlawful or negligent manner is too rash to be indulged in, and, if true, would afford no immunity to any party participating.

The defendants could avoid liability not by any supposed immunity, but only upon the same principle that any other person might be protected in the doing of a lawful act, and that is, that they had not done it negligently, to the injury of another. *Meares v. Wilmington, supra; Lewis v. Hunter, supra.*

Plaintiff alleges that the defendants' negligence in failing to use any protection to keep the dust, dirt and other accumulations which were

blown from the highway by the road sweeper operated by the defendants, out of his store, resulted in substantial damage to him. The evidence in support of this allegation is sufficient to carry the case to the jury.

The judgment of nonsuit erroneously entered by the court below is

Reversed.

SCHENCK, J., dissenting: The defendants Charlie Jones and Wes Abernathy were drivers and operators of a truck with blower attachments upon the highways of North Carolina and were employees of the State Highway and Public Works Commission to which said truck with attachments belonged, and said defendants so drove the truck with its attachments by the store of the plaintiff as to cause dirt and filth to be blown on the goods of the plaintiff in said store, to their great damage. While it may be conceded that the operation of said truck with its attachments in the manner in which it was operated might, under certain circumstances, constitute evidence of actionable negligence, still I do not concur in the conclusion that the evidence in this case was sufficient to have been submitted to the jury.

According to the record the defendants were employees and agents of the State Highway and Public Works Commission and any liability which attached to them was due to their public employment. "It is the established law in this jurisdiction that public officers, in the performance of their official and governmental duties involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly and of malice. *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735. It is also a recognized principle with us that in case of duties plainly ministerial in character, the individual liability of public officers for negligent breach thereof does not attach where the duties are of a public nature, imposed entirely for public benefit, unless the statute creating the office or imposing the duties makes provision for such liability." *Old Fort v. Harmon,* 219 N. C., 241, 13 S. E. (2d), 423; *Wilkins and Ward v. Burton,* 220 N. C., 13, 16 S. E. (2d), 406.

If the plaintiff seeks to hold the defendants liable upon the theory that they were in the performance of official or governmental duties involving the exercise of judgment or discretion his effort should fail for the want of any evidence of corruption or of malice on the part of the defendants. *Hipp v. Ferrall,* 173 N. C., 167, 91 S. E., 831; *Wilkins and Ward v. Burton, supra.*

If the plaintiff seeks to hold the defendants liable upon the theory that the defendants' duties with the relation to driving and operating the truck with sweeper attachments were ministerial in character, it appears that such duties were of a public nature and were imposed for public

benefit and no provision is made in the statute creating such duties imposing individual liability upon the part of the person upon whom such duties are cast, and the absence of such provision is fatal to the plaintiff's case. *Hudson v. McArthur,* 152 N. C., 445, 67 S. E., 995; *Bates v. Horner,* 65 Vt., 471, reported with full note in 22 L. R. A., p. 824.

Since the defendants were public employees, I think it is immaterial whether they were engaged in the performance of official and governmental duties requiring the exercise of judgment and discretion, or were engaged in the performance of duties purely ministerial in character of a public nature and imposed entirely for public benefit, with no provision for personal liability made in the statute creating such duties. In either case, I think the plaintiff should fail in his action.

DEVIN, J., dissenting: I do not think there was sufficient evidence of negligence on the part of the defendants to warrant submission of the case to the jury, and therefore the judgment of nonsuit was properly entered and should be affirmed.

The record discloses that at the conclusion of the plaintiff's evidence defendants' motion for judgment of nonsuit was allowed. The trial court's reasons for his action are not stated. Whatever ground in support of this ruling was stated in appellee's brief is immaterial, for the only question presented to us is the validity of the judgment of nonsuit on the record before us. If the plaintiff offered competent evidence of actionable negligence on the part of these defendants he was entitled to go to the jury; otherwise not.

It may be conceded that the immunity from personal liability accorded public officials engaged in governmental duties involving judgment and discretion does not relieve a mere employee from liability for damages for an injury occasioned by his negligence or other tort of which he is personally guilty, some fault or failure in the manner of doing the work, outside of and beyond the mere doing of the work for which he is employed, as illustrated in *Lewis v. Hunter,* 212 N. C., 504, 193 S. E., 814.

But here I think there was a failure of proof. The plaintiff's testimony does not make out a case of negligence. The evidence was brief. Only two witnesses testified, the plaintiff and another. Defendants' motion for nonsuit having been allowed, they offered no evidence. Plaintiff's testimony described the extent of the damage to his goods from dust and dirt raised by the sweeper used in preparing the State Highway in front of his store for hard-surfacing. It was testified the sweeper was being operated by the defendants who were employees of the State Highway Commission and as such engaged at the time on this work. There is no evidence that the use of this machine in sweeping the sur-

face of the highway was not the proper and approved method of doing this work. The only wrongful act suggested is that defendants failed to give plaintiff notice of the approach of the sweeper to his store. But these defendants were mere employees, under orders presumably both as to doing the work and as to the time. It was during working hours. There was no evidence that it was these defendants' duty to notify plaintiff, or that defendants knew of the conditions in plaintiff's store, or that they did anything that was not necessary to be done in preparing the highway for treatment. The plaintiff testified, "they were sweeping the roadbed out, getting ready to put the treatment on the road." As employees defendants were doing the work for which they were employed. The superintendent or engineer could not be held liable for giving the order. Nor should the employees be held liable for obeying. Only in the event of showing some negligence, some failure of duty to the plaintiff, in the manner of doing the work, could the employee be held liable.

The plaintiff's allegation in his complaint that the defendants failed to use any protection to keep the dust from being blown on defendants' store is not supported by any evidence.

In my opinion the evidence offered at the trial, which appears of record, was insufficient to show negligence on the part of the defendants, and the judgment of nonsuit should be affirmed.

BARNHILL, J., dissenting: I am not in disagreement with the law as stated in the majority opinion, but I find it impossible to concur in the view that there is evidence of negligence to be submitted to a jury.

The plaintiff alleges that these defendants failed to close the doors and windows of his store or to notify him to do so before the approach of the road sweeper and blower. There is neither allegation nor evidence that the machine was being operated in a careless or negligent manner or that defendants otherwise failed to exercise due care. Plaintiff rests his case on the one allegation of want of proper notice.

Conceding that he was entitled to notice, upon whom rested the duty to notify?

The work was being done under the supervision of the State Highway Commission. Its officials were in charge, supervising the work. It was for them to direct the manner and method of its performance. If notice was due it was due from them. On this record it is not made to appear that this duty had been delegated to or rested upon these defendants. They were mere employees charged with the duty of operating the road sweeper. To hold them liable for alleged derelictions of their superiors, without proof that this was one of the duties of their employment, is, to my mind, a novel application of the law of negligence.

It is suggested that counsel for defendants have not advanced the contention there is no evidence of negligence to be submitted to a jury but have elected instead to argue that there was no willful or malicious wrong. But the judgment was a judgment of nonsuit. The court below necessarily concluded there was no such evidence. This conclusion is challenged by the exception to the judgment. Are we to fail to sustain a judgment correctly entered because, forsooth, counsel may have "missed the boat" in their brief? I do not so understand.

The brief of defendants does disclose, as suggested, that in making the motion to dismiss as of nonsuit they relied in part at least upon the absence of proof of willfulness. Even so, the record, which is ordinarily controlling, contains the simple entry: "At the close of all the evidence, being the plaintiff's evidence, the defendants made a motion for judgment of nonsuit. Motion allowed. Plaintiff excepts." This is followed by a simple judgment of nonsuit. There is no indication here that the court below adopted, followed, or was misled by the theory of defendants.

Then too it is said there is no evidence defendants were under the actual supervision of their employers. "The inferences from the whole evidence are directly to the contrary." And further, the presumption that they were directed by officers in Raleigh "to perform a lawful act in an unlawful or negligent manner is too rash to be indulged in." No one so contends.

In this connection I call attention to the allegation that "defendant was engaged as a tractor operator, working under the supervision of Mr. S. B. Brinkley, Road Oil Supervisor of the Ninth Highway Division"; and to the evidence "They were preparing to retreat the road with bituminous treatment at the time." A retreatment project calls for a substantial force of workers, foremen, and supervisors. So common, ordinary observation would indicate. Certainly, to my mind, there is no presumption that two men operating a sweeper and blower on such a project were all alone on the job.

It is alleged as stated that defendants failed to control the dust that arose from the operation of the sweeper. Even so, there is no allegation that the dust could be controlled or that defendants failed to use any available means to that end. It is a matter of common knowledge that wind controls the flow of dust. Hence plaintiff might have alleged with equal force that defendants failed to control the wind. Neither is an allegation of negligence.

The only proof in this respect is to the effect that dust arose from the sweeper and permeated plaintiff's store. *Res ipsa loquitur* does not apply. Hence there is no evidence to support the allegation.

After all there is only one simple question presented on this appeal. The evidence is all to the effect that defendants did not notify plaintiff

of the approach of the sweeper. There is no evidence such duty was an incident of their employment. If, as a matter of law, it was their duty to notify, and we can so hold, the judgment below should be reversed. If not, it should be affirmed.

Being of the opinion that plaintiff has failed to offer any evidence of actionable negligence, I vote to affirm.

AUBREY A. PERKINS, INCOMPETENT, WACHOVIA BANK & TRUST COMPANY, TRUSTEE, v. IRENE PERKINS ISLEY.

(Filed 3 January, 1945.)

1. Wills § 46—

A legatee or devisee under a will is not bound to accept a legacy or devise therein provided, but may disclaim or renounce his right under the will, even where the legacy or devise is beneficial to him, provided he has not already accepted it.

2. Same: Deeds § 5—

The right to renounce a devise or legacy is a natural one and needs no statutory authority. A title by deed or devise requires the assent of the grantee or devisee before it can take effect.

3. Wills § 46—

An heir at law is the only person who, by the common law, becomes the owner of land without his own agency or consent. The law casts the title upon the heir, without any regard to his wishes or election.

4. Same: Wills § 42—

A beneficiary is presumed to have accepted a testamentary legacy or devise which is beneficial to him, but the presumption is rebuttable, and where the legatee or devisee renounces or disclaims the legacy or devise in clear and unequivocal terms, in the absence of fraud, the renunciation or disclaimer is effective as of the date of the death of the testator. In such case the devise or legacy is lapsed or void, and the gift passes under other provisions of the will, if there be any covering such contingency, otherwise it passes under the statutes of intestacy. G. S., 31-42.

5. Wills § 46—

When a devisee accepts a devise, his title relates back to the death of testator; but when there is a renunciation, the devise never takes effect and the title never vests in the devisee.

6. Same—

In most jurisdictions a renunciation must be made within a reasonable time after the probate of the will. What is a reasonable time is usually left to judicial determination in the light of the facts and circumstances involved in each case.

7. Same—

The mere fact that a daughter, the sole legatee and devisee under her mother's will, requested in writing the appointment of an administrator *c. t. a.*, in lieu of the executor named therein, who had been adjudged incompetent, is insufficient to estop her from renouncing her rights under the will.

8. Same—

Where a testatrix died in May and her will was probated in December following and in February thereafter a daughter, the sole devisee and legatee named in the will, filed a verified petition, in the office of the clerk of the Superior Court, reciting these facts and renouncing all her rights under the said will, such renunciation is in a clear and unequivocal manner and within a reasonable time, and justifies orders of the clerk and judge approving the same and directing distribution as in case of intestacy, and it relates back to the death of the testatrix.

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

APPEAL by defendant from *Phillips, J.*, at February Term, 1944, of GUILFORD.

This is an action for partition, instituted as a special proceeding before the clerk of the Superior Court of Guilford County. The defendant filed an answer alleging sole seizin of all the land sought to be partitioned. Whereupon the proceeding was transferred to the Civil Issue Docket of the Superior Court for trial upon the issues raised by the pleadings.

The facts pertinent to this appeal are as follows:

1. Lalah R. Perkins died seized and possessed of the land described in the petition and left surviving her two children, the plaintiff Aubrey A. Perkins and the defendant Irene Perkins Isley.

2. Lalah R. Perkins, the mother of Irene Perkins Isley and Aubrey A. Perkins, the parties hereto, died on 4 May, 1939, leaving a last will and testament, which was duly probated and filed in the office of the clerk of the Superior Court of Guilford County, North Carolina, on or about 19 December, 1939. That said last will and testament provides:

"Second—All my property of whatever nature, real, personal, or mixed, wheresoever situated, to which I may be legally or equitably entitled, or over which I may have any power of appointment, I give and bequeath to my daughter, Irene P. Isley, in fee simple, forever.

"Third—I appoint Aubrey A. Perkins to be the executor of this will, and request that no sureties upon his official bonds be required."

3. Aubrey A. Perkins was adjudged incompetent for want of understanding to manage his own affairs, on 5 December, 1939, and on 19 December, 1939, the Wachovia Bank & Trust Co. was appointed Trustee of his property and qualified as such Trustee and immediately entered

upon its duties and has continuously since that date and is now acting as such Trustee.

4. On 18 December, 1939, Irene Perkins Isley requested the clerk of the Superior Court of Guilford County, in writing, to appoint the Security National Bank, of Greensboro, N. C., administrator *c. t. a.* of the will of her mother, Mrs. Lalah Ross Perkins. The Security National Bank was duly appointed and immediately entered upon its duties as such administrator.

5. Irene Perkins Isley, on 12 February, 1940, filed in the office of the clerk of the Superior Court of Guilford County, a petition entitled "In the Matter of the Estate of Mrs. Lalah Ross Perkins, Security National Bank, Administrator *c. t. a.*" This petition was signed by her and her attorney and duly verified by Irene Perkins Isley. In this petition she alleges that her mother, Lalah Ross Perkins, died on 4 May, 1939, leaving a last will and testament which was duly filed and probated on or about 19 December, 1939; that Irene Perkins Isley, the petitioner, was named as sole beneficiary in said will, that the Security National Bank qualified as administrator *c. t. a.* on 19 December, 1939, that the estate consists of real and personal property of considerable value; and in Item III of said petition she alleges: "That the said Irene Perkins Isley does not wish to take under said will, but desires to renounce all her rights under the same; that she is advised that she is entitled to renounce as a matter of law, and she hereby does renounce all her rights under said will." And in Item IV she alleges: "That the said Lalah Ross Perkins left surviving her two children, Irene Perkins Isley and Aubrey A. Perkins, who under the intestate laws of the State of North Carolina are her only heirs at law and that the Wachovia Bank & Trust Company, of High Point, N. C., is the duly appointed qualified and acting Trustee of the property of Aubrey A. Perkins." And she prays as follows:

"Wherefore, petitioner prays the Court for an order:

"1. Authorizing petitioner to renounce all her rights under said will;

"2. Declaring said will to be of no effect and directing that the entire estate of the said Lalah Ross Perkins descend to and be distributed between Irene Perkins Isley and Wachovia Bank & Trust Co., Trustee for Aubrey A. Perkins, in accordance with the intestate laws of the State of North Carolina, and,

"3. Continuing the Security National Bank as Administrator and authorizing and directing said Administrator to distribute all property coming into its hands, after the payment of all lawful debts and charges, between Irene Perkins Isley and Wachovia Bank & Trust Co., Trustee for Aubrey A. Perkins, in accordance with the intestate laws of the State of North Carolina."

6. The Security National Bank, as Administrator *c. t. a.*, of the estate of Mrs. Lalah Ross Perkins, on 12 February, 1940, filed its answer in said cause. On the same day the clerk of the Superior Court of Guilford County adjudged, by its order that the petitioner, Irene Perkins Isley, "has the right, as a matter of law, to renounce under said will," and further ordered and adjudged that "Irene Perkins Isley be and she is hereby permitted to renounce all her rights under the will of Mrs. Lalah Ross Perkins in which the said Irene Perkins Isley was named as sole beneficiary and that by reason of the renunciation contained in the petition and this order, said renunciation is now complete; that said will is null and void and of no effect to pass title to any property, real, personal or mixed, of the estate of the said Mrs. Lalah Ross Perkins and that all of her said property shall descend to and be distributed between Irene Perkins Isley and Wachovia Bank & Trust Company, Trustee for Aubrey A. Perkins, in equal shares, in accordance with the intestate laws of the State of North Carolina," and further ordered and adjudged, "that the Security National Bank be continued as administrator and that said administrator, after paying all the debts of the estate and all proper charges against it, distribute all property remaining in its hands as such administrator between the said Irene Perkins Isley and Wachovia Bank & Trust Company, Trustee for Aubrey A. Perkins, in equal shares, in accordance with the intestate laws of the State of North Carolina."

7. There was an appeal from the order of the clerk of the Superior Court. The matter was heard in the Superior Court, on 12 February, 1940, and it was again adjudged that Irene Perkins Isley, the petitioner, "has the right, as a matter of law, to renounce all her rights under said will," and the order signed by the clerk of the Superior Court was in all respects approved and confirmed by the judge of the Superior Court.

8. The administrator *c. t. a.*, of Lalah Ross Perkins, deceased, the Wachovia Bank & Trust Company, Trustee for Aubrey A. Perkins, and Irene Perkins Isley, have at all times dealt with the property in accordance with the renunciation approved by the clerk and the judge of the Superior Court.

9. Irene Perkins Isley was a married woman at the time of the foregoing transactions; however, she and her husband separated on 8 November, 1939, and have lived separate and apart since said date, and they were divorced later by a judgment of the Superior Court of Guilford County.

10. W. F. Isley, the husband of the defendant, instituted the action for divorce 15 November, 1941, the defendant filed an answer alleging that W. F. Isley without provocation or cause on the part of the defendant, unlawfully and willfully abandoned her, and by way of cross action

prayed the court to grant her a divorce from the plaintiff. On 2 February, 1942, Irene Perkins Isley was granted an absolute divorce from W. F. Isley. Four issues were submitted to the jury and answered in the affirmative. The first issue as to residence, the second as to the marriage, the third as to whether or not the plaintiff and defendant had lived separate and apart continuously for two years or more immediately preceding the institution of the action, and the fourth was in the following language: "Was the abandonment and separation without fault on the part of the defendant?"

At the trial of this cause, the court submitted two issues to the jury and directed a verdict for the plaintiff, as follows:

"1. Are the plaintiff and defendant tenants in common and seized in fee simple of the lands described in the petition? Answer: Yes.

"2. What is the interest of the petitioner in said land? Answer: One-half undivided interest."

From judgment entered on the verdict, defendant appeals to the Supreme Court, assigning errors.

Sapp & Sapp for plaintiff.
Clifford Frazier for defendant.

DENNY, J. This appeal may be determined by answering the following questions: 1. Did Irene Perkins Isley renounce and refuse to take under the last will and testament of her mother, Mrs. Lalah Ross Perkins? 2. If so, did the renunciation have the effect of a conveyance which required the written assent of her husband, as provided in Art. X, sec. 6, of the Constitution of North Carolina, unless she was a freetrader under the provisions of G. S., 52-6? We think the first question must be answered in the affirmative and the second in the negative.

The weight of authority is to the effect that a legatee or devisee under a will is not bound to accept a legacy or devise therein provided, but may disclaim or renounce his right under the will, even where the legacy or devise is beneficial to him, provided he has not already accepted it. 69 C. J., Wills, sec. 2168, p. 674; 28 R. C. L., Wills, sec. 351, p. 352; Thompson on Wills, sec. 479, p. 567; Page on Wills, Vol. 4, secs. 1402 through 1404, p. 140, *et seq.; Sanders v. Jones,* 347 Mo., 255, 147 S. W. (2d), 424; *People v. Flanagan,* 331 Ill., 203, 162 N. E., 848, 60 A. L. R., 305; *In re Vasgaard's Estate,* 62 S. D., 421, 253 N. W., 453; *Greely v. Houston,* 148 Miss., 799, 114 So., 740; *Schnoover v. Osborne,* 193 Iowa, 474, 187 N. W., 20, 27 A. L. R., 465; *Chilcoat v. Reid,* 154 Md., 378, 140 A., 100; *Albany Hospital v. Hanson,* 214 N. Y., 435, 108 N. E., 812; *Peter v. Peter,* 343 Ill., 493, 175 N. E., 846, 75 A. L. R., 890; *In re Hodge's Estate,* 20 Tenn. App., 411, 99 S. W. (2d), 561; *Coomes v.*

Finegan (Iowa) (1943), 7 N. W. (2d), 729; *Strom v. Wood,* 100 Kan., 556, 164 Pac., 1100; *Bouse v. Hull,* 168 Md., 1, 176 A., 645; *Seifner v. Weller* (Mo.) (1943), 171 S. W. (2d), 617; *Daley v. Daley,* 308 Mass., 293, 32 N. E. (2d), 286.

The right to renounce a devise or legacy is a natural one and needs no statutory authorization. "An heir-at-law is the only person who, by the common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir, without any regard to his wishes or election. He cannot disclaim it if he would." 3 Washburn on Real Property (5th Ed.), sec. 4, p. 6; *In re Kalt's Estate* (Cal.) (1940), 102 Pac. (2d), 399; *S. c.,* 108 Pac. (2nd), 401; *In re Mahlstedt's Will,* 250 N. Y., 628.

A beneficiary is presumed to have accepted a testamentary legacy or devise which is beneficial to him, but the presumption is rebuttable, and where the legatee or devisee renounces or disclaims the legacy or devise in clear and unequivocal terms, in the absence of fraud, the renunciation or disclaimer is effective as of the date of the death of the testator. In such cases the devise or legacy is lapsed or void, and the gift passes under other provisions of the will, if there be any covering such contingency, otherwise it passes to the heirs at law under the statutes of intestacy. G. S., 31-42; *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769; *Bradford v. Leake,* 124 Tenn., 312, 137 S. W., 96; *Sanders v. Jones, supra; Greely v. Houston, supra; Schnoover v. Osborne, supra; Peter v. Peter, supra.*

When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation the devise never takes effect and title never vests in the devisee. *In re Johnston's Will,* 298 N. Y., 957; *Schnoover v. Osborne, supra.* In most jurisdictions, however, it is held that a renunciation must be made within a reasonable time after the probation of the will. What is a reasonable time is usually left for judicial determination in the light of the facts and circumstances involved in each case.

The appellant contends that she did not have the right to renounce the gift under her mother's will, since the Security National Bank was appointed administrator *c. t. a.,* at her suggestion. We do not so hold. We are advertent to the decisions of this Court, which hold that ordinarily where a beneficiary under a will, who is under the necessity of making an election, is presumed to have made the election by offering the will as executor and procuring its probate. *Benton v. Alexander, post,* 800, and the cases there cited. Even though a widow is estopped in this jurisdiction from claiming dower, where she, as executrix, procures the probation of her deceased husband's will, nothing else appear-

ing, she could still renounce the gift under the will and take nothing from her husband's estate if she so desired. *Brown v. Routzahn,* 63 Fed. (2d), 914, 290 U. S., 641, 78 Law Ed., 557. In the instant case, the appellant was under no obligation to make an election, and the mere fact that she requested the appointment of an administrator *c. t. a.,* in lieu of the executor named therein, who had been adjudged incompetent, is insufficient to estop her from renouncing her rights under the will.

The appellant renounced her rights under the will of her mother, Mrs. Lalah Ross Perkins, in a clear and unequivocal manner and within a reasonable time. She filed a verified petition in the office of the clerk of the Superior Court of Guilford County, in which she alleged that she was the sole beneficiary under the last will and testament of her mother, Mrs. Lalah Ross Perkins, that she did not wish to take under the will, and further stated therein that "She hereby does renounce all her rights under said will." The renunciation set forth in the petition was sufficient to justify the orders of the clerk and the judge of the Superior Court approving her renunciation and directing the Security National Bank, administrator *c. t. a.,* after paying the debts of the estate and all proper charges against it, to distribute all the property remaining in its hands as such administrator between Irene Perkins Isley and Wachovia Bank & Trust Company, Trustee for Aubrey A. Perkins, in equal shares, in accordance with the intestate laws of North Carolina.

The appellant's renunciation became effective upon the filing of her verified petition in the office of the clerk of the Superior Court renouncing her rights under said will and said renunciation related back to the death of her mother. The will of Mrs. Lalah Ross Perkins contained no residuary clause, or other provisions disposing of her property in the event of a renunciation by the beneficiary therein, therefore the plaintiff and the defendant herein are tenants in common in all the real property of which Mrs. Lalah Ross Perkins died seized.

The appellant may have made a mistake when she renounced her rights under her mother's will, but she has not shown upon this record any reason, legal or otherwise, why she should now be permitted to retract or revoke her renunciation.

Whether or not the right to renounce a testamentary gift is superior to the right of a judgment creditor, is not presented or decided.

In the trial below, we find

No error.

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

MRS. MYRTLE BENTON v. MRS. ALICE ALEXANDER.

(Filed 3 January, 1945.)

1. Wills § 44—

Nothing else appearing, a beneficiary under a will, who is under the necessity of making an election, has exercised that privilege by offering the will as executor and procuring its probate.

2. Same—

Presumption of election, arising from offering the will for probate and entering upon the administration, goes no further than the stated terms of the rule.

3. Wills §§ 31, 44—

It is clear that no mechanical application of rules will subordinate the intent of the will upon the vital point whether the beneficiary is put to an election.

4. Wills § 44—

The equitable doctrine of election is based upon the fundamental principle that a person, designated as beneficiary under a will, cannot take its separate benefits and at the same time reject its provisions adverse to his interests.

5. Same—

The intention of the testator, to dispose of property adversely to the interests of the devisee, must ordinarily be clear to put the devisee to his election.

6. Same—

The intention to put the donee to an election cannot be imputed to a testator who, as one of the supposedly alternate gifts, attempts to devise property which he mistakenly believes to be his own, and so describes it, whereas, in reality, it is the property of another.

7. Same: Husband and Wife § 13—

Where a husband, who owned no realty whatever except his interest in an estate by the entireties, leaves a will by which he devises, to his wife for life, all of his real estate, and at her death to another, the wife is not put to her election by offering the will for probate, qualifying as executrix and entering upon the administration.

APPEAL by plaintiff from *Frizzelle, J.*, at February Term, 1944, of LENOIR.

The plaintiff brought this action to remove a cloud from the title of the lands described in the complaint, arising out of the claim of owner-

ship by the defendant as devisee under the will of William H. Benton, husband of plaintiff. The will is as follows:

"NORTH CAROLINA,
LENOIR COUNTY.

"I, William H. Benton, being of sound mind and disposing memory, but realizing the uncertainty of this my earthly existence, do make and declare this my last will and testament, hereby revoking any and all wills by me heretofore made.

"Item One: I will and direct that my Executrix hereinafter named shall cause the burial of my body suitable to the wishes of my friends and relatives.

"Item Two: I will and bequeath to my wife, Myrtle Benton, as long as she may live, all my personal property of all kinds and all description wheresoever the same shall be found. At the death of my wife, such of my personal property as she has not used, I will and bequeath to my friend, Mrs. Alice Alexander.

"Item Three: I will and devise to my beloved wife, Myrtle Benton, all my real estate, consisting of lands and buildings thereon for the term of her natural life, and at the death of my said wife, I will and devise the said real estate to my friend, Alice Alexander.

"Item Four: I hereby appoint my beloved wife, Myrtle Benton, the Executrix of this, my last will and testament.

"In testimony whereof I hereunto set my hand and seal this the 5th day of February, 1938.

WILLIAM H. BENTON (SEAL)

"Signed, sealed, published and declared by the said William H. Benton to be his last will and testament in the presence of us, who, at his request and in his presence (and in the presence of each other) do subscribe our names as witnesses hereto.

"This the 5th day of February, 1938.

F. M. MOYE
T. H. WOOD."

Upon the death of William H. Benton, which occurred 5 January, 1939, the plaintiff, as executrix, offered the will for probate and thereafter qualified as executrix and entered into the administration of the estate.

The testator, William H. Benton, at no time owned any interest in lands other than those described in the complaint, which under a deed executed 4 February, 1938, by B. J. Alexander and Mrs. Alice Alexander

(the latter being the defendant) were conveyed to the said W. H. Benton and wife, Myrtle Benton, and which at the time of the making of the will and at the time of the death of the testator were held by W. H. Benton and his wife, the plaintiff, as an estate by the entirety. There is an admission in the record that the lands in controversy are the lands referred to in the will.

The plaintiff denied that she had sufficient knowledge or information of conditions which might put her to an election under the will—if such election was required—and offered evidence of her physical and mental condition at the time she offered the will for probate, of her want of knowledge as to the effect of the will and of the fact that she had no counsel or adviser in the matter, all of which was rejected by the court.

On this the defendant contended that plaintiff was put to an election as to the land in controversy, and by probating the will exercised that right and she now has only a life estate therein, as given by the will.

When the case came on to be submitted to the jury, the following issue was submitted:

"Does title to the land in controversy rest in Mrs. Alice Alexander in fee simple, subject only to the life estate therein of the plaintiff, Mrs. Myrtle Benton, under the will of W. H. Benton, deceased?"

Upon this issue, the plaintiff requested the following instruction:

"Upon the evidence, and all of it, offered in this case, the Court charges you that the plaintiff was not put to her election and that you should answer the issue No." The court refused to give this instruction.

Expressing the opinion that the case resolved itself into a question of law and that the plaintiff was put to her election under the will, and having probated the same, that she was bound by all of its provisions, the judge instructed the jury that if they believed all the evidence in the case, it would be their duty to answer the issue "Yes."

Thereupon, the jury answered the issue "Yes," and the court rendered its judgment that the defendant, Alice Alexander, was "the owner in fee simple, subject only to the life estate thereon of the plaintiff, Mrs. Myrtle Benton, of the lands in controversy in this action," describing the lands referred to in the complaint, and taxed the costs against the plaintiff.

From this judgment the plaintiff appealed, assigning errors.

Guy Elliott and J. A. Jones for plaintiff, appellant.

F. Ogden Parker, J. Faison Thomson, Geo. B. Greene, and F. E. Wallace for defendant, appellee.

SEAWELL, J. While decided differently in many jurisdictions, it is settled law in this State that, nothing else appearing, a beneficiary under

a will, who is under the necessity of making an election, has exercised that privilege by offering the will as executor and procuring its probate. *Mendenhall v. Mendenhall,* 53 N. C., 287; *Tripp v. Nobles,* 136 N. C., 99, 48 S. E., 675; *Elmore v. Byrd,* 180 N. C., 120, 104 S. E., 162; *Syme v. Badger,* 92 N. C., 706.

The question presented here is whether the plaintiff in this action was put to her election under the terms of her husband's will. Bearing upon the issues in controversy, if this query should be answered in the affirmative, we might inquire whether plaintiff was reasonably informed, or in the exercise of due diligence might have become informed, of those facts and conditions reasonably necessary to a valid and irrevocable choice, and consider the significance of the evidence on that point. Since we are convinced we need not go any further than a construction of the will in the light of admitted facts to arrive at a decision, we enter into no discussion of the rejected evidence bearing upon that phase of the case. In passing, however, we observe it is not disputed that the personalty willed to her was insufficient to pay the debts of the deceased, and that she spent substantial sums of her own money in discharging them. While it is contended that, in law, this might ordinarily merely reflect the unwisdom of her choice, it does have a bearing on the intent of the testator, who is presumed to have known his property, its value, and the extent of his obligations, when we come to analyze the question of election from that point of view; and, as hereafter pointed out, it may well be a decisive factor in the case.

In our approach to the problem, we are compelled to cite elementary law and principles well understood by the profession. But in their arrangement it is our purpose to make it clear that no mechanical application of rules will subordinate the intent of the will upon the vital point whether the beneficiary is put to an election.

The equitable doctrine of election is based upon the fundamental principle that a person designated as beneficiary under a will cannot take its separate benefits and at the same time reject its provisions adverse to his interest. "The doctrine rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction; he cannot accept and reject the same writing. Bispham Eq., 6th Ed., p. 413, sec. 295." *Elmore v. Byrd,* 180 N. C., 120, 122—"The doctrine of election, as applied to the law of wills, simply means that one who takes under a will must conform to all of its legal provisions." *McGehee v. McGehee,* 189 N. C., 558, 560, 127 S. E., 684.

To raise the legal necessity of election, the intent of the donor must clearly appear from the will under recognized rules of construction. Referring particularly to the type of problem here presented, it is said

in Page on Wills, Vol. 4, p. 1347: "The intention of testator to dispose of property or interests adverse to those of the devisee, must ordinarily be clear to put the devisee to his election," citing *Rich v. Morisey,* 149 N. C., 37, 62 S. E., 762; *Bank v. Misenheimer,* 211 N. C., 519, 191 S. E., 14.

We cannot accept the contention that upon the face of the will, the testator either actually conveyed, or intended to convey, lands belonging to his wife to another, or that if he did so, he did it with the intention of confining her to an alternate gift of personalty.

The land, subject of the devise in the will, is described generally as "all my real estate, consisting of lands and buildings thereon." Nothing else appearing, this would probably be regarded as insufficient to describe land held by the husband and wife in entirety, and beyond the testator's power of disposition—which in the event of his death would, by survivorship, become the estate of his wife. However, conceding that extraneous evidence and the admissions in the record identify the land devised to be the land so held by the entirety, it is not thereby any too clearly established that it was the intention of the donor to put the widow to an election. Under the circumstances of the case, it seems to us rather more reasonable that he was mistaken as to the nature of his interest in the property, and supposed himself, at the time of making the will, to be the owner of the land or some disposable interest in it, and was not consciously devising it as land of his wife.

In the case at bar there is no express declaration that the one gift should be taken in lieu of the other, as we often find in wills intended to put the wife to her election with regard to common law or statutory rights in the property of her husband. The inference of election arises only from the assumption that the devise related to the land of the wife. The intention to put the donee to an election cannot be imputed to a testator who, as one of the supposedly alternate gifts, attempts to devise property which he mistakenly believes to be his own, and so describes it, whereas, in reality, it is the property of another. In the case at bar the inference that an alternative proposal is presented in the will depends on the assumption that the testator was consciously devising his wife's land, whereas the terms of ownership employed—"my real estate"—are strongly persuasive that he regarded it as his own. Such a description—designation by the mere circumstance of ownership—would be sufficient in any will to pass title to the lands of the owner and is commonly used for that purpose. Its significance here cannot be ignored. It is strong evidence of the fact that the testator really supposed the land to be his own, or that he had a disposable interest in it, and was not conscious as we have said of an attempt to devise the land of his wife.

In *Elmore v. Byrd, supra,* p. 125, *Walker, J.,* writing the opinion, quotes from Pomeroy on Equity, 3 Ed., 1 Vol., at p. 792, sec. 475:

"The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own, for in such cases the testator intends that the devisee shall have both, though he is mistaken as to his own title to one." Mr. Pomeroy cites *Cull v. Showell,* Ambler, 727, *S. c.,* 27 Eng. Reports, full reprint p. 470: "One devised to A. for life an estate, which she supposed she had a power to dispose of, but in fact had not. She also gave a life interest in other estates to A. A. claimed the first estate under an old entail. *Held,* he is not put to his election."

The case considered in *Elmore v. Byrd, supra,* was distinguished from *Cull v. Showell, supra.* But in our opinion, the cited case embodies a sound principle of law. Its adoption by such a distinguished and careful writer on Equity as Mr. Pomeroy gives it added weight. We are in accord with these authorities.

There are other considerations that lead to our conclusion.

Presumption of election arising from offering the will for probate and entering upon the administration goes no further than its stated terms. It is sometimes loosely said to imply that the donee thereby elects to "abide by the terms of the will"—a declaration which is entirely too broad. From whatever point of view we take it, if the husband of this devisee merely attempted to ration the needs of the wife in her own lands without an alternate gift of his own property, which, under the law is available to her, there is no election, and the probate of the will raises no estoppel and is not detrimental to her assertion of her independent right. There are other duties of her office, the performance of which are not inconsistent with such assertion of right.

It is required that the executrix should pay the debts of her husband out of the estate. The law provides that the personalty must be applied to these debts—to pay them is an obligation upon the estate superior to that of the bequest. The legal obligations—the debts, the assets, and the relation of the estate thereto—were fixed things as of the time of the death. If we refer only to the intent of the testator and apply to him the presumption that he knew the conditions under which he made both the bequest and the devise, it seems conclusive that he must take into consideration that he owed more than his personal property would pay; but if we confine ourselves to the reality of the case, it is plain that he gave his wife nothing in the bequest of his personalty except the burden of administration, plus the privilege of paying the deficiency caused by the fact that his assets did not meet his liabilities.

The wife did not in the beginning, nor did she at any time during the period of her administration, have in her hands or accept any personalty by reason of the bequest. That property went under her hands in her capacity as executrix, and as such, she was, under the law, a trustee charged with the duty of its application to the debts. There was never at any time any surplus of personalty which might be applied to the bequest. The condition of the estate at the time of the death precluded such a possibility.

Under these circumstances, we can see no act of the plaintiff in the premises which could estop her from the assertion of her right to the lands in controversy, and the judgment of the court below is, therefore, reversed. The plaintiff is entitled to have judgment in accordance with the prayer of her complaint and conformable to this opinion. It is so ordered.

Judgment reversed.

OLA L. McDANIEL, WADE LEGGETT, MARIE McCORMICK LEGGETT, JENNIE ROSE LEGGETT, MINOR, THROUGH AND BY HER GENERAL GUARDIAN, J. G. McDANIEL, AND J. G. McDANIEL, INDIVIDUALLY, v. JUANITA McLELLAN LEGGETT, WAYNE LEGGETT, WILBUR LEGGETT AND WIFE, LIZZIE S. LEGGETT, RALPH LEGGETT, EARLINE L. BARNES AND HUSBAND, McKINNON BARNES, RICKS LEGGETT AND WIFE, EULA McLELLAN LEGGETT, BRACEY LEGGETT, ELLA MAE L. PREVATTE AND HUSBAND, FRANKLIN PREVATTE.

(Filed 3 January, 1945.)

1. Clerks of Superior Court § 3—

The clerk of the Superior Court has only such jurisdiction as is given by statute and is not vested with power affirmatively to administer an equity except in those cases where it is specifically conferred by statute.

2. Same: Courts § 2c—

Where the clerk of the Superior Court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the Superior Court and invokes the proper exercise of its power, by virtue of G. S., 1-276, the judge upon appeal may proceed to consider and determine the matter as if originally before him.

3. Pleadings § 22: Judgments § 24—

When lands of a deceased person are sold in a partition proceeding and it appears from the pleadings and evidence that it was the manifest intention of all parties that the entire lands of decedent be included in the sale, but by mistake a tract of 1.3 acres was omitted from the specific description in the petition, although announced at the sale as included, a motion in the cause by the purchaser, or his assignee, is the proper pro-

cedure to have the mistake corrected by amendment *nunc pro tunc*, and the court may make its decree conform thereto.

4. Pleadings § 22—

The power of the court to amend process and pleadings, both by statute and under decisions of this Court, is ample. And in the absence of showing that the rights of innocent third persons would be injuriously affected, the amendment relates back to the commencement of the action.

5. Estoppel §§ 6d, 6g—

A party who participated in the sale of property in which he had an interest and who stood by, while it was announced that the property being sold included a certain material element, thereby inducing another to purchase, and who accepted the benefit of the sale, may not be permitted thereafter to take an inconsistent position to the injury of the purchaser.

APPEAL by defendants from *Burney, J.*, at Chambers, 24 June, 1944. From ROBESON. Affirmed.

Motion in the cause by Zimp Leggett and wife, purchasers at partition sale, to correct and amend the record.

This was a special proceeding before the clerk to sell for partition the real property of H. J. Leggett, deceased. Plaintiffs and defendants are his heirs at law. Two tracts of land were described by metes and bounds in the petition and by amended petition the purpose was declared that all the real property of decedent should be sold. All the defendants were duly made parties and answered admitting the allegations of the petition and amended petition. Decree of sale was entered and commissioners appointed for that purpose. At the sale it was announced by one of the commissioners conducting the sale that the lands offered included the fish pond or mill pond, and that this was a material element of value in the sale, worth $1,500 or $2,000. The lands were bid off by Ricks Leggett, one of defendants, at the price of $4,550, and the bid transferred by him to the movents Zimp Leggett and wife. Deed was in due course made by the commissioners to the movents reciting, "It is the intention of this instrument to convey unto said parties of the second part all the lands owned by and in possession of H. J. Leggett at the time of his death." Distribution was made of the proceeds of sale and each of the parties accepted his or her proportionate share with knowledge that it was the purpose of the parties and the commissioners to sell all the lands of decedent.

Subsequently it was learned that a small parcel of land 1.3 acres covering a part of the fish pond or mill pond apparently was not embraced in the specific description of the lands in the petition. Defendants Ricks Leggett and Wilbur Leggett procured a quitclaim deed, without valuable consideration, and with notice of the rights of movents,

"from several of the other parties to this proceeding," and had same registered.

Thereupon the movents Zimp Leggett and wife, purchasers at the sale, moved in the cause before the clerk that the record be amended to show and declare that the mill pond was included in the lands purchased at the sale. After notice to respondents, all the parties being before the court, the clerk found the facts as above set out, and, in addition, that it was the intention of all parties and of the commissioners that all the lands of H. J. Leggett be included in the sale; that the parties understood the lands described and being sold embraced the 1.3 acres, and it was so announced by the commissioner conducting the sale, and bid off by Ricks Leggett and purchased by movents with that understanding; and that with this knowledge the proceeds of sale were received by the parties; that Ricks Leggett and Wilbur Leggett are the only respondents who resist movents' motion. These findings were made from the record and the testimony of the witnesses, including that of the appellant Ricks Leggett. There was no testimony *contra.*

Upon these findings it was decreed by the clerk that the petition and records of this proceeding be corrected to include the 1.3 acres by metes and bounds as a part of the lands owned by H. J. Leggett at the time of his death, and the commissioners directed to execute deed accordingly.

The defendants excepted and appealed to the judge of the Superior Court. The judge overruled defendants' exceptions, and adopted the findings and conclusions of the clerk and made them the findings and conclusions of the Superior Court. The execution of the judgment of the clerk was ordered to proceed.

Defendants excepted and appealed to this Court.

Varser, McIntyre & Henry for plaintiffs, appellees.
Caswell P. Britt and F. D. Hackett for defendants, appellants.

DEVIN, J. The defendants' appeal from the judgment below was based solely upon the ground that the judgment of the clerk of the Superior Court was void for want of authority, and that its affirmance by the judge could not give it life. It was contended that the motion of the appellees was to correct the record so as to include 1.3 acres of land omitted from the petition and orders by mistake, and that the findings of fact made out a case which required the aid of an equity which the clerk was without power to administer.

It is true the clerk has only such jurisdiction as is given by statute, *Moore v. Moore, ante,* 552; *Beaufort County v. Bishop,* 216 N. C., 211, 4 S. E. (2d), 525; *McCauley v. McCauley,* 122 N. C., 288, 30 S. E., 344, and that he is not vested with power affirmatively to administer an

equity except in those cases where it is specially conferred by statute, *Cheshire v. Church,* 221 N. C., 205, 19 S. E. (2d), 855; *High v. Pearce,* 220 N. C., 266, 17 S. E. (2d), 108, but that does not mean the judgment of the Superior Court in this case is necessarily void. It is expressly provided by statute (G. S., 1-276) that "whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction." Even in those cases where the clerk is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the Superior Court and invokes the proper exercise of its power, by virtue of this statute the judge upon appeal may proceed to consider and determine the matter. This statute since its enactment in 1887 has been upheld and applied by this Court in numerous cases: *Lictie v. Chappell,* 111 N. C., 347, 16 S. E., 171; *Elliott v. Tyson,* 117 N. C., 114, 23 S. E., 102; *Ledbetter v. Pinner,* 120 N. C., 455, 27 S. E., 123; *Faison v. Williams,* 121 N. C., 152, 28 S. E., 188; *Roseman v. Roseman,* 127 N. C., 494, 37 S. E., 518; *Oldham v. Rieger,* 145 N. C., 254, 58 S. E., 1091; *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1; *Perry v. Perry,* 179 N. C., 445, 102 S. E., 772; *Hall v. Artis,* 186 N. C., 105, 118 S. E., 901; *In re Estate of Wright,* 200 N. C., 620, 158 S. E., 192; *Spence v. Granger,* 207 N. C., 19, 175 S. E., 824; *Bynum v. Bank,* 219 N. C., 109, 12 S. E. (2d), 898; *Cody v. Hovey,* 219 N. C., 369, 14 S. E. (2d), 30; *Perry v. Bassenger,* 219 N. C., 838, 15 S. E. (2d), 865; *Cheshire v. Church,* 221 N. C., 205 (208), 19 S. E. (2d), 855; *Wilson, Ex Parte,* 222 N. C., 99, 22 S. E. (2d), 262.

Where the clerk exceeds his authority, *Hodges v. Lipscomb,* 133 N. C., 199, 45 S. E., 556, or has no jurisdiction, *Roseman v. Roseman, supra; Williams v. Dunn,* 158 N. C., 399, 74 S. E., 99, and the cause for any ground is sent to the judge, the judge may retain jurisdiction and dispose of the cause as if originally before him. *Perry v. Bassenger, supra. Stafford v. Harris,* 72 N. C., 198, decided prior to the Act of 1887, and upon somewhat different facts, is not in point.

In the case at bar the matter was properly presented by a motion in the cause by the purchaser at the partition sale. *Wilson, Ex Parte, supra.* The facts were not controverted. Manifestly it was the intention of all the parties that all the lands of decedent be included in the sale. By mistake a tract of 1.3 acres covering a part of the mill pond was omitted from the specific description in the petition. However, it was announced at the sale that this was included in the lands being sold, and upon that statement the purchase was made by the appellant Ricks Leggett, and with that knowledge the bid was transferred and deed made to the movents and consideration paid. With that knowledge proceeds of the sale were received by all the parties, including the appellants.

While the defendants excepted generally to the clerk's findings of fact, no objection to any specific finding was noted. This was insufficient. *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992; *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175; *Wilson v. Robinson, post,* 851; 3 Am. Jur., 129. No evidence *contra* was offered or suggested. The only exception to the action of the Superior Court judge was to the signing of the judgment. All the parties were before the court. There were no issues of fact. No rights of purchasers for value or without notice had arisen. The appellants in their brief raise only the question of the power of the clerk to grant the relief prayed for in the motion. Upon these facts the Superior Court in the exercise of general jurisdiction had power to permit the amendment of the petition *nunc pro tunc* to conform to the intention of all the parties, plaintiffs and defendants.

The power of the court to permit amendment is expressly conferred by G. S., 1-163: "The judge or court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved." *Hicks v. Nivens,* 210 N. C., 44, 185 S. E., 469; *Bailey v. Roberts,* 208 N. C., 532, 181 S. E., 754; *Mann v. Hall,* 163 N. C., 50, 79 S. E., 437; *Robeson v. Hodges,* 105 N. C., 49, 11 S. E., 263; *Pearce v. Mason,* 78 N. C., 37; *Garrett v. Trotter,* 65 N. C., 430. "The power of the court to amend process and pleading, both by statute and under the decisions of this Court, is ample." *Rushing v. Ashcraft,* 211 N. C., 627, 191 S. E., 332. The statute allows "amendments on a scale so liberal that it may well be said 'anything may be amended at any time.'" *Pearson, C. J.,* in *Garrett v. Trotter, supra.*

In the absence of showing that the rights of innocent third persons would be injuriously affected, the amendment relates back to the commencement of the action. *Lee v. Hoff,* 221 N. C., 233, 19 S. E. (2d), 858; *Lefler v. Lane,* 170 N. C., 181, 86 S. E., 1022.

Upon another ground we think the judgment below should be upheld. The appellant, who purchased the land at the sale under the commissioner's announcement that it included 1.3 acres and transferred his bid to the movents with that understanding, was equitably estopped to challenge the ruling of the court, as was also the other appellant who likewise was a party to the sale and a recipient of its benefits. A party who participated in the sale of property in which he had an interest and who stood by while it was announced that the property being sold included a certain material element, thereby inducing another to purchase, and who

accepted the benefit of the sale, may not be permitted thereafter to take an inconsistent position to the injury of the purchaser, or be heard to resist the motion to amend. 19 Am. Jur., 640, *et seq.; Textile Corp. v. Hood,* 206 N. C., 782 (790), 175 S. E., 151; *Bank v. Winder,* 198 N. C., 18, 150 S. E., 489; *Trust Co. v. Wyatt,* 191 N. C., 133, 131 S. E., 311; *Watford v. Pierce,* 188 N. C., 430, 124 S. E., 838; *Auto Co. v. Rudd,* 176 N. C., 497, 97 S. E., 477; *Holloman v. R. R.,* 172 N. C., 372, 90 S. E., 292; *Allison v. Kenion,* 163 N. C., 582 (587), 79 S. E., 1110; *Barker v. R. R.,* 125 N. C., 596, 34 S. E., 701; *Shattuck v. Cauley,* 119 N. C., 292, 25 S. E., 872; *Gill v. Denton,* 71 N. C., 341; *Saunderson v. Ballance,* 55 N. C., 322; *Saylor v. Coal Corp.,* 205 Ky., 724, 50 A. L. R., 666, annotations 688, *et seq.* This principle rests upon the necessity of compelling the observance of good faith. *Thomas v. Conyers,* 198 N. C., 229, 151 S. E., 270. "Its compulsion is one of fair play." *McNeely v. Walters,* 211 N. C., 112, 189 S. E., 114.

With the petition in this proceeding amended so as to supply an omission, in accordance with the manifest intention of all parties, there was no question that the court had the inherent power to amend its decree to conform thereto. *Cheshire v. Church,* 222 N. C., 280, 22 S. E. (2d), 566; *Ragan v. Ragan,* 212 N. C., 753, 194 S. E., 458; *Beam v. Bridgers,* 111 N. C., 269, 16 S. E., 391; *Brooks v. Stephens,* 100 N. C., 297, 6 S. E., 81; *Cook v. Moore,* 100 N. C., 294, 6 S. E., 795; *Maxwell v. Blair,* 95 N. C., 317; *Strickland v. Strickland,* 95 N. C., 471.

The result below seems to have been in accord with well considered principles of equity and justice, and will not be disturbed.

Affirmed.

SARAH E. EMBLER, BASHA G. CLODFELTER, DAISY GRUBB, ANNIE R. HEGE, RAY EMBLER AND E. R. CLODFELTER v. H. L. EMBLER, ADMINISTRATOR OF C. B. EMBLER, DECEASED.

(Filed 3 January, 1945.)

1. Frauds, Statute of, § 12: Contracts §§ 5, 7b—

Where co-tenants of the equity in lands, subject to a mortgage, agreed orally among themselves that one of their number, himself or through another for him, should bid off the lands at foreclosure sale, the other cotenants refraining from bidding, and hold the same in trust for the benefit of all the co-tenants, to be sold and proceeds divided, after reimbursing the purchaser for his outlay, the agreement is not in violation of the statute of frauds, G. S., 22-2, there is sufficient consideration to support it, and it is not against public policy.

2. **Frauds, Statute of, § 13: Trusts § 1b—**

In a suit against the administrator of one of several co-tenants by the other co-tenants, where the complaint alleged a parol trust in that defendant's intestate agreed orally with his co-tenants to bid off himself, or through another for him, the lands owned jointly by such co-tenants at a sale thereof under mortgage, hold and sell the same for the benefit of all, dividing the proceeds in accordance with their respective interests, after reimbursing himself for certain expenditures, and that, on the contrary, after such sale and purchase, said intestate sold parts of the property to his wife and parts to several of his children, without consideration, and sold other parts thereof for considerable sums to others, and otherwise violated the agreement, a demurrer was properly sustained for defect of parties defendant, the intestate's heirs at law being necessary parties; but a demurrer for failure to state a cause of action should have been denied.

3. **Frauds, Statute of, §§ 13, 14—**

The defense, that a contract cannot be enforced because it is not in writing as required by the statute of frauds, G. S., 22-2, cannot be taken advantage of by demurrer. The defendant may plead the statute, or he may deny the contract and object to parol evidence to establish it.

4. **Frauds, Statute of, § 12: Trusts § 1b—**

Where the purchaser of land at a judicial sale agreed, previously or contemporaneously, with another to buy and hold the land subject to the right of the latter to repay the purchase money and have a conveyance, there is no violation of the statute of frauds, G. S., 22-2. But where the grantor, by a mere declaration, engrafts upon his own deed a trust, the declaration must be neither prior or subsequent to, but contemporaneous with its execution.

APPEAL by defendant from *Sink, J.*, at September Term, 1944, of DAVIDSON.

This cause comes here upon a demurrer to the complaint. Taking the allegations of the complaint to be true, it may be summarized as follows:

At the time of the transaction upon which plaintiffs base their cause of action, the plaintiffs and C. B. Embler were co-tenants of the lands described in the complaint, by inheritance from A. W. Embler. A. W. Embler had executed a mortgage upon the lands, without joinder of his wife, in the amount of $1,863.24, which was unpaid at his death. After the lands had been advertised for sale, C. B. Embler, learning that the plaintiffs—his brother, sisters and nephew—were preparing to attend the mortgage sale and bid for the land, approached the plaintiffs and proposed to them that if they would not bid on the land, but would permit the said C. B. Embler to have it bid off, he would have someone bid enough to pay the Bowers mortgage and cost of sale, would advance the money to pay the same, and would purchase the dower interest of the widow; and would then sell all of the land and divide the proceeds

equally among the plaintiffs and himself, *i.e.*, one-seventh each, after reimbursing himself for his expenditures in paying off the mortgage, cost of sale, and amount advanced by him in purchase of the dower. This proposition was accepted by the plaintiffs, and they all entered into a contract that plaintiffs would not bid on the land, but that C. B. Embler should pursue the course suggested, would sell all of the lands described in the complaint—one tract of 144 acres at not less than $10 an acre—and divide the proceeds obtained from the sale of all the lands amongst the plaintiffs and himself, one-seventh each, after reimbursing himself out of said sales for the amounts advanced by him in the purchase of the land and the dower interest and the cost of sale. Plaintiffs carried out the terms of the agreement as it applied to them.

At the time of the sale under the mortgage, C. B. Embler had a docketed judgment against him, and for that reason procured one Charlie Myers to bid off the land at the purchase price of $2,250.00, but was required to pay to the mortgagee only $1,923.23.

Thereafter, he procured his agent and trustee, Myers, to convey three of the tracts of land described in the complaint, and purchased at the mortgage sale, to Sarah J. Embler, his wife, without any consideration for same; and on the same date he had the said Myers to convey the other tract of 144 acres to H. L. Embler, his son, without consideration.

Thereafter, the said C. B. Embler had his wife, Sarah J. Embler, to convey one of the tracts described and conveyed to her by C. F. Myers to W. Ray Nifong and wife, Mary Nifong, for the sum of $168.84; and subsequently had his said wife to convey another of the tracts conveyed to her by the said C. F. Myers to Harvey Clodfelter and wife for $1,100.

Thereafter, the said C. B. Embler and wife conveyed another of the tracts (except 60 acres thereof which had been allotted to Bessie J. Embler as her dower) to E. T. Embler, son of C. B. Embler, without consideration—and shortly thereafter, purchased the dower interest from Bessie J. Embler for $1,100, and had his said son, E. T. Embler, and Bessie J. Embler, the widow, to convey to him personally this tract of land, without consideration passing therefor. At this time the judgment against C. B. Embler had run out of date. Later, C. B. Embler had his son, H. L. Embler, who, it is alleged, held the land in trust for him, to sell 47 acres of the 144-acre tract to D. W. Bowers for the sum of $400, and later procured the said son, H. L. Embler, to convey the remainder of the 144-acre tract to Arthur Hedrick and wife for the sum of $500.

In December, 1941, the said C. B. Embler sold and conveyed to the Duke Power Company a right of way over the lands for the sum of $400. On 27 November, 1941, the said C. B. Embler executed a deed of trust to the First National Bank of Thomasville for $1,000 on the tract conveyed to him by E. J. Embler and Bessie J. Embler.

It is further alleged that C. B. Embler received certain amounts scheduled in the complaint for lands which it is alleged were sold under his contract with the plaintiffs, amounting to $2,568.84, which it is alleged he received and held in trust for the use and benefit of the plaintiffs and himself, and of which six-sevenths belonged to plaintiffs and the other one-seventh to the said C. B. Embler.

It is alleged that C. B. Embler died seized to the use of, or in trust for, the plaintiffs of the tract of 76¾ acres, the reasonable market value of which is $5,000.

The complaint alleges that Embler had broken his contract with the plaintiffs in that he failed to account to plaintiffs for the sums received for the sales of land over and above the just deductions for the advances made, and in that he sold the 144-acre tract of land for less than the amount agreed upon; and in that he had failed to sell all of the lands included in the contract, to the injury and damage of the plaintiffs.

Upon this the plaintiffs demand that the defendant administrator account to them and pay them the amounts alleged to be due in the complaint, and further, that a commissioner be appointed and that the lands of which the said C. B. Embler was seized at the time of his death be sold and the proceeds applied toward the payment of the plaintiffs' judgment.

To this complaint the defendant filed a written demurrer as follows:

"The defendant in the above entitled action, without waiving his right to make a motion to remove this action to the county where he was appointed, demurs to the complaint and as grounds for demurrer, alleges:

"1. That there is a defect of parties defendant, the defendant alleging that all the heirs at law of defendant's intestate are necessary parties to this action; that E. T. Embler and H. L. Embler, sons of C. B. Embler, deceased, are necessary parties.

