NORTH CAROLINA REPORTS

VOLUME 225

This book is an exact photo-reproduction of the original Volume 225 of North Carolina Reports that was published in 1946.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1978

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS
VOL. 225

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1945
FALL TERM, 1945

REPORTED BY
JOSEPH B. CHESHIRE

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1946

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"
1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
3 "	"	10	"
4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i. e.*, the original) paging, except 20 N. C., which is repaged throughout, without marginal paging.

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1945—FALL TERM, 1945.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

MICHAEL SCHENCK,
WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,
EMERY B. DENNY.

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

GEORGE B. PATTON,
W. J. ADAMS, JR.,
H. J. RHODES.

SUPREME COURT REPORTER:

JOHN M. STRONG.†

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

---

† On leave, U. S. Army, Acting Reporter, Joseph B. Cheshire.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

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

SPECIAL JUDGES

W. H. S. Burgwyn	Woodland.
Luther Hamilton	Morehead City.

WESTERN DIVISION

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

SPECIAL JUDGES

Hubert E. Olive	Lexington.

EMERGENCY JUDGES

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

SOLICITORS

EASTERN DIVISION

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

WESTERN DIVISION

J. ERLE MCMICHAEL	Eleventh	Winston-Salem.
J. LEE WILSON	Twelfth	Greensboro.
EDWARD H. GIBSON	Thirteenth	Laurinburg.
BASIL L. WHITENER	Fourteenth	Gastonia.
CHARLES L. COGGIN	Fifteenth	Salisbury.
FOLGER TOWNSEND	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, 1945

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, 1945—Judge Harris.

Beaufort—Sept. 17* (A); Sept. 24†; Oct. 8†; Nov. 5* (A); Dec. 3†.
Camden—Aug. 27.
Chowan—Sept. 10; Nov. 26.
Currituck—Sept. 3.
Dare—Oct. 22.
Gates—Nov. 19.
Hyde—Aug. 20†; Oct. 15.
Pasquotank—Sept. 17†; Oct. 8† (A); Nov. 5†; Nov. 12*.
Perquimans—Oct. 29.
Tyrrell—Oct. 1.

SECOND JUDICIAL DISTRICT

Fall Term, 1945—Judge Burney.

Edgecombe—Sept. 10; Oct. 15.
Martin—Sept. 17 (2); Nov. 19† (A) (2); Dec. 10.
Nash—Aug. 27; Sept. 17† (A) (2); Oct. 8†; Nov. 26*; Dec. 3†.
Washington—July 9; Oct. 22†.
Wilson—Sept. 3; Oct. 1†; Oct. 29† (2); Dec. 3 (A).

THIRD JUDICIAL DISTRICT

Fall Term, 1945—Judge Nimocks.

Bertie—Aug. 27 (2); Nov. 12 (2).
Halifax—Aug. 13 (2); Oct. 1† (A) (2); Oct. 22* (2); Nov. 26 (2).
Hertford—July 30; Oct. 15 (2).
Northampton—Aug. 6; Oct. 29 (2).
Vance—Oct. 1*; Oct. 8†.
Warren—Sept. 17*; Sept. 24†.

FOURTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Carr.

Chatham—July 30† (2); Oct. 22.
Harnett—Sept. 3* (A); Sept. 17†; Oct. 1† (A) (2); Nov. 12* (2).
Johnston—Aug. 13*; Sept. 24† (2); Oct. 15; Nov. 5†; Nov. 12† (A); Dec. 10 (2).
Lee—July 16; Sept. 10†; Sept. 17† (A); Oct. 29.
Wayne—Aug. 20; Aug. 27† (2); Oct. 8† (2); Nov. 26 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Thompson.

Carteret—Oct. 15; Dec. 3†.
Craven—Sept. 3*; Oct. 1† (2); Nov. 19† (2).
Greene—Dec. 3 (A); Dec. 10 (2).
Jones—Aug. 13†; Sept. 17; Dec. 10 (A).
Pamlico—Nov. 5 (2).
Pitt—Aug. 20†; Aug. 27; Sept. 10†; Sept. 24†; Oct. 22†; Oct. 29; Nov. 19† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Bone.

Duplin—July 23*; Aug. 27† (2); Oct. 1*; Dec. 3† (2).
Lenoir—Aug. 20; Sept. 24†; Oct. 15; Nov. 5† (2); Dec. 10 (A).
Onslow—July 16‡; Oct. 8; Nov. 19† (2).
Sampson—Aug. 6 (2); Sept. 10† (2); Oct. 22 (2); (first week mixed, second civil).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Parker.

Franklin—Sept. 17† (2); Oct. 8*; Nov. 26† (2).
Wake—July 9*; Sept. 3* (2); Sept. 17† (A) (2); Oct. 1*; Oct. 15† (3); Nov. 5*; Nov. 12† (2); Nov. 26† (A); Dec. 3* (A); Dec. 10*; Dec. 17†.

EIGHTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Williams.

Brunswick—Sept. 3; Sept. 10†.
Columbus—Aug. 27*; Sept. 24† (2); Nov. 12*; Nov. 19† (2).
New Hanover—July 23*; Aug. 13†; Aug. 20*; Oct. 8† (2); Oct. 29*; Nov. 5; Dec. 3† (2).
Pender—July 16†; Sept. 17*; Oct. 22†.

NINTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Frizzelle.

Bladen—Aug. 6†; Sept. 17*.
Cumberland—Aug. 27*; Sept. 24† (2); Oct. 8* (A); Oct. 22† (2); Nov. 19* (2).
Hoke—July 30†; Aug. 20; Nov. 12.
Robeson—July 9† (2); Aug. 13*; Aug. 27† (A); Sept. 3* (2); Sept. 24* (A); Oct. 8† (2); Oct. 22* (A); Nov. 5*; Nov. 12* (A); Dec. 26† (2); Dec. 17*.

TENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Stevens.

Alamance—July 30† (A); Aug. 13*; Sept. 3† (2); Nov. 12† (A) (2); Nov. 26*.
Durham—July 16*; July 30† (A) (2); Sept. 3* (A) (2); Sept. 17† (A) (3); Oct. 8*; Oct. 15† (A) (2); Oct. 29† (2); Dec. 3*.
Granville—July 23; Nov. 12 (2).
Orange—Aug. 20; Aug. 27†; Oct. 1†; Dec. 10.
Person—Aug. 6; Oct. 15.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Nettles.

Ashe—July 23† (2); Oct. 22*.
Alleghany—Oct. 1.
Forsyth—July 2* (2); Sept. 3* (2); Sept. 17† (3) (A) last week; Oct. 8* (2); Oct. 22† (A); Oct. 29†; Nov. 12*; Nov. 19† (2); Dec. 3* (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Alley.

Davidson—Aug. 20; Sept. 10† (2); Oct. 1† (A) (2); Nov. 19 (2).
Guilford—Greensboro: July 9; July 30; Aug. 13†; Aug. 27† (2); Sept. 10 (A); Sept. 24† (3); Oct. 15; Oct. 29 (3); Nov. 19† (2); Dec. 3† (2); Dec. 3 (A); Dec. 24.
High Point: July 16; Aug. 6†; Sept. 17 (A); Oct. 22†; Oct. 29 (2) (A); Dec. 14 (A).

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Clement.

Anson—Sept. 10†; Sept. 24*; Nov. 12†.
Moore—Aug. 13*; Sept. 17† (2) (A) last week.
Richmond—July 16†; July 23*; Sept. 3†; Oct. 1*; Nov. 5†.
Scotland—Aug. 6; Oct. 29†; Nov. 26 (2).
Stanly—July 9; Sept. 3† (2) (A); Oct. 8†; Nov. 19.
Union—Aug. 20 (2); Oct. 15 (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Sink.

Gaston—July 23*; July 30† (2); Sept. 10* (A); Sept. 17† (2); Oct. 22*; Oct. 29† (A); Nov. 26* (A); Dec. 3† (2).
Mecklenburg—July 9* (2); July 30* (A); Aug. 6* (A); Aug. 13* (2); Aug. 27*; Sept. 3† (2); Sept. 3† (A) (2); Sept. 17† (A) (2); Sept. 17* (A) (2); Oct. 1† (A) (2); Oct. 1*; Oct. 8† (2); Oct. 15† (A) (2); Oct. 29† (A) (2); Oct. 29† (2); Nov. 12† (A) (2); Nov. 12*; Nov. 19† (2); Nov. 26† (A) (2); Dec. 3* (A) (2); Dec. 10† (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Phillips.

Alexander—Aug. 27 (A) (2).
Cabarrus—Aug. 20*; Aug. 27†; Oct. 15 (2); Oct. 12† (A); Dec. 3† (A).
Iredell—July 30 (2); Nov. 5 (2).
Montgomery—July 9; Sept. 24†; Oct. 1; Oct. 29†.
Randolph—July 16† (2); Sept. 3*; Oct. 22† (A) (2); Dec. 3 (2).
Rowan—Sept. 10 (2); Oct. 8†; Oct. 15† (A); Nov. 19 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Gwyn.

Burke—Aug. 6 (2); Sept. 24† (3); Dec. 10 (2).
Caldwell—Aug. 20 (2); Oct. 1† (A) (2); Nov. 26 (2).
Catawba—July 2 (2); Sept. 3† (2); Nov. 12*; Nov. 19†.
Cleveland—July 23 (2); Sept. 10† (A); Sept. 17† (A); Oct. 29 (2).
Lincoln—July 16; Oct. 15 (2)—first week mixed, second civil.
Watauga—Sept. 17 (2) (A) second week.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Bobbitt.

Avery—July 2 (2); Oct. 15 (2).
Davie—Aug. 27; Dec. 3†.
Mitchell—July 23† (2); Sept. 17 (2).
Wilkes—Aug. 6 (2); Oct. 1† (2); Dec. 10 (2).
Yadkin—Aug. ....*; Nov. 19† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Armstrong.

Henderson—Oct. 8 (2); Nov. 19† (2).
McDowell—July 9† (2); Sept. 3 (2).
Polk—Aug. 20 (2).
Rutherford—Sept. 24† (2); Nov. 5 (2).
Transylvania—July 23 (2); Dec. 3 (2).
Yancey—Aug. 6 (2); Oct. 22† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1945—Judge Warlick.

Buncombe—July 9† (2); July 16 (A) (2); July 23*; July 30; Aug. 6† (2); Aug. 20*; Aug. 20 (A) (2); Sept. 3† (2); Sept. 17*; Sept. 17 (A) (2); Oct. 1* (2); Oct. 15*; Oct. 15 (A) (2); Oct. 29; Nov. 5† (2); Nov. 19*; Nov. 19 (A) (2); Dec. 3† (2); Dec. 17*; Dec. 17 (A) (2).
Madison—Aug. 27; Sept. 24; Oct. 22; Nov. 26; Dec. 24.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1945—Judge Rousseau.

Cherokee—Aug. 6 (2); Nov. 5 (2).
Clay—Oct. 1.
Graham—Sept. 3 (2).
Haywood—July 9 (2); Sept. 17† (2); Nov. 19 (2).
Jackson—Oct. 8 (2).
Macon—Aug. 20 (2); Dec. 3 (2).
Swain—July 23 (2); Oct. 22 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1945—Judge Pless.

Caswell—July 2; Nov. 12 (2).
Rockingham—Aug. 6* (2); Sept. 3† (2); Oct. 22†; Oct. 29* (2); Nov. 26† (2); Dec. 10*.
Stokes—Aug. 20; Oct. 8*; Oct. 15†.
Surry—July 9 (2); Sept. 17; Sept. 24 (2); Dec. 17.

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—DON GILLIAM, *Judge*, Wilson.
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. A. HAND JAMES, Clerk.

Fayetteville, third Monday in March and September. MRS. LORA C. BRITT, 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. ....., Deputy Clerk, Wilmington.

OFFICERS

CHARLES F. ROUSE, United States Attorney, Kinston.
CHAUNCEY H. LEGGETT, Assistant United States Attorney, Tarboro, N. C.
F. S. WORTHY, United States Marshal, Raleigh.
A. HAND JAMES, 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

BRYCE R. HOLT, Acting United States District Attorney, Greensboro.
ROBT. S. MCNEILL, Assistant United States Attorney, Winston-Salem.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
JOHN D. MCCONNELL, 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

DAVID E. HENDERSON, United States Attorney, Charlotte.
THOS. A. UZZELL, JR., 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, 1945.

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 9, 1945:

BIGGS, ISLEY MURCHISON.....Lumberton.
BURTON, BERNARD OTTWAY.....Milton.
DEVANE, GRAHAM STUART.....Tomahawk.
HILL, CECIL JAMES.....Arden.
HUDSON, JAMES GILES, JR.....Salisbury.
LEVY, IDRIENNE ESTHER.....Charlotte.
PARKER, JOSEPH WILEY.....Kelford.
TEAL, JAMES PAUL, JR.....Asheville.
WEST, JOHN OLIVER, JR.....Dunn.
WYCHE, THOMAS HENRY.....Charlotte.

COMITY LICENSES ISSUED.

MORGAN, ROY LEONARD.....Greensboro from Virginia.
STONEY, ANDREW BURNET.....Morganton from South Carolina.
TRADER, CLARENCE PRESTON.....Benson from District of Columbia.

Given over my hand and the seal of the Board of Law Examiners of the State of North Carolina, this the 10th day of August, 1945.

(SEAL) EDWARD L. CANNON, *Secretary.*

CASES REPORTED

A PAGE

Abbott, Whitehurst v. 1
Alford, Perry v. 146
Alverson, S. v. 29
American Laundry Machinery Co. v. Skinner 285
Assurance Co., Creech v. 479
Atkinson v. Atkinson 120
Atkinson, *In re* Will of 526
Avent v. Millard 40

B

Ball, *In re* Will of 91
Bank v. Corl 96
Bank v. Frederickson 267
Bank v. Parker 480
Bank v. Steele's Mills 302
Barbee v. Lamb 211
Barfield, S. v. 772
Basinger v. Pharr 531
Batchelor, Ricks v. 8
Batdorf, Ryan v. 228
Baumrind, Hinson v. 740
Baxter, Brumley v. 691
Beach v. Tarboro 26
Beam v. Gilkey 520
Beatty, McCorkle v. 178
Becton, Lane v. 457
Beddingfield, Lee v. 573
Bell v. Nivens 35
Bell v. Niven 395
Bolich-Hall Realty & Insurance Co. v. Disher 345
Boogher, Ins. Co. v. 493
Bourne v. R. R. 43
Bove, S. v. 363
Brady, S. v. 767
Brigman, English v. 402
Britt, S. v. 364
Brooks, S. v. 662
Brooks Transportation Co., Motor Lines v. 733
Brown, S. v. 22
Brumley v. Baxter 691
Bruton v. Smith 584
Buckner v. Wheeldon 62
Bullard v. Hotel Holding Co. 766
Burial Assn., Spearman v. 185
Burnett, *In re* 646
Burney v. Holloway 633

C PAGE

Cab Co., Stewart v. 654
Cabaniss, Rudasill v. 87
Caldwell v. McCorkle 171
Cannaday, S. v. 770
Cannon v. Cannon 611
Carlisle v. Carlisle 462
Carolina Coach Co., Morgan v. 668
Casualty Co. v. Lawing 103
Central Motor Lines, Inc., v. Transportation Co. 733
Chason, Newton v. 204
Cheshire v. First Prebyterian Church 165
Church, Cheshire v. 165
Citizens National Bank v. Corl. 96
Clark v. Clark 687
Clark, S. v. 52
Clay Co., English v. 467
Clayton v. Tobacco Co. 563
Cleaners & Tailors, Inc., Hilgreen v. 656
Coach Co., Hobbs v. 323
Coach Co., Morgan v. 668
Coach Co., Rader v. 537
Coble Dairy Products, Tysinger v. 717
Cochran v. Rowe 645
Cody, S. v. 38
Coleman v. Whisnant 494
Coley v. Dalrymple 67
Commercial National Bank of Charlotte v. Frederickson 267
Comr. of Banks, Indemnity Co. v. 187
Comr. of Banks, Indemnity Co. v. 361
Comr. of Revenue, Fertilizer Co. v. 426
Comrs. of Surry, Jarrell v. 430
Conn, Ervin v. 267
Connelly v. King 709
Corl, Bank v. 96
Cornelison v. Hammond 535
Cotton Co. v. Reaves 436
Cox v. King 709
Cox, S. v. 773
Coxe, Steele v. 726
Cramerton Mills, Inc., Fox v. 580
Crandall, S. v. 148
Creech v. Assurance Co. 479
Crissman v. Palmer 472

PAGE

Cummins v. Fruit Co. 625
Curling, S. v. 769

D

Dairy Products, Tysinger v. 717
Dalrymple, Coley v. 67
Daniel, *In re* Estate of. 18
Dark v. Johnson. 651
Daughtry v. Daughtry. 358
Davenport, S. v. 13
Davis, S. v. 117
Diamond Steamship Transportation Corp., Highway Comm. v. 198
Dickey v. Alverson. 29
Disher, Ins. Co. v. 345
Dover, S. v. 771
Drug Store, Ross v. 226
Dudley v. Dudley. 83

E

Eborn v. Ellis. 386
Elliott, Penner v. 33
Ellis, Eborn v. 386
English v. Brigman. 402
English v. Clay Co. 467
Ervin v. Conn. 267
Evans v. Johnson. 238

F

Fauth, Wood v. 398
Featherstone v. Glenn. 404
Ferguson v. Ferguson. 375
Fertilizer Co. v. Gill, Comr. 426
First-Citizens Bank & Trust Co. v. Parker. 480
First Presbyterian Church, Cheshire v. 165
First Security Trust Co. v. Henderson. 567
Fox v. Mills, Inc. 580
Fox v. Yarborough. 606
Frederickson, Bank v. 267
French, S. v. 276
Friddle, S. v. 240
Fruit Co., Cummins v. 625
Futrell Brothers Lumber Co., Johnson v. 595

G

General Motors Corp., Holladay v. 230
Gilkey, Beam v. 520
Gill, Comr., Fertilizer Co. v. 426

PAGE

Glenn, Featherstone v. 404
Goodman, Troitino v. 406
Goodson v. Lehmon. 514
Gordon, *In re* S. v. 241
Gordon, S. v. 757
Graham, S. v. 217
Grand Lodge v. Grand Lodge. 561
Griffin v. Insurance Co. 684
Griffin & Vose, Inc., v. Minerals Corp. 434
Guilford County, Ins. Co. v. 293

H

Hammond, Cornelison v. 535
Harper v. Harper. 260
Harper, Wickham v. 260
Harrill v. Refining Co. 421
Harrington v. Taylor. 690
Harris Clay Co., English v. 467
Harris, Jordan v. 763
Harrison, S. v. 234
Hartford Accident and Indemnity Co. v. Hood, Comr. 187
Hartford Accident & Indemnity Co. v. Hood, Comr. 361
Hatcher v. Williams. 112
Heglar, S. v. 220
Henderson, Sayer v. 642
Henderson, Trust Co. v. 567
Henry v. Atkinson. 526
Henson v. Wilson. 417
Herrin, Perry v. 601
Highway Comm. v. Transportation Corp. 198
Hilgreen v. Cleaners & Tailors, Inc. 656
Hill, S. v. 74
Hinson v. Baumrind. 740
Hinson v. Morgan. 740
Hobbs v. Coach Co. 323
Holden v. Totten. 558
Holladay v. General Motors Corp. 230
Holloway, Burney v. 633
Hood, Comr., Indemnity Co. v. 187
Hood, Comr., Indemnity Co. v. 361
Horne, S. v. 603
Horton Motor Lines, Inc., Ins. Co. v. 588
Hotel Holding Co., Bullard v. 766

I

Indemnity Co. v. Hood, Comr. 187
Indemnity Co. v. Hood, Comr. 361

PAGE

Ingram v. Smoky Mountain Stages, Inc. 444
In re Burnett 646
In re Morris 48
In re Parker 369
In re Estate of Daniel..... 18
In re S. v. Gordon..... 241
In re Will of Atkinson..... 526
In re Will of Ball..... 91
In re Will of Lomax..... 31
In re Will of Lomax..... 592
Insurance Co. v. Boogher 493
Insurance Co. v. Disher 345
Insurance Co., Griffin v..... 684
Insurance Co. v. Guilford County 293
Insurance Co. v. Motor Lines, Inc. 588
Insurance Co. v. Wells 547
Isaac, S. v..... 310

J

Jackson v. Powell..... 599
Jackson, Sample v..... 380
Jackson County, Turpin v..... 389
Jarrell v. Snow..... 430
Jefferson Standard Life Ins. Co. v. Boogher 493
Jefferson Standard Life Ins. Co. v. Guilford County..... 293
Jenkins v. Jenkins..... 681
Johnson Cotton Co., Inc., v. Reaves 436
Johnson, Dark v..... 651
Johnson, Evans v..... 238
Johnson v. Lumber Co..... 595
Johnson v. Sidbury..... 208
Jones, S. v..... 363
Jordan v. Harris..... 763

K

Kearney v. Thomas..... 156
Kelly v. King..... 709
King, Kelly v..... 709
King v. King..... 639
King, S. v..... 236
King, S. v..... 767
Kornegay, Loftin v..... 490

L

Lamb, Barbee v..... 211
Lane v. Becton..... 457

PAGE

Laundry Machinery Co. v. Skinner 285
Lawing, Casualty Co. v..... 103
Lee v. Beddingfield..... 573
Lehmon, Goodson v..... 514
Lerner Shops v. Rosenthal..... 316
Liggett & Myers Tobacco Co., Clayton v. 563
Loftin v. Kornegay..... 490
Lomax, *In re* Will of..... 31
Lomax, *In re* Will of..... 592
Long, Padgett v..... 392
Lord, S. v..... 354
Louisburg, Mullen v..... 53
Lowe, Westmoreland v..... 553
Lumber Co., Johnson v..... 595
Lumber Mutual Casualty Ins. Co. v. Wells 547

Mc

McCorkle, Caldwell v..... 171
McCorkle v. Beatty..... 178
McDaniel, S. v..... 768
McGuinn v. McLain..... 750
McKnight v. Yarborough..... 606
McLain, McGuinn v..... 750
McMichael v. Pegram..... 400
McMillan v. Robeson..... 754
McNeill, S. v..... 560

M

Manning, S. v..... 41
Marsh, S. v..... 648
Maryland Casualty Co. v. Lawing 103
Masons v. Masons..... 561
Matheson, S. v..... 109
Mays, S. v..... 486
Melton v. Rickman..... 700
Millard, Avent v..... 40
Miller, Ridenhour v..... 543
Miller, S. v..... 213
Miller, S. v..... 478
Mills, Inc., Fox v..... 580
Minerals Corp., Griffin & Vose, Inc., v. 434
Mitchell, S. v..... 42
Moody v. Moody..... 89
Morgan v. Coach Co..... 668
Morgan, Hinson v..... 740
Morgan, S. v..... 549
Morris, *In re*..... 48
Motor Lines, Inc., Ins. Co. v..... 588
Motor Lines v. Transportation Co. 733

PAGE

Mullen v. Louisburg 53
Murdock, S. v. 224
Murphy, S. v. 115

N

Neamand v. Skinkle 383
New Hanover County v. Sidbury .. 679
Newton v. Chason 204
Nivens, Bell v. 35
Niven, Bell v. 395
Noble v. Hotel Holding Co. 766
Non-Metallic Minerals Corp., Griffin & Vose, Inc., v. 434

O

Oldham v. Oldham 476
Order of Masons v. Order of Masons 561

P

Padgett v. Long 392
Palmer, Crissman v. 472
Parker, *In re* 369
Parker, Stewart v. 551
Parker, Trust Co. v. 480
Parsons, S. v. 765
Pearce v. Pearce 571
Pegram, McMichael v. 400
Penner v. Elliott 33
Perry v. Alford 146
Perry v. Herrin 601
Perry, S. v. 174
Peterson, S. v. 540
Pharr, Basinger v. 531
Pleasants, White v. 760
Plummer v. King 709
Powell, Jackson v. 599
Pugh v. Pugh 555

Q

Queen City Coach Co., Hobbs v. 323
Queen City Coach Co., Rader v. 537

R

Rader v. Coach Co. 537
R. R., Bourne v. 43
Raynor v. King 709
Rea v. Simowitz 575
Realty v. Disher 345
Reaves, Cotton Co. v. 436
Refining Co., Harrill v. 421

PAGE

Reid v. Yarborough 606
Rickman, Melton v. 700
Ricks v. Batchelor 8
Ridenhour v. Miller 543
Ridenhour v. Ridenhour 508
Ritchie v. White 450
Robeson, McMillan v. 754
Robinson, Estate, Wilson and Stone v. 348
Rodgers v. Todd 689
Rosenthal, Lerner Shops v. 316
Ross v. Drug Store 226
Rowe, Cochran v. 645
Rudasill v. Cabaniss 87
Ryan v. Batdorf 228

S

Sample v. Jackson 380
Sayer v. Henderson 642
Schaub, Taylor v. 134
Scoggins, S. v. 71
Sechrest, Sink v. 232
Service Fire Ins. Co. v. Motor Lines, Inc. 588
Sherman's Cleaners & Tailors, Inc., Hilgreen v. 656
Shuford Estate, McMichael v. 400
Sidbury, Johnson v. 208
Sidbury, New Hanover County v. 679
Simowitz, Rea v. 575
Sinclair Refining Co., Harrill v. 421
Sink v. Sechrest 232
Skinkle, Neamand v. 383
Skinner, Laundry Machinery Co. v. 285
Smith, S. v. 78
Smith, Bruton v. 584
Smith v. Smith 189
Smith v. Steen 644
Smoky Mountain Stages, Inc., Ingram v. 444
Snow, Jarrell v. 430
Southern Fruit Co., Cummins v. .. 625
Southern Railway Co., Bourne v. 43
Spearman v. Burial Assn. 185
Spencer, S. v. 608
Spooner v. King 709
Spruill, S. v. 356
Standard Fertilizer Co. v. Gill, Comr. 426
Stanley, S. v. 363
S. v. Alverson 29
S. v. Barfield 772

PAGE

S. v. Brady 767
S. v. Britt 364
S. v. Brooks 662
S. v. Brown 22
S. v. Cannaday 770
S. v. Clark 52
S. v. Cody 38
S. v. Cox 773
S. v. Crandall 148
S. v. Curling 769
S. v. Davenport 13
S. v. Davis 117
S. v. Dover 771
S. v. French 276
S. v. Friddle 240
S. v. Gordon 241
S. v. Gordon 757
S. v. Graham 217
S. v. Harrison 234
S. v. Heglar 220
S. v. Hill 74
S. v. Horne 603
S. v. Isaac 310
S. v. Jones 363
S. v. King 236
S. v. King 767
S. v. Lord 354
S. v. McDaniel 768
S. v. McNeill 560
S. v. Manning 41
S. v. Marsh 648
S. v. Matheson 109
S. v. Mays 486
S. v. Miller 213
S. v. Miller 478
S. v. Mitchell 42
S. v. Morgan 549
S. v. Murdock 224
S. v. Murphy 115
S. v. Parsons 765
S. v. Perry 174
S. v. Peterson 540
S. v. Scoggins 71
S. v. Smith 78
S. v. Spencer 608
S. v. Spruill 356
S. v. Stevenson 771
S. v. Stutts 647
S. v. Sutton 332
S. v. Talton 770
S. v. Todd 689
S. v. Vanderlip 610
S. v. White 351