"2. That the complaint does not state facts sufficient to constitute a cause of action, for that the complaint alleges a contract relating to real estate, the same not being in writing and the plaintiffs having failed to bring this action against C. B. Embler in his lifetime the plaintiffs' alleged cause of action abated at his death, and the plaintiffs have no cause of action against the personal representative of C. B. Embler, deceased.

"Dated this 10th day of July, 1944.

WALTER E. CRISSMAN,
PHILLIPS & BOWER,
Attorneys for Defendant."

The demurrer was overruled, and defendant appealed.

J. F. Spruill for plaintiffs, appellees.
Walter E. Crissman and Phillips & Bower for defendant, appellant.

SEAWELL, J. The defendant demurred to the complaint upon two grounds: First, that there is a defect of parties defendant, since it appears upon the face of the complaint that the action, in part, is directed toward the sale of lands descended from C. B. Embler to H. L. Embler and E. T. Embler, who are necessary to a final determination of the controversy; and second, that the complaint does not state a cause of action against the defendant.

Upon reading the complaint, we are of opinion that the demurrer for defect of parties must be sustained, and it is so ordered, subject to the right of the plaintiffs to bring them in.

The demurrer to the complaint as not constituting a cause of action is untenable.

In the argument here, the defendant seeks to sustain his demurrer in that respect upon the ground that the alleged contract upon which the trust is grounded was not in writing and was, therefore, void under the statute of frauds, G. S., 22-2; further, that it must fail for want of consideration, since the only consideration supporting it—namely, to refrain from bidding at a public auction—is in violation of public policy.

If it be conceded for the purpose of discussion and analysis, only, that the contract upon which the trust is grounded is covered by the statute of frauds, the question of its validity cannot be raised by demurrer. Contracts required to be in writing, G. S., 22-2, but which are actually in parol, are vulnerable in two respects: They are not valid if the person sought to be charged so elects; and parol evidence to establish them cannot be introduced over objection. Procedurally, the defense of the statute of frauds cannot be taken advantage of by demurrer; *Hemmings v. Doss,* 125 N. C., 400, 402, 34 S. E., 511; *Stephens v. Midyette,* 161 N. C., 323, 77 S. E., 423; it can only be raised by answer. This may be done in either of two ways: The defendant may plead the statute, in which case when it develops on the trial that the contract is in parol, it must be declared invalid; or the defendant may enter a general denial, and on trial may object to the parol evidence to establish the contract, which will be equally fatal to the maintenance of the action; *McCall v. Textile Ind. Inst.,* 189 N. C., 775, 128 S. E., 349, 353. See, also, *Luton v. Badham,* 127 N. C., 96, 37 S. E., 143; *Winders v. Hill,* 144 N. C., 614, 57 S. E., 456. Compare *Ebert v. Disher,* 216 N. C., 36, 3 S. E. (2d), 301.

Moreover, a parol trust of the character sought to be established is not within the statute of frauds. *Peele v. LeRoy,* 222 N. C., 123, 22 S. E. (2d), 244; *Brogden v. Gibson,* 165 N. C., 16, 80 S. E., 966; *Newby v.*

Realty Co., 182 N. C., 34, 108 S. E., 323; *Anderson v. Harrington,* 163 N. C., 140, 79 S. E., 426; *Riggs v. Swann,* 59 N. C., 118; *Shelton v. Shelton,* 58 N. C., 292.

The objection that the alleged contract has no consideration to support it except a forbearance to bid at a public auction sale, which is against public policy, is not well taken. First, it may be questioned whether a parol contract made under the circumstances here alleged requires any consideration. As to the establishment of parol trusts, it is said in *Cobb v. Edwards,* 117 N. C., 245, loc. cit. 246, 23 S. E., 241:

"Where it is proved satisfactorily that the purchaser at a judicial sale of land agreed with another previously, in contemplation of or at the time of bidding it off, that he would buy and hold it when bought subject to the right of the latter to repay the purchase money and demand a reconveyance, it has been repeatedly held by this Court that the beneficial interest to which the agreement relates passes with the transmutation of the legal estate, because there is no such requirement in our statute as that contained in 29 Car. II., that declarations of trust shall be manifested and proved by some writing. *Shelton v. Shelton,* 58 N. C., 292; *Pittman v. Pittman,* 107 N. C., 159; *Cloninger v. Summit,* 55 N. C., 513; *Cohn v. Chapman,* 62 N. C., 94; *Hargrave v. King,* 40 N. C., 430; *Jones v. Emory,* 115 N. C., 158; *Thompson v. Newlin,* 38 N. C., 338. But where the grantor by a mere declaration engrafts upon his own deed a trust, the declaration must be neither prior nor subsequent to, but contemporaneous with its execution. *Blount v. Washington,* 108 N. C., 230; *Smiley v. Pearce,* 98 N. C., 185."

C. B. Embler had not acquired the legal title at the time of the alleged agreement with respect thereto. The equitable title to the whole land was in the heirs at law of A. W. Embler, and the parties to the parol contract were co-tenants. The plan upon which they are alleged to have agreed was nothing more than a device by which both the equitable title of all the parties to the agreement, as well as the legal title, which at that time rested in the trustee or mortgagee, could be transmitted, in trust, to one of their number for the benefit of them all. *Lefkowitz v. Silver,* 182 N. C., 339, 344, 109 S. E., 56; *Kelly v. McNeill,* 118 N. C., 349, 354, 24 S. E., 738. If any consideration was required under the facts of this case, it is sufficiently manifested by the act of the plaintiffs in foregoing their own protection by bidding at the sale. Considering the common interest which all the parties had in the matter, the agreement was not against public policy. *Newby v. Realty Co., supra,* pp. 37, 38. Their interest in the *res* was at the time unitary, and no public policy would require that they enter a competitive bid at the sale in order to protect it.

For these reasons, the judgment of the court below overruling the demurrer is, in the respects noted,

Modified and affirmed.

GUILFORD COUNTY v. GEORGE C. HAMPTON, JR., GUARDIAN OF SARAH SAFERIGHT.

(Filed 3 January, 1945.)

1. **State § 2a: Limitation of Actions § 1b—**

Generally, the maxim "*nullum tempus occurrit regi*" has been abrogated by G. S., 1-30, and is no longer in force in this State, except as otherwise provided by statutory exceptions.

2. **Limitation of Actions § 2e: Counties § 2: Municipal Corporations § 7—**

G. S., 153-156, authorizing boards of county commissioners to reimburse the counties for the support of indigent persons by sale in a special proceeding of any property of such persons, confers no sovereign power; and as far as the indigent persons are concerned it creates a private obligation only, which is subject to the bar of the three-year statute of limitations. G. S., 1-52.

APPEAL by plaintiff from *Sink, J.*, at August-September Term, 1944, of GUILFORD.

Sarah Saferight, an indigent of subnormal mentality, was admitted to Guilford County Home on 11 January, 1909, and remained there continuously from that time until the institution of this action, 18 April, 1944. (She is still there.) During all this time, she received maintenance and support from Guilford County and to date the county has received no compensation therefor. The reasonable value of this service is $8,100 (R., p. 10). When said Saferight entered the County Home, she was the owner of a tract of land in Sumner Township, Guilford County, North Carolina, of the tax value of $100.00.

The County Commissioners of Guilford County never at any time made a demand upon Sarah Saferight for compensation for her said maintenance and support, and took no action to sell her land as provided by C. S., 1330, now G. S., 153-156, until May, 1943. In May, 1943, Guilford County brought a special proceeding before the clerk of the Superior Court of Guilford County for the sale of the land of said Sarah Saferight under the provisions of the statute aforesaid, and the land was sold pursuant to orders of the court in said proceeding, and the net proceeds of said sale, $8,137.20, were paid to G. C. Hampton, Jr., who was appointed guardian for Sarah Saferight after the sale. This payment was made pursuant to an order of the court in the proceeding. After payment as aforesaid was made, Guilford County filed its claim for maintenance and support with the guardian, and the claim, except the last three years' maintenance and support, $1,080, was denied. Thereupon Guilford County instituted the present action. It was heard

before Judge Sink upon agreed facts, without a jury, and judgment was rendered denying the contentions of the plaintiff.

From this judgment plaintiff appealed.

Thos. C. Hoyle and Rupert T. Pickens for plaintiff, appellant.

Andrew Joyner, Jr., for defendant, appellee.

SEAWELL, J. The question posed is whether the three-year statute of limitations—G. S., 1-52—applies to an action brought by Guilford County against an inmate of the County Home to secure reimbursement or indemnity for sums expended for her upkeep in the Home, running back some thirty-four years. The proceeding is under G. S., 153-156.

Under the article relating to limitations of actions, it is provided in G. S., 1-46, "that the periods prescribed for the commencement of actions, other than the recovery of real property, are as set forth in this article."

Applicable to the actions therein designated, G. S., 1-52, a part of this article, provides:

"1-52. Three years. Within three years an action—

"1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the previous sections.

"2. Upon a liability created by statute, other than a penalty for forfeiture, unless some other time is mentioned in the statute creating it."

These provisions were made applicable to actions by the State by section 159, Code of 1868, now G. S., 1-30, continuously in force from its enactment:

"Applicable to actions by state.—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."

Against the application of the statute to its claim, the appellant invokes the maxim *"nullum tempus occurrit regi,"* contending that the present action is brought to enforce a demand as to which the county, *pro hac vice,* is in the exercise of a sovereign power. It is argued that the Act of 1868 (G. S., 1-30), extending the statute of limitations to actions by the State, should not be construed as applying to actions brought in its sovereign capacity, and to enforce sovereign rights.

It is to be admitted that the course of decision has not been entirely consistent, but we doubt whether plaintiff can profit much by the confusion thus produced, such as it may be.

There can be no doubt that the cited Act of 1868, G. S., 1-30, was currently accepted as altogether abrogating the maxim *"nullum tempus occurrit regi"* or the principle of law finding expression therein, and this view remained unquestioned for a long period thereafter. In *Fur-*

man v. Timberlake (1885), 93 N. C., 66, it is declared that the maxim *"nullum tempus occurrit regi"* is "no longer in force in this State, having been abrogated by the provisions of The Code, sec. 159."

Historically, this view is strongly corroborated by the fact that numerous statutes were enacted as the years went by to exempt the State and its agencies from the limitations imposed by the general statute, with respect to actions undoubtedly involving the sovereign power and relating to sovereign rights. In 1891, by chapter 224 (G. S., 1-45), the General Assembly excepted from the supposed application of the general statute of limitations actions with respect to claims to any part of a public road, street, lane, alley, square or public way of any kind, etc.

In *Turner v. Commissioners* (1900), 127 N. C., 153, 37 S. E., 191, *Justice Clark,* commenting on the effect of the statute, said:

"As to streets, ways, squares, commons and other property which a municipal corporation may hold in trust for the public use, without power to alienate, it is true no statute of limitations can run . . . This has been affirmed in this State by a statutory declaration (chapter 224, Laws 1891); *but as to all other matters the statute of limitations runs against a municipality as against anyone else.*"

Of that character is chapter 182, Public Laws of 1895, authorizing the State, county and city to recover delinquent taxes. If it had been thought that the maxim *"nullum tempus occurrit regi"* still applied, the enabling statute would have been unnecessary.

There is a tendency on the part of the Court in many cases to base the validity of recovery beyond the period of limitation upon exceptions made to the general statute by other statutes applicable to the designated agency, or subject of the action, rather than the effect of the doctrine implied in the maxim, operating *ex proprio vigore.* The trend is, at least, to limit its application to matters of taxation. *Threadgill v. Wadesboro,* 170 N. C., 641, 87 S. E., 521; *Manning v. R. R.,* 188 N. C., 648, 125 S. E., 555; *Charlotte v. Kavanaugh,* 221 N. C., 259, 20 S. E. (2d), 97.

We do not attempt to reconcile conflicting authority with regard to the application of the maxim cited, or to follow it further into its ramifications, which might lead only to unprofitable differences.

We come to certain illuminating legislation with regard to agencies on a parity with the plaintiff with respect to the principles and limitations under discussion. It affords, to some extent, a legislative interpretation of the law, and is certainly an acceptance of the prior conclusion of this Court in a case which we must regard as significant in the present controversy.

In *State Hospital v. Fountain,* 129 N. C., 90, 39 S. E., 734, the Court held that the three-year statute of limitation applied to an action of

the State to enforce collection of a claim for the care of a nonindigent patient. Thereafter, chapter 120, Public Laws of 1925 (G. S., 143-122), exempted claims of a number of State institutions from the application of statutes of limitations. Amongst them are the State Hospitals at Raleigh, Morganton and Goldsboro and various other institutions.

It is not contended, as we understand it, that the maxim *"nullum tempus occurrit regi"* applies to any other action than one brought to enforce a demand growing out of sovereignty. In *Charlotte v. Kavanaugh,* 221 N. C., 259, loc. cit. p. 265, 20 S. E. (2d), 97, it is said:

"An examination of the above cases will disclose that the three-year statute of limitations applies to the State, *and political subdivisions thereof,* in an action brought in the name of the State *or for its benefit, or for the benefit of political subdivisions thereof,* when the action is not brought in the capacity of its sovereignty."

And in *Threadgill v. Wadesboro, supra,* loc. cit. 644, *Justice Hoke,* speaking for the Court, observed:

"The towns are only supposed to come under the influence of this maxim (*nullum tempus,* etc.) when and to the extent that they are properly considered governmental agencies of the State, and, if the State itself is barred by the statute (G. S., 1-30) its subordinate agents may be barred also."

Uniformly a distinction has been observed between actions brought by the State, counties and municipalities in their sovereign capacity, and those brought with respect to proprietary demands. The terminology is hardly sufficient for a complete classification unless there is included in the definition of proprietary claims certain causes of action contractual in their nature, or similar obligations arising out of the statute. The county of Guilford is under what we might regard as a constitutional mandate to provide for its poor at the public expense, through the levying and collection of a general tax for that purpose, and may provide a County Home. It is under no constitutional mandate to collect from a nonindigent inmate, or from her property, reimbursement for sums disbursed for her maintenance. That is merely a wise and just provision of the statute. G. S., 153-156, under which this proceeding is brought, is as follows:

"When any indigent person who becomes chargeable to a county for maintenance and support in accordance with the provisions of this article, owns any estate, it is the duty of the board of commissioners of any county liable to pay the expenses of such indigent person to cause the same to be sold for its indemnity or reimbursement in the manner provided under Article 3 of the chapter entitled Insane Persons and Incompetents, or they may take possession thereof and rent the same out and apply the rent toward the support of such indigent person. . . ."

It is further provided therein that an action may be brought in the name of the county against the owners and interested parties to sell, mortgage, or rent the property of the indigent for the purpose of such indemnity or reimbursement.

No one could contend that the power thus sought to be exercised by a civil action is the sovereign power of condemnation, conscription, or taxation, for, amongst other disqualifying features, it is not for a public purpose. It reaches no further than fair compensation for the maintenance, care and attention given her. It tends to reduce the general taxes, of course, but in so far as the defendant is concerned, and her relation to the action and to the party plaintiff, it is a private obligation arising out of the statute, which provides a simple procedure for its collection out of private property. While the general law may affect a great many persons, it is not in any sense a contribution levied by the State or county in its sovereign capacity for a public purpose, and is subject to the bar of the three-year statute of limitations.

It follows that recovery must be limited to items within the period of three years next preceding the commencement of the action.

The judgment is

Affirmed.

HOLLIS HELMSTETLER v. DUKE POWER COMPANY.

(Filed 3 January, 1945.)

Husband and Wife §§ 9, 10—

When a married woman is negligently injured by the tort of another, her husband cannot maintain an action to recover damages sustained by him through (1) imposed nursing and care, (2) loss of his wife's services, (3) mental anguish, and (4) loss of *consortium*. Under existing law, the injured spouse alone may sue for his or her earnings or damages for personal injuries. G. S., 52-10.

APPEAL by plaintiff from *Olive, Special Judge,* at October Term, 1944, of DAVIDSON.

Civil action by husband to recover damages alleged to have been sustained by him through a negligent injury to his wife.

Plaintiff alleges that in consequence of defendant's negligence, which caused serious and permanent injuries to his wife, Irma Helmstetler, when her automobile collided with defendant's bus in the city of Winston-Salem on 2 February, 1944, he has "nursed her, looked after and cared for her . . . and he is advised . . . he will have to continue to nurse and care for her as long as she lives"; that he has been required to give up his own work and "to take over and carry on her business as

a florist which she operated prior to her said injuries"; that he has endured "physical pain and mental anguish in being forced to observe his wife's sufferings"; and that he has lost "the companionship and *consortium* of his wife and has partly been deprived of her society, services, aid and comfort." It is further alleged that plaintiff and his wife have been married and have lived together for many years and have enjoyed reasonably good health until the injuries of which he now complains.

The defendant filed answer, denied the allegations of negligence, and pleaded the wife's contributory fault and that she has since secured judgment for all damages, sustained by her, at the June Term, 1944, which judgment has been paid.

When the instant case was called for trial, the defendant interposed a demurrer *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, maintainable by the plaintiff in his own right.

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

Don A. Walser for plaintiff, appellant.

Womble, Carlyle, Martin & Sandridge and Phillips & Bower for defendant, appellee.

STACY, C. J. When a married woman is negligently injured by the tort of another, can her husband maintain an action to recover damages sustained by him through (1) imposed nursing and care, (2) loss of his wife's services, (3) mental anguish, and (4) loss of *consortium?*

The earlier decisions, grounded on the common law, would answer in the affirmative. *Holleman v. Harward,* 119 N. C., 150, 25 S. E., 972, 56 Am. St. Rep., 672, 34 L. R. A., 803; *Kimberly v. Howland,* 143 N. C., 398, 55 S. E., 778, 7 L. R. A. (N. S.), 545; *May v. Tel. Co.,* 157 N. C., 416, 72 S. E., 1059, 37 L. R. A. (N. S.), 912; *Bailey v Long,* 172 N. C., 661, 90 S. E., 809, L. R. A., 1917-B, 708; Anno. 21 A. L. R., 1517; Anno. 133 A. L. R., 1156; 27 Am. Jur., 100, *et seq.;* 41 C. J. S., 897, *et seq.*

In 1913, however, the General Assembly adopted the Married Women's Act, G. S., 52-10, which provides that the earnings of a married woman by virtue of any contract for her personal services, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried.

To what extent this statute has abridged the husband's common-law right of action to recover damages sustained by him through injuries negligently inflicted on his wife has not heretofore been considered,

except obliquely perhaps in the cases of *Hinnant v. Power Co.,* 189 N. C., 120, 126 S. E., 307, and *McDaniel v. Trent Mills,* 197 N. C., 342, 148 S. E., 440, where, in each case, the wife was seeking to recover damages sustained by her through injuries negligently inflicted on her husband. *Boden v. Del-Mar Garage,* 205 Ind., 59; Anno. 5 A. L. R., 1049; 13 A. L. R., 1333; 18 A. L. R., 882; 37 A. L. R., 897; 59 A. L. R., 680; 27 Am. Jur., 113.

Nor are we presently concerned with an action where the alleged tort consists in the wrongful destruction or impairment of *consortium,* intentionally inflicted, such as alienation of affections, crim. con., assault and battery against the wife, malicious prosecution or defamation of her character. 27 Am. Jur., 99 and 107.

Similar legislation in other jurisdictions has resulted in divergent views as to its effect. Some courts hold that the husband's common-law right of action *per quod consortium amisit* is not destroyed by the Married Women's Act, and that he may still recover, at least, for certain elements of damage. 27 Am. Jur., 101. Other courts hold that under this legislation a husband can no longer recover for loss of *consortium* sustained by him through a negligent injury to his wife. Anno. 21 A. L. R., 1527; 151 A. L. R., 479.

This then brings us to a consideration of the scope and effect of the Married Women's Act of 1913. It should be read in the light of Art. X, sec. 6, of the Constitution which protects a married woman in the sole ownership of her property, and also in connection with the Martin Act of 1911, G. S., 52-2, which seeks to secure to her the free use of her property. *Martin v. Bundy,* 212 N. C., 437, 193 S. E., 831. See *Buford v. Mochy, ante,* 235.

Initially, it will be noted that by the terms of the statute, a married woman is to have the earnings arising from "any contract for her personal services." *Patterson v. Franklin,* 168 N. C., 75, 84 S. E., 18. This clearly gives to her any wages earned outside the home, but plaintiff says it would not include services rendered in the household. *Price v. Electric Co.,* 160 N. C., 450, 76 S. E., 502. Replying, the defendant says the household duties were included within the husband's common-law right to his wife's earnings, and as this right has now been transferred to the wife, no cause of action exists for the lesser and incidental right. Authorities elsewhere may be cited in support of either view. Anno. 151 A. L. R., 479; 27 Am. Jur., 101-102.

Next, the married woman is given "any damages for personal injuries or other tort sustained by her." What are the damages recoverable by her in an action for personal injuries or other tort? These are understood to embrace indemnity for entailed nursing and care, medical expenses, loss of time, loss from inability to pursue avocation or to per-

form labor, and loss from diminished capacity to earn money. The measure of recovery is reasonable satisfaction for loss of both bodily and mental powers, and for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury. In short, it is such as will make the plaintiff whole or compensate her fully for all injuries sustained by her, past, present and prospective. *Ledford v. Lumber Co.,* 183 N. C., 614, 112 S. E., 421; *Price v. Electric Co., supra.* Of course, the present-worth rule would be applicable to any prospective loss. *Daughtry v. Cline, ante,* 381.

In *Kirkpatrick v. Crutchfield,* 178 N. C., 348, 100 S. E., 602, where a married woman was suing in tort for personal injuries, it was said: "This Court has repeatedly held that 'damages for personal injury include actual expenses for nursing, medical services; also loss of time and of *earning capacity* and mental and physical suffering.' *Wallace v. R. R.,* 104 N. C., 442; *Rushing v. R. R.,* 149 N. C., 158; *Ridge v. R. R.,* 167 N. C., 510."

It follows, therefore, that a married woman is now entitled to recover in tort for all pecuniary loss sustained by her, including nursing and care, and loss from inability to perform labor or to carry on her household duties. The statute provides for such recovery in an action by her suing alone, which is to be her sole and separate property as fully as if she had remained unmarried. This transfers to the wife, the husband's common-law right of action to recover for her services and for imposed nursing and care occasioned by the tort of another. *Shore v. Holt,* 185 N. C., 312, 117 S. E., 165; *Dorsett v. Dorsett,* 183 N. C., 354, 111 S. E., 541; *Rodgers v. Boynton,* 315 Mass., 279, 52 N. E. (2d), 576, 151 A. L. R., 475. Under existing law, the injured spouse alone may sue for his or her earnings or damages for personal injuries.

There remains to be considered the allegations of mental anguish and loss of *consortium.* We have followed those jurisdictions in which it is held that no cause of action for loss of *consortium* survives the transfer or destruction of the husband's common-law right of action to recover for his wife's services, and that without such cause of action, there is none for mental anguish. *Hinnant v. Power Co., supra; Craig v. Lumber Co.,* 189 N. C., 137, 126 S. E., 312; Anno. 21 A. L. R., 1517; 133 A. L. R., 1156; 151 A. L. R., 479.

If no cause of action for loss of *consortium* or mental anguish may be maintained by a married woman on account of injuries negligently inflicted on her husband, and we have so held in *Hinnant's case, supra,* then it would seem that no such right of action should exist in favor of the husband, since he can no longer sue to recover his wife's earnings or damages for torts committed on her. *Golden v. Greene Paper Co.,* 44 R. I., 231, 116 Atl., 579, 21 A. L. R., 1514; *Marri v. Stamford St. R.*

Co., 84 Conn., 9, 78 Atl., 582, 33 L. R. A. (N. S.), 1042, Ann. Cas. 1912-B, 1120; *Whitcomb v. N. Y., N. H. & H. R. Co.,* 215 Mass., 440, 102 N. E., 663; *Blair v. Seitner Drug Goods Co.,* 184 Mich., 304, 151 N. W., 724, L. R. A., 1915-D, 524, Ann. Cas., 1916-C, 882; *Jacobson v. Fullerton,* 181 Iowa, 1195, 165 N. W., 358; *Clark v. Southwestern Greyhound Lines,* 144 Kan., 344, 58 Pac. (2d), 1128. The two now stand on a parity in respect of such suits. *Hipp v. Dupont,* 182 N. C., 9, 108 S. E., 318. Either may recover for his or her own injury, including all damages immediately and necessarily incident thereto, but neither may recover for the injury of the other. *Hipp v. Dupont, supra.* The effect of the legislation on the subject is to equalize the legal status of husband and wife, and to deny to each any overlapping recovery on account of the other's loss or injury.

It is true a husband is still under the duty to support his wife, and he is entitled to such services as she may choose to perform, and to her aid, comfort, society and companionship, which the law regards as the full equivalent of support and like aid, comfort, society and companionship on the part of the husband. *Dorsett v. Dorsett, supra; Kirkpatrick v. Crutchfield, supra.* But if the legislative intent of equality is to prevail, the same cause of action which is denied to the wife may not be retained or preserved to the husband. 27 Am. Jur., 102 and 113. This would seem to accord with the intent and purpose of the statutes as interpreted in the *Hinnant case, supra.* There it was said: "By virtue of these statutes, the husband is deprived of such rights as he may have had at common law in the special benefits thus conferred upon the wife." See Anno. 151 A. L. R., 501; *Boden v. Del-Mar Garage, supra.*

It is not alleged that the plaintiff has expended any of his own funds in consequence of the injuries negligently inflicted on his wife. *McDaniel v. Trent Mills, supra.*

Affirmed.

STATE v. CLYDE OXENDINE.

(Filed 3 January, 1945.)

1. Assault and Battery § 10—

In a prosecution for assault with a deadly weapon (a shotgun), inflicting serious injuries, it is competent for the prosecuting witness to testify to approximately how many shot went into his head to show the seriousness of the injury, when he had formerly testified that he knew how many shot he had been told went into his head, there being nothing in the record to support the assumption that the former statement was based upon the latter.

2. Evidence § 27: Criminal Law § 81c—

Objection to the introduction of evidence is waived, where other evidence to the same effect is later admitted without objection.

3. Evidence § 22: Criminal Law § 41b—

Where a witness on cross-examination admits that he has been convicted of an assault, on redirect examination the witness may explain such testimony.

4. Assault and Battery § 10—

Upon trial on an indictment for an assault with a deadly weapon, inflicting serious injury, where it was in evidence that the defendant had said he was going to kill the prosecuting witness because he had shot defendant's best friend, the testimony of prosecuting witness, that he had shot a brother-in-law of defendant on the night of his assault, was competent to explain the previous testimony and to establish motive.

5. Same—

In a criminal prosecution for assault, the prosecuting witness may testify that he had arrested defendant for being drunk to establish motive for the assault.

6. Assault and Battery § 11—

On trial upon an indictment for assault with a deadly weapon with intent to kill, causing serious injury, where the State's evidence tended to show a motive for revenge, threats by the defendant to shoot prosecuting witness and attempt to acquire shotgun shells by defendant, who was 100 yards or so from the scene of the shooting going in the direction of the place where prosecuting witness was shot with a shotgun, and soon after the crime a shotgun, recently fired, was found in the home of defendant, who stated to the officers that he had shot prosecuting witness, motion for judgment of nonsuit, G. S., 15-173, was properly denied.

7. Criminal Law § 51—

The solicitor may comment on all the evidence, in a criminal prosecution, and he may draw reasonable inferences therefrom, and also make application of the law thereto.

8. Criminal Law § 2—

Upon trial on an indictment for a crime, an essential element of which is intent, there is no prejudicial error in a charge that intention is an act or emotion of the mind, seldom, if ever, capable of direct or positive proof, which is to be arrived at by just and reasonable deductions from the facts and acts proven.

9. Trial § 29a: Criminal Law § 53a—

When a charge, considered as a whole in the same connected way in which it was given, presents the law fairly and correctly, it affords no ground for reversal, though some of the expressions, when standing alone, might be regarded as erroneous.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1944, of ROBESON.

The defendant was tried upon a bill of indictment charging that he "did unlawfully, wilfully and feloniously assault C. S. Warriax with a certain deadly weapon, to wit: Shotgun, with the felonious intent to kill and murder the said C. S. Warriax, inflicting serious injuries, not resulting in death, upon the said C. S. Warriax, to wit: serious injuries about the head and body caused by being assaulted with deadly weapon, against the form of the statute in such case made and provided and against the peace and dignity of the State." The jury returned a verdict that the "said defendant, Clyde Oxendine is guilty as charged," and the court pronounced judgment that "the defendant be confined in State's Prison for not less than seven or more than ten years," from which judgment the defendant appealed, assigning errors.

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

Varser, McIntyre & Henry and F. D. Hackett for defendant, appellant.

SCHENCK, J. The first group of assignments of error set out in appellant's brief is presented under the first question posed in his brief, namely: "Did the Court err in admission of testimony offered by the State?"

The first of these assignments relates to the testimony of the prosecuting witness Warriax that "there were approximately 150 shot in his head." The defendant objected to the testimony and moved to strike it from the record. The court overruled the objection as well as the motion to strike, and defendant excepted. The defendant bases his exception upon the theory that the witness had formerly testified that "he knew how many (shot) he had been told went in there" (his head), and that therefore the testimony was hearsay. It does not appear in the record that the witness made the statement that he knew approximately how many shot went into his own head immediately following his statement that he knew how many shot he had been told went in his head, and there is nothing in the record that supports the assumption that the former statement was based on the latter statement; the former statement could have been as readily based on his suffering or his sense of feeling. It was clearly competent for the witness to testify to approximately how many shot went into his own head—this for the purpose of showing the seriousness of the injury, if nothing else. This assignment of error is not sustained.

The second assignment of error relates to the testimony of a witness for the State to the effect that a gun found in the defendant's home smelled as if the powder therein had been recently fired. It would seem that this testimony would be competent on the question as to whether the defendant fired the gun, but however this may be, any value which the exception might originally have had was waived by testimony of a number of witnesses to the same effect in the record without objection. *S. v. Hudson,* 218 N. C., 219 (230), 10 S. E. (2d), 730. This assignment of error is not sustained.

The third assignment of error relates to the testimony of a State's witness in explaining on redirect examination his testimony given on cross-examination. The witness was interrogated on cross-examination and had admitted that he had been convicted of an assault, and the testimony assailed by this exception was the explanation given by the witness on redirect examination of his testimony on cross-examination. Such testimony was competent. *S. v. Orrell,* 75 N. C., 317.

The fourth assignment of error relates to the testimony of the prosecuting witness to the effect that he had shot a brother-in-law of the defendant on the night of the assault. In view of the fact that it was in evidence that the defendant had said he was going to kill the prosecuting witness because he (witness) had shot his (defendant's) best friend, the testimony was merely an explanation of previous testimony, and was also clearly admissible to establish motive. *S. v. Hudson, supra; S. v. Lefevers,* 216 N. C., 494, 5 S. E. (2d), 55.

The fifth assignment of error relates to the admission, over objection, of testimony of the prosecuting witness to the effect that he had arrested the defendant for being drunk. This assignment is untenable as the testimony tends to establish a motive for the shooting of the witness by the defendant, which, though not necessary to be shown, was competent to be shown. *S. v. Lefevers, supra.*

The sixth assignment of error set out in the plaintiff's brief is to the refusal of the court to allow the defendant's motion for a judgment of nonsuit duly lodged under G. S., 15-173, when the State had introduced its evidence and rested its case. The essential elements of the offense with which the defendant was charged are (1) that the defendant, Oxendine, assaulted the prosecuting witness, Warriax, (2) that the assault was committed with a deadly weapon, (3) that the assault was committed with intent to kill the prosecuting witness, (4) that serious injury was inflicted upon the prosecuting witness by the assault, and (5) that the assault did not result in the death of the prosecuting witness. Taking the evidence in the light most favorable to the State it discloses a motive for the shooting of the prosecuting witness, the motive being revenge for the fact that the prosecuting witness, in the performance of his duties as

a policeman, had shot the brother-in-law and friend of the defendant; threats on the part of the defendant to shoot the prosecuting witness; the defendant attempted to acquire a shotgun shell, that the defendant was 100 or 150 yards from the scene of the shooting, going in the direction of where the shooting took place; that the prosecuting witness was shot with a shotgun; that soon after the shooting a shotgun was found in the home of the defendant which had recently been fired; and, finally, the defendant made a statement to the officers that he had shot the prosecuting witness. A mere statement of the evidence is in itself a sufficient answer to the exception, and renders citation of authority unnecessary.

The defendant offered no evidence.

There appears in the record the following: "During the argument of the Solicitor, the defendant objected to the Solicitor's argument with reference to the 12 gauge shell. The Solicitor stated that the defendant had a size shell that didn't fit his gun. The shell he had wasn't the kind that he wanted to shoot this man with. The Solicitor said a 16 shell would not have the force behind it that a 12 gauge would have had. The Solicitor said a 12 gauge shell would have carried his head on with it. The court declined to interfere with the Solicitor's argument and overruled defendant's objection thereto, and the defendant excepted. Exception No. 7."

A witness for the State testified that the defendant a short time before the shooting asked him if he had a 12 gauge shell, and at the time the defendant had a shell of some sort in his hand. The prosecuting witness testified that if he had been shot with a 12 gauge shell it would have blown the top of his head off. With this evidence before the court, it is not perceived how the Solicitor extended the latitude of his prerogative in making the argument assailed by the assignment of error. The Solicitor may comment on all the evidence, and draw reasonable inferences therefrom, and may also make application of the law thereto. This assignment is untenable.

With a few omissions Exceptions No. 8 to No. 38, both inclusive, are disposed of in the appellant's brief with the following comment: "The foregoing exceptions present the same contentions as are set forth in the second question and are aimed at the action of the court below in submitting the case to the jury and the same argument applies to these as applies to the exception to the nonsuit." Having disposed of the motion for judgment of nonsuit, further comment on these exceptions would be superfluous.

Exception No. 14 is directed specifically to that portion of the judge's charge in which it is said that intention is an act or emotion of the mind, seldom, if ever, capable of direct or positive proof, which is to be arrived at by just and reasonable deductions from the facts and acts proven.

This charge would seem to be sustained by *S. v. Smith,* 211 N. C., 93, 189 S. E., 175, a case wherein the defendant was tried for burglary in the first degree, an essential element of which crime is the intent as in the instant case. Certainly there is no prejudicial error in such charge, and the assignment of error is therefore untenable.

There are many assignments of error to the charge, some of which, if considered alone, might be subject to criticism, but when the charge is considered as a whole in the same connected way in which it was given it presents the law fairly and correctly, and, therefore, affords no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *S. v. Exum,* 138 N. C., 599, 50 S. E., 283; *S. v. Smith, supra.*

No error.

IN RE THE WILL OF A. G. HOLMES, DECEASED,
and
A. B. HOLMES, C. B. HOLMES, C. C. HOLMES, A. G. HOLMES AND MRS. A. R. BENNETT v. MRS. SELENA M. HOLMES.

(Filed 3 January, 1945.)

1. Evidence § 45a—

Opinion evidence of a medical expert should be elicited by hypothetical question, and not by simply asking the opinion of the witness.

2. Husband and Wife § 1: Wills § 21c—

A wife is not the agent of her husband by force of the marital relationship; and hence the burden of proof, on an issue of undue influence between husband and wife in favor of the wife, is upon the party asserting undue influence.

3. Wills § 21b—

The fact that a man bequeaths his estate to his wife, excluding his children and other relatives, does not tend to show mental incapacity or undue influence.

APPEAL by A. B. Holmes, C. B. Holmes, C. C. Holmes, A. G. Holmes and Mrs. A. R. Bennett, caveators, and plaintiffs in above actions, from *Johnson, Special Judge,* at June Special Term, 1944, of BLADEN.

Two civil actions—one, an issue of *devisavit vel non,* and the other, to set aside three deeds, consolidated for purpose of trial and heard together as both are based upon allegations of mental incapacity and the same conditions and relationships and events which it is alleged unduly influenced the execution of the will and the deeds.

Upon the trial in Superior Court these undisputed facts appear:

1. On 21 November, 1905, A. G. Holmes, then 55 years of age, a widower and resident of, and on farm in Columbus County, the father of seven children, five sons and two daughters, ranging in ages from four to eighteen years, married the defendant, then 26 years of age, by which union five daughters were born. A. G. Holmes died testate and resident of Bladen County, on 3 February, 1943, at the age of 88 years, leaving surviving the plaintiffs, who are the remaining five children of the first marriage (a daughter having died, and a son having been killed in World War I, neither of whom is survived by issue) and the defendant, who is his widow, and their five daughters.

2. Prior to his death, A. G. Holmes executed to his wife the defendant three deeds, one of which was acknowledged on 31 January, 1933, and registered in Bladen County, conveying lands in that county, and the other two dated 5 May, 1926, and acknowledged on 21 December, 1937, registered in Bladen and Columbus counties, and conveying lands in those counties.

3. After the death of A. G. Holmes a paper writing purporting to be his last will and testament, dated 17 March, 1933, and admittedly executed in form in accordance with law, was duly probated in common form. By its terms all of his property, real and personal, which he owned at his death, other than $25.00 bequeathed to each of the plaintiffs, children of his first marriage, was devised and bequeathed to his wife with provision that in the event she should remarry the land should go to his "heirs at law by reason of" his "two marriages." But should she remain a widow, she should hold all his lands in fee, and at her death dispose of it as she desires.

Further on the trial in Superior Court, the parties testified and offered much other evidence bearing upon the issues as to the mental capacity of A. G. Holmes to execute a will, and the deeds, at the time each was executed. And separate issues in the two actions were submitted to the jury, all of which were answered against the contentions of the caveators, in the action pertaining to the will, and of the plaintiffs in the action to set aside the deeds.

From judgment in accordance with the verdict in the respective cases, the caveators and plaintiffs, respectively, appeal to the Supreme Court, and assign error.

Isaac C. Wright, R. J. Hester, Jr., and F. Ertel Carlyle for plaintiffs, caveators, appellants.

H. H. Clark and McLean & Stacy for defendant-propounder, appellee.

WINBORNE, J. Careful consideration of the questions involved on this appeal as stated, and predicated upon numerous exceptions taken by appellants fails to show error for which a new trial should be granted.

The first question relates to the ruling of the court with respect to the testimony of Dr. A. B. Holmes, caveator and plaintiff, and medical expert. The ruling arose in this fashion: The witness had testified that while the physical condition of his father to the last was remarkable for a man of his age, he had hardening of the arteries, or arteriosclerosis, and that he was mentally incompetent in 1932 as well as in, and between January, 1933, and December, 1937. Then counsel for caveators and plaintiffs asked him this question: "Dr. Holmes, do you have an opinion satisfactory to yourself that the hardening of the arteries of human beings will affect the human mind?" The witness would have said, "I have; it will affect the brain," but defendant's objection to the question was sustained by the court—with the suggestion that that sort of opinion from a medical expert should be elicited by hypothetical question. In the light of this suggestion, and since the question is framed in general terms, we are of opinion that the ruling was without harm to the propounders of the question. It is not directed specifically to the opinion of the witness as to the effect of the hardening of arteries observed in A. G. Holmes would have upon his brain. It is clear that the court would have permitted an answer under a different framing of the question. Moreover, what the witness would have said was only a reason for the opinion which he had already expressed. Hence, it would seem that a reversal of the ruling could not be predicated on this exception.

The appellants paramount the fifth question embracing many exceptions, predicated on the theory relied upon by them in regard to the issues of undue influence, that is, that the evidence in the case tends to establish between A. G. Holmes and his wife, the defendant, the relationship of principal and agent, upon which a presumption of fraud as a matter of law arises from a transaction between them, wherein she is benefited, and that the burden of proof is upon her, when the transaction is called in question, to show by the greater weight of the evidence that it was open, fair and honest, and that the court should have so charged the jury. They rely upon the case of *McNeill v. McNeill,* 223 N. C., 178, 25 S. E. (2d), 615. The factual situation in that case, however, is distinguishable from that in the case in hand. There the relationship of principal and agent was created by written power of attorney, and the testator and grantor, and the beneficiary and grantee were not husband and wife, as they are here. And, while the evidence in the present case tends to show that A. G. Holmes was forgetful and that the wife helped him, and was watchful of him in his dealings in the operation of a certain store in which she had an interest with him, and that in other

respects she was vigilant and aided him in the conduct of his business affairs, there is no evidence in the case from which it could be presumed as a matter of law that her assistance, interest and vigilance were prompted by, or permeated with sinister motives. And a wife is not the agent of her husband by force of the marital relationship between them. 26 Am. Jur., 845, Husband and Wife, 236. Hence, the burden of proof on the issues of undue influence was upon those asserting that the will, and the deeds, were procured by the undue influence of defendant.

Moreover, the fact that a man bequeaths his estate to his wife, excluding his children and other relatives, does not tend to show mental incapacity or undue influence. *In re Peterson,* 136 N. C., 13, 48 S. E., 561. It is there stated: "The silent influence of affection and respect augmented by tender and kindly attention of a faithful wife cannot be regarded as in any sense undue influence."

Furthermore, there appears in the record such expressions as these in the testimony of caveators and plaintiffs as witnesses on the trial below, speaking of their stepmother, the defendant: C. B. Holmes said: "Mrs. Mattie took good care of the home and trained my brothers and sisters and did a good job"; Dr. A. B. Holmes said: "The home surroundings were pleasant. She was kind and attentive to my father"; and Mrs. Bennett said: "I never knew any other mother than Miss Mattie, who was very good to me." Indeed, the record fails to show anything to the contrary. And even after the death of her father, Mrs. Bennett wrote defendant a letter in which she used such expressions as these: "I am for you all the way . . . with all my heart I hope Papa has a will, and that he left everything to you and only you. If anybody starts anything I will get my teeth into them." Also it appears from testimony of these same witnesses and others that all the surviving children of the first marriage received some education above that obtained in public schools, and that only two children of the second marriage had such advantages. Hence, in the light of this evidence, coupled with the factual background revealed in the statement of uncontradicted facts hereinabove, the jury was fully justified in finding that there was no undue influence.

As to other questions involved, as stated by appellants, the record discloses that the course and theory of the trial in Superior Court were in keeping with well settled principles of law as set forth in numerous decisions of this Court, among which are: *Mayo v. Jones,* 78 N. C., 402; *In re Burns' Will,* 121 N. C., 336, 28 S. E., 519; *In re Craven's Will,* 169 N. C., 561, 86 S. E., 587; *In re Will of Brown,* 200 N. C., 440, 157 S. E., 420; *In re Fleming,* 172 N. C., 840, 90 S. E., 3; *In re Will of Hargrove,* 206 N. C., 307, 173 S. E., 577; *In re Will of Redding,* 216 N. C., 497, 5 S. E. (2d), 544; *In re Will of Lomax, ante,* 459.

In the trial below there is

No error.

STATE v. WILLIAM DEBERRY.

(Filed 3 January, 1945.)

1. Courts § 9—

The purchase of lands by the United States, within the limits of a State, does not of itself oust the jurisdiction of the State over the lands so purchased; but where the purchase is with the full consent of the Legislature of the State, the jurisdiction of the United States then becomes exclusive.

2. Same—

The consent of the Legislature of a State to the acquisition of lands within its borders by the United States, having once been given, may not thereafter be revoked or withdrawn, unless Federal jurisdiction had not been accepted.

3. Same—

The Legislature of the State may qualify its consent to the acquisition of lands within its borders by the United States so as to retain some jurisdiction or partial jurisdiction over such lands.

4. Same—

Jurisdiction of the United States is exclusive over property in this State, acquired in 1899 by virtue of Art. I, sec. 8, clause 17 of the Federal Constitution and with the State's legislative consent as expressed in ch. 136, Public Laws 1887, and such exclusive jurisdiction is not affected by the restrictive provisions of G. S., 104-1 and 104-7 subsequently enacted, which are prospective only.

APPEAL by defendant from *Clement, J.*, at July Criminal Term, 1944, of FORSYTH.

Criminal prosecution tried upon warrant charging the defendant with assault and battery on "one Louise Johnson, a woman, he being a man over eighteen years of age," in violation of G. S., 14-33 (C. S., 4215).

The original trial was in the municipal court of the city of Winston-Salem and resulted in a conviction. From a judgment of thirty days on the roads, the defendant appealed to the Superior Court of Forsyth County, where the case was tried *de novo*.

In the Superior Court the defendant entered a plea in abatement, for that the scene of the alleged assault was on property over which the United States Government has exclusive jurisdiction, to wit, the Federal courtroom in the Post Office Building in the city of Winston-Salem. It was admitted for the purposes of the plea that the Federal Government acquired the property in question on 28 July, 1899; acquisition confirmed in 1900. Motion to abate denied; exception.

The evidence for the State tends to show that on 20 June, 1944, a panel hearing of the National War Labor Board, involving labor rela-

tions at the R. J. Reynolds Tobacco Company, was being held in the Federal courtroom at Winston-Salem, N. C. During the noon recess, the prosecuting witness, whose affidavit had been used in the hearing, was talking with two fellow employees, when, according to her testimony, the defendant came up and slapped her or struck her from behind and grabbed her skirt and pulled it. He was gritting his teeth and seemed very angry.

This evidence is corroborated by the two fellow employees.

The defendant denied that he made any assault on the prosecuting witness or that his attitude was in any way threatening. His testimony is corroborated by a number of witnesses.

Several exceptions were taken to the admission of evidence and to questions likely to incite race feeling or tension.

Exception was also to the denial of the motion to nonsuit.

The jury returned a verdict of guilty, and from judgment of 60 days on the roads, the defendant appeals, assigning errors.

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

I. Duke Avnet, W. H. Boyer, Fred S. Hutchins, and H. Bryce Parker for defendant.

STACY, C. J. The case turns on the question of jurisdiction.

It is admitted that the alleged assault took place "in the Federal Courtroom, which is located in the Post Office Building in the city of Winston-Salem," and that "said property was acquired by the Federal Government in 1899 and confirmed by Judge Boyd in 1900."

It is further conceded that this property was "purchased by the consent of the legislature of the State," as expressed in ch. 136, Public Laws 1887, and that its acquisition by the United States was under and by virtue of Art. I, sec. 8, clause 17, of the Federal Constitution.

This clause 17 provides that Congress shall have power "to exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings." In *Battle v. United States,* 209 U. S., 36, 52 L. Ed., 670, it was said that "post offices are among the 'other needful buildings.'" So, also, are court buildings and customhouses. *Sharon v. Hill,* 24 Fed., 726. Indeed, "other needful buildings" would seem to embrace whatever structures are necessary in the performance of the particular functions of the Federal Government for which the property was acquired. *James v. Dravo Contracting Co.,* 302 U. S., 142, 82 L. Ed., 155.

It is established by the pertinent statutes and decisions on the subject that—

1. The purchase of lands by the United States, within the limits of a State, does not of itself oust the jurisdiction of the State over the lands so purchased; but where the purchase is with the full consent of the legislature of the State, the jurisdiction of the United States then becomes exclusive. *Ft. Leavenworth R. Co. v. Lowe,* 114 U. S., 525, 29 L. Ed., 264; *Supply Trading Co. v. Cook,* 281 U. S., 647, 74 L. Ed., 1091; *Bowen v. Johnston,* 306 U. S., 19, 83 L. Ed., 455.

2. The consent of the legislature of a State to the acquisition of lands within its borders by the United States, having once been given, may not thereafter be revoked or withdrawn, unless Federal jurisdiction has not been accepted. *United States v. Unzeuta,* 281 U. S., 138, 74 L. Ed., 761; *Adams v. United States,* 319 U. S., 312, 87 L. Ed., 1421.

3. The legislature of the State may qualify its consent to the acquisition of lands within its borders by the United States so as to retain some jurisdiction or partial jurisdiction over such lands. *Silas Mason Co. v. Tax Commission,* 302 U. S., 186, 82 L. Ed., 187; *James v. Dravo Contracting Co., supra.*

4. The most usual qualification to be found in the consent statutes is that of the reservation of authority to execute any civil or criminal process in and on the lands acquired by the United States. See *Ft. Leavenworth R. Co. v. Lowe, supra.*

5. In many of the States concurrent jurisdiction is also retained for the enforcement or administration of the criminal laws of the State. *Collins v. Yosemite Park & Co.,* 204 U. S., 518, 82 L. Ed., 1502.

The Legislature of North Carolina, in 1887, gave its unqualified consent to the acquisition of lands within the State by the United States for the purpose of erecting thereon any post office, courthouse, etc., and this statute was in force at the time of the purchase of the post office site in Winston-Salem in 1899.

Section 5426 of the Revisal of 1905 undertakes to qualify the State's consent to the acquisition of Federal lands, and reserves to the State concurrent jurisdiction with the United States over such lands for the service of process issued by the courts of the State, and "the State of North Carolina also retains authority to punish all violations of its criminal laws committed on any such tract of land." Now G. S., 104-1. Two years later, however, in 1907, another statute was enacted which ceded "exclusive jurisdiction in and over any land so acquired by the United States . . . for all purposes, except the service upon such sites of all civil and criminal process of the courts of this State." Ch. 25, Public Laws 1907. Now G. S., 104-7.

Neither the cited section of the Revisal of 1905 nor the cited statute of 1907 makes any reference to lands theretofore acquired by the United States for the purposes named; and according to the general rule of construction, in the absence of such reference, the statute is to be regarded as prospective only. *Ashley v. Brown,* 198 N. C., 369, 151 S. E., 725; *S. v. Pridgen,* 151 N. C., 651, 65 S. E., 617. Hence, the applicable law would be that which was in force at the time of the acquisition of the property in 1899. At that time the Legislature had given its unqualified consent to the acquisition of lands within the State by the United States for the purpose of erecting thereon any post office, courthouse, etc., and the Federal jurisdiction therefore became exclusive. *United States v. Unzeuta, supra.*

The same conclusion would apparently follow, even if the subsequent legislation be given a retroactive effect, since the law as found in the Revisal of 1905 seems to be in conflict with the later statute enacted in 1907.

This may lead to an undesirable result. Nevertheless, we can only declare the law as we find it.

The motion to abate is well founded.

Reversed.

OMA MINK McLAIN v. SHENANDOAH LIFE INSURANCE CO.

(Filed 3 January, 1945.)

1. Fraud § 1—

Fraudulent statements, sufficient to vitiate an instrument, must be false representations of fact, peculiarly within the knowledge of the party making them, and where the parties, dealing at arms length, have equal means of information, so that with ordinary prudence and diligence either may rely upon his own judgment, they are presumed to have done so, and, if not, they must abide the consequences.

2. Fraud § 11—

In an action to recover double indemnity on a policy of insurance, where all the evidence tended to show that plaintiff settled with the defendant for the face of the policy, without double indemnity, though plaintiff knew the policy carried a rider providing double indemnity and that defendant was contesting the validity of such rider, and that plaintiff signed a full release after an hour's negotiation with defendant's representatives, having had the policy in her possession for five weeks before the settlement without excuse for not reading it, and that plaintiff relied on alleged false statements of defendant's agents that the double indemnity provision was not effective, a motion for judgment as of nonsuit should have been allowed.

APPEAL by defendant from *Clement, J.*, at September Term, 1944, of FORSYTH.

This is a civil action to recover upon a double indemnity provision of an insurance policy issued by the defendant upon the life of Robert Sherrill McLain in which the plaintiff, Oma Mink McLain, his wife, was beneficiary. The insured was killed in a collision between the motorcycle on which he was riding and a truck. The plaintiff accepted the check of the defendant for $2,500.00, and executed and delivered a release of all claims against the defendant. The plaintiff now contends that the execution and delivery by her of a release of all claims against the defendant company was procured by misrepresentation and fraud practiced on her by the defendant, and seeks to avoid the release and to recover the double indemnity provided in the policy. The defendant denies that it practiced any misrepresentation or fraud upon the plaintiff.

The policy in suit was first written to cover only indemnity of $2,500.00 upon the death of the insured, but there was subsequently attached thereto a supplemental contract for "Double Indemnity Benefit," which provided for payment of an additional $2,500.00 "if the insured . . ., shall die as a result of any bodily injury effected while not under the influence of intoxicants, directly through external, violent and accidental means, . . . provided such death does not result . . . from any violation of the law."

There arose upon the contradictory allegations and contentions of the plaintiff and defendant the fourth issue which was submitted to the jury, to wit: "4. Was the plaintiff induced to accept the check and execute the release by the fraudulent misrepresentation of the defendant, as alleged in the complaint and reply?"

The jury answered the fourth issue in the affirmative, as contended for by the plaintiff, and the other issues were also answered in favor of the plaintiff. The court entered judgment, predicated on the verdict, that the plaintiff recover of the defendant the amount sued for, namely, $2,500.00. From this judgment the defendant appealed, assigning errors.

H. H. Leake, Fred S. Hutchins, and H. Bryce Parker for plaintiff, appellee.

Womble, Carlyle, Martin & Sandridge for defendant, appellant.

SCHENCK, J. The defendant, appellant, states in his brief: "On this appeal the appellant chooses to rely upon its Assignments of Error Nos. 1, 3 and 4, which relate to the signing of the judgment and to the overruling of the defendant's motion for judgment as of nonsuit made at the conclusion of the plaintiff's evidence and renewed at the conclusion of all the evidence." It is the contention of the defendant that there was not

sufficient evidence of fraudulent misrepresentation to be submitted to the jury, and since the plaintiff's alleged cause of action is bottomed upon the allegation of fraud in the procurement of the release executed and delivered by her, the motion of the defendant for a judgment as in case of nonsuit, or to dismiss the action, should have been allowed. There appears in the brief of the plaintiff, appellee, the following: "As stated by the defendant, the sole question now before the Court is whether there was sufficient evidence of fraud for the jury."

We adopt the statement that "the sole question now before the Court is whether there was sufficient evidence of fraud for the jury."

The fraud alleged and relied upon by the plaintiff consisted of the alleged false statements made by the representatives of the defendant to the plaintiff as to the provisions contained in the policy, namely, that the policy had not been in force long enough to put in effect the provision for double liability, and that the policy did not cover death caused by a motorcycle. The policy, of which she was the beneficiary and which was the subject of the settlement, was in the possession of the plaintiff, and, according to her own testimony, she had known the policy contained double indemnity provision from the time it was issued in December, 1934, that she had access to it during her husband's lifetime and since his death it had been in her possession. The double indemnity contract was on a separate piece of paper attached to the policy and its provisions stated in plain easily understood language. There is no evidence of any resort to artifice or trick to prevent plaintiff from reading the contract. She was literate, and had been for six or seven years helping her father in his business, keeping his books, writing and depositing his checks, and carrying on his correspondence. She testified that she discussed the settlement with the representatives of the defendant for approximately an hour and relied upon their statements as to the provision of the double indemnity contract instead of reading the provision herself. She and the representatives of the defendant were dealing at arms length. She had the contract during the negotiation for settlement and delivered it to said representatives only after she had signed the total release and received the check for $2,500.00.

The plaintiff's own testimony shows that she had every opportunity to know the contents of the double indemnity provision of the insurance contract. If she did not read the provision there was nothing to prevent her from doing so. As to her reading or failure to read such provision her own testimony shows she was a perfectly free agent. She not only had the contract for five weeks prior to the execution of the release, but it was actually in her possession during the discussion of the settlement, which she says lasted an hour. The principle applicable to alleged fraudulent statements relied upon to vitiate an instrument, is stated in

Ward v. Heath, 222 N. C., 470, 24 S. E. (2d), 5, as follows: "It must be a false representation of fact materially affecting the value of the contract and which is peculiarly within the knowledge of the person making it and in respect to which the other person in the exercise of proper vigilance has not an equal opportunity of ascertaining the truth."

The principle with which we are now concerned is also clearly stated in Cooley on Torts (Fourth Edition), at page 580, in the following words: "Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them, and that, therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence."

It has long been a recognized principle of law that where parties have equal means of information, so that with ordinary prudence and diligence, either may rely upon his own judgment, they are presumed to have done so, or, if they have not done so, they must abide the consequences.

Furthermore, it appears from the evidence that the plaintiff had knowledge of the fact that the defendant was contesting any payment under the double indemnity feature of the contract a considerable time before she accepted the check and signed and delivered the release, and notwithstanding this knowledge she relied upon the alleged statements of the defendant's representatives, rather than make her own investigation. "A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests. *Austin v. George,* 201 N. C., 380, 160 S. E., 364; *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949; *Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348; *Sanderlin v. Cross,* 172 N. C., 234, 90 S. E., 213." *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498.

We are of the opinion, and so hold, that even if the representatives of the defendant company did make to the plaintiff the false statements regarding the provisions of the policy she alleges they made, namely, that the policy had not been written a sufficient length of time to cover death by accident or that the policy did not cover death due to a motorcycle, there was no actionable fraud, for the reason the plaintiff failed to take advantage of the opportunity she had to inspect the policy and to learn the truth as to its provision. Therefore we hold that the Superior Court erred in overruling the defendant's demurrer to the evidence, and in declining to allow his motion for judgment as in case of nonsuit and to

dismiss the action, as on the record it was barred by the statute of limitations.

For the reasons given, the judgment below is

Reversed.

BERTHA G. FIELDS v. TOMPKINS-JOHNSTON PLUMBING CO., ET AL.

(Filed 3 January, 1945.)

1. **Master and Servant § 40i—**

The rule generally recognized is that, where the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. On the other hand, where the employee is not by reason of his work exposed to such hazards, the injuries are not ordinarily compensable. The test is whether the employment subjects the workman to a greater hazard or risk.

2. **Master and Servant § 52c—**

Where there is evidence in the record to support the facts found, the determination of the Industrial Commission is not subject to review.

3. **Master and Servant § 40f—**

In a proceeding under the Workmen's Compensation Act to determine the liability of defendant employer, for the death of an employee, where the evidence tended to show that deceased, a plumber, was working in a partially finished frame building calking with hot lead the joints of drain pipe in the ground, his face and head being in close proximity to the melted lead, which increased the temperature from one-half to ten degrees, the general outside temperature being at the time 104° Fahrenheit, and that deceased, after working all day to 4:30 p.m. became ill, reported his condition to his employer, got in his car, drove out of the enclosure where he was working and was found 25 minutes later, a few hundred yards down the road, unconscious and died a few hours later from exhaustion and sunstroke, there is sufficient evidence to support the finding of liability.

APPEAL by defendants from *Gwyn, J.*, at May Term, 1944, of SCOTLAND.

Proceeding under Workmen's Compensation Act to determine liability of defendants to widow and adopted minor daughter, dependents of Charles Blane Fields, deceased employee.

In addition to the jurisdictional determinations, the operative findings and conclusions of the Industrial Commission follow:

On 19 July, 1942, Charles B. Fields was employed by Tompkins-Johnston Plumbing Company at the Maxton Air Base, installing plumb-

ing in a frame building, 50 by 30 feet, with weatherboarding up, and roof sheathed over, but with windows and doors not yet in, which building was eventually to be used as a bath house. The said Fields, with a helper, was installing the pipes in the ground, calking the joints with hot lead; "his face and head were in close proximity to the melted lead with which he was calking the drain pipes." There is evidence that this hot lead increased the temperature where Fields was working from ½ to 10 degrees, which the Commission finds subjected him to a temperature of "several degrees higher than the outside temperature owing to the hot lead being used in his work." The weather was unusually hot, the general outside temperature being 104 degrees Fahrenheit. Fields worked all day until about 4:00 p.m., when he became ill and reported to the office that he would have to "check in" for the day. He left the office, got in his automobile and drove out of the enclosure of the camp and a few hundred yards down the highway. Twenty-five minutes later he was found slumped over his steering wheel in an unconscious condition. He died in a few hours from heat exhaustion or sunstroke. It is found as a fact that the deceased was taken ill and the condition which produced his death "seized him before he left the premises of the defendant employer."

The Commission specifically finds that the deceased while performing his work and on the date he suffered the heat stroke and died from the effects thereof, "was subjected to a greater heat hazard than the public generally who performed manual labor was subjected to at the time and place plaintiff's deceased suffered his heat stroke or in the immediate vicinity thereof." And further that the intestate's death resulted from an injury by accident which arose out of and in the course of his employment.

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

W. A. Leland McKeithen (in absentia) and M. G. Boyette for plaintiff, appellee.

Helms & Mulliss for defendants, appellants.

STACY, C. J. The question for decision is whether the record permits the inference that the death of Fields resulted from an injury by accident which arose out of and in the course of his employment. An affirmative answer would uphold the judgment below; a negative response would reverse it.

The rule generally recognized is, that where the employment subjects a workman to a special or particular hazard from the elements, such as

excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. *Collett v. Com.,* 116 W. Va., 213, 179 S. E., 657; Anno. 83 A. L. R., 234; 71 C. J., 760. On the other hand, where the employee is not by reason of his work peculiarly exposed to injury by sunstroke or freezing, such injuries are not ordinarily compensable. *Walker v. Wilkins,* 212 N. C., 627, 194 S. E., 89; *Wax v. Des Moines Asphalt Paving Corp.,* 220 Iowa, 864, 263 N. W., 333; 28 R. C. L., 806. The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed. *Lockey v. Cohen, Goldman Co.,* 213 N. C., 356, 196 S. E., 342; *Miskowiak v. Bethlehem Steel Co.,* 156 Md., 690, 145 Atl., 199; *Kripplaben v. Iron & Steel Co.,* 227 Mo. App., 161, 50 S. W. (2d), 752; 25 Cornell L. R., 645; Harvard L. R., 153. The decisions in *Neely v. Statesville,* 212 N. C., 365, 193 S. E., 664 (death from heart failure), and *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844 (death from pneumonia), are not at variance with this position, since these were cases free from "injury by accident." The general test was not there presented, as it is here. Hence, any expressions in the latter case on the general subject were *obiter.* See *Goodwin v. Bright,* 202 N. C., 481, 163 S. E., 576.

The question, then, on the present record is whether plaintiff's intestate's death may reasonably be attributed to the increased temperature occasioned by the manner and method employed in doing the work, or should it be ascribed to natural causes. Either inference seems permissible. Hence, the determination of the Industrial Commission that the additional hazard created by the artificial heat was the direct and superinducing cause of plaintiff's intestate's death is conclusive on appeal. *Brown v. Aluminum Co., ante,* 766; *Hegler v. Cannon Mills, ante,* 669.

Where the record supports the fact-finding body, its determinations are not subject to review by the Superior Court or this Court. *Kearns v. Furniture Co.,* 222 N. C., 438, 23 S. E. (2d), 310.

The following from the opinion of the Commission makes clear its position in the matter: "It is the opinion of the Full Commission that a one degree increase in temperature by artificial heat at a time and place where the temperature is 104 degrees would be more likely to cause a heat stroke than an increase of 30 degrees from the natural temperature by artificial heat for instance in a boiler room when or at a place where the natural temperature is 60 degrees Fahrenheit." In other words, it is the last straw that breaks the camel's back.

While the evidence may be slight, it seems sufficient to sustain the award.

Affirmed.

PETE CHASON v. JESSIE MARLEY AND LENA MARLEY.

(Filed 3 January, 1945.)

1. **Frauds, Statute of, § 13—**

In an action on a contract to convey land, the defense being that the contract is not in writing as required by G. S., 22-2, the parties sought to be charged may simply deny the contract or plead the statute of frauds, or they may do both, and if either plea is made good the contract cannot be enforced.

2. **Frauds, Statute of, § 14—**

A contract which the law requires to be in writing can be proven only by the writing itself, not as the best evidence, but as the only admissible evidence of its existence; and it must adequately express the intent and obligation of the parties. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely.

3. **Same—**

Receipts for principal and interest and for taxes, in which no mention is made of any agreement by the person signing same to sell or convey land, are insufficient under the provisions of G. S., 22-2.

APPEAL by plaintiff from *Burney, J.*, at May Term, 1944, of ROBESON.

This is a civil action upon an alleged contract between plaintiff and defendants for the purchase and sale of real property owned by the defendants in the town of Lumber Bridge, county of Robeson, wherein the plaintiff alleges the contract, the performance thereof on his part, by making the agreed payments of principal and interest monthly, and the payment annually of the insurance premiums and taxes on the property, and the nonperformance of the contract by the defendants by declining to convey the property to the plaintiff upon his demand for such conveyance. The plaintiff seeks specific performance of the alleged contract. The defendants answer and deny the contract and the plaintiff's performance thereof, and plead the statute of frauds.

When the plaintiff had introduced his evidence and rested his case the defendants moved the court for a judgment as in case of nonsuit, or to dismiss the action (G. S., 1-183), which motion was allowed, and from judgment predicated on such ruling the plaintiff appealed, assigning error.

F. D. Hackett and Varser, McIntyre & Henry for plaintiff, appellant.

Robert H. Dye for defendants, appellees.

SCHENCK, J. The defendants, the parties sought to be charged in this action, could simply deny the contract alleged, or they could plead the statute of frauds, or they could do both as they have elected so to do, and if either plea is made good the said contract cannot be enforced, and the action cannot be maintained. *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439, and cases there cited.

The plaintiff relied upon certain receipts given to him from time to time by the defendants and certain checks given by him to defendants which were accepted, endorsed, and cashed by the defendants to satisfy the statute of frauds (G. S., 22-2). The statute reads: "All contracts to sell or to convey any lands, . . . or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

The receipts relied upon by the plaintiff to satisfy the statute are substantially in the following words: "Received of Pete Chason Thirty-five & no/100 Dollars, $25.00 on principal, $10.00 on interest. $35.00. Jessie Marley." None of such receipts or checks given therefor make any mention of an agreement by the defendants to sell. The plaintiff likewise relied upon certain receipts from the defendants for taxes paid by him on the property. These receipts are in substantially these words: "Received of Pete Chason Thirteen & 05/100 Dollars for 1941 taxes on house and lot. $13.05. Jessie Marley." None of these receipts make any mention of an agreement by the defendant to sell. "A contract which the law requires to be in writing can be proved only by the writing itself, not as the best, but as the only admissible evidence of its existence." *Morrison v. Baker,* 81 N. C., 76; *Bonham v. Craig,* 80 N. C., 224. "The agreement must adequately express the intent and obligation of the parties. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely." *Mayer v. Adrian,* 77 N. C., 83. See, also, *Keith v. Bailey,* 185 N. C., 262, 116 S. E., 729; *Simpson v. Lumber Co.,* 193 N. C., 454, 137 S. E., 311; *Kluttz v. Allison,* 214 N. C., 379, 199 S. E., 395; *Smith v. Joyce,* 214 N. C., 602, 200 S. E., 431.

Since the contract upon which the plaintiff's alleged cause of action is bottomed rests solely in parol, and since the said contract is one to sell and convey lands and no memorandum thereof has been put in writing and signed by the party charged therewith, or by any person by him thereto lawfully authorized, it cannot, under the statute, be enforced. The evidence adduced is legally insufficient to support the alleged contract.

Holding as we do that the evidence does not satisfy the statute of frauds and that the alleged contract to convey lands therefore cannot be

enforced, it becomes unnecessary for us to decide the question posed on the record as to whether Jessie Marley was duly authorized to act for and bind her codefendant, Lena Marley.

For the reasons given, the judgment of the Superior Court dismissing the action at the cost of the plaintiff and his surety must be affirmed, and it is so ordered.

Affirmed.

STATE v. ADA GODWIN, RUBY MURPHY, LEWIS COOK, SAMMY FLOYD, FRED BLUE AND THOMAS BLUE.

(Filed 3 January, 1945.)

1. Evidence § 19: Criminal Law § 40—

Evidence, in a criminal prosecution, tending to discredit and impeach a defendant about a collateral matter and to create an unfavorable impression of defendant in the minds of the jury, is incompetent and its admission is error.

2. Evidence § 27—

The rule that, when incompetent evidence is admitted over objection and the same evidence has theretofore been, or is thereafter, admitted without objection, the benefit of the objection is ordinarily lost, does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception.

3. Criminal Law § 29b—

In a prosecution against several defendants for an assault with a deadly weapon with intent to kill, evidence that one of the defendants, about a month before the commission of the alleged crime, in a dispute with witness, used violent and profane language, is incompetent and does not come within the rule that proof of like offenses may be admitted to show intent and motive.

APPEAL by all defendants, except Ruby Murphy, from *Burgwyn, Special Judge,* at May Term, 1944, of CUMBERLAND.

The defendants were indicted in three bills of indictment, charging conspiracy, assault with deadly weapon with intent to kill and murder J. R. Bullard, and assault with deadly weapon with intent to kill and murder Mrs. J. R. Bullard.

All the cases based upon these bills of indictment were consolidated, without objection, for trial.

Verdict: "Guilty as to all defendants of conspiracy; Guilty of assault with deadly weapon on J. R. Bullard as to all defendants, except Ruby

Murphy; Guilty as to assault with a deadly weapon on Mrs. J. R. Bullard as to all defendants, except Ruby Murphy."

From a judgment sentencing the appealing defendants to various terms of imprisonment, predicated upon the verdict, said defendants appealed to the Supreme Court, assigning error.

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

James R. Nance for defendants.

DENNY, J. The defendants excepted to and assigned as error, the admission of certain evidence, purely collateral in character and which they contend was prejudicial to them. George Elliott, a witness for the State, who admitted he had had trouble with the defendant, Miss Ada Godwin, was permitted to testify that about a month before the commission of the alleged crime, for which the defendants were on trial, that he had started to Miss Ada Godwin's house to see her relative to a fire and that he met her at Dale's Filling Station and said to her: "I want to see you, I have had a lot of trouble about cattle. The other two fires are a thing of the past, but I have about reached my limit. The one last night . . . I can't take it any longer. I would like to ask you if you would be willing, leaving me out, to pay the tenants of mine, the share-croppers, a part of their corn and for their hay, so they will have something to feed their stock on." He further testified her reply was "G—— d——n the fire. I am not interested in the damn fire. So far as I am concerned it was over the Cape Fear River." The witness was also permitted to testify to the use of vile and profane language by Ada Godwin in discussing a debt owed by one of her tenants for a seed loan, which tenant was planning to move on Elliott's land, without paying the loan.

This evidence tended to discredit and impeach this defendant about a collateral matter and to create an unfavorable impression of the defendant in the minds of the jurors which was manifestly prejudicial. *S. v. Lee,* 211 N. C., 326, 190 S. E., 234. It is true, as the State contends, she went upon the stand and testified in her own behalf, but she denied that any such conversation took place, and by so doing she did not make the evidence competent nor waive the objection to its admission. The well established rule that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but, as stated by *Brogden, J.,* in *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232: "The rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy

its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception."

The testimony of the above witness does not come within the rule that proof of the commission of other like offenses may be admitted to show the *scienter,* intent and motive when the crimes are so connected or associated that the evidence will throw light on the question under consideration. *S. v. Smith,* 204 N. C., 638, 169 S. E., 230; *S. v. Beam,* 179 N. C., 768, 103 S. E., 370; *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Lee, supra; Gray v. Cartwright,* 174 N. C., 49, 93 S. E., 432; *S. v. Walton,* 114 N. C., 783, 18 S. E., 945; *S. v. Murphy,* 84 N. C., 742. The fact that the trial judge instructed the jury to consider this evidence as against Ada Godwin only, did not limit the prejudicial effect of the evidence to her alone, since the testimony of the State as a whole tended to show that she was the instigator of the conspiracy and personally directed the assault on the Bullards. We think the exception well taken and that the defendants are entitled to a new trial.

There are other exceptions of merit presented on the record, but since there must be a new trial, we deem it unnecessary to discuss them.

New trial.

STATE v. NEWITT W. STONE.

(Filed 3 January, 1945.)

1. Homicide § 25—

In a prosecution for felonious slaying, where the State's evidence tended to show that the prisoner and deceased were drinking together and on the prisoner's invitation went together towards prisoner's house about 11 p.m., and were seen going in that direction, and about three o'clock in the morning thereafter a gun shot was heard at prisoner's home and two or three minutes later a man was seen leaving the home by the back door, and in the home a table was found on which was a jar and a bottle, both having contained liquor, with two chairs close to the table and a bucket between them containing cigarette butts, and deceased was found dead on his back in the doorway of the room where the table was, with a shotgun of the prisoner's between his legs, one barrel of which contained an empty shell with hammer down and the other hammer cocked, deceased having a shotgun wound in his breast without powder burns on his body or white shirt, and that prisoner made contradictory statements as to the time he left home and the discovery of the dead body, there is sufficient evidence to go to the jury.

2. Criminal Law § 53c—

In a criminal prosecution where there is no admission or evidence establishing a presumption, sufficient to overcome the presumption of innocence, which requires the defendant to go upon the stand and make

an explanation, there is reversible error for the court to charge that "the most that can be required of the defendant is explanation, but not exculpation."

3. Criminal Law § 18—

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.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1944, of ROBESON.

Criminal prosecution tried upon indictment charging the defendant with the felonious slaying of one T. Willis Edwards.

Verdict: Guilty of manslaughter. Judgment: Imprisonment in the State's Prison for not less than five nor more than ten years. Defendant appeals, assigning error.

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

F. D. Hackett for defendant.

DENNY, J. The first exception is to the refusal of his Honor to grant the defendant's motion for judgment as of nonsuit at the close of the State's evidence. The defendant offered no evidence. The State's evidence disclosed that the defendant was drinking on Saturday night, 22 April, 1944, that he went to the home of his sister, Mrs. Annie Edwards, mother of the deceased, shortly after 9:30 o'clock. His nephew, T. Willis Edwards, the deceased, came home between ten and eleven o'clock. The defendant invited the deceased to go with him to the defendant's home. The last time the deceased was seen alive, he was with the defendant. The defendant admitted to the sheriff that he and the deceased were alone in the defendant's home and that they sat up late talking and drinking. A gun shot was heard around three o'clock in the morning of 23 April, 1944, at the home of the defendant, and two or three minutes after the gun shot was heard, a man was seen leaving the defendant's home, having come out of the back door of the house. A jar and bottle were found on a table in the defendant's home and both had contained liquor. There were two chairs close to the table and a bucket between the chairs, containing cigarette butts. The deceased was found lying on his back in the doorway between the room where the men had been sitting and the front room of the house. A shotgun belonging to the defendant was found between the legs of the deceased, with the

left-hand hammer cocked and the right-hand hammer down. The right-hand barrel contained an empty shell. The gun shot wound was in the breast of the deceased and ranged slightly downward. There were no powder burns on the white shirt worn by the deceased or on his body. The defendant made contradictory statements as to when he left his home and as to the time he discovered the body of his nephew upon his return home.

We think the evidence sufficient to warrant its submission to the jury. *S. v. Mann,* 219 N. C., 212, 13 S. E. (2d), 247; *S. v. Lee,* 211 N. C., 326, 190 S. E., 234; *S. v. Marion,* 200 N. C., 715, 158 S. E., 406; *S. v. Carr,* 196 N. C., 129, 144 S. E., 698; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669.

The second exception is to the following portion of his Honor's charge to the jury: "In the absence of some admission or evidence establishing an opposite presumption, sufficient to overcome the presumption of innocence, the most that can be required of the defendant in a criminal prosecution is explanation, but not exculpation."

It will be noted that this portion of the charge is a direct quotation from the opinion in *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398, where the principle upon which the doctrine of the burden of proof rests in both civil and criminal cases, is discussed. The quotation is a statement of the law in general terms and is not applicable to the facts in this case. Here there was no admission or evidence establishing a presumption, sufficient to overcome the presumption of innocence, which required the defendant to go upon the stand and make an explanation, as in a case where it is admitted or proven to the satisfaction of the jury beyond a reasonable doubt, that the defendant had killed another with a deadly weapon. "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,* 223 N. C., 381, 26 S. E. (2d), 869; *S. v. Hill,* 141 N. C., 769, 53 S. E., 311; *S. v. Riley,* 113 N. C., 648, 18 S. E., 168. Under the charge as given, the jury could have inferred that the State had the right to require the defendant to go upon the stand and make some explanation as to the charge against him. In this there was error.

The exception is well taken and must be sustained. The defendant is entitled to a new trial, and it is so ordered.

New trial.

JAMES WILSON AND WILLIE STONE v. WALTER ROBINSON AND (S. W. THAGGARD, ADMINISTRATOR OF WALTER ROBINSON, DECEASED).

(Filed 3 January, 1945.)

1. Appeal and Error § 37e—

A general exception, to the court's findings of fact and to the signing of the judgment thereon, is insufficient to bring up for review the findings of the judge. The alleged errors should be pointed out by specific exceptions as to findings of fact as well as law.

2. Appeal and Error § 38—

In the absence of specific exceptions, there is a presumption that the findings of the court are supported by evidence and that the judgment thereon is correct.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at March Term, 1944, of DURHAM.

Facts pertinent to this appeal are set forth in his Honor's findings of fact, and judgment entered thereon, as follows:

"This cause coming on to be heard and the same being heard upon Motion to Vacate and set aside the judgments herein entered against the defendant, as appears of record in the office of the Clerk of the Superior Court, and the Court, after hearing the argument of counsel for plaintiffs and defendant, finds the following facts:

"1. That in these entitled causes the defendant employed Malcolm McQueen of the Fayetteville Bar to represent him in these and other causes pending before this Court wherein James Wilson, Clifton Barnes, C. Alexander, Willie Stone and Lillie Smith were plaintiffs and Walter Robinson was defendant; that no complaint was served on defendant except the Lillie Smith case, in which defendant's attorney appeared and filed pleadings; that in the other causes defendant's said attorney appeared in Court in apt time and lodged Motions to Dismiss for the reason that complaints were not filed within the time allowed and that copies were not left with the Clerk for defendant as required by law in such cases; that in the cases of the above named defendants (plaintiffs) the Court took the Motions under advisement, stating that same would be ruled upon and defendant's attorney advised; that in the case of C. Alexander and Clifton Barnes was ruled upon and dismissed and the defendants (plaintiffs) herein named retained by the Court, and not ruled upon.

"2. That defendant's attorney corresponded with the Clerk, requesting information regarding the ruling of the Court with respect to said Motions and was never notified of any action with respect to said motions

retained by the Court as aforesaid; that judgments by default were taken against the defendant in these causes while said motions were pending without notice to defendant or his counsel. The Court finds as a fact that copies of the complaints were not left with the Clerk or defendant as by law required, and defendant was entitled to motion to dismiss.

"3. That defendant and his counsel used and exercised due diligence in said matters and the judgments herein rendered during the years of 1939 and 1940 were erroneous and contrary to the usual course and practice of the Court, without fault on defendant's part; that defendant had no notice of the same until January 24, 1944, when docketed in the Superior Court of Cumberland County.

"4. The Court further finds as a fact that the Court had no jurisdiction to render said judgment on account of the facts herein stated; that same were without notice, as stated in the verified motion and the Court finds the facts to be as therein set out with respect to these judgments and that the same should be vacated and set aside as therein prayed; that defendant has a good and meritorious defense thereto and should be allowed to assert same; that defendant has used due diligence in all respects, and any neglect, if any, is excusable under the circumstances.

"5. Upon the foregoing facts the Court being of the opinion that the judgments against the defendant should be, as a matter of law and also in the discretion of the Court, set aside and vacated.

"It Is Therefore, Considered, Ordered and Adjudged that these judgments against the defendant be, and the same are hereby vacated and set aside, and it is so ordered, this 24th day of March, 1944."

The plaintiffs excepted to his Honor's findings of fact and to the signing of the judgment, and appealed to the Supreme Court.

Bennett & McDonald for plaintiffs.
Malcolm McQueen for defendant.

DENNY, J. A general exception to his Honor's findings of fact and to the signing of the judgment thereon, is insufficient to bring up for review the findings of the judge. As stated in *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992: "The alleged errors should be pointed out by specific exceptions as to findings of fact as well as law. Findings of fact by the judge are binding on us where supported by evidence, and when it is claimed that such finding is not supported by any evidence the exceptions and assignments of error should so specify. Such objection cannot be taken for the first time in this Court. *Joyner v. Stancill,* 108 N. C., 153; *Hawkins v. Cedar Works,* 122 N. C., 87."

The exception taken by the plaintiffs points out no specific error. *Hickory v. Catawba County,* 206 N. C., 165, 173 S. E., 56. The judgment herein is based upon his Honor's findings of fact and are presumed, in the absence of specific exceptions, to be supported by the evidence and are binding on us. The judgment based on those findings is correct. *Sturtevant v. Cotton Mills, supra; Vestal v. Vending Machine Co.,* 219 N. C., 468, 14 S. E. (2d), 427; *Smith v. Mineral Co.,* 217 N. C., 346, 8 S. E. (2d), 225; *Harrell v. White,* 208 N. C., 409, 181 S. E., 268; *Roberts v. Davis,* 200 N. C., 424, 157 S. E., 66; *Wood v. Bank,* 199 N. C., 371, 154 S. E., 623; *Thomas v. Products Co.,* 194 N. C., 729, 140 S. E., 722; *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175; *Boyer v. Jarrell,* 180 N. C., 479, 105 S. E., 9.

For the reason stated, the judgment of the court below is

Affirmed.

JOHN B. ROBERSON ET AL. v. W. O. ABBITT.

(Filed 8 March, 1944.)

APPEAL by plaintiffs from *Bone, J.,* at November Term, 1943, of MARTIN.

Civil action to recover damages for death of 28 hogs on 18 September, 1942, while in transit in defendant's truck from Williamston, N. C., to Richmond, Va.

Upon denial of liability and issues joined, the jury returned a verdict in favor of the defendant. From judgment thereon, the plaintiffs appeal, alleging error in requiring them to establish the defendant's negligence by a preponderance of the evidence as a condition precedent to recovery. Exception.

Wheeler Martin and Clarence W. Griffin for plaintiffs, appellants.
Hugh G. Horton for defendant, appellee.

PER CURIAM. The case was tried on the principles announced in *Fuller v. R. R.,* 214 N. C., 648, 200 S. E., 403; *Edgerton v. R. R.,* 203 N. C., 281, 165 S. E., 689; *Farming Co. v. R. R.,* 189 N. C., 63, 126 S. E., 167; and *Hinkle v. R. R.,* 126 N. C., 932, 36 S. E., 348, which was as favorable to the plaintiff as he could expect. The defendant was a contract carrier, but not a common carrier. There was no error in the placing of the burden of proof. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; *Hosiery Co. v. Express Co.,* 184 N. C., 478, 114 S. E., 823.

The verdict and judgment will be upheld.

No error.

STATE v. HARVEY C. REGISTER, CARL GODWIN, JAMES REGISTER AND JAMES JACKSON.

(Filed 22 March, 1944.)

APPEAL by defendants from *Williams, J.*, at November Term, 1943, of HARNETT. No error.

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

J. R. Young and Neill McK. Salmon for defendants.

PER CURIAM. The defendants were indicted for conspiracy to commit a felonious assault upon the State's witness, and also for assault upon him with a deadly weapon with intent to kill. There was a general verdict of guilty. While the evidence was conflicting, the jury has accepted the State's version of the transaction. An examination of the record reveals no error in the trial. The exception to evidence of a declaration by one of the defendants cannot be sustained. This evidence was competent and there was no request that its effect be limited. *S. v. McKeithan,* 203 N. C., 494, 166 S. E., 336. The exceptions to the charge are without merit. The judgment pronounced upon the verdict will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. JOSEPH O'CONNOR AND SURETY, TAR HEEL BOND COMPANY, AND SURETIES ON SUPERSEDEAS BOND, C. P. BARRINGER AND MAE H. BARRINGER.

(Filed 22 March, 1944.)

APPEAL by Tar Heel Bond Company from *Williams, J.*, at November Term, 1943, of HARNETT. Affirmed.

Defendant Bond Company, surety upon an appearance bond, appealed from an order denying motion under C. S., 600, to set aside judgment absolute. The other defendants signed *supersedeas bond.* On appeal here the judgment was affirmed. *S. v. O'Connor,* 223 N. C., 469. The opinion of this Court having been certified down, the court below entered decree affirming the judgment by default final against the defendant Bond Company and rendered judgment on the *supersedeas* bond against the individual defendants with interest from the January Term, 1942, at which term the judgment by default final was entered. The defendant Bond Company excepted and appealed.

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

H. Paul Strickland and M. O. Lee for Harnett County Board of Education, appellee.

Neill McK. Salmon and H. L. Mangum for defendant, appellant.

PER CURIAM. The only exceptive assignments of error contained in the record are directed to the judgment against the individual defendants. We do not concede that a judgment upon an appearance bond does not bear interest. G. S., 24-5 (C. S., 2309). Even so, the individual defendants are the ones affected. If the defendant Bond Company is required to pay interest it will be required to do so by virtue of the terms of the statute. It cannot present here a contention in behalf of the other defendants. There is no merit in the appeal. The judgment below is

Affirmed.

STATE v. FRANK BALLARD.

(Filed 22 March, 1944.)

APPEAL by defendant from *Williams, J.*, at November Term, 1943, of HARNETT.

Criminal prosecution tried upon indictment charging the defendant of assault with intent to commit rape.

Verdict: Guilty. Judgment: Imprisonment in the State's Prison for a term of not less than ten or more than fifteen years.

Defendant appeals, assigning error.

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

Neill McK. Salmon for defendant.

PER CURIAM. After a careful consideration of defendant's exceptive assignments of error, we are of opinion they are without sufficient merit to disturb the verdict below.

In the trial below, we find

No error.

CHESTER B. McLEOD v. MARY STUDEBAKER McLEOD.

(Filed 22 March, 1944.)

APPEAL by plaintiff from *Frizzelle, J.*, at April Term, 1943, of WAYNE.

Civil action for absolute divorce upon ground of two years separation, heard upon motion, under G. S., 1-220, formerly C. S., 600, to set aside judgment rendered herein at February Term, 1943, of Wayne. But it appearing upon the face of the record that affidavit for publication of notice of summons is fatally defective for that it fails to state that "defendant cannot, after due diligence, be found in the State," the court being of opinion that the trial court acquired no jurisdiction over defendant and that hence the judgment rendered in the action is void, so adjudged, and vacated and annulled the judgment to which the motion related.

Plaintiff appeals therefrom to Supreme Court and assigns error.

J. Faison Thomson for plaintiff, appellant.
Claude C. Canaday for defendant, appellee.

PER CURIAM. The record fails to show error in the judgment below. G. S., 1-98, formerly C. S., 484. *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737.

Affirmed.

WILLIE MAE GIBSON REDDICK AND HUSBAND, JOHN REDDICK, AND HILL GIBSON, v. RALPH U. BUTLER AND GLOSTER GIBSON.

(Filed 29 March, 1944.)

APPEAL by defendants from *Ervin, Special Judge,* at October Term, 1943, of CALDWELL.

L. H. Wall and Hal B. Adams for defendants, appellants.
W. H. Strickland and Hunter Martin for plaintiffs, appellees.

PER CURIAM. This case was brought by plaintiffs to have a trust in their favor declared upon lands formerly belonging to them, but now held by one of the defendants, Butler, under a tax deed, which plaintiffs say was procured through fraud or conspiracy between the defendants while it was the duty of Butler to pay the tax. The defendants demurred to the complaint as not stating a cause of action, and the demurrer was overruled, from which judgment defendants appealed.

The Court is of the opinion that the demurrer was properly overruled. Since no new principles of law are involved and there is nothing unique in their application discussion of whch would be useful to the profession, we do not deem a formal opinion necessary.

The judgment overruling the demurrer is

Affirmed.

F. D. CLINE AND MRS. F. D. CLINE, TRADING AS F. D. CLINE, CONTRACTOR, v. VIRGINIA AND CAROLINA SOUTHERN RAILROAD COMPANY, A CORPORATION.

(Filed 19 April, 1944.)

APPEAL by plaintiffs from *Johnson, Special Judge,* at January Term, 1944, of WAKE.

Civil action to recover damages for negligent failure to deliver shipment of fuel oil.

The Mexican Petroleum Corporation, of Texas, shipped a carload of fuel oil to plaintiffs, freight prepaid, *via* Seaboard Air Line Railway as delivering carrier. An intermediate carrier erroneously routed the shipment from Atlanta by the Atlantic Coast Line Railroad and defendant, with waybill and shipping instructions "freight collect." On arrival at Lumberton plaintiffs were notified but declined to pay the freight shown to be due on the waybill. Some days thereafter he paid the freight and the shipment was promptly delivered.

There was judgment of nonsuit, and plaintiffs appealed.

Thomas W. Ruffin for plaintiffs, appellants.

McLean & Stacy and Arch T. Allen for defendant, appellee.

PER CURIAM. The shipping instructions received by defendant called for the collection of freight upon delivery. It was unlawful for it to make delivery without complying with these instructions. U. S. C. A., Vol. 49, sec. 3 (2). So soon as the freight was paid prompt delivery was made. No negligence on the part of this defendant is made to appear. Hence, the judgment below must be

Affirmed.

H. J. LEE v. BESSIE DRIGGERS, ADMINISTRATRIX OF ROSA PARHAM, DECEASED.

(Filed 19 April, 1944.)

APPEAL by plaintiff from *Harris, J.,* at November Term, 1943, of WAKE.

Civil action for recovery on a negotiable note, to which defendant pleads the three-year statute of limitations. G. S., 1-52, formerly C. S., 441.

The case was tried upon a single issue of indebtedness—to which the jury answered "No." From judgment thereon plaintiff appeals to Supreme Court and assigns error.

J. M. Templeton for plaintiff, appellant.
Briggs & West for defendant, appellee.

PER CURIAM. Upon the pleadings in the case the liability of the estate of Rosa Parham, deceased, was made to depend upon whether she signed the note by way of accommodation to her son, J. M. Parham. It was largely a question of fact which the jury has settled. And the case on appeal fails to show prejudicial error.

No error.

H. J. LEE v. M. V. CHAMBLEE.

(Filed 19 April, 1944.)

APPEAL by plaintiff from *Harris, J.*, at October Term, 1943, of WILSON.

Simms & Simms and J. M. Templeton for plaintiff, appellant.
Bunn & Arendell for defendant, appellee.

PER CURIAM. The plaintiff asked for recovery upon a negotiable note bearing the signature of defendant and others, and apparently under seal. The defendant pleaded suretyship and also denied that he had adopted as his own the seal appearing after his signature, and pleaded the three-year statute of limitations. Upon the evidence adduced, and after appropriate instructions by the court, the jury answered the issues favorably to defendant's contentions and judgment was rendered accordingly. Plaintiff appealed.

The trial was in all respects well within the standards of correct procedure. We hesitate to burden the Reports with a formal opinion, especially since over-writing the subject could only result in needless repetition, and variant expressions might lead to confusion. This case is controlled by *Flippen v. Lindsey,* 221 N. C., 30, 18 S. E. (2d), 824, and authorities there cited. We find

No error.

JULIAN H. SWAIN v. E. P. COHOON, SR.

(Filed 20 September, 1944.)

APPEAL by defendant from *Burgwyn, Special Judge,* at April Term, 1944, of TYRRELL.

Civil action to recover for Irish potatoes sold and delivered by plaintiff to defendant during the 1943 season.

From verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

H. L. Swain for plaintiff, appellee.

J. C. Meekins for defendant, appellant.

PER CURIAM. The case presents no more than a controverted issue of fact which the jury has resolved in favor of the plaintiff in a trial free from reversible error.

The verdict and judgment will be upheld.

No error.

STATE v. DAVID BECKWITH.

(Filed 8 November, 1944.)

APPEAL by defendant from *Grady, Emergency Judge,* at March Criminal Term, 1944, of WAKE.

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

R. N. Simms for defendant, appellant.

PER CURIAM. Upon proper proceedings instituted in the Recorder's Court for certain townships of Wake County, the defendant was apprehended, had his preliminary trial, and, probable cause having been found, was sent to the Superior Court for trial. There, upon proper indictment, he was tried upon the charge of felonious assault on Castleberry with a deadly weapon with intent to kill and murder and inflicting serious injuries not resulting in death. There was a verdict of guilty of assault with a deadly weapon, inflicting serious and permanent injuries. Whereupon, defendant was sentenced to a term of eighteen months in

the common jail of Wake County, to be assigned to work upon the public roads. From this judgment, defendant appealed.

The appeal was fully heard in this Court, and we have carefully examined the record for error. We have been unable to find any reason which would justify interference with the result of the trial. We do not regard a formal opinion as necessary.

No error.

ROSA WATKINS v. JOHN HARRIS, TRADING AS LITTLE ROSETTA TAXI.

(Filed 13 December, 1944.)

APPEAL by plaintiff from *Sink, J.*, at October Term, 1944, High Point Division, of GUILFORD.

Civil action to recover for alleged personal injuries sustained by plaintiff, while riding in a taxi belonging to the defendant.

At the close of all the evidence, the defendant renewed his motion for judgment as of nonsuit, made at the close of plaintiff's evidence; motion granted and plaintiff appeals, assigning error.

C. A. York and Walser & Wright for plaintiff.
Gold, McAnally & Gold for defendant.

PER CURIAM. An examination of the evidence disclosed on this record leads to the conclusion that the motion for judgment as of nonsuit was properly granted, under the authority of the companion case, *Watkins v. Grier, ante,* 339, 30 S. E. (2d), 219.

Affirmed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

S. v. Williams, 224 N. C., 183. Petition allowed 13 April, 1944.

S. v. Inman, 224 N. C., 531. Petition for *certiorari* denied, 29 January, 1945.

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Brown, 556; in action for, minor child awarded mother and after both parents move from State, court may continue custody of such child with grandparents with whom child left by mother, *Walker v. Walker*, 751; welfare of child paramount in awarding custody in proceedings for, *ibid.*

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Usury—Corrupt intent a necessary element, *Bailey v. Inman*, 571; equity will not reform a usurious contract unless the debtor pays legal interest to principal and in

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Waiver—Defined and applicable to agreement to convey land, *Johnson v. Noles,* 542; of contract by subsequent parol agreement, *Whitehurst v. FCX Fruit & Vegetable Service,* 628.

Warrant—Doctrine that man's house is castle has no application to officer seeking to arrest under warrant, *S. v. Shook,* 728.

Ways—Stairways, hallways and other private ways, when subjected to easement by adjoining owners, *Packard v. Smart,* 480.

Wills—By husband devising all property to wife, her executors, administrators and assigns forever and whatever remains at end of wife's existence to go to testator's next of kin, conveys a fee simple, *Burgess v. Simpson,* 102; oral contract to devise realty or bequeath its value to one for services, is obnoxious to statute of fraud, but beneficiary may sue estate of deceased for services, *Neal v. Trust Co.,* 103; contract to devise realty is within statute of frauds; contract to bequeath personalty is not, *ibid.;* on a promise of reward to another for services by devise or bequest, statute of limitations does not begin to run until death of promisor, *ibid.;* devise to daughters for life then to their children and their heirs, children, a word of purchase, *Moore v. Baker,* 133; interpretation and intent, see *Holland v. Smith,* 255; inconsistencies reconciled and no word rejected, *ibid.;* presumption that all property disposed of, *ibid.;* devise with power of disposal, *ibid.;* devise of life estate, then to bodily heirs, rule in *Shelley's case, ibid.;* devise to bodily heirs in technical sense will violate rule against perpetuities and creates fee simple, *Elledge v. Parrish,* 397; no presumption that words used in technical sense against testamentary intent, *ibid.;* intent to be gathered from contextual construction, *ibid.;* mere abstract statement by witness that person is incompetent inadmissible, *In re Will of Lomax,* 459; which provide for partition among life tenants procedure and effect, *Moore v. Baker,* 498; devise for life and then to children devisee takes life estate, *Prince v. Barnes,* 702; after-born children take interest, *ibid.;* legatees and devisees not bound to accept legacy or devise and may renounce, *Perkins v. Isley,* 793; sole legatee and devisee requesting appointment of administrator not necessarily estopped to renounce, *ibid.;* renunciation must be in reasonable time, *ibid.;* what is reasonable time depends on facts in each case, *ibid.;* facts of case make renunciation clear, unequivocal and within reasonable time, *ibid.;* heir at law only person to take property without consent, *ibid.;* beneficiary presumed to have accepted beneficial legacy or devise, *ibid.;* presumption rebuttable, *ibid.;* renunciation or disclaimer must be unequivocal and takes effect as of date of death, *ibid.;* renunciation makes devise or legacy lapsed or void, *ibid.;* acceptance of devise or legacy relates back to date of death, *ibid.;* beneficiary elects by offering will as executor and securing probate, *Benton v. Alexander,* 800; presumption of election, *ibid.;* election depends on intent of testator, *ibid.;* election, defined, *ibid.;* intent of testator must be clear to put devisee to election, *ibid.;* and cannot be imputed where testator attempts to dispose of property not his own, *ibid.;* there can be no election by wife taking an estate by entireties by survival, *ibid.;* burden of showing undue influence upon husband by wife on party asserting it, *In re Will of Holmes,*

830; fact that man bequeaths entire estate to wife no evidence of incapacity or undue influence, *ibid.*

Workmen's Compensation Act—Liberal construction applies to Act itself only, *Hayes v. Elon College*, 11; employee defined under, *ibid.;* courts cannot enlarge meaning of, *ibid.;* one seeking benefits of, must prove himself embraced therein, *ibid.;* deputy sheriffs not included in, originally but were included subsequently, *Towe v. Yancey County*, 579; evidence of special risk and hazard from heat or cold sufficient to justify compensation, *Fields v. Plumbing Co.*, 841.

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ANALYTICAL INDEX.

ACTIONS.

§§ 9, 11. Method of Commencement: Pendency and Termination.

A civil action is commenced by the issuance of summons, G. S., 1-88, and is pending until final judgment. G. S., 1-208. *Moore v. Moore*, 552.

ADOPTION.

§ 3. Consent of Natural Parents.

The statute, G. S., 48-10, providing that where the juvenile court has declared the parent unfit to have the custody of his or her child, such parent shall not be a necessary party to any proceeding for the adoption of the child, was intended to apply only to final and unconditional determination of unfitness, and not to a judgment retained "for further orders." *In re Morris*, 487.

§ 9. Conclusiveness and Effect of Final Decree.

A proceeding relating to the custody of a child may be for the minority of the child and may be modified from time to time; whereas that for adoption for life terminates the relationship between the natural parents and the child. *In re Morris*, 487.

ADVERSE POSSESSION.

§ 2. Presumption of Title Out of State.

In actions involving the title to real property, where the State is not a party, other than trials of protested entries laid for the purpose of obtaining grants, title is conclusively presumed to be out of the State, and neither party is required to show such fact, though either may do so. *Ramsey v. Ramsey*, 110; *Vance v. Guy*, 607.

§ 4a. Tenants in Common.

The possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for twenty years. G. S., 1-40. *Parham v. Henley*, 405; *Hardy v. Mayo*, 558.

§ 4f. Widow and Heirs.

Where a widow, entitled to a dower, remains upon the land of her husband after his death, whether or not dower is assigned, her possession is not adverse to the heirs of her husband. *Ramsey v. Ramsey*, 110.

§ 7. Tacking Possession.

The possession of the widow is not only not adverse to the heir, but it may be tacked to the possession of the ancestor for the purpose of perfecting title in the heir. *Ramsey v. Ramsey*, 110.

§ 8. Lappage.

Where the title deeds of two rival claimants to land lap upon each other, and neither is in actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. *Vance v. Guy*, 607.

ADVERSE POSSESSION—*Continued.*

If one of rival claimants be seated on the lappage and the other not, the possession of the whole interference is in the former. *Ibid.*

If both rival claimants have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. *Ibid.*

§ 9a. What Constitutes Color of Title.

A letter of one purporting to be attorney for one of plaintiff's predecessors in title, disclaiming any interest in the land in controversy, is neither muniment nor color of title. *Young v. Pittman*, 175.

§ 9b. Presumptive Possession to Outermost Boundaries of Deed.

Where one enters upon real estate under adverse deed or title, possession so taken will be construed to extend to the boundaries of the deed or title; and although the deed or title may be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title, unless at the same time the true owner be in the possession of a part of the estate, claiming title to the whole. *Vance v. Guy*, 607.

§ 13c. Time Necessary Between Individuals Under Color of Title.

Where a plaintiff's deed ostensibly conveys the land in fee, the title to the mineral rights having been previously reserved and separated from the surface rights by a predecessor in title, plaintiff is remitted to a claim of adverse possession under his deed as color of title for seven years to establish his right to the minerals in question. *Vance v. Guy*, 607.

§ 13f. Possession Within Twenty Years Before.

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status, as to any title by adverse possession must be determined by the twenty-year statute, G. S., 1-39, rather than the seven-year statute, G. S., 1-38. *Ange v. Owens*, 514.

§ 17. Presumptions and Burden of Proof.

In a contested action on adverse possession, where the court instructed the jury that the plaintiff had the burden of the issue, which never shifts, but when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts as to him, there is reversible error. *Vance v. Guy*, 607.

§ 20. Instructions.

Where plaintiff's surface rights to lands are conceded and the mineral rights alone are involved in a claim of adverse possession, it would seem that some appropriate limitation on the use of the words "lands" and "some part of the land" might be in order in the charge to the jury on the law as to the possession of mineral rights which will ripen into title. *Vance v. Guy*, 607.

In a contested action on the question of adverse possession, where the court instructed the jury that the plaintiff had the burden of the issue, which never shifts, but when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts as to him, there is reversible error. *Ibid.*

ANIMALS.

§ 2. Liability for Damages Inflicted by Domestic Animals.

Where adjoining landowners apportion to each a part of the division fence to be kept in repair, each is liable for trespass on the lands of the other committed by his livestock through defects resulting from his failure to perform the duty assumed. Conversely, if one fails to keep his part of the fence in repair and as a result the livestock of the other landowner trespasses upon his land, he may not recover from the other damages therefor. *McCoy v. Tillman*, 201.

However, all persons are under the statutory duty of restraining their livestock from running at large, G. S., 68-23, and when out of the pasture such stock is at large and is subject to be taken up and impounded by any person, G. S., 68-24, even though they are at large as a result of the negligence of the person who so impounds them, where the owner has knowledge of their being at large and neglects to restrain them. *Ibid.*

APPEAL AND ERROR.

I. Nature and Grounds of Appellate Jurisdiction of Supreme Court.
- 3a. Parties who may appeal. Watkins v. Grier, 334.
- 4. Academic questions and advisory opinions. Reidsville v. Slade, 48.
- 5. Motions in Supreme Court. Hall v. Coach Co., 781.

II. Presentation and Preservation in Lower Court of Grounds of Review.
- 8. Theory of trial. Hinson v. Shugart, 207; Sawyer v. Staples, 298.

IV. Effect of Appeal.
- 13. Powers and proceedings in lower court after appeal. Futrell v. Trust Co., 221.

V. Docketing Appeal.
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VI. The Record Proper.
- 19. Necessary parts of record. Conley v. Pearce-Young-Angel Co., 211.
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VII. Assignments of Error.
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- 24. Necessity of exceptions to support assignments of error. R. R. v. Beaufort County. 115.

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IX. Dismissal and Reinstatement of Appeals.
- 30b. In the Supreme Court. S. v. Couch, 232.
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XI. Review.
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- 38. Presumptions and burden of showing error. Wilson v. Robinson, 851.
- 39a. Prejudicial error, in general. Hopkins v. Colonial Stores, Inc., 137.
- 39d. Harmless error in admission or exclusion of evidence. Ward v. R. R., 696.
- 39e. Harmless and prejudicial error in instructions. Hopkins v. Colonial Stores, Inc., 137; S. v. Truelove, 147; Vance v. Guy, 607; Ward v. R. R., 696.
- 39g. Burden of proof. Vance v. Guy, 607.
- 40e. Nonsuit. Atkins v. Transportation Co., 688.

XII. Rehearings.
- 43. Determination of petition. Abrams v. Ins. Co., 1.

XIII. Determination and Disposition of Cause.
- 47. New trial. Watkins v. Grier, 334.

§ 3a. Parties Who May Appeal.

Only the party aggrieved may appeal from the Superior Court to the Supreme Court. G. S., 1-271. *Watkins v. Grier*, 334.

APPEAL AND ERROR—*Continued.*

§ 4. Academic Questions and Advisory Opinions.

Denial of defendant's right to appeal to this Court is moot after the appeal is here. *Reidsville v. Slade*, 48.

§ 5. Motions in Supreme Court.

Demurrer, *ore tenus*, to the complaint as not stating a cause of action, may be made and disposed of in this Court. *Hall v. Coach Co.*, 781.

§ 8. Theory of Trial.

Having tried a case upon one theory, the law will not permit a party to change his position in the Supreme Court. The rule is that an appeal *ex necessitate* follows the theory of the trial. *Hinson v. Shugart*, 207; *Sawyer v. Staples*, 298.

§ 13. Powers and Proceedings in Lower Court After Appeal.

When an action in the Superior Court is dismissed, the judgment of dismissal remains in full force and effect until modified or reversed on appeal and, until so modified or reversed, any subsequent order in the cause is void for want of jurisdiction. *Futrell v. Trust Co.*, 221.

§ 18. Certiorari.

Where there is no right of appeal, a *certiorari* as a substitute therefor cannot be granted. *S. v. Todd*, 776.

§ 19. Necessary Parts of Record.

When cases are consolidated for trial they become one case for the purpose of trial and appeal. Only one record is required. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 211.

§ 20. Form and Requisites of Transcript.

Appeals in civil actions may be taken from judgments of the municipal court of High Point to the Superior Court of Guilford County, for errors in matters of law, in the same manner as appeals from the Superior Court to the Supreme Court. Public-Local Laws 1927, ch. 699, sec. 5, subsec. (j). And attention is called to Rule 19, subsec. 3, of Rules of Practice in the Supreme Court. *Watkins v. Grier*, 334.

§ 23. Form and Requisites of Assignments of Error.

Assignments of error relating to damages, where the record shows no such damages awarded, are untenable as no prejudicial error appears. *Hopkins v. Colonial Stores, Inc.*, 137.

§ 24. Necessity of Exceptions to Support Assignments of Error.

Where no objection or exception is made in the court below and no contention presented in the brief of appellant, oral contentions in this Court of error below come too late. *R. R. v. Beaufort County*, 115.

§ 29. Abandonment of Exceptions by Failure to Discuss Same in Brief.

Assignments of error, without reason, argument, or authority in the brief to support them, will not be considered on appeal. Rule 28 of the Rules of Practice in the Supreme Court. *Hopkins v. Colonial Stores, Inc.*, 137; *Merchant v. Lassiter*, 343.

APPEAL AND ERROR—*Continued.*

§ 30b. Jurisdiction of Supreme Court to Dismiss.

While failure to serve "case on appeal" may not perforce, in and of itself, entitle appellee to a dismissal, motion to dismiss will be allowed, where the record shows on its face that an appeal would be frivolous or could only be taken for the purpose of delay. *S. v. Couch,* 232.

§ 31e. Dismissal for That Question Presented Has Become Moot.

When plaintiff preserves objection and exception to the setting aside of the verdict on an issue awarding punitive damages, and subsequent to trial and judgment, defendant pays into court the full amount of the judgment rendered, which is accepted by plaintiff, with nothing in the record to show that such payment was intended or accepted as a full settlement, this Court is not required, *ex mero motu,* to dismiss the appeal, nor does such payment and acceptance preclude the plaintiff from a new trial on the issue to which the verdict was set aside. *Alligood v. Shelton,* 754.

§ 37b. Matters in Discretion of Lower Court.

Upon verified application for examination of an adverse party, under G. S., 1-569-570, the affidavit complying with the requirements of the statutes, an appeal from an order granting the application is premature and will be dismissed. *Sudderth v. Simpson,* 181.

The exercise of a discretionary power by the trial court, in the absence of allegation or suggestion of abuse, is not reviewable on appeal. *Hall v. Landen,* 233.

§ 37c. Injunctive Proceedings.

On appeal from a judgment dissolving an injunction, the evidence is addressed to the court. *Kadis v. Britt,* 154.

§ 37e. Findings of Fact.

On an appeal from the denial of a motion to set aside an order allowing a claim of a creditor against a corporation in the hands of a receiver, where it appears that the judgment on the motion below was based on numerous findings of fact, which in some instances are not supported by evidence and some of which are not in accord with the record, the judgment will be vacated and the cause remanded for further consideration. *Trust Co. v. Lumber Co.,* 153.

On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause. *Williamson v. Spivey,* 311.

Where the court below was not dealing with the final issue, but merely with the question whether a temporary restraining order should be continued to the hearing, and the court was not requested to find the facts in writing and did not do so, under our practice this Court will presume that, for the purpose of the order made, the court found facts sufficient to support it. *Hall v. Coach Co.,* 781.

A general exception, to the court's findings of fact and to the signing of the judgment thereon, is insufficient to bring up for review the findings of the judge. The alleged errors should be pointed out by specific exceptions as to findings of fact as well as law. *Wilson v. Robinson,* 851.

APPEAL AND ERROR—*Continued.*

§ 38. Presumptions and Burden of Showing Error.

In the absence of specific exceptions, there is a presumption that the findings of the court are supported by evidence and that the judgment thereon is correct. *Wilson v. Robinson*, 851.

§ 39a. Prejudicial Error, in General.

Assignments of error relating to damages, where the record shows no such damages awarded, are untenable as no prejudicial error appears. *Hopkins v. Colonial Stores, Inc.*, 137.

§ 39d. Harmless Error in Admission or Exclusion of Evidence.

Where there is objection and exception to a question asked a witness, the record failing to show that the witness answered the question, error, if any, is harmless. *Ward v. R. R.*, 696.

§ 39e. Harmless and Prejudicial Error in Instructions.

A charge as to proper brakes on motor vehicles, in compliance with G. S., 20-124, where the evidence shows no mention of brakes, is a harmless inadvertence. *Hopkins v. Colonial Stores, Inc.*, 137.

Where the court, in concluding its charge, referred to the indictment for abduction as one for "kidnapping," and the jury corrected it by the use of the word "abduction" in the verdict, there is no error, the inadvertence being a *lapsus linguæ*. *S. v. Truelove*, 147.

In a sharply contested action on the question of adverse possession, where the court instructed the jury that the plaintiff had the burden of the issue, which never shifts, but when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts as to him, there is reversible error. *Vance v. Guy*, 607.

There is nothing objectionable in a charge to the jury "that while this is a case of a colored person against a railroad, each is entitled to the same rights under our law and to a fair and impartial trial." *Ward v. R. R.*, 696.

§ 39g. Burden of Proof.

The rule as to burden of proof constitutes a substantial right, and error in respect thereof usually entitles the party aggrieved to a new trial. *Vance v. Guy*, 607.

§ 40e. Nonsuit.

When the defendant offers testimony, his exception to the court's refusal to grant his motion for judgment as of nonsuit, first entered at the conclusion of the evidence for the plaintiff, is waived and only the exception noted at the close of all the evidence may be urged and considered, and it is to be decided upon consideration of all the testimony. G. S., 1-183. *Atkins v. Transportation Co.*, 688.

The rule that, upon motion for judgment as of nonsuit made at the conclusion of all the evidence, the decision is to be made upon a consideration of all the evidence, is subject to certain limitations: (a) The evidence is to be taken in the light most favorable to the plaintinff and he is entitled to the benefit of every reasonable inference to be drawn therefrom. (b) So much of the defendant's evidence as is favorable to plaintiff, or tends to explain or make clear that which has been offered by plaintiff, may be considered, but

APPEAL AND ERROR—*Continued.*

(c) That which tends to establish another and different state of facts or which tends to contradict or impeach the evidence of plaintiff is to be disregarded. *Ibid.*

§ 43. Determination of Petition to Rehear.

No case should be reheard on a petition to rehear unless it was decided hastily and some material point had been overlooked or some direct authority was not called to the attention of the Court. *Abrams v. Ins. Co.*, 1.

On petition to rehear the petitioner will not be permitted to shift his ground and take a different position from that upon which the case was originally tried and heard. *Ibid.*

§ 47. New Trial.

When a municipal court has erred in setting aside a verdict as a matter of law and its action, on appeal to the Superior Court, is affirmed, on appeal to this Court the usual practice would be to send the case back to the Superior Court to be remanded to the municipal court for judgment on the verdict; but the ends of justice requiring it, the verdict in this case is set aside and a new trial is ordered. *Watkins v. Grier*, 334.

APPEARANCE.

§§ 1, 2a. Special Appearance: Acts Constituting General Appearance.

A defendant, by asking leave to file an answer to the complaint, casts aside the cloak of special appearance assumed for the purpose of objecting to the jurisdiction and, in effect, enters a general appearance. *Rodriguez v. Rodriguez*, 275.

While a request by defendant for leave to answer supersedes her motion to dismiss the action for want of service, it does not, by relation back, cure any prior fatal defect in the proceeding with reference to notice, or validate a judgment or decree of divorce entered upon such defective service. *Ibid.*

ARREST AND BAIL.

§ 1c. Officers With Warrant.

The doctrine that a man's house is his castle has no application to an officer seeking to make an arrest under a warrant charging a criminal offense. Such officer has authority to break open the doors of the dwelling occupied by the person whose arrest is directed, even during the nighttime. *S. v. Shook*, 728.

ASSAULT AND BATTERY.

§ 7a. Elements in General.

The doctrine that a man's house is his castle has no application to an officer seeking to make an arrest under a warrant charging a criminal offense. Such officer has authority to break open the doors of the dwelling occupied by the person whose arrest is directed, even during the nighttime. *S. v. Shook*, 728.

§ 7c. Assault With Deadly Weapon With Intent to Kill Resulting in Injury.

An objection to the charge for failing to point out, in a prosecution for secret assault with intent to kill, that if the jury found no intent to kill,

ASSAULT AND BATTERY—*Continued.*

defendant might be convicted of a less offense, is untenable, where the judge had already instructed the jury on the crime charged, and the lesser offenses, or degrees of guilt, of which he might be found guilty. *S. v. Shook*, 728.

§§ 7g, 9. Assault on Female: Presumption and Burden of Proof.

Where a male defendant is charged with an assault upon a female, G. S., 14-33, there is a rebuttable presumption that the defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the jury is not required to determine defendant's age. *S. v. Lewis*, 774.

§ 10. Competency of Evidence.

Ordinarily, remoteness in time in the making of a threat otherwise admissible does not render it incompetent as evidence, but only goes to its weight and effect. *S. v. Shook*, 728.