PAGE

S. v. Williams 182
S. v. Williams 475
S. v. Wise 746
S. *ex rel.* Rodgers v. Todd 689
S. *ex rel.* Stewart v. Parker 551
Steele v. Coxe 726
Steele's Mills, Trust Co. v. 303
Steen, Smith v. 644
Sterling Drug Store, Ross v. 226
Stevenson, S. v. 771
Stewart v. Cab Co. 654
Stewart v. Parker 551
Stone v. Thaggard 348
Stutts, S. v. 647
Sun Life Assurance Co., Creech v. 479
Sutton, S. v. 332

T

Talton, S. v. 770
Tarboro, Beach v. 26
Taylor, Harrington v. 690
Taylor v. Schaub 134
Taylor v. Taylor 80
Thaggard, Stone v. 348
Thaggard, Wilson v. 348
Thomas, Kearney v. 156
Tice v. Winchester 673
Tobacco Co., Clayton v. 563
Todd, S. v. 689
Totten, Holden v. 558
Transportation Co., Motor Lines v. 733
Transportation Corp., Highway Comm. v. 198
Troitino v. Goodman 406
Trust Co. v. Henderson 567
Trust Co. v. Parker 480
Trust Co. v. Steele's Mills 303
Turpin v. Jackson County 389
Tysinger v. Dairy Products 717

U

United Mutual Burial Assn., Inc., Spearman v. 185
United Services Life Ins. Co., Griffin v. 684

V

Vanderlip, S. v. 610

W

Wachovia Bank & Trust Co. v. Steele's Mills 303

	PAGE
Wells, Ins. Co. v.	547
Westmoreland v. Lowe	553
Wheeldon, Buckner v.	62
Whisnant, Coleman v.	494
White v. Pleasants	760
White, Ritchie v.	450
White, S. v.	351
Whitehurst v. Abbott	1
Wickham v. Harper	260
Williams, Hatcher v.	112
Williams, S. v.	182
Williams, S. v.	475
Wilson, Henson v.	417
Wilson v. Thaggard	348
Winchester, Tice v.	673
Wise, S. v.	746
Wood v. Fauth	398

Y

Yarborough, Fox v.	606
Yarborough, McKnight v.	606
Yarborough, Reid v.	606
Yellow Cab Co., Stewart v.	654
Young v. Young	340

DISPOSITION OF APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES 773

CASES CITED

A

Abbitt v. Gregory....196 N. C., 9....608
Abbott v. Hunt....129 N. C., 403....347, 762, 763
Abernethy v. Burns....206 N. C., 370....680
Abernethy v. Burns....210 N. C., 636....703, 704
Adams v. Adams....212 N. C., 373....683
Adams, *In re*....218 N. C., 379....50
Aden v. Doub....146 N. C., 10....320
Alderman, *In re*....157 N. C., 507....51
Alexander v. Alexander.... 41 N. C., 229....377
Alexander v. Cedar Works....177 N. C., 137....147
Allen v. Allen ....180 N. C., 465....477
Allen v. Cameron ....181 N. C., 120....378, 620
Allen v. Carr ....210 N. C., 513....698
Allen v. Gooding ....173 N. C., 93....133
Allen v. Gooding ....174 N. C., 271....518
Allen v. Greenlee .... 13 N. C., 370....703
Allen v. Parker ....187 N. C., 376....525
Allen v. Yarborough ....201 N. C., 568....176
Allison v. R. R....129 N. C., 336....738
Alsbrook v. Reid.... 89 N. C., 151....21
Anderson v. Anderson ....177 N. C., 401....466
Anderson v. Felton .... 36 N. C., 55....570
Anderson v. Fidelity Co. ....174 N. C., 417....203
Anderson v. Harrington ....163 N. C., 140....127, 133
Anderson v. McRae ....211 N. C., 197....169, 170, 583
Anderson v. Wilkins ....142 N. C., 153....524
Appomattox Co. v. Buffaloe....121 N. C., 37....37
Archbell v. Archbell....158 N. C., 408....194, 195, 196, 360, 683
Archie v. Lumber Co....222 N. C., 477....583, 584
Armstrong v. Best....112 N. C., 59....195
Arrington v. Arrington....114 N. C., 116....465
Arrington v. Arrington....127 N. C., 190....643
Asheville v. Herbert....190 N. C., 732....700
Ashford v. Davis....185 N. C., 89....350
Askew v. Koonce....118 N. C., 526....83
Atkins v. Durham....210 N. C., 295....698
Audit Co. v. Taylor....152 N. C., 272....292
Austin v. Austin....160 N. C., 367....378
Avent v. Millard....225 N. C., 40....76
Avery v. Stewart....136 N. C., 426....133, 465, 466

B

Bagwell v. Hines....187 N. C., 690....600
Bailey, *In re*....180 N. C., 30....95
Bailey v. R. R....223 N. C., 244....448
Baird v. Baird.... 42 N. C., 265....101
Baird v. Baird....223 N. C., 730....240, 263, 266, 267
Baker v. Edge....174 N. C., 100....622
Bakery v. Ins. Co....201 N. C., 816....539, 540

Balentine v. Gill....218 N. C., 496....70, 456
Ballard v. Boyette....171 N. C., 24....128, 134
Ballinger v. Thomas....195 N. C., 517....194, 240, 266
Balsley v. Balsley....116 N. C., 472....21
Bank v. Broadhurst....197 N. C., 365....145
Bank v. Corl....225 N. C., 96....617
Bank v. Crowder....194 N. C., 312....465
Bank v. Dardine....207 N. C., 509....322
Bank v. Derby....215 N. C., 669....350, 681
Bank v. Dortch....186 N. C., 510....600
Bank v. Gornto....161 N. C., 341....129
Bank v. Johnson....168 N. C., 304....570
Bank v. Lewis....201 N. C., 148....555
Bank v. McArthur....168 N. C., 48....313
Bank v. McCullers....201 N. C., 440....360
Bank v. McCullers....211 N. C., 327....534
Bank v. Mfg. Co....213 N. C., 489....320
Bank v. Miller....190 N. C., 775....37
Bank v. Penland....206 N. C., 323....641
Bank v. Smith....186 N. C., 635....610
Bank v. Snow....221 N. C., 14....600
Bank v. Tolbert....192 N. C., 126....474
Bank v. Turner....202 N. C., 162....454
Banks v. Lane....170 N. C., 14....207
Banks v. Lane....171 N. C., 505....207
Banks v. Mineral Corp....202 N. C., 408....470
Barbee v. Barbee....108 N. C., 581....555
Barbee v. Barbee....187 N. C., 538....478
Barbee v. Bumpass....191 N. C., 521....360
Barber v. Powell....222 N. C., 133....362
Barden v. Stickney....130 N. C., 62....391
Barker v. Dowdy....224 N. C., 742....546, 759
Barker v. Palmer....217 N. C., 519....31
Barnes v. Comrs....135 N. C., 27....432, 433
Barnes v. Saleeby....177 N. C., 256....212
Barnes v. Ward....45 N. C., 93....108
Barrett v. Williams....220 N. C., 32....406
Barrow v. R. R....184 N. C., 202....412
Barton v. Grist....193 N. C., 144....433
Basnight v. Jobbing Co....148 N. C., 350....301
Batchelor v. R. R....196 N. C., 84....79
Bateman v. Sterrett....201 N. C., 59....187
Battle v. Baird....118 N. C., 854....230
Battle v. Mayo....102 N. C., 413....455
Batts v. Little....222 N. C., 353....397
Baxter v. Irvin....158 N. C., 277....197
Beach v. R. R....131 N. C., 399....738
Beck v. Hooks....218 N. C., 105....266
Bell v. Danzer....187 N. C., 224....588
Bell v. Nivens....225 N. C., 35....364
Bellamy v. Mfg. Co....200 N. C., 676....584
Benton v. Alexander....224 N. C., 800....461
Benton v. Building Co....223 N. C., 809....603
Berbarry v. Tombacker....162 N. C., 497....411
Bernard v. Shemwell....139 N. C., 446....590

Berry v. Coppersmith....212 N. C., 50.... 147
Berry v. Payne....219 N. C., 171.... 404
Berwer v. Ins. Co....210 N. C., 814.... 688
Biggers v. Matthews....147 N. C., 299....506, 586, 588
Biggs v. Bowen....170 N. C., 34.... 362
Bird v. Gilliam....125 N. C., 76.... 519
Biscuit Co. v. Sanford....200 N. C., 467....432, 433
Bissette v. Strickland....191 N. C., 260.... 677
Bizzell v. Equipment Co....182 N. C., 98.... 641
Bizzell v. Mitchell....195 N. C., 484.... 350
Black, *In re*....162 N. C., 457.... 372
Blackmore v. Winders....144 N. C., 212....500, 505, 598
Bladen County v. Breece....214 N. C., 544.... 598
Blalock v. Clark....137 N. C., 140.... 415
Blanton v. Bostic....126 N. C., 418.... 474
Blevins v. Barker.... 75 N. C., 436....88, 89
Blount v. Carroway.... 67 N. C., 396....128, 134
Board of Education v. Board of Comrs. ....178 N. C., 305.... 433
Board of Education v. Comrs.....189 N. C., 650.... 433
Board of Education v. Comrs. of Johnston ....198 N. C., 430.... 647
Boger v. Ader....222 N. C., 758.... 66
Boon v. Murphy....108 N. C., 187.... 339
Boone v. Collins ....202 N. C., 12.... 537
Boone v. Hardie .... 83 N. C., 471.... 681
Boone v. Lee ....175 N. C., 383....181, 465
Bost v. Metcalf....219 N. C., 607.... 240
Boutten v. R. R....128 N. C., 337.... 165
Bowden v. Dress....198 N. C., 559.... 228
Bowen v. Bank....209 N. C., 140.... 412
Bowles v. Graded School....211 N. C., 36.... 700
Bowser v. Tarry....156 N. C., 35.... 323
Boyd v. Campbell ....192 N. C., 398.... 600
Boyd v. Latham .... 44 N. C., 365.... 377
Boyd v. Williams ....207 N. C., 30.... 401
Boyer v. Jarrell....180 N. C., 479.... 539
Boyett v. Bank....204 N. C., 639.... 128
Braddy v. Winston-Salem....201 N. C., 301.... 432
Branch v. Griffin.... 99 N. C., 173....524, 525
Brawley v. Collins.... 88 N. C., 605.... 377
Brewington v. Loughran....183 N. C., 558.... 413
Bridges v. Charlotte....221 N. C., 472.... 697
Briggs v. Raleigh....195 N. C., 223.... 698
Britt v. Board of Canvassers.....172 N. C., 797.... 433
Broach, *In re* Will of....172 N. C., 520.... 96
Brock v. Porter....220 N. C., 28.... 617
Brogden v. Gibson....165 N. C., 16....128, 133, 134
Bronson v. Ins. Co.... 85 N. C., 411.... 443
Brown v. Brown....124 N. C., 19.... 546
Brown v. Brown ....213 N. C., 347.... 83
Brown v. Clement ....217 N. C., 47.... 169
Brown v. Comrs. of Richmond..223 N. C., 744.... 696
Brown v. Kress & Co....207 N. C., 722.... 688
Brown v. Hamilton ....135 N. C., 10.... 379

Brown v. Polk ....201 N. C., 375.... 145
Brown v. R. R. ....154 N. C., 300.... 413
Brown v. Ruffin ....189 N. C., 262....686, 687
Brown v. Williams ....196 N. C., 247.... 70
Bryant v. Bryant....178 N. C., 77.... 591
Bryant v. Bryant....193 N. C., 372.... 114
Bryson v. Lucas.... 84 N. C., 680.... 301
Buckner v. Anderson....111 N. C., 572.... 677
Buford v. Mochy....224 N. C., 235.... 69
Buie v. Kennedy....164 N. C., 290.... 539
Builders v. Gadd....183 N. C., 447.... 412
Building Co. v. Sanders....183 N. C., 413....322, 323
Building Co. v. Sanders....185 N. C., 328.... 319
Bullock v. Oil Co....165 N. C., 63.... 525
Bundy v. Sutton....207 N. C., 422.... 176
Bunn v. Todd....107 N. C., 266.... 401
Burcham v. Burcham....219 N. C., 357.... 637
Burke v. Turner.... 85 N. C., 500....107, 108
Burleson v. Board of Aldermen..200 N. C., 30.... 699
Burns v. McGregor.... 90 N. C., 222....128, 134
Burroughs v. Burroughs....160 N. C., 515.... 16
Burroughs v. McNeill.... 22 N. C., 297.... 216
Burton v. Mfg. Co....132 N. C., 17.... 686
Burton v. Smith....191 N. C., 599.... 350
Burton v. Styers....210 N. C., 230.... 70
Butler v. Butler....169 N. C., 584.... 360
Butler v. Tobacco Co....152 N. C., 416.... 566
Butler v. Winston....223 N. C., 421....525, 598
Byers v. Byers....222 N. C., 298....82, 343, 344
Byers v. Byers....223 N. C., 85....82, 83, 151, 343, 588
Bynum v. Wicker....141 N. C., 95.... 129

C

C. T. H. Corporation v. Maxwell..212 N. C., 803.... 202
Cab Co. v. Sanders....223 N. C., 626.... 656
Cable Co. v. Macon....153 N. C., 150.... 413
Calvert v. Alvey....152 N. C., 610.... 729
Calvert v. Peebles.... 80 N. C., 334.... 485
Campbell v. Campbell ....207 N. C., 859.... 82
Campbell v. Cronly....150 N. C., 457.... 600
Cameron v. McDonald....216 N. C., 712.... 474
Campbell v. R. R....201 N. C., 102.... 266
Campbell v. Sigmon....170 N. C., 348....492, 555
Cannon v. Cannon....223 N. C., 664....613, 616, 618, 623
Capehart v. Burrus....122 N. C., 119.... 377
Capehart v. Burrus....124 N. C., 48.... 377
Carlisle v. Carlisle....225 N. C., 462.... 492
Carlton v. Bernhardt-Seagel Co...210 N. C., 655.... 583
Carnes v. Carnes....204 N. C., 636.... 572
Carpenter v. Boyles....213 N. C., 432.... 31
Carpenter v. Hanes....167 N. C., 551....703, 704, 706
Carroll v. Herring....180 N. C., 369....101, 619
Carroll v. Smith....163 N. C., 204....321, 402
Carson v. Oates.... 64 N. C., 115.... 443

Carter v. Anderson....208 N. C., 529.... 210
Carter v. Oxendine....193 N. C., 478.... 465
Carter v. Young....193 N. C., 678.... 620
Cary v. Harris....178 N. C., 624.... 413
Case v. Arnold....215 N. C., 593.... 587
Case v. Biberstein....207 N. C., 514....377, 378
Cash Register Co. v. Townsend....137 N. C., 652....289, 290
Cason v. Shute....211 N. C., 195.... 641
Casualty Co. v. DeLozier....213 N. C., 334.... 548
Casualty Co. v. Lawing....223 N. C., 8.... 106
Caudle v. Morris....160 N. C., 168.... 382
Caudle v. R. R....202 N. C., 404.... 447
Causey v. Morris....195 N. C., 532.... 362
Chambers v. Payne.... 59 N. C., 276.... 524
Champion, *In re*.... 45 N. C., 246....378, 379
Chappell v. Mowery....202 N. C., 584.... 432
Charlotte v. Kavanaugh....221 N. C., 259.... 428
Chavis v. Brown....174 N. C., 122.... 641
Cheatham v. Bobbitt....118 N. C., 343.... 114
Chemical Co. v. Bass....175 N. C., 426.... 641
Cherry v. Canal Co....140 N. C., 422.... 323
Cheshire v. First Presbyterian Church ....221 N. C., 205.... 167
Cheshire v. First Presbyterian Church ....222 N. C., 280....167, 169
Chesson v. Bank....190 N. C., 187.... 608
Chesson v. Container Co....216 N. C., 337.... 412
Chesson v. Container Co....223 N. C., 378.... 411
Chilton v. Smith....180 N. C., 472....464, 492
Christman v. Hilliard....167 N. C., 4.... 147
Churchill v. Ins. Co.... 88 N. C., 205.... 210
Cilley v. Geitner....182 N. C., 714.... 570
Clancy v. Overman.... 18 N. C., 402.... 414
Clark v. Carolina Homes....189 N. C., 703.... 559
Clark v. Henderson....200 N. C., 86....539, 540
Clark v. Lumber Co....158 N. C., 139.... 763
Clarke v. Martin....215 N. C., 405.... 632
Clegg v. Canady....217 N. C., 433....536, 537
Clegg v. Clegg....186 N. C., 28.... 49
Clodfelter v. Wells....212 N. C., 823.... 643
Coates v. Wilkes.... 92 N. C., 376....443, 444
Cobb v. Edwards....117 N. C., 245....134, 213
Cobb v. Fountain....187 N. C., 335.... 483
Coble v. Barringer....171 N. C., 445.... 391
Cochran v. Rowe....225 N. C., 645.... 647
Cogdill v. Hardwood Co....194 N. C., 745.... 33
Cohoon v. Upton....174 N. C., 88.... 600
Cole v. Boyd....175 N. C., 555....125, 126, 131
Cole v. Koonce....214 N. C., 188....632, 633
Cole v. Trust Co....221 N. C., 249.... 690
Coleman v. Whisnant....225 N. C., 494.... 586
Coley v. Dalrymple....225 N. C., 67....416, 453, 456
Collingwood v. Brown....106 N. C., 362.... 4
Collins v. Collins.... 62 N. C., 153.... 194
Collins v. Collins....125 N. C., 98.... 636

Collins v. Davis....132 N. C., 106.... 587
Collins v. Lamb....215 N. C., 719....237, 645
Collins v. Land Co....128 N. C., 563.... 716
Colt Co. v. Barber....205 N. C., 170....686, 687
Colt v. Conner....194 N. C., 344.... 288
Colt v. Springle....190 N. C., 229.... 288
Comr. of Banks v. Gavin....202 N. C., 843.... 145
Construction Co. v. Wright....189 N. C., 456.... 416
Cook v. Bank....129 N. C., 149.... 350
Cook v. Hospital....168 N. C., 250.... 703
Cook v. Sink....190 N. C., 620.... 391
Cooper v. Cooper....221 N. C., 124.... 364
Cooper, *In re* Will of....166 N. C., 210.... 96
Coppersmith v. Ins. Co....222 N. C., 14.... 288
Corbett v. Lumber Co....223 N. C., 704.... 436
Corl v. Corl....209 N. C., 7.... 99
Cornelison v. Hammond....224 N. C., 757.... 535
Cornelison v. Hammond....225 N. C., 535.... 717
Cornelius v. Brawley....109 N. C., 542.... 402
Cory v. Cory....205 N. C., 205.... 448
Cottle v. Johnson....179 N. C., 426.... 546
Cotton Co. v. Reaves....225 N. C., 436.... 514
Cotton Mills v. Maslin....200 N. C., 328.... 169
Cotton Oil Co. v. Tel. Co....171 N. C., 705.... 416
Covington v. James....214 N. C., 71.... 66
Covington v. Wyatt....196 N. C., 367.... 65
Cowan v. Trust Co....211 N. C., 18.... 698
Cowles v. Reavis....109 N. C., 417.... 678
Cox v. Boyden....167 N. C., 320.... 641
Cram v. Cram....116 N. C., 288.... 194
Crampton v. Ivie....126 N. C., 894.... 266
Craven v. Comrs....176 N. C., 531.... 207
Craven, *In re*....169 N. C., 561.... 94
Craven v. Munger....170 N. C., 424.... 362
Craven County v. Investment Co. ....201 N. C., 523.... 517
Crawford v. Marion....154 N. C., 73.... 432
Credle v. Ayers....126 N. C., 11.... 753
Credit Corp. v. Boushall....193 N. C., 605.... 313
Credit Corp. v. Satterfield....218 N. C., 298.... 350
Crissman v. Palmer....225 N. C., 472.... 584
Critcher v. Porter....135 N. C., 542.... 414
Croom v. Lumber Co....182 N. C., 217....70, 467
Crotts v. Winston-Salem....170 N. C., 24.... 60
Crouse v. Barham....174 N. C., 460.... 378
Crowder v. Stiers....215 N. C., 123.... 559
Crowell v. Ins. Co....169 N. C., 35.... 548
Crowell v. Parker....171 N. C., 392.... 763
Cullifer v. R. R....168 N. C., 309.... 448
Cummings v. R. R....217 N. C., 127.... 447
Cunningham v. Long....186 N. C., 526.... 133
Cunningham v. R. R....139 N. C., 427.... 591
Curlee v. Bank....187 N. C., 119.... 362
Curlee v. Scales....200 N. C., 612.... 358
Curlee v. Scales....223 N. C., 788....313, 367, 530

Currie v. Gilchrist.....147 N. C., 648..... 147

D

Daughtry v. Daughtry.....223 N. C., 528.....70, 456
Daughtry v. Daughtry.....225 N. C., 358.....467, 572
Davenport v. McKee..... 94 N. C., 325..... 730
Davie v. Sprinkle.....180 N. C., 580..... 553
Davis v. Bass.....188 N. C., 200..... 360
Davis v. Doggett .....212 N. C., 589.....12, 745
Davis v. Frazier .....150 N. C., 447..... 102
Davis v. Moore .....215 N. C., 449..... 765
Davis v. Shaver ..... 61 N. C., 18..... 389
Davis v. Storage Co. .....186 N. C., 676..... 518
Davis v. Wallace .....190 N. C., 543..... 539
Davis v. Wilmerding .....222 N. C., 639.....64, 65, 66
Davis v. Wyche .....224 N. C., 746..... 397
Dawson v. Dawson.....211 N. C., 453..... 683
Dawson v. Wood.....177 N. C., 158..... 525
Deaver v. Deaver.....137 N. C., 240..... 555
Debnam v. Tel. Co.....126 N. C., 831..... 738
Deitz v. Bolch.....209 N. C., 202..... 641
DeLoache v. DeLoache.....189 N. C., 394..... 731
Denny v. Closse..... 39 N. C., 102..... 570
Dickson v. Brewer.....180 N. C., 403..... 696
Dicks v. Young.....181 N. C., 448..... 622
Distributing Co. v. Carraway.....196 N. C., 58..... 684
Dixon v. Osborne.....201 N. C., 489..... 539
Dodd, *Ex parte*..... 62 N. C., 97.....523, 525
Doe v. Trust Co.....211 N. C., 319..... 534
Dorsett v. Dorsett.....183 N. C., 354.....455, 466
Dorman v. Goodman.....213 N. C., 406..... 12
Dowd v. Corpening..... 32 N. C., 58..... 559
Dowdy v. Dowdy.....154 N. C., 556..... 572
Downing v. Stone.....152 N. C., 525..... 506
Drainage Comrs. v. Sparks.....179 N. C., 581..... 662
Drake v. Asheville.....194 N. C., 6..... 125
Drake v. Howell.....133 N. C., 162..... 554
Ducker v. Cochrane..... 92 N. C., 597..... 415
Dudley v. Dudley.....225 N. C., 83.....82, 343, 344
Duffie v. Williams.....148 N. C., 530..... 483
Duffy v. Hartsfield.....180 N. C., 151..... 424
Dunn v. Bomberger.....213 N. C., 172..... 579
Dunn v. Hines.....164 N. C., 113..... 102
Dunn v. Jones.....195 N. C., 354..... 210
Dunn v. Swanson.....217 N. C., 279..... 765
Dyer v. Dyer.....212 N. C., 620..... 58

E

Edens v. Williams..... 7 N. C., 27..... 101
Edgerton v. Hood, Comr. of Banks .....205 N. C., 816..... 698
Edgerton v. Kirby.....156 N. C., 347..... 432
Edmonds v. Wood.....222 N. C., 118..... 398

Edwards v. Matthews....196 N. C., 39.... 70
Edwards v. Perry....208 N. C., 252....37, 364
Efird v. Comrs. of Forsyth....217 N. C., 691.... 647
Efird v. Smith....208 N. C., 394....539, 540
Elizabeth City v. Commander....176 N. C., 26.... 716
Ellington v. Trust Co....196 N. C., 755.... 378
Elliott v. Power Co....190 N. C., 62.... 731
Elliott v. Tyson....116 N. C., 184.... 646
Elliott v. Tyson....117 N. C., 114.... 646
Ellis v. Ellis....190 N. C., 418.... 82
Ellis v. Wellons....224 N. C., 269.... 704
Elvington v. Shingle Co....191 N. C., 515....507, 586, 587, 588
Erskine v. Motor Co....187 N. C., 826.... 731
Evans v. Etheridge.... 96 N. C., 42.... 404
Evans, *In re* Will of....223 N. C., 206.... 96
Evans v. Johnson....225 N. C., 238.... 266
Everett, *In re* Will of....153 N. C., 83.... 95
Ex Parte Barefoot....201 N. C., 393.... 745
Ex Parte Dodd.... 62 N. C., 97....523, 525
Ex Parte Wilson....222 N. C., 99.... 399
Exum v. R. R....222 N. C., 222.... 559

F

Faggart v. Bost....122 N. C., 517.... 465
Faison v. Middleton....171 N. C., 170....378, 379, 622
Falkner v. Pilcher....137 N. C., 449.... 686
Farfour v. Fahad....214 N. C., 281.... 64
Farrington v. McNeill....174 N. C., 420.... 320
Faulk v. Mystic Circle....171 N. C., 301.... 187
Faust v. Faust....144 N. C., 383.... 745
Feigel v. Products Co....195 N. C., 659.... 414
Ferguson v. Blanchard....220 N. C., 1.... 11
Ferguson v. Glenn....201 N. C., 128.... 65
Ferrand v. Jones.... 37 N. C., 633.... 637
Ferrell v. Broadway....126 N. C., 258.... 107
Field v. Eaton.... 16 N. C., 283.... 101
Fields v. Ogburn....178 N. C., 407.... 425
Finance Co. v. Trust Co....213 N. C., 369.... 559
Finley v. Finley....201 N. C., 1.... 620
Fisher v. Comrs....166 N. C., 238.... 433
Fisher v. Fisher....217 N. C., 70.... 360
Fisher v. Fisher....218 N. C., 42.... 360
Fisher v. Ins. Co....136 N. C., 217.... 203
Flanner v. Butler....131 N. C., 151.... 88
Flanner v. Butler....131 N. C., 155.... 465
Fleming v. Holleman....190 N. C., 449....233, 529
Fleming v. R. R....168 N. C., 248.... 475
Flemming v. Asheville....205 N. C., 765....432, 433
Fochtman v. Greer....194 N. C., 674.... 591
Foil v. Newsome....138 N. C., 115.... 379
Food Co. v. Elliott....151 N. C., 393.... 292
Forte v. Boone....114 N. C., 176.... 37
Fortune v. Hunt....149 N. C., 358.... 321
Foust v. Ireland.... 46 N. C., 184.... 377

Fowler, *In re* Will of....159 N. C., 203.... 94
Foy v. Foy.... 35 N. C., 90.... 343
Foy v. Haughton.... 85 N. C., 169.... 391
Francis v. Francis....223 N. C., 401.... 70
Franklin v. Gentry....222 N. C., 41.... 688
Freeman v. Freeman....141 N. C., 97.... 622
Freeman v. Thompson....216 N. C., 484.... 239
Frey v. Ramsour.... 66 N. C., 466.... 213
Frick Co. v. Shelton....197 N. C., 296.... 412
Fry v. Utilities Co....183 N. C., 281.... 448
Fulton v. Waddell....191 N. C., 688.... 570
Furniture Co. v. Express Co....148 N. C., 87.... 413

G

Gaffney v. Phelps....207 N. C., 553.... 266
Gaither v. Generator Co....121 N. C., 384.... 424
Galloway v. Carter....100 N. C., 111.... 378
Gardner v. Tel. Co....171 N. C., 405.... 412
Garner v. Horner....191 N. C., 539.... 360
Garrett v. Kendrick....201 N. C., 388.... 684
Garrison v. Machine Co....159 N. C., 285....319, 320, 322
Gaskins v. Mitchell....194 N. C., 275.... 686
Gasque v. Asheville....207 N. C., 821.... 731
Gaylord v. Gaylord....150 N. C., 222....132, 133, 319, 321, 464, 492
Geddie v. Williams....189 N. C., 333.... 537
George v. High.... 85 N. C., 99....455, 456
Gerringer v. Gerringer....223 N. C., 818.... 531
Ghormley v. Hyatt....208 N. C., 478.... 125
Gibbs v. Ins. Co....224 N. C., 462.... 548
Gibson v. Gordon....213 N. C., 666.... 641
Gibson, *In re*....222 N. C., 350.... 50
Gillespie v. Gillespie....187 N. C., 40.... 321
Gilliam v. Sanders....198 N. C., 635.... 399
Gilmore v. Ins. Co....214 N. C., 674.... 688
Godfrey v. Power Co....223 N. C., 647....239, 240
Godwin v. R. R....220 N. C., 281.... 631
Goins v. Sargent....196 N. C., 478.... 590
Goldsboro v. Supply Co....200 N. C., 405.... 433
Goode v. Hearne....180 N. C., 475.... 379
Goodson v. Lehmon....224 N. C., 616....516, 517
Goodwin v. Claytor....137 N. C., 225.... 382
Gordon v. Chair Co....205 N. C., 739.... 584
Gordon v. Collett....104 N. C., 381.... 731
Gordon v. Ehringhaus....190 N. C., 147....377, 378
Goss v. Williams....196 N. C., 213.... 579
Gossett v. McCracken....189 N. C., 115.... 763
Goswick v. Durham....211 N. C., 687.... 699
Gower v. Davidian....212 N. C., 172.... 66
Glass v. Shoe Co....212 N. C., 70.... 587
Glenn v. Glenn....169 N. C., 729.... 466
Grady v. Faison....224 N. C., 567....70, 457
Graham v. Floyd....214 N. C., 77.... 598
Graham v. Hoke....219 N. C., 755....69, 70
Grandy v. Sawyer.... 62 N. C., 8.... 379

Grantham v. Grantham.....205 N. C., 363..... 69
Gray v. High Point.....203 N.C., 756..... 332
Green v. Green..... 86 N. C., 546..... 570
Green v. Greensboro College..... 83 N. C., 449..... 644
Greer v. Hayes.....216 N. C., 396.....536, 537
Gregory v. Ins. Co.....223 N. C., 124..... 64
Grier v. Weldon.....205 N. C., 575..... 731
Griffin v. Baker.....192 N. C., 297..... 703
Griffin v. Comrs.....169 N. C., 642..... 207
Griffin v. R. R.....150 N. C., 312..... 518
Griggs v. Sears, Roebuck & Co...218 N. C., 166..... 228
Grimes v. Guion.....220 N. C., 676.....213, 587
Groce v. Myers.....224 N. C., 165.....65, 66
Grocery Co. v. Bails.....177 N. C., 298..... 466
Guano Co. v. Hicks.....120 N. C., 29..... 37
Guano Co. v. Livestock Co.....168 N. C., 442.....289, 413, 414
Guano Co. v. Lumber Co.....146 N. C., 187..... 714
Guano Co. v. Lumber Co.....168 N. C., 337..... 566
Gurganus v. McLawhorn.....212 N. C., 397.....169, 583
Guy v. Bank.....205 N. C., 357..... 391

H

Hagood v. Holland.....181 N. C., 64..... 763
Hale v. Hale.....219 N. C., 191..... 262
Hall v. Coach Co.....224 N. C., 781..... 30
Hall v. Giessell.....179 N. C., 657..... 731
Hamilton v. Buchanana.....112 N. C., 463..... 493
Hamilton v. Greyhound Corp.....220 N. C., 815.....736, 737, 739
Hanes v. Shapiro.....168 N. C., 24..... 234
Hankins v. Hankins.....202 N. C., 358..... 545
Hanna v. Timberlake.....203 N. C., 556..... 688
Harden v. Raleigh.....192 N. C., 395..... 433
Hardware Co. v. Buggy Co.....167 N. C., 423..... 412
Hardware Co. v. Jones.....222 N. C., 530..... 382
Hargrove v. Wilson.....148 N. C., 439.....559, 598
Harper v. Harper.....148 N. C., 453..... 378
Harper v. R. R.....211 N. C., 398..... 266
Harrell v. Hoskins..... 19 N. C., 479..... 379
Harrell v. Welstead.....206 N. C., 817..... 247
Harrington v. Greenville.....159 N. C., 632..... 28
Harrington v. Grimes.....163 N. C., 76..... 600
Harris v. Board of Education....216 N. C., 147..... 432
Harris v. Distributing Co.....172 N. C., 14..... 559
Harris v. Durham .....185 N. C., 572..... 699
Harris v. Harris .....178 N. C., 7..... 465
Harris, *In re* Will of.....218 N. C., 459..... 96
Harris v. R. R.....220 N. C., 698..... 395
Harrison v. R. R.....168 N. C., 382..... 262
Harrison v. Ray.....108 N. C., 215..... 197
Hart v. Comrs. of Burke.....192 N. C., 161..... 246
Hartman v. Spiers..... 87 N. C., 28..... 529
Harvester Co. v. Carter.....173 N. C., 229.....289, 290, 291
Haskins v. Royster..... 70 N. C., 601.....506, 587
Hatch v. R. R.....183 N. C., 617.....229, 230

Hatcher v. Dabbs....133 N. C., 239....687, 731
Hatcher v. Williams....225 N. C., 112....232, 309
Hawkins v. Cedar Works....122 N. C., 87....57
Hawkins v. Everett....58 N. C., 42....570
Hayden v. Hayden....178 N. C., 259....716
Hayes v. Benton....193 N. C., 379....432
Hayes v. Tel. Co....211 N. C., 192....631
Hayman v. Davis....182 N. C., 563....69, 70
Haynes v. Gas Co....114 N. C., 203....579
Haynes v. R. R....182 N. C., 679....447, 448
Haywood v. Trust Co....149 N. C., 208....101
Helms v. Green....105 N. C., 251....608
Helms v. Power Co....192 N. C., 784....579
Helmstetler v. Power Co....224 N. C., 821....69, 70, 453
Henderson v. Powell....221 N. C., 239....653
Henderson v. Wilmington....191 N. C., 269....301
Henderson County v. Smyth....216 N. C., 421....514
Herring v. Pugh....125 N. C., 437....646
Herring v. Williams....153 N. C., 231....101, 617
Heyer v. Bulluck....210 N. C., 321....101, 102, 378, 617
Hickory v. Catawba County....206 N. C., 165....57, 539, 540
Hicks v. Kenan....139 N. C., 337....301
Hicks v. Nivens....210 N. C., 44....165
Hicks v. Westbrook....121 N. C., 131....37, 364
Higdon v. Light Co....207 N. C., 39....583
Hinnant v. R. R....202 N. C., 489....266
Hinton v. Pritchard....107 N. C., 128....181
Hinton v. State Treasurer....193 N. C., 496....696, 697
Hinton v. West....207 N. C., 708....114
Hobbs v. Coach Co....225 N. C., 323....420, 448, 632, 724
Hobbs v. Hobbs....218 N. C., 468....683
Hodges v. Lipscomb....133 N. C., 199....525
Hoffman v. Hospital....213 N. C., 669....703
Holden v. Strickland....116 N. C., 185....134
Holden v. Totten....224 N. C., 547....559
Holder v. Bank....208 N. C., 38....507, 586, 588
Holder v. Mfg. Co....135 N. C., 392....587
Holding v. Daniel....217 N. C., 473....364, 539
Holladay v. General Motors Corp. ....225 N. C., 230....436
Holland v. Smith....224 N. C., 255....101, 377, 619
Holler v. Tel. Co....149 N. C., 336....686, 687
Hollowell v. Manly....179 N. C., 262....378
Holloman v. R. R....172 N. C., 372....168
Holmes v. Fayetteville....197 N. C., 740....699
Holmes v. York....203 N. C., 709....378
Holt v. Holt....114 N. C., 241....102
Holt v. Warehouse Co....116 N. C., 480....608
Home Building, Inc. v. Nash....200 N. C., 430....686
Honeycutt v. Watkins....151 N. C., 652....688
Hopkins v. Barnhardt....223 N. C., 617....661, 662
Hopkins v. Hopkins....132 N. C., 25....759
Hosiery Co. v. Express Co....184 N. C., 478....530
Hospital v. Florence Mills....186 N. C., 554....518
House v. Abell....182 N. C., 619....763

House v. House....131 N. C., 141.... 83
Howard v. Coach Co....216 N. C., 799.... 767
Howard v. Hinson....191 N. C., 366.... 362
Howard v. Howard....200 N. C., 574....64, 263
Howell v. Harris....220 N. C., 198.... 313
Howell v. Howell.... 29 N. C., 491.... 213
Howell v. Howell....223 N. C., 62.... 572
Hoyle v. Carter....215 N. C., 90.... 197
Hudgins v. White.... 65 N. C., 393.... 474
Hudson v. Coble.... 97 N. C., 260.... 399
Hudson v. Greensboro....185 N. C., 502.... 698
Hudson v. R. R....190 N. C., 116.... 448
Hudson v. Silk Co....185 N. C., 342.... 425
Huffman v. Pearson....222 N. C., 193.... 536
Hughes v. Crooker....148 N. C., 318.... 320
Hughes v. Fields....168 N. C., 520.... 7
Hughes v. King.... 27 N. C., 203.... 559
Hughes v. Knott....138 N. C., 105.... 415
Hughes v. Long....119 N. C., 52.... 474
Humphrey v. Churchill....217 N. C., 530.... 251
Hunter v. Bruton....216 N. C., 540.... 447
Hunter v. Retirement System....224 N. C., 359.... 765
Hutchison v. Hutchison....126 N. C., 671.... 525
Hyder v. Hyder....215 N. C., 239.... 83

I

Improvement Co. v. Coley-Bardin....156 N. C., 255.... 424
Ingle v. Green....202 N. C., 116.... 332
Ingram v. Smoky Mountain States, Inc....225 N. C., 444....723, 725
In re Adams....218 N. C., 379.... 50
In re Alderman....157 N. C., 507.... 51
In re Bailey....180 N. C., 30.... 95
In re Black....162 N. C., 457.... 372
In re Broach's Will....172 N. C., 520.... 96
In re Champion.... 45 N. C., 246....378, 379
In re Craven....169 N. C., 561....94, 531
In re Gibson....222 N. C., 350.... 50
In re Lewis.... 88 N. C., 31.... 107
In re Morris....224 N. C., 487....49, 51
In re Mueller's Will....170 N. C., 28.... 95
In re Peterson....136 N. C., 13.... 96
In re Rawling's Will....170 N. C., 58.... 530
In re Reynolds....206 N. C., 276.... 107
In re Scarborough Will....139 N. C., 423....50, 51
In re Shelton's Will....143 N. C., 218.... 95
In re Steele....220 N. C., 685.... 245
In re West....212 N. C., 189.... 550
In re Estate of Daniel....225 N. C., 18.... 300
In re Will of Beard....202 N. C., 661.... 539
In re Will of Cooper....166 N. C., 210.... 96
In re Will of Evans....223 N. C., 206....96, 636
In re Will of Everett....153 N. C., 83.... 95

In re Will of Fowler....159 N. C., 203.... 94
In re Will of Harris....218 N. C., 459.... 96
In re Will of Henderson....201 N. C., 759.... 176
In re Will of Howell....204 N. C., 437.... 662
In re Will of Lomax....224 N. C., 459.... 594
In re Will of Lomax....225 N. C., 31.... 592
In re Will of Stallcup....202 N. C., 6.... 530
In re Will of Westfeldt....188 N. C., 702.... 636
Ins. Co. v. Carolina Beach....216 N. C., 778.... 716
Ins. Co. v. Cordon ....208 N. C., 723.... 321
Ins. Co. v. Dial ....209 N. C., 339.... 319
Ins. Co. v. Disher ....225 N. C., 345.... 763
Ins. Co. v. Jones ....191 N. C., 176.... 402
Ins. Co. v. Knox ....220 N. C., 725....4, 5
Ins. Co. v. Locker ....214 N. C., 1.... 590
Ins. Co. v. Morehead ....209 N. C., 174....319, 322
Ins. Co. v. Parmele ....214 N. C., 63.... 713
Ins. Co. v. R. R. ....132 N. C., 75.... 591
Ins. Co. v. R. R. ....179 N. C., 255....529, 590
Ins. Co. v. Smathers ....211 N. C., 373.... 197
Ins. Co. v. Stadiem ....223 N. C., 49.... 395
Ipock v. Bank....206 N. C., 791.... 526
Iron Works Co. v. Cotton Oil Co..192 N. C., 442.... 412
Irvin v. Clark.... 98 N. C., 437.... 524

J

Jackson v. Jackson....105 N. C., 433.... 572
Jackson v. Tel. Co....139 N. C., 347....705, 706, 707, 708
Jackson v. Williams....152 N. C., 203.... 537
Jarrett v. Holland....213 N. C., 428....6, 88
Jarvis v. Hyer .... 15 N. C., 367.... 444
Jefferson v. Sales Corp....220 N. C., 76.... 684
Jenkins v. R. R....196 N. C., 466.... 447
Jernigan v. Jernigan....179 N. C., 237.... 210
Jerome v. Shaw....172 N. C., 862.... 704
Johnson v. Andrews....132 N. C., 376.... 37
Johnson v. Baker.... 7 N. C., 318.... 524
Johnson v. Ins. Co....215 N. C., 120....562, 690
Johnson v. Ins. Co....221 N. C., 441.... 763
Johnson v. Mills Co....196 N. C., 93.... 608
Johnson v. Sidbury....225 N. C., 208.... 350
Johnston v. Johnston....213 N. C., 255.... 546
Jolley v. Humphries....204 N. C., 672.... 378
Jones v. Britton....102 N. C., 166.... 382
Jones v. Casstevens....222 N. C., 411.... 319
Jones v. Griggs....223 N. C., 279.... 640
Jones v. Guano Co....180 N. C., 319.... 608
Jones v. Ins. Co....210 N. C., 559.... 41
Jones v. Jones....164 N. C., 320.... 133
Jones v. Myatt....153 N. C., 225.... 379
Jones v. Stanly.... 76 N. C., 355.... 587
Jones v. Whichard....163 N. C., 241.... 600
Jordan v. Bryan....103 N. C., 59.... 540
Jordan v. Coffield.... 70 N. C., 110.... 107

Jordan v. Miller....179 N. C., 73....424, 425
Joyner v. Stancill....108 N. C., 153....57
Justice v. Sherard....197 N. C., 237....133

K

Keen v. Parker....217 N. C., 378....598, 640
Keller v. Furniture Co....199 N. C., 413....237
Keller v. R. R....205 N. C., 269....266
Kelly v. McNeill....118 N. C., 349....493
Kelly v. Oliver....113 N. C., 442....320
Kenney v. Hotel Co....194 N. C., 44....411
Kerr v. Bank....205 N. C., 210....210
Kerr v. Girdwood....138 N. C., 473....637
Kester v. Miller Bros....119 N. C., 475....414
Ketchie v. Hedrick....186 N. C., 392....698
Kidder v. Bailey....187 N. C., 505....378
Killon v. Winston-Salem....221 N. C., 512....266
Kime v. Riddle....174 N. C., 442....413
Kindler v. Trust Co....204 N. C., 198....319
Kinney v. Kinney....149 N. C., 321....82, 83
King v. McRackan....168 N. C., 621....7
King v. McRackan....171 N. C., 752....7
King v. Motor Lines....219 N. C., 223....736, 737, 739
Kirby v. Reynolds....212 N. C., 271....506
Kirkman v. Stoker....201 N. C., 9....700
Kivett v. Young....106 N. C., 567....765
Klander v. West....205 N. C., 524....703
Knott v. Cutler....224 N. C., 427....321, 414
Krites v. Plott....222 N. C., 679....102, 617

L

Lackey v. R. R....219 N. C., 195....239
Lamb v. Baxter....130 N. C., 67....762
Lamb v. Pigford....54 N. C., 196....134
Lancaster v. Bland....168 N. C., 377....475
Land Bank v. Davis....215 N. C., 100....461
Landreth v. Morris....214 N. C., 619....70, 534
Lane v. R. R....192 N. C., 287....412
Lanier v. Lumber Co....177 N. C., 200....587
LaRoque v. Kennedy....156 N. C., 360....574
Latham v. Harris....194 N. C., 802....433
Latham v. Simmons....48 N. C., 27....444
LaVecchia v. Land Bank....218 N. C., 35....232
Lawrence v. Hester....93 N. C., 79....69, 71
Lawson v. Langley....211 N. C., 526....362
Leary v. Bus Corp....220 N. C., 745....672, 673
Leary v. Land Bank....215 N. C., 501....329
Leavitt v. Rental Co....222 N. C., 81....425
Ledbetter v. Culberson....184 N. C., 488....101
Ledford v. Lumber Co....183 N. C., 614....332
Lee v. Baird....132 N. C., 755....525, 570
Lee v. Barefoot....196 N. C., 107....677, 678
Lee v. Johnson....222 N. C., 161....12

Lee v. Lee....182 N. C., 61.... 82
Lee v. Parker....171 N. C., 144.... 321
Lee v. Waynesville....184 N. C., 565....60, 433
Lee v. Williams....111 N. C., 200....93, 94
Lefkowitz v. Silver....182 N. C., 339....125, 181
Leonard v. Maxwell, Comr. of Revenue....216 N. C., 89.... 395
Leonard v. Transfer Co....218 N. C., 667.... 632
Lentz v. Lentz....193 N. C., 742.... 683
Lerch v. McKinne....187 N. C., 419.... 474
Lexington v. Indemnity Co....207 N. C., 774.... 350
Lide v. Wells....190 N. C., 37.... 525
Light Co. v. Moss....220 N. C., 200....151, 588
Lightner v. Boone....221 N. C., 78.... 108
Lightner v. Boone....222 N. C., 205.... 397
Lilly & Co. v. Saunders....216 N. C., 163.... 698
Lindsey v. Speight....224 N. C., 453....70, 763
Linebarger v. Linebarger....143 N. C., 229.... 94
Lipe v. Trust Co....206 N. C., 24.... 71
Lipe v. Trust Co....207 N. C., 794....70, 457
Lippard v. Johnson....215 N. C., 384.... 65
Little v. Miles....204 N. C., 646.... 698
Loan Corp. v. Trust Co....210 N. C., 29.... 698
Lockhart v. Lockhart....223 N. C., 123.... 83
Lockhart v. Lockhart....223 N. C., 559.... 82
Locklear v. Savage....159 N. C., 236.... 147
Logan v. Griffith....205 N. C., 580.... 591
London v. Comrs. of Yancey....193 N. C., 100.... 302
Long v. Long....206 N. C., 706.... 82
Love v. Edmonston.... 23 N. C., 152.... 213
Lowder v. Smith....201 N. C., 642.... 537
Ludwick v. Mining Co....171 N. C., 60.... 362
Ludwick v. Penny....158 N. C., 104....703, 704
Lumber Co. v. Blue....170 N. C., 1.... 210
Lumber Co. v. Chair Co....190 N. C., 437.... 210
Lumber Co. v. Drainage Comrs.174 N. C., 647.... 207
Lumber Co. v. Herrington....183 N. C., 85.... 524
Lumber Co. v. Lumber Co....150 N. C., 282.... 88
Lumber Co. v. Mfg. Co....162 N. C., 395.... 411
Lumber Co. v. R. R. ....151 N. C., 23.... 413
Lupton v. Hawkins....210 N. C., 658.... 688
Luttrell v. Hardin....193 N. C., 266.... 488
Lutz v. Hoyle....167 N. C., 632....133, 465
Lykes v. Grove....201 N. C., 254.... 415
Lyon v. Comrs....120 N. C., 237.... 432

Mc

McAden v. Craig....222 N. C., 497....322, 411, 415
McAllister v. Pryor....187 N. C., 832.... 579
McCallum v. McCallum....167 N. C., 310....377, 378, 524, 617
McCanless v. Ballard....222 N. C., 701....536, 537
McClamroch v. Ice Co....217 N. C., 106.... 680
McClure v. Crow....196 N. C., 657.... 587
McCorkle v. Sherrill.... 41 N. C., 173.... 378

McCormick v. Proctor....217 N. C., 23....246, 251, 432
McCotter v. Reel....223 N. C., 486....31
McCoy v. Trust Co....204 N. C., 721....346, 539
McCrowell v. R. R....221 N. C., 366....631
McCullen v. Daughtry....190 N. C., 215....377
McCurry v. Purgason....170 N. C., 463....69
McDaniel v. Tre t Mills....197 N. C., 342....456
McDonald v. Carson....94 N. C., 497....443, 444
McDonald v. MacArthur....154 N. C., 122....350
McFarland v. Harrington....178 N. C., 189....128, 134
McFetters v. McFetters....129 N. C., 731....477
McGee v. Frohman....207 N. C., 475....502
McGill v. Lumberton....215 N. C., 752....71, 416
McGuire v. Evans....40 N. C., 269....101
McIlhenney v. Wilmington....127 N. C., 146....28
McIntire v. McIntire....203 N. C., 631....688
McIntyre v. McIntyre....211 N. C., 698....50
McKeel v. Holloman....163 N. C., 132....21, 435
McLain v. Ins. Co....224 N. C., 837....288
McLean v. Caldwell....178 N. C., 424....525
McManus v. McManus....191 N. C., 740....572
McManus v. R. R....174 N. C., 735....448
McNeill v. McNeill....223 N. C., 178....114, 126, 530
McNinch v. Trust Co....183 N. C., 33....127, 128, 133
McQueen v. McQueen....82 N. C., 471....82

M

Machine Co. v. Bullock....161 N. C., 1....289, 291, 293
Machine Co. v. Freezer....152 N. C., 516....289, 290, 293
Machine Co. v. McClamrock....152 N. C., 405....289, 291
Machine Co. McKay....161 N. C., 584....289, 290, 291, 293
Machine Co. v. Owings....140 N. C., 503....415
Machine Co. v. Tobacco Co....141 N. C., 284....412
Madry v. Scotland Neck....214 N. C., 461....700
Main Co. v. Field....144 N. C., 307....686
Mallonee v. Young....119 N. C., 549....346, 348
Malloy v. Bruden....86 N. C., 251....147
Mann v. Mann....176 N. C., 353....207
Mfg. Co. v. Gray....126 N. C., 108....413
Mfg. Co. v. Gray....129 N. C., 438....413
Mfg. Co. v. Oil Co....150 N. C., 150....413, 414
Mfg. Co. v. R. R....128 N. C., 280....165
Mfg. Co. v. R. R....222 N. C., 330....80
Markham v. Carver....188 N. C., 615....247
Marsh v. Nimocks....122 N. C., 478....399
Martin v. Clegg....163 N. C., 528....753
Martin v. Martin....130 N. C., 27....572
Martin v. Motor Co....201 N. C., 641....703
Martin v. Raleigh....208 N. C., 369....697
Martin v. Sloan....69 N. C., 128....647
Mason v. White....53 N. C., 421....524
Mathews v. Moore....6 N. C., 181....389
Mauney v. Norvell....179 N. C., 628....212, 213
Maxwell v. Construction Co....200 N. C., 500....502

May v. Lewis....132 N. C., 115....379
May v. Loomis....140 N. C., 350....114
Mebane v. Mebane....80 N. C., 34....399
Medlin v. Board of Education....167 N. C., 239....313
Mendenhall v. Benbow....84 N. C., 646....444
Mercer v. Powell....218 N. C., 642....448
Mercer v. Williams....210 N. C., 456....425
Merrell v. Stuart....220 N. C., 326....194, 671
Mesker v. West....192 N. C., 230....539
Mewborn v. Kinston....199 N. C., 72....699
Meyer v. Reaves....193 N. C., 172....168
Mhoon v. Drizzle....14 N. C., 414....212, 213
Michael v. Foil....100 N. C., 178....555
Michaux v. Lassiter....188 N. C., 132....653
Middleton v. Rigsbee....179 N. C., 437....525
Midgett v. Nelson....214 N. C., 396....765
Miller v. Cherry....56 N. C., 24....678
Miller v. Greenwood....218 N. C., 146....703
Miller v. Howell....184 N. C., 119....291
Miller v. R. R....205 N. C., 17....447, 448
Mills v. McRae....187 N. C., 707....416
Mills v. Moore....219 N. C., 25....722
Mining Co. v. Lumber Co....170 N. C., 273....591
Mintz v. Frink....217 N. C., 101....229
Mitchell v. Melts....220 N. C., 793....672, 722, 725
Mitchell v. Saunders....219 N. C., 178....66
Mitchem v. James....213 N. C., 673....66
Mizell v. Bazemore....194 N. C., 324....559
Moffitt v. Asheville....103 N. C., 237....28
Moffitt v. Glass....117 N. C., 142....71
Monger v. Lutterloh....195 N. C., 274....173, 412, 416
Monroe v. Holder....182 N. C., 79....608
Monroe v. Niven....221 N. C., 362....396, 559
Montgomery v. Blades....217 N. C., 654....239
Moody v. Moody....225 N. C., 89....83, 343
Mooney v. Mull....216 N. C., 410....703
Moore v. Iron Works....183 N. C., 438....579
Moore v. Rankin....172 N. C., 599....21
Moose v. Barrett....223 N. C., 524....394
Mordecai v. Boylan....59 N. C., 365....570
Morehead v. Bennett....219 N. C., 747....598
Morgan v. Fraternal Assn....170 N. C., 75....574
Morgan v. Hood, Comr. of Banks..211 N. C., 91....641
Morgan v. Smith....77 N. C., 37....587
Morgan v. Turnage Co., Inc....213 N. C., 425....590
Morris v. Basnight....179 N. C., 298....6
Morris v. Holshouser....220 N. C., 293....506
Morris, *In re*....224 N. C., 487....49, 51
Morris v. Waggoner....209 N. C., 183....378
Morton v. Lumber Co....178 N. C., 163....391
Morton v. Water Co....169 N. C., 468....313
Motor Co. v. Credit Co....219 N. C., 199....591
Motor Co. v. Reaves....184 N. C., 260....350
Moye v. Petway....76 N. C., 327....197
Mueller, *In re* Will of....170 N. C., 28....95