In a criminal prosecution for felonious assault upon an officer of the law, evidence of threats by the defendant against the officers of the law, as a class, is competent. *Ibid.*

In a prosecution for assault with a deadly weapon (a shotgun), inflicting serious injuries, it is competent for the prosecuting witness to testify to approximately how many shot went into his head to show the seriousness of the injury, when he had formerly testified that he knew how many shot he had been told went into his head, there being nothing in the record to support the assumption that the former statement was based upon the latter. *S. v. Oxendine*, 825.

Upon trial on an indictment for an assault with a deadly weapon, inflicting serious injury, where it was in evidence that the defendant had said he was going to kill the prosecuting witness because he had shot defendant's best friend, the testimony of prosecuting witness, that he had shot a brother-in-law of defendant on the night of his assault, was competent to explain the previous testimony and to establish motive. *Ibid.*

In a criminal prosecution for assault, the prosecuting witness may testify that he had arrested defendant for being drunk to establish motive for the assault. *Ibid.*

§ 11. Sufficiency of Evidence.

On trial upon an indictment for assault with a deadly weapon with intent to kill, causing serious injury, where the State's evidence tended to show a motive for revenge, threats by the defendant to shoot prosecuting witness and attempt to acquire shotgun shells by defendant, who was 100 yards or so from the scene of the shooting going in the direction of the place where prosecuting witness was shot with a shotgun, and soon after the crime a shotgun, recently fired, was found in the home of defendant, who stated to the officers that he had shot prosecuting witness, motion for judgment of nonsuit. G. S., 15-173, was properly denied. *S. v. Oxendine*, 825.

§ 13. Instructions.

An objection to the charge for failing to point out, in a prosecution for secret assault with intent to kill, that if the jury found no intent to kill, defendant might be convicted of a less offense, is untenable, where the judge had already instructed the jury on the crime charged, and the lesser offenses, or degrees of guilt, of which he might be found guilty. *S. v. Shook*, 728.

ATTACHMENT.

§ 2. In What Actions Attachment Will Lie.

An action for specific performance, under our statute authorizing service by publication, is in the nature of an action *in rem*, and a contract for the conveyance of real property may be enforced against a nonresident. G. S., 1-98. *Voehringer v. Pollock*, 409.

§ 3. Grounds for Attachment.

Where defendants in attachment, who have a voting residence in this State, have resided in a distant state for some time, are conducting there large business interests and will continue in such distant state for an indefinite time, apparently in order to avoid service of process here, they are nonresidents within the meaning of the attachment statutes. *Voehringer v. Pollock*, 409.

§ 7. Necessity of Service of Summons at Time or Within Thirty Days.

Where service is by attachment of property and publication, no summons is required. *Voehringer v. Pollock*, 409.

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. G. S., 1-449. *Ibid.*

While the order of publication of service may be obtained at the time the warrant of attachment is issued, a delay from 18 February to 3 March following does not oust the jurisdiction of the court. *Ibid.*

§§ 13, 14. Levy: Attachment of Lien.

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. G. S., 1-449. *Voehringer v. Pollock*, 409.

ATTORNEY AND CLIENT.

§§ 6, 7. Scope of Authority: Duties and Liabilities to Client.

Counsel employed to conduct litigation has complete authority over the suit, the mode of conducting it, and all that is incident to it, and other matters which properly belong to the suit, and the management and conduct of the trial. As to the ordinary incidents of the trial counsel is under no obligation to consult his client, who must, if aggrieved by his conduct, look to his counsel for recompense. *Coker v. Coker*, 450.

Excusable neglect of an attorney, who fails to file an answer for the defendants, may not be attributable to his clients. *Gunter v. Dowdy*, 522.

AUTOMOBILES.

§ 1. Licensing and Regulation of Drivers.

The power to suspend or revoke an automobile driver's license is vested exclusively in the State Department of Motor Vehicles, subject to the right of review by the Superior Court. G. S., 20—Art. 2. *S. v. Cooper*, 100.

A judgment of the Superior Court requiring a defendant to surrender his license to drive a motor vehicle and prohibiting him from operating such

AUTOMOBILES—*Continued.*

vehicles for a specified period, is in excess of the jurisdiction of such court and is void. *Ibid.*

§ 9a. Attention to Road and Proper Lookout.

"Right of way" is not an absolute right. It is only relative. Nevertheless, as a rule of the road or of law, it is a practical protection of the highest value, when considering the mutual obligations and duties of persons confronted with a common danger on the highway. *Jackson v. Browning*, 75.

§ 9b. Distance Between Vehicles Traveling in Same Direction.

When one motor vehicle is trailing another, it is the duty of the driver of the rear vehicle to exercise ordinary care to avoid an accident by driving at a reasonable distance from the vehicle he is trailing and at a speed which will not be hazardous under the circumstances. *Atkins v. Transportation Co.*, 688.

§ 11. Passing Vehicles on Highways.

"Right of way" is not an absolute right. It is only relative. Nevertheless, as a rule of the road or of law, it is a practical protection of the highest value, when considering the mutual obligations and duties of persons confronted with a common danger on the highway. *Jackson v. Browning*, 75.

§ 12a. Speed, in General.

On the issue of contributory negligence, evidence of speed at the time of the accident is substantive, while evidence of prior speed is only corroboratory, so that a remark of the court—"I think it immaterial"—on overruling an objection to evidence of speed prior to the accident, if error, is not of such import as to require a new trial, when contributory negligence must be conceded. *Caulder v. Gresham*, 402.

§ 13. Stopping, Starting, and Turning.

Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. It is the stopping without giving a signal, approved by statute, whenever the operation of any other vehicle may be affected thereby. G. S., 20-154. A violation of the statute is negligence *per se*. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 211.

§ 18a. Negligence and Proximate Cause.

Upon a motion for judgment as of nonsuit, G. S., 1-183, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion. *Jackson v. Browning*, 75.

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The violation of a statute, imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety, has been held to constitute negligence *per se;* but, before the person claiming damages for injuries sus-

AUTOMOBILES—*Continued.*

tained can be permitted to recover, he must show a causal connection between the injury received and the disregard of the statutory mandate. *Ibid.*

§ 18c. Contributory Negligence.

Upon a motion for judgment as of nonsuit, G. S., 1-183, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion. *Jackson v. Browning*, 75.

§ 18g. Sufficiency of Evidence and Nonsuit.

In an action to recover damages for the alleged negligent collision of two automobiles, where the evidence tends to show that plaintiff, going south and defendant, going north on the same road, met and collided where another car had been abandoned, parked on the east side of the road and in plain view of both drivers, who could also see each other for some distance as they approached, the plaintiff having the right of way and in the absence of timely notice that the other driver intended to turn to the left, there was error in sustaining a motion as of nonsuit at the close of plaintiff's evidence. *Jackson v. Browning*, 75.

Where plaintiff, a passenger in defendant's motor vehicle, brings an action to recover damages for personal injuries received from the alleged negligence of defendant's driver, when the car in which they were driving at about 35 to 40 miles per hour, on a paved highway, in fair weather, about seven-thirty a.m., suddenly left the road, ran down an embankment and turned over, causing the plaintiff injuries, motion for judgment as of nonsuit, for lack of evidence of negligence, properly refused. *Boone v. Matheny*, 250.

In an action to recover damages for the wrongful death of plaintiff's intestate caused by a collision between the automobile of plaintiff's intestate and a truck of the defendant, where plaintiff's evidence tended to show, though no eyewitness testified, that defendant's truck was being operated on its left-hand side of the highway and the coupe of plaintiff's intestate was being operated on its right-hand side of the highway, at the time of the collision between the two vehicles going in opposite directions, there was error in the allowance of a motion for judgment as of nonsuit at the close of plaintiff's evidence. *Wyrick v. Ballard Co., Inc.*, 301.

Where defendant leaves his truck unattended, partly on a paved or improved portion of a State Highway, between sunset and sunup, without displaying flares or lanterns not less than two hundred feet to the front and rear of the vehicle, it is an act of negligence, G. S., 20-161, and the driver of the car in which plaintiff was riding, traveling at about 30 to 35 miles per hour on his right side of the road, under conditions which made it impossible for him to see more than a few feet ahead, although apparently guilty of negligence, is not under the duty of anticipating defendant's negligent parking, so that the concurrent negligence of the two made the resulting collision inevitable and an exception to the denial of a motion of nonsuit cannot be sustained. *Caulder v. Gresham*, 402.

Where the driver of plaintiff's loaded truck, trailing defendants' bus at 25 to 30 miles per hour and within 20 feet, on a street 25 to 30 feet wide with an open space on the left of from 12 to 17 feet, saw the bus begin to stop and slammed on his brakes, as he was too near to turn aside or stop, hitting the

AUTOMOBILES—*Continued.*

bus with such force that the front of the truck was practically demolished and the bus was badly damaged, there was error in refusing defendants' motion for judgment as of nonsuit on the ground of contributory negligence. *Atkins v. Transportation Co.*, 688.

§ 32e. Sufficiency of Evidence and Nonsuit in Criminal Prosecutions.

Evidence showing that one driving an automobile, with knowledge of the danger, heedlessly cut in front of another motor vehicle, traveling in the same direction and immediately in his rear, thereby causing a collision and damage, is sufficient to be submitted to the jury in a criminal prosecution for reckless driving. *S. v. Ogle*, 468.

Where two motor vehicles are traveling very near each other, on the same road and in the same direction, the lead car being on the right-hand side of the road and the rear car being a little behind and to the left—or "nearly side by side"—and there is evidence that the lead car turned to the left, which the driver thereof denied, causing the rear car to strike and injure a pedestrian, the evidence is insufficient to be submitted to a jury in a criminal charge of reckless driving against the driver of the lead car. *Ibid.*

§ 36. Revocation and Suspension of Drivers' Licenses.

The power to suspend or revoke an automobile driver's license is vested exclusively in the State Department of Motor Vehicles, subject to the right of review by the Superior Court. G. S., 20—Art. 2. *S. v. Cooper*, 100.

A judgment of the Superior Court requiring a defendant to surrender his license to drive a motor vehicle and prohibiting him from operating such vehicles for a specified period, is in excess of the jurisdiction of such court and is void. *Ibid.*

In a criminal prosecution for the operation of a motor vehicle after the operator's license had been revoked, where the State's evidence tended to show that defendant was tried and convicted in recorder's court, for operating a motor vehicle while under the influence of intoxicants, as James Stewart had his license revoked for one year, that the records show no license issued to James Stewart but show one to James Tyree Stewart of the same county as defendant, who admitted that his name was James Tyree Stewart when the highway patrolman went to take up his license, and that defendant was seen operating a motor vehicle upon the public highway within one year of such conviction and there had been no reinstatement of the revocation, there is sufficient evidence to sustain a conviction and motion for nonsuit, G. S., 15-173, was properly refused. *S. v. Stewart*, 528.

Evidence, that defendant had been convicted in recorder's court on an indictment for operating an automobile while under the influence of intoxicants, was competent and pertinent on the question as to whether a driver's license issued to defendant had been legally revoked. G. S., 20-17. *Ibid.*

BAILMENT.

§ 1. Nature, Requisites and Validity.

A bailee may sue a third person for interference with the bailment, but in order to do so he must have possession of the goods at the time of the trespass. Possession and control are essential elements in the law of bailment. *S. v. Hall*, 314.

BAILMENT—*Continued.*

§ 3. Care and Custody of Property.

A bailee has a right of action against a third party, who by his negligence causes loss of or injury to the bailed articles, and this right has been held to be the same even though the bailee is not responsible to the bailor for the loss. *Hopkins v. Colonial Stores, Inc.*, 137.

§ 6. Actions for Conversion or Failure to Surrender Property.

A bailee has a right of action against a third party, who by his negligence causes loss of or injury to the bailed articles, and this right has been held to be the same even though the bailee is not responsible to the bailor for the loss. *Hopkins v. Colonial Stores, Inc.*, 137.

A bailee may sue a third person for interference with the bailment, but in order to do so he must have possession of the goods at the time of the trespass. Possession and control are essential elements in the law of bailment. *S. v. Hall*, 314.

BASTARDS.

§ 2. Nature and Elements of Offense of Willful Failure to Support.

The only prosecution contemplated by the bastardy statutes is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child, the mere begetting of the child not being denominated a crime. G. S., 49-2. *S. v. Dill*, 57.

A man cannot be criminally liable for the willful failure to support an illegitimate child one day old, of whose existence he had, upon the face of the record, no previous knowledge. *S. v. Summerlin*, 178.

Willfulness is an essential element of the offense of failure to support an illegitimate child, G. S., 49-2, and a verdict—"guilty of failure to support and maintain his bastard child"—is insufficient to support a judgment. *S. v. Allen*, 530.

Willfulness of the refusal to support one's illegitimate child is an essential ingredient of the offense of failure to support in violation of G. S., 49-2, and must be proven beyond a reasonable doubt; and instructions, which fail to so charge, deprive the defendant of his right to have the jury consider his willfulness as an issuable fact. *S. v. Hayden*, 779.

In order to convict a defendant under G. S., 49-2, the burden is on the State to show not only that he is the father of the child, and that he has refused or neglected to support and maintain it, but further that his refusal or neglect was willful, without just cause, excuse, or justification, after notice and request for support. *Ibid.*

§ 4. Procedure.

A prosecution of the father of an illegitimate child for the willful neglect and refusal to support such child must be instituted within three years next after the birth of the child, or where the reputed father has acknowledged the paternity of the child by payments for its support within three years from the birth thereof, then within three years from the date of such acknowledgment. G. S., 49-1, 49-4. *S v. Dill*, 57.

BETTERMENTS.

§ 1. In General.

Where one officiously confers a benefit upon another, the other is enriched but not unjustly enriched. But the recipient cannot stand by and see another

BETTERMENTS—*Continued.*

confer a benefit upon him and retain the same which knowingly he has permitted to be conferred upon him by mistake. *Rhyne v. Sheppard*, 734.

§ 3. Color of Title of Party Claiming.

Ordinarily, there can be no recovery in a common law action for improvements made on the lands of another by one who has no color of title to the premises: and there can be no color of title without some paper writing attempting to convey title. G. S., 1-340. *Rhyne v. Sheppard*, 734.

BIGAMY.

§ 2. Bigamous Cohabitation.

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution may be instituted in the county of their apprehension. G. S., 14-183. *S. v. Williams*, 183.

§ 3. Prosecution and Punishment.

Where in a criminal prosecution for bigamous cohabitation, G. S., 14-183, there is a conviction and judgment chiefly on the ground of insufficient service, which on appeal is affirmed by this Court and reversed by the Supreme Court of the United States and remanded, upon the second trial on the issue of domicile only, the plea of former jeopardy and motion to dismiss were properly overruled. *S. v. Williams*, 183.

Upon issues of traverse on indictment for bigamous cohabitation, G. S., 14-183, the prosecution offering evidence tending to show that defendants had been previously married, that their respective spouses were still living, that defendants had undertaken to contract a marriage in another state and thereafter had cohabited with each other in this State, a *prima facie* case is made out and a demurrer to the evidence was properly overruled. *Ibid.*

BILL OF DISCOVERY.

§§ 3, 8. Affidavit and Proceedings to Secure.

Upon verified application for examination of an adverse party, under G. S., 1-569-570, the affidavit complying with the requirements of the statutes, an appeal from an order granting the application is premature and will be dismissed. *Sudderth v. Simpson*, 181.

BILLS AND NOTES.

§§ 9c, 10b. Endorsers and Persons Secondarily Liable.

Where a resolution, by the board of directors of a corporation, authorized two of their number, by their signatures, to bind each of the directors individually on any notes due by the company or renewals thereof, the endorsement of such notes, by the two directors so authorized, binds the other directors as endorsers only and not as principals. G. S., 25-69. *Bank v. Stokes*, 83.

An action on a note under seal against an endorser on the note is ordinarily barred after three years from maturity, even though the endorsement is under seal. *Ibid.*

§ 17a. Payment, in General.

Payments by the principal on a note under seal do not stop the running of the statute of limitations in favor of an endorser. *Bank v. Stokes*, 83.

BILLS AND NOTES—*Continued.*

§ 25. Presumptions and Burden of Proof.

When plaintiff declares on a past-due negotiable note, regular in form, and offers evidence of its execution by defendants, a *prima facie* case is made out, which imposes upon defendants the burden of going forward with evidence to rebut the presumption created by the statute (G. S., 25-29), or incur the risk of an adverse verdict. *Beam v. Wright*, 677.

§§ 27, 29. Sufficiency of Evidence, Nonsuit, Directed Verdict: Instructions.

When plaintiff declares on a past-due negotiable note, regular in form, and offers evidence of its execution by defendants, a *prima facie* case is made out, which imposes upon defendants the burden of going forward with evidence to rebut the presumption created by the statute (G. S., 25-29), or incur the risk of an adverse verdict. *Beam v. Wright*, 677.

Where plaintiff, in an action on a note for $5,976, introduced the note and offered evidence of its execution by defendants and evidence that defendants received full and valid consideration therefor, and defendants' evidence showing that the note was payable to plaintiff personally and was given solely to cover $800 in checks drawn by defendant on the bank of which plaintiff was an officer and the note was filled in for an unauthorized amount and used illegally by plaintiff to cover up his defalcation, and all the evidence showing that plaintiff's shortages have been fully paid by his bondsman, it was error for the court to instruct the jury to answer the issue as to defendants' liability on the note in the affirmative; while a motion to nonsuit was properly denied. *Ibid.*

BOUNDARIES.

§ 2. General and Specific Descriptions.

A general description giving the boundaries of a tract of land is not too vague to permit the reception of parol evidence to explain, locate, or make certain the calls or descriptive terms used in the deed, but never to enlarge, supplement, or add to the same. *Peel v. Calais*, 421.

The description of lands in a deed of trust is sufficient, where it sets out the property as a one-half undivided interest in 35 acres, part of the old W tract, adjoining F, S, D, and others, beginning at the forks of the H and G roads, on the west side of the H road in the fork and running to where it will intersect the northeast corner of the D land, thence west with the D land far enough to make (using the G road as the northern boundary) 35 acres, reference being made to the grantor's deed by the parties thereto and book and page where recorded, less certain lots by numbers sold prior to the execution of the said deed of trust. *Hardy v. Mayo*, 558.

§ 3a. Definiteness of Description in General.

A general description giving the boundaries of a tract of land is not too vague to permit the reception of parol evidence to explain, locate, or make certain the calls or descriptive terms used in the deed, but never to enlarge, supplement, or add to the same. *Peel v. Calais*, 421.

At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed. Failing in this, the deed is void. *Ibid.*

BOUNDARIES—*Continued.*

§ 3e. **Parol Evidence.**

When land is described as adjoining or bounded by certain other tracts, and (1) there are certain other identifying terms such as "known as the A tract"; or (2) there are references to an identifiable muniment or source of title, such as the same land conveyed by B to C; or (3) the land is designated by such a term as the home place of D; or (4) adjoining landowners are named and it is shown that grantor has no other land in the vicinity which may be embraced within such bounds, G. S., 39-2, the description is not void for vagueness and it may be aided by parol evidence. *Peel v. Calais,* 421.

When, however, the general description would apply to one tract as well as to another, or the land in controversy is not a distinct tract, or is a part of a larger tract, the description is void and cannot be aided by evidence *aliunde. Ibid.*

§ 7. **Parties and Procedure.**

In a proceeding to establish the dividing line between two adjoining landowners, where the original papers had been lost and substituted pleadings filed and reference made, apparently without objection, the report of the referees reciting that the reference was for finding the true dividing line and the trial court finding the report of the referees to be in compliance with their appointment to determine the matters at issue, motion of plaintiff to remand to the clerk, on the averment that the reference was simply to locate the "agreed line," was properly overruled, and, after hearing and overruling exceptions to the report, there was no error in a judgment confirming same. *Williamson v. Spivey,* 311.

§ 9. **Evidence.**

Plaintiffs in a processioning proceeding, G. S., ch. 38, are bound by the call in their deed for a named corner whether it be marked or unmarked. *Cornelison v. Hammond,* 757.

When a beginning corner, monument or landmark, either natural or artificial, has been lost or destroyed, or its location is uncertain, and the terminus of the first call is admitted or established, the first call may be reversed in order to find the beginning. But when, as here, the objective is the location of a lost corner of another tract called for as plaintiffs' beginning point, plaintiffs, being unable to locate the corner without resort to this rule, must look to the deeds establishing the corner for proof. Nothing else appearing, the calls and distances, in the senior description of which such corner is a part, are controlling. *Ibid.*

Resort may not be had to a junior conveyance for the purpose of locating the corner or line referred to or described therein as being established by a previous deed or grant. Before the calls of the junior grant can be ascertained, those of the elder must be located and recourse cannot be had to the junior grant for that purpose. *Ibid.*

BROKERS AND FACTORS.

§ 12. **Actions for Commissions.**

With the allegations of special contract aside, the rule is that, where a broker is "the procuring cause of the sale," he is entitled to recover the reasonable value of his services. *Lindsey v. Speight,* 453.

BROKERS AND FACTORS—*Continued.*

A broker is not entitled to recover in *assumpsit* simply because of effort expended. His effort must have resulted in a sale, or in the procurement of a purchaser, ready, willing and able to buy on the terms authorized. *Ibid.*

In an action by plaintiff for the reasonable value of his services in securing a purchaser for the property of defendant, who had listed such property with the plaintiff for sale, where there is evidence that plaintiff was the procuring cause of the sale, a motion for judgment of nonsuit was properly overruled. *Ibid.*

BURGLARY AND UNLAWFUL BREAKING.

§§ 1b, 10. Burglary in Second Degree: Instructions.

In a prosecution for burglary in the first degree, the jury has the right to render a verdict of guilty of burglary in the second degree, even though the jury may find facts sufficient to constitute first degree burglary, and failure of the judge to so instruct the jury is reversible error. *S. v. McLean*, 704.

CARRIERS.

§§ 4, 14. Rates and Tariff.

Where the Utilities Commission, after due notice and hearing, establishes rates for intrastate shipments of pulpwood which it finds to be just and reasonable, and thereafter, upon petition of defendant and other common carriers for reconsideration, the rates so established are ordered by the Commission to remain in full force and effect, by virtue of the statute (G. S., 62-123) these rates must be deemed the only just and reasonable rates for this commodity, rendering it unlawful for defendant to charge a greater amount. G. S., 62-135. *Utilities Com. v. R. R.*, 283.

After rates for certain intrastate shipments have been duly established by the Utilities Commission and defendant seeks to increase such rates by filing tariff schedules to that effect, whereupon the Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates, pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant, such action of the Commission is binding on the defendant. G. S., 62-11. However, defendant should be given a reasonable time to comply with the order before penalties may be invoked. *Ibid.*

§ 12. Loss of Goods.

While proof of facts which constitute *prima facie* evidence of negligence permits but does not compel a verdict for plaintiff, a peremptory instruction upon the evidence of loss of goods is justified where the defendant is admittedly a common carrier. *Merchant v. Lassiter*, 343.

A common carrier is an insurer against the loss of goods received for shipment; and it is liable for loss of property in its possession not due to acts of God, the fault of the shipper, or the inherent nature or quality of the goods. *Ibid.*

A common carrier is bound to safely carry and deliver merchandise received and accepted for transportation, and in case of loss plaintiff need only prove delivery to and nondelivery by the carrier. In the absence of proof tending to bring the case within one of the exceptions, nondelivery by the carrier affords

CARRIERS—*Continued.*

a presumption of negligence, and its obligations render it liable to plaintiff for the resulting damage. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§§ 10, 12a. Rights and Liabilities of Mortgagor; Rights of Purchaser Under Registered Instruments.

Where a mortgagor is left in possession of the mortgaged goods which, in the contemplation of the parties, are to be disposed of by the mortgagor in the ordinary course of trade, such mortgagor is the agent of the mortgagee to the extent that he may pass the title to the goods, sold in the usual way to a purchaser, freed from the mortgage lien. *Discount Corp. v. Young*, 89.

CLERKS OF SUPERIOR COURT.

§ 3. Jurisdiction and Powers as Court: In General.

The former statute, Michie's Code, sec. 597 (b), providing that no judgment shall be entered by the clerk except on Monday, unless otherwise provided, makes void and of no effect such judgment of the clerk on any other day. G. S., 1-215, and 1-215.1 have changed this requirement. *Ange v. Owens*, 514.

In an action by a wife against her husband for separate maintenance and counsel fees wherein the judge has made an order for subsistence and counsel fees pending further orders, a judgment of the clerk, upon findings of fact that the parties had resumed marital relations and dismissing the action as of voluntary nonsuit, is a nullity and void upon its face. It is manifestly not voluntary. G. S., 1-209. *Moore v. Moore*, 552.

The clerk of the Superior Court has only such jurisdiction as is given by statute and is not vested with power affirmatively to administer an equity except in those cases where it is specifically conferred by statute. *Moore v. Moore*, 552; *McDaniel v. Leggett*, 806.

Where the clerk of the Superior Court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the Superior Court and invokes the proper exercise of its power, by virtue of G. S., 1-276, the judge upon appeal may proceed to consider and determine the matter as if originally before him. *McDaniel v. Leggett*, 806.

§ 19½. Fees.

In an action by an ex-clerk of the Superior Court against the county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned over to the county, is demurrable as not stating a cause of action, the county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. G. S., 105-391 (k), 105-391 (s). *Watson v. Lee County*, 508.

Since there is no obligation on a county to pay any advance cost or fees accrued in a tax foreclosure suit unless cast, the voluntary payment to the clerk of the Superior Court of certain amounts, less than the fees fixed by statute, does not constitute grounds for an action against the county for the remainder of the total amount of such fees. *Ibid.*

CLERKS OF SUPERIOR COURT—*Continued.*

§ 23c. Actions Against Clerk by Successor.

Our statute, G. S., 2-22, gives the incoming clerk of the Superior Court the right to demand of his predecessor in office, and to recover, any money in the hands of the outgoing clerk by virtue or under color of his office, which includes amounts paid to such clerk for the use of various individuals. *S. v. Watson*, 502.

In an action by a clerk of the Superior Court against his predecessor in office for money wrongfully detained, the law allows interest by way of damages on any recovery. G. S., 109-37. *Ibid.*

§ 23e. Parties and Pleadings.

Where a clerk of the Superior Court brings an action against his predecessor in office to recover funds wrongfully withheld, allegations by defendant of misconduct of other officers, in failing to pay over moneys to defendant, should be stricken. There is no liability by defendant for funds he never received. *S. v. Watson*, 502.

CONSTITUTIONAL LAW.

§ 1. Methods of Establishing or Amending.

The will of the people, as expressed in the Constitution, is the supreme law of the land and is subject to change only in the manner prescribed. *S. v. Emery*, 581.

§ 3a. General Rules of Constructing.

The courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so to protect rights guaranteed by the Constitution. The presumption is in favor of constitutionality, and the contrary must appear beyond a reasonable doubt. *Turner v. Reidsville*, 42.

In searching for the will or intent of the people, as expressed in the Constitution, all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purpose of the instrument. *S. v. Emery*, 581.

The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected. *Ibid.*

§ 4a. Legislative Power, in General.

The Legislature has no power to validate a void judgment, or indeed to give validity of any sort to a proceeding absolutely void. *Ange v. Owens*, 514.

§ 4b. Taxing Power.

The board of county commissioners of Beaufort County having levied, in the year 1942, a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by Art. V, sec. 6, N. C. Constitution, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation, G. S., 153-9 (6), and any levy for public welfare or poor relief, in excess thereof, is invalid. *Railroad v. Beaufort County*, 115.

§ 4c. Delegation of Powers.

While the power of the Legislature to delegate authority to an administrative agency of the State to prescribe rules and regulations for the due and

CONSTITUTIONAL LAW—*Continued.*

orderly performance of its public functions is unquestioned, this does not authorize the formulation of rules contrary to the statute. *Utilities Com. v. R. R.*, 283.

§ 6b. Power and Duty to Determine Constitutionality of Statute.

The courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so to protect rights guaranteed by the Constitution. The presumption is in favor of constitutionality, and the contrary must appear beyond a reasonable doubt. *Turner v. Reidsville*, 42.

A private individual, to invoke the judicial power to determine the validity of executive or legislative action, must show that he has sustained, or is in immediate danger of sustaining a direct injury as a result of that action, and it is not sufficient that he has merely a general interest common to all members of the public. *Ibid.*

§ 8. Regulation of Trades and Professions.

Public Laws 1939, ch. 277, now G. S., 97-2, including deputy sheriffs, and persons acting as deputy sheriffs, within the term "employee" as used in the N. C. Workmen's Compensation Act, is consonant with Art. I, sec. 7, and with Art. II, sec. 29, of the N. C. Constitution. *Towe v. Yancey County*, 579.

§ 15a. Due Process, Nature and Scope of Mandate, in General.

G. S., 14-183, making bigamous cohabitation in this State a felony is valid and offends neither the Federal nor State Constitutions. *S. v. Williams*, 183.

§ 23. Full Faith and Credit to Foreign Judgments.

No valid divorce from the bonds of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. Such a decree is void and not entitled to the full faith and credit clause of the Federal Constitution. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. *S. v. Williams*, 183.

The full faith and credit clause of the Federal Constitution does not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it appears that such facts did not exist, the record will be a nullity, notwithstanding recitals in the judgment. *Ibid.*

§ 27. Right to Jury Trial.

A jury, as understood at common law and as used in our Constitutions, signifies twelve good (or free) and lawful men in a court of justice, duly selected and impaneled in the case to be tried. Women are excluded from juries *propter defectum sexus*, and aliens and persons under 21 years of age are not competent to serve. *S. v. Emery*, 581.

The General Assembly is at liberty to impose the burden of jury service on some and relieve others of the obligation, provided the classification is not in derogation of the 14th Amendment to the Constitution of the U. S. or of our own Constitution. Classification by races would be unlawful, while there is no objection to classification on the basis of sex. *Ibid.*

With us liability to jury duty is not an incident to the right of suffrage and the 19th Amendment to the Constitution of the U. S. has no bearing on the right of women to serve on juries in North Carolina. *Ibid.*

CONTEMPT OF COURT.

§ 2b. Willful Disobedience to Court Order.

A husband cannot be adjudged in contempt of court for failure to comply with the provisions of a separation agreement, entered into prior to the institution of an action in which a divorce was granted the parties on the grounds of two years separation, which judgment provided that it should not affect or invalidate the separation agreement. *Brown v. Brown*, 556.

CONTRACTS.

§ 5. Consideration.

Where a contract, containing a negative covenant against other employment, is exacted from an employee while he is, and has been for years, in the same employment, his position and duties and the nature of the business remaining the same, there is a threat of discharge and no present consideration. *Kadis v. Britt*, 154.

Evidence of the performance of valuable services at the request of, or knowingly accepted by another, raises the implication of a promise to pay what the services are reasonably worth. *Grady v. Faison*, 567.

Where cotenants of the equity in lands, subject to a mortgage, agreed orally among themselves that one of their number, himself or through another for him, should bid off the lands at foreclosure sale, the other cotenants refraining from bidding, and hold the same in trust for the benefit of all the cotenants, to be sold and proceeds divided, after reimbursing the purchaser for his outlay, the agreement is not in violation of the statute of frauds, G. S., 22-2, there is sufficient consideration to support it, and it is not against public policy. *Embler v. Embler*, 811.

§ 6. Form and Requisites of Agreement or Instrument.

A contract (except when forbidden by the statute of frauds) may be partly written and partly oral and in such cases the oral part of the agreement may be shown. However, it is the settled rule that a contemporaneous parol agreement is inadmissible to contradict that which is written. *Whitehurst v. FCX Fruit & Vegetable Service*, 628.

§ 7a. Contracts in Restraint of Trade.

Contracts in partial restrain of trade are contrary to public policy and void, unless shown to be reasonable. The burden of showing their reasonableness is upon the person relying thereon. *Kadis v. Britt*, 154.

The reasonableness and validity of a contract in partial restraint of trade is a question for the court and not for the jury, to be determined from the contract itself and admitted or proven relevant facts. *Ibid.*

Equity will not specifically enforce, as of course, the naked terms of a negative covenant restricting other employment, unless ancillary to and supported by a valid affirmative covenant of the employer, who has a substantial right—unique in his business—which it is the office of the court to protect; and the restriction laid upon the employee has a reasonable relevancy to that result, and imposes no undue hardship. *Ibid.*

The right of the employer to protect, by reasonable contract with his employee, the unique assets of his business, a knowledge of which is acquired in confidence during the employment and by reason of it, is recognized everywhere. *Ibid.*

CONTRACTS—*Continued.*

Where a deliveryman and bill collector, after years of service, is required by his employer to enter into a written contract, without change in his position, duties, or nature of the employment, except the requirement that neither the employee nor any member of his family shall work in a business of the same character for two years after the cessation of the employment, the contract is unreasonable and void. *Ibid.*

§ 7b. Contracts Working Fraud on Courts.

Where cotenants of the equity in lands, subject to a mortgage, agreed orally among themselves that one of their number, himself or through another for him, should bid off the lands at foreclosure sale, the other cotenants refraining from bidding, and hold the same in trust for the benefit of all the cotenants, to be sold and proceeds divided, after reimbursing the purchaser for his outlay, the agreement is not in violation of the statute of frauds, G. S., 22-2, there is sufficient consideration to support it, and it is not against public policy. *Embler v. Embler*, 811.

§ 8. General Rules of Construction.

There being no substantial controversy as to the facts, the relationship created by a contract is a question of law and the conclusion of the Industrial Commission is reviewable. *Hayes v. Elon College*, 11.

§ 9. Entire and Divisible Contracts.

Although it be conceded that under certain conditions alternative promises may be subject to the rule of separability, it does not follow that it may be applied in every case—the facts of the particular case must be strongly controlling. *Neal v. Trust Co.*, 103.

Where a contract is entire, whether in one or several instruments, the whole contract stands or falls together. *Oil Co. v. Baars*, 612.

§ 12. Modification, Reformation and Abandonment, in General.

The effect of a waiver is to release one of the parties from the terms of the original proposition and substitute for it other terms. If this be done by language, the terms of the new proposition are to be ascertained by the words used; if by conduct the law gives to such conduct a construction which secures a fair and just result. *Johnson v. Noles*, 542.

The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument required any modification to be in writing, and also where the contract provided that no agent should have the right to change or modify the same. *Whitehurst v. FCX Fruit & Vegetable Service*, 628.

§ 16. Performance or Breach, in General.

He, who would insist on strict performance of a contract, must not himself be the cause of the breach. *Johnson v. Noles*, 542.

Where one party to an option to purchase land is ready, able and willing and offers to perform his part and the other party refuses to comply with the terms thereof, tender of the balance of the purchase price and demand for a deed are unnecessary. *Ibid.*

CONTRACTS—*Continued.*

§ 18. Waiver of Breach.

An extension of the time for tender of the balance of the purchase price of land and for the acceptance of the deed by plaintiff, given by defendants, not for the benefit and accommodation of the plaintiff, but in order that defendants may give a good deed with full covenants and warranty, which defendants could not then do, is valid and binding on the parties though not in writing and without additional consideration. *Johnson v. Noles*, 542.

§ 21. Pleadings.

A complaint, alleging a breach by defendant of his contract to make patterns and cut goods for plaintiff, states a cause of action *ex contractu*, notwithstanding such breach may have been caused by defendant's neglect and failure to perform his obligations thereunder; and defendant may, therefore, plead as a counterclaim overtime, under payment and penalties under the Federal Fair Labor Standards Act of 1938. G. S., 1-135; G. S., 1-137. *Smoke Mount Industries, Inc., v. Fisher*, 72.

In an action to recover on a special contract and also upon a *quantum meruit*, it is permissible under our practice to allow plaintiff to abandon his special contract, and to recover on *quantum meruit* for the reasonable value of his services. *Lindsey v. Speight*, 453.

§ 22. Evidence and Burden of Proof.

Evidence of the performance of valuable services at the request of, or knowingly accepted by another, raises the implication of a promise to pay what the services are reasonably worth. *Grady v. Faison*, 567.

§ 23. Sufficiency of Evidence and Nonsuit.

A complaint, alleging breach of a contract between plaintiff and defendant, whereby plaintiff and another were to survey lands purchased by defendant, divide the same into lots and sell the lots, the proceeds to be used first to pay the purchase price for the lands, all costs and expenses and taxes and the remaining lands held by defendant for the benefit of all three parties to the contract, that all costs, expenses and taxes have been paid according to the contract, that defendant holds the remaining lands claiming same as sole owner, and plaintiff asking for an accounting, states a cause of action and there was error in sustaining a demurrer. *Sandlin v. Yancey*, 519.

The mere fact that one corporation owns all of the capital stock of another corporation, the board of directors of both being the same, nothing else appearing, is not sufficient to render the parent corporation liable for the contracts of its subsidiary. In order to establish such liability there must be additional circumstances showing fraud, actual or constructive, or agency. *Whitehurst v. FCX Fruit & Vegetable Service*, 628.

CORPORATIONS.

§ 23. Contracts and Indebtedness.

The mere fact that one corporation owns all of the capital stock of another corporation, the board of directors of both being the same, nothing else appearing, is not sufficient to render the parent corporation liable for the contracts of its subsidiary. In order to establish such liability there must be additional circumstances showing fraud, actual or constructive, or agency. *Whitehurst v. FCX Fruit & Vegetable Service*, 628.

CORPORATIONS—*Continued.*

§ 34. Claims Against Receiver.

Upon objections filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence, or findings, the objections alleging facts which if true would constitute a valid defense to such claim, there is error in the trial court's denial of a motion to set aside the allowance of such claim and refusal to grant a hearing on the objections. G. S., 55-153. *Trust Co. v. Lumber Co.*, 432.

COUNTIES.

§ 2. Governmental Powers.

G. S., 153-156, authorizing boards of county commissioners to reimburse the counties for the support of indigent persons by sale in a special proceeding of any property of such persons, confers no sovereign power; and as far as the indigent persons are concerned it creates a private obligation only, which is subject to the bar of the three-year statute of limitations. G. S., 1-52. *Guilford County v. Hampton*, 817.

COURTS.

§ 2c. Appeals from Clerks of Court.

Where the clerk of the Superior Court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the Superior Court and invokes the proper exercise of its power, by virtue of G. S., 1-276, the judge upon appeal may proceed to consider and determine the matter as if originally before him. *McDaniel v. Leggett*, 806.

§ 3. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

A Superior Court judge assigned to a district has, during the period of assignment, jurisdiction of all "in Chambers" matters arising in the district, including restraining orders and injunctions, G. S., 1-493, and he may, in an adjoining district, vacate or modify a temporary injunction issued without notice. G. S., 1-498. *Reidsville v. Slade*, 48.

§ 9. Jurisdiction in General of State and Federal Courts.

The Articles of War—92 referring to murder and rape, and 93 referring to various crimes (including robbery)—do not confer upon military courts an exclusive jurisdiction to try members of the U. S. Army for such offenses committed within the State and beyond the exclusive territory under the immediate control of the military authorities, even in time of war, the State courts and military courts having concurrent jurisdiction of such offenses. *S. v. Inman*, 531.

The purchase of lands by the United States, within the limits of a State, does not of itself oust the jurisdiction of the State over the lands so purchased; but where the purchase is with the full consent of the Legislature of the State, the jurisdiction of the United States then becomes exclusive. *S. v. DeBerry*, 834.

The consent of the Legislature of a State to the acquisition of lands within its borders by the United States, having once been given, may not thereafter be revoked or withdrawn, unless Federal jurisdiction had not been accepted. *Ibid.*

COURTS—*Continued.*

The Legislature of the State may qualify its consent to the acquisition of lands within its borders by the United States so as to retain some jurisdiction or partial jurisdiction over such lands. *Ibid.*

Jurisdiction of the United States is exclusive over property in this State, acquired in 1899 by virtue of Art. I, sec. 8, clause 17 of the Federal Constitution and with the State's legislative consent as expressed in ch. 136, Public Laws 1887, and such exclusive jurisdiction is not affected by the restrictive provisions of G. S., 104-4 and 104-7 subsequently enacted, which are prospective only. *Ibid.*

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§ 1a. Nature and Elements of Crime, in General.

In criminal procedure one may only be punished for that which has already transpired—never for what he may do in the future. *S. v. Summerlin*, 178.

The prosecution has the burden of proving the *corpus delicti*, that is, a crime has been committed, before the jury may proceed to inquire as to who committed it. *S. v. Edwards*, 577.

To show the death of deceased, without establishing the felonious cause of the death, or the identity of the defendant as the person who caused the death, or circumstances from which these facts might reasonably be inferred, falls short of proving the *corpus delicti* of the crime of which the defendant has been convicted. *Ibid.*

§ 1b. Attempts.

An attempt to commit a crime is an indictable offense, and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making the specific charge, or on one which charges a complete offense. G. S., 15-170. *S. v. Parker*, 524.

An attempt is an overt act in part execution of a crime, which falls short of actual commission, but which goes beyond mere preparation to commit. *Ibid.*

§ 2. Intent: Willfulness.

Intent alone is not sufficient for a conviction even of an attempt to commit the offense charged. *S. v. Graham*, 347.

Intent is one of the elements necessary to sustain a charge of an attempt to commit a criminal offense. *S. v. Edwards*, 527.

Rarely may a peremptory instruction be given to convict the defendant, if the jury finds the facts to be as testified, in cases where the substance of the offense is willfulness or a specific intent is an essential element. *S. v. Hayden*, 779.

Upon trial on an indictment for a crime, an essential element of which is intent, there is no prejudicial error in a charge that intention is an act or emotion of the mind, seldom, if ever, capable of direct or positive proof, which is to be arrived at by just and reasonable deductions from the facts and acts proven. *S. v. Oxendine*, 825.

§ 8. Principals.

Where two defendants go into a house and rob a person, while a third remains outside in an automobile, parked near-by for the purpose of aiding and abetting the two in getting away and sharing the money with them, all are equally guilty as principals. *S. v. Ham*, 128.

CRIMINAL LAW—*Continued.*

One who aids and abets another in the commission of a misdemeanor is, under the common law, a principal and may be convicted as such. *S. v. Graham*, 351.

§ 10. Accomplices.

One, who does not seek the right to prosecute and who is not charged with participation in the crime, cannot complain of the court's refusal to grant his petition to intervene in a criminal prosecution. *S. v. Gordon*, 304.

§ 17. Plea of Guilty and Nolo Contendere.

A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime sufficiently charged in the indictment or information. *S. v. Robinson*, 412.

§ 18. Plea of Not Guilty.

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. Stone*, 848.

§ 23. Same Offense.

Where in a criminal prosecution for bigamous cohabitation, G. S., 14-183, there is a conviction and judgment chiefly on the grounds of insufficient service, which on appeal is affirmed by this Court and reversed by the Supreme Court of the United States and remanded, upon the second trial on the issue of domicile only, the plea of former jeopardy and motion to dismiss were properly overruled. *S. v. Williams*, 183.

§ 28a. Presumptions and Burden of Proof.

The prosecution has the burden of proving the *corpus delicti*, that is, a crime has been committed, before the jury may proceed to inquire as to who committed it. *S. v. Edwards*, 577.

To show the death of deceased, without establishing the felonious cause of death, or the identity of the defendant as the person who caused the death, or circumstances from which these facts might reasonably be inferred, falls short of proving the *corpus delicti* of the crime of which the defendant has been convicted. *Ibid.*

§ 29a. Facts in Issue, in General.

In a criminal prosecution, based upon an indictment charging larceny of money and valuable papers and evidence tending to show, at most, an attempt to commit larceny of two suitcases, there is a fatal variance between *allegata* and *probata*, of which advantage may be taken under an exception to the disallowance of a motion for judgment as of nonsuit. *S. v. Nunley*, 96.

§ 29b. Evidence of Guilt of Other Offenses.

In a prosecution for incest, G. S., 14-178, and for carnal knowledge of a female under sixteen years of age, G. S., 14-26, allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a

CRIMINAL LAW—*Continued.*

similar nature, was competent solely for the purpose of showing intent or guilty knowledge. *S. v. Edwards*, 527.

Evidence of a distinct substantive offense is inadmissible to prove another and independent crime, where the two are disconnected and in no way related; but there is a well established exception to this rule, that proof of the commission of like offenses may be competent to show intent, design, guilty knowledge, or identity of person or crime. And this applies to evidence of like offenses subsequent to the offense charged, if not too remote, and notwithstanding the evidence may tend to impeach the character of defendants. *Ibid.; S. v. Biggs*, 722.

In a prosecution against several defendants for an assault with a deadly weapon with intent to kill, evidence that one of the defendants, about a month before the commission of the alleged crime, in a dispute with witness, used violent and profane language, is incompetent and does not come within the rule that proof of like offenses may be admitted to show intent and motive. *S. v. Godwin*, 846.

§ 29e. Motive and Malice.

In a prosecution for robbery evidence of prosecutrix, that she "thought" or "reckoned" defendants were trying to borrow considerable sums from her shortly before the robbery, was competent to show motive and knowledge of defendants. *S. v. Ham*, 128.

On a trial upon an indictment for robbery from the person of a woman, evidence that one of defendants was heard to say some time before the alleged robbery, in a conversation relative to other robberies, that he knew an old woman who kept money under her dress, *held* competent. *Ibid.*

§ 30. Evidence and Record at Former Trial or Proceedings.

G. S., 15-88, 15-91, and 15-100, making competent evidence on preliminary hearings reduced to writing by the magistrate, are an extension of the common law rule and such testimony, when properly taken, may be read in evidence on mere identification. *S. v. Ham*, 128.

The testimony of a witness, stenographically taken at a *habeas corpus* proceeding before the trial of defendants, may be received as evidence on their subsequent trial upon indictment, the witness in the meantime having become insane, when its correctness is testified to by the official stenographer who took and transcribed it, and there is no suggestion that the record thereof is not full and accurate. *Ibid.*

§ 31a. Subjects of Expert and Opinion Evidence, in General.

To the rule that opinion evidence is incompetent there are, at least, three exceptions: First, opinions of experts; second, opinions on the question of identity; and third, opinions received from necessity, where no better evidence can be obtained. *S. v. Ham*, 128.

In a criminal prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than $50 to establish a felony under G. S., 14-72. *S. v. Weinstein*, 645.

§ 31f. Identification by Sight or Appearance.

In a criminal prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses,

CRIMINAL LAW—*Continued.*

who based their opinions on personal observation, is admissible to show a value of more than $50 to establish a felony under G. S., 14-72. *S. v. Weinstein*, 645.

Where two witnesses saw two of the defendants enter a store, both witnesses being present, hold up the proprietor with pistols and shoot and kill him and flee, and two other witnesses saw both of these defendants run out of the store and enter and drive away in a car with the third defendant, all four of these witnesses picking out defendants from a number of prisoners in a city jail about 30 days after the homicide and positively identifying them and their car, without denial on the part of the prisoners, and other persons identifying the same defendants as the perpetrators of another hold-up just before their arrest, there is sufficient identification and evidence of murder for the jury, notwithstanding discrepancies and inaccuracies in certain particulars of the evidence, and motion for nonsuit was properly denied. *S. v. Biggs*, 722.

§ 32a. Circumstantial Evidence, in General.

Where the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce, in the minds of the jurors, a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis. *S. v. Graham*, 347.

The admissibility of circumstantial evidence, otherwise competent to prove the commission of the offense and the guilty participation therein of the accused, may not be successfully questioned. *S. v. Weinstein*, 645.

Ordinarily, remoteness in time in the making of a threat otherwise admissible does not render it incompetent as evidence, but only goes to its weight and effect. *S. v. Shook*, 728.

In a criminal prosecution for felonious assault upon an officer of the law, evidence of threats by the defendant against the officers of the law, as a class, is competent. *Ibid.*

Instructions, regarding circumstantial evidence in a criminal prosecution, which adopts the formula that the jury must be satisfied beyond a reasonable doubt, do not disclose prejudicial error, even though the court failed to add that such evidence must "exclude every reasonable hypothesis of innocence," there being no special request for the judge to so instruct. *Ibid.*

§ 33. Confessions.

In a criminal prosecution, where statements in the nature of confessions have been made by defendants, if the evidence in respect of the voluntariness of the statements were merely in conflict, the court's determination would be conclusive; however, what facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the court below can be reviewed. *S. v. Biggs*, 23.

Where a person in authority offers some suggestion of hope or fear to one suspected of crime and thereby induces a statement in the nature of a confession, such statement is involuntary in law and incompetent as evidence. *Ibid.*

A free and voluntary statement in the nature of a confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but any statement wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. *Ibid.*

CRIMINAL LAW—*Continued.*

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

Where three boys from 19 to 20 years of age were imprisoned in Virginia under a charge of highway robbery, and on numerous occasions officers from this State visited these boys and questioned them in regard to a charge of murder made against them here, the final visit consuming the greater part of two days, and the accused constantly refuse to make any statement, but finally the officers told the boys "they were liable to pay the death penalty in Virginia" and that in North Carolina "as to what will be done with you will be left to the jury and the court," whereupon, after a few minutes consultation among themselves, the boys made statements in the nature of confessions. *Held:* Such statements were involuntary and are incompetent as evidence. *Ibid.*

In the trial of a capital case, objections to confessions of defendants come too late, defendants having refused the offer of the trial judge to have their voluntariness determined in the absence of the jury, unless their involuntariness appears from the State's evidence. *S. v. Thompson*, 661.

Statements made by a defendant in a criminal prosecution while in the custody of officers, or in jail, are competent, if made voluntarily and without any inducement or fear. Likewise, a confession, otherwise voluntary, is not made inadmissible because of the number of officers present at the time it was made. *Ibid.*

Where the accused persons, at the time of their arrest, were informed of the charge against them as required by G. S., 15-47, and none of them made a request to be allowed to communicate with relatives or friends or to obtain counsel, objection to the failure of the officers to inform them of the charge against them and their right to have counsel, cannot be sustained. *Ibid.*

There is no set formula or exact language that must be used in warning a defendant of his rights, and the following language of officers affects in no way the voluntariness of defendants' confessions—"you need not make any statement, but any statement you make could be used for or against you," or "if you want to go ahead and tell me the truth, I will appreciate it." *Ibid.*

§ 34a. Admissions and Declarations, in General.

When the State offers the declaration of a defendant which tends to exculpate him on a material point, he is entitled to whatever advantage it affords. *S. v. Watts*, 771.

While the State in a criminal prosecution, by offering the statements of a defendant and his employee, is not precluded from showing that the facts were otherwise, no such evidence being offered by the State, the statements are presented as worthy of belief. *Ibid.*

§ 34e. Admissions of Counsel.

In a subsquent prosecution the State is not bound by an admission, made by its counsel in the appellate court on the hearing of a former appeal from a conviction upon the same indictment. *S. v. Williams*, 183.

§ 40. Character Evidence of Defendant.

Evidence, in a criminal prosecution, tending to discredit and impeach a defendant about a collateral matter and to create an unfavorable impression of defendant in the minds of the jury, is incompetent and its admission is error. *S. v. Godwin*, 846.

CRIMINAL LAW—*Continued.*

§ 41b. Cross-examination of Witness.

Incompetent evidence, by a State's witness in a criminal trial, brought out on redirect examination in explanation of testimony elicited under cross-examination, is competent. *S. v. Sawyer*, 61.

On cross-examination questions relating to crime and anti-social conduct are freely allowed; but this latitude is peculiar to cross-examination, and the examiner is bound by the answers of the witness when such answers are collateral to the issue. *S. v. King*, 329.

Where a witness on cross-examination admits that he has been convicted of an assault, on rediect examination the witness may explain such testimony. *S. v. Oxendine*, 825.

§ 41d. Evidence Competent for Impeaching Witness.

Our courts do not permit a witness to be impeached by independent evidence of particular misconduct; and the admission of extrinsic record evidence of conviction of crime, for the purpose of impeaching a witness, has not been adopted in this jurisdiction. *S. v. King*, 329.

On cross-examination questions relating to crime and anti-social conduct are freely allowed; but this latitude is peculiar to cross-examination, and the examiner is bound by the answers of the witness when such answers are collateral to the issue. *Ibid.*

§ 41e. Evidence Competent for Corroborating Witness.

Where evidence, competent only for the purpose of corroborating a witness, is admitted generally without objection, there is no error in the court's failure to so restrict it. *S. v. Ham*, 128.

§ 45. Preliminary Proceedings.

One, who does not seek the right to prosecute and who is not charged with participation in the crime, cannot complain of the court's refusal to grant his petition to intervene in a criminal prosecution. *S. v. Gordon*, 304.

§ 47. Consolidation of Indictment for Trial.

Upon the consolidation and trial together, over defendants' objection, of two indictments, the first against all three of defendants for abduction of a fourteen-year-old girl, and the second against two of the three defendants for an assault with intent to commit rape upon the abducted child during the abduction, while a verdict of guilty on the first charge and a verdict of not guilty on the second would seem to render the exception to the consolidation feckless, the right to consolidate was in the sound discretion of the trial court. G. S., 15-152. *S. v. Truelove*, 147.

§ 51. Argument and Conduct of Counsel.

The solicitor may comment on all the evidence, in a criminal prosecution, and he may draw reasonable inferences therefrom, and also make application of the law thereto. *S. v. Oxendine*, 825.

§ 52b. Nonsuit.

In a criminal prosecution, based upon an indictment charging larceny of money and valuable papers and evidence tending to show, at most, an attempt to commit larceny of two suitcases, there is a fatal variance between *allegata* and *probata*, of which advantage may be taken under an exception to the disallowance of a motion for judgment as of nonsuit. *S. v. Nunley*, 96.

CRIMINAL LAW—*Continued.*

On the trial of several defendants, upon an indictment for robbery, where the evidence against one of the defendants raises no more than a suspicion of his guilt, a motion to dismiss as to such defendant should be allowed. G. S., 15-173. *S. v. Ham*, 128.

Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. G. S., 15-169. *S. v. Gay*, 141.

The general rule on a demurrer to the evidence is that only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State. *S. v. Oldham*, 415.

In cases where the evidence of guilt is purely negative in character, positive and uncontradicted evidence in explanation, which clearly rebuts the inference of guilt and is not inconsistent with the State's evidence, should be taken into consideration on motion to nonsuit. *Ibid.*

The evidence must do more than raise a suspicion or conjecture in regard to the essential facts of the case: *Holding* evidence in a prosecution for vagrancy insufficient to support a conviction. *Ibid.*

On motion to nonsuit a criminal case, the evidence will be considered in its most favorable light for the prosecution. *S. v. McMahan*, 476.

Allegations of ownership of the property described in a bill of indictment for larceny must be proven substantially as laid, else a fatal variance would result, and this would be available on a motion to nonsuit. *S. v. Weinstein*, 645.

A motion for judgment of nonsuit must be denied, if there be any substantial evidence—more than a scintilla—to prove the allegations of the indictment. *Ibid.*

Where a defendant, charged in the indictment with larceny and receiving, is found guilty on both counts and a single judgment rendered, there being evidence to support the judgment on the second count, motion for nonsuit is properly denied. *Ibid.*

When a complete defense is made out by the State's evidence, a defendant should be allowed to avail himself of such defense on motion for judgment as of nonsuit. *S. v. Watts*, 771.

Evidence, which merely suggests the possibility of guilt or raises only a conjecture, is insufficient to require submission to the jury. *Ibid.*

Evidence sufficient to take the case to the jury, in a criminal action, must tend to prove the fact in issue or reasonably conduce to its conclusion as a fair, logical and legitimate deduction, and not merely such as raises a suspicion or conjecture of guilt. *S. v. Kirkman*, 778.

§ 53a. Instructions, Form and Sufficiency, in General.

The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away." *S. v. Truelove*, 147.

Rarely may a peremptory instruction be given to convict the defendant, if the jury finds the facts to be as testified, in cases where the substance of the offense is willfulness or a specific intent is an essential element. *S. v. Hayden*, 779.

CRIMINAL LAW—*Continued.*

When a charge, considered as a whole in the same connected way in which it was given, presents the law fairly and correctly, it affords no ground for reversal, though some of the expressions, when standing alone, might be regarded as erroneous. *S. v. Oxendine*, 825.

§ 53b. Applicability to Counts and Evidence.

Where an instruction, that "the possession of more than one gallon of liquor constitutes *prima facie* evidence of unlawful possession for the purpose of sale in violation of G S., 18-32," is directed to a count charging unlawful possession for the purpose of sale, and defendant is convicted on that count and on another count of unlawful transportation, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case. *S. v. Gordon*, 304.

Concerning the necessity of the charge of the court complying with G. S., 1-180, nothing more is required than clear instructions which apply the law to the evidence and give the positions taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. *S. v. Biggs*, 722.

§ 53c. Instructions on Burden of Proof and Presumptions.

In a criminal prosecution where there is no admission or evidence establishing a presumption, sufficient to overcome the presumption of innocence, which requires the defendant to go upon the stand and make an explanation, there is reversible error for the court to charge that "the most that can be required of the defendant is explanation, but not exculpation." *S. v. Stone*, 848.

§ 53d. Less Degrees of Crimes Charged.

Where all the evidence, in the trial of a criminal action, if believed by the jury, tends to show that the crime charged was committed as alleged and there is no evidence to show the commission of a crime of less degree, there is no error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged and convict him of an assault or less degree of the crime charged. *S. v. Sawyer*, 61.

§ 53f. Requests for Instructions.

Where, on trial of an indictment for an assault with intent to commit rape, the evidence is not sufficient to convict as charged but is sufficient to support a verdict for an assault, and defendant moves, not only for dismissal and nonsuit, but also for directed verdict, such motions are tantamount to a request for an instruction that there is no evidence to support a conviction as charged, and upon conviction and judgment of an assault with intent to commit rape, a new trial will be granted. *S. v. Gay*, 141.

Where the court in its charge substantially complies with G. S., 1-180, if defendant desires further elaboration and explanation, he should tender prayers for instructions; otherwise, he cannot complain. *S. v. Gordon*, 304.

§ 54a. Form and Sufficiency of Issues, in General.

In a criminal prosecution it is error for the court to instruct the jury, either in the general charge or in response to an inquiry made by the jury, that they may return a verdict with recommendation of mercy, or with other words having reference, necessarily, to the judgment to be rendered by the court, where there is no discretion in the court as to the punishment to be

CRIMINAL LAW—*Continued.*

imposed. If the jury return such a verdict voluntarily, their recommendation may be regarded as surplusage. *S. v. Rowell,* 768.

§ 54b. Form, Sufficiency and Effect of Verdict.

A general verdict on a warrant or bill of indictment, containing several counts charging offenses of the same grade and punishable alike, is a verdict of guilty on each and every count. *S. v. Graham,* 347.

The rule, both in civil and criminal actions, is that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *S. v. Cody,* 470.

Where an indictment contains several counts and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates. *Ibid.*

§ 58. Motions for New Trial for Newly Discovered Evidence.

On suggestion by defendant's counsel here that, since the trial below on an indictment for murder, he has come into possession of material evidence tending to show the insanity of the defendant, he is at liberty to present it to the court below at the next succeeding criminal term on a motion for a new trial for newly discovered evidence. *S. v. Dunheen,* 738.

§ 60. Judgment, Conformity to Verdict.

When offenses, of the same grade and punishable alike, are distinct, and there is a general verdict, the court can impose sentences on each count. *S. v. Graham,* 347.

Where on a warrant containing five counts, charging offenses of the same grade and punishable alike, there is a general verdict of guilty and on four of the counts there is insufficient evidence to support conviction, and the court below pronounced judgment, treating the counts severally, and sentenced the defendant on the counts not supported by the evidence, and prayer for judgment was continued on the only count supported by the evidence, there will not be a new trial, but the sentence imposed will be set aside and the case remanded for judgment upon the verdict on the count supported by the evidence. *Ibid.*

The rule, both in civil and criminal actions, is that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *S. v. Cody,* 470.

A judgment in a criminal prosecution, in excess of the statutory penalty, will be stricken out on appeal, and the cause remanded for proper judgment. *Ibid.*

§ 61e. Severity of Sentence.

The court is not authorized to inflict punishment beyond the bounds prescribed by the statute under which the warrant or indictment was drawn. *S. v. Robinson,* 412.

§ 65. Validity and Attack.

In a criminal prosecution, where the legal theory upon which the State chiefly relies to defeat the defense is disapproved on appeal, this does not perforce preclude further challenge to the defense on other grounds, and it does not work an acquittal of defendants. *S. v. Williams,* 183.

CRIMINAL LAW—*Continued.*

If the verdict on any count be free from valid objection, and having evidence tending to support it, the conviction and sentence for that offense will be upheld. *S. v. Graham,* 347.

§ 65½. Amount and Assessment of Cost.

Expenses for returning persons charged with crime to this State from points outside the State, without extradition, are not denominate allowable costs under G. S., 6-1. *S. v. Patterson,* 471.

§ 67. Nature and Grounds of Appellate Jurisdiction.

Appeals in criminal cases in this jurisdiction are wholly statutory. *S. v. Inman,* 531.

§ 68a. Right of State to Appeal.

It is provided by G. S., 15-179, that an appeal in a criminal case to this Court may be taken by the State in four specific instances, naming them, "and no other." An appeal by the State from a judgment granting a new trial on the ground of newly discovered evidence falls within the "and no other," albeit the State seeks to present only a question of law. *S. v. Todd,* 776.

§ 68b. Right of Defendant to Appeal.

Upon the arrest and indictment for rape and robbery of members of the U. S. Armed Forces by State authorities, the crimes allegedly having been committed beyond the territory under the immediate control of the military authorities, an appeal by defendants from an adverse ruling on their objection to the jurisdiction is premature. The practice is to note the objection and preserve the exception upon appeal from the final judgment. G. S., 15-180; G. S., 15-181. *S. v. Inman,* 531.

§ 69. Appeal and Certiorari.

By consent of the parties the complaint, in a civil action to compel the Commissioner of Motor Vehicles to restore an automobile driver's license surrendered pursuant to a judgment in a criminal prosecution, will be considered as an application for writ of *certiorari,* in the nature of a writ of error, to bring up the record in the criminal prosecution as it appears in the Superior Court. *S. v. Cooper,* 100.

Where there is no right of appeal, a *certiorari* as a substitute therefor cannot be granted. *S. v. Todd,* 776.

§ 77a. Necessary Parts of Record.

On appeal in a criminal case the indictment or warrant is a necessary part of the case on appeal and in its absence the appeal will be dismissed. *S. v. Dry,* 234.

§ 78a. Theory of Trial.

In a criminal prosecution, where the legal theory upon which the State chiefly relies to defeat the defense is disapproved on appeal, this does not perforce preclude further challenge to the defense on other grounds, and it does not work an acquittal of defendants. *S. v. Williams,* 183.

To sustain a conviction and the judgment upholding it, the prosecution is compelled, upon appeal, to rely on the main theory of the trial below. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 78b. Exceptions and Assignments of Error.

Exceptions not set out in defendant's brief are deemed abandoned, Rule 28; and assignments of error must be brought forward and grouped in accordance with Rule 19 (3). However, as defendants have been sentenced to death, the appeal has been considered on its merits. *S. v. Thompson*, 661.

§ 80. Prosecution of Appeals and Dismissal.

While failure to serve "case on appeal" may not perforce, in and of itself, entitle appellee to a dismissal, motion to dismiss will be allowed, where the record shows on its face that an appeal would be frivolous or could only be taken for the purpose of delay. *S. v. Couch*, 232.

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of Attorney-General, after the Court has examined the record proper for errors on its face. *S. v. Jones*, 473; *S. v. Alexander*, 478; *S. v. Taylor*, 479; *S. v. Buchanan*, 626; *S. v. Brooks*, 627.

§ 81c. Prejudicial and Harmless Error.

Error in the admission of evidence is rendered harmless by the later admission of substantially similar evidence without objection. *S. v. Gordon*, 304; *S. v. Oxendine*, 825.

§ 82. Motions in Supreme Court for New Trial.

On suggestion by defendant's counsel here that, since the trial below on an indictment for murder, he has come into possession of material evidence tending to show the insanity of the defendant, he is at liberty to present it to the court below at the next succeeding criminal term on a motion for a new trial for newly discovered evidence. *S. v. Dunheen*, 738.

§ 83. Determination and Disposition of Cause.

When a conviction in a criminal prosecution is affirmed by this Court and reversed by the Supreme Court of the United States on the ground that the case was tried in the main upon an unsound principle of law, the practice is to remand for another hearing. *S. v. Williams*, 183.

§ 85. Proceedings in Lower Court After Remand.

A judgment in a criminal prosecution, in excess of the statutory penalty, will be stricken out on appeal, and the cause remanded for proper judgment. *S. v. Cody*, 470.

CURTESY.

§ 1. Nature of the Estate.

When a married woman, who is one of several owners of an equitable remainder in lands, has children, her husband as father of such children acquires an estate by the curtesy initiate in his wife's interest therein and, upon her death intestate, an estate by the curtesy consummate. *Parham v. Henley*, 405.

DAMAGES.

§§ 1a, 13. Compensatory Damages: Instructions.

In an action to recover damages for injuries to plaintiff, allegedly caused by the negligence of the defendant, there is error in a charge to the jury, on the measure of damages, which fails to limit the plaintiff's recovery for future losses to the present cash value or present worth of such losses. *Daughtry v. Cline*, 381.

DEATH.

§ 3. Grounds and Conditions Precedent in Action for Wrongful Death.

The right of action for wrongful death, given under G. S., 28-173, did not exist at common law and rests entirely on the statute. *Wilson v. Massagee*, 705.

Before the Federal Employers' Liability Act was passed by Congress, the liability of common carriers by railroad, engaged in interstate commerce, for injuries to, or death of their employees while engaged in such commerce, was governed by the laws of the several states; but this Act took possession of the field of liability in such cases and superseded all state laws upon the subject. *Ibid.*

DEEDS.

§ 3. Execution, Acknowledgment, Private Examination and Probate.

Neither a covenant nor a representation on the part of a married woman that she is a *feme sole* will estop her from asserting her incapacity to convey her separate real estate without the written assent of her husband and privy examination as required by statute; and a married woman cannot by her own misrepresentation enlarge her capacity to convey an estate in land. *Buford v. Mochy*, 235.

While G. S., 52-2, may enable a married woman ordinarily to contract and deal with her property as if she were unmarried and to be bound by estoppel; yet this statute contains a pertinent delimitation making a conveyance of real estate invalid unless with the written assent of her husband, Art. X, sec. 6, of the N. C. Constitution, and privy examination as required by law. *Ibid.*

One who deals with a married woman is chargeable with knowledge of her disability, and that she can convey her real estate only in the manner prescribed by the Constitution and laws on the subject. *Ibid.*

§ 4. Consideration.

In the purchase of land the recital, acknowledging receipt of a consideration in the deed therefor, is *prima facie* evidence of that fact and is presumed to be correct. *Randle v. Grady*, 651.

§ 5. Delivery and Acceptance.

The right to renounce a devise or legacy is a natural one and needs no statutory authority. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. *Perkins v. Isley*, 793.

§ 8. Registration as Notice.

A purchaser of real estate is charged with notice of the contents of each recorded instrument constituting a link in his chain of title and is put on notice of any fact or circumstance affecting his title which any such instrument would reasonably disclose. *Randle v. Grady*, 651.

§ 11. General Rules of Construction.

Ordinarily, the intent of the grantor must be found within the four corners of the deed. *Monk v. Kornegay*, 194.

But when the intent materially depends on ambiguous or equivocal expressions, resort may be had to evidence *dehors* the deed to explain its terms; and such evidence may include the circumstances attending its execution, the relation of the parties to each other and to the property and generally all sources of inquiry as to things which might have acted on the mind of the grantor. *Ibid.*

DEEDS—*Continued.*

Where an ancestor, by deeds delivered and recorded at one and the same time, makes a division of all of his property among his children and grandchildren of two marriages and his second wife, declaring in the deeds for the benefit of the children and grandchildren of the first marriage that the property thereby conveyed is an advance in full of their share of the grantor's estate and reciting in the deed for the benefit of second wife and her children and grandchildren that the same should include "any other children that are born to said grantor in lawful wedlock," the words "any other children born to said grantor in lawful wedlock" do not include grantor's children of the first marriage. *Ibid.*

§ 12. Property Conveyed.

A general description giving the boundaries of a tract of land is not too vague to permit the reception of parol evidence to explain, locate, or make certain the calls or descriptive terms used in the deed, but never to enlarge, supplement, or add to the same. *Peel v. Calais*, 421.

At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed. Failing in this, the deed is void. *Ibid.*

The description of lands in a deed of trust is sufficient, where it sets out the property as a one-half undivided interest in 35 acres, part of the old W tract, adjoining F, S, D, and others, beginning at the forks of the H and G roads, on the west side of the H road in the fork and running to where it will intersect the northeast corner of the D land, thence west with the D land far enough to make (using the G road as the northern boundary) 35 acres, reference being made to the grantor's deed by the parties thereto and book and page where recorded, less certain lots by numbers sold prior to the execution of the said deed of trust. *Hardy v. Mayo*, 558.

§ 13b. Rule in Shelley's Case.

A conveyance to one for "his lifetime, and at his death to his heirs, if any, his heirs," invokes the application of the rule in *Shelley's case* and vests a fee in the first taker. The use of the phrase "if any" does not prevent the application of the rule, since there is no limitation over. *Glover v. Glover*, 152.

§§ 16, 17. Restrictions: Covenants and Warrant.

While the owner of real estate has the right to restrict the use of the property by covenants and agreements in his conveyance thereof, the universal interpretation of such restrictions has been in favor of the free and untrammeled use of the property and against any restriction upon the use thereof, and any doubt arising or ambiguity appearing will be resolved against the validity of the restriction. *Edney v. Powers*, 441.

Restrictions in a deed to real estate for a term of 21 years, against its use for other than residential purposes and also against subdivision or sale to certain persons, are void after the expiration of the time stated, even though denominated covenants running with the land. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 3. Heirs and Distributees, in General.

"Bodily heirs," in the strict technical sense of *issue*, are not limited to the immediate issue, or children, of the first taker, but include the rest of his lineal descendants in indefinite succession. *Elledge v. Parrish*, 397.

DESCENT AND DISTRIBUTION—*Continued.*

§ 10b. Collateral Heirs of Bastards.

Prior to 1935, G. S., 29-1, Rule 10, when an illegitimate child died leaving no issue and his mother had predeceased him, the collateral relatives of the mother could not inherit from her illegitimate child. *Board of Education v. Johnston*, 86.

DIVORCE.

§ 2a. Separation.

In an action for divorce, based upon two years separation by mutual consent, the plaintiff must not only show that he and the defendant have lived separate and apart for the statutory period, but also that the separation was voluntary in its inception. *Williams v. Williams*, 91.

There can be no voluntary separation as a ground for divorce without the conscious act of both of the parties, by an agreement expressed or implied; and there can be no agreement, assent or acquiescence on the part of a spouse who is mentally incapable of assenting. *Ibid.*

If a plaintiff, in a divorce action on grounds of separation, contributes to the support of his wife, solely in an attempt to fulfill the obligation imposed by statute, his conduct is not inconsistent with a legal separation; but, if he makes such payments in recognition of his marital status and in discharge of his marital obligations, there is no living separate and apart within the meaning of the statute. *Ibid.*

§ 3. Jurisdiction and Venue.

Leaving one's domicile of origin and going into another state simply and solely for the purpose of obtaining a divorce, with a mind of immediately returning, is not sufficient to effect a change of domicile. The *animus manendi* is lacking. *S. v. Williams*, 183.

No valid divorce from the bonds of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. Such a decree is void and not entitled to the full faith and credit clause of the Federal Constitution. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. *Ibid.*

§ 8. Sufficiency of Evidence.

In an action for divorce, based upon two years separation by mutual consent, the plaintiff must not only show that he and the defendant have lived separate and apart for the statutory period, but also that the separation was voluntary in its inception. *Williams v. Williams*, 91.

There can be no voluntary separation as a ground for divorce without the conscious act of both of the parties, by an agreement expressed or implied; and there can be no agreement, assent or acquiescence on the part of a spouse who is mentally incapable of assenting. *Ibid.*

If a plaintiff, in a divorce action on grounds of separation, contributes to the support of his wife, solely in an attempt to fulfill the obligation imposed by statute, his conduct is not inconsistent with a legal separation; but, if he makes such payments in recognition of his marital status and in discharge of his marital obligations, there is no living separate and apart within the meaning of the statute. *Ibid.*

§ 10. Verdict and Decree.

In an action for divorce a defect in service of process cannot be validated by a consent judgment, since that would be, in practical effect, consenting to a

DIVORCE—*Continued.*

divorce—which is diametrically opposed to public policy. *Rodriguez v. Rodriguez,* 275.

While a request by defendant for leave to answer supersedes her motion to dismiss the action for want of service, it does not, by relation back, cure any prior fatal defect in the proceeding with reference to notice, or validate a judgment or decree of divorce entered upon such defective service. *Ibid.*

§ 14. Enforcing Payment of Alimony.

A husband cannot be adjudged in contempt of court for failure to comply with the provisions of a separation agreement, entered into prior to the institution of an action in which a divorce was granted the parties on the grounds of two years separation, which judgment provided that it should not affect or invalidate the separation agreement. *Brown v. Brown,* 556.

§ 17. Hearing and Decree.

Where the custody of a minor child has been awarded the mother in a divorce proceeding and subsequently, after both parents, who are proper and fit persons to have the custody of such child, have moved out of the State, the child being left by the mother with her parents, residents of this State and highly proper persons to rear the said child, upon petition of the father, in the divorce action, for custody of the child, the court has authority under the statute, G. S., 50-13, to order that the child continue in the custody of the grandparents. *Walker v. Walker,* 751.

The welfare of the child is the paramount consideration to guide the court in granting the custody and tuition of a minor child of divorced parents to the father or mother. *Ibid.*

§ 19. Foreign Decrees.

Leaving one's domicile of origin and going into another state simply and solely for the purpose of obtaining a divorce, with a mind of immediately returning, is not sufficient to effect a change of domicile. The *animus manendi* is lacking. *S. v. Williams,* 183.

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as *prima facie* valid, they are not conclusive; and, when challenged in a prosecution under G. S., 14-183, for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired *bona fide* domiciles in the state granting their divorces and that such divorces are valid. *Ibid.*

No valid divorce from the bonds of matrimony can be decreed on constructive service by the court of a state in which neither party is domiciled. Such a decree is void and not entitled to the full faith and credit clause of the Federal Constitution. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. *Ibid.*

DOMICILE.

§ 1. Defined.

Domicile is a matter of fact and intention, and ordinarily it is the place where one lives. Two circumstances must concur in order to establish domicile: first, residence; and secondly, the intention to make it a home or to live there permanently. A domicile once obtained is never lost until another is acquired. *S. v. Williams,* 183.

DOMICILE—*Continued.*

§ 2. Animus.

Leaving one's domicile of origin and going into another state simply and solely for the purpose of obtaining a divorce, with a mind of immediately returning, is not sufficient to effect a change of domicile. The *animus manendi* is lacking. *S. v. Williams*, 183.

EASEMENT.

§ 2. By Necessity and Implication.

Whoever purchases lands, upon which the owner has imposed an easement of any kind or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created, of which he has notice. *Packard v. Smart*, 480.

While no easement or *quasi*-easement will be created by implication, unless the easement be one of strict necessity, this rule means only that the easement should be reasonably necessary to the just enjoyment of the properties affected thereby. *Ibid.*

When one conveys part of his estate, he impliedly grants all those apparent or visible easements upon the part retained, which were at the time used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use thereof. *Ibid.*

Easements created by implication or estoppel do not necessarily stem from a common ownership. *Ibid.*

Where adjoining properties of separate owners have been developed in relation to each other, so as to create cross easements in the stairways, hallways, or other private ways serving both properties, such easements, if open, apparent and visible, pass as an appurtenant to the respective properties, and are binding on grantees although not referred to in the conveyance. *Ibid.*

One who purchases lands with notice, actual or constructive, that it is burdened with an easement takes the same subject to the easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement. He has no greater right than his grantor. The rule applies whether the sale is voluntary or involuntary. *Ibid.*

§ 3. By Prescription.

The recent use for an indefinite number of years of a neighborhood road across lands to a river, for purposes of hauling wood, boating, fishing and bathing, is no evidence of the existence of a public way. *Chesson v. Jordan*, 289.

Permissive use of a road across the lands of another does not create a right of way. The user must be hostile in character, repelling the inference that it was with the owner's consent. *Ibid.*

§ 5. Extent of Right.

The weight of authority gives the owner of lands, used for agricultural purposes and burdened with a right of way acquired by prescription, the right to erect gates across the way. *Chesson v. Jordan*, 289.

Generally speaking, the nature of the easement acquired rather than the character of the use must control the rights of the parties. Hence, no hard and fast rule may be prescribed. Each case is controlled, in a large measure, by the particular facts and circumstances therein. *Ibid.*

EJECTMENT.

§§ 9a, 11. Nature and Essentials of Right of Action: Complaint.

Ordinarily, any person claiming title to real estate, whether in or out of possession, may maintain an action to remove a cloud from title against anyone who claims an interest in the property adverse to the claimant, and is required to allege only that defendant claims an interest in the land in controversy. *Ramsey v. Ramsey*, 110.

While it has been said that, in an action to determine adverse claims to land, it is not necessary for plaintiff to set forth the nature of defendants' claim, the adverse or beclouding character of the claim or other matter complained of should appear in the complaint; and, where fraud is relied on, it must be alleged and proved. *Ibid.*

§ 14. Competency and Relevancy of Evidence.

In an action in ejectment, where the actual record title to the land involved is not adverse to plaintiffs, but confirms title in them, and no relief is sought on the ground of fraud, there is no error in the refusal of the trial court to admit in evidence an original deed for the land described in the complaint for the purpose of plaintiff's attacking it. *Ramsey v. Ramsey*, 110.

§ 15. Sufficiency of Evidence.

Collateral attack upon a void judgment is particularly apposite in ejectment in which a party may show that any instrument, relied upon by his adversary as evidence of title, is void and ineffectual to convey title. *Powell v. Turpin*, 67.

An action to remove a cloud from title cannot be sustained, when the title or pretended title is not adverse to complainant. *Ramsey v. Ramsey*, 110.

EQUITY.

§ 1a. He Who Seeks Equity Must Do Equity.

Where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury. *Bailey v. Inman*, 571.

If defendants would avoid their contract of option, given to plaintiff on certain property at the time the property was acquired and as part of the same transaction, they must surrender the property so acquired. He who seeks equity must do equity. *Oil Co. v. Baars*, 612.

§ 1d. Party Will Not Be Allowed to Benefit by His Own Wrong.

Where plaintiffs allege in their complaint that one of them built a house upon the property of defendants and that plaintiff who built the house and the other plaintiffs, his assignees, thinking the property was theirs and in good faith, paid taxes thereon and occupied the dwelling openly, notoriously and adversely for more than four years, defendants being residents of the city in which the property was located and making no objection, knowledge is at least inferentially alleged and a cause of action is stated and demurrer on that ground was properly overruled. *Rhyne v. Sheppard*, 734.

Where one officiously confers a benefit upon another, the other is enriched but not unjustly enriched. But the recipient cannot stand by and see another

EQUITY—*Continued.*

confer a benefit upon him and retain the same which knowingly he has permitted to be conferred upon him by mistake. *Ibid.*

§ 2. Laches.

No statute of limitations runs against a plaintiff's right of action in ejectment by reason of a void judgment of foreclosure for nonpayment of taxes, and laches, if any appeared, is no defense. *Powell v. Turpin*, 67.

Where there was a conveyance in 1906 of a one-half undivided interest in lands, the deed reciting that grantee and associates would construct a railroad line through part thereof and build a station in the vicinity and that the lands so conveyed were to be laid off and plotted into lots, which were to be sold for the benefit of the parties to the deed, all of which was done except that only a few of the lots were sold, one of the heirs of grantor, who had for more than 20 years recognized grantee's title in court pleadings and deeds, is estopped by record and laches to deny the validity of the 1906 deed. *Hardy v. Mayo*, 558.

ESCHEATS.

§ 1. Nature and Application in General.

The right of succession by escheat to all property, when there is no wife or husband or parties to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by the State Constitution, Art. IX, sec. 7, and extended by several statutes. G. S., 116-20, 21, 22, 23, 24, and 25. *Board of Education v. Johnston*, 86.

§ 2. Failure of Heirs.

Prior to 1935, G. S., 29-1, Rule 10, when an illegitimate child died leaving no issue and his mother had predeceased him, the collateral relatives of the mother could not inherit from her illegitimate child. *Board of Education v. Johnston*, 86.

§ 3. Actions to Enforce Rights of the State.

It is not necessary, under our laws governing inheritances and escheats, for the University of North Carolina to institute an action and have a court of competent jurisdiction determine whether or not such an inheritance has escheated before title to the inheritance vests in the University. Title to property which escheats does not remain *in nubibus*. *Board of Education v. Johnston*, 86.

ESTATES.

§ 4. Merger of Estates.

Where the holder of the legal title and the *cestui que trust* are one and the same person and the equitable interest of no other person intervenes, ordinarily a merger of the legal and equitable title results, defeating the trust, and conferring a fee title upon the person holding the legal title and the beneficial interest. *Blades v. R. R.*, 32.

It is also a condition of merger that the legal and equitable estates must be *coextensive* and *commensurate*, these terms implying a reference not only to quantum of the estates, but also to the quality and nature of their tenure. *Ibid.*

But where there is a plurality of trustees and beneficiaries, the rule is otherwise. The law will not reject a trust, where the group named as trustees and the group named as *cestuis* are identical in personnel, either on the theory of

ESTATES—*Continued.*

incompatability or that of merger, especially when the trustee's action must be unanimous. No *cestui que trust* has a free hand in dealing with his own equitable interest nor with that of any other; and each has an equitable interest which is separate from the legal interest held by the whole group. The confidence has been reposed in the composite mind, will and conscience of the trustees. *Ibid.*

§ 5. Estates in Fee Simple.

In a will devising lands to testator's three daughters, during their natural lives, and providing that the share of each of the daughters shall upon her death go to *her children* and their heirs absolutely, the word "children" is a word of purchase. This use of "children" does not create an estate in fee simple or a fee tail which would be converted into a fee simple by G. S., 41-1. *Moore v. Baker*, 133.

A conveyance to one for "his lifetime, and at his death to his heirs, if any, his heirs," invokes the application of the rule in *Shelley's case* and vests a fee in the first taker. The use of the phrase "if any" does not prevent the application of the rule, since there is no limitation over. *Glover v. Glover*, 152.

A devise to one and his "bodily heirs," if the testatrix intended to use the term in its strict technical sense, would violate the rule against perpetuities, or might create a fee tail, and in either case a fee simple would vest in the first taker. *Elledge v. Parrish*, 397.

§ 9a. Creation and Termination of Life Estates and Vesting of Remainders.

In a will devising lands to testator's three daughters, during their natural lives, and providing that the share of each of the daughters shall upon her death go to *her children* and their heirs absolutely, the word "children" is a word of purchase. This use of "children" does not create an estate in fee simple or a fee tail which would be converted into a fee simple by G. S., 41-1. *Moore v. Baker*, 133.

When the devise is to one for life and after his death to his children or issue, the rule in *Shelley's case* has no application, unless it manifestly appears that such words are used in the sense of heirs generally. *Ibid.*

Where a deed to lands creates an active trust for the benefit of the grantor for life and at his death the trustee, after payment of his debts, is empowered to sell the remaining property and divide the proceeds among named remaindermen, any proceeds of such realty sold will be stamped with the character of realty in determining the relationship between such remaindermen. And such equitable remaindermen are tenants in common, the remainder vesting absolutely in them upon the death of the grantor. *Parham v. Henley*, 405.

An estate in remainder is an estate limited to take effect in possession immediately after the expiration of the prior estate created at the same time and by the same instrument. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determinates, universally distinguishes a vested remainder from one that is contingent. *Pinnell v. Dowtin*, 493.

Vested remainders are those by which the present interest passes, though to be enjoyed in the future, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. The person entitled has an immediate fixed right of future enjoyment, which may

ESTATES—*Continued.*

be transferred, aliened, and charged, much in the same manner as an estate in possession. *Ibid.*

A devise to testator's wife, during her lifetime and widowhood, and at her death or remarriage, the lands to become at once the property of testator's children, creates a vested remainder in the children. *Ibid.*

Where there is a devise to one for life and then to his children, such devisee takes only a life estate, and his deed will not estop the remaindermen. Upon the birth of children the fee vests in such children. *Prince v. Barnes*, 702.

§ 9e. Proceeds of Fire Insurance Policies.

A life tenant of realty has an insurable interest therein, and nothing else appearing, such tenant for life is entitled to the full amount collected upon a policy of insurance thereon taken out by him, and the remaindermen have no interest in such insurance. *In re Will of Wilson*, 505.

ESTOPPEL.

§ 1. Creation and Operation.

Neither a covenant nor a representation on the part of a married woman that she is a *feme sole* will estop her from asserting her incapacity to convey her separate real estate without the written assent of her husband and privy examination as required by statute; and a married woman cannot by her own misrepresentation enlarge her capacity to convey an estate in land. *Buford v. Mochy*, 235.

Estoppel is applied against those who are capable of acting in their own right in respect of the matter at issue, and not against those under specific disability in respect of it. *Ibid.*

Where the title to land is vested in husband and wife as tenants by entirety, and the husband conveys the land to his wife and then survives her, he and those claiming under him, as his heirs at law as well as others standing in privity to him, are estopped by his deed to claim the land. *Keel v. Bailey*, 447.

A deed by husband to wife, intending to convey and conveying in fee land held by such husband and wife by entireties, is an estoppel against the husband, his heirs and others standing in privity to him, although the deed contains no technical covenants. *Ibid.*

Where there was a conveyance in 1906 of a one-half undivided interest in lands, the deed reciting that grantee and associates would construct a railroad line through part thereof and build a station in the vicinity and that the lands so conveyed were to be laid off and plotted into lots, which were to be sold for the benefit of the parties to the deed, all of which was done except that only a few of the lots were sold, one of the heirs of grantor, who had for more than 20 years recognized grantee's title in court pleadings and deeds, is estopped by record and laches to deny the validity of the 1906 deed. *Hardy v. Mayo*, 558.

§ 2. After-Acquired Title.

Where the title to land is vested in husband and wife as tenants by entirety, and the husband conveys the land to his wife and then survives her, he and those claiming under him, as his heirs at law as well as others standing in privity to him, are estopped by his deed to claim the land. *Keel v. Bailey*, 447.

A deed by husband to wife, intending to convey and conveying in fee land held by such husband and wife by entireties, is an estoppel against the hus-

ESTOPPEL—*Continued.*

band, his heirs and others standing in privity to him, although the deed contains no technical covenants. *Ibid.*

§ 6b. Estoppel by Misrepresentation.

Neither a covenant nor a representation on the part of a married woman that she is a *feme sole* will estop her from asserting her incapacity to convey her separate real estate without the written assent of her husband and privy examination as required by statute; and a married woman cannot by her own misrepresentation enlarge her capacity to convey an estate in land. *Buford v. Mochy*, 235.

§ 6d. Estoppel by Conduct.

To the extent that a married woman is authorized to deal with her property as a *feme sole* she is liable on her contracts and subject to estoppel; but otherwise her disability may not be circumvented or the pertinent legal restrictions of coverture set at naught. *Buford v. Mochy*, 235.

A married woman is no more estopped by her acts *in pais* than by her covenant of warranty; and it is only in a case of pure tort, altogether disconnected with contract, that an estoppel against her can operate. *Ibid.*

A party who participated in the sale of property in which he had an interest and who stood by, while it was announced that the property being sold included a certain material element, thereby inducing another to purchase, and who accepted the benefit of the sale, may not be permitted thereafter to take an inconsistent position to the injury of the purchaser. *McDaniel v. Leggett*, 806.

§§ 6g, 6h. Acceptance of Benefits: Knowledge.

Where plaintiffs allege in their complaint that one of them built a house upon the property of defendants and that plaintiff who built the house and the other plaintiffs, his assignees, thinking the property was theirs and in good faith, paid taxes thereon and occupied the dwelling openly, notoriously and adversely for more than four years, defendants being residents of the city in which the property was located and making no objection, knowledge is at least inferentially alleged and a cause of action is stated and demurrer on that ground was properly overruled. *Rhyne v. Sheppard*, 734.

Where one officiously confers a benefit upon another, the other is enriched but not unjustly enriched. But the recipient cannot stand by and see another confer a benefit upon him and retain the same which knowingly he has permitted to be conferred upon him by mistake. *Ibid.*

A party who participated in the sale of property in which he had an interest and who stood by, while it was announced that the property being sold included a certain material element, thereby inducing another to purchase, and who accepted the benefit of the sale, may not be permitted thereafter to take an inconsistent position to the injury of the purchaser. *McDaniel v. Leggett*, 806.

EVIDENCE.

§ 6. Burden of Proof in General.

The burden of proof of the issue remains on the party who asserts the affirmative thereof, and this burden never shifts. *Insurance Co. v. Boogher*, 563.

The most that a *prima facie* case does, when made out, is to warrant but not compel a verdict. A *prima facie* case is only evidence, and the party against

EVIDENCE—*Continued.*

whom it is raised is not bound to overthrow it by the greater weight of the evidence. He may introduce evidence to overcome it; or he may go to the jury upon it and combat it as insufficient proof of the ultimate facts, in which case he risks an adverse verdict. *Insurance Co. v. Boogher*, 563; *Vance v. Guy*, 607.

The rule as to burden of proof constitutes a substantial right, and error in respect thereof usually entitles the party aggrieved to a new trial. *Vance v. Guy*, 607.

§ 15. Credibility of Witness in General.

Variance, or lack of definiteness and positiveness, and contradictions on cross-examination of a witness, affects only the credibility of the witness, and of this the jury is the judge. *S. v. Ham*, 128; *Chestnutt v. Durham*, 149.

The weight of the evidence is for the jury, while its competency is for the court. *Ward v. R. R.*, 696.

§ 19. Evidence Competent to Impeach or Discredit Witness.

In an action to recover damages caused by the collision of two motor vehicles, whether or not the answer of defendant's driver, made to a question by plaintiff's driver immediately after the accident, that he "must have been asleep," was part of the *res gestæ* becomes feckless, after defendant's driver goes upon the stand and denies the statement attributed to him, the first evidence becoming competent to impeach the defendant's driver. *Hopkins v. Colonial Stores, Inc.*, 137.

Our courts do not permit a witness to be impeached by independent evidence of particular misconduct; and the admission of extrinsic record evidence of conviction of crime, for the purpose of impeaching a witness, has not been adopted in this jurisdiction. *S. v. King*, 329.

Evidence, in a criminal prosecution, tending to discredit and impeach a defendant about a collateral matter and to create an unfavorable impression of defendant in the minds of the jury, is incompetent and its admission is error. *S. v. Godwin*, 846.

§ 22. Cross-examination.

On cross-examination questions relating to crime and anti-social conduct are freely allowed; but this latitude is peculiar to cross-examination, and the examiner is bound by the answers of the witness when such answers are collateral to the issue. *S. v. King*, 329.

Where a witness on cross-examination admits that he has been convicted of an assault, on redirect examination the witness may explain such testimony. *S. v. Oxendine*, 825.

§ 27. Competency, General Rules.

Incompetent evidence, by a State's witness in a criminal trial, brought out on redirect examination in explanation of testimony elicited under cross-examination, is competent. *S. v. Sawyer*, 61.

A statement by a witness of his conclusion as to the cause of damage invades the province of the jury and should be stricken out. *Hopkins v. Colonial Stores, Inc.*, 137.

Unaccepted offers of compromise are incompetent as evidence. *Merchant v. Lassiter*, 343.

The weight of the evidence is for the jury, while its competency is for the court. *Ward v. R. A.*, 696.

EVIDENCE—*Continued.*

Objection to the introduction of evidence is waived, where other evidence to the same effect is later admitted without objection. *S. v. Oxendine*, 825.

The rule that, when incompetent evidence is admitted over objection and the same evidence has theretofore been, or is thereafter, admitted without objection, the benefit of the objection is ordinarily lost, does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception. *S. v. Godwin*, 846.

§ 32. Transactions or Communications With Decedent.

Recital in a complaint of a parol contract, void under the statute of frauds, does not bind plaintiff in his choice of action, it being common and approved practice, in actions to recover for services rendered on such contracts, to recite the same, not by way of reliance on its terms, but to rebut any presumption that the services were gratuitous, or in support of the contention that they were rendered and accepted in expectation of being paid for. Parol evidence of the contract is competent for such purpose. *Neal v. Trust Co.*, 103.

The plaintiff on his examination-in-chief, in an action against an executor or administrator, is competent to testify to the handwriting of the deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. G. S., 8-51. *Batten v. Aycock*, 225.

When the defendant, representative of the deceased, is examined in behalf of himself and his co-representative concerning a personal transaction between plaintiff and deceased, G. S., 8-51, he thus opens the door and makes competent the testimony of his adversary concerning the same transaction. *Ibid.*

The door is opened, under G. S., 8-51, by the representative of the deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opens the door as to one transaction, the other party cannot swing it wide in order to admit another independent transaction. *Ibid.*

§ 39. General Rule of Parol Evidence Affecting Writings.

A contract (except when forbidden by the statute of frauds) may be partly written and partly oral and in such cases the oral part of the agreement may be shown. However, it is the settled rule that a contemporaneous parol agreement is inadmissible to contradict that which is written. *Whitehurst v. FCX Fruit & Vegetable Service*, 628.

§ 40. Exceptions to General Rule.

Recital in a complaint of a parol contract, void under the statute of frauds, does not bind plaintiff in his choice of action, it being common and approved practice, in actions to recover for services rendered on such contracts, to recite the same, not by way of reliance on its terms, but to rebut any presumption that the services were gratuitous, or in support of the contention that they were rendered and accepted in expectation of being paid for. Parol evidence of the contract is competent for such purpose. *Neal v. Trust Co.*, 103.

The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument required any modification to be in writing, and also where the contract provided that no agent should have the right to change or modify the same. *Whitehurst v. FCX Fruit & Vegetable Service*, 628.

EVIDENCE—*Continued.*

§ 42b. Res Gestæ.

In an action to recover damages caused by the collision of two motor vehicles, whether or not the answer of defendant's driver, made to a question by plaintiff's driver immediately after the accident, that he "must have been asleep," was part of the *res gestæ* becomes feckless, after defendant's driver goes upon the stand and denies the statement attributed to him, the first evidence becoming competent to impeach the defendant's driver. *Hopkins v. Colonial Stores, Inc.*, 137.

For a declaration to be competent as part of the *res gestæ*, at least three qualifying conditions must concur: (a) The declaration must be of such spontaneous character as to preclude the likelihood of reflection and fabrication; (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom; (c) and must have some relevancy to the fact sought to be proved. If not of this character, its mere nearness to the transaction in point of time has no significance. *Coley v. Phillips*, 618.

In an action, by the next friend of an infant eight years of age against defendant, to recover for injuries sustained in a collision with defendant's automobile, allegedly caused by the negligence of the defendant, who pleaded contributory negligence, evidence that the child's mother came, half crying, upon the scene within two minutes of the accident, and said, "I have told her about crossing that highway a number of times," is not competent as part of the *res gestæ*, and there could be no imputed negligence. *Ibid.*

§ 45a. Expert and Opinion Evidence in General.

In cases where the physician's or surgeon's want of skill or lack of care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required. *Groce v. Myers*, 165.

A mere abstract statement by a witness that a person under investigation, in his opinion, was or was not competent to make a will, or a contract or a deed, is improper and inadmissible. Capacity to make a will or contract is not a simple question of fact but a conclusion which the law draws from certain facts gained from personal observation as a predicate for the expression of opinion. *In re Will of Lomax*, 459.

Opinion evidence of a medical expert should be elicited by hypothetical question, and not by simply asking the opinion of the witness. *In re Will of Holmes*, 830.

§ 46. Subjects of Opinion Evidence by Nonexperts.

While considerable latitude is permitted in the reception of opinion evidence as to mental capacity from witnesses who base their opinion on personal association, this rule should not be expanded to include mere expressions of opinion not based on circumstances importing mental incapacity. *In re Will of Lomax*, 459.

EXECUTORS AND ADMINISTRATORS.

§ 4. Removal and Revocation of Letters.

Where a son of an intestate, who left a widow, was appointed administrator and shortly thereafter the widow filed her renunciation of prior right and requested the appointment of another, the clerk's notice to the son, already appointed, to show cause on 6 September why his appointment should not be

EXECUTORS AND ADMINISTRATORS—*Continued.*

revoked, was served on 4 September, and respondent personally appeared on 6 September and objected that the notice did not provide sufficient time, refusing an offer of continuance. *Held:* Respondent was in court and the clerk acted properly in revoking his appointment. *In re Estate of Loflin*, 230.

The appointment of one as administrator of an estate should be revoked upon renunciation of the widow, who has a prior right to administer the estate or to nominate in her stead, and the clerk of the court has jurisdiction and should appoint on her request a fit and competent person nominated by her. G. S., 28-32, 28-20 (3), 28-15. *Ibid.*

§ 15d. Claims for Personal Services Rendered Deceased.

An oral contract, to devise specific real estate, or to bequeath its value to husband and wife for joint services rendered deceased, is obnoxious to the statute of frauds, and, that issue being raised, the husband and wife may separately sue the estate of deceased upon the *quantum meruit* for the services rendered by them respectively without regard to the contract. *Neal v. Trust Co.*, 103.

Recital in a complaint of a parol contract, void under the statute of frauds, does not bind plaintiff in his choice of action, it being common and approved practice, in actions to recover for services rendered on such contracts, to recite the same, not by way of reliance on its terms, but to rebut any presumption that the services were gratuitous, or in support of the contention that they were rendered and accepted in expectation of being paid for. Parol evidence of the contract is competent for such purpose. *Ibid.*

Failure to prove a special contract, between plaintiff and defendant's intestate for compensation to plaintiff for personal services by a devise of real and personal property, will not prevent plaintiff from maintaining his claim for compensation upon an implied promise to pay what these services were reasonably worth. *Grady v. Faison*, 567.

In the absence of a special contract to compensate plaintiff for his services to defendant's intestate, by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. *Ibid.*

The relationship of plaintiff, an adult nephew, to the defendant's intestate, an elderly aunt, in an action for compensation for personal services, is not sufficient to raise the presumption of gratuitous services. *Ibid.*

EXTRADITION.

§ 8. Costs of Extradition Proceedings.

Upon indictment, prosecution, and conviction of defendant for manslaughter and judgment of imprisonment to be suspended upon payment by defendant of $500.00 to relatives of the deceased and the costs of the action, where defendant made the payments required, including the expenses of the sheriff in going to a distant state and returning defendant without extradition, there is error in an order of the court that the State pay such expenses of the sheriff under G. S., 15-78. *S. v. Patterson*, 471.

FRAUD.

§ 1. In General.

Fraudulent statements, sufficient to vitiate an instrument, must be false representations of fact, peculiarly within the knowledge of the party making

FRAUD—*Continued.*

them, and where the parties, dealing at arms length, have equal means of information, so that with ordinary prudence and diligence either may rely upon his own judgment, they are presumed to have done so, and, if not, they must abide the consequences. *McLain v. Insurance Co.*, 837.

§ 2. Misrepresentation.

In an action to reform an instrument based on false and fraudulent representations, the complaint must allege (1) that the representation was false; (2) that the person making the statement, or the person or persons responsible for it, knew it to be untrue or had a reckless disregard as to its truth or falsity; (3) that the statement was intended to mislead the plaintiff and induce him to act upon it; and (4) that the plaintiff did rely on the statement and acted upon it and has been damaged thereby. *Kemp v. Funderburk*, 353.

§ 11. Sufficiency of Evidence.

In an action to recover double indemnity on a policy of insurance, where all the evidence tended to show that plaintiff settled with the defendant for the face of the policy, without double indemnity, though plaintiff knew the policy carried a rider providing double indemnity and that defendant was contesting the validity of such rider, and that plaintiff signed a full release after an hour's negotiation with defendant's representatives, having had the policy in her possession for five weeks before the settlement without excuse for not reading it, and that plaintiff relied on alleged false statements of defendant's agents that the double indemnity provision was not effective, a motion for judgment as of nonsuit should have been allowed. *McLain v. Insurance Co.*, 837.

FRAUDS, STATUTE OF.

§ 1. Purpose and Operation in General.

A suitor will not be permitted to make use of the statute of frauds, not to prevent a fraud upon himself, but to commit a fraud upon his adversary. *Johnson v. Noles*, 542.

§ 3. Pleading.

The defense, that a contract cannot be enforced because it is not in writing as required by the statute of frauds, G. S., 22-2, cannot be taken advantage of by demurrer. The defendant may plead the statute, or he may deny the contract and object to parol evidence to establish it. *Embler v. Embler*, 811.

§ 9. Application as to Realty, in General.

An oral contract, to devise specific real estate, or to bequeath its value to husband and wife for joint services rendered deceased, is obnoxious to the statute of frauds, and, that issue being raised, the husband and wife may separately sue the estate of deceased upon the *quantum meruit* for the services rendered by them respectively without regard to the contract. *Neal v. Trust Co.*, 103.

A contract to devise real estate is within the statute of frauds. A contract to bequeath personalty, standing alone, is not. *Ibid.*

§ 12. Parol Trusts.

Where cotenants of the equity in lands, subject to a mortgage, agreed orally among themselves that one of their number, himself or through another for

FRAUDS, STATUTE OF—*Continued.*

him, should bid off the lands at foreclosure sale, the other cotenants refraining from bidding, and hold the same in trust for the benefit of all the cotenants, to be sold and proceeds divided, after reimbursing the purchaser for his outlay, the agreement is not in violation of the statute of frauds, G. S., 22-2, there is sufficient consideration to support it, and it is not against public policy. *Embler v. Embler*, 811.

Where the purchaser of land at a judicial sale agreed, previously or contemporaneously, with another to buy and hold the land subject to the right of the latter to repay the purchase money and have a conveyance, there is no violation of the statute of frauds, G. S., 22-2. But where the grantor, by a mere declaration, engrafts upon his own deed a trust, the declaration must be neither prior or subsequent to, but contemporaneous with its execution. *Ibid.*

§ 13. Parties and Pleadings.

In a suit to enforce specific performance of an oral contract to convey land, the denial of the contract in the answer raises the defense of the statute of frauds. *Grady v. Faison*, 567.

In a suit against the administrator of one of several cotenants by the other cotenants, where the complaint alleged a parol trust in that defendant's intestate agreed orally with his cotenants to bid off himself, or through another for him, the lands owned jointly by such cotenants at a sale thereof under mortgage, hold and sell the same for the benefit of all, dividing the proceeds in accordance with their respective interests, after reimbursing himself for certain expenditures, and that, on the contrary, after such sale and purchase, said intestate sold parts of the property to his wife and parts to several of his children, without consideration, and sold other parts thereof for considerable sums to others, and otherwise violated the agreement, a demurrer was properly sustained for defect of parties defendant, the intestate's heirs at law being necessary parties; but a demurrer for failure to state a cause of action should have been denied. *Embler v. Embler*, 811.

The defense, that a contract cannot be enforced because it is not in writing as required by the statute of frauds, G. S., 22-2, cannot be taken advantage of by demurrer. The defendant may plead the statute, or he may deny the contract and object to parol evidence to establish it. *Ibid.*

In an action on a contract to convey land, the defense being that the contract is not in writing as required by G. S., 22-2, the parties sought to be charged may simply deny the contract or plead the statute of frauds, or they may do both, and if either plea is made good the contract cannot be enforced. *Chason v. Marley*, 844.

§ 14. Evidence.

Recital in a complaint of a parol contract, void under the statute of frauds, does not bind plaintiff in his choice of action, it being common and approved practice, in actions to recover for services rendered on such contracts, to recite the same, not by way of reliance on its terms, but to rebut any presumption that the services were gratuitous, or in support of the contention that they were rendered and accepted in expectation of being paid for. Parol evidence of the contract is competent for such purpose. *Neal v. Trust Co.*, 103.

The defense, that a contract cannot be enforced because it is not in writing as required by the statute of frauds, G. S., 22-2, cannot be taken advantage of by demurrer. The defendant may plead the statute, or he may deny the contract and object to parol evidence to establish it. *Embler v. Embler*, 811.

FRAUDS, STATUTE OF—*Continued.*

A contract which the law requires to be in writing can be proven only by the writing itself, not as the best evidence, but as the only admissible evidence of its existence; and it must adequately express the intent and obligation of the parties. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely. *Chason v. Marley*, 844.

Receipts for principal and interest and for taxes, in which no mention is made of any agreement by the person signing same to sell or convey land, are insufficient under the provisions of G. S., 22-2. *Ibid.*

GIFTS.

§§ 1, 2. Nature and Essentials of Gifts: Operation and Effect.

An owner of personalty may make a valid gift thereof, *inter vivos*, with the right of enjoyment in the donee postponed until after the death of the donor, if the subject of the gift is delivered to a third person to be given to donee on donor's death, the donor thereby intending to part with all control over the property. *Chestnutt v. Durham*, 149.

In order to pass title to personal property as a gift there must have been both an intention to give and a delivery. While the delivery may be actual or constructive, the donor's surrender of the property must be complete and his control relinquished. *S. v. Weinstein*, 645.

HIGHWAYS.

§ 2. Individual Liability of Officers.

An officer, charged with the performance of a governmental duty involving discretion, cannot be held for mere negligence with respect thereto, but, on the contrary, is not liable unless his act, or failure to act, is corrupt or malicious. The act or omission then, for all practical purposes, takes on the guise of a malicious tort. *Miller v. Jones*, 783.

An employee, as distinguished from a public officer, is generally held individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer, although such negligence may not be imputed to the employer on the principle of *respondeat superior*, when such employer is clothed with governmental immunity. *Ibid.*

§§ 6, 9. Public Roads in General: Location.

There can be in this State no public road or highway unless it be one either established by the public authorities in a proceeding before a proper tribunal; or one generally used by the public and over which the proper authorities have asserted control for a period of twenty years or more; or one dedicated to the public by the owner of the soil with the sanction of the authorities and for maintenance of which they are responsible. *Chesson v. Jordan*, 289.

§ 13. Nature and Right to Establish.

Generally speaking, the nature of the easement acquired rather than the character of the use must control the rights of the parties. Hence, no hard and fast rule may be prescribed. Each case is controlled, in a large measure, by the particular facts and circumstances therein. *Chesson v. Jordan*, 289.

HIGHWAYS—*Continued.*

§ 14. Establishment and Maintenance.

The recent use for an indefinite number of years of a neighborhood road across lands to a river, for purposes of hauling wood, boating, fishing and bathing, is no evidence of the existence of a public way. *Chesson v. Jordan*, 289.

Permissive use of a road across the lands of another does not create a right of way. The user must be hostile in character, repelling the inference that it was with the owner's consent. *Ibid.*

The weight of authority gives the owner of lands, used for agricultural purposes and burdened with a right of way acquired by prescription, the right to erect gates across the way. *Ibid.*

HOMICIDE.

§ 4c. Premeditation and Deliberation.

When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. G. S., 14-17. *S. v. Dunheen*, 738.

§ 4d. In Perpetration of a Robbery.

When the evidence offered in a criminal prosecution tends to show a homicide committed in the perpetration or attempt to perpetrate a robbery, the offense is murder in the first degree within the specific language of the statute. G. S., 14-17. *S. v. Biggs*, 722.

§ 11. Self-defense.

If an unprovoked attack is made upon one in his own place of business and the person assaulted fights only in self-defense, he is not required to retreat, regardless of the nature of the assault. *S. v. Pennell*, 622.

In a prosecution for homicide, where the court in its charge to the jury places upon the defendant the duty to retreat and avoid the difficulty unless the assault committed on premises of defendant is, or appears to be, felonious in intent, there is reversible error. *Ibid.*

If the prisoner stood entirely on the defensive and would not have fought but for the attack and the attack threatened (or reasonably appeared to him to threaten) death or great bodily harm, and he killed to save himself, then it is excusable homicide, although the prisoner did not run or flee out of his own house. *Ibid.*

§ 13. Defense of Property.

The doctrine that a man's house is his castle has no application to an officer seeking to make an arrest under a warrant charging a criminal offense. Such officer has authority to break open the doors of the dwelling occupied by the person whose arrest is directed, even during the nighttime. *S. v. Shook*, 728.

§ 16. Presumptions and Burden of Proof.

In a homicide case where an intentional killing is established, the law presumes malice from the use of a deadly weapon and the defendant is guilty of murder in the second degree, unless he can satisfy the jury, from the evidence offered, of 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. *S. v. Todd*, 358.

HOMICIDE—*Continued.*

§ 18b. Threats.

Ordinarily, remoteness in time in the making of a threat otherwise admissible does not render it incompetent as evidence, but only goes to its weight and effect. *S. v. Shook*, 728.

In a criminal prosecution for felonious assault upon an officer of the law, evidence of threats by the defendant against the officers of the law, as a class, is competent. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

In a prosecution for murder, the evidence tending to show that the prisoner killed deceased, while the two were quarreling over some trivial matters, defendant admitting the killing but alleging that he shot deceased to repel an assault, the issue is for the jury and demurrer to the evidence was properly overruled. G. S., 15-173. *S. v. Rivers*, 419.

Where two witnesses saw two of the defendants enter a store, both witnesses being present, hold up the proprietor with pistols and shoot and kill him and flee, and two other witnesses saw both of these defendants run out of the store and enter and drive away in a car with the third defendant, all four of these witnesses picking out defendants from a number of prisoners in a city jail about 30 days after the homicide and positively identifying them and their car, without denial on the part of the prisoners, and other persons identifying the same defendants as the perpetrators of another hold-up just before their arrest, there is sufficient identification and evidence of murder for the jury, notwithstanding discrepancies and inaccuracies in certain particulars of the evidence, and motion for nonsuit was properly denied. *S. v. Biggs*, 722.

In a prosecution for felonious slaying, where the State's evidence tended to show that the prisoner and deceased were drinking together and on the prisoner's invitation went together towards prisoner's house about 11 p.m., and were seen going in that direction, and about three o'clock in the morning thereafter a gun shot was heard at prisoner's home and two or three minutes later a man was seen leaving the home by the back door, and in the home a table was found on which was a jar and a bottle, both having contained liquor, with two chairs close to the table and a bucket between them containing cigarette butts, and deceased was found dead on his back in the doorway of the room where the table was, with a shotgun of the prisoner's between his legs, one barrel of which contained an empty shell with hammer down and the other hammer cocked, deceased having a shotgun wound in his breast without powder burns on his body or white shirt, and that prisoner made contradictory statements as to the time he left home and the discovery of the dead body, there is sufficient evidence to go to the jury. *S. v. Stone*, 848.

§ 27c. Charge on Question of Murder in First Degree.

In a prosecution for murder, where all of the evidence for the State tended to show a felonious slaying committed in an attempt to perpetrate a robbery, the defendants offering no testimony, the court correctly charged the jury that, if defendants were guilty at all, they were guilty of murder in the first degree, and that the only verdict the jury could render was guilty of murder in the first degree or not guilty. *S. v. Biggs*, 722.

In a prosecution on an indictment for murder in the first degree, where all of the State's evidence tended to show that the accused lay in wait for the deceased, concealed behind a hedge along a street frequented by her and shot her with a gun twice as she went along with a companion, there being no

HOMICIDE—*Continued.*

evidence of a quarrel or ill feeling and the accused offering no testimony, the court's charge that the jury must return one of two verdicts, either murder in the first degree or not guilty, is without error. *S. v. Dunheen*, 738.

§ 27d. Charge on Question of Murder in Second Degree.

In a homicide case where an intentional killing is established, the law presumes malice from the use of a deadly weapon and the defendant is guilty of murder in the second degree, unless he can satisfy the jury, from the evidence offered, of 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. *S. v. Todd*, 358.

§ 27f. Charge on Question of Defense.

In a prosecution for homicide, where the court in its charge to the jury places upon the defendant the duty to retreat and avoid the difficulty unless the assault committed on premises of defendant is, or appears to be, felonious in intent, there is reversible error. *S. v. Pennell*, 622.

Where there is an unsuccessful attempt, in a trial for murder, to bring out on cross-examination of the State's witnesses evidence of the insanity of the accused, whereupon the court gave the accused the full benefit of the plea and charged fully on insanity as a defense, there is no error of which defense can complain. *S. v. Dunheen*, 738.

HUSBAND AND WIFE.

§ 1. Mutual Rights, in General.

A wife is not the agent of her husband by force of the marital relationship; and hence the burden of proof, on an issue of undue influence between husband and wife in favor of the wife, is upon the party asserting undue influence. *In re Will of Holmes*, 830.

§ 4a. Contracts and Conveyances, in General.

One who deals with a married woman is chargeable with knowledge of her disability, and that she can convey her real estate only in the manner prescribed by the Constitution and laws on the subject. *Buford v. Mochy*, 235.

To the extent that a married woman is authorized to deal with her property as a *feme sole* she is liable on her contracts and subject to estoppel; but otherwise her disability may not be circumvented or the pertinent legal restrictions of coverture set at naught. *Ibid.*

§ 4c. Contracts With Third Person.

While G. S., 52-2, may enable a married woman ordinarily to contract and deal with her property as if she were unmarried and to be bound by estoppel; yet this statute contains a pertinent delimitation making a conveyance of real estate invalid unless with the written assent of her husband, Art. X, sec. 6, of the N. C. Constitution, and privy examination as required by law. *Buford v. Mochy*, 235.

§§ 9, 10. Husband's Right of Action for Injury to Wife: Wife's Right.

When a married woman is negligently injured by the tort of another, her husband cannot maintain an action to recover damages sustained by him through (1) imposed nursing and care, (2) loss of his wife's services, (3) mental anguish, and (4) loss of *consortium*. Under existing law, the injured

HUSBAND AND WIFE—*Continued.*

spouse alone may sue for his or her earnings or damages for personal injuries. G. S., 52-10. *Helmstetler v. Power Co.*, 821.

§ 13. Estates by Entireties, Survivorship.

Where a husband, who owned no realty whatever except his interest in an estate by the entireties, leaves a will by which he devises, to his wife for life, all of his real estate, and at her death to another, the wife is not put to her election by offering the will for probate, qualifying as executrix and entering upon the administration. *Benton v. Alexander*, 800.

§ 14. Conveyance, Lien and Encumbrances.