Mull v. Walker....100 N. C., 46.... 107
Mullen v. Louisburg....225 N. C., 53....433, 435
Munds v. Cassidey.... 98 N. C., 558.... 443
Murphy v. Greensboro....190 N. C., 268.... 700
Murray Co. v. Broadway....176 N. C., 149.... 288
Murray v. R. R....218 N. C., 392.... 331
Muse v. Muse.... 84 N. C., 35....195, 360
Myers v. R. R....162 N. C., 343....45, 47

N

Nash v. Monroe....198 N. C., 306.... 699
Nash v. R. R.... 67 N. C., 413.... 716
Nash v. R. R....202 N. C., 30.... 266
Nash v. Royster....189 N. C., 408....65, 414
Neal v. R. R....126 N. C., 634.... 631
Neal v. Trust Co....224 N. C., 103....69, 70, 456
Neely v. Minus....196 N. C., 345.... 230
Nelson v. Nelson....176 N. C., 191....88, 465
Nesbitt v. Donoho....198 N. C., 147.... 70
Newbern v. Hinton....190 N. C., 108.... 4
Newbern v. Leigh....184 N. C., 166.... 4
Newby v. Drainage District....163 N. C., 24.... 207
Newlin v. Osborne.... 47 N. C., 164.... 377
Newman v. Comrs. of Vance County ....208 N. C., 675.... 698
Nicholson v. Lumber Co....156 N. C., 59.... 574
Noble v. Pritchett....204 N. C., 804.... 688
Norton v. McLaurin....125 N. C., 185.... 474
Norton v. McLelland....208 N. C., 137.... 70

O

Oil Co. v. Baars....224 N. C., 612.... 134
Oil Co. v. Burney....174 N. C., 382....416, 574
Olds v. Cedar Works....173 N. C., 161.... 391
Olive v. Kearsley....183 N. C., 195....347, 763
Oliver v. Oliver....219 N. C., 299....82, 344
O'Briant v. Lee....212 N. C., 793....11, 12
O'Connor v. O'Connor....109 N. C., 139.... 572
O'Neal v. Wake County....196 N. C., 184.... 302
Owens v. Lumber Co....212 N. C., 133.... 729
Owens v. Phelps.... 95 N. C., 286.... 687
Owens v. Williams....130 N. C., 165....134, 465

P

Pack v. Auman....220 N. C., 704.... 722
Packard v. Smart....224 N. C., 480.... 386
Pafford v. Construction Co....218 N. C., 782.... 767
Page v. Foust.... 89 N. C., 447.... 379
Page v. Page....161 N. C., 170.... 83
Palmer v. Haywood County....212 N. C., 284.... 301
Palmer v. Lowder....167 N. C., 331.... 762
Parker v. Fenwick....138 N. C., 209.... 413

Parker v. Dickinson....196 N. C., 242.... 399
Parker v. Parker....210 N. C., 264....85, 343
Parks-Belk Co. v. Concord....194 N. C., 134.... 28
Parris v. Fischer Co....219 N. C., 292.... 202
Parrish v. Armour & Co....200 N. C., 654.... 584
Patterson v. Bryant....216 N. C., 550.... 587
Patterson v. Franklin....168 N. C., 75.... 70
Patterson v. Mills....121 N. C., 258.... 731
Pate v. Blades....163 N. C., 267.... 289
Pate v. Gaitley....183 N. C., 262.... 555
Pate v. Lumber Co....165 N. C., 184.... 379
Paul v. Washington....134 N. C., 363.... 432
Payne v. Stanton....211 N. C., 43.... 66
Peacock v. Barnes....139 N. C., 196.... 391
Peanut Co. v. R. R....155 N. C., 148.... 412
Peebles v. Patapsco Guano Co.... 77 N. C., 233.... 292
Peele v. LeRoy....222 N. C., 123....127, 128, 134
Peele v. Peele....216 N. C., 298.... 478
Pendergraft v. Royster....203 N. C., 384.... 66
Pendergraph v. Express Co....178 N. C., 344.... 413
Pendleton v. Williams....175 N. C., 248.... 525
Penland v. Wells....201 N. C., 173....464, 492
Penny v. Battle....191 N. C., 220.... 677
Peoples v. Fulk....220 N. C., 635....672, 673
Pepper v. Clegg....132 N. C., 312.... 210
Perkins v. Caldwell.... 77 N. C., 433.... 21
Perkins v. Coal Co....189 N. C., 602.... 580
Perkins v. Perkins.... 88 N. C., 41.... 90
Perry v. Bassenger....219 N. C., 838....521, 525
Perry v. Perry....172 N. C., 62.... 362
Perry v. Surety Co....190 N. C., 284....9, 464, 492
Peterson, *In re*....136 N. C., 13.... 96
Pettillo, *Ex Parte*.... 80 N. C., 50.... 399
Pharr v. Pharr....223 N. C., 115.... 83
Phipps v. Indemnity Co....203 N. C., 420.... 483
Pickard v. Plaid Mills....213 N. C., 28.... 584
Pickler v. Board of Education....149 N. C., 221.... 60
Pierce v. Eller....167 N. C., 672.... 210
Pierce v. Faison....183 N. C., 177.... 591
Pinnix v. Griffin....221 N. C., 348.... 169
Pleasants v. Barnes....221 N. C., 173.... 653
Plott v. Ferguson....202 N. C., 446.... 698
Pollard v. Pollard....221 N. C., 46.... 572
Porter v. Construction Co....195 N. C., 328.... 165
Posey v. Patton....109 N. C., 455.... 610
Powell v. Benthall....136 N. C., 145.... 546
Powell v. Moore....204 N. C., 654.... 688
Powell v. Powell....168 N. C., 561.... 524
Powell v. Turpin....224 N. C., 67....389, 390
Powell v. Water Co....171 N. C., 290....590, 591
Powell v. Woodcock....149 N. C., 235.... 378
Power Co. v. Elizabeth City....188 N. C., 278.... 698
Power Co. v. Casualty Co....193 N. C., 618.... 549
Power Co. v. Clay County....213 N. C., 698.... 301
Power Co. v. Klutz....196 N. C., 358.... 362

Powers v. Sternberg....213 N. C., 41....330, 449, 723
Pue v. Hood, Comr....222 N. C., 310....60, 433
Pratt v. Chaffin....136 N. C., 350....320, 323
Pretzfelder v. Ins. Co....123 N. C., 164....731
Price v. Askins....212 N. C., 583....69, 70, 457
Price v. Electric Co....160 N. C., 450....452
Price v. Harrington....171 N. C., 132....555
Price v. Honeycutt....216 N. C., 270....765
Price v. Hunt....33 N. C., 42....444
Price v. Trustees....172 N. C., 84....28
Pritchard v. Fox....49 N. C., 141....413
Pritchard v. Steamboat Co....169 N. C., 457....391
Pritchard v. Williams....176 N. C., 108....406
Pritchett v. R. R....157 N. C., 88....610
Pruitt v. Wood....199 N. C., 788....37

Q

Queen v. DeHart....209 N. C., 414....176
Quelch v. Futch....174 N. C., 395....518
Query v. Ins. Co....218 N. C., 386....475, 539, 584

R

Rader v. Coach Co....225 N. C., 537....584
Ragan v. Ragan....212 N. C., 753....559
Ragan v. Ragan....214 N. C., 36....514
R. R. v. Forbes....188 N. C., 151....697
R. R. v. Gaston County....200 N. C., 780....700
R. R. v. Hardware Co....138 N. C., 175....703, 705
R. R. v. Hardware Co....143 N. C., 54....703, 704, 705
R. R. v. Lumber Co....185 N. C., 227....165
R. R. v. Morehead City....167 N. C., 118....432
Raines v. Osborne....184 N. C., 599....619
Raleigh v. Jordan....218 N. C., 55....430
Ralston v. Telfair....17 N. C., 255....620
Rand v. Rand....78 N. C., 12....443
Rankin v. Oates....183 N. C., 517....323
Rankin v. Shaw....94 N. C., 405....382
Ratcliff v. Ratcliff....131 N. C., 425....575
Rawls v. Bennett....221 N. C., 127....703
Ray v. Robinson....216 N. C., 430....534
Raynor v. Comrs. of Louisburg..220 N. C., 348....61
Real Estate Co. v. Sasser....179 N. C., 497....763
Realty Co. v. Boren....211 N. C., 446....698
Rector v. Logging Co....179 N. C., 59....107
Redmon v. R. R....195 N. C., 764....447, 448
Reed v. Highway Comm....209 N. C., 648....60, 433
Register Co. v. Bradshaw....174 N. C., 414....292
Reel v. Reel....8 N. C., 248....94
Reeves v. Miller....209 N. C., 362....377
Reeves v. Reeves....16 N. C., 386....377
Reeves v. Staley....220 N. C., 573....331, 672, 724
Reid v. Alexander....170 N. C., 303....620
Reid v. Reid....199 N. C., 740....216

Reidsville v. Slade....224 N. C., 48.... 513
Rental Co. v. Justice....212 N. C., 523....212, 213, 590
Reyburn v. Sawyer....135 N. C., 328.... 30
Reynolds, *In re*....206 N. C., 276.... 107
Reynolds v. Morton....205 N. C., 491.... 465
Reynolds v. Reynolds....209 N. C., 254.... 453
Rhodes v. Collins....198 N. C., 23.... 703
Ricks v. Wilson....154 N. C., 282....88, 465, 492
Riggan v. Harrison....203 N. C., 191.... 688
Riggs v. Swann.... 59 N. C., 118.... 127
Righton v. Pruden.... 73 N. C., 61.... 443
Riley v. Pelletier....134 N. C., 316.... 362
Riley v. Stone....169 N. C., 421.... 40
Ringgold v. Land....212 N. C., 369.... 35
Ritchie v. White....225 N. C., 450.... 466
Roberts v. Bus. Co....198 N. C., 779.... 37
Roberts v. Oldham.... 63 N. C., 297.... 444
Roberts v. Woodworking Co....111 N. C., 432.... 70
Robertson v. Halton....156 N. C., 215....291, 413
Robinson v. Ham....215 N. C., 24.... 483
Robinson v. McAlhaney....216 N. C., 674.... 169
Robinson v. Willoughby.... 65 N. C., 520.... 11
Rodriguez v. Rodriguez....224 N. C., 275.... 641
Roebuck v. Carson....196 N. C., 672.... 322
Roebuck v. Surety Co....200 N. C., 196.... 483
Rogers v. Timberlake....223 N. C., 59.... 406
Rollins v. Henry.... 78 N. C., 342.... 6
Rose v. Franklin....216 N. C., 289....714, 715
Ross v. Henderson.... 77 N. C., 170.... 444
Rowe v. Lumber Co....128 N. C., 301.... 714
Rowe v. Lumber Co....133 N. C., 433.... 714
Ruark v. Trust Co....206 N. C., 564.... 202
Rudasill v. Falls.... 92 N. C., 222.... 731
Ruffin v. Overby.... 88 N. C., 369.... 147
Rush v. McPherson....176 N. C., 562.... 465
Russ v. R. R....220 N. C., 715.... 262
Russell v. Campbell....112 N. C., 404.... 646
Russell v. Cutshall....223 N. C., 353....653, 654
Ryals v. Contracting Co....219 N. C., 479.... 358

S

Salmon v. Pearce....223 N. C., 587.... 729
Samet v. Klaff....181 N. C., 502.... 102
Sample v. Jackson....225 N. C., 380.... 485
Sanders v. Sanders....167 N. C., 319.... 107
Sandlin v. Yancey....224 N. C., 519.... 133
Sappenfield v. Goodman....215 N. C., 417....212, 213
Sash Co. v. Parker....153 N. C., 130.... 382
Scarborough, *In re* Will of....139 N. C., 423....50, 51
School District v. Alamance County ....211 N. C., 213....358, 432
School v. Peirce....163 N. C., 424.... 210
Schwren v. Falls....170 N. C., 251.... 637
Scott v. Life Assn....137 N. C., 516.... 350

Scott v. Smith....121 N. C., 94....432
Scull v. Pruden....92 N. C., 168....715
Sedbury v. Express Co....164 N. C., 363....389
Self Help Corp. v. Brinkley....215 N. C., 615....358
Sexton v. Ins. Co....132 N. C., 1....382
Shakespeare v. Land Co....144 N. C., 516....684
Shaw v. McNeill....95 N. C., 535....686
Sheets v. Tobacco Co....195 N. C., 149....170, 483
Shelton, *In re* Will of....143 N. C., 218....95
Shelton v. R. R....193 N. C., 670....332
Shelton v. Shelton....58 N. C., 292....133
Shelton v. White....163 N. C., 90....207
Shepard v. Leonard....223 N. C., 110....216
Sherlin v. R. R....214 N. C., 222....448
Sherrod v. Mayo....156 N. C., 144....444
Shirley v. Ayers....201 N. C., 51....331, 448
Shives v. Cotton Mills....151 N. C., 290....197
Shoenith, Inc. v. Mfg. Co....220 N. C., 390....203
Shore v. Shore....220 N. C., 802....477
Shorter v. Cotton Mills....198 N. C., 27....653
Shuford v. Yarborough....198 N. C., 5....517
Sills v. Ford....171 N. C., 733....587
Silver v. Silver....220 N. C., 191....683
Simmons v. Dowd....77 N. C., 155....474
Simons v. Lebrun....219 N. C., 42....213
Simonton v. Lanier....71 N. C., 498....698
Simpson v. Simpson....80 N. C., 332....485
Sims v. Ray....93 N. C., 87....195
Sing v. Charlotte....213 N. C., 60....301, 699
Singleton v. Cherry....168 N. C., 402....360, 465
Sink v. Sechrest....225 N. C., 232....266
Sisk v. Motor Freight, Inc....222 N. C., 631....204
Sitterson v. Sitterson....191 N. C., 319....82
Skinner v. Terry....107 N. C., 103....474
Sloan v. Hart....150 N. C., 269....753
Small v. Dorsett....223 N. C., 754....114, 291
Smathers v. Gilmer....126 N. C., 757....391
Smiley v. Pearce....98 N. C., 185....128
Smith v. Allen....181 N. C., 56....591
Smith v. Arthur....110 N. C., 400....555
Smith v. Bank....223 N. C., 249....57
Smith v. Browne....132 N. C., 365....762
Smith v. Furniture Co....221 N. C., 536....767
Smith v. Gudger....133 N. C., 627....525
Smith v. Hosiery Mill....212 N. C., 661....313
Smith v. Kappas....219 N. C., 850....358
Smith v. King....107 N. C., 273....194
Smith v. Lumber Co....155 N. C., 389....102
Smith v. Moore....149 N. C., 185....114
Smith v. Moore....150 N. C., 158....518
Smith v. Smith....199 N. C., 463....37
Smith v. Smith....223 N. C., 433....364
Smith v. Smith....225 N. C., 189....360, 456, 572
Smith v. Texas Co....200 N. C., 39....539, 540, 583
Smith v. Thompson....210 N. C., 672....332

Smith v. Turnage-Winslow Co....212 N. C., 310..... 587
Smith v. Wharton .....199 N. C., 246..... 66
Smith v. Winston-Salem .....189 N. C., 178..... 539
Smith v. Witter .....174 N. C., 616..... 525
Snider v. High Point.....168 N. C., 608..... 28
Snoden v. Humphries..... 2 N. C., 21..... 153
Solomon v. Bates.....118 N. C., 311..... 114
Sparks v. Sparks..... 94 N. C., 527..... 194
Speas v. Bank.....188 N. C., 524.....83, 530, 543
Speed v. Perry.....167 N. C., 122..... 313
Speight v. Trust Co.....209 N. C., 563.....114, 128
Spence v. Pottery Co.....185 N. C., 128..... 12
Spencer v. Brown.....214 N. C., 114..... 358
Spencer v. Credle.....102 N. C., 68..... 4
Spencer v. Wills.....179 N. C., 175..... 207
Spiers v. Halstead..... 74 N. C., 620..... 413
Springs v. Scott.....132 N. C., 548..... 525
Sprinkle v. Wellborn.....140 N. C., 163..... 517
Sprout v. Ward.....181 N. C., 372..... 412
Staley v. Lowe.....197 N. C., 243..... 70
Stancil v. Wilder.....222 N. C., 706..... 684
Stancill v. Underwood.....188 N. C., 475.....506, 703
Stanford v. Grocery Co.....143 N. C., 419.....506, 703
S. v. Allen .....190 N. C., 498..... 33
S. v. Allison .....200 N. C., 190..... 184
S. v. Anderson .....222 N. C., 148.....358, 530
S. v. Andrew ..... 61 N. C., 205..... 667
S. v. Arnold .....107 N. C., 861.....119, 489
S. v. Arrington ..... 7 N. C., 571..... 176
S. v. Aswell .....193 N. C., 399..... 759
S. v. Bagley .....158 N. C., 608..... 176
S. v. Baker .....222 N. C., 428..... 358
S. v. Baldwin .....178 N. C., 693..... 667
S. v. Baxley .....223 N. C., 210..... 604
S. v. Bazemore .....193 N. C., 336..... 176
S. v. Beal .....199 N. C., 278.....76, 237, 315
S. v. Benson .....183 N. C., 795.....284, 749
S. v. Bentley .....223 N. C., 563..... 177
S. v. Bethea .....186 N. C., 22..... 73
S. v. Biggs .....224 N. C., 23..... 356
S. v. Bost .....189 N. C., 639..... 358
S. v. Bowser .....214 N. C., 249.....111, 367
S. v. Boyd .....223 N. C., 79.....117, 151, 223, 588
S. v. Boykin .....211 N. C., 407..... 153
S. v. Brame .....185 N. C., 631..... 177
S. v. Branner .....149 N. C., 559.....150, 151, 155
S. v. Britt .....225 N. C., 364..... 313
S. v. Brittain .....143 N. C., 668..... 154
S. v. Brockwell .....209 N. C., 209..... 698
S. v. Brown .....203 N. C., 513..... 559
S. v. Brown .....218 N. C., 415.....111, 759
S. v. Brown .....221 N. C., 301..... 30
S. v. Bryant .....213 N. C., 752..... 358
S. v. Bryson .....200 N. C., 50..... 358
S. v. Buffkin .....209 N. C., 117..... 749

S. v. Burgess ....192 N. C., 668.... 219
S. v. Burney ....215 N. C., 598.... 111
S. v. Calcutt ....219 N. C., 545.... 215
S. v. Cameron ....121 N. C., 572.... 550
S. v. Cameron ....223 N. C., 464.... 530
S. v. Carpenter ....215 N. C., 635.... 255
S. v. Casey ....201 N. C., 620....237, 474, 475
S. v. Casey ....212 N. C., 352....336, 367
S. v. Cash ....219 N. C., 818.... 604
S. v. Clarke ....220 N. C., 392.... 611
S. v. Clegg ....214 N. C., 675.... 24
S. v. Cloninger ....149 N. C., 567.... 184
S. v. Coal Co. ....210 N. C., 742.... 225
S. v. Cody ....224 N. C., 470.... 117
S. v. Coffey ....174 N. C., 814....284, 749
S. v. Conly ....130 N. C., 683.... 550
S. v. Cook ....162 N. C., 586.... 313
S. v. Cook ....207 N. C., 261.... 611
S. v. Corpening .... 32 N. C., 58.... 559
S. v. Cox ....216 N. C., 424.... 151
S. v. Craig ....176 N. C., 740....176, 177
S. v. Crandall ....225 N. C., 148.... 588
S. v. Crook ....115 N. C., 760....215, 216, 218, 219
S. v. Crook ....133 N. C., 672.... 358
S. v. Cureton ....215 N. C., 778.... 749
S. v. Cutshall ....109 N. C., 764.... 17
S. v. Daniels ....197 N. C., 285.... 150
S. v. Davenport ....225 N. C., 13.... 759
S. v. Davis ....214 N. C., 787....244, 245, 255, 258, 259
S. v. Davis ....222 N. C., 178.... 235
S. v. Davis ....223 N. C., 381.... 542
S. v. Day ....215 N. C., 566.... 749
S. v. Dee ....214 N. C., 509.... 323
S. v. DeGraffenreid ....224 N. C., 517....77, 355
S. v. DeHerrodora ....192 N. C., 749.... 703
S. v. DeJournette ....214 N. C., 575.... 550
S. v. DeVane ....166 N. C., 281.... 51
S. v. Dick .... 60 N. C., 440.... 313
S. v. Dilliard ....223 N. C., 446....367, 543
S. v. Dingle ....209 N. C., 293.... 37
S. v. Dixon ....215 N. C., 161.... 698
S. v. Donnell ....202 N. C., 782.... 489
S. v. Dowden ....118 N. C.,1145.... 111
S. v. Duncan ....208 N. C., 316.... 372
S. v. Dunheen ....224 N. C., 738.... 489
S. v. Elder ....217 N. C., 111.... 237
S. v. Eliason .... 91 N. C., 564.... 16
S. v. Ellerbe ....223 N. C., 770.... 358
S. v. Ellis ....210 N. C., 166.... 542
S. v. Elmore ....212 N. C., 531.... 119
S. v. Evans ....198 N. C., 82....111, 749
S. v. Everhardt ....203 N. C., 610.... 30
S. v. Everitt ....164 N. C., 399....215, 651
S. v. Exum ....138 N. C., 599.... 284
S. v. Exum ....213 N. C., 16.... 488

S. v. Farrington ....141 N. C., 844.... 150
S. v. Finley ....118 N. C.,1161.... 184
S. v. Floyd ....220 N. C., 530....33, 605
S. v. Fogleman ....204 N. C., 401.... 489
S. v. Fowler ....193 N. C., 290.... 698
S. v. Francis ....157 N. C., 612.... 119
S. v. Friddle ....223 N. C., 258....241, 367
S. v. Fuller ....114 N. C., 885....284, 474
S. v. Gay ....224 N. C., 141.... 111
S. v. Godwin ....138 N. C., 582.... 176
S. v. Goff ....205 N. C., 545....24, 153, 155
S. v. Gooding ....196 N. C., 710.... 488
S. v. Goodman ....220 N. C., 250.... 223
S. v. Gordon ....224 N. C., 304....111, 249, 252
S. v. Gore ....207 N. C., 618....17, 73
S. v. Grady .... 83 N. C., 643.... 339
S. v. Graham ....194 N. C., 459.... 339
S. v. Graham ....224 N. C., 347....117, 561
S. v. Graham ....225 N. C., 217.... 216
S. v. Grainger ....223 N. C., 716.... 749
S. v. Grass ....223 N. C., 31....356, 488, 667, 748
S. v. Gray ....162 N. C., 608.... 358
S. v. Greer ....173 N. C., 759.... 215
S. v. Gregory ....223 N. C., 415....177, 479
S. v. Griggs ....197 N. C., 352.... 33
S. v. Griggs ....223 N. C., 279.... 598
S. v. Hairston ....222 N. C., 455....282, 339, 606, 667
S. v. Hall ....199 N. C., 685.... 111
S. v. Hall ....224 N. C., 314....247, 248, 249, 251, 364
S. v. Hammonds ....216 N. C., 67....111, 759
S. v. Hardin ....183 N. C., 815....215, 216, 218, 651
S. v. Hargett ....196 N. C., 692.... 177
S. v. Harris ....213 N. C., 758.... 25
S. v. Harris ....216 N. C., 746.... 698
S. v. Harris ....223 N. C., 697.... 25
S. v. Hart ....186 N. C., 582.... 184
S. v. Hartsfield ....188 N. C., 357.... 550
S. v. Hawkins ....214 N. C., 326....111, 284, 336
S. v. Henderson ....206 N. C., 830.... 215
S. v. Herndon ....223 N. C., 208.... 759
S. v. Hilton ....151 N. C., 687....215, 216, 219
S. v. Hobbs ....216 N. C., 14.... 732
S. v. Holland ....216 N. C., 610.... 488
S. v. Holt ....195 N. C., 240.... 24
S. v. Howard ....222 N. C., 291.... 749
S. v. Hudson .... 74 N. C., 246.... 177
S. v. Hudson ....218 N. C., 219....111, 488
S. v. Hunt ....223 N. C., 173....119, 282
S. v. Hyman ....164 N. C., 411.... 154
S. v. Ingram ....204 N. C., 557.... 151
S. v. Isaac ....225 N. C., 310.... 530
S. v. Jarrell ....141 N. C., 722.... 184
S. v. Jaynes ....198 N. C., 728.... 219
S. v. Johnson ....169 N. C., 311.... 216
S. v. Johnson ....199 N. C., 429....116, 223

S. v. Johnson ..... 219 N. C., 757 367
S. v. Jones ..... 139 N. C., 612 154
S. v. Jones ..... 175 N. C., 709 488
S. v. Jones ..... 222 N. C., 37 111
S. v. Justices ..... 24 N. C., 430 432
S. v. King ..... 219 N. C., 667 367
S. v. King ..... 222 N. C., 137 ..... 216, 514
S. v. Kline ..... 190 N. C., 177 32
S. v. Koonce ..... 108 N. C., 752 ..... 150, 153
S. v. Landin ..... 209 N. C., 20 ..... 111, 225, 759
S. v. Lawrence ..... 213 N. C., 674 698
S. v. Lee ..... 193 N. C., 231 530
S. v. Lefevers ..... 216 N. C., 494 488
S. v. Lemons ..... 182 N. C., 828 177
S. v. Levy ..... 187 N. C., 581 355
S. v. Lippard ..... 223 N. C., 167 248
S. v. Lockey ..... 214 N. C., 525 560
S. v. Love ..... 187 N. C., 32 313
S. v. Lowry ..... 170 N. C., 730 489
S. v. Lytle ..... 138 N. C., 738 154
S. v. McAlphin ..... 26 N. C., 140 153
S. v. McClure ..... 166 N. C., 321 ..... 283, 284, 748
S. v. McDuffie ..... 107 N. C., 885 17
S. v. McHaffey ..... 194 N. C., 28 ..... 282, 284
S. v. McKay ..... 150 N. C., 813 ..... 176, 177
S. v. McKinnon ..... 223 N. C., 160 759
S. v. McKnight ..... 210 N. C., 57 151
S. v. McLamb ..... 214 N. C., 322 611
S. v. McLeod ..... 198 N. C., 649 489
S. v. Mann ..... 219 N. C., 212 16
S. v. Manning ..... 221 N. C., 70 667
S. v. Marion ..... 200 N. C., 715 759
S. v. Marshall ..... 208 N. C., 127 358
S. v. Martin ..... 182 N. C., 846 42
S. v. Matthews ..... 191 N. C., 378 ..... 177, 749
S. v. Maultsby ..... 130 N. C., 664 73
S. v. Melvin ..... 194 N. C., 394 74
S. v. Merrick ..... 171 N. C., 788 358
S. v. Miller ..... 197 N. C., 445 ..... 284, 749
S. v. Miller ..... 214 N. C., 317 759
S. v. Miller ..... 219 N. C., 514 ..... 488, 489
S. v. Miller ..... 225 N. C., 213 219
S. v. Millican ..... 158 N. C., 617 79
S. v. Mills ..... 181 N. C., 530 24
S. v. Moore ..... 210 N. C., 459 364
S. v. Moore ..... 210 N. C., 686 37
S. v. Moore ..... 222 N. C., 356 604
S. v. Morgan ..... 133 N. C., 743 17
S. v. Moschoures ..... 214 N. C., 321 150
S. v. Murphy ..... 225 N. C., 115 223
S. v. Myers ..... 202 N. C., 351 489
S. v. Newsome ..... 195 N. C., 552 489
S. v. Noland ..... 204 N. C., 329 176
S. v. Norris ..... 206 N. C., 191 76
S. v. Norton ..... 222 N. C., 418 33

S. v. Ormond ....211 N. C., 437.... 76
S. v. Overton .... 77 N. C., 485.... 220
S. v. Parker ....152 N. C., 790.... 177
S. v. Pasley ....180 N. C., 695.... 154
S. v. Patterson ....212 N. C., 659.... 605
S. v. Payne ....213 N. C., 719....111, 284
S. v. Pelley ....221 N. C., 487....215, 218, 651
S. v. Pennell ....224 N. C., 622.... 358
S. v. Phillips ....185 N. C., 614.... 216
S. v. Poteet .... 30 N. C., 23.... 16
S. v. Poythress ....174 N. C., 809.... 24
S. v. Price ....175 N. C., 804.... 24
S. v. Prince ....182 N. C., 788.... 759
S. v. Pritchett ....106 N. C., 667.... 339
S. v. Puckett ....211 N. C., 66.... 17
S. v. R. R. .... 74 N. C., 287.... 647
S. v. R. R. ....125 N. C., 666.... 489
S. v. R. R. ....145 N. C., 495....432, 433
S. v. Ray ....212 N. C., 725.... 367
S. v. Ray ....212 N. C., 748.... 215
S. v. Reynolds ....212 N. C., 37.... 358
S. v. Rhinehart ....106 N. C., 787.... 16
S. v. Rhinehart ....209 N. C., 150.... 33
S. v. Rhodes ....208 N. C., 241.... 216
S. v. Roberson ....150 N. C., 837.... 748
S. v. Robinson ....213 N. C., 273.... 358
S. v. Roddey ....219 N. C., 532.... 358
S. v. Rogers ....216 N. C., 731.... 667
S. v. Rogers ....221 N. C., 462.... 216
S. v. Rountree ....181 N. C., 535....16, 73
S. v. Sasseen ....206 N. C., 644.... 698
S. v. Satterfield ....207 N. C., 118....355, 489
S. v. Scott ....142 N. C., 582.... 358
S. v. Shepherd ....187 N. C., 609.... 216
S. v. Shepherd ....220 N. C., 377....336, 367, 488, 606
S. v. Shine ....149 N. C., 480.... 154
S. v. Sigmon ....190 N. C., 684.... 76
S. v. Sims ....213 N. C., 590.... 74
S. v. Singleton ....183 N. C., 738.... 542
S. v. Smith ....103 N. C., 210.... 24
S. v. Smith ....157 N. C., 578.... 551
S. v. Smith ....174 N. C., 804.... 177
S. v. Smith ....201 N. C., 494.... 479
S. v. Smith ....211 N. C., 93.... 226
S. v. Smith ....221 N. C., 278....76, 543
S. v. Smith ....221 N. C., 400.... 119
S. v. Smith ....223 N. C., 457.... 543
S. v. Snipes ....185 N. C., 743....176, 177
S. v. Spivey ....132 N. C., 989.... 284
S. v. Spivey ....151 N. C., 676.... 79
S. v. Sprinkle .... 65 N. C., 463.... 118
S. v. Stancill ....178 N. C., 693.... 237
S. v. Starnes ....220 N. C., 384.... 33
S. v. Steele ....190 N. C., 506.... 111
S. v. Stewart ....189 N. C., 340....177, 750

S. v. Stiwinter ..... 211 N. C., 278 33
S. v. Stone ..... 224 N. C., 848 542
S. v. Suddreth ..... 223 N. C., 610 561
S. v. Swanson ..... 223 N. C., 442 765
S. v. Swepson ..... 84 N. C., 827 550
S. v. Tarlton ..... 208 N. C., 734 611
S. v. Telfair ..... 130 N. C., 645 24
S. v. Thomas ..... 118 N. C., 1113 284
S. v. Thompson ..... 97 N. C., 496 79
S. v. Thornton ..... 211 N. C., 413 358
S. v. Todd ..... 222 N. C., 346 759
S. v. Todd ..... 224 N. C., 776 42
S. v. Toole ..... 106 N. C., 736 117
S. v. Tripp ..... 168 N. C., 150 ..... 215, 216, 219
S. v. Tuttle ..... 207 N. C., 649 336
S. v. Ussery ..... 118 N. C., 1177 339
S. v. Utley ..... 223 N. C., 39 ..... 151, 282, 588
V. v. Vick ..... 213 N. C., 235 449
S. v. Wagstaff ..... 219 N. C., 15 ..... 119, 488, 732, 748
S. v. Walker ..... 173 N. C., 780 ..... 284, 749
S. v. Wall ..... 205 N. C., 659 475
S. v. Wall ..... 218 N. C., 566 339
S. v. Wallace ..... 162 N. C., 623 364
S. v. Wallace ..... 203 N. C., 284 749
S. v. Warren ..... 95 N. C., 674 550
S. v. Warren ..... 113 N. C., 683 ..... 150, 155
S. v. Warren ..... 211 N. C., 75 698
S. v. Wasden ..... 4 N. C., 596 119
S. v. Watkins ..... 200 N. C., 692 235
S. v. Webster ..... 218 N. C., 692 17
S. v. Wells ..... 221 N. C., 144 ..... 76, 367
S. v. Whaley ..... 191 N. C., 387 313
S. v. Whisenant ..... 149 N. C., 515 ..... 176, 177
S. v. Whitaker ..... 89 N. C., 472 177
S. v. Whitener ..... 191 N. C., 659 667
S. v. Wiggins ..... 171 N. C., 813 489
S. v. Wilcox ..... 132 N. C., 1120 17
S. v. Williams ..... 220 N. C., 445 111
S. v. Williams ..... 224 N. C., 183 ..... 51, 71, 416
S. v. Wilson ..... 216 N. C., 130 215
S. v. Wilson ..... 221 N. C., 365 24
S. v. Wood ..... 175 N. C., 809 550
S. v. Woodard ..... 218 N. C., 572 759
S. v. Woodell ..... 211 N. C., 635 759
S. v. Wray ..... 217 N. C., 167 76
S. v. Wyont ..... 218 N. C., 505 313
Staton v. Staton ..... 148 N. C., 490 207
Steel Co. v. Copeland ..... 159 N. C., 556 412
Steel v. Steel ..... 104 N. C., 631 82
Steele, *In re* ..... 220 N. C., 685 245
Steele v. Tel. Co. ..... 206 N. C., 220 736
Stephens v. Hicks ..... 156 N. C., 239 506
Stewart v. Cary ..... 220 N. C., 214 377
Strauss v. Life Assn. ..... 126 N. C., 971 187
Stilley v. Planing Mills ..... 161 N. C., 517 475

Stokes v. Taylor....104 N. C., 394.... 70
Stroud v. Stroud....206 N. C., 668.... 483
Sturtevant v. Cotton Mills....171 N. C., 119....57, 539, 540
Sugg v. Credit Corp....196 N. C., 97.... 168
Summerell v. Sales Corp....218 N. C., 451.... 583
Sutherland v. McLean....199 N. C., 345.... 210
Swain v. Johnson....151 N. C., 93....507, 586, 588
Swift & Co. v. Aydlett....192 N. C., 330.... 504
Sykes v. Boone....132 N. C., 199....133, 465

T

Tarlton v. Griggs....131 N. C., 216....320, 321
Tarrant v. Bottling Co....221 N. C., 390.... 331
Taylor v. Addington....222 N. C., 393.... 465
Taylor v. Brown....165 N. C., 157.... 101
Taylor v. Rierson....210 N. C., 185.... 447
Taylor v. Taylor.... 93 N. C., 418.... 195
Taylor v. Taylor....174 N. C., 537.... 570
Taylor v. Taylor....197 N. C., 197.... 478
Taylor v. Taylor....225 N. C., 80....86, 343, 573
Taylor v. Wahab....154 N. C., 219....465, 466
Texas v. Phillips....206 N. C., 355.... 169
Thomas v. Carteret....182 N. C., 374....319, 320, 323
Thomas v. Realty Co....195 N. C., 591.... 763
Thompson v. Humphrey....179 N. C., 44.... 570
Thompson v. Lumberton....182 N. C., 260....432, 433
Thompson v. Rospigliosi....162 N. C., 145.... 524
Thornton v. Brady....100 N. C., 38.... 37
Thurber v. LaRoque....105 N. C., 301.... 465
Tiedemann v. Tiedemann....204 N. C., 682.... 477
Tillery v. Benefit Society....165 N. C., 262.... 661
Tillinghast v. Cotton Mills....143 N. C., 268.... 412
Timber Co. v. Ins. Co....192 N. C., 115.... 202
Tire Co. v. Lester....190 N. C., 411....88, 465
Toler v. French....213 N. C., 360.... 194
Townsend v. Holderby....197 N. C., 550.... 546
Trade Assn. v. Doughton....192 N. C., 384.... 647
Tredwell v. Rascoe.... 14 N. C., 50.... 444
Triplett v. Williams....149 N. C., 394.... 600
Troitino v. Goodman....225 N. C., 406.... 526
Trust Co. v. Adams....145 N. C., 161....346, 347
Trust Co. v. Black....198 N. C., 219.... 88
Trust Co. v. Hood, Comr....206 N. C., 268.... 58
Trust Co. v. Jones....210 N. C., 339.... 616
Trust Co. v. Miller....223 N. C., 1....101, 617
Trust Co. v. Nicholson....162 N. C., 257....524, 525
Trust Co. v. Refining Co....208 N. C., 501.... 598
Tryon v. Power Co....222 N. C., 200.... 548
Tucker v. Eatough....186 N. C., 505.... 350
Tucker v. Justices.... 46 N. C., 451.... 432
Tucker v. Satterthwaite....120 N. C., 118.... 686
Tunstall v. Cobb....109 N. C., 316.... 575
Turlington v. Neighbors....222 N. C., 694....401, 402
Turner v. Davis....132 N. C., 187.... 475

Turner v. Glenn....220 N. C., 620.... 587
Turner v. New Bern....187 N. C., 541....432, 433
Turner v. Power Co....154 N. C., 131.... 579
Turner v. Reidsville....224 N. C., 42.... 699
Tuttle v. Tuttle....146 N. C., 484.... 731
Tyler v. Capehart....125 N. C., 64.... 686
Tyson v. Frutchey....194 N. C., 750.... 234
Tyson v. Jones....150 N. C., 181.... 291

U

Underwood v. Car Co....166 N. C., 458....413, 414
Unitype Co. v. Ashcraft....155 N. C., 63....289, 292
Ury v. Brown....129 N. C., 270.... 483
Usry v. Suit.... 91 N. C., 406.... 540
Utilities Com. v. R. R....223 N. C., 840.... 690

V

Vance v. Guy....223 N. C., 409.... 147
Vance v. Guy....224 N. C., 607.... 530
Vanderbilt v. R. R....188 N. C., 568.... 643
Van Dyke v. Atlantic Greyhound Corp. ....218 N. C., 283.... 449
VanDyke v. Ins. Co....174 N. C., 78.... 646
Vanhook v. Vanhook.... 21 N. C., 589.... 524
Van Kempen v. Latham....201 N. C., 505.... 518
Vann v. Lawrence....111 N. C., 32.... 608
Vassor v. R. R....142 N. C., 68.... 47
Vaughan v. Vaughan....211 N. C., 354.... 514
Vestal v. Vending Machine Co.....219 N. C., 468....350, 539, 540, 584
Vincent v. Powell....215 N. C., 336.... 194

W

Waddell v. Aycock....195 N. C., 268.... 492
Wadesboro v. Atkinson....107 N. C., 317.... 540
Walker v. Johnston.... 70 N. C., 576.... 524
Walker v. Scott....106 N. C., 56.... 197
Wall v. Bain....222 N. C., 375.... 420
Wall v. Wall....142 N. C., 387.... 714
Wallace v. Salisbury....147 N. C., 58....37, 364
Wallin v. Rice....170 N. C., 417.... 360
Walsh v. Hall.... 66 N. C., 233.... 391
Walston v. Coppersmith....197 N. C., 407.... 401
Walters v. Walters....172 N. C., 328....492, 493, 555
Walton v. Walton....178 N. C., 73.... 360
Ward v. Martin....175 N. C., 287.... 608
Ward v. Phillips.... 89 N. C., 215.... 197
Ward v. R. R....224 N. C., 696.... 80
Ward v. Sutton.... 40 N. C., 421.... 570
Warehouse Co. v. Ozment....132 N. C., 839.... 731
Warren v. Boyd....120 N. C., 56.... 765
Washington County v. Land Co...222 N. C., 637.... 216
Waters v. Boyd....179 N. C., 180.... 647

Watkins v. Furnishing Co.....224 N. C., 674..... 228
Watkins v. Williams.....123 N. C., 170..... 12
Webb v. Port Commission.....205 N. C., 663.....696, 697
Webb v. Webb.....222 N. C., 551..... 643
Weiner v. Style Shop.....210 N. C., 705..... 197
Wells v. Housing Authority.....213 N. C., 744.....696, 697
Wessell v. Rathjohn..... 89 N. C., 377..... 517
Whedbee v. Ruffin.....189 N. C., 257..... 555
Whichard v. Lipe.....221 N. C., 53..... 69
Whichard v. Lipe.....223 N. C., 856..... 767
White v. Chappell.....219 N. C., 652.....672, 673
White v. Comrs. of Chowan..... 90 N. C., 437..... 28
White v. Fisheries Co.....183 N. C., 228..... 322
White v. Jones..... 92 N. C., 388..... 88
White v. McCabe.....208 N. C., 301..... 653
White v. R. R.....216 N. C., 79..... 672
White v. Snow..... 71 N. C., 232..... 210
White v. White..... 84 N. C., 340..... 572
Whitehurst v. Hinton.....209 N. C., 392..... 4
Whitehurst v. Ins. Co.....149 N. C., 273..... 291
Whitesides v. Cooper.....115 N. C., 570.....525, 570
Whitford v. Foy..... 65 N. C., 265..... 108
Whitley v. Arenson.....219 N. C., 121.....378, 600
Whitted v. Fuquay.....127 N. C., 68..... 598
Whitten v. Peace.....188 N. C., 298.....360, 466
Wilder v. Medlin.....215 N. C., 542..... 401
Wildes v. Nelson.....154 N. C., 590..... 504
Wilkins v. Norman.....139 N. C., 39..... 600
Wilkinson v. Board of Education .....199 N. C., 669..... 433
Wilkinson v. Coppersmith.....218 N. C., 173..... 411
Williams v. Cooper.....222 N. C., 589..... 350
Williams v. Express Lines.....198 N. C., 193.....632, 633
Williams v. Hassell..... 74 N. C., 434..... 524
Williams v. McLean.....221 N. C., 228..... 653
Williams v. McPherson.....216 N. C., 565..... 524
Williams v. Parsons.....167 N. C., 529..... 587
Williams v. Rand.....223 N. C., 734.....101, 617
Williams v. Stores Co., Inc.....209 N. C., 591..... 228
Williams v. Williams.....224 N. C., 91.....82, 343, 344, 573
Williams v. Woodhouse..... 14 N. C., 257..... 389
Williamson v. Cocke.....124 N. C., 585..... 210
Williamson v. Williamson.....224 N. C., 474..... 641
Wilmington v. Board of Education .....210 N. C., 197.....562, 590
Wilmington v. Cronly.....122 N. C., 388..... 428
Wilson v. Charlotte.....206 N. C., 856.....539, 540
Wilson, *Ex Parte*.....222 N. C., 99..... 399
Wilson v. Featherstone.....120 N. C., 446..... 169
Wilson v. Heptasophs.....174 N. C., 628..... 187
Wilson v. Lumber Co.....186 N. C., 56..... 645
Wilson v. Massagee.....224 N.C., 705..... 239
Wilson v. Robinson.....224 N. C., 851.....57, 349
Winborne v. Byrd..... 92 N. C., 7..... 37
Wingate v. Causey.....196 N. C., 71..... 703

Wingler v. Miller....223 N. C., 15.... 401
Winkler v. Killian....141 N. C., 575....70, 534
Winn v. Finch....171 N. C., 272.... 413
Winslow v. Carolina Conference Assn. ....211 N. C., 571.... 583
Winstead v. Stanfield.... 68 N. C., 40.... 483
Winstead v. Woolard....223 N. C., 814.... 377
Wise v. Hollowell....205 N. C., 286.... 64
Wolf Co. v. Mercantile Co....189 N. C., 322....292, 293
Womble v. Battle.... 38 N. C., 182.... 88
Wood v. Cherry.... 73 N. C., 110.... 213
Wood v. Hughes....195 N. C., 185.... 537
Wood v. Jones....198 N. C., 356.... 176
Woodruff v. Woodruff....215 N. C., 685....341, 343, 344
Wool v. Fleetwood....136 N. C., 460.... 524
Wooten v. Cunningham....171 N. C., 123.... 350
Worth v. Trust Co....152 N. C., 242.... 517
Wright v. Harris....160 N. C., 542....703, 704, 705, 706, 707
Wyatt v. Berry....205 N. C., 118.... 525

Y

Yancey's Case....124 N. C., 151.... 524
Yelverton v. Coley....101 N. C., 248.... 169
Young v. R. R....189 N. C., 238.... 518
Yowmans v. Hendersonville....175 N. C., 574.... 416

Z

Zachary v. R. R....156 N. C., 496.... 45
Zebulon v. Dawson....216 N. C., 520.... 300
Zimmerman v. Lynch....130 N. C., 61.... 391

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1945

ADA V. WHITEHURST AND HUSBAND, CECIL WHITEHURST, SOPHIA MORGAN AND HUSBAND, J. C. MORGAN, AND FLOSSIE NOSAY AND HUSBAND, HENRY NOSAY, v. HENRY D. ABBOTT.

(Filed 28 February, 1945.)

1. Wills §§ 30, 46: Registration § 4b—

Where the executor of a will, who is also the propounder and one of the devisees, purchases the interest of other devisees and conveys to a third party, he is not an innocent purchaser and his deed, executed *pendente lite*, does not convey a good title.

2. Same—

An innocent purchaser for value without notice from a devisee, prior to the filing of a caveat, unquestionably acquires an unassailable title. G. S., 31-19.

3. Lis Pendens §§ 2, 3a, 3b—

At common law a pending suit was notice to all the world, but now the pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land lies. G. S., 1-116.

4. Lis Pendens § 5: Registration § 4b—

The effect of *lis pendens* and the effect of registration are one and the same, each being a record notice upon the absence of which a prospective innocent purchaser may rely.

5. Lis Pendens § 1: Wills §§ 17, 30—

The Legislature intended the term "action," as used in our *lis pendens* statute, G. S., 1-116, to embrace all judicial proceedings affecting the title to real property or in which title to land is at issue, including the caveat to a will.

6. Actions § 4—

The word "action," when unqualified, is an inclusive term and connotes all judicial proceedings of a civil nature maintained and prosecuted for the purpose of asserting a right or redressing a wrong.

7. Wills §§ 17, 30: Lis Pendens § 1—

While a caveat is not an adverse proceeding in the ordinary sense and the will is the *res* involved, any final decree therein will directly affect the title to land devised, hence the filing of *lis pendens* is essential to give constructive notice to those not directly interested.

8. Lis Pendens § 1—

Lis pendens notice under our statute is not exclusive, nor is it designed to protect intermeddlers. G. S., 1-116.

9. Lis Pendens § 3a: Judgments § 16—

When a person acquires an interest in property, pending an action in which title thereto is at issue, from one of the parties to the action, with notice of the action, actual or constructive, he is bound by the judgment therein just as the party from whom he bought would have been.

10. Deeds §§ 4, 11, 24: Registration § 4b—

He who claims to be a *bona fide* purchaser for value without notice, so as to avoid the defective character of his deed, asserts an affirmative defense and has the burden of proving that fact.

11. Wills § 30: Constitutional Law § 16—

Whatever may be the effect of ch. 108, Public Laws 1921 (G. S., 31-20, 21), it does not control rights which accrued prior to its enactment. N. C. Const., Art. I, secs. 17, 19. Hence, when an original will probated in 1910 is invalidated by judicial decree, a certified copy thereof recorded in another county becomes void and one who purchases with notice of the caveat cannot convey any title thereunder, either before or after notice of its invalidity has been filed in the county where the certified copy has been recorded. The only purpose of such certified copy was to give notice of the source of title.

APPEAL by plaintiffs from *Nimocks, J.*, at August Term, 1944, of CAMDEN. New trial.

Special proceeding for the sale of land for partition in which defendant filed answer denying the alleged title of plaintiffs and pleading sole seizin and adverse possession under color for more than twenty years. The answer having raised issues of fact, the cause was transferred to the civil issue docket of Camden County Superior Court for trial.

John L. Hinton, a resident of Pasquotank County, died testate in January, 1910, and on 29 January, 1910, his will was probated in common form in Pasquotank County. A copy of the will was certified to and recorded in the office of the Clerk of the Superior Court of Camden County.

The will devised the lands of testator to his wife and his children other than J. C. Hinton who predeceased the testator. No provision was made in the will for the widow and children of the deceased son.

At the time of his death the testator owned a tract of land in Camden County known as the Abbott Ridge Farm containing 324 acres. On 12 August, 1910, R. L. Hinton, son of the testator, purchased the interest of the other devisees and took deed therefor, which was duly registered in the Camden County registry.

On 30 September, 1918, the widow and children of J. C. Hinton, deceased, filed a caveat to the will of John L. Hinton. No notice of *lis pendens* was filed in Camden County or indexed or cross-indexed in the *lis pendens* docket in the office of the Clerk of the Superior Court in Pasquotank County.

On 24 July, 1919, R. L. Hinton, while the hearing on the caveat was pending, conveyed the Abbott Ridge Farm in Camden County to one T. G. McPherson.

On 10 January, 1920, judgment was entered in the caveat proceedings sustaining the caveat on the grounds of mental incapacity and undue influence and declaring the will null and void. On appeal to this Court the judgment was affirmed. *In re Hinton,* 180 N. C., 206, 104 S. E., 341. The judgment declaring the will null and void was not certified to Camden County and no marginal entry was made on the certified copy of the will as recorded in Camden.

On 4 December, 1923, McPherson conveyed to defendant Henry D. Abbott that part of the Camden County farm which is described in the complaint and is the subject matter of this action.

When the cause came on for hearing in the court below, the jury, by their answers to the issues submitted, found that T. G. McPherson and H. D. Abbott were each purchasers for value and without notice of the claim of plaintiffs. There was judgment on the verdict decreeing that plaintiffs have no right, title, or interest in the land in controversy and plaintiffs appealed.

P. W. McMullan and John H. Hall for plaintiffs, appellants.

W. I. Halstead and W. A. Worth for defendant, appellee.

BARNHILL, J. R. L. Hinton was a devisee, executor, and propounder of the will of John L. Hinton. He purchased the interest of the other

devisees in the Camden County property. He and the other devisees were dealing *inter partes* in the property of the estate. He conveyed the land after the caveat was filed. Any claim that he was an innocent third party and that his deed, executed *pendente lite,* conveyed a good title is without substance. To hold otherwise would open the door for parties to litigation to convey the subject matter of the litigation pending a hearing and thus render the court powerless to enforce its own decrees. *Newbern v. Hinton,* 190 N. C., 108, 129 S. E., 181.

As to T. G. McPherson, grantee of R. L. Hinton, a different question arises. Had he purchased before the filing of the caveat unquestionably under our decisions his title would have been unassailable. G. S., 31-19; *Newbern v. Leigh,* 184 N. C., 166, 113 S. E., 674; *Whitehurst v. Hinton,* 209 N. C., 392, 184 S. E., 66; Anno. 26 A. L. R., 270. But such is not the case. He acquired title to the property in Camden after the filing of the caveat from one of the devisees who was directly affected by the proceedings then pending in Pasquotank, the county in which the original will was probated. Is he charged with constructive notice of the claim of plaintiffs?

At common law a pending suit was regarded as notice to all the world. The complaint or cross-complaint, as the case might be, was the *lis pendens* and any person dealing with the property *pendente lite* was bound by the judgment rendered. *Insurance Co. v. Knox,* 220 N. C., 725, 18 S. E. (2d), 436; 34 Am. Jur., 363.

The ever-increasing volume of litigation rendered this common law rule so harsh and burdensome upon abstracters that the Legislature intervened and adopted the modifying Acts now incorporated in Article 11, chapter 1, General Statutes of North Carolina. Now the pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land is located. G. S., 1-116, *et seq.; Collingwood v. Brown,* 106 N. C., 362; *Spencer v. Credle,* 102 N. C., 68.

When a will is probated in common form, any interested party may appear and enter a caveat. G. S., 31-32. But a caveat is an *in rem* proceedings. In effect it is nothing more than a demand that the will be produced and probated in open court, affording the caveators an opportunity to attack it for the causes and upon the grounds set forth and alleged in the caveat. It is an attack upon the validity of the instrument purporting to be a will and not an "action affecting the title to real property." The will and not the land devised is the *res* involved in the litigation. Prospective purchasers were held to notice that probate jurisdiction was in Pasquotank County and if they acquired title without ascertaining the status of the proceedings in that county they did so at their peril. Hence the *lis pendens* statute has no application. So contend the appellants.