Where the title to land is vested in husband and wife as tenants by entirety, and the husband conveys the land to his wife and then survives her, he and those claiming under him, as his heirs at law as well as others standing in privity to him, are estopped by his deed to claim the land. *Keel v. Bailey*, 447.

A deed by husband to wife, intending to convey and conveying in fee land held by such husband and wife by entireties, is an estoppel against the husband, his heirs and others standing in privity to him, although the deed contains no technical covenants. *Ibid.*

§ 17. Liabilities and Charges.

A married woman is no more estopped by her acts *in pais* than by her covenant of warranty; and it is only in a case of pure tort, altogether disconnected with contract, that an estoppel against her can operate. *Buford v. Mochy*, 235.

§§ 18a, 18b. Conveyance: Actions.

Neither a covenant nor a representation on the part of a married woman that she is a *feme sole* will estop her from asserting her incapacity to convey her separate real estate without the written assent of her husband and privy examination as required by statute; and a married woman cannot by her own misrepresentation enlarge her capacity to convey an estate in land. *Buford v. Mochy*, 235.

One who deals with a married woman is chargeable with knowledge of her disability, and that she can convey her real estate only in the manner prescribed by the Constitution and laws on the subject. *Ibid.*

§ 28. Abandonment, Sufficiency of Evidence.

The law presumes the legitimacy of a child born in lawful wedlock, and this includes one of antenuptial conception. *S. v. McMahan*, 476.

§§ 34, 40. Evidence in Action for Alienation: Sufficiency of Evidence.

In a civil action for damages against defendant for alienation of plaintiff's wife's affections and for criminal conversation, where plaintiff's evidence tended to show that he was a tenant farmer with a large family and on satisfactory terms with his wife until they moved, at her instance, to a farm of defendant, in a different county, not far from the town where defendant lived and was in business, when immediately defendant began paying attention to plaintiff's wife, who would go off with defendant in his automobile, take the children to the moving pictures and leave them there to meet her later at defendant's store, that defendant would come out to plaintiff's house often without a reason and gave plaintiff's wife presents and was seen once to kiss her, that plaintiff remonstrated with defendant and the next year removed to another county in consequence, his wife remaining with several of their chil-

HUSBAND AND WIFE—*Continued.*

dren on defendant's farm; and defendant and plaintiff's wife denying all misconduct by their testimony, explaining innocently their automobile trips as on business for plaintiff and with his knowledge and that the children were left at the movies while the wife shopped, and all three parties showing evidence of good character, there is sufficient evidence to go to the jury on alienation, but all of the evidence is insufficient to support a verdict for criminal conversation. *Barker v. Dowdy*, 742.

§ 39. Competency of Evidence of Criminal Conversation.

As a failure to testify, in a case of alienation of affections and for criminal conversation, affords an inference against the defendant, the fact that he goes on the stand and explains suspicious circumstances will avoid such inference. *Barker v. Dowdy*, 742.

INDICTMENT.

§ 17. Nature and Scope of Bill of Particulars.

A bill of particulars is not evidence but is filed so as to advise the defendant of the various items making up the total claimed by the plaintiff, who must recover, if at all, on the strength of the evidence offered. An attack on such bill has no place in the pleadings. *S. v. Watson*, 502.

§ 19. Procedure to Raise Question of Variance.

In a criminal prosecution, based upon an indictment charging larceny of money and valuable papers and evidence tending to show, at most, an attempt to commit larceny of two suitcases, there is a fatal variance between *allegata* and *probata*, of which advantage may be taken under an exception to the disallowance of a motion for judgment as of nonsuit. *S. v. Nunley*, 96.

Allegations of ownership of the property described in a bill of indictment for larceny must be proven substantially as laid, else a fatal variance would result, and this would be available on a motion to nonsuit. *S. v. Weinstein*, 645.

INJUNCTIONS.

§ 2. Inadequacy of Legal Remedy and Irreparable Injury.

Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie. This rule applies to condemnation proceedings. *Reidsville v. Slade*, 48.

§ 4. Contracts, Conveyances and Encumbrances.

Injunction will not issue to compel the performance of an affirmative promise of service, because that would result in involuntary servitude—man may sell his services but not himself. *Kadis v. Britt*, 154.

§ 6. Torts and Trespassing.

Ordinarily, a court of equity will not interfere by injunction to determine a disputed question of title to land, nor undertake to dispossess one party for the benefit of another, but rather will leave the controverted issues of fact to be decided in an action at law. *Young v. Pittman*, 175.

When equity has been invoked by allegations of continuous trespass or wrongful interference with present right of possession, under circumstances permitting the inference of inadequate remedy at law, or other ground of equitable jurisdiction, the court may proceed to give relief by temporary re-

INJUNCTIONS—*Continued.*

straining order, pending the action, with such reasonable restrictions as the exigencies of the case may require. *Ibid.*

As one of the ends sought by the use of the ancillary remedy of injunction is to preserve the *status quo* and to protect the parties from irreparable injury, and in view of the evidence that defendant's dwelling and spring would be endangered by the use of high explosives, it was proper for the court's order to restrict the plaintiff's use of dynamite in mining mica and feldspar within 200 yards of the said house and spring. *Ibid.*

§ 10. Bonds and Proceedings.

If an application for an injunction is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by using an affidavit filed in another cause. G. S., 1-499. *Reidsville v. Slade*, 48.

§ 11. Continuance, Modification and Dissolution.

A Superior Court judge assigned to a district has, during the period of assignment, jurisdiction of all "in Chambers" matters arising in the district. including restraining orders and injunctions, G. S., 1-493, and he may, in an adjoining district, vacate or modify a temporary injunction issued without notice. G. S., 1-498. *Reidsville v. Slade*, 48.

Where the court below was not dealing with the final issue, but merely with the question whether a temporary restraining order should be continued to the hearing, and the court was not requested to find the facts in writing and did not do so, under our practice this Court will presume that, for the purpose of the order made, the court found facts sufficient to support it. *Hall v. Coach Co.*, 781.

INSANE PERSONS.

§ 4. Hearings, Judgments and Appeals.

A verdict and judgment in an inquisition, where the jury found and the court adjudged that, "due to old age and other physical infirmities," G was incapable of looking after or managing her own affairs—and nothing more, constitutes no evidence, conclusive or otherwise, of the mental incapacity of G. *Goodson v. Lehmon*, 616.

§ 5. Appointment of Guardians.

G. S., ch. 35, defines four several classes of persons for whom a guardian may be appointed, but it creates one cause and one cause only for such appointment. That cause is mental incapacity or want of understanding. *Goodson v. Lehmon*, 616.

INSURANCE.

§ 11. Agents and Brokers, Liability and Termination of Relationship.

Where an agent or broker undertakes to procure insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the obligation he has assumed, and within the amount of the proposed insurance, he may be held liable for the loss properly attributable to his negligent default. *Meiselman v. Wicker*, 417.

§ 12. Execution of Contract.

In the field of insurance a "binder," or a "binding slip," is merely a written memorandum of the most important terms of a preliminary contract of insur-

INSURANCE—*Continued.*

ance, intended to give temporary protection pending the investigation of the risk of the insurer, or until the issuance of a formal policy. *Distributing Corp. v. Indemnity Co.*, 370.

When the contract of insurance is finally complete, it is customarily embodied in a formal written instrument, termed a "policy." This instrument merges all prior agreements touching the transaction and upon accepting it the insured is conclusively presumed, in the absence of fraud, to have given his assent to all of its terms. *Ibid.*

It is incumbent upon an applicant for insurance, who receives a policy which does not conform, as to terms, to the agent's representations, to notify the company, within a reasonable time, of his refusal to accept the policy. And if an applicant receives and retains, without objection, policies made and sent to him, it is regarded as an acceptance. *Ibid.*

Reasonable time begins to run on receipt of the policy. What is a reasonable time seems to depend upon the circumstances of the case. A delay of four and a half to five months has been held unreasonable. *Ibid.*

§ 22b. Avoidance for Nonpayment of Premiums or Assessments.

A recital of payment of premium in a policy of insurance, unconditionally delivered, may not be contradicted to work a forfeiture of the policy, or to defeat a recovery thereon, in the absence of fraud. If in fact the premium was not paid, it may be recovered, but the policy cannot be invalidated on that account. *Creech v. Assurance Co.*, 144.

§ 24d. Persons Entitled to Payment.

A life tenant of realty has an insurable interest therein, and nothing else appearing, such tenant for life is entitled to the full amount collected upon a policy of insurance thereon taken out by him, and the remaindermen have no interest in such insurance. *In re Will of Wilson*, 505.

§ 30a. Forfeiture, in General.

A recital of payment of premium in a policy of insurance, unconditionally delivered, may not be contradicted to work a forfeiture of the policy, or to defeat a recovery thereon, in the absence of fraud. If in fact the premium was not paid, it may be recovered, but the policy cannot be invalidated on that account. *Creech v. Assurance Co.*, 144.

§ 30c. Evidence and Proof of Payment.

Payment of the initial premium on a policy of life insurance to one, who is a soliciting agent or broker of the company to solicit the insurance and deliver the policy, constitutes payment to the company by virtue of G. S., 58-46. *Creech v. Assurance Co.*, 144.

§ 32a. Cancellation by Insurer.

If the defendant wrongfully terminated or canceled the policy of insurance, as may be inferred from the evidence in this record, it was in derogation of the plaintiff's rights. *Abrams v. Insurance Co.*, 1.

§ 37. Actions on Policies.

In an action to recover on a policy of life insurance, where defendant admits the issuance of the policy, its assignment to plaintiff, payment by plaintiff of all premiums except the first and the death of insured, there being evidence

INSURANCE—*Continued.*

for plaintiff of payment by him of first premium to defendant's agent, a *prima facie* case for the jury is made out. *Creech v. Assurance Co.*, 144.

§ 43. Construction of Policy as to Risks Covered and Property Insured.

A policy of indemnity, insuring a corporation and an individual from liability for damages sustained in the operation of a truck, when used commercially and principally in connection with the business of the manufacture of paper, does not cover personal injuries to an employee of the individual, caused by the negligent operation of the truck in question while being used by the said individual and his employee to haul for hire the potatoes of their neighbor. *Gibbs v. Insurance Co.*, 462.

§ 44a. Provisions Limiting Liability, in General.

In an action to recover damages occasioned by the alleged negligent operation of a motor vehicle, the insurance company, which has issued a policy to protect an insolvent defendant, is not the real defendant in interest, the policy providing that no action shall lie against the company unless the insured shall have fully complied with all the terms of the policy, nor until the amount of insured's obligation shall have been finally determined by judgment against insured after trial, or by written agreement of the insured, the claimant and the company. *Davis v. Wyche*, 746.

§ 47. Estoppel and Ratification by Insurer.

In an action to recover damages for personal injuries, received by plaintiff in an automobile accident, against defendant, the owner of the car, where defendant's insurer undertakes the defense of the action, with full information as to the character of the injury, and a judgment is rendered against insured, in a subsequent action by the same plaintiff against the insurer, based on such judgment, an objection that the liability is not one within the terms of the policy will be deemed waived and a demurrer to complaint for failure to state a cause of action overruled. *Early v. Insurance Co.*, 172.

INTOXICATING LIQUORS.

§ 2. Control, Construction, and Operation.

Both by the Constitution of the United States (Amendment XXI) and our State statutes (G. S., 18-2, *et seq.*) liquor has been placed in a category somewhat different from other articles of commerce, and the State's regulations thereof should not be held obnoxious to the interstate commerce clause, unless clearly in conflict with granted Federal powers and congressional action thereunder. *S. v. Hall*, 314.

§ 4d. Presumptions From Possession.

In a criminal prosecution, charging defendant with the possession of whiskey for purpose of sale, where the State's evidence showed the presence of four tax-paid, unbroken bottles, containing less than a gallon of whiskey, in the cabin of defendant near his filling station, and four other tax-paid, unbroken bottles, containing four-fifths of a gallon, in another cabin near-by on defendant's premises, occupied by a woman who claimed these four bottles as her own purchase for her own use, the evidence is not sufficient to make out a *prima facie* case, and defendant's motion for judgment as of nonsuit should have been allowed. G. S., 18-11, 18-32. *S. v. Watts*, 771.

INTOXICATING LIQUORS—*Continued.*

In a criminal prosecution for the possession of intoxicating liquor for the purpose of sale, where the evidence taken in the light most favorable to the State tended to show only that there was found in the yard of defendant's house, in which he resided with his adoptive mother, an automobile containing 42 gallons of liquor, upon which no tax had been paid, the defendant testifying that the car was not his, but was driven by a stranger, got out of order and defendant helped push it onto his premises, where it remained several days while he was away from home, and it was subsequently driven away by someone unknown to him, and the adoptive mother testifying that she did not own the automobile and did not know the owner and that she had no interest in the liquor, the refusal of defendant's motion for judgment of nonsuit, G. S., 15-173, was error. *S. v. Kirkman*, 778.

§ 7. Transportation.

A cargo of liquor, started on its way as an interstate shipment, may be diverted to unlawful purposes and the nature of the shipment does not license the one in possession to dispose of it at will in this State. *S. v. Gordon*, 304.

The Twenty-first Amendment to the Constitution of the United States removes the protection afforded interstate commerce only from shipments of liquor into a dry state, but does not affect shipments through such state. However, congressional action under the interstate commerce clause of the Constitution renders criminal the interstate transportation of liquor in packages unlabeled to show the consignee. 18 U. S. C. A. 390, amended 25 June, 1936. *S. v. Hall*, 314.

When a cargo of intoxicating liquor, though started on its way as an interstate shipment, is diverted to unlawful purposes in violation of the law of the state in which it has come to rest, the initial character of the shipment does not clothe those in possession with immunity from prescribed penalties or oust the jurisdiction of the state courts, either as to person or property. *Ibid.*

§ 8. Forfeitures.

Where one, who was in possession of seized liquor at the time he was arrested for unlawful acts with respect thereto, pleads guilty to charges of unlawful possession and unlawful transportation of this liquor and thereupon personal judgment is rendered against him, the provisions of the statute, G. S., 18-6, are mandatory that the judgment also order the confiscation and forfeiture of the liquor so unlawfully possessed and transported. *S. v. Hall*, 314.

Our statutes seem to indicate the legislative intent to be that liquor itself, when the subject of unlawful traffic and capable of harmful effects, offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. Only in case of failure to establish a violation of the law is the restoration of the liquor permitted. G. S., 18-13. However, the processes of our courts are available to anyone legally interested to present his claim for seized liquor, and his plea will be heard. *Ibid.*

Where liquor has been confiscated by judgment, in a criminal prosecution, an order, entered more than a year after seizure, awarding it to petitioning bailee can only be construed as affording ground for further action by the real party in interest, the subject matter of the order being no longer in existence and it being manifest that no claim therefor can be prosecuted by the petitioner. *Ibid.*

INTOXICATING LIQUORS—*Continued.*

§ 9b. Presumptions and Burden of Proof.

The Turlington Act, G. S., 18-2—18-32, contemplates that no person shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions and, ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession. *S. v. Gordon*, 304.

§ 9d. Sufficiency of Evidence.

In a criminal prosecution for having liquor for the purpose of sale, where the State's evidence tended to show that defendant, who was not listed as owner or driver, had possession of a truck loaded with 579 cases of liquor, part of an interstate shipment from Maryland to South Carolina which had been diverted far from the usual route, the packages not being labeled as to consignee and contents in violation of the U. S. penal code, and the evidence also showing that defendant had offered to let one have some of the liquor and was, when arrested, apparently in the act of making delivery to this party, who then had $1,000.00 in cash on his person, an exception to a refusal to dismiss as in case of nonsuit, G. S., 15-173, is without merit, the evidence being amply sufficient without resort to the statutory presumption, G. S., 18-32. *S. v. Gordon*, 304.

In a prosecution for the unlawful possession of intoxicating liquor for the purpose of sale, evidence that defendant, who resided four miles from the still, came to the still and got one-half gallon of nontax-paid whiskey and left with it, is sufficient to make out a *prima facie* case for the jury. G. S., 18-11. *S. v. Graham*, 347.

In a criminal prosecution, charging defendant with the possession of whiskey for purpose of sale, where the State's evidence showed the presence of four tax-paid, unbroken bottles, containing less than a gallon of whiskey, in the cabin of defendant near his filling station, and four other tax-paid, unbroken bottles, containing four-fifths of a gallon in another cabin near-by on defendant's premises, occupied by a woman who claimed these four bottles as her own purchase for her own use, the evidence is not sufficient to make out a *prima facie* case, and defendant's motion for judgment as of nonsuit should have been allowed. G. S., 18-11, 18-32. *S. v. Watts*, 771.

In a criminal prosecution for the possession of intoxicating liquor for the purpose of sale, where the evidence taken in the light most favorable to the State tended to show only that there was found in the yard of defendant's house, in which he resided with his adoptive mother, an automobile containing 42 gallons of liquor, upon which no tax had been paid, the defendant testifying that the car was not his, but was driven by a stranger, got out of order and defendant helped push it onto his premises, where it remained several days while he was away from home, and it was subsequently driven away by someone unknown to him, and the adoptive mother testifying that she did not own the automobile and did not know the owner and that she had no interest in the liquor, the refusal of defendant's motion for judgment of nonsuit, G. S., 15-173, was error. *S. v. Kirkman*, 778.

§ 9f. Instructions.

Where an instruction, that "the possession of more than one gallon of liquor constitutes *prima facie* evidence of unlawful possession for the purpose of sale in violation of G. S., 18-32," is directed to a count charging unlawful posses-

INTOXICATING LIQUORS—*Continued.*

sion for the purpose of sale, and defendant is convicted on that count and on another count of unlawful transportation, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case. *S. v. Gordon*, 304.

JUDGES.

§ 2a. Rights of Regular Judge.

A Superior Court judge assigned to a district has, during the period of assignment, jurisdiction of all "in Chambers" matters arising in the district, including restraining orders and injunctions, G. S., 1-493, and he may, in an adjoining district, vacate or modify a temporary injunction issued without notice. G. S., 1-498. *Reidsville v. Slade*, 48.

JUDGMENTS.

I. Judgments by Consent.
1. Nature and essentials. Rodriguez v. Rodriguez, 275; Williamson v. Williamson, 474.
2. Jurisdiction to enter. Ibid.
3. Rendition. Ibid.

VI. Judgments on Trial of Issues or Hearing of Motions.
17a. Forms and requisites, in general. Moore v. Moore, 552; Hall v. Coach Co., 781.
17b. Conformity to verdict, proof and pleadings. S. v. Cody, 470.

VIII. Validity, Modification and Attack.
22b. Procedure: Direct and collateral attack. Powell v. Turpin, 67; Coker v. Coker, 450; Gunter v. Dowdy, 522; Holden v. Totten, 547.
22c. Pleadings and hearings. Gunter v. Dowdy, 522.
22e. For surprise, inadvertence, and excusable neglect. Ibid.
22h. For want of jurisdiction. Powell v. Turpin, 67; Rodriguez v. Rodriguez, 275; Hill v. Stansbury, 356; Ange v. Owens, 514; Holden v. Totten, 547; Moore v. Moore, 552.
24. Modification and correction. McDaniel v. Leggett, 806.

IX. Conclusiveness of Judgment.
29. Parties concluded. Powell v. Turpin, 67.
30. Matters concluded. Williamson v. Spivey, 311; In re Morris, 487.
31. Foreign judgments. S. v. Williams, 183.

X. Operation of Judgments as Bar to Subsequent Actions.
33a. Judgment as of nonsuit. Bourne v. R. R., 444.

XI. Assignment.
36. Right to assign. Harrington v. Buchanan, 123.

XII. Actions on Judgments.
40. Foreign judgments. S. v. Williams, 183.

XIII. Payment and Discharge.
42. Payment to clerk. Alligood v. Shelton, 754.

§§ 1, 2, 3. Nature and Essentials: Jurisdiction to Enter: Rendition.

In many respects a judgment by consent is treated as a contract between the parties. The power to render such judgment depends upon the subsistence of the consent at the time the agreement receives the sanction of the court, or is rendered and promulgated as a judgment. Without such consent the judgment is void. *Rodriguez v. Rodriguez*, 275.

In an action for divorce a defect in service of process cannot be validated by a consent judgment, since that would be, in practical effect, consenting to a divorce—which is diametrically opposed to public policy. *Ibid.*

While a request by defendant for leave to answer supersedes her motion to dismiss the action for want of service, it does not, by relation back, cure any prior fatal defect in the proceeding with reference to notice or validate a judgment or decree of divorce entered upon such defective service. *Ibid.*

JUDGMENTS—*Continued.*

While an affidavit, upon which substituted service is based, may be amended, G. S., 1-163, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction. *Ibid.*

The power of the court to sign a consent judgment, or to approve a compromise agreement of the parties, depends upon the unqualified consent of the parties, leaving nothing more to be ascertained by the court. Such consent must still subsist at the time the court is called upon to exercise its jurisdiction. *Williamson v. Williamson*, 474.

A consent judgment may not be signed *nunc pro tunc* over the objection of one of the parties. *Ibid.*

§ 17a. Forms and Requisites, in General.

A civil action is commenced by the issuance of summons, G. S., 1-88, and is deemed to be pending until its final determination by judgment. G. S., 1-208. *Moore v. Moore*, 552.

Where the court below was not dealing with the final issue, but merely with the question whether a temporary restraining order should be continued to the hearing, and the court was not requested to find the facts in writing and did not do so, under our practice this Court will presume that, for the purpose of the order made, the court found facts sufficient to support it. *Hall v. Coach Co.*, 781.

§ 17b. Conformity to Verdict, Proof and Pleadings.

The rule, both in civil and criminal actions, is that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *S. v. Cody*, 470.

§ 22b. Procedure: Direct and Collateral Attack.

Where a court of competent jurisdiction of the subject matter recites in its judgment or decree that service of process by summons, or in the nature of summons, has been had upon the defendant, who is subject to the jurisdiction of the court, and the judgment is regular on its face, nothing else appearing, such judgment or decree is conclusive until set aside by direct proceedings, or by motion in the cause. *Powell v. Turpin*, 67.

The recital in a judgment is conclusive as against collateral attack, when and only when it is consistent with the whole record in the case, as when the record shows service when in fact no service has been had or when summons has been lost. But the recital will not prevail against positive evidence in the record showing affirmatively that there was no legal service, or where other fatal defect appears on the face of the record or is discernible from an inspection of the record. *Ibid.*

Collateral attack upon a void judgment is particularly apposite in ejectment in which a party may show that any instrument, relied upon by his adversary as evidence of title, is void and ineffectual to convey title. *Ibid.*

Where plaintiffs, in an independent action to set aside a former judgment, allege that they did not consent to such judgment and failed to offer evidence under the belief that the issue was to be answered by consent in their favor, their remedy, if any, is by motion in the cause; and it is permissible for the trial court to treat the action as a motion in the cause, rather than dismiss it. *Coker v. Coker*, 450.

JUDGMENTS—*Continued.*

On a motion in the cause to set aside a former judgment, the evidence raises questions of fact for the court to decide and not issues of fact for the jury; and the facts found, when supported by competent evidence, are conclusive. *Ibid.*

The clerk of the Superior Court has authority, upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from an irregular judgment or one taken against him by mistake, inadvertence, surprise, or excusable neglect; and, on appeal in such cases from the clerk, the judge shall hear and pass upon the matter *de novo*, finding the facts and entering his judgment accordingly. G. S., 1-220. *Gunter v. Dowdy*, 522.

A void judgment may be attacked at any time and any place where it might injure or defeat a substantial right; and, ordinarily, the aid of the law to prevent its enforcement may be invoked in the jurisdiction where the injury is threatened. *Holden v. Totten*, 547.

§ 22c. Pleadings and Hearings.

On motion, within the year, to set aside a judgment by default or excusable neglect, the findings by the court are conclusive when supported by competent evidence. *Gunter v. Dowdy*, 522.

§ 22e. For Surprise, Inadvertence and Excusable Neglect.

Where plaintiff issued summons and filed complaint, serving both on defendant, who in apt time employed an attorney to make answer and resist the suit, and judgment by default was taken by plaintiff, no answer having been filed in consequence of the illness and death of the wife of defendant's attorney and the prolonged illness of the attorney himself, such circumstances constitute excusable neglect under G. S., 1-220. *Gunter v. Dowdy*, 522.

Excusable neglect of an attorney, who fails to file an answer for the defendants, may not be attributable to his clients. *Ibid.*

§ 22h. For Want of Jurisdiction.

Unless a defendant has been brought into court in some way sanctioned by law, or has made a voluntary appearance in person or by attorney, the court has no jurisdiction of his person and a judgment rendered against him is void and may be treated as a nullity. *Powell v. Turpin*, 67.

No statute of limitations runs against a plaintiff's right of action in ejectment by reason of a void judgment of foreclosure for nonpayment of taxes, and laches, if any appeared, is no defense. *Ibid.*

While an affidavit, upon which substituted service is based, may be amended G. S., 1-163, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction. *Rodriguez v. Rodriguez*, 275.

Where there is a want of jurisdiction over the person, the cause, the process, or the subject matter, the whole proceeding is said to be *coram non judice* and is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose. *Hill v. Stansbury*, 356.

The former statute, Michie's Code, sec. 597 (b), providing that no judgment shall be entered by the clerk except on Monday, unless otherwise provided, makes void and of no effect such judgment of the clerk on any other day. G. S., 1-215, and 1-215.1 have changed this requirement. *Ange v. Owens*, 514.

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status, as to any title by adverse possession must be

JUDGMENTS—*Continued.*

determined by the twenty-year statute, G. S., 1-39, rather than the seven-year statute, G. S., 1-38. *Ibid.*

A void judgment may be attacked at any time and any place where it might injure or defeat a substantial right; and, ordinarily, the aid of the law to prevent its enforcement may be invoked in the jurisdiction where the injury is threatened. *Holden v. Totten*, 547.

An action to quiet title or to remove a cloud from title is equitable in its nature, and now may be maintained to remove from title a cloud created by the apparent lien of an invalid judgment docketed in the county where the land lies. G. S., 41-10. *Ibid.*

In an action by a wife against her husband for separate maintenance and counsel fees wherein the judge has made an order for subsistence and counsel fees pending further orders, a judgment of the clerk, upon findings of fact that the parties had resumed marital relations and dismissing the action as of voluntary nonsuit, is a nullity and void upon its face. It is manifestly not voluntary. G. S., 1-209. *Moore v. Moore*, 552.

§ 24. Modification and Correction.

When lands of a deceased person are sold in a partition proceeding and it appears from the pleadings and evidence that it was the manifest intention of all parties that the entire lands of decedent be included in the sale, but by mistake a tract of 1.3 acres was omitted from the specific description in the petition, although announced at the sale as included, a motion in the cause by the purchaser, or his assignee, is the proper procedure to have the mistake corrected by amendment *nunc pro tunc*, and the court may make its decree conform thereto. *McDaniel v. Leggett*, 806.

§ 29. Parties Concluded.

Where a court of competent jurisdiction of the subject matter recites in its judgment or decree that service of process by summons, or in the nature of summons, has been had upon the defendant, who is subject to the jurisdiction of the court, and the judgment is regular on its face, nothing else appearing, such judgment or decree is conclusive until set aside by direct proceedings, or by motion in the cause. *Powell v. Turpin*, 67.

The recital in a judgment is conclusive as against collateral attack, when and only when it is consistent with the whole record in the case, as when the record shows service when in fact no service has been had or when summons has been lost. But the recital will not prevail against positive evidence in the record showing affirmatively that there was no legal service, or where other fatal defect appears on the face of the record or is discernible from an inspection of the record. *Ibid.*

No statute of limitations runs against a plaintiff's right of action in ejectment by reason of a void judgment of foreclosure for nonpayment of taxes, and laches, if any appeared, is no defense. *Ibid.*

§ 30. Matters Concluded.

The principle of *omnia rite acta praesumuntur* and *prima facie* presumption of rightful jurisdiction arise from the fact that a court of general jurisdiction has acted upon a matter. *Williamson v. Spivey*, 311.

No question becomes *res judicata* until settled by a final judgment. *In re Morris*, 487.

JUDGMENTS—*Continued.*

§ 31. Foreign Judgments.

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as *prima facie* valid, they are not conclusive; and, when challenged in a prosecution under G. S., 14-183, for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired *bona fide* domiciles in the state granting their divorces and that such divorces are valid. *S. v. Williams*, 183.

No valid divorce from the bonds of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. Such a decree is void and not entitled to the full faith and credit clause of the Federal Constitution. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. *Ibid.*

§ 33a. Judgments as of Nonsuit.

Although a judgment of nonsuit does not necessarily decide the merits of the cause of action, it is a final judgment in that it terminates the action. If there is no appeal or if the nonsuit is sustained on appeal, plaintiff, if he would prosecute his claim further, must institute a new action. G. S., 1-25. *Bourne v. R. R.*, 444.

§ 36. Right to Assign.

Upon the transfer on the judgment docket of a judgment by an attorney of record, acting under authority expressly granted by G. S., 1-240, nothing appearing to indicate that the attorney received less than full value, there is a presumption that such attorney acted within the scope of his authority, and the burden is on the party seeking to set the transfer aside to prove that no such authority existed. Proper issues on the pleadings and evidence herein suggested. *Harrington v. Buchanan*, 123.

§ 40. Foreign Judgments.

No valid divorce from the bonds of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. Such a decree is void and not entitled to the full faith and credit clause of the Federal Constitution. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. *S. v. Williams*, 183.

The full faith and credit clause of the Federal Constitution does not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it appears that such facts did not exist, the record will be a nullity, notwithstanding recitals in the judgment. *Ibid.*

§ 42. Payment to Clerk.

When plaintiff preserves objection and exception to the setting aside of the verdict on an issue awarding punitive damages, and subsequent to trial and judgment, defendant pays into court the full amount of the judgment rendered, which is accepted by plaintiff, with nothing in the record to show that such payment was intended or accepted as a full settlement, this Court is not required, *ex mero motu*, to dismiss the appeal, nor does such payment and acceptance preclude the plaintiff from a new trial on the issue as to which the verdict was set aside. *Alligood v. Shelton*, 754.

JUDICIAL SALES.

§ 7. Title and Rights of Purchaser.

A purchaser at a judicial sale must ascertain that the court had jurisdiction of the subject matter and the person, and that the decree authorized the sale. And when the record itself discloses a want of service of process, he takes with notice that the decree is void and purchases at his peril. *Powell v. Turpin*, 67.

JURY.

§ 1. Competency, Qualifications and Challenges for Cause.

The judge shall decide all questions as to the competency of jurors, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. *S. v. DeGraffenreid*, 517.

Upon challenge for cause, in a murder trial, of a juror, who had formed some opinion adverse to the prisoner, where such juror states that he could render a fair and impartial verdict entirely in accordance with the law and the evidence, uninfluenced by any previously formed opinion, the court is justified in a finding of indifferency. *Ibid.*

Objection to a juror for alleged bias or misconduct, during the trial of a murder case, is addressed to the court's discretion, and an adverse ruling, upon evidence and findings by the court below, will not be disturbed. *Ibid.*

A jury, as understood at common law and as used in our Constitutions, signifies twelve good (or free) and lawful men in a court of justice, duly selected and impaneled in the case to be tried. Women are excluded from juries *propter defectum sexus*, and aliens and persons under 21 years of age are not competent to serve. *S. v. Emery*, 581.

Jury service is not a right or privilege guaranteed to anyone. It is an obligation imposed by law upon those who come within a designated class possessing the prescribed qualification. Women have not yet been assigned to jury duty in this jurisdiction. *Ibid.*

The General Assembly is at liberty to impose the burden of jury service on some and relieve others of the obligation, provided the classification is not in derogation of the 14th Amendment to the Constitution of the U. S. or of our own Constitution. Classification by races would be unlawful, while there is no objection to classification on the basis of sex. *Ibid.*

With us liability to jury duty is not an incident to the right of suffrage and the 19th Amendment to the Constitution of the U. S. has no bearing on the right of women to serve on juries in North Carolina. *Ibid.*

§ 2. Peremptory Challenges.

The failure, of a defendant in a criminal prosecution to exhaust his peremptory challenges, does not affect his rights to attack an illegally constituted jury. *S. v. Emery*, 581.

LARCENY.

§ 4. Indictment.

Allegations of ownership of the property described in a bill of indictment for larceny must be proven substantially as laid, else a fatal variance would result, and this would be available on a motion to nonsuit. *S. v. Nunley*, 96; *S. v. Weinstein*, 645.

§ 5. Presumptions and Burden of Proof.

The doctrine of recent possession in larceny applies only when the possession is of a kind which manifests that the stolen goods came to the possessor

LARCENY—*Continued.*

by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have obtained unless the holder was himself the thief. The presumption is one of fact only, to be considered merely along with other evidence of guilt. *S. v. Weinstein*, 645.

A charge by the court, in a prosecution for larceny and receiving, that where property has been stolen, or so proven beyond a reasonable doubt, and some time thereafter it is found in defendant's possession, he is presumed to be the thief and the more recent the possession the stronger the presumption, is not harmful error, the court thereafter having referred to the evidence of recent possession as a circumstance which the jury had a right to consider. *Ibid.*

§ 6. Competency and Relevancy of Evidence.

In a criminal prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experience witnesses, who based their opinions on personal observation, is admissible to show a value of more than $50 to establish a felony under G. S., 14-72. *S. v. Weinstein*, 645.

§ 7. Sufficiency of Evidence and Nonsuit.

Allegations of ownership of the property described in a bill of indictment for larceny must be proven substantially as laid, else a fatal variance would result, and this would be available on a motion to nonsuit. *S. v. Weinstein*, 645.

Where a defendant, charged in the indictment with larceny and receiving, is found guilty on both counts and a single judgment rendered, there being evidence to support the judgment on the second count, motion for nonsuit is properly denied. *Ibid.*

Upon an indictment for larceny and receiving, where there is evidence that, before the goods were received by defendant, repeated notice was given him that the said goods were the property of another and that same had been feloniously carried away by defendant's trucks and notwithstanding such notice defendant received the goods and was in the act of packing same for shipment when discovered and attempted to misdirect the seeking officers, there is sufficient evidence for the jury and motion to nonsuit was properly refused. *Ibid.*

§ 8. Instructions.

A charge by the court, in a prosecution for larceny and receiving, that where property has been stolen, or so proven beyond a reasonable doubt, and some time thereafter it is found in defendant's possession, he is presumed to be the thief and the more recent the possession the stronger the presumption, is not harmful error, the court thereafter having referred to the evidence of recent possession as a circumstance which the jury had a right to consider. *S. v. Weinstein*, 645.

LIMITATIONS OF ACTIONS.

§ 1b. Applicability to Sovereign.

Generally, the maxim "*nullum tempus occurrit regi*" has been abrogated by G. S., 1-30, and is no longer in force in this State, except as otherwise provided by statutory exceptions. *Guilford County v. Hampton*, 817.

LIMITATIONS OF ACTIONS—*Continued.*

§ 2a. ***Actions* Barred *in* Ten Years.**

Where a new series of installment payments of an assessment for local improvements is provided under G. S., 160-94, the ten-year statute of limitations begins to run on each new installment as it becomes due. *Salisbury v. Arey*, 260.

§ 2e. **Actions Barred in Three Years.**

Payments by the principal on a note under seal do not stop the running of the statute of limitations in favor of an endorser. *Bank v. Stokes*, 83.

Where there is a promise by one to reward another for services performed, by devise or bequest, the statute of limitations does not begin to run against the promise until the death of the promisor. *Neal v. Trust Co.*, 103.

In the absence of a special contract to compensate plaintiff for his services to defendant's intestate, by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. *Grady v. Faison*, 567.

G. S., 153-156, authorizing boards of county commissioners to reimburse the counties for the support of indigent persons by sale in a special proceeding of any property of such persons, confers no sovereign power; and as far as the indigent persons are concerned it creates a private obligation only, which is subject to the bar of the three-year statute of limitations. G. S., 1-52. *Guilford County v. Hampton*, 817.

§ 3. **Accrual of Right of Action and Time From Which Statute Begins.**

Where there is a promise by one to reward another for services performed, by devise or bequest, the statute of limitations does not begin to run against the promise until the death of the promisor. *Neal v. Trust Co.*, 103.

Where a new series of installment payments of an assessment for local improvements is provided under G. S., 160-94, the ten-year statute of limitations begins to run on each new installment as it becomes due. *Salisbury v. Arey*, 260.

§ 15. **Pleadings.**

A new cause of action may be introduced by way of amendment to the original pleadings; but if the amendment introduces new matter, or a cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit. *Nassaney v. Culler*, 323.

LOST AND DESTROYED INSTRUMENTS.

§§ 2, 3. **Competency and Relevancy of Evidence: Sufficiency.**

If the original instrument cannot be produced and it becomes necessary to offer secondary evidence of its contents, such contents, including the course of its legal operation, must be established by the testimony of one who has first-hand knowledge of the subject, for hearsay is not competent. *Downing v. Dickson*, 455.

"First-hand knowledge," required to prove a lost instrument, does not necessarily imply testimony of verbal precision; but it is necessary to prove the execution of the paper, its delivery, its loss, the material parts, and its legal operation. *Ibid.*

LOST AND DESTROYED INSTRUMENTS—*Continued.*

In an action to set up an alleged lost mortgage and to foreclose same, where there is no evidence of who signed the mortgage, or of the authority of anyone to sign it, and a total absence of evidence of the execution of the mortgage, the allowance of a motion for judgment as in the case of nonsuit was correct. *Ibid.*

MARRIAGE.

§ 2b. Between Races.

All marriages between a white person and a person of Negro descent to the third generation, inclusive, shall be void. N. C. Const., Art. XIV, sec. 8; G. S., 51-3. Therefore, every person who has one-eighth Negro blood in his veins is within the prohibited degree set out in our Constitution and statute. *S. v. Miller*, 228.

While the Legislature has prescribed no exclusive mode or manner in which the percentage of Negro blood may be ascertained, evidence competent to show Negro blood includes—the kind of hair, color of skin, opinion and expert testimony. The evidence in this case *held* sufficient to be submitted to the jury. *Ibid.*

MASTER AND SERVANT.

I. The Relation.
2. Requisites and validity of contract of employment. Kadis v. Britt, 154.
7a. Termination of relationship, in general. Ibid.

IV. Employer's Liability for Employee's Negligent Injury of Third Person.
20. Liability of servant. Miller v. Jones, 783.
21a. "Employee" within meaning of rule. Boone v. Matheny, 250.
21b. Course of employment, scope of authority. Rogers v. Black Mountain, 119; Eldridge v. Oil Co., 457.

V. Federal Employers' Liability Act.
25. To what cases the Federal Act applies. Wilson v. Massagee, 705.

VI. State Regulation of Liability of Railroad Employers.
21. To what cases the State statutes apply. Ibid.

VII. Workmen's Compensation Act.
37. Nature and construction of Compensation Act, in general. Hayes v. Elon College, 11.
39a. Employees within meaning of Act, in general. Ibid.
39b. Independent contractors. Ibid.
39g. Public officers. Towe v. Yancey County, 579.
40d. Whether injury results from an "accident." Brown v. Aluminum Co., 766.
40e. Whether accident "arises out of employment." Hegler v. Mills Co., 669; Brown v. Alumnium Co., 766.
40f. Whether accident "arises in course of employment." Brown v. Aluminum Co., 766; Fields v. Plumbing Co., 841.
40i. Excessive heat and cold. Fields v. Plumbing Co., 841.
52b. Hearings and evidence before the Commission. Hayes v. Elon College, 11.
52c. Findings. Hegler v. Mills Co., 669; Brown v. Aluminum Co., 766; Fields v. Plumbing Co., 841.
55d. Review. Hayes v. Elon College, 11.

IX. Federal Wage and Hour Act.
63. Construction, in general. Smoke Mount Industries, Inc., v. Fisher, 72; Greene v. Mills Co., 714.
65. Employees within. Greene v. Mills Co., 714.

§ 2. Requisites and Validity of Contract of Employment.

Equity will not specifically enforce, as of course, the naked terms of a negative covenant restricting other employment, unless ancillary to and supported by a valid affirmative covenant of the employer, who has a substantial right—which it is the office of the court to protect; and the restriction laid upon the employee has a reasonable relevancy to that result, and imposes no undue hardship. *Kadis v. Britt*, 154.

The right of the employer to protect, by reasonable contract with his employee, the unique assets of his business, a knowledge of which is acquired in

MASTER AND SERVANT—*Continued.*

confidence during the employment and by reason of it, is recognized everywhere. *Ibid.*

Ordinarily, employment is a sufficient consideration to support a restrictive negative covenant in a contract, but will not, of course, aid it as to other defects. *Ibid.*

Where a contract, containing a negative covenant against other employment, is exacted from an employee while he is, and has been for years, in the same employment, his position and duties and the nature of the business remaining the same, there is a threat of discharge and no present consideration. *Ibid.*

Injunction will not issue to compel the performance of an affirmative promise of service, because that would result in involuntary servitude—man may sell his services but not himself. *Ibid.*

Where a deliveryman and bill collector, after years of service, is required by his employer to enter into a written contract, without change in his position, duties, or nature of the employment, except the requirement that neither the employee nor any member of his family shall work in a business of the same character for two years after the cessation of the employment, the contract is unreasonable and void. *Ibid.*

§ 7a. Termination of Relationship, In General.

While an employee may not subsequently use written memoranda concerning customers entrusted to him or made by him for use in his principal's business, or copies thereof, or trade secrets of his employer, he is privileged to use, in competition with his former principal, the names of customers retained in his memory and methods and processes of doing business which are but variations of those in general use. *Kadis v. Britt*, 154.

§ 20. Negligent Injury, Liability of Servant.

An employee, as distinguished from a public officer, is generally held individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer, although such negligence may not be imputed to the employer on the principle of *respondeat superior*, when such employer is clothed with governmental immunity. *Miller v. Jones*, 783.

§ 21a. Liability of Master, "Employee" Within Meaning of Rule.

In an action to recover for personal injuries to plaintiff, a passenger in defendant's wrecking car, from alleged negligence of defendant's driver, where plaintiff's evidence tended to show that defendant's foreman, on application of plaintiff, directed an employee of defendant to take defendant's wrecker and go to plaintiff's damaged car and repair it, plaintiff being invited, in the presence of the foreman, to ride with such employee, and they went to the damaged car, which could not be repaired where it was, and was taken in tow by the wrecker and on the way to defendant's garage the wrecker and its tow ran off the road, overturned and injured plaintiff, motion for judgment of nonsuit, for want of evidence of authority in driver to carry plaintiff as a passenger, was properly overruled. *Boone v. Matheny*, 250.

§ 21b. Course of Employment: Scope of Authority.

The master is responsible, under the doctrine of *respondeat superior*, for the tort of his servant which results in injury to another, when the servant is acting in the course of his employment and is at the time about his master's business. *Rogers v. Black Mountain*, 119.

MASTER AND SERVANT—*Continued.*

If a servant, wholly for a purpose of his own, disregarding the object for which he is employed and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. *Ibid.*

In an action to recover damages for alleged wrongful death of plaintiff's intestate, the evidence tending to show that a fight occurred at a filling station between plaintiff's intestate and the operator of the filling station, in the presence of an agent of defendants, who was there to deliver oil for his principals, and the operator, fleeing from plaintiff's intestate, seeking the aid of the defendant's agent to expedite his retreat, climbed into the defendant's truck, whereupon defendants' agent drove the truck off, in an effort to help the operator escape, and thus fatally injured plaintiff's intestate, who was on the running board fighting the operator through the window of the truck, judgment of nonsuit was proper. *Eldridge v. Oil Co.*, 457.

§§ 25, 31. Federal Employers' Liability Act, to What Cases the Act Applies: To What Cases the State Statutes Apply.

Before the Federal Employers' Liability Act was passed by Congress, the liability of common carriers by railroad, engaged in interstate commerce, for injuries to, or death of their employees while engaged in such commerce, was governed by the laws of the several states; but this Act took possession of the field of liability in such cases and superseded all state laws upon the subject. *Wilson v. Massagee*, 705.

Where plaintiff brings an action against an individual and an oil company, alleging the wrongful death (G. S., 28-173) of plaintiff's intestate, who at the time of his death was operating a railroad locomotive engaged in interstate commerce, by the negligence of the original defendants, who bring into the action the said railroad, an interstate common carrier, seeking contribution from such railroad as a joint tort-feasor under G. S., 1-240, there is no common liability to suit, between the original defendants and such railroad, which is a condition precedent to contribution, and motion of such railroad, on special appearance, to strike out the order making it a party defendant was properly allowed. *Ibid.*

§ 37. Workmen's Compensation Act, Nature and Construction of Compensation Act, in General.

There being no substantial controversy as to the facts, the relationship created by a contract is a question of law and the conclusion of the Industrial Commission is reviewable. *Hayes v. Elon College*, 11.

The doctrine of the liberal construction of the Workmen's Compensation Act arises out of the Act itself and relates only to cases falling within the purview of the Act. It cannot be invoked to determine when the Act applies. *Ibid.*

The courts are without authority to enlarge the meaning of the terms used in the Workmen's Compensation Act by the Legislature or to extend by construction its scope and intent so as to include persons not embraced by its terms. *Ibid.*

One who seeks to avail himself of the Workmen's Compensation Act must come within its terms and must be held to proof that he is in a class embraced in the Act. *Ibid.*

§ 39a. Employees Within Meaning of Act, in General.

Except as to public officers the definition of "employee" contained in the Workmen's Compensation Act adds nothing to the common law meaning of the

MASTER AND SERVANT—*Continued.*

term. Nor does it encroach upon or limit the common law meaning of "independent contractor." These terms must be given their natural and ordinary meaning in their accepted legal sense. *Hayes v. Elon College*, 11.

§ 39b. Independent Contractors.

The elements, which earmark the relationship of employer and independent contractor, are generally as follows: The person employed (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price, or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he thinks proper; (g) has full control over such assistants; and (h) selects his own time. The presence of no one of these *indicia* is controlling, nor is the presence of all required. *Hayes v. Elon College*, 11.

Where defendant contracted with plaintiff and two other electricians to rebuild, in their "off" hours, a part of its electric line for a lump sum of $30.00, the defendant having the holes dug and furnishing the poles, a truck, other tools and two helpers, requiring that certain trees be not trimmed but disclaiming any knowledge of the work and leaving it up to the electricians, and plaintiff was killed by a live wire while so engaged, and thereafter the remaining electricians secured other help and completed the job, the relationship thus created is that of independent contractor. *Ibid.*

§ 39g. Public Officers.

Deputy sheriffs were not included as employees of the sheriff or of the county within the meaning of the N. C. Workmen's Compensation Act as originally enacted. *Towe v. Yancey County*, 579.

Public Laws 1939, ch. 277, now G. S., 97-2, including deputy sheriffs, and persons acting as deputy sheriffs, within the term "employee" as used in the N. C. Workmen's Compensation Act, is consonant with Art. I, sec. 7, and with Art. II, sec. 29, of the N. C. Constitution. *Ibid.*

§ 40d. Whether Injury Results From "Accident."

Injury by accident implies a result produced by a fortuitous cause. An accident, within the meaning of the Workmen's Compensation Act, is defined as an unlooked-for and untoward event which is not expected or designed by the person who suffers the injury. *Brown v. Aluminum Co.*, 766.

§ 40e. Whether Accident "Arises Out of Employment."

Where there is friction and enmity between two employees, growing out of criticism of the work of one of them by the other and complaint thereof to the employer and the employee, whose work was criticized, assaulted his fellow worker from anger and revenge over such criticism, which resulted in the death of the one assaulted, such death occurred from an accident in the course of the employment, and there is sufficient inference that it arose out of the employment. *Hegler v. Mills Co.*, 669.

On the question as to whether or not an injury by accident, under the Workmen's Compensation Act, arises out of and in the course of the employment, the words "out of" refer to the origin or cause of the accident, while the words "in the course of" have reference to the time, place and circumstances under which it occurred. *Brown v. Aluminum Co.*, 766.

MASTER AND SERVANT—*Continued.*

§ 40f. Whether Accident "Arises in Course of Employment."

The fact that deceased was not actually engaged in the performance of his duties as watchman, at the time he was pushed over and injured unintentionally by a fellow employee in a hurry, does not perforce defeat his claim for compensation under the Workmen's Compensation Act. Both employees had checked in for work, were on the premises and where they had a right to be. The injury by accident arose out of and in the course of the employment. *Brown v. Aluminum Co.*, 766.

In a proceeding under the Workmen's Compensation Act to determine the liability of defendant employer, for the death of an employee, where the evidence tended to show that deceased, a plumber, was working in a partially finished frame building calking with hot lead the joints of drain pipe in the ground, his face and head being in close proximity to the melted lead, which increased the temperature from one-half to ten degrees, the general outside temperature being at the time 104° Fahrenheit, and that deceased, after working all day to 4:30 p.m. became ill, reported his condition to his employer, got in his car, drove out of the enclosure where he was working and was found 25 minutes later, a few hundred yards down the road, unconscious and died a few hours later from exhaustion and sunstroke, there is sufficient evidence to support the finding of liability. *Fields v. Plumbing Co.*, 841.

§ 40i. Excessive Heat and Cold.

The rule generally recognized is that, where the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. On the other hand, where the employee is not by reason of his work exposed to such hazards, the injuries are not ordinarily compensable. The test is whether the employment subjects the workman to a greater hazard or risk. *Fields v. Plumbing Co.*, 841.

§ 52b. Evidence and Burden of Proof.

One who seeks to avail himself of the Workmen's Compensation Act must come within its terms and must be held to proof that he is in a class embraced in the Act. *Hayes v. Elon College*, 11.

§ 52c. Findings of Industrial Commission.

When the record is such as to permit findings either for or against a party, the determination of the Industrial Commission is conclusive on appeal. *Hegler v. Mills Co.*, 669.

The factual determinations of the Industrial Commission are conclusive on appeal to the Superior Court and in this Court. *Brown v. Aluminum Co.*, 766.

Where there is evidence in the record to support the facts found, the determination of the Industrial Commission is not subject to review. *Fields v. Plumbing Co.*, 841.

§ 55d. Review.

There being no substantial controversy as to the facts, the relationship created by a contract is a question of law and the conclusion of the Industrial Commission is reviewable. *Hayes v. Elon College*, 11.

MASTER AND SERVANT—*Continued.*

§ 63. Construction of Federal Wage and Hour Act.

A complaint, alleging a breach by defendant of his contract to make patterns and cut goods for plaintiff, states a cause of action *ex contractu*, notwithstanding such breach may have been caused by defendant's neglect and failure to perform his obligations thereunder; and defendant may, therefore, plead as a counterclaim overtime, under payment and penalties under the Federal Fair Labor Standards Act of 1938. G. S., 1-135; G. S., 1-137. *Smoke Mount Industries, Inc., v. Fisher*, 72.

There is no presumption that, when Congress adopts a new scheme for Federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Congress may choose to regulate only part of what it constitutionally can regulate leaving to the states activities which, if isolated, are only local. *Greene v. Mills Co.*, 714.

§ 65. Employees Within Act.

Employees of an office building, in which is carried on no manufacture or production of goods for interstate commerce, are not within the purview of the Fair Labor Standards Act of 1938, generally known as the Wage and Hour Law. *Greene v. Mills Co.*, 714.

By the use of the phrase *engaged in commerce* in the Fair Labor Standards Act of 1938, Congress intended that those employees only are to be included who are actually so engaged, and not those merely engaged in incidental occupations which might more or less affect it, or even more remotely aid it. And Congress thought it essential to enlarge and extend the meaning of the word "engage" so as to include employees related to manufacture or production of goods. *Ibid.*

MINES AND MINERALS.

§ 3. Possession.

Where a plaintiff's deed ostensibly conveys the land in fee, the title to the mineral rights having been previously reserved and separated from the surface rights by a predecessor in title, plaintiff is remitted to a claim of adverse possession under his deed as color of title for seven years to establish his right to the minerals in question. *Vance v. Guy*, 607.

§ 6. Instructions.

Where plaintiff's surface rights to lands are conceded and the mineral rights alone are involved in a claim of adverse possession, it would seem that some appropriate limitation on the use of the word "lands" and "some part of the land" might be in order in the charge to the jury on the law as to the possession of mineral rights which will ripen into title. Especially since plaintiff is not claiming any mineral rights in part of the property embraced in his deed. *Vance v. Guy*, 607.

MORTGAGES.

§ 24. Transfer by Mortgagee.

Upon conveyance of real and personal property by plaintiff to defendants, who as part of the same transaction and at the same time gave plaintiff an option to repurchase the said property and executed to plaintiff's attorney as trustee a deed of trust thereon securing a debt, plaintiff having exercised its option, in a suit for specific performance, judgment was properly entered for plaintiff. *Oil Co. v. Baars*, 612.

MORTGAGES—*Continued.*

§ 30c. Default.

Where there is default in the payment of the first nine annual installments of a debt, secured by a deed of trust on lands, and these nine installments are all paid, there can be no valid foreclosure, based on default, commenced before default in payment of the tenth annual installment of the debt. *Oliver v. Piner*, 215.

The foreclosure of a deed of trust on lands securing a debt is not valid when based on a failure to pay taxes on the property, under a provision of the deed of trust which requires the grantor to pay all taxes accruing and upon his failure so to do authorizing the holder of the debt to pay the same and making sums so paid a part of the debt secured by the deed of trust, it appearing that the unpaid taxes in question have not been paid by anyone and nowhere in the deed of trust is any specific or definite time fixed when nonpayment of taxes shall constitute default. *Ibid.*

When a deed of trust on lands, to secure a debt, contains a provision requiring the grantor to keep the property insured for the benefit of the holder of the debt, but fails to specify any amount of insurance, the grantor may not be penalized by a foreclosure for not procuring insurance. *Ibid.*

§§ 39b, 39f. Burden of Proof and Proceedings: Actions.

Recitals, in a foreclosure deed from a trustee under a deed of trust to secure a debt, that after due advertisement as in said deed prescribed and by law provided, the trustee did expose to public sale the lands hereinafter described, are *prima facie* evidence of the correctness of the facts therein set forth. *Insurance Co. v. Boogher*, 563.

MUNICIPAL CORPORATIONS.

§ 7. Governmental Powers.

The power to enact ordinances and resolutions necessarily implies power in the same body to amend them. *Salisbury v. Arey*, 260.

G. S., 153-156, authorizing boards of county commissioners to reimburse the counties for the support of indigent persons by sale in a special proceeding of any property of such persons, confers no sovereign power; and as far as the indigent persons are concerned it creates a private obligation only, which is subject to the bar of the three-year statute of limitations. G. S., 1-52. *Guilford County v. Hampton*, 817.

§ 8. Private Powers.

The construction and maintenance of a municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of the constitutional limitations, and no right guaranteed by the 14th Amendment to the Federal Constitution will be injuriously affected thereby. *Turner v. Reidsville*, 42.

The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the majority of the qualified voters in accordance with the Constitution. Art. VII, sec. 7. *Reidsville v. Slade*, 48.

§ 12. Exercise of Governmental and Corporate Powers in General.

A municipality is not liable for the negligence of its officers and servants in the performance of purely governmental duties imposed solely for the benefit of the public. *Dixon v. Wake Forest*, 624.

MUNICIPAL CORPORATIONS—*Continued.*

A town is under no duty to provide a person, confined in its brick jail without accessible windows, with someone to look out for him and is not liable in damages for death of such prisoner from burns and suffocation, occasioned by a fire of unknown origin breaking out in such prisoner's cell during the night. *Ibid.*

§ 30. Power to Make Improvements.

The construction and maintenance of a municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of the constitutional limitation, and no right guaranteed by the 14th Amendment to the Federal Constitution will be injuriously affected thereby. *Turner v. Reidsville,* 42.

The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the majority of the qualified voters in accordance with the Constitution. Art. VII, sec. 7. *Reidsville v. Slade,* 48.

§ 34. Nature of Lien, Priorities, and Enforcement.

The provisions of G. S., 160-92, giving the property owner thirty days in which to pay assessments for local improvements, in cash without interest, or the election to pay the same in installments, are for the benefit of the property owner and, when exercised, become mandatory upon the municipality; but, when the property owner remains silent and neither pays in cash nor elects to pay in installments, the option passes to the municipality to foreclose or to collect in installments. *Salisbury v. Arey,* 260.

No authority, by way of resolution or ordinance of the governing body of a municipality, is required to divide an assessment for local improvements into installments in accordance with the terms of the original resolution. *Ibid.*

A resolution of the governing body of a municipality, providing for an extension of the payments of an assessment for local improvement in installments, which is contrary to the statute, G. S., 160-94, is defective but not void, and may be amended by a subsequent resolution to conform to the statutory requirements. *Ibid.*

The lien of a municipality, for an assessment for public improvements, is not invalidated by an extension resolution providing a new series of installment payments, where the sums of the new installments in the aggregate exceed the amount actually due at the time of the extension. Differences may be adjusted under G. S., 160-90. *Ibid.*

§ 49. Claims and Actions Against, Procedure.

Since a municipality may act only through its officers and agents, an action against it is an action against "a public officer" within the meaning of G. S., 1-77 (2), and a proper venue against a municipality is the county where the cause of action, or some part thereof, arose, and if an action against a municipality be instituted in any other county, the municipality has the right, upon motion aptly made, to have the action removed to the proper county. *Godfrey v. Power Co.,* 657.