Thus we are called upon to decide the force and effect of the *lis pendens* statute as it relates to a caveat proceedings.

The registration statute, G. S., 43-18, modifies the common law rule of *lis pendens*. Its purpose is to stabilize titles by requiring recordation of all deeds, mortgages, or other paper writings which transfer or encumber the title to land. Our *lis pendens* statute, above cited, is designed to supplement the registration law and to provide a simple and readily available means of ascertaining the existence of adverse claims to land not otherwise disclosed by the registry. Notice under the Act is required to give constructive notice to prospective purchasers when the claim is in derogation of the record. *Insurance Co. v. Knox, supra.*

The effect of *lis pendens* and the effect of registration are in their nature the same thing. They are only different examples of the operation of the rule of constructive notice. One is simply a record in one place and the other is a record in another place. Each serves its purpose in proper instances. They are each record notices upon the absence of which a prospective innocent purchaser may rely.

Bearing this broad general purpose in mind, it would seem to be apparent that the Legislature intended the term "action," as used in G. S., 1-116, to embrace all judicial proceedings affecting the title to real property or in which title to land is at issue.

Naturally proceedings in court are divided into various classifications. Each class has its own particular label. But the word "action," when unqualified is an inclusive term and connotes all judicial proceedings of a civil nature maintained and prosecuted for the purpose of asserting a right or redressing a wrong. When qualified, as in the statute, by the term "affecting the title to real property," it includes and embraces all such proceedings wherein the title to real property is at issue.

Such is a caveat. Though not an adverse proceedings in the ordinary sense, interested parties are notified and given an opportunity to be heard. Legal rights are at stake and the issues raised are tried as in other civil actions.

While in one sense the will is the *res* involved in the caveat proceedings, it is quite clear that any final decree entered therein will directly affect the title to the land devised. The probated will constitutes a muniment of title unassailable except in a direct proceedings. G. S., 31-19. It operates as a conveyance of title to the land devised. Any action or proceedings contesting its validity directly assails the validity of such conveyance and necessarily involves the title. Hence the filing of notice under the *lis pendens* statute is essential to give constructive notice to those who are not directly interested in the proceedings. *McIlwrath v. Hollander,* 39 Am. Rep., 484.

But *lis pendens* notice under the statute is not exclusive. Nor is it designed to protect intermeddlers. When a person acquires an interest in property pending an action in which the title thereto is at issue, from one of the parties to the action, with notice of the action, *actual* or constructive, he is bound by the judgment in the action just as the party from whom he bought would have been. This rule seems to be universal and is considered by all the courts to be absolutely necessary to give effect to the judgments of the courts because, if it was not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger and the claimant would be compelled to commence a new action against him. *Rollins v. Henry,* 78 N. C., 342; *Jarrett v. Holland,* 213 N. C., 428, 196 S. E., 314.

"Our statute on the subject . . . only purports to deal with constructive notice, and its effect on subsequent purchasers, but where one buys from a litigant with full notice or knowledge of the suit, and of its nature and purpose, and the specific property to be affected, he is concluded or his purchase will be held ineffective and fraudulent as to decree rendered in the cause and the rights thereby established. *Griswold v. Muller,* 15 Barbour, 520; *Corwin v. Bensley,* 43 Cal., 253-262; *Wick v. Dawson,* 48 West Va., 469-475; 25 Cyc., 1452; Bennett on Lis Pendens, 319." *Morris v. Basnight,* 179 N. C., 298, 102 S. E., 389.

Plaintiffs offered evidence tending to show that when the court proceedings was being heard at the January Term, 1919, McPherson was present in court and that he talked about the case in the presence of his son and his brother, all prior to the time he purchased. Upon this evidence, which is uncontradicted, plaintiffs duly requested the court to give a peremptory charge on the second issue, which is as follows:

"Did T. G. McPherson purchase the lands in controversy for value and without notice of plaintiffs' claim?"

The court declined to give the requested instruction. Instead it charged the jury that the burden rested upon the plaintiffs to show that McPherson "did not purchase it for value and that at the time he, T. G. McPherson, had notice of plaintiffs' claim to the land in question" and that if they failed to so find they should answer the second issue "Yes." In this there was error prejudicial to the plaintiffs.

As heretofore stated, a party directly interested in a judicial proceeding affecting the title to real property cannot convey a good title to the *res pendente lite.* Even so, the grantee acquires a good title provided he purchases (1) for value, and (2) without notice, actual or constructive. Both conditions must appear. Hence the absence of either is fatal.

The uncontroverted evidence tends to show and it seems to be admitted that Hinton conveyed to McPherson *pendente lite.* This being true, his deed was ineffective and fraudulent as against the final decree

in the pending action. Upon such showing plaintiffs were entitled to judgment, certainly as against McPherson, unless it should be made to appear that he purchased for value and without notice. This is an affirmative defense and he who claims to be a *bona fide* purchaser for value without notice so as to avoid the defective character of his deed has the burden of proving that fact. *Hughes v. Fields,* 168 N. C., 520, 84 S. E., 804; *King v. McRackan,* 168 N. C., 621, 84 S. E., 1027 (affirmed on rehearing, *King v. McRackan,* 171 N. C., 752, 88 S. E., 226); 27 R. C. L., 737.

The conditions under which defendant acquired title are on this record immaterial. At that time there was no presumptively valid will of record operating as a muniment of title. It had been annulled by decree of court. It protects a purchaser only until vacated. G. S., 31-19. It follows that his title rests squarely upon the title possessed by his grantor.

If McPherson was an innocent purchaser for value, his deed to defendant conveyed title in fee to the land therein described. Conversely, if McPherson purchased with notice, then immediately upon the entry of the final decree in the caveat proceedings invalidating the will, the plaintiffs, as heirs at law of J. C. Hinton, by operation of law, became seized and possessed of an undivided interest in the Camden County land. From that instant they were tenants in common with McPherson. His deed to defendant thereafter executed conveyed only such interest as he possessed and the vested interest of plaintiffs can be defeated only by twenty years' adverse possession pleaded by defendant.

But defendant insists that even though, at the time he purchased, the will was void, the certified copy thereof filed in Camden County was still of record without any notation or entry that would operate as notice to him of the judgment entered in Pasquotank County and that he had the right to rely on this record as a valid link in his chain of title. We cannot so hold.

Whatever may be the effect of ch. 108, Public Laws 1921, the rights of the parties to this action accrued prior to its enactment and are to be controlled by the law as it existed before the effective date of that statute.

At that time it was the original will as probated in the county in which the testator resided at the time of his death that constituted the muniment of title as to all land devised. C. S., 4145. Ownership under the will in nowise is made dependent upon the certified copy directed to be recorded in the county where the land lies. C. S., 4163. The only purpose of the certified copy disclosed by the pertinent statute was to give information to abstracters and to direct their attention to the source of title—the will as originally probated. Hence when the original will was annulled by judicial decree the certified copy ceased to have any force and effect for any purpose.

Nor is defendant protected by the provisions of sec. 2 of the 1921 statute. At the time of its enactment the final decree had been entered. There was no valid will of record. If McPherson purchased with notice title had vested in plaintiffs. The Legislature was without authority to divest them of their title and revest it in McPherson. It is not to be presumed that the General Assembly so intended. In any event the Act cannot be so construed. Sections 17, 19, Art. I, N. C. Const.

It follows that there must be a new trial in accord with this opinion. It is so ordered.

New trial.

POLLY WILLIAMS RICKS AND HUSBAND, MADD RICKS, v. J. M. BATCHELOR AND WIFE, IRENE BATCHELOR, AND W. D. INSCOE AND WIFE, MATTIE INSCOE, ORIGINAL PARTIES DEFENDANT (AND MRS. IRENE BATCHELOR, EXECUTRIX OF J. M. BATCHELOR, DECEASED, ADDITIONAL PARTY DEFENDANT).

(Filed 28 February, 1945.)

1. Mortgages § 27—

Where defendant, at plaintiff's request, paid off a mortgage on plaintiff's property to prevent a foreclosure, and then took from plaintiff a deed for the property, absolute on its face, giving plaintiff contemporaneously an option to repurchase within a time certain, the transaction does not constitute a mortgage.

2. Deeds § 1d: Mortgages §§ 8, 9, 27—

Whether any particular transaction amounts to a mortgage or an option to repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction is whether the debt existing prior to the conveyance is still subsisting or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a mortgage.

3. Mortgages § 8—

The intention of the parties that a deed with option to repurchase shall constitute a mortgage must be established by evidence *dehors* the deed inconsistent with an absolute conveyance.

4. Deeds §§ 4, 11—

One who for value purchases the record title without notice, actual or constructive, of any equity or adverse claim therein is protected.

APPEAL by plaintiffs from *Rudisill, Special Judge,* at September Term, 1944, of NASH. No error.

This was an action to have a deed executed by plaintiffs to J. M. Batchelor declared a mortgage, and for an accounting.

It was alleged that J. M. Batchelor represented to the plaintiffs that the paper they signed was a mortgage to secure a debt they owed, but that in fact it was a deed purporting to convey the land in fee simple to Batchelor, and that Batchelor subsequently conveyed to defendant W. D. Inscoe, who took with notice of all the facts. Plaintiffs prayed that Inscoe be declared to hold as mortgagee subject to plaintiffs' right to redeem, and for an accounting. Pending the action J. M. Batchelor died and his executrix was made party defendant.

Defendants denied the paper referred to was ever intended as a mortgage, but that when the land was advertised to be sold under a mortgage given to one Bartholomew, Batchelor at the instance of plaintiffs paid off all liens and took deed for the land and at same time gave plaintiffs an option to repurchase within a certain time; that plaintiffs failed to exercise the option within the time limited and thereafter Batchelor conveyed the land to W. D. Inscoe, who purchased for full value and without notice of any equity or claim of plaintiffs.

Plaintiffs did not undertake to maintain this action on the ground of fraud or mistake (*Perry v. Surety Co.*, 190 N. C., 284, 129 S. E., 721), but upon the ground that the deed, together with the contemporaneous option to repurchase, under the circumstances, constituted in law and equity a mortgage—a security for a debt. The plaintiffs asked the court to so hold and declare and to charge the jury accordingly. The defendants, on the other hand, maintained the position that there was no evidence upon which to read into the transaction more than an absolute conveyance and an option to repurchase which was never exercised; and that in any event defendant Inscoe was a purchaser for value without notice.

The court charged the jury, if they found the facts to be as shown by all the evidence, to answer the issue in favor of the defendants. The jury returned verdict accordingly, and from judgment on the verdict the plaintiffs appealed.

Leon T. Vaughan and O. B. Moss for plaintiffs.

L. L. Davenport and Yarborough & Bolmer for defendants.

DEVIN, J. It was conceded on the argument here that in the trial below only a question of law was presented. There were no controverted issues of fact. Plaintiffs prayed for an adjudication by the court in their favor or for a directed verdict, and likewise the defendants on the same facts contended they were entitled to peremptory instructions to the jury in their favor. The trial court adopted the defendants' view and so charged the jury. The only assignments of error brought forward relate to this ruling.

Did the execution of a deed by the plaintiffs coupled with a contemporaneous option to repurchase, under the circumstances of this case, constitute a mortgage—a security for a subsisting debt—or were these instruments in law just what they purported to be, vesting an unclouded title upon plaintiffs' failure to exercise the option? In either case, was the defendant Inscoe an innocent purchaser for value?

Briefly stated in chronological order, the pertinent facts were these:

On 5 March, 1930, the plaintiffs executed mortgage on *feme* plaintiff's land (42 acres) to Bartholomew to secure a debt of $633, mortgage due 1 December, 1930.

On 24 February, 1931, nothing having been paid on the debt, Bartholomew advertised the land for sale on 28 March, 1931. On 26 March, 1931, at request of plaintiffs, J. M. Batchelor took up the Bartholomew mortgage, and on same day the plaintiffs executed deed to Batchelor for the consideration of $646, and on same day Batchelor in writing gave plaintiffs an option to repurchase the land at the price of $700. The agreement or option recited the conveyance had been made "with conditions" that upon payment of $700 on or before 1 December, 1932, Batchelor would make deed to plaintiffs. The option was not exercised. On 1 February, 1933, Batchelor instituted summary ejectment proceedings against plaintiffs (only the male plaintiff was served), and plaintiffs moved off the land and yielded possession to Batchelor. Batchelor remained in possession, paying all taxes, until he conveyed to defendant Inscoe, 8 October, 1934.

On 15 January, 1934, plaintiffs, in an effort to re-acquire or redeem the land, made application to the Columbia Land Bank for a loan. In aid of plaintiffs' effort, Batchelor signed a statement attached to the plaintiffs' application for the loan in which he referred to himself as holder of a mortgage on the land dated 5 March, 1930, and agreed to accept $850 in full settlement of the indebtedness. On this application was written by plaintiffs' then attorney a statement that Batchelor had purchased the land from plaintiffs, paid all liens, and given them privilege of redeeming and had agreed to cancel his lien upon payment of $850.

On 1 February, 1934, Batchelor gave plaintiffs in writing an option to purchase the land for $850, the option to expire 1 April, 1934. This option was not exercised. The loan was allowed by the bank for $850, but when the house on the land burned the loan was recalled. Thereafter, 8 October, 1934, Batchelor conveyed the land to defendant Inscoe for $850, the deed containing full covenants of seizin and warranty.

The deed from plaintiffs to Batchelor was duly recorded, but neither of the options was registered. This action was begun in 1942.

The principles of law governing transactions similar to those disclosed by the record in this case, wherein a debtor conveys land to a creditor by deed absolute in form and at same time receives an agreement for reconveyance upon payment of a sum certain before a specified date, were considered by this Court in the recent cases of *O'Briant v. Lee,* 212 N. C., 793, 195 S. E., 15; *S. c.,* 214 N. C., 723, 200 S. E., 865; and *Ferguson v. Blanchard,* 220 N. C., 1, 16 S. E. (2d), 414.

In the *Ferguson case, supra,* it was said: "It is true that when a debtor conveys land to a creditor by deed absolute in form and at the same time gives a note or otherwise obligates himself to pay the debt, and takes from the grantee an agreement to reconvey upon payment of the debt, the transaction is a mortgage. *Robinson v. Willoughby,* 65 N. C., 520. But if the agreement leaves it entirely optional with the debtor whether he will pay the debt and redeem the land or not, and does not bind him to do so, or continue his obligation to pay, the relationship of mortgagor and mortgagee may not be held to continue unless the parties have so intended. The distinction is pointed out in *O'Briant v. Lee,* 212 N. C., 793, 195 S. E., 15, where *Connor, J.,* speaking for the Court, quotes with approval from 41 C. J., 325, as follows: 'If it is a debt which the grantor is bound to pay, which the grantee might collect by proper proceedings, and for which the deed to the land is to stand as security, the transaction is a mortgage; but if it is entirely optional with the grantor to pay the money and receive a reconveyance, he has not the rights of a mortgagor, but only the privilege of repurchasing the property.' "

In Pomeroy's Equity Jurisprudence (sec. 1194) it is said: "Where land is conveyed by an absolute deed, and an instrument is given back as a part of the same transaction, not containing the condition ordinarily inserted in mortgages, but being an agreement that the grantee will reconvey the premises if the grantor shall pay a certain sum of money at or before a specified time, the two taken together may be what on their face they purport to be—a mere sale with a contract of repurchase, or they may constitute a mortgage."

Whether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction is whether the debt existing prior to the conveyance is still subsisting or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a method of securing a debt—and hence a mortgage. Pomeroy's Equity Jurisprudence, sec. 1195.

But the intention of the parties that the deed with option to repurchase shall constitute a mortgage or security for a debt must be established by

proof of facts and circumstances *dehors* the deed inconsistent with an absolute conveyance. *Watkins v. Williams,* 123 N. C., 170, 31 S. E., 388.

While there are inferences which might be drawn from the facts in evidence in the case at bar consistent with plaintiff's contention that Batchelor recognized the relationship of debtor and creditor as still subsisting between plaintiffs and himself, which, under *O'Briant v. Lee, supra,* might entitle them to go to the jury, we are advertent to the fact that both in their brief and oral argument plaintiffs have based their appeal on the ground that as a matter of law the instruments themselves and the uncontroverted facts in evidence in relation thereto constitute a mortgage and conclusively establish the relationship of mortgagor and mortgagee as still subsisting. If it be conceded that there is some evidence to sustain plaintiffs' position, we cannot concur in the view that the evidence is conclusive or that as a matter of law plaintiffs were entitled to an adjudication or peremptory instruction to the jury in their favor.

However, upon another ground we think the ruling below must be upheld. The evidence sustains the position of defendant Inscoe that he was a purchaser for value without notice, and, since plaintiffs are not suing for damages for wrongful alienation of their land (*Lee v. Johnson,* 222 N. C., 161, 22 S. E. [2d], 230; *Davis v. Doggett,* 212 N. C., 589, 194 S. E., 288), but to recover their rights in the land as mortgagors, and to redeem upon payment of the debt after an accounting, no error can be predicated upon the ruling of the trial court in giving the instruction complained of.

Upon this phase of the case it may be noted that after the expiration of the option in December, 1932, in consequence of the adversary action of Batchelor, the grantee in the deed, the plaintiffs yielded possession of the land to him, and that while Inscoe at the time he took his deed from Batchelor knew plaintiffs had executed a mortgage on the land to Bartholomew and that Batchelor had paid off this mortgage and taken deed from plaintiffs, there is no evidence that he had any knowledge of the options or of any statement by Batchelor of facts from which the inference could be drawn that the relationship of mortgagor and mortgagee still subsisted, or that plaintiffs had or claimed any interest in the land. That Inscoe paid fair and reasonable value for the land in its condition at that time is not controverted. One who for value purchases the record title without notice, actual or constructive, of any equity or adverse claim therein is protected. This just principle is based on reason, fortified by statutes, and upheld by the courts. G. S., 47-18; G. S., 39-19; *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 32; *Dorman v. Goodman,* 213 N. C., 406 (412), 196 S. E., 352.

The result below will be upheld.

No error.

STATE v. ALFRED DAVENPORT.

(Filed 28 February, 1945.)

1. Fornication and Adultery § 3: Criminal Law § 32a—

The guilt of defendants or of a defendant, in a criminal prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony.

2. Same—

On a prosecution upon indictment charging fornication and adultery, where the State's evidence tended to show that defendants were constantly together, day and night, on the streets and in several different homes maintained by the male defendant, and that they were arrested late at night in one of these homes, no other person being in the house at the time, both defendants coming out of the same bedroom, there was sufficient evidence to support a conviction and motion for nonsuit was properly denied.

3. Fornication and Adultery § 4—

Upon trial in the Superior Court, after appeal by the male defendant only from a conviction of fornication and adultery in the Recorder's Court, a charge that, if the jury find from the evidence, beyond a reasonable doubt, that this defendant, not being married to the woman, did lewdly and lasciviously bed and cohabit with her and violated the statute, they should bring in a verdict of guilty, and if they should fail to so find, they should bring in a verdict of not guilty, substantially complies with G. S., 1-180, in the absence of request for further instructions.

4. Fornication and Adultery §§ 1, 4—

Where the male defendant only appealed from a verdict of guilty, on prosecution in Recorder's Court for fornication and adultery, an exception to the court's charge, which referred to the male defendant, singly, as the person on trial, is without merit. The prosecution is not one in which both defendants must be convicted of mutual intent to violate the law before conviction of one of them can be sustained.

APPEAL by defendant from *Dixon, Special Judge,* at October Term, 1944, of TYRRELL. No error.

The defendant Davenport, with Lois Wright, was tried in the Recorder's Court of Tyrrell County upon a charge of fornication and adultery, and both were convicted. Both defendants appealed to the Superior Court, but the defendant Lois Wright did not prosecute her appeal in that court. Upon the hearing in the Superior Court, Alfred Davenport was again convicted, and from the judgment of the court therein, appealed to this Court. The evidence upon the trial in the Superior Court

pertinent to an understanding of the exceptions taken at that time and considered here may be summarized as follows:

Sheriff Cohoon, of Tyrrell County, went to the home of the defendant around 12:00 o'clock at night, accompanied by the Chief of Police, and found the defendant at home with Lois Wright. The witness had known Lois Wright for several years, and stated that she was living in Washington County, just over the line, with Alfred Davenport. Prior to that time she was in Tyrrell County, living on property in which she had an interest, but not at the time living with the defendant. Witness saw them both in the same house on various occasions; and when the defendant brought Lois up to Columbia, "anybody could see her." Witness had seen her there both in daytime and nighttime, and they were together the night they were arrested.

Witness had seen her there late at night—in riding by there between 7:00 and 9:00 o'clock. Davenport has grown children. It was the understanding of witness that he had a divorce from his former wife. The defendant has two or three homes; maintains a home in Alligator; maintains one "here" and has other places where this woman stays. The last time witness saw her in Davenport's house in Columbia, where she was arrested, was two or three days after she was arrested and given time to get out of the county.

At her trial in the Recorder's Court, the Judge of that court gave her three to five days to leave the county or go to jail for six months, and she stayed right at the time with the defendant, and witness knew that defendant took her away. She was carried to defendant's house in Washington County, just over the Tyrrell County line.

The defendant did not keep anyone else in the house with him except a little boy.

Witness had the place covered for some time before he went in there and under observation.

Chief of Police Poston testified that he went with the Sheriff on the night of the 6th, and found Lois Wright and Alfred Davenport. They had the house under observation from sundown until they went in; were there five minutes before they made an alarm or made their presence known. Witness knew Lois Wright. She had been staying there some two or three weeks at Davenport's home in Columbia, and prior to that time she was staying across the road from Davenport's farm in Alligator. He saw her at his home frequently at that time, and there was no other person living there with him; saw her both in daylight and nighttime. On complaint from the neighbors as to what was going on, witness made several visits to see for himself, and talked with Alfred Davenport and the Sheriff concerning the complaints about him prior to the arrest. "He admitted it," and said that he had been advised that he had a per-

fect right to keep Lois there. Witness said he had seen them together since then on the streets of Columbia in his car—in Davenport's car—two or three days after the Recorder's Court trial. Davenport was a married man. At the time of his arrest Davenport and his wife were not living together.

The witness stated that they went to Davenport's place the night of the arrest about 12:00 o'clock. There was no other person there but Davenport and Lois. Witness saw them when they left from up the street, when they went in the house. He was standing on the street watching the car when they went into the house after the picture show. They went in the front door, and witness saw no one else go in there.

At the time of the arrest, Davenport and Lois came from the same room upstairs. "I was standing at the corner of the house listening, at the corner where he was sleeping. I could hear her in the dark, feeling for her clothes, and Alfred got up and put on his pants and came downstairs, and while he was talking to the Sheriff she came down from the same room. Heard her dropping things in the dark like anyone would do. She dropped a dress, clothes rack and things. Stood outside downstairs and heard a woman drop a dress upstairs."

Upon the conclusion of this evidence, the defendant moved for judgment as of nonsuit, and the motion was denied. Defendant excepted to the denial of his motion and offered no evidence.

Inter alia, the Judge instructed the jury as follows: "Now, I charge you that if you find from the evidence, beyond a reasonable doubt, that this defendant violated the statute upon which he is being tried, that is, that not being married to the woman, and that he did lewdly and lasciviously bed and cohabit with her, if you find that he violated that statute, and you must find this beyond a reasonable doubt, then it will be your duty to bring in a verdict of guilty against this defendant, but if you fail to so find, then it will be your duty to bring in a verdict of not guilty, or, if upon a fair and impartial consideration of all the facts and circumstances in this case, if you have a reasonable doubt as to his guilt of this charge, then it will be your duty to give him the benefit of that doubt and acquit him." To this instruction the defendant excepted.

The jury returned a verdict of guilty, and the defendant moved to set aside the verdict for errors of law committed in the course of the trial. The motion was denied, and defendant excepted. From the judgment entered upon the verdict, the defendant appealed, assigning error.

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

J. C. Meekins and W. L. Whitley for defendant, appellant.

SEAWELL, J. The appeal poses two questions for our decision: First. Was there any evidence to support the conviction? Second, Did the trial judge in his charge satisfy the requirements of G. S., 1-180, in explaining the law and applying it to the evidence?

1. It is perhaps true that upon this particular subject the weight and persuasiveness of the evidence will appear differently to different minds. "Many men of many minds," says the old copy book. With this phenomenon we obviously have nothing to do; it is ours only to decide whether there is evidence tending to show defendant's guilt of the offense charged, and it is the province of the jury to pass upon its weight and sufficiency. In the numerous writings and judicial opinions upon the sufficiency of evidence in cases like this, one consideration stands out clearly; the guilt of the defendants or the defendant must be established in almost every case, if at all, by circumstantial evidence. It is never essential to conviction that even a single act of illicit sexual intercourse be proven by direct testimony. While necessary to a conviction that such acts must have occurred, it is, nevertheless, competent to infer them from the circumstances presented in the evidence. Some sense of natural shame, coupled with a fear of public condemnation or, more likely, the fear of the law, drives offenses of this nature into secret places, and usually causes those who commit them to observe the outward forms of decency.

We must not forget that jurors are selected from the body of the people because their experiences and observations in the affairs of life have taught them to make reasonable inferences from the testimony and evidence laid before them, and to judge of the probative force of one fact or aggregation of supporting facts in establishing the things sought to be proved, more especially when dealing with matters within the common experience. The evidence which they were called upon to consider in this case might fairly, in the language of *Lord Stowell* in *Loveden v. Loveden, infra,* "lead the guarded discretion of a reasonable and just man to the conclusion" of defendant's guilt. Measured by former standards of this Court, it tended to show a violation of the statute under which Davenport was indicted, and will not be disturbed. *S. v. Rhinehart,* 106 N. C., 787, 11 S. E., 512; *S. v. Mann,* 219 N. C., 212, 13 S. E. (2d), 247; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669; *S. v. Poteet,* 30 N. C., 23; *S. v. Eliason,* 91 N. C., 564; *Burroughs v. Burroughs,* 160 N. C., 515, 76 S. E., 478; *Loveden v. Loveden,* 4 Eng. Ecc. R., 461; 1 Am. Jur., sec. 62, p. 705; Underhill, Criminal Evidence, sec. 639.

2. The law is not always to be regarded as a cabalistic utterance, whose inner meaning only the initiate may understand and the professional expert interpret. Not infrequently, especially in respect to the statute law, the language used is so simple, comprehensive and self-

definitive that the trial court could find no words more appropriate than those used in the statute in which to couch an explanation. The Court finds itself compelled, after searching through synonyms and substitute phrases, to return to the well considered words of the law as containing the more enlightening expression. *S. v. Morgan,* 133 N. C., 743, 745, 45 S. E., 1033; *S. v. Webster,* 218 N. C., 692, 696, 697, 12 S. E. (2d), 272; *S. v. Puckett,* 211 N. C., 66, 74, 75, 189 S. E., 183. See *S. v. Gore,* 207 N. C., 618, 178 S. E., 209; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625.

"Lewdly and lasciviously cohabit" plainly implies habitual intercourse, in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or non-habitual intercourse and the offense the statute means to denounce.

In many instances, of course, the law cannot be regarded as self-explanatory in all particulars, and judicial interpretation becomes a requirement of the law. G. S., 1-180. What situations demand an explanation of the law through proper instruction to the jury without special prayer, and what explanations may be regarded as matters of subordinate elaboration, must be referred to the history of the subject as developed in our Reports, rather than to any fixed rule. New situations must be dealt with as they arise. We can only say here that the statute itself employs simple and understandable terms which directly define the offense, and we think the instruction was comprehensible. If the explanation given by the Court in these simple terms was not thought to be sufficient, it became the privilege of defense counsel to ask for further instructions. We regard the exception as untenable.

The further objection to the matter bracketed in the exception to the charge, that is, that the trial court referred to the defendant Davenport as, singly, the person on trial, is not meritorious. The record shows that Lois Wright did not prosecute her appeal in the Superior Court, and Davenport, therefore, alone was on trial. Nor is this a case in which both defendants must be convicted of mutual intent to violate the law before conviction of one of them can be sustained. *S. v. Cutshall,* 109 N. C., 764, 14 S. E., 107; *S. v. McDuffie,* 107 N. C., 885, 12 S. E., 83.

For these reasons, we find that there was, in the course of the trial,

No error.

IN RE ADMINISTRATION OF THE ESTATE OF CHARLES A. DANIEL, ALIAS CHARLES A. LUTZ—GEO. J. SPENCE, ADMINISTRATOR.

(Filed 28 February, 1945.)

1. Equity § 3—

A court of equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law.

2. Executors and Administrators § 13a—

An administrator, desiring to subject an interest in lands of his intestate to the payment of debts of the estate, is given full power to that end under G. S., 28-81, *et seq.* Heirs at law are necessary parties, G. S., 28-87; and adverse claimants may be brought in, G. S., 28-88.

APPEAL by petitioner Geo. J. Spence, Administrator, of the estate of Charles A. Daniel, *alias* Charles A. Lutz, deceased, from *Nimocks, J.*, at Edenton, N. C., on ..... December, 1944.

Proceeding instituted upon petition filed before Clerk of Superior Court and heard in Superior Court upon appeal thereto by petitioner from adverse decision.

I. The petition alleges substantially these facts:

(1) On 13 March, 1909, one Mary Louisa Lutz, being the owner of a certain tract of land, in Perquimans County, North Carolina, upon which she resided together with her daughter, Noria A. Wood, wife of I. W. Wood, and also her foster son, Charles A. Daniel, *alias* Lutz, as members of her family, executed two deeds, by one of which, after reserving to herself a life estate therein, she conveyed a certain portion of said land to her said daughter for life, with remainder over as therein set forth, and by the other of which, after reserving to herself a life estate therein, she conveyed the remaining portion of said land to her said foster son, with remainder over as therein provided—the dividing line between the two portions running through the house in which she and they resided.

(2) That after the life estate of Mary Louisa Lutz had been terminated by her death, Noria A. Wood, the daughter, and Charles A. Daniel, the foster son, took possession of the respective portions so conveyed to them as above set forth, and continued to reside in the house on said lands, and in the year 1943, while they were the only inmates of the house, it was burned and their charred bodies and remains were found in the ashes and resultant debris—there being no knowledge or evidence as to which one survived, and no legal presumption suggestive thereof, and no provision in the deed to meet such contingency.

(3) That thereafter one W. D. Landing administered on the estate of Noria A. Wood, and the petitioner Geo. J. Spence qualified as administrator of Charles A. Daniel.

(4) That W. D. Landing as administrator of Noria A. Wood, deceased, filed a petition to sell the land of his intestate to make assets to pay debts, naming numerous persons as parties thereto, but not including the petitioner, administrator of Charles A. Daniel, or any of the heirs at law of Charles A. Daniel, and in the petition described as the lands of the intestate, Noria A. Wood, not only the portion of the land described in the deed to her, but the portion described in the deed to Charles A. Daniel, as above set forth, and in the due course of the proceedings all the lands so described were sold and the sale confirmed by the court, and the proceeds of sale turned over to W. D. Landing as administrator of the estate of Noria A. Wood, deceased, and he now holds same subject to the orders of the court.

(5) That no moneys or chattels or personal property has come into the hands of the petitioner Geo. J. Spence, administrator of Charles A. Daniel, and hence no inventory has been filed by him and he is unable to pay funeral expenses of his intestate, taxes, cost of administration, or any part of the indebtedness against the estate.

(6) That as the petitioner Geo. J. Spence is informed, believes, and alleges his intestate, Charles A. Daniel, died seized of the land described in the deed to him from Mary Louisa Lutz as above set forth, and same is of sufficient value to pay all of the indebtedness of the estate and a substantial sum to the heirs at law of his intestate, but that petitioner has filed no petition for a sale of said lands to make assets because of the adverse claim, and cloud on title as revealed in the said proceeding by W. D. Landing, as administrator of Noria A. Wood, deceased, and that under the facts and circumstances standing in the way of his filing and presenting such petition for sale, petitioner now "respectfully approaches this court by this report, petition and requesting, as its Trustee, to be advised and directed what procedure, if any, he should adopt to the end that the trust committed to him by this court should be faithfully and legally administered . . ."

(7) That though the sale of the land in the proceeding instituted by W. D. Landing, administrator of Noria A. Wood, as aforesaid, passed no title to the portion of the land described in the deed to Charles A. Daniel as aforesaid, the petitioner, "subject however to the opinion and authority of this court to whose advices and orders he stands subject, and subject also to the approval of the heirs at law of said Charles A. Daniel to be filed in writing in this cause, if made, ratifies the said sale and demands possession of that part of the fund accruing therefrom representing the relative value of the interest of Charles A. Daniel to the whole, . . . which said relative value he asks this court to determine in such manner as it may see fit to the end that the debts of the estate of his intestate may be paid and proper distribution made to the heirs

at law as in such cases made and provided by law," and that, to that end, the court issue an order to said Landing, administrator, directing him to withhold distribution of the fund, and that he show cause why an order should not be made directing him to pay same into this court to abide decision in the premises; and that the court "make such other and further orders as may be necessary to advise this petitioner of his rights and duties and determine and adjudge the rights, titles and interest of the grantees in each and both of the two deeds above set out and the creditors and the heirs at law of each of them in and to the funds so held by the aforesaid commissioner."

II. Thereupon under caption of *"In re:* W. D. Landing, Administrator of Noria A. Wood," the Clerk of Superior Court issued a citation to said Landing directing him to hold the funds paid into his hands as proceeds of sale of the lands as aforesaid until further orders of the court, and to make answer to the said report and petition of the said Geo. J. Spence, administrator of Charles A. Daniel.

III. W. D. Landing, administrator of Noria A. Wood, deceased, answering the said citation, in material aspects, denies: (a) That Charles A. Daniel died seized of the tract of land described in the deed to him from Mary Louisa Lutz, by which he was given only a life estate, with remainder upon a contingency, which under the admitted facts surrounding the deaths of Noria A. Wood and Charles A. Daniel, has never eventuated, or (b) that the facts alleged in said report or petition are sufficient in law or equity to sanction or support petitioner's invocation of the advisory power of the court. And, for further and separate answer and defense, said administrator says that, if the material allegations of said report and petition were true, which is denied, the petitioner in that event would have a plain, complete and adequate remedy at law in that in that event no title to the land or estate belonging to petitioner's intestate would have passed by respondent's sale to make assets, but would be now subject to a like sale by the petitioner, and to an action by the petitioner for the recovery of the possession of it.

IV. The Clerk of the Superior Court, on hearing upon the report and petition of Geo. J. Spence, administrator as aforesaid, and the answer filed by W. D. Landing, administrator of Noria A. Wood, deceased, being of opinion that, upon facts found, and substantially undisputed, the petitioner has shown no right to said fund or any right therein, denied the relief demanded, vacated the order directing W. D. Landing, administrator, to hold said fund, and dismissed the proceeding at the cost of petitioner, from which petitioner appealed to Judge of Superior Court holding the court of the First Judicial District.

V. The Judge of Superior Court, on hearing before him on such appeal, found facts, and entered judgment substantially the same as did the Clerk as above stated.

Petitioner appeals to Supreme Court and assigns error.

R. B. Lowry and H. S. Ward for petitioner, appellant.
McMullan & McMullan for respondent, appellee.

WINBORNE, J. While appellant debates the question as to what estate Charles A. Daniel took under the deeds in question, viewed in the light of the fact that both grantees died instantaneously in a common disaster, the appellee appropriately interjects the question as to the jurisdiction of the court over the subject matter of, and parties to this proceeding. The challenge to jurisdiction is not upon the ground that the jurisdiction of the Superior Court is derivative and consequently fails for lack of jurisdiction in the Clerk, but that the Superior Court would have been without jurisdiction to entertain the proceeding if it had been instituted originally in that court. These authorities, upon which the appellee relies, support his contention: McIntosh in N. C. P. & P., page 68; *Alsbrook v. Reid,* 89 N. C., 151; *Perkins v. Caldwell,* 77 N. C., 433; *Balsley v. Balsley,* 116 N. C., 472, 21 S. E., 954; *Moore v. Rankin,* 172 N. C., 599, 90 S. E., 759.

The petitioner invokes the aid, and seeks the advice of a court of equity, when the questions involved are questions of law, regarding which an adequate remedy at law is provided. And a court of equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law. *Moore v. Rankin, supra.* The deeds in question convey legal estates. The construction of them presents purely legal questions, and the statutes relating to proceeding to sell land to make assets to pay debts, G. S., 28-81, *et seq.,* prescribe a full, complete and adequate remedy at law by which the petitioner as administrator of Charles A. Daniel, upon compliance with the provisions of the statute, may reach land of which his intestate died seized. To such proceeding the heirs at law of the intestate are necessary parties, G. S., 28-87, and where, as here, the land is claimed by another, such claimant may be admitted to be heard as a party to the proceeding or may be brought in as a party thereto. G. S., 28-88. *McKeel v. Holloman,* 163 N. C., 132, 79 S. E., 445. And when an issue of law or fact is joined between the parties, the course of procedure shall be as prescribed in such cases for other special proceedings. G. S., 28-89.

The record discloses that neither the petitioner nor the heirs of Charles A. Daniel were parties to the proceeding instituted by the administrator of Noria A. Wood for the purpose of selling land to make assets to pay her debts. Hence, they are in no respect bound or prejudiced by the judgment therein rendered.

The action is

Dismissed.

STATE v. LUCILE BOWEN BROWN.

(Filed 28 February, 1945.)

1. Indictment § 15—

The Superior Court, under G. S., 7-149, Rule 12, may allow, in its discretion, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. A warrant, defective in both form and substance, may be sufficient to inform the defendant of the accusation against him.

2. Carriers § 18b—

In a prosecution against a colored passenger for a violation of G. S., 60-136, where the State's evidence tended to show that such passenger, when called upon by the driver of a common carrier bus, refused to move from a seat in the front to an unoccupied seat in the rear of the bus, to make room for white passengers, compelling the said driver to call upon officers of the law to remove her, there is sufficient evidence for the jury, and motion for nonsuit was properly denied.

3. Criminal Law § 28a—

Where there was no special plea, in a criminal prosecution, that shifted the burden upon the defendant to show anything to the satisfaction of the jury, the State must prove beyond a reasonable doubt every essential element of the crime charged, including intent; and there is error for the court to instruct the jury to bring in a verdict of not guilty, if it appears to their satisfaction from the evidence that the defendant acted in good faith.

4. Carriers § 18b: Criminal Law § 28c—

The refusal of a passenger on a street car, or other passenger vehicle, to move to another seat when requested to do so by the driver, when necessary to carry out the purpose of providing separate seats for white and colored passengers, constitutes *prima facie* evidence of an intent to violate the statute, but does not shift the burden of proof. While it is no longer necessary to show willfulness, under G. S., 60-136, the State must show beyond a reasonable doubt that the defendant intentionally violated the statute.

APPEAL by defendant from *Carr, J.*, at September Term, 1944, of MARTIN.

Criminal prosecution tried upon a warrant charging defendant with violating G. S., 60-136, which statute regulates the occupancy of seats by white and colored passengers in street cars or other passenger vehicles or motor buses.

The warrant upon which defendant was tried in the Recorder's Court of Martin County read as follows: "Lucile Bowen Brown did refuse, upon request of the driver in charge of Carolina Trailway Bus to move

to an unoccupied seat toward or in the rear of said bus, did use indecent language in said bus and did resist said bus driver in the performance of his duties as bus driver and as police officer. Did also resist an officer of the Town of Robersonville in the performance of his duties as such officer." The warrant as amended in the Superior Court read: "That the defendant, Lucile Bowen Brown, on the 14th day of July, 1944, being a colored passenger on a certain motor bus of the Carolina Trailways, did unlawfully and wilfully refuse to move to an unoccupied seat toward and in the rear of said bus, when requested so to do by the driver and person in charge of the bus, in order and when necessary to carry out the purpose of providing separate seats for white and colored passengers, contrary to the form of the Statute made and provided and against the peace and dignity of the State."

In the trial below the State offered evidence tending to show these facts: On 14 July, 1944, the defendant, a colored person, and her sister-in-law were passengers on a bus of the Carolina Trailways, operating from Williamston to Raleigh, N. C. When the bus reached Robersonville and the passengers had alighted, there were five vacant seats back of the defendant and her sister-in-law, towards the rear of the bus. There were only two vacant seats in front of the defendant, towards the front of the bus. There were five white passengers waiting to get on the bus. The driver requested the colored passengers to move to the rear of the bus. All the colored passengers moved back except the defendant, who refused to do so. The driver in charge of the bus requested an officer of the town of Robersonville to remove the defendant from the bus. The defendant refused to leave and resisted removal, whereupon the officer summoned help and she was evicted by force.

Verdict: Guilty. From judgment imposing a fine of twenty-five dollars, defendant appeals to the Supreme Court, assigning errors.

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

P. H. Bell for defendant.

DENNY, J. The defendant was convicted in the Recorder's Court of Martin County upon a warrant containing two counts. The first count charged a violation of G. S., 60-136, and the second resisting an officer. From judgment entered upon both counts, the defendant appealed to the Superior Court.

At the trial in the Superior Court, when the State rested, the defendant moved for judgment as of nonsuit. The motion was allowed as to the count for resisting arrest, but was denied as to the charge under G. S., 60-136. The defendant excepted. The defendant offered evidence

but did not go upon the stand herself. At the close of all the evidence, defendant renewed her motion for judgment as of nonsuit. The motion was denied and defendant again excepted.

After the motion for judgment as of nonsuit had been renewed and denied, the solicitor moved to amend the warrant to conform to the requirements of the statute. The motion was allowed and the defendant excepted.

The foregoing exceptions constitute the basis of appellant's first three assignments of error. The appellant contends that at the time the motion for judgment as of nonsuit was made the only criminal charge before the court was the count in the warrant charging the defendant with resisting an officer, and when the motion was allowed on that count there was no criminal charge pending against her. Consequently, the appellant contends, it was error to deny the motion for judgment as of nonsuit and thereafter allow the State to amend the warrant. We do not concur in this view.

It is well settled by this Court, that the power of the Superior Court to allow amendments to warrants is very comprehensive. *S. v. Wilson,* 221 N. C., 365, 20 S. E. (2d), 273; *S. v. Holt,* 195 N. C., 240, 135 S. E., 324; *S. v. Mills,* 181 N. C., 530, 106 S. E., 677; *S. v. Price,* 175 N. C., 804, 95 S. E., 478; *S. v. Smith,* 103 N. C., 410, 9 S. E., 200. A warrant cannot be amended so as to charge a different offense. *S. v. Clegg,* 214 N. C., 675, 200 S. E., 371; *S. v. Goff,* 205 N. C., 545, 177 S. E., 407. However, the Superior Court, under our statute, G. S., 7-149, Rule 12, may allow, within the discretion of the court, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. *S. v. Mills, supra; S. v. Poythress,* 174 N. C., 809, 93 S. E., 919; *S. v. Telfair,* 130 N. C., 645, 40 S. E., 976; *S. v. Smith, supra.* A warrant may be defective in form and substance and yet contain sufficient information to inform the defendant of the accusation made against him. Such a warrant may be amended.

We think the evidence adduced by the State in the trial below was sufficient to carry the case to the jury and that the amendment to the warrant was properly allowed. Hence, these assignments of error cannot be sustained.

The fourth exception and assignment of error is to the following portion of his Honor's charge: "There has been some reference to a decision of the Supreme Court in which a similar situation existed and the colored person was requested to move back in order to make space to give seating space to oncoming white passengers and that she stated to the driver that she would not move back that she would get off the bus rather than move back, and that under those circumstances that our Supreme

Court held that such conduct on the part of a colored passenger was not a willful violation of the statute. The court instructs you that the Supreme Court has so held in a similar case but that since that time the statute has been slightly amended and the statute the court has read to you is a little different from the statute that was in effect at the time that opinion was handed down. However, the court instructs you in light of the decision which the court has just referred to, notwithstanding the amendment to the statute since that case was decided by the Supreme Court, that if it appears from the evidence to the satisfaction of the jury that the defendant in this case did in good faith offer to stand in the aisle in preference to moving as requested, if she offered that in good faith, then she would not be guilty of a willful refusal to comply with this statute."

We think this exception is well taken and must be sustained. There was no special plea on the part of the defendant that shifted the burden upon her to show anything to the satisfaction of the jury. The burden was upon the State to prove beyond a reasonable doubt every essential element of the crime charged, including the necessary intent. *S. v. Harris,* 223 N. C., 697, 28 S. E. (2d), 232. The fact that refusal of a passenger on a street car, or other passenger vehicle or motor bus, to move to another seat when requested to do so by the driver or person in charge thereof, when necessary in order to carry out the purpose of providing separate seats for white and colored passengers, constitutes *prima facie* evidence of an intent to violate the statute does not shift the burden of proof. And while C. S., 3537, as amended, now G. S., 60-136, does not require the State to prove willfulness, as was the case in *S. v. Harris,* 213 N. C., 758, 197 S. E., 594, the burden still rests upon the State to show beyond a reasonable doubt that the defendant intentionally violated the statute.

The foregoing assignment of error presents for our consideration the correctness of the charge as to the burden of proof only. The substances of the charge is not challenged. We deem it proper to state, however, that we do not approve it as an exact interpretation of the statute.

For the reasons stated, there must be a new trial, and it is so ordered.

New trial.

ELMA BEACH v. TOWN OF TARBORO AND JOHN F. BREWER.

(Filed 28 February, 1945.)

1. Municipal Corporations § 12—

It is the general rule in this jurisdiction that municipal corporations, when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs of their employees and agents, unless made so by statute.

2. Same—

The mission of the town's employee, out of which the alleged injury to the plaintiff arose, is the determining factor as to liability—not what such employee was called upon to do at other times and places, but what he was engaged in doing at the particular time and place alleged.

3. Same—

In an action against a town to recover damages for alleged negligent injury to plaintiff by reason of a collision of a taxicab in which plaintiff was riding with a truck of the town, where all of the evidence tended to show that the collision occurred when the truck was being driven by the town's employee for the purpose of repairing five street lights in the town lighting system maintained for the public good and benefit, the court erred in refusing to grant defendant's motion for judgment as of nonsuit, made at the close of plaintiff's evidence and again at the close of all the evidence.

APPEAL by defendant town of Tarboro from *Carr, J.*, at October Term, 1944, of EDGECOMBE.

This is a civil action to recover damages for personal injuries to the plaintiff alleged to have been caused by the negligence of the defendants. A judgment as of nonsuit was entered at the close of the plaintiff's evidence as to the defendant Brewer, from which no appeal was taken.

It is alleged by the plaintiff that she was a passenger in a taxicab owned by defendant Brewer which was in a collision with a truck owned by the defendant town, and that as a result thereof she received personal injuries.

It is not denied by the defendant town that the plaintiff received injuries from a collision between a taxicab in which she was a passenger and a truck of the defendant town operated by its employee, but liability for any negligent act of its employee is denied by it upon the ground that said act was performed in its behalf in the exercise of its governmental function.

The evidence of the plaintiff tends to show that the truck of the town involved in the collision under investigation was being operated by one Vernon Pitt, who testified as a witness for the plaintiff to the effect that

he, Pitt, was employed by the town in the light and power department as service man, light repair and general maintenance for electric lights and street lighting; the town sells electricity to customers for lighting and heating purposes and that he read meters when he cut off or cut on customers; that he got his instructions either at the power plant or the City Hall; that he was driving the truck from the power plant at the time of the collision, and was going to stop at the City Hall to see if anything urgent had happened before he went to put on the street lights he had on the truck; his first destination was the City Hall to find out if any emergency existed, he left the power plant with instructions to repair five overhead street lights, and was going to stop at the City Hall to see if any line had broken, or if anybody wanted lights cut on or off; he did not have any instructions to work on any commercial lines at this particular time, and there was none at the City Hall when he went there; it was necessary to follow the course he did to get to the City Hall, and when he left the power plant with instructions to repair five street lights he decided to go by the City Hall to see if there were any instructions in regard to emergencies; there was no difference in the course he pursued if he hadn't needed to go to the City Hall; he was using the truck he generally used about the city repairing any kind of electrical trouble; the town sold electricity to homes, places of business and mills and had its own electricity connected with the streets and municipal hall; the town's biggest maintenance job is keeping lines clear and hanging transformers, it has lines that serve paying customers and lines that serve street lights. One George Earnhardt testified as a witness for the plaintiff to the effect that he is the City Clerk, and kept the records, and that the town operates a power plant and Mr. Pitt's salary was paid from the utilities fund, line and repair operation, expense of the power plant.

When the plaintiff had introduced her evidence and rested her case the defendant town moved to dismiss the action and for a judgment as in case of nonsuit, the motion was refused, and exception was preserved; when all the evidence on both sides was in said defendant renewed its motion for dismissal and for judgment as in case of nonsuit, which motion was again refused, and defendant preserved exception. G. S., 1-183.

Issues were submitted to the jury and were answered in favor of the plaintiff, and from judgment predicated on the verdict the defendant town appealed, assigning errors.

George M. Fountain and V. E. Fountain for plaintiff, appellee.
Henry C. Bourne for defendant town, appellant.

SCHENCK, J. The third and fourth exceptive assignments of error, which relate to the court's refusal of defendant's motion to dismiss the action and for judgment as in case of nonsuit lodged when the plaintiff had introduced her evidence and rested her case and renewed when all the evidence on both sides was in, pose the determinative question as to whether the driver of the town's truck was engaged in the performance of a governmental function at the time of the collision between said truck and the taxicab in which the plaintiff was a passenger. If such driver was so engaged the motion to dismiss and for judgment as in case of nonsuit should have been allowed, if not so engaged it may be conceded that the motion was properly disallowed.

"It is the general rule in this jurisdiction that a municipal corporation, when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs of their employees and agents, unless made so by statute. *Snider v. High Point,* 168 N. C., 608; *Harrington v. Greenville,* 159 N. C., 632; *McIlhenney v. Wilmington,* 127 N. C., 146; *Moffitt v. Asheville,* 103 N. C., 237; *White v. Comrs.,* 90 N. C., 437." *Price v. Trustees,* 172 N. C., 84, 89 S. E., 1066.

Upon the facts which the evidence tends to establish, we are constrained to hold that the acts of the defendant employee, which the plaintiff alleges were actionable negligence, were performed by him in behalf of the defendant town in the exercise of governmental power conferred upon it. The maintenance of a street lighting system is a separate function from the sale of electricity from the same power plant. Just as in *Parks-Belk Co. v. Concord,* 194 N. C., 134, 138 S. E., 599, the rule of nonliability was held applicable to damages caused by the water used to flush the street which came from the same water main which the city used to convey water for sale to customers.

The mission of the town's employee, out of which the alleged injury to the plaintiff arose is the determining factor of the case at bar—not what such employee was called upon to do at other times and places, but what he was engaged in doing at the particular time and place alleged. Plaintiff's evidence shows that the purpose of the trip was to repair five street lights in the lighting system maintained for the public good and benefit—that is what he drove the truck from the power plant to do, and that is what he was proceeding to do at the time of the collision.

Holding as we do that the mission on which the town's employee had embarked was in the performance of a governmental function, "to put on the street lights which he (I) had on the truck," it becomes unnecessary for us to consider the other interesting questions presented in the briefs relative to the evidence and the charge.

We are of the opinion and so hold that the defendant's motion for dismissal of the action and for a judgment as in case of nonsuit lodged when the plaintiff rested her case and renewed when all the evidence on both sides was in should have been allowed and the refusal so to do by the court was error for which the judgment below must be

Reversed.

STATE OF NORTH CAROLINA ON RELATION OF W. S. DICKEY, H. E. DICKEY, AND E. G. NICHOLS, v. C. L. ALVERSON.

(Filed 28 February, 1945.)

1. Nuisance § 6—

The maintenance of a public nuisance is an offense against the State, and upon proper allegation and proof would subject the person who maintained it to indictment.

2. Nuisance §§ 5, 6—

There must be an allegation of peculiar injury to person or property of plaintiff resulting from a public nuisance to entitle plaintiff to maintain a civil action therefor.

3. Nuisance §§ 7, 10, 11—

The proceeding prescribed by G. S., 19-2, for a civil action by a citizen in the name of the State for injunction, the closing of a place of business, and the seizure and sale of personal property used therewith, must be based upon allegations and proof of prostitution, gambling, or the illegal sale of whiskey as specified in G. S., 19-1.

APPEAL by defendant from *Alley, J.*, at Chambers, 6 September, 1944. From CHEROKEE.

This was a civil action instituted by plaintiffs in the name of the State under G. S., 19-2, to close defendant's place of business and to enjoin the maintenance there of an alleged nuisance.

In the complaint it was alleged, in substance, that defendant operated a place of business in Murphy known as the "Smoke House," where beer and wine were sold and a pool room operated; that the sale of beer and wine caused public drunkenness, profanity and disorder, and the gathering of intoxicated men on the public street outside the Smoke House, so as to constitute a public nuisance; that the loud noise of a music machine disturbs those living in the vicinity, and that beer and wine are sold to minors. Injunction was prayed against the maintenance and operation of this place, the abatement of the nuisance and the seizure and sale of the personal property used in connection therewith.

Temporary restraining order was issued as prayed. Upon the hearing defendant moved to dismiss on the ground that the facts alleged in the complaint were not sufficient to invoke the proceeding under G. S., 19-2. Motion was overruled and defendant excepted.

Evidence was thereupon offered by plaintiffs tending to substantiate the allegations of the complaint, and evidence *contra* by defendant.

The restraining order was modified so as not to apply to defendant's cafe operated in same building, and in all other respects the restraining order was continued to the hearing, and the sheriff directed to retain custody of the personal property seized.