After the commencement of an action for damages for wrongful death in the county of which plaintiff and her intestate were residents, a municipality of another county, where the accident which caused the death took place, was brought in as an alleged joint tort-feasor on motion by the original defendant. the cause may be removed, as a matter of right, to the county in which such municipality is situated. *Ibid.*

NEGLIGENCE.

I. Acts and Omissions Constituting Negligence.

1a. In general. Miller v. Jones, 783.
4b. Invitees and licensees. Watkins v. Furnishing Co., 674.
4d. Attractive nuisance. Barlow v. Gurney, 223.

II. Proximate Cause.

5. In general. Conley v. Pearce-Young-Angel Co., 211; Wyrick v. Ballard Co., Inc., 301; Watkins v. Furn. Co., 674; Atkins v. Trans. Co., 688.
6. Concurrent negligence. Caulder v. Gresham, 402.
7. Intervening negligence. Ibid.
8. Primary and secondary liability. Ibid.
9. Anticipation of injury. Atkins v. Transportation Co., 688.

III. Contributory Negligence.

13b. Parents. Coley v. Phillips, 618.
14. Comparative negligence. Daughtry v. Cline, 381.

IV. Actions.

19a. On issue of negligence. Rogers v. Black Mountain, 119; Conley v. Pearce-Young-Angel Co., 211; Boone v. Matheny, 250; Wyrick v. Ballard Co., 301; Killough v. Williams, 254; Ray v. Post, 665; Watkins v. Furnishing Co., 674; Miller v. Jones, 783.
19b. On issue of contributory negligence. Daughtry v. Cline, 381; Atkins v. Transportation Co., 688.
19c. Res ipsa loquitur. Watkins v. Furnishing Co., 674.
20. Instructions. Caulder v. Gresham, 402; Coley v. Phillips, 618.

§ 1a. In General.

An officer, charged with the performance of a governmental duty involving discretion, cannot be held for mere negligence with respect thereto, but, on the contrary, is not liable unless his act, or failure to act, is corrupt or malicious. The act or omission then, for all practical purposes, takes on the guise of a malicious tort. *Miller v. Jones*, 783.

An employee, as distinguished from a public officer, is generally held individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer, although such negligence may not be imputed to the employer on the principle of *respondeat superior*, when such employer is clothed with governmental immunity. *Ibid.*

It is a broad general rule that any person, who violates a legal duty he owes another, is liable for the natural and probable consequences of his act or omission, and exceptions to this rule should not, by mere judicial rationalization, be extended beyond the recognized public policy out of which they spring. *Ibid.*

§ 4b. Invitees and Licensees.

In an action for damages from injuries to plaintiff by the alleged negligence of defendant, where all the evidence tended to show that defendant had installed two pairs of "magic eye" doors, opening from its store into the street, which were operated electrically and by compressed air and springs, that the plaintiff entered through the left side of the double door opening, the door on the left side being partially open, and that the door on the left side suddenly closed and caught plaintiff between said left door and the other door or door frame causing injury, there is a total lack of evidence of negligence and motion for judgment of nonsuit was properly allowed. *Watkins v. Furnishing Co.*, 674.

The proprietor of a store is not an insurer of the safety of a customer while on the premises, and the doctrine of *res ipsa loquitur* is not applicable. *Ibid.*

The only duty, required of the owner of a store for the protection of his patrons, is the exercise of ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils and unsafe conditions in so far as can be ascertained by reasonable inspection and supervision. *Ibid.*

NEGLIGENCE—*Continued.*

§ 4d. Attractive Nuisance.

A person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so. *Barlow v. Gurney*, 223.

When a person maintains premises attractive to children of tender years, which become a common playground for such children, and the owner knows or by the exercise of due care should know of such use of his premises, then it becomes his duty to exercise ordinary care to provide reasonably adequate protection against injury. Failure so to do constitutes negligence. *Ibid.*

Attractiveness of the premises, as well as notice to the owner, may be shown by evidence that children were accustomed to play in and around the premises for such length of time that the owner knew or by the exercise of ordinary care should have known of such use thereof. *Ibid.*

§ 5. Proximate Cause in General.

Proximate cause is an inference of fact, to be drawn from other facts and circumstances, hence what is proximate cause is ordinarily for the jury. If the evidence is so slight as not to warrant the inference, the court will not leave the matter to the speculation of the jury. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 211.

When a thing which causes an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care. *Wyrick v. Ballard Co., Inc.*, 301.

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 injuries negligently inflicted. *Watkins v. Furnishing Co.*, 674.

When one motor vehicle is trailing another, it is the duty of the driver of the rear vehicle to exercise ordinary care to avoid an accident by driving at a reasonable distance from the vehicle he is trailing and at a speed which will not be hazardous under the circumstances. *Atkins v. Transportation Co.*, 688.

§§ 6, 7, 8. Concurrent; Intervening; and Primary and Secondary Negligence.

Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about the accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause; but where the second actor does not become apprised of such danger, until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties. *Caulder v. Gresham*, 402.

§ 9. Anticipation of Injury.

When one motor vehicle is trailing another, it is the duty of the driver of the rear vehicle to exercise ordinary care to avoid an accident by driving at a reasonable distance from the vehicle he is trailing and at a speed which will not be hazardous under the circumstances. *Atkins v. Transportation Co.*, 688.

NEGLIGENCE—*Continued.*

§ 13b. Parents.

In an action, by the next friend of an infant eight years of age against defendant, to recover for injuries sustained in a collision with defendant's automobile, allegedly caused by the negligence of the defendant, who pleaded contributory negligence, evidence that the child's mother came, half crying, upon the scene within two minutes of the accident, and said, "I have told her about crossing that highway a number of times," is not competent as part of the *res gestæ,* and there could be no imputed negligence. *Coley v. Phillips,* 618.

§ 14. Comparative Negligence.

Where plaintiff is so absorbed in the performance of his duties as to render him oblivious of danger, and this obliviousness to danger is apparent, or should, in the exercise of due care, have been apparent to the defendant, the defendant is thereby charged with the duty of using due care to avoid injuring the plaintiff, and the plaintiff is not guilty of such contributory negligence as would bar him from recovery against the defendant for not exercising due care to protect himself from the danger which was obvious or should, in the exercise of due care, have been obvious to the defendant. *Daughtry v. Cline,* 381.

§ 19a. Nonsuit on Issue of Negligence.

In an action to recover damages for wrongful death of plaintiff's intestate, where the evidence tended to show that defendant's servant, contrary to orders and without his master's knowledge, took deceased and other boys, also employees of defendant, at their request, on a pleasure ride in the master's truck, and, while so engaged on the public highway, the truck struck a hole and plaintiff's intestate was thrown out and killed, demurrer to the evidence should have been sustained. *Rogers v. Black Mountain,* 119.

The violation of a statute, imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety, has been held to constitute negligence *per se;* but, before the person claiming damages for injuries sustained can be permitted to recover, he must show a causal connection between the injury received and the disregard of the statutory mandate. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.,* 211.

Where plaintiff, a passenger in defendant's motor vehicle, brings an action to recover damages for personal injuries received from the alleged negligence of defendant's driver, when the car in which they were driving at about 35 to 40 miles per hour, on a paved highway, in fair weather, about seven-thirty a.m., suddenly left the road, ran down an embankment and turned over, causing the plaintiff's injuries, motion for judgment as of nonsuit, for lack of evidence of negligence, properly refused. *Boone v. Matheny,* 250.

When a thing which causes an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care. *Boone v. Matheny,* 250; *Wyrick v. Ballard Co.,* 301.

In an action to recover damages for injuries to plaintiff caused by alleged negligence of defendant, where plaintiff's evidence tended to show that he was driving his automobile just after dark, on a paved highway, following about forty feet in the rear of defendant's truck, at about 35 miles per hour, when defendant pulled to the right, off the shoulder of the road, apparently as if

NEGLIGENCE—*Continued.*

to stop, then suddenly, without signal or warning, drove the truck to the left across the road immediately in front of plaintiff's car, leaving neither time nor space to avoid the collision from which the damage resulted, motion for judgment as of nonsuit was erroneously granted, as contributory negligence on the part of plaintiff does not conclusively appear from his evidence. *Killough v. Williams*, 254.

Direct evidence of negligence is not required, but the same may be inferred from facts and circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury. *Wyrick v. Ballard Co.*, 301.

In an action for damages to plaintiff from the negligent operation of defendant's automobile, where plaintiff's evidence, in its most favorable light, tended to show that plaintiff and her husband attempted to cross a city street near an intersection with a signal light, passing between two cars which had stopped on account of the red light, and almost immediately after coming out into the street from between the said cars, plaintiff was clipped by defendant's car and injured, without more and with no evidence as to speed, the allowance of a motion for judgment as of nonsuit was proper. *Ray v. Post*, 665.

In an action for damages from injuries to plaintiff by the alleged negligence of defendant, where all the evidence tended to show that defendant had installed two pairs of "magic eye" doors, opening from its store into the street, which were operated electrically and by compressed air and springs, that the plaintiff entered through the left side of the double door opening, the door on the left side being partially open, and that the door on the left side suddenly closed and caught plaintiff between said left door and the other door or door frame causing injury, there is a total lack of evidence of negligence and motion for judgment of nonsuit was properly allowed. *Watkins v. Furnishing Co.*, 674.

In an action for alleged damages to plaintiff's stock of goods by the willful, wanton, and malicious negligence of defendants, employees of the State Highway Commission, where the plaintiff's evidence tended to show that defendants, in charge of a sweeper and blower in working the highway near plaintiff's store, without warning, so used the sweeper and blower as to throw such a cloud of dirt and filth through the open windows and doors of the store that the merchandise therein was badly damaged, there is ample evidence for the jury and allowance of motion for judgment as of nonsuit, G. S., 1-183, was erroneous. *Miller v. Jones*, 783.

§ 19b. On Issue of Contributory Negligence.

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. Contributory negligence can be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends only to establish it, as he thus proves himself out of court. *Daughtry v. Cline*, 381; *Atkins v. Transportation Co.*, 688.

Where the driver of plaintiff's loaded truck, trailing defendants' bus at 25 to 30 miles per hour and within 20 feet, on a street 25 to 30 feet wide with an open space on the left of from 12 to 17 feet, saw the bus begin to stop and slammed on his brakes, as he was too near to turn aside or stop, hitting the bus with such force that the front of the truck was practically demolished and the bus was badly damaged, there was error in refusing defendants' motion for

NEGLIGENCE—*Continued.*

judgment as of nonsuit on the ground of contributory negligence. *Atkins v. Transportation Co.*, 688.

§ 19c. Res Ipsa Loquitur.

The proprietor of a store is not an insurer of the safety of a customer while on the premises, and the doctrine of *res ipsa loquitur* is not applicable. *Watkins v. Furnishing Co.*, 674.

The only duty, required of the owner of a store for the protection of his patrons, is the exercise of ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils and unsafe conditions in so far as can be ascertained by reasonable inspection and supervision. *Ibid.*

§ 20. Instructions.

On the issue of contributory negligence, evidence of speed at the time of the accident is substantive, while evidence of prior speed is only corroboratory, so that a remark of the court—"I think it immaterial"—on overruling an objection to evidence of speed prior to the accident, if error, is not of such import as to require a new trial, when contributory negligence must be conceded. *Caulder v. Gresham*, 402.

In the court charge, in an action to recover for personal injuries, allegedly caused by negligence of defendant—Upon the issue of contributory negligence the test is: Did plaintiff fail to exercise that degree of care which a reasonably prudent person would have exercised or employed under the same or similar circumstances to avoid injury and was such failure proximate cause of the injury? That is what is negligence for defendant. The corresponding negligence of plaintiff is called contributory negligence. We refer to it as negligence when alleged against the defendant, and contributory negligence when alleged against plaintiff—there is no reversible error, when the same was rendered harmless by more particular instructions given thereafter. *Coley v. Phillips*, 618.

PARENT AND CHILD.

§ 1. Relation: In General.

The law presumes that children may be born to a married couple, as long as that relation continues to exist, it matters not how old either or both may be. *Prince v. Barnes*, 702.

§§ 2, 14. Proof of Relationship and Presumption of Paternity: Sufficiency of Evidence.

The law presumes the legitimacy of a child born in lawful wedlock, and this includes one of antenuptial conception. *S. v. McMahan*, 476.

PARTIES.

§ 4. Proper Parties.

In an action to recover damages occasioned by the alleged negligent operation of a motor vehicle, the insurance company, which has issued a policy to protect an insolvent defendant, is not the real defendant in interest, the policy providing that no action shall lie against the company unless the insured shall have fully complied with all the terms of the policy, nor until the amount of insured's obligation shall have been finally determined by judgment against insured after trial, or by written agreement of the insured, the claimant and the company. *Davis v. Wyche*, 746.

PARTITION.

§ 1. In General.

Ordinarily, remaindermen are not bound by a partition by the life tenants alone. But when the life estates are created by will and the power to partition is vested in the first takers or executors and the respective shares of the life tenants pass to the children of the first taker, the remaindermen are not necessary parties to a partition proceeding. *Moore v. Baker*, 498.

§ 4a. Parties and Procedure.

In a petition for partition of land, alleging that petitioners and defendants, except John B. Cherry, are tenants in common and owners of, and are seized in fee of the lands therein described, an additional statement that Cherry is in wrongful possession of some part of the land is insufficient to oust jurisdiction and a demurrer thereto was properly overruled. *Moore v. Baker*, 133.

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§§ 10, 11. Partition by Exchange of Deeds: Operation and Effect.

When a will provides for partition among life tenants and the respective shares of the life tenants pass to their children, a partition by court proceeding is not essential, and the assessment of an owelty charge against one share in favor of another is not a fatal departure from the power conferred by the will. Whether the executors or life tenants are the donees of the power to divide is immaterial, where the sole surviving executor was a party to the partition deed of the life tenants. *Moore v. Baker*, 498.

Where the partition of lands, authorized by a will, was made by deed of the sole surviving executor and the life tenants named in the will, the children of each life tenant taking their parents' share as remaindermen, and no complaint is voiced for sixty years, protest by remaindermen is too late. *Ibid.*

PENALTIES.

§ 2. Actions.

An action to enforce or collect a penalty, given by a statute to any person injured, is an action on contract. *Smoke Mount Industries, Inc., v. Fisher*, 72.

PERJURY.

§ 3. Prosecution and Punishment.

Where defendant in a criminal prosecution, having gone upon the stand and sworn that he was not the person served by the officer and that it was a case of mistaken identity, was convicted, a subsequent prosecution and conviction for perjury, based upon such evidence, will not be disturbed. *S. v. Hill*, 782.

PHYSICIANS AND SURGEONS.

§ 12. Discharge and Termination of Employment.

After the relation of physician and patient has been established, unless otherwise limited in the contract of employment, it cannot be terminated at the mere will of the physician, but must last until treatment is no longer required, or until dissolved by mutual consent or reasonable notice. *Groce v. Myers*, 165.

PHYSICIANS AND SURGEONS—*Continued.*

§§ 14, 15b. Visiting and Attention to Patient: Knowledge and Skill Required.

It is required of a physician, who has undertaken the care and treatment of a patient, not only that he have a reasonable amount of the knowledge and skill he holds himself out to have, but that he use it in the treatment of the patient. *Groce v. Myers*, 165.

§ 15d. Competency and Relevancy of Evidence in Actions for Malpractice.

In cases where the physician's or surgeon's want of skill or lack of care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required. *Groce v. Myers*, 165.

§ 15e. Sufficiency of Evidence of Damages for Malpractice.

In an action to recover damages for malpractice against a physician, where all the evidence tended to show that plaintiff, a patient in defendant's hospital and admittedly in an insane condition, got under her bed and could not be removed by the nurses, whereupon defendant took hold of her arm and pulled so hard that he heard the bone break, and failed to reduce or immobilize the fracture in a reasonable time, but sent for her father and delivered her to him, declining to treat her further, there was error in sustaining a motion for judgment as of nonsuit. *Groce v. Myers*, 165.

PLEADINGS.

§ 3a. Statement of Cause in General.

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the Court, we are directed by statute to construe such allegations liberally with a view to substantial justice between the parties. G. S., 1-151. *Kemp v. Funderburk*, 353.

§ 6. Defenses in General.

Where it is made to appear that a former action is pending between the same parties and upon substantially the same causes, when a second action is commenced, on appropriate plea by answer or demurrer, the court will dismiss the latter action. *Moore v. Moore*, 552.

§ 10. Counterclaims, Setoffs, and Cross Complaints.

A complaint, alleging a breach by defendant of his contract to make patterns and cut goods for plaintiff, states a cause of action *ex contractu*, notwithstanding such breach may have been caused by defendant's neglect and failure to perform his obligations thereunder; and defendant may, therefore, plead as a counterclaim overtime, under payment and penalties under the Federal Fair Labor Standards Act of 1938. G. S., 1-135; G. S., 1-137. *Smoke Mount Industries, Inc., v. Fisher*, 72.

§ 13½. Demurrer, in General.

The office of a demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of the allegations of facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted. *Kemp v. Funderburk*, 353.

PLEADINGS—*Continued.*

A complaint is not to be overthrown by demurrer, if in any portion or to any extent, it states facts sufficient to constitute a cause of action. *Sandlin v. Yancey*, 519.

Upon the examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, G. S., 1-151 (C. S., 535), and every reasonable intendment and presumption given the pleader, and the demurrer overruled unless the pleading is wholly insufficient. *Ibid.*

A demurrer may not be entertained after answer filed, unless by leave of court the answer is withdrawn, because a defendant is not permitted to answer and demur to one cause of action at the same time. But this rule does not apply when objection is entered to the jurisdiction or to the complaint for failure to state a cause of action. *Ezzell v. Merritt*, 602.

§ 14. To Jurisdiction of Court.

A demurrer, on the ground that the complaint does not state a cause of action, may be interposed at any time in either trial or appellate court. Even after answering, a defendant may demur *ore tenus*, or the court may raise the question *ex mero motu*. *Watson v. Lee County*, 508.

§ 15. For Failure of Complaint to State Cause of Action.

In a suit to rescind a contract and for a return of the purchase price paid, where the complaint alleges that defendant sold plaintiff a truck and trailer for a down payment, balance in monthly installments from payments to plaintiff for hauling freight for defendant, who agreed to furnish sufficient freight for that purpose, and after a substantial sum had been paid on the balance of the purchase price from such freight, the defendant took possession of the truck and trailer, arbitrarily refused to give plaintiff any more freight, demanded the balance of the purchase money, and attempted to sell the truck and trailer privately, a cause of action is stated and the allowance on the trial of an amendment to the complaint, alleging a public sale of the property by defendant to himself, and also conversion, and the court's refusal to grant defendant a continuance on that account are not prejudicial errors. *Nassaney v. Culler*, 323.

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Where plaintiffs allege in their complaint that one of them built a house upon the property of defendants and that plaintiff who built the house and the other plaintiffs, his assignees, thinking the property was theirs and in good faith, paid taxes thereon and occupied the dwelling openly, notoriously and adversely for more than four years, defendants being residents of the city in which the property was located and making no objection, knowledge is at least inferentially alleged and a cause of action is stated and demurrer on that ground was properly overruled. *Rhyne v. Sheppard*, 734.

Demurrer, *ore tenus*, to the complaint as not stating a cause of action, may be made and disposed of in this Court. *Hall v. Coach Co.*, 781.

§ 16a. For Misjoinder of Parties and Causes.

In a petition for partition of land, alleging that petitioners and defendants, except John B. Cherry, are tenants in common and owners of, and are seized in fee of the lands therein described, an additional statement that Cherry is

PLEADINGS—*Continued.*

in wrongful possession of some part of the land is insufficient to oust jurisdiction and a demurrer thereto was properly overruled. *Moore v. Baker*, 133.

No general rule has or can be adopted with regard to multifariousness of parties and causes. *Ezzell v. Merritt*, 602.

The court should allow the joinder of all parties interested in the subject of action and whose presence is necessary to a complete settlement of the controversy. G. S., 1-68, 1-69, 1-73. *Ibid.*

The statute extends to plaintiffs the right to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, arising out of the same subject of action, so that the court may dispose of the whole controversy, and its incidents and corrolaries, in one action. G. S., 1-123. *Ibid.*

In an action by heirs at law to recover for the estate of their father money, allegedly due on a verbal promise of defendant, who purchased the share of one of such heirs, to pay to the estate the same amount as a note of such heir, secured by mortgage on her share of her father's land and payable personally to the executor of her father's estate, who died prior to the suit, there is no error in making the administrator, *c. t. a.* and *d. b. n.* of the father's estate a party plaintiff and the administrator *c. t. a.* and *d. b. n.* of the deceased executor a party defendant. *Ibid.*

In a suit by a county against three defendants to foreclose a tax lien (G. S., 105-391) on five tracts of land, title to tracts 1, 2, and 3 being in E. L. for life with remainder to E. J., title to tract 4 being in E. L. in fee and the other defendants never having had any interest therein, and title to tract 5 being in E. J., and the other defendants never having had any interest therein, the joinder of the third defendant, H. F., is mere surplusage and not fatal, as he is not a necessary party; but a joint demurrer for misjoinder of parties should have been sustained, and there can be no division of the action under G. S., 1-132. *Moore County v. Burns*, 700.

If any one of several defendants is a necessary or proper party as to each tract of land, in a suit to foreclose a tax lien on several tracts, the complaint is not subject to attack by joint demurrer. *Ibid.*

In an action to recover the value of improvements made by plaintiff upon the lands of another, assignees of plaintiff are not necessary or proper parties, and demurrer for misjoinder of parties should have been sustained. *Rhyne v. Sheppard*, 734.

§ 16c. Another Action for Same Cause Pending.

Where it is made to appear that a former action is pending between the same parties and upon substantially the same causes, when a second action is commenced, on appropriate plea by answer or demurrer, the court will dismiss the latter action. *Moore v. Moore*, 552.

§ 20. Office and Effect of Demurrer.

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the Court, we are directed by statute to construe such allegations liberally with a view to substantial justice between the parties. G. S., 1-151. *Kemp v. Funderburk*, 353.

A plaintiff's demurrer to the answer searches the record and calls into question the sufficiency in law of the complaint, for an insufficient complaint cannot afford a basis for attack upon the answer. *Watson v. Lee County*, 508.

PLEADINGS—*Continued.*

§§ 21, 22. Amendment Before Trial: Amendment by Trial Court.

In a suit to rescind a contract and for a return of the purchase price paid, where the complaint alleges that defendant sold plaintiff a truck and trailer for a down payment, balance in monthly installments from payments to plaintiff for hauling freight for defendant, who agreed to furnish sufficient freight for that purpose, and after a substantial sum had been paid on the balance of the purchase price from such freight, the defendant took possession of the truck and trailer, arbitrarily refused to give plaintiff any more freight, demanded the balance of the purchase money, and attempted to sell the truck and trailer privately, a cause of action is stated and the allowance on the trial of an amendment to the complaint, alleging a public sale of the property by defendant to himself, and also conversion, and the court's refusal to grant defendant a continuance on that account are not prejudicial errors. *Nassaney v. Culler*, 323.

The court in its discretion may allow an amendment to pleadings setting up new matter, even where the transaction occurred after the action was brought, provided it does not assume the role of a new and entirely different claim. G. S., 1-163. *Ibid.*

A new cause of action may be introduced by way of amendment to the original pleadings; but if the amendment introduces new matter, or a cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit. *Ibid.*

Ordinarily, when an amendment is made containing substantially new and material allegations, the opposing party must be given an opportunity to meet the new allegations and a continuance for such purpose has been regarded as a matter of right; but not so where the facts set up are well known to the other party and a continuance would not put him in a position to dispute them. *Ibid.*

After the time for answering a pleading expires, no amendment thereto may be made as a matter of right, and a motion to amend is then addressed to the sound discretion of the court and a decision thereon is not subject to review, except in case of manifest abuse. *Hardy v. Mayo*, 558.

When lands of a deceased person are sold in a partition proceeding and it appears from the pleadings and evidence that it was the manifest intention of all parties that the entire lands of decedent be included in the sale, but by mistake a tract of 1.3 acres was omitted from the specific description in the petition, although announced at the sale as included, a motion in the cause by the purchaser, or his assignee, is the proper procedure to have the mistake corrected by amendment *nunc pro tunc*, and the court may make its decree conform thereto. *McDaniel v. Leggett*, 806.

The power of the court to amend process and pleadings, both by statute and under decisions of this Court, is ample. And in the absence of showing that the rights of innocent third persons would be injuriously affected, the amendment relates back to the commencement of the action. *Ibid.*

§ 23. Amendment After Decision on Appeal.

Leave to file answer may be granted in the court below or, in proper cases, in this Court. And such leave is hereby granted, partly because of complications in this case and to avoid repeated reviews. *Rodriguez v. Rodriguez*, 275.

PLEADINGS—*Continued.*

§ 24½. Bill of Particulars.

A bill of particulars is not evidence but is filed so as to advise the defendant of the various items making up the total claimed by the plaintiff, who must recover, if at all, on the strength of the evidence offered. An attack on such bill has no place in the pleadings. *S. v. Watson*, 502.

PRINCIPAL AND AGENT.

§ 2. Creation and Existence.

Where a mortgagor is left in possession of the mortgaged goods which, in the contemplation of the parties, are to be disposed of by the mortgagor in the ordinary course of trade, such mortgagor is the agent of the mortgagee to the extent that he may pass the title to the goods, sold in the usual way to a purchaser, freed from the mortgage lien. *Discount Corp. v. Young*, 89.

§ 7. Evidence and Proof of Agency.

In an action to recover for personal injuries to plaintiff, a passenger in defendant's wrecking car, from alleged negligence of defendant's driver, where plaintiff's evidence tended to show that defendant's foreman, on application of plaintiff, directed an employee of defendant to take defendant's wrecker and go to plaintiff's damaged car and repair it, plaintiff being invited, in the presence of the foreman, to ride with such employee, and they went to the damaged car, which could not be repaired where it was, and was taken in tow by the wrecker and on the way to defendant's garage the wrecker and its tow ran off the road, overturned and injured plaintiff, motion for judgment of nonsuit, for want of evidence of authority in driver to carry plaintiff as a passenger, was properly overruled. *Boone v. Matheny*, 250.

PROCESS.

§§ 1, 3, 4. Form and Requisite: Defective Process and Amendment: Personal Service on Resident Individuals.

Clerical errors or omissions in the copy of a summons delivered to a defendant will not affect the jurisdiction of the court, when they consist of mere irregularities, such as the want of the signature of the officer who issues it, the omission of the date of the summons, or the failure to endorse thereon the date and place of service. Such errors do not mislead or prejudice defendants. *Washington County v. Blount*, 438.

§ 5. Service by Publication.

No valid divorce from the bonds of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. Such a decree is void and not entitled to the full faith and credit clause of the Federal Constitution. Domicile of at least one of the parties is the *sine qua non* to jurisdiction in actions for divorce. *S. v. Williams*, 183.

The jurisdiction of the court, where substituted service is sought, depends upon the factual representations made to it under statutory procedure. G. S., 1-98. Since this method of giving notice is out of the ordinary, a strict compliance with the statute has always been deemed to be necessary. Averment as to due diligence is jurisdictional and its absence is a fatal defect. *Rodriguez v. Rodriguez*, 275.

PROCESS—*Continued.*

While an affidavit, upon which substituted service is based, may be amended, G. S., 1-163, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction. *Ibid.*

§ 11. Defective Service.

In an action for divorce a defect in service of process cannot be validated by a consent judgment, since that would be, in practical effect, consenting to a divorce—which is diametrically opposed to public policy. *Rodriguez v. Rodriguez*, 275.

The jurisdiction of the court, where substituted service is sought, depends upon the factual representations made to it under statutory procedure. G. S., 1-98. Since this method of giving notice is out of the ordinary, a strict compliance with the statute has always been deemed to be necessary. Averment as to due diligence is jurisdictional and its absence is a fatal defect. *Ibid.*

While an affidavit, upon which substituted service is based, may be amended. G. S., 1-163, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction. *Ibid.*

§ 15. Abuse of Process, Nature and Essentials of Right of Action.

Abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. The abuse may be of civil or criminal process. Its distinctive nature is its improper use after it has been issued, and not for maliciously causing it to issue. *Ellis v. Wellons*, 269.

There are two essential elements for an action for abuse of process, (1) the existence of an ulterior motive, and (2) an act in the use of the process not proper in the regular prosecution of the proceeding. *Ibid.*

§ 16. Actions.

In a civil action for damages, based on abuse of process, where plaintiff's evidence tended to show that defendant procured the issuance of a warrant against plaintiff for disposing of mortgaged property and offered not to have it served if plaintiff would pay the amount claimed by defendant, and that, after plaintiff's arrest under the warrant and imprisonment, defendant offered to procure his release if plaintiff would pay or work out the amount claimed, there is sufficient evidence of motive and intent to carry the case to the jury and motion for judgment as of nonsuit was properly denied. *Ellis v. Wellons*, 269.

While there is a definite distinction between an action for malicious prosecution and an action for abuse of process in that, among other things, in the former want of probable cause is a requisite and not in the latter, the evidence may be competent on both causes of action. *Ibid.*

PROHIBITION, WRIT OF.

§ 2. Where Other Remedy.

The writ of prohibition is considered discretionary and has been uniformly denied where there is other remedy. *S. v. Inman*, 531.

PROSTITUTION.

§ 5b. Competency of Evidence.

Testimony, tending to show the reputation of the house of defendant and of persons residing in or frequenting the same, is made competent by statute in cases of prosecution for prostitution. G. S., 14-206. *S. v. Harrill*, 477.

PUBLIC OFFICERS.

§ 7a. Liability, in General.

In an action by taxpayers against public officers, G. S., 128-10, to recover public funds unlawfully expended, the plaintiffs disclaiming in their complaint any right personally to participate in the recovery, after recovery, consent judgment dismissing appeals, and payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is without jurisdiction, G. S., 7-65, to order payments, out of the recovery, of such petitioner's expenses and counsel fees. *Hill v. Stansbury*, 356.

§ 8. Civil Liability to Individuals.

In an action by taxpayers against public officers, G. S., 128-10, to recover public funds unlawfully expended, the plaintiffs disclaiming in their complaint any right personally to participate in the recovery, after recovery, consent judgment dismissing appeals, and payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is without jurisdiction, G. S., 7-65, to order payments, out of the recovery, of such petitioner's expenses and counsel fees. *Hill v. Stansbury*, 356.

An officer, charged with the performance of a governmental duty involving discretion, cannot be held for mere negligence with respect thereto, but, on the contrary, is not liable unless his act, or failure to act, is corrupt or malicious. The act or omission then, for all practical purposes, takes on the guise of a malicious tort. *Miller v. Jones*, 783.

PUBLIC UTILITIES.

§ 2b. Regulation, Rates and Services.

The Legislature has not undertaken to foresee and provide for every contingency involved in the problem of supervising and regulating public utilities within the State, but it has authorized and empowered the Utilities Commission, generally, to make rules and regulations by which the purpose of the statute may be effectuated. *Utilities Com. v. Greyhound Corp.*, 293.

For the purpose of making investigations and conducting hearings, the Legislature has constituted the Utilities Commission a court of record, with all the powers of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure is prescribed, G. S., 62-11, *et seq.*, with right in any party affected thereby to appeal, G. S., 62-20, to the courts. *Ibid.*

QUIETING TITLE.

§§ 1, 2. Nature and Grounds of Remedy: Proceedings.

An action to quiet title or to remove a cloud from title is equitable in its nature, and now may be maintained to remove from title a cloud created by the apparent lien of an invalid judgment docketed in the county where the land lies. G. S., 41-10. *Holden v. Totten*, 547.

QUIETING TITLE—*Continued.*

In an action to remove a cloud from plaintiff's title, allegedly caused by a judgment against plaintiff docketed in the county in which the land is situated, where the evidence tends to show that the judgment recited that it was rendered at a certain term before a specified judge, when it was actually signed by a different judge at a subsequent term, there is sufficient evidence to justify the continuance of an injunction to the hearing. *Ibid.*

RAPE.

§ 1d. Sufficiency of Evidence.

Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. G. S., 15-169. *S. v. Gay,* 141.

§ 2. Attempts.

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short distance to her home, the evidence is insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. G. S., 15-169; G. S., 14-33. *S. v. Gay,* 141.

In order to convict of an assault with intent to commit rape, the evidence should show, not only an assault, but that defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. *Ibid.*

Where, on trial of an indictment for an assault with intent to commit rape, the evidence is not sufficient to convict as charged but is sufficient to support a verdict for an assault, and defendant moves, not only for dismissal and nonsuit, but also for directed verdict, such motions are tantamount to a request for an instruction that there is no evidence to support a conviction as charged, and upon conviction and judgment of an assault with intent to commit rape, a new trial will be granted. *Ibid.*

In a prosecution against two defendants for assault with intent to commit rape on the prosecutrix, at different times on the same night, where the State's evidence tends to show that the assaults were made separately, without evidence that either defendant aided and abetted the other, there is reversible error in a charge that, if the intent to ravish and carnally know the proscutrix existed in the mind of one of the defendants, or both of them, at any time during the assault, both would be guilty of an assault with intent to commit rape. *S. v. Walsh,* 218.

A jury may not convict an accused of assault with intent to commit rape without evidence and findings, upon proper instructions, that defendant committed an assault upon the person of the prosecutrix with intent at the time to ravish and carnally know her, by force and against her will, notwithstanding any resistance she might make. *Ibid.*

§ 4. Carnal Knowledge of Female Child Under Twelve Years.

One who has carnal knowledge of a female child under the age of twelve years is guilty of rape, and the fact that the offender may have believed the child was above the age of consent will not mitigate the crime. One having carnal knowledge of such a child does so at his peril. *S. v. Wade,* 760.

RAPE—*Continued.*

A defendant on trial for the rape of a child under twelve years of age may show that the prosecutrix is above the age of consent, but he cannot prove this fact by her declaration. *Ibid.*

§ 5. Less Degree of Crime.

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short distance to her home, the evidence is insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. G. S., 15-169; G. S., 14-33. *S. v. Gay*, 141.

Upon an indictment for an assault with intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. G. S., 15-169. *Ibid.*

RECEIVERS.

§ 12a. Filing and Proof of Claims.

Upon objections filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence, or findings, the objections alleging facts which if true would constitute a valid defense to such claim, there is error in the trial court's denial of a motion to set aside the allowance of such claim and refusal to grant a hearing on the objections. G. S., 55-153. *Trust Co. v. Lumber Co.*, 432.

RECEIVING STOLEN GOODS.

§ 2. Knowledge and Felonious Intent.

An unlawful attempt to feloniously receive stolen property, knowing it to have been stolen, is composed of two essential elements: (1) guilty knowledge at the time that the property had been stolen; and (2) the commission of some overt act with the intent to commit the major offense. *S. v. Parker*, 524.

§ 4. Presumptions and Burden of Proof.

A charge by the court, in a prosecution for larceny and receiving, that where property has been stolen, or so proven beyond a reasonable doubt, and some time thereafter it is found in defendant's possession, he is presumed to be the thief and the more recent the possession the stronger the presumption, is not harmful error, the court thereafter having referred to the evidence of recent possession as a circumstance which the jury had a right to consider. *S. v. Weinstein*, 645.

§ 5. Relevancy and Competency of Evidence.

In a criminal prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than $50 to establish a felony under G. S., 14-72. *S. v. Weinstein*, 645.

§ 6. Sufficiency of Evidence.

In a prosecution for larceny and receiving, where the State's evidence tended to show that strangers to defendants stole a barrel of molasses, hid it among

RECEIVING STOLEN GOODS—*Continued.*

some trees in a pasture, offered to sell it to defendants, who agreed to buy at a price considerably below the market and went in the nighttime to inspect and remove their purchase and were in the act of having it rolled out to their truck when the officer arrived, there is sufficient evidence to convict of an attempt to feloniously receive stolen property, knowing it to have been stolen, and motion of nonsuit, G. S., 15-173, was properly refused. *S. v. Parker,* 524.

Where a defendant, charged in the indictment with larceny and receiving, is found guilty on both counts and a single judgment rendered, there being evidence to support the judgment on the second count, motion for nonsuit is properly denied. *S. v. Weinstein,* 645.

Upon an indictment for larceny and receiving, where there is evidence that, before the goods were received by defendant, repeated notice was given him that the said goods were the property of another and that same had been feloniously carried away by defendant's trucks and notwithstanding such notice defendant received the goods and was in the act of packing same for shipment when discovered and attempted to misdirect the seeking officers, there is sufficient evidence for the jury and motion to nonsuit was properly refused. *Ibid.*

§ 8. Verdict and Judgment.

Where a defendant, charged in the indictment with larceny and receiving, is found guilty on both counts and a single judgment rendered, there being evidence to support the judgment on the second count, motion for nonsuit is properly denied. *S. v. Weinstein,* 645.

REFERENCE.

§§ 4a, 12. Consent Reference: Affirmance and Modification.

In a proceeding to establish the dividing line between two adjoining land-owners, where the original papers had been lost and substituted pleadings filed and reference made, apparently without objection, the report of the referees reciting that the reference was for finding the true dividing line and the trial court finding the report of the referees to be in compliance with their appointment to determine the matters at issue, motion of plaintiff to remand to the clerk, on the averment that the reference was simply to locate the "agreed line," was properly overruled, and, after hearing and overruling exceptions to the report, there was no error in a judgment confirming same. *Williamson v. Spivey,* 311.

On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause. *Ibid.*

REFORMATION OF INSTRUMENTS.

§ 2. Mistake Induced by Fraud.

In an action to reform an instrument based on false and fraudulent representations, the complaint must allege (1) that the representation was false; (2) that the person making the statement, or the person or persons responsible for it, knew it to be untrue or had a reckless disregard as to its truth or falsity; (3) that the statement was intended to mislead the plaintiff and induce him to act upon it; and (4) that the plaintiff did rely on the statement and acted upon it and has been damaged thereby. *Kemp v. Funderburk,* 353.

REFORMATION OF INSTRUMENTS—*Continued.*

§ 6. **Parties.**

In a suit to reform an instrument on account of false and fraudulent representations made by defendants, where plaintiffs allege in their complaint that they were directed by defendants to deal with defendants' attorney, who prepared the papers, such attorney is not a necessary party to the action, for if false representations were made by such attorney, defendants would be liable for the acts of their agent. *Kemp v. Funderburk*, 353.

In an action to reform a deed, all parties, claiming an interest in the land, or any part thereof, purported to be conveyed by the instrument to be reformed and whose interests may be affected by the reformation thereof, are necessary parties to the action. *Ibid.*

REMOVAL OF CAUSES.

§ 1. **Nature of Right and Statutory Provisions in General.**

The Federal Courts have final authority in matters of removal. *Kerley v. Oil Co.*, 465.

When a petition for removal is filed in the State court and denied, the movent may either (1) file his record in the Federal Court, subject to plaintiff's right to make a motion to remand, or (2) appeal to this Court and thence to the highest Federal Court. *Ibid.*

§ 2. **Actions and Proceedings Removable.**

In considering a petition for the removal of a cause to the Federal Courts, the allegations of the complaint are admitted to be true and the rights of the parties must be determined upon the allegations contained therein. *Smoke Mount Industries, Inc., v. Insurance Co.*, 93.

A purely nominal party, or technical arrangement of parties, will not oust the jurisdiction of the Federal Courts, nor prevent the removal of a cause thereto. The courts will look to the actual interest and the real contest between the parties for a determination of the question. *Ibid.*

§ 4a. **Determination of Whether Controversy Is Separable.**

Where insured brought suit in the State courts, alleging a loss under a fire policy, against insurer, a foreign corporation, and also against a resident mortgagee, named with plaintiff in the lost payable clause as its interest might appear, and the complaint alleged that the mortgagee had been paid in full, jurisdictional amount and diverse citizenship being admitted, petition for removal to the Federal Court should have been granted. *Smoke Mount Industries, Inc., v. Insurance Co.*, 93.

§ 4b. **Determination of Issue of Fraudulent Joinder.**

Where insured brought suit in the State courts, alleging a loss under a fire policy, against insurer, a foreign corporation, and also against a resident mortgagee, named with plaintiff in the lost payable clause as its interest might appear, and the complaint alleged that the mortgagee had been paid in full, jurisdictional amount and diverse citizenship being admitted, petition for removal to the Federal Court should have been granted. *Smoke Mount Industries, Inc., v. Insurance Co.*, 93.

In deference to the final authority in the Federal Court, it is not the practice of the State court to pass upon and determine issues of fact bearing upon the removal, when the joinder of parties is challenged as fraudulent. When the

REMOVAL OF CAUSES—*Continued.*

motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State Court decide the question on the face of the record, taking for that purpose the allegations of the petition to be true. *Kerley v. Oil Co.*, 465.

The petition is insufficient if it merely denies the allegations of the complaint. The movent who has challenged the jurisdiction because of fraudulent joinder has the duty of positively stating the facts in support of his petition. *Ibid.*

When removal is made to the Federal Court upon a petition alleging fraudulent joinder, the plaintiff may make a motion to remand, whereupon the Federal Court will hear and determine the issues of fact relating thereto and make its decision accordingly. *Ibid.*

RETIREMENT SYSTEM.

§§ 7b, 8b. Benefits: Municipal and County.

The employees of the consolidated Board of Health of New Hanover County, Public-Local Laws 1913, ch. 316, are joint employees of the city of Wilmington and county of New Hanover, and the Trustees of the Retirement System of the city of Wilmington may be compelled, by *mandamus*, to accept from such employees the payments required by ch. 708, S. L., 1943, and to place the names of such employees upon the pension rolls of such Retirement System. *Hunter v. Retirement System*, 359.

The Wilmington Public Library is an agency of the city of Wilmington, controlled by, and entirely dependent upon, the city for its existence, Private Laws 1907, ch. 138, and Private Laws 1921, ch. 5, and therefore the employees of the said library are employees of the city of Wilmington and as such are entitled to the benefits of the Retirement System under the provisions of ch. 708, S. L., 1943. *Ibid.*

The Associated Charities of the city of Wilmington is a private corporation, in no way controlled or dependent upon the city of Wilmington, although it receives some voluntary aid from said city; and the employees of said Associated Charities are not, therefore, entitled to the benefits of the Retirement System, S. L., 1943, ch. 708. *Ibid.*

The Alcoholic Beverage Control Board of New Hanover County, Public Laws 1937, ch. 49, Public-Local Laws 1937, ch. 471, is in no way under the control or management of either the city of Wilmington or New Hanover County, and its employees are not employees of said city and county and are not entitled to the benefits of the Retirement System. S. L., 1943, ch. 708. *Ibid.*

ROBBERY.

§ 1a. Nature and Elements, in General.

Upon an indictment for highway robbery at common law, it is not necessary to prove both violence and putting in fear—proof of either is sufficient. *S. v. Sawyer*, 61.

Force in the offense of robbery may be either actual or constructive. Although actual force implies personal violence, the degree of force is immaterial, so long as it is sufficient to compel the victim to part with his property. Constructive force includes all demonstrations of force, menaces or other means, however slight, by which the person robbed is put in fear sufficient to prevent resistance. *Ibid.*

ROBBERY—*Continued.*

The kind and value of property taken in highway robbery is not material; and an allegation of ownership is sufficient when it negatives the idea of the accused taking his own property. *Ibid.*

§ 1b. Robbery With Firearms.

Force or intimidation, occasioned by the use or threatened use of firearms, is the main element of the offense of robbery with firearms. G. S., 14-87. It is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show it was the property of the person assaulted or in his care, and had a value. *S. v. Mull*, 574.

Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there is no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge. *Ibid.*

§ 3. Prosecution and Punishment.

The kind and value of property taken in highway robbery is not material; and an allegation of ownership is sufficient when it negatives the idea of the accused taking his own property. *S. v. Sawyer*, 61.

SALES.

§ 11. Transfer of Title as Between the Parties.

The title to merchandise, sold and shipped from without this State to a person within the State, does not pass to the purchaser, when the shipment is C.O.D., until delivery by the carrier, who is an agent of the seller, hence a sales tax on such transaction would not contravene the commerce clause of the U. S. Constitution. *Johnston v. Gill, Comr. of Revenue*, 638.

SCHOOLS.

§§ 1, 9. Establishment and Operation of Private Schools: Public Schools, in General.

The State maintains no monopoly in the education of its citizens. Neither the school law nor the educational policy of the State excludes private educational enterprise patently conducive to the public welfare. *West v. Lee*, 79.

A trust created by will in 1895, providing a free permanent common school English education for poor white children of Buncombe County, of eight years old and over, whose parents are financially unable to so educate them, is valid and effective, notwithstanding the great advance in free educational facilities provided by the State. *Ibid.*

SHERIFFS.

§ 2. Deputies and Assistants.

Deputy sheriffs were not included as employees of the sheriff or of the county within the meaning of the N. C. Workmen's Compensation Act as originally enacted. *Towe v. Yancey County*, 579.

A deputy sheriff, although appointed by the sheriff and acting for him, is considered a public officer; and his compensation as fixed by statute, whether fees or salary, is for public service. *Ibid.*

SPECIFIC PERFORMANCE.

§ 1. Contracts Specifically Enforceable.

An action for specific performance, under our statute authorizing service by publication, is in the nature of an action *in rem*, and a contract for the conveyance of real property may be enforced against a nonresident. G. S., 1-98. *Voehringer v. Pollock*, 409.

Specific performance does not follow as a matter of course merely by establishing the existence and validity of the contract involved. It is not a matter of absolute right even though a legal right to damages for breach of the contract may exist, and it may be refused where the defense is not such as would warrant a rescission of the contract. *Knott v. Cutler*, 427.

As a general rule, when it appears that a contract was unfairly procured by overreaching or overkeenness on plaintiff's part, or was induced or procured by means of oppression, extortion, threats, or illegal promises on his part, the plaintiff cannot obtain specific performance. *Ibid.*

A binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced; and mere inadequacy of price, without more, will not as a rule prevent the application of this principle. *Ibid.*

Specific performance of an oral contract to devise real property is unenforceable, as is also an indivisible contract to devise real and personal property. *Grady v. Faison*, 567.

Upon conveyance of real and personal property by plaintiff to defendants, who as part of the same transaction and at the same time gave plaintiff an option to repurchase the said property and executed to plaintiff's attorney, as trustee, a deed of trust thereon securing a debt, plaintiff having exercised its option, in a suit for specific performance, judgment was properly entered for plaintiff. *Oil Co. v. Baars*, 612.

§ 3. Waiver and Defenses.

An extension of the time for tender of the balance of the purchase price of land and for the acceptance of the deed by plaintiff, given by defendants, not for the benefit and accommodation of the plaintiff, but in order that defendants may give a good deed with full covenants and warranty, which defendants could not then do, is valid and binding on the parties though not in writing and without additional consideration. *Johnson v. Noles*, 542.

He, who would insist on strict performance of a contract, must not himself be the cause of the breach. *Ibid.*

In a suit to enforce specific performance of an oral contract to convey land, the denial of the contract in the answer raises the defense of the statute of frauds. *Grady v. Faison*, 567.

§ 4. Proceedings and Relief.

An action for specific performance, under our statute authorizing service by publication, is in the nature of an action *in rem*, and a contract for the conveyance of real property may be enforced against a nonresident. G. S., 1-98. *Voehringer v. Pollock*, 409.

Where one party to an option to purchase land is ready, able and willing and offers to perform his part and the other party refuses to comply with the terms thereof, tender of the balance of the purchase price and demand for a deed are unnecessary. *Johnson v. Noles*, 542.

Issues approved in a suit for specific performance of a contract to convey land. *Ibid.*

STATE.

§ 2a. Actions Against State.

Generally, the maxim "*nullum tempus occurrit regi*" has been abrogated by G. S., 1-30, and is no longer in force in this State, except as otherwise provided by statutory exceptions. *Guilford County v. Hampton*, 817.

STATUTES.

§§ 5a, 5b. General Rules of Construction: Construction in Regard to Constitutionality.

Every statute is to be interpreted in the light of the Constitution and the common law and as it was intended to be understood at the time of its enactment. *S. v. Emery*, 581.

Where there are two provisions in a statute, one of which is special or particular, and certainly includes the matter in hand, and the other general, which, if standing alone, would include the matter and thus conflict with the particular provisions, the special will be taken as intended to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict. *Godfrey v. Power Co.*, 657.

SUBROGATION.

§ 1. Nature and Grounds of Remedy.

Legal subrogation is a device adopted by equity to compel the ultimate discharge of an obligation by him who, in good conscience, ought to pay it. It arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable. The application of this doctrine has been expanded beyond matters of strict suretyship or priorities and is called into operation by a variety of circumstances. *Beam v. Wright*, 677.

§ 2. Operation, Enforcement and Effect.

It is generally held that the equitable relief of subrogation will be withheld from those who are themselves guilty of wrongful conduct with respect to the transaction in which it is invoked. One who is a mere volunteer, or who is guilty of fraud in bringing about the situation wherein he seeks the aid of equity, will not be permitted to avail himself of relief by the doctrine of subrogation. It will not be applied to a tortious transaction at the instance of the tort-feasor, nor enforced in a doubtful case when the rights are not clear. *Beam v. Wright*, 677.

TAXATION.

§ 3a. Tax Rate.

The board of county commissioners of Beaufort County having levied, in the year 1942, a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by Art. V, sec. 6, N. C. Constitution, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation, G. S., 153-9 (6), and any levy for public welfare or poor relief, in excess thereof, is invalid. *R. R. v. Beaufort County*, 115.

§ 5. Public Purpose.

It remains, in the final analysis, a question for the court to determine whether a particular expenditure of public funds or a proposed levy of taxes

TAXATION—*Continued.*

is for public purpose, taking into consideration the pertinent factors of time and circumstance. *Turner v. Reidsville*, 42.

To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest must be so clear and palpable as to be immediately perceptible to every mind. Where there is doubt the act of the Legislature, approved by the people to be taxed, should prevail. *Ibid.*

The construction and maintenance of a municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of the constitutional limitation, and no right guaranteed by the 14th Amendment to the Federal Constitution will be injuriously affected thereby. *Ibid.*

The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the majority of the qualified voters in accordance with the Constitution. Art. VII, sec. 7. *Reidsville v. Slade*, 48.

§§ 7, 14, 15. Interstate Commerce: Excise, License and Franchise Taxes: Sales, Use and Transfer Taxes.

While a sales tax and a use tax may bring about the same result, they are different in conception. A sales tax is a tax on freedom of purchase and, when applied to interstate transactions, runs counter to the commerce clause of the Federal Constitution and is void. Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. These taxes, taken together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased. *Johnston v. Gill, Comr. of Revenue*, 638.

Where one is engaged within this State in a regular business of soliciting orders for tailor-made clothing on commission, part of which he collects at the time the order is taken, and the clothes are shipped by the maker, who collects the balance of the price, directly to the purchaser, such transaction is subject to the use tax and the solicitor is a retailer and an agent for collecting the use tax, for which he is liable on his failure to do so. G. S., 105-219, 105-220, 105-223. *Ibid.*

The title to merchandise, sold and shipped from without this State to a person within the State, does not pass to the purchaser, when the shipment is C.O.D., until delivery by the carrier, who is an agent of the seller, hence a sales tax on such transaction would not contravene the commerce clause of the U. S. Constitution. *Ibid.*

§ 38c. Recovery of Tax Paid Under Protest.

Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. A compliance with G. S., 105-406, is a prerequisite to a right of action for the recovery of taxes or any part thereof. *Middleton v. R. R.*, 309.

§ 40b. Foreclosure of Certificates, Notice and Parties.

In an action by an ex-clerk of the Superior Court against the county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned

TAXATION—*Continued.*

over to the county, is demurrable as not stating a cause of action, the county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. G. S., 105-391 (k), 105-391 (s). *Watson v. Lee County*, 508.

Since there is no obligation on a county to pay any advance cost or fees accrued in a tax foreclosure suit unless cast, the voluntary payment to the clerk of the Superior Court of certain amounts, less than the fees fixed by statute, does not constitute grounds for an action against the county for the remainder of the total amount of such fees. *Ibid.*

In a suit by a county against three defendants to foreclose a tax lien (G. S., 105-391) on five tracts of land, title to tracts 1, 2, and 3 being in E. L. for life with remainder to E. J., title to tract 4 being in E. L. in fee and the other defendants never having had any interest therein, and title to tract 5 being in E. J., and the other defendants never having had any interest therein, the joinder of the third defendant, H. F., is mere surplusage and not fatal, as he is not a necessary party; but a joint demurrer for misjoinder of parties should have been sustained, and there can be no division of the action under G. S., 1-132. *Moore County v. Burns*, 700.

TENANTS IN COMMON.

§ 8. One Tenant Binding His Cotenant.

While, ordinarily, a tenant in common in dealing with third parties may not bind his cotenant by any act, with relation to the common property, not previously authorized or subsequently ratified, acts by one tenant, with relation to the common interest, are presumed to have been done by authority and for the benefit of a cotenant, if there be any circumstances upon which to base such presumption. And there is no presumption to the contrary. *Hinson v. Shugart*, 207.

TORTS.

§ 6. Right to Contribution Among Tort-Feasors.

The intent and purpose of G. S., 1-240, is to permit a defendant, who has been sued in a tort action, to bring into the action for the purpose of enforcing contribution, any joint tort-feasor against whom the plaintiff could have originally brought suit in the same action. *Wilson v. Massagee*, 705.

Where plaintiff brings an action against an individual and an oil company, alleging the wrongful death (G. S., 28-173) of plaintiff's intestate, who at the time of his death was operating a railroad locomotive engaged in interstate commerce, by the negligence of the original defendants, who bring into the action the said railroad, an interstate common carrier, seeking contribution from such railroad as a joint tort-feasor under G. S., 1-240, there is no common liability to suit, between the original defendants and such railroad, which is a condition precedent to contribution, and motion of such railroad, on special appearance, to strike out the order making it a party defendant was properly allowed. *Ibid.*

§ 9a. Effect of Release.

A release, executed by an injured party and based upon a valuable consideration, is a complete defense to an action for damages on account of such injuries, and where the execution of such a release is admitted or established by the evidence, it is necessary for the plaintiff to prove matter in avoidance of the release. *Watkins v. Grier*, 339.

TORTS—*Continued.*

An injured person, who can read, is under the duty to read a release from liability for damages for personal injuries before signing it. Hence, where such person signs a release without reading it, he is charged with knowledge of its contents, and he may not thereafter attack it upon the ground that, at the time of signing, he did not know its purport, unless his failure to read it was due to some artifice or fraud of, or chargeable to the party released. *Ibid.*

TRESPASS.

§ 1g. Continuing Trespass.

When equity has been invoked by allegations of continuous trespass or wrongful interference with present right of possession, under circumstances permitting the inference of inadequate remedy at law, or other ground of equitable jurisdiction, the court may proceed to give relief by temporary restraining order, pending the action, with such reasonable restrictions as the exigencies of the case may require. *Young v. Pittman*, 175.

TRIAL.

I. Time of Trial, Notice, Preliminary Proceedings.

4. Continuance. Davis v. Wyche, 746.

II. Order, Conduct, and Course of Trial.

8. Conduct and acts of parties and witnesses. Ibid.
11. Consolidation of actions for trial. Conley v. Pearce-Young-Angel Co., 211.

III. Reception of Evidence.

17. Admission of evidence for restricted purpose. S. v. Ham, 128.

IV. Province of Court and Jury.

19. In regard to evidence. Hopkins v. Colonial Stores, Inc., 137; Coker v. Coker, 450.
20. Questions of law and of fact. Ibid.

V. Nonsuit.

21. Time and necessity of making motion and renewal thereof and time of rendition. Watkins v. Grier, 334.
22a. In general. Jackson v. Browning, 75; Bourne v. R. R., 444; Lindsey v. Speight, 453; Moore v. Moore, 552; Grady v. Faison, 567; Atkins v. Transportation Co., 688.
22b. Sufficiency of evidence. Jackson v. Browning, 75; Downing v. Dickson, 455; Eldridge v. Oil Co., 457.
22c. Nonsuit in favor of party having burden of proof. Jackson v. Browning, 75; Atkins v. Transportation Co., 688.
25. Voluntary nonsuit. Bourne v. R. R., 444.

VII. Instructions.

29a. In general. S. v. Truelove, 147; Ward v. R. R., 696; S. v. Oxendine, 825.
29b. Statement of evidence and explanation of law arising thereon. Conley v. Pearce-Young-Angel Co., 211; Ellis v. Wellons, 269; Ward v. R. R., 696.
30. Conformity to pleadings and evidence. Corpening v. Ins. Co., 97; Merchant v. Lassiter, 343.
32. Requests for instructions. Hinson v. Shugart, 207; Ellis v. Wellons, 269.
33. Statement of contentions, and objections thereto. Vance v. Guy, 607; Ward v. R. R., 696.

VIII. Issues and Verdict.

38. Conformity to pleadings and evidence. Corpening v. Ins. Co., 97; Lindsey v. Speight, 453.

X. Motions After Verdict.

49. Motions to set aside verdict as being against weight of evidence. Caulder v. Gresham, 402; Alligood v. Shelton, 754.
51. Setting aside of verdict by court ex mero motu. Watkins v. Grier, 334; Alligood v. Shelton, 754.

XI. Trial by Court by Agreement.

54. Findings and judgment. Grady v. Faison, 567.

§ 4. Continuance.

It is mandatory upon the trial judge, under the Soldiers' and Sailors' Civil Relief Act of 1940, sec. 521, 50 U. S. C. A., to grant a stay in the trial of any action in which a person in military service is involved, upon application of such person or of someone in his behalf, unless, in the opinion of the court, the

TRIAL—*Continued.*

ability of such person to prosecute or defend the action is not materially affected by reason of his military service. *Davis v. Wyche,* 746.

The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up burdens of the nation. *Ibid.*

§ 8. Conduct and Acts of Parties and Witnesses.

Every party has the right, within due limitations, to be present at the trial of his cause, to be allowed to testify personally before the jury rather than through the notoriously indifferent medium of deposition, to take part in the selection of the jury, and to be personally present during the entire proceeding so that those charged with the burden of decision may observe him, either for his advantage or to his detriment. *Davis v. Wyche,* 746.

§ 11. Consolidation of Actions for Trial.

When cases are consolidated for trial they become one case for the purpose of trial and appeal. Only one record is required. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.,* 211.

§ 17. Admission of Evidence for Restricted Purpose.

Where evidence, competent only for the purpose of corroborating a witness, is admitted generally without objection, there is no error in the court's failure to so restrict it. *S. v. Ham,* 128.

§§ 19, 20. In Regard to Evidence: Questions of Law and of Fact.

A statement by a witness of his conclusion as to the cause of damage invades the province of the jury and should be stricken out. *Hopkins v. Colonial Stores, Inc.,* 137.

On a motion in the cause to set aside a former judgment, the evidence raises questions of fact for the court to decide and not issues of fact for the jury; and the facts found, when supported by competent evidence, are conclusive. *Coker v. Coker,* 450.

§ 21. Nonsuit, Time and Necessity for Making Motion.

Where a trial court has refused to grant motions of nonsuit made under G. S., 1-183, it is error for such trial court to set aside the verdict for insufficiency of evidence as a matter of law. *Watkins v. Grier,* 334.

§ 22a. In General.

Upon a motion for judgment as of nonsuit, G. S., 1-183, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion. *Jackson v. Browning,* 75.

Although a judgment of nonsuit does not necessarily decide the merits of the cause of action, it is a final judgment in that it terminates the action. If there is no appeal or if the nonsuit is sustained on appeal, plaintiff, if he would prosecute his claim further, must institute a new action. G. S., 1-25. *Bourne v. R. R.,* 444.

On motion to nonsuit, the plaintiff is entitled to every fact and inference of fact pertaining to the issue involved, which may be reasonably deduced from the evidence. *Lindsey v. Speight,* 453.

TRIAL—*Continued.*

Defendant's evidence is not available to him, on motion to nonsuit, except to explain or make clear that which has been offered by plaintiff. *Ibid.*

In an action by a wife against her husband for separate maintenance and counsel fees wherein the judge has made an order for subsistence and counsel fees pending further orders, a judgment of the clerk, upon findings of fact that the parties had resumed marital relations and dismissing the action as of voluntary nonsuit, is a nullity and void upon its face. It is manifestly not voluntary. G. S., 1-209. *Moore v. Moore*, 552.

The refusal of defendant's motion for nonsuit, and his failure to offer evidence, should not be considered as conclusively establishing the credibility of plaintiff's evidence. G. S., 1-183. *Grady v. Faison*, 567.

When the defendant offers testimony, his exception to the court's refusal to grant his motion for judgment as of nonsuit, first entered at the conclusion of the evidence for the plaintiff, is waived and only the exception noted at the close of all the evidence may be urged and considered, and it is to be decided upon consideration of all the testimony. G. S., 1-183. *Atkins v. Transportation Co.*, 688.

The rule that, upon motion for judgment as of nonsuit made at the conclusion of all the evidence, the decision is to be made upon a consideration of all the evidence, is subject to certain limitations: (a) The evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. The inferences contemplated are logical inferences reasonably sustained by the evidence in its light most favorable to plaintiff. (b) So much of the defendant's evidence as is favorable to plaintiff, or tends to explain or make clear that which has been offered by plaintiff, may be considered, but (c) That which tends to establish another and different state of facts or which tends to contradict or impeach the evidence of plaintiff is to be disregarded. *Ibid.*

§ 22b. Sufficiency of Evidence.

In an action to recover damages for the alleged negligent collision of two automobiles, where the evidence tends to show that plaintiff, going south and defendant, going north on the same road, met and collided where another car had been abandoned, parked on the east side of the road and in plain view of both drivers, who could also see each other for some distance as they approached, the plaintiff having the right of way and in the absence of timely notice that the other driver intended to turn to the left, there was error in sustaining a motion as of nonsuit at the close of plaintiff's evidence. *Jackson v. Browning*, 75.

In an action to set up an alleged lost mortgage and to foreclose same, where there is no evidence of who signed the mortgage, or of the authority of anyone to sign it, and a total absence of evidence of the execution of the mortgage, the allowance of a motion for judgment as in the case of nonsuit was correct. *Downing v. Dickson*, 455.

In an action to recover damages for alleged wrongful death of plaintiff's intestate, the evidence tending to show that a fight occurred at a filling station between plaintiff's intestate and the operator of the filling station, in the presence of an agent of defendants, who was there to deliver oil for his principals, and the operator, fleeing from plaintiff's intestate, seeking the aid of the defendants' agent to expedite his retreat, climbed into the defendants' truck, whereupon defendants' agent drove the truck off, in an effort to help the oper-

TRIAL—*Continued.*

ator escape, and thus fatally injured plaintiff's intestate, who was on the running board fighting the operator through the window of the truck, judgment of nonsuit was proper. *Eldridge v. Oil Co.*, 457.

§ 22c. Nonsuit in Favor of Party Having Burden of Proof.

Upon a motion for judgment as of nonsuit, G. S., 1-183, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion. *Jackson v. Browning*, 75.

A judgment of involuntary nonsuit on the grounds of contributory negligence will not be sustained or directed unless the evidence is so clear on that issue that no other conclusion seems to be permissible. *Atkins v. Transportation Co.*, 688.

Where the driver of plaintiff's loaded truck, trailing defendants' bus at 25 to 30 miles per hour and within 20 feet, on a street 25 to 30 feet wide with an open space on the left of from 12 to 17 feet, saw the bus begin to stop and slammed on his brakes, as he was too near to turn aside or stop, hitting the bus with such force that the front of the truck was practically demolished and the bus was badly damaged, there was error in refusing defendants' motion for judgment as of nonsuit on the ground of contributory negligence. *Ibid.*

§ 25. Voluntary Nonsuit.

When a defendant, at the close of plaintiff's evidence, moves for judgment dismissing the action as of nonsuit, he in effect submits to a voluntary nonsuit on any counterclaim set up by him. *Bourne v. R. R.*, 444.

§ 29a. Instructions, Form, etc., in General.

Where the court, in concluding its charge, referred to the indictment for abduction as one for "kidnapping," and the jury corrected it by the use of the word "abduction" in the verdict, there is no error, the inadvertence being a *lapsus linguæ*. *S. v. Truelove*, 147.

While a court's charge may be subject to some criticism, it is sufficient in substance, when read contextually, if it covers the subject and presents the issues understandably in accordance with the settled principles applicable to the case. *Ward v. R. R.*, 696.

When a charge, considered as a whole in the same connected way in which it was given, presents the law fairly and correctly, it affords no ground for reversal, though some of the expressions, when standing alone, might be regarded as erroneous. *S. v. Oxendine*, 825.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

In an action for damages, based upon injuries by negligence and wrongful death from an automobile collision, a peremptory charge, based on plaintiff's evidence alone, which fails to apply the law to the evidence offered by defendant on the particular aspect of the case in question, or fails to require the finding of negligence and proximate cause from a consideration of all the evidence, must be held for error. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 211.

An exception, simply to the general failure of the court to state the evidence in a plain and correct manner and explain the law arising thereon, is too general and cannot be sustained. *Ellis v. Wellons*, 269.

TRIAL—*Continued.*

Any substantial errors made by the court, in the statement of the evidence or in the statement of the contentions of the parties, must be called to the court's attention at the time they are made, in order to give an opportunity for correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal. *Ward v. R. R.*, 696.

§ 30. Conformity to Pleadings and Evidence.

The failure of the trial court to submit appropriate issues on a material phase of the case presented by pleading and evidence, coupled with instructions to the jury apparently confining consideration of the evidence relating thereto to the issue of fraud, was sufficiently prejudicial to require a new trial. *Corpening v. Ins. Co.*, 97.

While proof of facts which constitute *prima facie* evidence of negligence permits but does not compel a verdict for plaintiff, a peremptory instruction upon the evidence of loss of goods is justified where the defendant is admittedly a common carrier. *Merchant v. Lassiter*, 343.

§ 32. Requests for Instructions.

Where the record does not show a request for specific instructions and the question not having been presented on the trial, a failure to charge on the subject will not be held for error. *Hinson v. Shugart*, 207.

Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have an opportunity to correct the oversight. *Ellis v. Wellons*, 269.

§ 33. Statement of Contentions and Objections Thereto.

An exception cannot be sustained where it is directed to a contention which was not seasonably called to the court's attention and opportunity afforded to correct it. *Vance v. Guy*, 607.

Any substantial errors made by the court, in the statement of the evidence or in the statement of the contentions of the parties, must be called to the court's attention at the time they are made, in order to give an opportunity for correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal. *Ward v. R. R.*, 696.

§ 38. Issues and Verdict, Conformity to Pleadings and Evidence.

The failure of the trial court to submit appropriate issues on a material phase of the case presented by pleading and evidence, coupled with instructions to the jury apparently confining consideration of the evidence relating thereto to the issue of fraud, was sufficiently prejudicial to require a new trial. *Corpening v. Ins. Co.*, 97.

In an action to recover on a special contract and also upon a *quantum meruit*, it is permissible under our practice to allow plaintiff to abandon his special contract, and to recover on *quantum meruit* for the reasonable value of his services. *Lindsey v. Speight*, 453.

§ 49. Motion to Set Aside Verdict as Being Against Weight of Evidence.

A motion to set aside a verdict, as excessive and against the weight of the evidence, is addressed to the sound discretion of the trial court and is not subject to review in the absence of abuse. *Caulder v. Gresham*, 402.

TRIAL—*Continued.*

It is within the power of the trial judge, in the exercise of his sound discretion, to set aside the verdict of the jury, in whole or in part. G. S., 1-207. *Alligood v. Shelton*, 754.

The discretionary action of the trial court in setting aside the verdict on the issues of damages, because excessive or contrary to the weight of the evidence, is not appealable in the absence of a denial of some legal right. *Ibid.*

Where the trial court set aside that part of the jury's verdict, awarding punitive damages to plaintiff against defendants, and denied the plaintiff's motion for a new trial on the issue so set aside, there is error and the ruling of the trial court is reversed. *Ibid.*

§ 51. Setting Aside of Verdict by Court Ex Mero Motu.

Where a trial court has refused to grant motions of nonsuit made under G. S., 1-183, it is error for such trial court to set aside the verdict for insufficiency of evidence as a matter of law. *Watkins v. Grier*, 334.

The trial judge has the discretionary power, during the term at which the case is tried, to set aside a verdict and to order a new trial. *Ibid.*

When plaintiff preserves objection and exception to the setting aside of the verdict on an issue awarding punitive damages, and subsequent to trial and judgment, defendant pays into court the full amount of the judgment rendered, which is accepted by plaintiff, with nothing in the record to show that such payment was intended or accepted as a full settlement, this Court is not required, *ex mero motu*, to dismiss the appeal, nor does such payment and acceptance preclude the plaintiff from a new trial on the issue as to which the verdict was set aside. *Alligood v. Shelton*, 754.

§ 54. Trial by Court, Findings and Judgment.

Findings of fact by a referee, approved by the judge, trial by jury having been waived by the parties, are unassailable when supported by competent evidence. *Grady v. Faison*, 567.

TRUSTS.

§ 1a. Creation in General.

A person who has no title or interest in property can create no trust therein. *Randle v. Grady*, 651.

§ 1b. Parol Trusts.

In a suit against the administrator of one of several cotenants by the other cotenants, where the complaint alleged a parol trust in that defendant's intestate agreed orally with his cotenants to bid off himself, or through another for him, the lands owned jointly by such cotenants at a sale thereof under mortgage, hold and sell the same for the benefit of all, dividing the proceeds in accordance with their respective interests, after reimbursing himself for certain expenditures, and that, on the contrary, after such sale and purchase, said intestate sold parts of the property to his wife and parts to several of his children, without consideration, and sold other parts thereof for considerable sums to others, and otherwise violated the agreement, a demurrer was properly sustained for defect of parties defendant, the intestate's heirs at law being necessary parties; but a demurrer for failure to state a cause of action should have been denied. *Embler v. Embler*, 811.

Where the purchaser of land at a judicial sale agreed, previously or contemporaneously, with another to buy and hold the land subject to the right

TRUSTS—*Continued.*

of the latter to repay the purchase money and have a conveyance, there is no violation of the statute of frauds, G. S., 22-2. But where the grantor, by a mere declaration, engrafts upon his own deed a trust, the declaration must be neither prior or subsequent to, but contemporaneous with its execution. *Ibid.*

§ 1d. Charitable Trusts.

A trust created by will in 1895, providing a free permanent common school English education for poor white children of Buncombe County, of eight years old and over, whose parents are financially unable to so educate them, is valid and effective, notwithstanding the great advance in free educational facilities provided by the State. *West v. Lee,* 79.

§ 8b. Title and Rights of Respective Parties.

Under an active trust, which gives trustees power to sell and convey lands, in their discretion, such trustees and *cestuis* being identical persons, the respective wives of the trustees have no dower interests in the land and are not necessary parties to a conveyance. *Blades v. R. R.,* 32.

§ 8c. Merger of Legal and Equitable Titles.

Where the holder of the legal title and the *cestui que trust* are one and the same person and the equitable interest of no other person intervenes, ordinarily a merger of the legal and equitable title results, defeating the trust, and conferring a fee title upon the person holding the legal title and the beneficial interest. *Blades v. R. R.,* 32.

It is also a condition of merger that the legal and equitable estates must be *coextensive* and *commensurate,* these terms implying a reference not only to quantum of the estates, but also to the quality and nature of their tenure. *Ibid.*

But where there is a plurality of trustees and beneficiaries, the rule is otherwise. The law will not reject a trust, where the group named as trustees and the group named as *cestuis* are identical in personnel, either on the theory of incompatibility or that of merger, especially when the trustees' action must be unanimous. No *cestui que trust* has a free hand in dealing with his own equitable interest nor with that of any other; and each has an equitable interest which is separate from the legal interest held by the whole group. The confidence has been reposed in the composite mind, will and conscience of the trustees. *Ibid.*

§ 15. Acts and Transactions Creating Resulting or Constructive Trusts.

Where a person *in loco parentis* purchases land with consideration furnished by a child, a resulting trust arises *pro tanto.* No agreement by the parties can destroy the effect of the legal presumption that the estate is held in trust. *Randle v. Grady,* 651.

§§ 17, 18e. Titles and Rights of Tranferees of Trustee: Sufficiency of Evidence and Nonsuit.

Where the mother of a minor holds money in bank and other personal property in her own name as trustee for said minor, without authority of law, and with such property as part payment purchases personalty and real estate, taking title in her own name as trustee for such minor, the deed reciting that the mother as such trustee is given complete control and power over the property purchased, in her discretion, to sell, mortgage and convey the same in

TRUSTS—*Continued.*

such manner and for such purpose as the mother may deem best, she being the sole judge, and at the same time the mother as trustee for the minor gives notes and a deed of trust on the property to secure a large part of the purchase price, which deed of trust is foreclosed and all of the property lost, on suit by the minor's next friend against the purchasers of the said notes, who had secured the entire property from the purchaser at the foreclosure sale, alleging fraud and the evidence tending to show the foregoing facts, a cause of action is stated, and motion for nonsuit should have been denied. *Randle v. Grady*, 651.

USURY.

§ 2. Contracts and Transactions Usurious.

To constitute a usurious transaction, corrupt intent to take more than the legal rate of interest is an essential element. *Bailey v. Inman*, 571.

§ 5. Necessity of Tender of Debt With Legal Interest.

Where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury. *Bailey v. Inman*, 571.

UTILITIES COMMISSION.

§ 1. Nature and Function in General.

The N. C. Utilities Commission, a creature of the General Assembly, is an administrative agency of the State with such powers and duties as are given it by statute, G. S., ch. 62. These powers and duties are of a dual nature—supervisory or regulatory and judicial. *Utilities Com. v. Greyhound Corp.*, 293, 672.

The N. C. Utilities Commission is a court of record and authorized by law to formulate and promulgate its own rules of practice, including rules for rehearings. G. S., 62-12. It is also a court of general and original jurisdiction only as to subjects embraced within ch. 62 of the General Statutes and it does not possess the inherent powers of an appellate court. *Utilities Com. v. R. R.*, 762.

§ 2. Jurisdiction.

The Legislature has not undertaken to foresee and provide for every contingency involved in the problem of supervising and regulating public utilities within the State, but it has authorized and empowered the Utilities Commission, generally, to make rules and regulations by which the purpose of the statute may be effectuated. *Utilities Com. v. Greyhound Corp.*, 293, 672.

For the purpose of making investigations and conducting hearings, the Legislature has constituted the Utilities Commission a court of record, with all the powers of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure is prescribed, G. S., 62-11, *et seq.*, with right in any party affected thereby to appeal, G. S., 62-20, to the courts. *Ibid.*

§ 3. Judgments and Orders.

Where the Utilities Commission, after due notice and hearing, establishes rates for intrastate shipments of pulpwood which it finds to be just and reason-

UTILITIES COMMISSION—*Continued.*

able, and thereafter, upon petition of defendant and other common carriers for reconsideration, the rates so established are ordered by the Commission to remain in full force and effect, by virtue of the statute (G. S., 62-123) these rates must be deemed the only just and reasonable rates for this commodity, rendering it unlawful for defendant to charge a greater amount. G. S., 62-135. *Utilities Com. v. R. R.*, 283.

After rates for certain intrastate shipments have been duly established by the Utilities Commission and defendant seeks to increase such rates by filing tariff schedules to that effect, whereupon the Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates, pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant, such action of the Commission is binding on the defendant. G. S., 62-11. However, defendant should be given a reasonable time to comply with the order before penalties may be invoked. *Ibid.*

The Utilities Commission's rules of practice and procedure, promulgated under legislative authority (G. S., 62-12), require a defendant, if it desires the vacation or modification of a previous order, to file a written notice of intention to make changes resulting in increases, which would seem to implement the requirements of the statute (G. S., 62-126) that thirty days notice of an increase be given the Commission. *Ibid.*

The granting of a franchise for the operation of any motor vehicle upon the public highways of North Carolina, for the transportation of persons and property for compensation, must be predicated upon public convenience and necessity and a determination made by the Utilities Commission is *prima facie* just and reasonable. G. S., 62-21. *Utilities Com. v. Coach Co.*, 390.

The Commission may, in its discretion, grant a franchise which would duplicate, in whole or in part, a previously authorized similar class of service; and, when 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, it would be its duty to do so. G. S., 62-105. *Ibid.*

§ 4. **Appeal.**

No procedure for appeals to the courts, from rules and regulations of the Utilities Commission, has been prescribed by statute, hence the validity thereof cannot be challenged by appeal. *Utilities Com. v. Greyhound Corp.*, 293, 672.

In the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, the appellee, on appeal to the Superior Court, is entitled to an affirmance of the decision of the Commission. *Utilities Com. v. Coach Co.*, 390.

The statutory notice of appeal from the Utilities Commission to the Superior Court, G. S., 62-20, is mandatory, and the time within which such notice may be given cannot be extended by the parties of record. The Commission is a party of record, in a proceeding before it, and upon appeal becomes the party plaintiff. *Utilities Com. v. R. R.*, 762.

A court, having power to grant a rehearing, may entertain a petition to rehear, filed after the time for appeal has expired, but in considering whether or not to grant the rehearing, such consideration will not enlarge the time for

UTILITIES COMMISSION—*Continued.*

appeal, if the rehearing is denied. An appeal does not lie from the denial of a petition to rehear. On the other hand, where a petition to rehear is filed before the time for appeal has expired, it tolls the running of the time and appeal may be taken within the statutory time for appeal from the date of denial of the petition for rehearing. *Ibid.*

§ 5. **Rehearings.**

The General Assembly, in lieu of giving the N. C. Utilities Commission authority to grant rehearings, expressly provided for a rehearing upon exceptions, and the Commission is not authorized to grant rehearings other than in the manner so provided. G. S., 62-20. *Utilities Com. v. R. R.*, 762.

A court, having power to grant a rehearing, may entertain a petition to rehear, filed after the time for appeal has expired, but in considering whether or not to grant the rehearing, such consideration will not enlarge the time for appeal, if the rehearing is denied. An appeal does not lie from the denial of a petition to rehear. On the other hand, where a petition to rehear is filed before the time for appeal has expired, it tolls the running of the time and appeal may be taken within the statutory time for appeal from the date of denial of the petition for rehearing. *Ibid.*

VENUE.

§ 1b. **Executors and Administrators.**

This Court has construed G. S., 1-78, to apply to all actions against executors and administrators in their official capacity, whether upon their bonds or not. *Godfrey v. Power Co.*, 657.

§§ 1c, 4a. **Public Office: Motions for Change of Venue as Matter of Right.**

Since a municipality may act only through its officers and agents, an action against it is an action against "a public officer" within the meaning of G. S., 1-77 (2), and a proper venue against a municipality is the county where the cause of action, or some part thereof, arose, and if an action against a municipality be instituted in any other county, the municipality has the right, upon motion aptly made, to have the action removed to the proper county. *Godfrey v. Power Co.*, 657.

After the commencement of an action for damages for wrongful death in the county of which plaintiff and her intestate were residents, a municipality of another county, where the accident which cause the death took place, was brought in as an alleged joint tort-feasor on motion by the original defendant, the cause may be removed, as a matter of right, to the county in which such municipality is situated. *Ibid.*

WILLS.

§§ 4, 5. **Contracts to Devise or Bequeath, Requisites and Validity: Actions.**

An oral contract, to devise specific real estate, or to bequeath its value to husband and wife for joint services rendered deceased, is obnoxious to the statute of frauds, and, that issue being raised, the husband and wife may separately sue the estate of deceased upon the *quantum meruit* for the services rendered by them respectively without regard to the contract. *Neal v. Trust Co.*, 103.

WILLS—*Continued.*

A contract to devise real estate is within the statute of frauds. A contract to bequeath personalty, standing alone, is not. *Ibid.*

Where there is a promise by one to reward another for services performed, by devise or bequest, the statute of limitations does not begin to run against the promise until the death of the promisor. *Ibid.*

§ 21b. Mental Incapacity.

The fact that a man bequeaths his estate to his wife, excluding his children and other relatives, does not tend to show mental incapacity or undue influence. *In re Will of Holmes*, 830.

§ 21c. Fraud, Duress and Undue Influence.

A wife is not the agent of her husband by force of the marital relationship; and hence the burden of proof, on an issue of undue influence between husband and wife in favor of the wife, is upon the party asserting undue influence. *In re Will of Holmes*, 830.

§ 23b. Evidence on Issue of Mental Capacity.

A mere abstract statement by a witness that a person under investigation, in his opinion, was or was not competent to make a will, or a contract or a deed, is improper and inadmissible. Capacity to make a will or contract is not a simple question of fact but a conclusion which the law draws from certain facts gained from personal observation as a predicate for the expression of opinion. *In re Will of Lomax*, 459.

§ 31. General Rules of Construction.

The end to be sought 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 at variance with some rule of law or contrary to public policy. *Holland v. Smith*, 255.

In ascertaining the meaning of particular parts, the intention of the testator is to be gathered from the whole. Apparent inconsistencies are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose. No words ought to be rejected if any meaning can possibly be put upon them. *Ibid.*

The courts are not required to indulge the presumption of technical use of words against the testamentary intent, when such intent may be reasonably ascertained from a contextual construction of the will. *Elledge v. Parrish*, 397.

It is clear that no mechanical application of rules will subordinate the intent of the will upon the vital point whether the beneficiary is put to an election. *Benton v. Alexander*, 800.

§ 32. Presumption Against Partial Intestacy.

A presumption exists that a testator intends to dispose of his entire estate and not to die intestate as to any part of his property. *Holland v. Smith*, 255.

§ 33a. In General.

Under a will by a husband, devising all of his property to his wife, her executors, administrators, and assigns, forever, with further provision that at the end of the wife's natural existence, should the whole or any part of the devise remain undisposed of by the wife, the same to go to testator's nearest of kin,

WILLS—*Continued.*

the wife acquires and may convey a fee simple title to the land devised. *Burgess v. Simpson*, 102.

Where lands are devised to one generally, and to be at his disposal, this is a fee in the grantee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee. *Holland v. Smith*, 255.

Where by will one takes a life estate in remainder, with limitation to her bodily heirs, if any, and, if none, then over, this excludes the rule in *Shelley's case*, and the devise terminates upon the death of the devisee without bodily heirs. *Ibid.*

§ 33b. Under Rule in Shelley's Case.

In a will devising lands to testator's three daughters, during their natural lives, and providing that the share of each of the daughters shall upon her death go to *her children* and their heirs absolutely, the word "children" is a word of purchase. This use of "children" does not create an estate in fee simple or a fee tail which would be converted into a fee simple by G. S., 41-1. *Moore v. Baker*, 133.

When the devise is to one for life and after his death to his children or issue, the rule in *Shelley's case* has no application, unless it manifestly appears that such words are used in the sense of heirs generally. *Ibid.*

Where by will one takes a life estate in remainder, with limitation to her bodily heirs, if any, and, if none, then over, this excludes the rule in *Shelley's case*, and the devise terminates upon the death of the devisee without bodily heirs. *Holland v. Smith*, 255.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

A devise of lands to testator's wife for her life to do with as she pleases and at her death to H. for life and then to H.'s bodily heirs, if any, and, if none, then to testator's kin, where testator's wife dies without disposing of the property, and H. dies without issue, the entire estate goes by the will in fee to the heirs of the testator. *Holland v. Smith*, 255.

By a devise of a life estate to trustees for the benefit of a son and "whatever remains after his death shall go to his bodily heirs and if they are under age, at the time of my son's death, a guardian shall be appointed for the minor heirs of my son," and providing further, "in case my son and his bodily heirs should die leaving part of my estate, then I will that my nephew and his wife receive whatever remains," the only child of such son receives an unqualified remainder in fee after the life estate of his father, which vests in the only such child living at the death of testatrix for the benefit of himself and his class, subject to be defeated, in favor of the nephew and his wife, only upon the contingence of the death of such child before his father. *Elledge v. Parrish*, 397.

Where there is a devise to one for life and then to his children, such devisee takes only a life estate, and his deed will not estop the remaindermen. Upon the birth of children the fee vests in such children. *Prince v. Barnes*, 702.

§ 33f. Devisees With Power of Disposition.

Where lands are devised to one generally, and to be at his disposal, this is a fee in the grantee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee. *Holland v. Smith*, 255.

WILLS—*Continued.*

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

"Bodily heirs," in the strict technical sense of *issue*, are not limited to the immediate issue, or children, of the first taker, but include the rest of his lineal descendants in indefinite succession. *Elledge v. Parrish*, 397.

A devise to one and his "bodily heirs," if the testatrix intended to use the term in its strict technical sense, would violate the rule against perpetuities, or might create a fee tail, and in either case a fee simple would vest in the first taker. *Ibid.*

When a will provides for partition among life tenants and the respective shares of the life tenants pass to their children, a partition by court proceeding is not essential, and the assessment of an owelty charge against one share in favor of another is not a fatal departure from the power conferred by the will. Whether the executors or life tenants are the donees of the power to divide is immaterial, where the sole surviving executor was a party to the partition deed of the life tenants. *Moore v. Baker*, 498.

Where the partition of lands, authorized by a will, was made by deed of the sole surviving executor and the life tenants named in the will, the children of each life tenant taking their parents' share as remaindermen, and no complaint is voiced for sixty years, protest by remaindermen is too late. *Ibid.*

§ 35. Conditions and Restrictions.

Under a will by a husband, devising all of his property to his wife, her executors, administrators, and assigns, forever, with further provision that at the end of the wife's natural existence, should the whole or any part of the devise remain undisposed of by the wife, the same to go to the testator's nearest of kin, the wife acquires and may convey a fee simple title to the land devised. *Burgess v. Simpson*, 102.

§ 42. Lapsed Legacies.

A beneficiary is presumed to have accepted a testamentary legacy or devise which is beneficial to him, but the presumption is rebuttable, and where the legatee or devisee renounces or disclaims the legacy or devise in clear and unequivocal terms, in the absence of fraud, the renunciation or disclaimer is effective as of the date of the death of the testator. In such case the devise or legacy is lapsed or void, and the gift passes under other provisions of the will, if there be any covering such contingency, otherwise it passes under the statutes of intestacy. G. S., 31-42. *Perkins v. Isley*, 793.

§ 44. Election.

Nothing else appearing, a beneficiary under a will, who is under the necessity of making an election, has exercised that privilege by offering the will as executor and procuring its probate. *Benton v. Alexander*, 800.

Presumption of election, arising from offering the will for probate and entering upon the administration, goes no further than the stated terms of the rule. *Ibid.*

It is clear that no mechanical application of rules will subordinate the intent of the will upon the vital point whether the beneficiary is put to an election. *Ibid.*

The equitable doctrine of election is based upon the fundamental principle that a person, designated as beneficiary under a will, cannot take its separate benefits and at the same time reject its provisions adverse to his interests. *Ibid.*

WILLS—*Continued.*

The intention of the testator, to dispose of property adversely to the interests of the devisee, must ordinarily be clear to put the devisee to his election. *Ibid.*

The intention to put the donee to an election cannot be imputed to a testator who, as one of the supposedly alternate gifts, attempts to devise property which he mistakenly believes to be his own, and so describes it, whereas, in reality, it is the property of another. *Ibid.*

Where a husband, who owned no realty whatever except his interest in an estate by the entireties, leaves a will by which he devises, to his wife for life, all of his real estate, and at her death to another, the wife is not put to her election by offering the will for probate, qualifying as executrix and entering upon the administration. *Ibid.*

§ 46. Nature of Title and Rights of Devisees, Legatees, and Heirs.

A legatee or devisee under a will is not bound to accept a legacy or devise therein provided, but may disclaim or renounce his right under the will, even where the legacy or devise is beneficial to him, provided he has not already accepted it. *Perkins v. Isley*, 793.

The right to renounce a devise or legacy is a natural one and needs no statutory authority. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. *Ibid.*

An heir at law is the only person who, by the common law, becomes the owner of land without his own agency or consent. The law casts the title upon the heir, without any regard to his wishes or election. *Ibid.*

A beneficiary is presumed to have accepted a testamentary legacy or devise which is beneficial to him, but the presumption is rebuttable, and where the legatee or devisee renounces or disclaims the legacy or devise in clear and unequivocal terms, in the absence of fraud, the renunciation or disclaimer is effective as of the date of the death of the testator. In such case the devise or legacy is lapsed or void, and the gift passes under other provisions of the will, if there be any covering such contingency, otherwise it passes under the statutes of intestacy. G. S., 31-42. *Ibid.*

When a devisee accepts a devise, his title relates back to the death of testator; but when there is a renunciation, the devise never takes effect and the title never vests in the devisee. *Ibid.*

In most jurisdictions a renunciation must be made within a reasonable time after the probate of the will. What is a reasonable time is usually left to judicial determination in the light of the facts and circumstances involved in each case. *Ibid.*

The mere fact that a daughter, the sole legatee and devisee under her mother's will, requested in writing the appointment of an administrator *c. t. a.*, in lieu of the executor named therein, who had been adjudged incompetent, is insufficient to estop her from renouncing her rights under the will. *Ibid.*

Where a testatrix died in May and her will was probated in December following and in February thereafter a daughter, the sole devisee and legatee named in the will, filed a verified petition, in the office of the clerk of the Superior Court, reciting these facts and renouncing all her rights under the said will, such renunciation is in a clear and unequivocal manner and within a reasonable time, and justifies orders of the clerk and judge approving the same and directing distribution as in case of intestacy, and it relates back to the death of the testatrix. *Ibid.*

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(For convenience in annotating.)

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1-25. Nonsuit final judgment and new action necessary. *Bourne v. R. R.*, 444.

1-30. Statutes of limitations apply generally to sovereign. *Guilford County v. Hampton*, 817.

1-36. Title conclusively presumed out of State, where State not party except trial of protested entries. *Ramsey v. Ramsey*, 110; *Vance v. Guy*, 607.

1-38. Seven years hereunder will not ripen title for tenant in common against his cotenant. *Parham v. Henley*, 405; *Ange v. Owens*, 514.

1-40. Twenty years adverse possession necessary by tenant in common against cotenant. *Parham v. Henley*, 405.

1-52. Action on note under seal against endorser barred after three years from maturity. *Bank v. Stokes*, 83; action by county to sell land of indigent for support barred hereunder. *Guilford County v. Hampton*, 817.

1-57. In actions to reform an instrument, all persons having, or claiming any interest therein, are necessary parties. *Hemp v. Funderburk*, 353.

1-68, -69. Joinder of all parties necessary to settlement should be allowed. *Ezzell v. Merritt*, 602.

1-70. Making unwilling party a defendant. *Smoke Mount Industries, Inc., v. Ins. Co.*, 93.

1-73. Consolidation improper where it will complicate or embarrass. *Ezzell v. Merritt*, 602.

1-76 (1). Action to quiet title in county where land lies. *Holden v. Totten*, 547.

1-77 (2). Municipality acts by public officers only and suit hereunder removable to county where cause of action arose. *Godfrey v. Power Co.*, 657.

1-88. Commenced by summons and pending until final judgment. *Moore v. Moore*, 552.

1-97. Clerical errors or omissions, which are mere irregularities, in copy of summons for defendant will not affect jurisdiction. *Washington County v. Blount*, 438.

1-98. Strict compliance with statute necessary to confer jurisdiction. *Rodriguez v. Rodriguez*, 275. Service by publication may be made in a suit for specific performance against a nonresident. *Voehringer v. Pollock*, 409.

1-123. An amendment, setting up new matter wholly distinctive, would not comply herewith. *Nassaney v. Culler*, 323. May join matters, legal and equitable arising out of subject of action. *Ezzell v. Merritt*, 602.

1-127. Referred to, *Sandlin v. Yancey*, 519; any one of several defendants being a necessary or proper party to each tract of land in tax foreclosure suit, complaint not subject to joint demurrer. *Moore County v. Burns*, 700.

1-132. In an action to foreclose tax liens on a number of tracts, in some of which different defendants have no interest, there is a misjoinder of parties and no division can be made hereunder. *Ibid.*

GENERAL STATUTES—*Continued.*

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1-134. Demurrer, except for want of jurisdiction or failure to state cause of action, may not be entered after time for answering. *Ezzell v. Merritt*, 602.

1-135.
-137. Defense and counterclaim under Federal Fair Labor Standards. *Smoke Mount Industries v. Fisher*, 72.

1-151. Pleadings must be construed liberally. *Kemp v. Funderburk*, 353; *Sandlin v. Yancey*, 519.

1-163. Affidavit for substituted service may be amended, but not so as to validate void judgment. *Rodriguez v. Rodriguez*, 275; amendments setting up new matter in court's discretion, even as to occurrences after action brought, provided not a new and entirely different claim. *Nassaney v. Culler*, 323.

1-180. General exception hereto not sustained. *Ellis v. Wellons*, 269; where court substantially complies herewith, no error unless special instructions tendered and refused. *S. v. Gordon*, 304; noncompliance herewith as to damages, *Daughtry v. Cline*, 381; charge complies herewith when it applies law to evidence and gives positions of parties and controlling features of case. *S. v. Biggs*, 722.

1-183. Upon motion for judgment as of nonsuit—whole evidence taken in light most favorable to plaintiff, *Jackson v. Browning*, 75; where same denied it is error to set aside verdict, as matter of law, for insufficient evidence, *Watkins v. Grier*, 334; refusal of motion and failure of defendant to offer evidence not conclusive, *Grady v. Faison*, 567; where defendant offers testimony, how all evidence considered on motion, *Atkins v. Transportation Co.*, 688; limitations to this rule, *ibid.*, judgment of nonsuit improper on evidence, *Jackson v. Browning*, 75; *Boone v. Matheny*, 250; *Killough v. Williams*, 254; *Ellis v. Wellons*, 269; *Wyrick v. Ballard Co.*, 301; *Daughtry v. Cline*, 381; *Miller v. Jones*, 783; judgment of nonsuit proper on evidence, *Rogers v. Black Mountain*, 119; *Ray v. Post*, 665; *Watkins v. Furnishing Co.*, 674.

1-207. Trial court has discretion, during term at which case tried, to set aside verdict, *Watkins v. Grier*, 334; may set aside in whole or in part, *Alligood v. Shelton*, 754.

1-208. Action pending until final judgment. *Moore v. Moore*, 552.

1-209. Clerk may enter nonsuit judgment only when voluntary. *Ibid.*

1-215. Time for clerk's judgments. *Ange v. Owens*, 514.

1-215.1. Judgments, not on Mondays, validated. *Ibid.*

1-220. Relief of party from judgment by clerk, on appeal heard *de novo*. *Gunter v. Dowdy*, 522. What constitutes excusable neglect. *Ibid.*

1-240. Transfer hereunder of judgment on docket by attorney of record, presumption of validity, *Harrington v. Buchanan*, 123; party brought in hereunder may make motion to remove to proper county, *Godfrey v. Power Co.*, 657; purpose of this statute is to bring in joint tortfeasor, against whom plaintiff could originally have brought suit, for contribution, *Wilson v. Massagee*, 705.

1-250, *et seq.* Controversy without action. *Blades v. R. R.*, 32; *Prince v. Barnes*, 702.

1-271. Only parties aggrieved may appeal to Supreme Court. *Watkins v. Grier*, 334.

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1-276. Where clerk has no authority, judge on appeal may dispose of, if court has jurisdiction, *McDaniel v. Leggett*, 806.

1-340. No color of title without some paper writing attempting to convey title, *Rhyne v. Sheppard*, 734; ordinarily no recovery for improvements without color of title; but benefits knowingly accepted may be a charge by estoppel in equity. *Ibid.*

1-449. Jurisdiction dates from levy which becomes effective by endorsement, but lien attaches when certified to clerk and indexed. *Voehringer v. Pollock*, 409.

1-486. Restraining order against continuing trespass without allegation of insolvency, *Young v. Pittman*, 175.

1-493,
-494. Judge assigned to district has "Chambers" jurisdiction including injunctions. *Reidsville v. Slade*, 48.

1-498. Judge assigned to district may, in adjoining district modify temporary injunction, *Reidsville v. Slade*, 48.

1-499. Use of affidavit in another cause to oppose injunction. *Ibid.*

1-569,
-570. Verified application complying herewith, appeal, from order for examination of adverse party, premature. *Sudderth v. Simpson*, 181.

2-22. Money herein includes amounts for the use of various individuals. *S. v. Watson*, 502.

4-1. Does not make women eligible to jury duty. *S. v. Emery*, 581.

5-1 (4). Husband not subject to contempt for failure to comply with separation agreement made before divorce. *Brown v. Brown*, 556.

6-1. Expense of returning persons charged with crime to State, without extradition, not costs. *S. v. Patterson*, 471..

7-65. In suit against public officer to recover funds unlawfully expended, plaintiff disclaiming any participation in recovery, court without jurisdiction to order payment of expenses and counsel fees from recovery. *Hill v. Stansbury*, 356.

7-74. Judge assigned to district is judge thereof for six months and has jurisdiction of all "in Chambers" matters. *Reidsville v. Slade*, 48.

7-103. Jurisdiction over children under sixteen. *In re Morris*, 487.

8-39. Does not make valid description "adjoining lands of A.B. containing 25 acres more or less." *Peel v. Calais*, 421.

8-51. In action against executor or administrator, plaintiff may testify to handwriting of deceased, *Batten v. Aycock*, 225; where defendant testifies as to personal transaction between plaintiff and deceased, he opens the door for plaintiff as to some transaction, but not generally. *Ibid.*

9-12. Judge passes on competency of juror. *S. v. DeGraffenreid*, 517.

12-3. Does not make women eligible to jury duty. *S. v. Emery*, 581.

14-17. Homicide, committed in robbery or attempt thereof, is murder in first degree, *S. v. Biggs*, 722; homicide by poison, lying in wait, imprisonment, starving, torture, presumes premeditation and deliberation. S. *v. Dunheen*, 738.

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14-26. Evidence of like crime competent, *S. v. Edwards*, 527; one who has carnal knowledge of a child under the age of twelve years is guilty of rape. *S. v. Wade*, 760.

14-33. Rebuttable presumption defendant over 18 years of age, *S. v.. Lewis*, 774; jury required to find age. *Ibid.*

14-41. Charge harmless where words "taken out" used for "kidnapping." *S. v. Truelove*, 147.

14-72. Evidence of value, size, weight, quality of property allegedly stolen proper. *S. v. Weinstein*, 645.

14-87. Force or intimidation main elements, *S. v. Mull*, 574; accurate description of property not necessary, *ibid.;* attempt a felony, *ibid.;* aiders and abettors, *ibid.*

14-178. Evidence of like crime admissible. *S. v. Edwards*, 527.

14-183. First trial and conviction, for bigamy on issue of insufficient service reversed, second trial on issue of domicile not vulnerable to plea of former jeopardy and motion to dismiss, *S. v. Williams*, 183; evidence necessary for *prima facie* case hereunder, *ibid.;* in prosecution hereunder against one, defending under divorce in another state, burden on such defendant to show validity of such divorce, *ibid.;* this section is valid and constitutional, *ibid.;* cohabitation in one county and arrest in another, prosecution may be in latter county, *ibid.*

14-206. Reputation as to prostitution. *S. v. Harrill*, 477.

14-290,
-291. Court not authorized to inflict punishment beyond bounds of lottery statute under which indictment drawn. *S. v. Robinson*, 412.

14-336. Evidence on prosecution for vagrancy must do more than raise a suspicion. *S. v. Oldham*, 415.

15-47. Accused informed as here required, making no request to communicate with friends or counsel, objection that statute not complied with too late. *S. v. Thompson*, 661.

15-78. State not liable for expense of returning to State without extradition, one convicted of manslaughter. *S. v. Patterson*, 471.

15-88,
-91,
-100, Evidence on preliminary hearings made competent on mere identification, *S. v. Ham*, 128; evidence at *habeas corpus* proceeding, *ibid.*

15-152. Consolidation of two indictments against three defendants for abduction and a second against two of them for assault. *S. v. Truelove*, 147.

15-169,
-170. No evidence of less degree of crime charged, court need not instruct jury that it may convict of assault on less degree, *S. v. Sawyer*, 61; where defendant made improper proposals and exposed his person indecently, evidence not sufficient for rape but sufficient for assault, *S. v. Gay*, 141; conviction for an attempt to commit a crime may be had on indictment for crime, *S. v. Parker*, 524.

15-173. Nonsuit on evidence proper: on prosecution for bastardy under new act, when paternity established under old, *S. v. Dill*, 57; on indictment for robbery and no more than suspicion shown, *S. v. Ham*, 128; for rape where defendant did not touch prosecutrix, *S. v. Gay*, 141; mo-

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tion for directed verdict tantamount to request for instruction that there is no evidence, *ibid.;* only suspicion, *S. v. Oldham,* 415; failure to prove *corpus delicti, S. v. Edwards,* 577; possession of liquor, *S. v. Watts,* 771.

Nonsuit on evidence improper: In possession of liquor for sale, *S. v. Gordon,* 304; *S. v. Graham,* 347; *S. v. Graham,* 351; *S. v. Rivers,* 419; *S. v. Parker,* 524; *S. v. Stewart,* 528; *S. v. Lewis,* 774; *S. v. Kirkman,* 778; circumstantial evidence in murder case, *S. v. Oxendine,* 825.

Taking advantage of fatal variance by motion for nonsuit, *S. v. Nunley,* 96.

15-179. State cannot appeal from judgment granting a new trial for newly discovered evidence, *S. v. Todd,* 776.

15-180,
-181. Appeal from adverse ruling on jurisdiction premature: correct practice to object and preserve exception and appeal from final judgment. *S. v. Inman,* 531.

18-2,
18-32. Turlington Act contemplates that no person shall transport or possess liquor, and burden on him who asserts that he comes within exceptions. *S. v. Gordon,* 304; *S. v. Hall,* 314.

18-6,
-13,
-48. Whether statutes creates a forfeiture or confiscation, not decided, *S. v. Gordon,* 304; forfeiture and confiscation mandatory, under 18-6, on plea of guilty, *S. v. Hall,* 314; liquor restored only on failure to establish violation of law, *ibid.;* liquor in category different from other articles of commerce and State regulation not obnoxious to interstate commerce clause, *ibid.*

18-11. Taking nontax-paid whiskey from a still and carrying it away, is *prima facie* evidence of possession for sale, *S. v. Graham,* 347; possession of less than a gallon, *S. v. Watts,* 771.

18-32. Presumptions as to possession and charge thereon, *S. v. Gordon,* 304; possession of less than a gallon, *S. v. Watts,* 771.

20-5, *et seq.* Power to suspend or revoke automobile driver's license exclusively in Department of Motor Vehicles, *S. v. Cooper,* 100; judgment of Superior Court prohibiting operation of such vehicle, void. *Ibid.*

20-17. Conviction of drunken driving competent on question of revocation of driver's license. *S. v. Stewart,* 529.

20-124. Charge as to proper brakes harmless, where evidence shows no mention of brakes. *Hopkins v. Colonial Stores, Inc.,* 137.

20-146,
-147. Failure to observe statute, negligence. *Wyrick v. Ballard Co.,* 301.

20-148. Charge in accordance herewith, *Hopkins v. Colonial Stores, Inc.,* 137; failure to observe, negligence, *Wyrick v. Ballard Co.,* 301.

20-152. Motor vehicles following each other too closely. *Killough v. Williams,* 254.

20-154. Stopping on highway negligence only on failure to give proper signal; and violation here is negligence *per se.* *Conley v. Pearce-Young-Angel Co.,* 211.

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20-161. Parking on highway at night without lights, flares, etc, negligence. *Caulder v. Gresham*, 402.

22-2. Previous or contemporaneous parol trust not invalid, *Embler v. Embler*, 811; cannot be taken advantage of by demurrer, *ibid.;* taken advantage of by denial or plea or both, *Chason v. Marley*, 844; receipts without mention of sale or conveyance not sufficient hereunder. *Ibid.*

25-29. *Prima facie* case, in suit on note by offering note and proving its execution. *Beam v. Wright*, 677.

25-69. Where two directors authorize to bind all directors on notes of company, endorsement by the two binds others as endorsers only. *Bank v. Stokes*, 83.

28-15,
-20,
-32. Appointment of administrator should be revoked on renunciation by one with prior right and request for appointment of a suitable person. *In re Estate of Loftin*, 230.

28-173. Municipality not liable for wrongful death from negligence in performance of governmental duty, *Dixon v. Wake Forest*, 624; venue hereunder in action against municipality is county of municipality, *Godfrey v. Power Co.*, 657; right of action hereunder purely statutory, *Wilson v. Massagee*, 705; in action hereunder against an individual and one, who attempts to bring in a railroad under G. S., 1-240, there is no common liability to suit and order making railroad a party should be stricken out. *Wilson v. Massagee*, 705.

29-1. Rule 10—Prior to 1935 when illegitimate child died leaving no issue and no mother, collateral relatives of mother did not inherit. *Board of Education v. Johnston*, 86.

30-5. No dower right in widows of *cestui que trust* where lands held under active trust by several trustees who are also *cestuis que trustent*. *Blades v. R. R.*, 32.

31-42. Renunciation by legatee or devisee property passes hereunder. *Perkins v. Isley*, 793.

35-1,
-2. Defines only one cause for guardian, mental incapacity, *Goodson v. Lehmon*, 616; old age and physical infirmities not mental incapacity, *ibid.*

38-1, *et seq.* Plaintiff bound by call in his deed for named corner, whether marked or unmarked. *Cornelison v. Hammond*, 757.

39-2. Not void where described as (1) "A tract"; (2) same land conveyed by B. to C.; (3) home place of D.; (4) adjoining E. and grantor has no other land so bounded and the like. *Peel v. Calais*, 421.

40-10. Plaintiffs who own no interest in the lands sought to be condemned cannot invoke this statute. *Turner v. Reidsville*, 42.

41-1 Devise to daughters for life and on death to their children and their heirs, not converted hereby to fee simple, *Moore v. Baker*, 133; a devise to one and his "bodily heirs" creates a fee tail, *Elledge v. Parrish*, 397.

41-10. Action to quiet title, or remove cloud created by void judgment. *Holden v. Totten*, 547.

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46-10. Owelty authorized when partition under authority in a will, *Moore v. Baker*, 498.

48-4. Parents must be parties, when. *In re Morris*, 487.

48-10. Applies only to final judgments as to unfitness. *In re Morris*, 487.

49-1, -2. Willful neglect or refusal to support illegitimate child is criminal, not the begetting, *S. v. Dill*, 57; willfulness necessary element, *S. v. Allen*, 530; *S. v. Hayden*, 779.

49-4. Prosecution of father of illegitimate child for failure to support must be commenced, when. *S. v. Dill*, 57.

49-7, -8. Orders in bastardy may be supplemented or modified. *S. v. Dill*, 57.

50-11. Husband not subject to contempt for failure to comply with separation agreement made before divorce. *Brown v. Brown*, 556.

50-13. Where divorced mother, to whom child awarded, places child with her parents and both mother and father removed from State, court may continue custody of grandparents. *Walker v. Walker*, 751.

51-3. Marriages between white persons and persons of Negro descent to the third generation, inclusive, are void, *S. v. Miller*, 228; evidence competent to show Negro blood, *ibid.*

52-2. May enable a married woman to contract as if unmarried, but it exempts conveyances of realty, *Buford v. Mochy*, 235; and married woman alone may now recover for personal injuries, *Helmstetler v. Power Co.*, 821.

52-10. An injured spouse alone may sue for damages for personal injuries. *Ibid.*

55-153. Facts sufficient to set aside allowance of claim hereunder. *Trust Co. v. Lumber Co.*, 432.

58-46. Payment of initial premium on life insurance policy to agent or broker is payment to company. *Creech v. Assurance Co.*, 144.

58-207. Notice of nonpayment of premium required before forfeiture. *Abrams v. Ins. Co.*, 1.

62-1 *et seq.* Utilities Commission, creature of Legislature, has regulatory and judicial power as prescribed by statute, *Utilities Com. v. Greyhound Corp.*, 293; and is court of record and general jurisdiction only as to subject embraced herein, *Utilities Com. v. R. R.*, 762.

62-11. Rates fixed under statutes and confirmed pending decision on petition binding on parties, *Utilities Com. v. R. R.*, 283; Utilities Commission is court of record, with general jurisdiction as to subjects in the statutes, and makes rules of procedure hereunder, *Utilities Com. v. Greyhound Corp.*, 293.

62-12. Rules of practice made by Commission binding. *Utilities Com. v. R. R.*, 283; *Utilities Com. v. R. R.*, 762.

62-20. Right of appeal to courts of the State from Utilities Commission. *Utilities Com. v. Greyhound Corp.*, 293; rehearings authorized on exceptions, *Utilities Com. v. R. R.*, 762; notice of appeal mandatory and time cannot be extended, *ibid.;* power of rehearing, *ibid.*

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62-21. Franchise based on public necessity and Commission's ruling *prima facie* just. *Utilities Com. v. Coach Co.*, 390.

62-105. Franchise in discretion of Commission and where existing service insufficient, duty of Commission to correct by additional franchise if necessary. *Utilities Com. v. Coach Co.*, 390.

62-109. Regulatory rules hereunder binding. *Utilities Com. v. Greyhound Corp.*, 293.

62-123. Rates hereunder deemed the only just and reasonable rates for commodities named. *Utilities Com. v. R. R.*, 283.

62-126. Seems implemented by rules under 62-12. *Ibid.*

62-135. Unlawful to charge rates other than those fixed under statute. *Ibid.*

68-23,
-24. Livestock at large and subject to be impounded. *McCoy v. Tillman*, 201.

97-2. Workmen's Compensation Act applies only where employer-employee relationship exists, *Hayes v. Elon College*, 11; deputy sheriffs included in Act by 1939, ch. 277, *Towe v. Yancey County*, 579.

104-1,
-7. Not applicable to lands acquired by U. S. before their enactment. *S. v. DeBerry*, 834.

105-164 *et seq.* Sales tax defined and compared to use tax. *Johnston v. Gill, Comr. of Revenue*, 638.

105-219,
-220,
-221,
-223. Use tax defined and compared to sales tax, *ibid.;* one who solicits orders and collects part of price, goods shipped from out of State direct and balance collected for direct, is a retailer hereunder, *ibid.*

105-391. In foreclosure hereunder of a number of tracts of land, in some of which different defendants have no interest, there is a misjoinder of parties and no division can be made, *Moore County v. Burns*, 700; complaint not subject to joint demurrer if any defendant necessary or proper party to each tract, *ibid.;* county not liable to clerk for costs in tax suit unless collected. *Watson v. Lee County*, 508.

105-406. Compliance herewith prerequisite to recovery of taxes, which not recoverable when paid without objection or compulsion. *Middleton v. R. R.*, 309.

109-37. Interest allowed as damages. *S. v. Watson*, 502.

110-21. Superior Court's jurisdiction over children under sixteen. *In re Morris*, 487.

110-36. Orders subject to modification. *Ibid.*

116-20,
-21,
-22,
-23,
-24,
-25. Escheats and unclaimed property appropriated to University by N. C. Constitution, IX, 7, and these statutes. *Board of Education v. Johnston*, 86.

128-10. In suit against public officer for recovery of funds unlawfully expended, plaintiff disclaiming participation in recovery, court may not

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order payment of expenses and counsel fees out of recovery. *Hill v. Stansbury*, 356.

135-1 *et seq.* Compare *Hunter v. Retirement System*, 359.

153-9 (6). Limit on tax levy for public welfare and for poor relief. *R. R. v. Beaufort County*, 115.

(23). *Ibid.*

153-156. Confers no sovereign powers. *Guilford County v. Hampton*, 817.

160-90. Lien for improvements not invalidated by extension resolution where amount due erroneously stated as may be corrected hereunder. *Salisbury v. Arey*, 260.

160-92. Right to pay in cash or by installments mandatory on election by owner but otherwise at option of municipality, *Salisbury v. Arey*, 260; no resolution or ordinance necessary to make effective, *ibid.*

160-94. Resolution, of governing body for extension of assessments where contrary to statute, is defective and not void, *ibid.*; statute of limitation begins to run on extended assessments on each new installment as it becomes due, *ibid.*

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 7. Deputy sheriffs included in Workmen's Compensation Act no violation of, *Towe v. Yancey County*, 579.

I, sec. 13. Jury hereunder twelve good and lawful (free) men. Women, aliens, and minors excluded. *S. v. Emery*, 581.

I, sec. 17. Seems not violated by condemnation of land for, and construction and operation of municipal airport with tax money. *Reidsville v. Slade*, 48; jury hereunder twelve good and lawful (free) men, women, aliens, and minors excluded. *S. v. Emery*, 581.

I, sec. 19. Jury hereunder twelve good and lawful (free) men, women, aliens and minors excluded. *S. v. Emery*, 581.

II, sec. 29. Seems not violated by construction and maintenance of municipal airport with tax money, when approved under Art. VII, sec. 7, *Reidsville v. Slade*, 48; deputy sheriffs in Workmen's Compensation Act no violation of, *Towe v. Yancey County*, 579.

IV, sec. 8. Jurisdiction of Supreme Court on appeal confined to matters of law and legal inferences, *S. v. Biggs*, 23; no jurisdiction hereunder to review appeal from judgment in criminal case granting a new trial for newly discovered evidence, *S. v. Todd*, 776.

V, sec. 3. Whether public funds or taxes are for a public purpose is for the courts. *Turner v. Reidsville*, 42; the construction and maintenance of a municipal airport for a city, as here circumstanced, may be financed with tax money without a violation of this section, or of the 14th Amendment to the U. S. Constitution, *ibid.*; *Reidsville v. Slade*, 48.

V, sec. 6. Limit of tax levy by county for public welfare or poor relief. *R. R. v. Beaufort County*, 115.

VII, sec. 7. Construction and operation of municipal airport is public purpose and funds from taxation may be used therefor when approved hereunder. *Reidsville v. Slade*, 48.

IX, sec. 7. Escheats and unclaimed property appropriated to use of University, *Board of Education v. Johnston*, 86; not necessary for University to institute action to vest escheat, *ibid.*

X, sec. 6. No statute can supersede this provision, *Buford v. Mochy*, 235; renunciation of devise is not conveyance hereunder, *Perkins v. Isley*, 793; in connection with G. S., 52-2 and 52-10, *Helmstetler v. Power Co.*, 821.

XIV, sec. 8. Marriage between white person and person of Negro descent to the third generation, inclusive, are void. *S. v. Miller*, 228.