Defendant excepted and appealed.

Winifred Townson Wells and Edwards & Leatherwood for plaintiffs.
J. D. Mallonee, F. O. Christopher, and J. B. Gray for defendant.

DEVIN, J. The statutes, G. S., 19-1, and G. S., 19-2, under which this action was brought, authorize a civil action in the name of the State upon the relation of a citizen, and permit the issuance of an injunction without bond, the closing of a place of business, and the seizure of the personal property used in connection therewith, upon verified complaint of a nuisance which is therein defined as follows:

"Whoever shall erect, establish, continue, maintain, use, own or lease any building, erection or place used for the purpose of lewdness, assignation, prostitution, gambling or the illegal sale of whiskey, is guilty of a nuisance."

It is apparent that the allegations and proof of acts and conduct which would justify the proceeding here undertaken must point to one of three things, viz.: prostitution, gambling or the illegal sale of whiskey. Neither of these is alleged in the complaint or shown by the evidence. Hence, defendant was entitled to have the restraining order dissolved and the personal property released from custody.

There is no allegation of peculiar injury to person or property of plaintiffs resulting from the public nuisance alleged which would entitle the plaintiffs to maintain a civil action therefor. *Reyburn v. Sawyer,* 135 N. C., 328, 47 S. E., 761; *Hall v. Coach Co.,* 224 N. C., 781. The maintenance of a public nuisance is an offense against the State, and upon proper allegation and proof would subject the person who maintained it to indictment. *S. v. Everhardt,* 203 N. C., 610, 166 S. E., 738; *S. v. Brown,* 221 N. C., 301, 20 S. E. (2d), 286; 39 Am. Jur., 378. But the proceeding prescribed by G. S., 19-2, for a civil action by a citizen in the name of the State for injunction, the closing of a place of business, and the seizure and sale of the personal property used therewith must be based upon allegation and proof of one or more of the specific acts

denounced by G. S., 19-1. *Barker v. Palmer,* 217 N. C., 519, 8 S. E. (2d), 610; *Carpenter v. Boyles,* 213 N. C., 432, 196 S. E., 850.

While the plaintiffs' allegations and the affidavits offered disclose undesirable conditions about defendant's place of business, they are not in law sufficient to invoke the statutory procedure here undertaken. Whether the evidence warrants criminal prosecution is a matter for the local authorities.

It may be noted that the sale of beer and wine is permitted under the State law, and license therefor was granted to this defendant by the county and municipality under the provisions of G. S., 18-72, *et seq.* The rights of the parties and of the public thereunder are pointed out in *McCotter v. Reel,* 223 N. C., 486.

The order continuing the restraining order and directing retention of custody of defendant's personal property must be

Reversed.

IN RE THE LAST WILL AND TESTAMENT OF MAGGIE NIPSON LOMAX.

(Filed 28 February, 1945.)

Wills § 25—

In the trial of a civil action of *devisavit vel non,* where the court charged the jury, on the second issue, which was "did testatrix at the time in question have testamentary capacity?" that, should the jury find from the greater weight of the evidence that the testatrix lacked such capacity, they should answer the issue "yes," and should the jury fail to so find they should answer the issue "no," there is reversible error, even though the error is a *lapsus linguæ.*

APPEAL by caveators from *Pless, J.,* at December Term, 1944, of BUNCOMBE.

Civil action, an issue of *devisavit vel non.*

A new trial having been granted on former appeal for errors shown, 224 N. C., 459, 31 S. E. (2d), 369, the case was again tried in Superior Court, upon these issues, which were answered by the jury as shown:

"1. Did the deceased, Maggie Nipson Lomax, execute the paper writing offered for probate as her last will and testament, according to law? Answer: Yes.

"2. If so, did the said Maggie Nipson Lomax at the time in question have testamentary capacity? Answer: Yes.

"3. Was the execution of the said paper writing procured by fraud, duress or undue influence? Answer: No.

"4. Is the paper writing offered for probate, and every part thereof, the last will and testament of Maggie Nipson Lomax? Answer: Yes."

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

George F. Meadows and Cecil C. Jackson for caveators, appellants.
Carl W. Greene for propounder, appellee.

WINBORNE, J. The record discloses that in charging the jury on the second issue, and after declaring the law as to the burden of proof, and reviewing the evidence offered by the respective parties bearing on the issue, the court gave this instruction:

"Bringing the question or issue to a final conclusion, and again summarizing the law for you, the burden of proof on this issue is on the caveators, those who object to the setting up of the paper writing. The court instructs you that if their evidence has satisfied you from its quality and convincing power that at the time of executing the will that the maker, Maggie Nipson Lomax, did not know the property she had, and its nature and extent and value, and that she did not have a full understanding of what she was about, and the significance and importance of the act in which she was engaged, did not know the persons who were the natural objects of her bounty, and did not appreciate the fact that she was engaged in the execution of a will; I say if the caveators have satisfied you by the greater weight of the evidence that she was of that mental condition at that time, January 8, 1941, the court instructs you that you answer that issue in their favor, that is, YES. On the other hand, if the caveators have not so satisfied you, that is, if their evidence has not outweighed in at least some degree the quality and convincing power of the propounders' evidence, then you will answer the issue in favor of the propounders by writing in the word, NO."

This instruction constitutes an exceptive assignment by caveators. The error assigned is that if on the second issue the jury should find in favor of the caveators, the answer would be "No," and if the jury should fail to so find, the answer would be "Yes." In other words, as used in the instruction the word "Yes" appears where the word "No" should be, and the word "No" appears where the word "Yes" should be. And a careful review of the charge as a whole fails to show that this error was cured. No doubt, due to the form of the issue, the use of the words in such reverse order was a slip of the tongue, *lapsus linguæ,* characterized by *Stacy, C. J.,* as "one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit." *S. v. Kline,* 190 N. C., 177, 129 S. E., 413. Nevertheless, we are bound by the record, and, we must assume, in passing upon appropriate

exception thereto, that the jury understood the instruction as it appears in the record, and that the jury in coming to a verdict observed the instruction as it so appears. Similar situations arose in these cases: *S. v. Allen,* 190 N. C., 498, 130 S. E., 163; *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732; *S. v. Griggs,* 197 N. C., 352, 148 S. E., 547; *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868; *S. v. Starnes,* 220 N. C., 384, 17 S. E. (2d), 346; *S. v. Floyd,* 220 N. C., 530, 17 S. E. (2d), 658; *S. v. Norton,* 222 N. C., 418, 23 S. E. (2d), 301.

Other exceptive assignments are not considered as they may not recur upon another trial. For error assigned, let there be a

New trial.

J. R. PENNER v. J. B. ELLIOTT.

(Filed 28 February, 1945.)

1. Libel and Slander § 1—

Slander, as distinguished from libel, may be actionable *per se* or only *per quod.* That is, the false remarks in themselves may form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed; or the false utterance may be such as to sustain an action only when causing some special damage, in which case both the malice and the special damage must be alleged and proved.

2. Libel and Slander § 2—

Ordinarily, we must look to the common law for defamations which are actionable *per se,* including accusations of crime or offenses involving moral turpitude, defamatory statements about a person with respect to his trade, occupation or business, imputation of having a loathesome disease, and the like.

3. Libel and Slander §§ 3, 11—

A public statement by defendant, that plaintiff "is a man who will not pay his honest debts, that he will not work and is a man that respectable people had best not have anything to do with," is not actionable *per se,* and, plaintiff having alleged no special damages, defendant's demurrer to the complaint for failure to state a cause of action should have been allowed.

4. Libel and Slander § 16—

Special damages are those which are the actual, but not the necessary result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. Humiliation and mental anguish are not special damages in an action for slander.

PENNER *v.* ELLIOTT.

APPEAL by defendant from *Pless, J.,* at Regular September Term, 1944, of BUNCOMBE.

Plaintiff brought this action to recover damages for an alleged slander publicly uttered against him while defendant was traveling in a bus of the White Transportation Company in the city of Asheville. It is charged in the complaint that the defendant uttered concerning plaintiff the following false and defamatory language: "J. R. Penner (meaning the plaintiff) is a man who will not pay his honest debts; that he will not work and is a man that respectable people had best not have anything to do with." Plaintiff complains that the said false utterances held him up to "public ridicule and contempt, thereby destroying plaintiff's good name and standing in the community," and that, as a proximate cause thereof, he has suffered damages in the sum of $1,000.00.

In a further count of the complaint, plaintiff alleges that the defamatory utterances were malicious, reckless and wanton, and without legal excuse or justification, and asks for $1,000.00 as punitive damages.

The complaint contains no allegation of special damages.

To this complaint the defendant demurred as not stating a cause of action, and moved to dismiss.

Upon the hearing the trial judge overruled the demurrer, and the defendant appealed, assigning error.

Thomas A. Curry for plaintiff, appellee.

Sale, Pennell & Pennell for defendant, appellant.

SEAWELL, J. Slander, as that term is appropriated to oral defamatory utterances as distinguished from libel, may be actionable *per se* or only *per quod.* That is, the false remarks in themselves may form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed; or the false utterance may be such as to sustain an action only when causing some special damage, in which case both the malice and the special damage must be alleged and proved.

The policy of the law has much restricted the range of defamatory utterances which are actionable *per se.* Some statutes, with which we are not here concerned, make a limited number of defamations slanderous *per se;* but ordinarily we must look to the history of the subject in the common law, under the guidance of our own decided cases, in order to determine which are of that character. Included amongst them are accusations of crime or offenses involving moral turpitude, defamatory statements about a person with respect to his trade, occupation or business, imputations of having a loathesome disease, and the like. It is sufficient to say that the words alleged of the defendant do not come within any of the categories recognized as actionable *per se;* and that

plaintiff has not alleged against him any special damage—that is, damage sustained by reason of any special circumstances or conditions attending the breach of duty of which plaintiff complains, and this is fatal to the case as presently laid in the complaint.

In *Ringgold v. Land,* 212 N. C., 369, loc. cit. 371, *Justice Schenck,* speaking for the Court, quotes the following from Black's Law Dictionary as defining special damages:

"Special damages are those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. Hence general damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case." Black's Law Dictionary, 2d Ed., pp. 314-15, and authorities there cited.

In this respect plaintiff is not aided by his "second count," in which he alleges that the defamatory words were wanton and malicious, and that he suffered humiliation and mental anguish. To recover at all, he must allege and prove malice; and damages for humiliation and mental suffering are not special damages within the accepted definition.

Ringgold v. Land, supra, contains a full discussion of the subject, with copious citations, on a statement of fact remarkably similar to the one here considered, and we reaffirm its authority.

The demurrer should have been sustained. It is so ordered.

Judgment reversed.

P. H. BELL v. VICTOR H. NIVENS ET AL.

(Filed 28 February, 1945.)

1. Appeal and Error §§ 10a, 16, 18a—

A writ of *certiorari* from this Court is not available to extend the time for preparation and service of statement of case on appeal, which is a matter for the parties and the court below, subject to the limitation that extension may not carry the appeal beyond the time it is due here.

2. Appeal and Error § 10b—

A statement of case on appeal not served in time may be disregarded or treated as a nullity. Of course, where a party is disadvantaged by some error or act of the court or its officers, and not by any fault or neglect of his own or his agent, a different situation is presented.

3. Appeal and Error § 18a—

It is not permissible to retrieve by *certiorari* the right to bring up "the case on appeal" which has been lost by laches. Its true use is to preserve the right before it is lost in order to prevent its loss.

4. Appeal and Error §§ 10e, 31b—

The failure to have the "case on appeal" legally settled does not *ipso facto* require a dismissal of the appeal. The appellants are still entitled to present the case on the record proper.

5. Appeal and Error § 29—

Failure to file brief works an abandonment of the exceptions and assignments of error, except those appearing on the face of the record which are cognizable *sua sponte*.

6. Appeal and Error § 10a—

The mailing by appellant of his statement of case on appeal is not sufficient service in the absence of an understanding to that effect.

APPEAL by defendants from *Carr, J.*, at October Term, 1944, of WASHINGTON.

Application by appellants for *certiorari* to bring up "case on appeal."

Motion by appellee (1) to dismiss the appeal, and (2) to affirm the judgment.

The case was tried at the October Term, 1944, of Washington Superior Court, and resulted in judgment for plaintiff being signed at Nashville, N. C., on 5 December, 1944. Copy of the judgment was mailed to defendant, Thomas J. Nivens, in New York City.

The defendants were allowed 28 days in which to serve case on appeal. This was later extended for seven days. The extension was subsequently revoked as the judge concluded that he had no authority to grant the extension.

On 7 January, 1945, the defendant, Thomas J. Nivens, mailed from New York City by registered letters copies of statement of case on appeal to the presiding judge, assistant clerk of the Superior Court of Washington County, and counsel for plaintiff at their respective addresses in North Carolina. Signed receipts, dated 9 January, 1945, were received from each of the addressees. Counsel for plaintiff did not accept service of statement of case; nor was service waived.

Up to this time the defendants were not represented by counsel. They undertook to try their own case and to prosecute the appeal *in propria personæ*. The appeal was due here 30 January, 1945.

On 9 February, 1945, counsel for defendants filed in this Court application for *certiorari* to bring up case on appeal.

Plaintiff moves to dismiss the appeal and to affirm the judgment.

Carl L. Bailey for plaintiff, appellee.

E. D. Flowers (in Supreme Court only) for defendants, appellants.

STACY, C. J. We have here a question of appellate procedure.

A writ of *certiorari* from this Court is not available to extend the time for preparation and service of statement of case on appeal. *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737. This is a matter which belongs to the parties and the court below, *S. v. Moore,* 210 N. C., 686, 188 S. E., 421, subject to the limitation that the extension may not carry the appeal beyond the time it is due here. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126. It is axiomatic among those engaged in appellate practice that a "statement of case on appeal not served in time" may be disregarded or treated as a nullity. *Guano Co. v. Hicks,* 120 N. C., 29, 26 S. E., 650. Of course, where a party is disadvantaged by some error or act of the court or its officers, and not by any fault or neglect of his own or his agent, a different situation is presented. *Bank v. Miller,* 190 N. C., 775, 130 S. E., 616; *Winborne v. Byrd,* 92 N. C., 7; *Johnson v. Andrews,* 132 N. C., 376, 43 S. E., 926.

Nor is it permissible to retrieve by *certiorari* the right to bring up the "case on appeal" which has been lost by laches. *S. v. Moore, supra.* Its true use is to preserve the right before it is lost in order to prevent its loss. *Bank v. Miller, supra; Pruitt v. Wood, supra.*

The failure to have the "case on appeal" legally settled, however, does not *ipso facto* require a dismissal of the appeal. *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398; *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713. The appellants are still entitled to present the case on the record proper. *Hicks v. Westbrook,* 121 N. C., 131, 28 S. E., 188.

The failure to file brief works an abandonment of the exceptions and assignments of error, *S. v. Dingle,* 209 N. C., 293, 183 S. E., 376, except those appearing on the face of the record which are cognizable *sua sponte, e.g.,* want of jurisdiction or some patent defect. *Thornton v. Brady,* 100 N. C., 38, 5 S. E., 910; *Appomattox v. Buffaloe,* 121 N. C., 37, 27 S. E., 999.

Here the right to bring up the "case on appeal" has been lost by failure of appellants to serve their statement within the time allowed, or to obtain a waiver of such requirement. The mailing of the statement was not sufficient service in the absence of an understanding to that effect. *Forte v. Boone,* 114 N. C., 176, 19 S. E., 632; *Hicks v. Westbrook, supra; Edwards v. Perry,* 208 N. C., 252, 179 S. E., 892; *Roberts v. Bus Co., supra.* Hence, the result:

Certiorari, disallowed.

Motion to dismiss, denied.

Motion to affirm, granted.

STATE v. CLARENCE CODY.

(Filed 28 February, 1945.)

1. Assault and Battery §§ 7c, 11—

In a criminal prosecution for assault with a deadly weapon with intent to kill, resulting in injury, G. S., 14-32, where the State's evidence tended to show that prosecutor was in the act of taking money from his cash register, after closing his store for the night, when the defendant, who was definitely identified by both prosecutor and his clerk, shot a gun through the store window, the load lodging near prosecutor, who ran out of the store and shot a pistol in the direction defendant had gone and was wounded by gunshot in reply from the darkness, threats by defendant against prosecutor being also shown, there is ample evidence to sustain conviction and motion to dismiss under G. S., 15-173, was properly denied.

2. Assault and Battery §§ 7c, 13—

In a prosecution for an assault with a deadly weapon with intent to kill, resulting in injury, where the court charged that one of three verdicts might be returned: (1) guilty of assault with a deadly weapon with intent to kill, inflicting serious injury, not resulting in death, or (2) guilty of assault with a deadly weapon, or (3) not guilty, there being slight, if any, evidence of serious injury, there is no harmful error in the court's submitting the felony charge to the jury, defendant having been acquitted on that count.

APPEAL by defendant from *Pless, J.*, at September Term, 1944, of BUNCOMBE. No error.

Criminal prosecution on bill of indictment charging a felonious assault under G. S., 14-32.

L. S. Sargent, the prosecuting witness, operates a place of business near Newbridge on the Weaverville Road. On 14 July, 1944, about 11:00 p.m., he had closed his store and was standing with his back to the front in the act of taking money from his cash register when someone in front and on the outside fired a gun. The load went through the window and lodged near Sargent. The overhead lights in front were on. Both Sargent and an employee in the store immediately looked and saw defendant in front, going across the road. He had a gun. No one else was out in front. Sargent got his pistol, ran out, and began shooting in the direction defendant had gone. There was another gunshot from that direction and a part of the load lodged in Sargent's shoulder.

About 10:45 on the same night defendant went to the home of a Mrs. Hicks who lived near Sargent's place of business and got his gun he had previously loaned her. He also got two shells. A few minutes before the shooting he was heard to say he was going to "get even with Sarge (Sargent)" and one Wilson. He was then near Sargent's place of busi-

ness. He went to Wilson's home and repeated this statement about fifteen minutes after the shooting.

The defendant having offered no evidence in rebuttal, the cause was submitted to the jury on the testimony of the State. The jury returned a verdict of "guilty of an assault with a deadly weapon." From judgment on the verdict defendant appealed.

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

J. W. Haynes for defendant, appellant.

BARNHILL, J. Defendant's primary assignment of error is directed to the refusal of the court to dismiss on motion made under G. S., 15-173, C. S., 4643. He insists there was insufficient evidence of the identity of the defendant. In this we are unable to concur.

The defendant was definitely identified by two witnesses as the person who was in front of the building at the time the shot was fired. He had a gun. No one else was there. He had just a few minutes before avowed his purpose to "get even with Sarge." Thus the testimony tends to show. This evidence was amply sufficient to repel the motion to dismiss and to sustain the verdict. Its credibility was for the jury.

The other exceptive assignments of error are directed to alleged error in the charge of the court. After careful consideration we are unable to find in them any cause for disturbing the verdict.

The court instructed the jury that they might return any one of three verdicts: (1) guilty of an assault with a deadly weapon with intent to kill, inflicting serious injury, not resulting in death, or (2) guilty of an assault with a deadly weapon, or (3) not guilty. It fully explained the constituent elements of each of the two offenses.

There is very slight, if any, evidence of serious injury within the meaning of the statute. Thus, if there was error in the instructions, it rests in the fact that the court submitted the felony charge to the jury. Even so, on this count there was a verdict of not guilty. Hence defendant has not been prejudiced thereby.

In the trial below we find

No error.

H. M. AVENT v. D. W. MILLARD AND GERTRUDE MILLARD.

(Filed 28 February, 1945.)

1. Trial § 22a—

The power of the Superior Court to grant an involuntary nonsuit is altogether statutory and did not exist prior to 1897, and therefore the requirement of the statute, now G. S., 1-183, must be strictly followed.

2. Same—

Where defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his motion therefor at the close of all the evidence cannot be granted, the right to demur to the evidence having been waived.

APPEAL by plaintiff from *Rudisill, Special Judge,* at September Term, 1944, of NASH.

Action to recover damages alleged to have been negligently caused in a collision between a Lafayette automobile driven by the plaintiff, H. M. Avent, and a Ford automobile of the male defendant, D. W. Millard, driven by the *feme* defendant, Gertrude Millard, in the city of Rocky Mount on 8 January, 1944. The court entered judgment wherein it is recited "At the close of all the evidence the defendants and each of them lodged motion for judgment as of nonsuit. After a discussion said judgment as of nonsuit as to both defendants is allowed." An examination of record discloses that when the plaintiff had introduced his evidence and rested his case the defendants lodged no motion for dismissal or for judgment as in case of nonsuit, but introduced their evidence, and after all the evidence on both sides was in lodged motion for judgment as of nonsuit. This motion was allowed, and judgment accordant therewith was entered. To this action of the court the plaintiff objected, excepted and appealed to the Supreme Court, assigning errors.

Keel & Keel for plaintiff, appellant.

J. W. Grissom for defendants, appellees.

PER CURIAM. The power of the Superior Court to grant an involuntary nonsuit is altogether statutory and did not exist prior to the passing of the statute in 1897 (Hinsdale Act), *Riley v. Stone,* 169 N. C., 421, 86 S. E., 348; and since the allowance of a motion for judgment as of nonsuit is thus based upon purely statutory grounds, the requirement of the statute, now G. S., 1-183, must be strictly followed. Therefore, where a defendant fails to move for a judgment as of nonsuit at the close of the plaintiff's evidence, his motion therefor at the close of all the

evidence cannot be granted, as the right to demur to the evidence is waived. *Jones v. Insurance Co.,* 210 N. C., 559, 187 S. E., 769.

The defendants having failed to lodge their motion for dismissal of the action and for a judgment as in case of nonsuit when the plaintiff had introduced his evidence and rested his case, the granting of such a motion after all the evidence on both sides was in was unauthorized and error, for which the judgment below must be

Reversed.

STATE v. HERMAN MANNING AND JOE MARTIN.

(Filed 28 February, 1945.)

Abortion § 8—

Where, in a criminal prosecution for aiding and abetting in an abortion, G. S., 14-45, the State's evidence tended to show that defendant, and another who pleaded guilty, took a pregnant woman, in the car of defendant who was driving, to several near-by towns, in the last of which an abortion was performed on the woman, and defendant was heard to say that he might have to pay out of this case, there is sufficient evidence to sustain a conviction.

APPEAL by defendant, Herman Manning, from *Carr, J.,* at September Term, 1944, of MARTIN.

Criminal prosecution tried upon indictment charging the defendants with aiding and abetting in the procurement of an abortion or miscarriage in violation of G. S., 14-45.

It is in evidence that on the night of 5 June, 1944, the defendants, Joe Martin and Herman Manning, took Beulah Brown, a pregnant woman, in a car driven by Manning, from her home in Martin County to Tarboro. Two days later they took her from her home to Plymouth; and finally, on 10 June, 1944, they took her in Manning's car from her home to Goldsboro, where an abortion was performed upon her. She died on 12 or 13 June following.

At the close of the evidence, the defendant, Joe Martin, entered a plea of guilty, and sought to exculpate his codefendant from any criminal responsibility in the matter, albeit Manning "said something" to one of the witnesses after the occurrence "about he had (might have) to pay out of this case." The jury returned a verdict of guilty against the defendant Herman Manning.

Judgment: Two years on the roads as to both defendants.

The defendant. Herman Manning, appeals, assigning as error the refusal to dismiss as in case of nonsuit.

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

B. A. Critcher for defendant Herman Manning.

PER CURIAM. The only question presented by the appeal is the sufficiency of the evidence to carry the case to the jury as against the defendant Herman Manning. We join with the trial court in believing the case to be one for the twelve. *S. v. Martin,* 182 N. C., 846, 109 S. E., 74.

No error.

STATE v. EMMA MITCHELL.

(Filed 28 February, 1945.)

Criminal Law § 68a—

Where the court enters judgment of not guilty, after a purported special verdict, on the conclusion that the statute, on which the criminal prosecution was based, is unconstitutional, the State has no right of appeal under G. S., 15-179.

APPEAL by the State from *Pless, J.,* at December Term, 1944, of BUNCOMBE. Appeal dismissed.

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

Sanford W. Brown for defendant.

PER CURIAM. The defendant was charged with practicing palmistry for compensation, in violation of ch. 51, Public-Local Laws 1927. On what purported to be a special verdict, judgment was rendered that the defendant was not guilty on the ground that the enactment of statute under which she was charged was prohibited by Art. II, sec. 29, of the Constitution. From this judgment the State undertook to appeal.

It is apparent that the judgment was based, not on the facts found, but upon the court's conclusion that the statute itself was unconstitutional. This ruling the court was competent to make at any time. The special verdict therefore was without significance, and the State's appeal was not authorized by the enabling statute, G. S., 15-179, as now in force. The appeal will be dismissed. *S. v. Todd,* 224 N. C., 776.

Appeal dismissed.

MRS. CLARA BOURNE, ADMINISTRATRIX OF THE ESTATE OF FREDERICK T. BOURNE, DECEASED, v. SOUTHERN RAILWAY COMPANY.

(Filed 7 March, 1945.)

1. Master and Servant § 25—

In a civil action to recover damages for alleged wrongful death, under Federal Employers' Liability Act, plaintiff is not entitled to recover unless her intestate at the time of his death was an employee of the defendant, acting within the scope of his employment and engaged at the time in interstate commerce.

2. Master and Servant § 26a—

The Federal Employers' Liability Act does not define the word "employer" or the word "employee," hence they are to be considered as having been used in the Act in their natural and ordinary sense.

3. Same—

Being remedial, the Federal Employers' Liability Act is to be liberally construed to advance the remedy proposed, but it applies only when the relation of master and servant exists.

4. Same—

Where an experienced locomotive engineer, employed by defendant for about eighteen years, is given a permit, under the company's rules, to ride an engine for the one and only purpose of learning that portion of the track, roadbed, sidings, curves and changes thereon, so that he may be eligible for assignment on that part of the road, he is not a student engineer and he is not an employee within the meaning of the Federal Employers' Liability Act, but at most a licensee.

5. Same—

One has no claim upon an employer, predicated on an alleged breach of duty imposed by the Federal Employers' Liability Act, where it appears that the employee was in fact injured while acting outside the scope of his employment, as for example, when voluntarily assuming to do something that the employer did not employ him to do or when doing something which the known rules of the employer forbid his doing.

APPEAL by plaintiff from *Pless, J.*, at November Term, 1944, of BUNCOMBE.

Civil action to recover under the Federal Employers' Liability Act for the alleged wrongful death of plaintiff's intestate, Frederick T. Bourne.

The facts pertinent to this appeal are as follows:

1. Mrs. Clara Bourne is the duly qualified and acting administratrix of the estate of Frederick T. Bourne, deceased.

2. Plaintiff's intestate at the time of his death was 52 years of age, of good moral habits and in good health. Mrs. Clara Bourne is the

widow of Frederick T. Bourne; Miss Barbara Bourne is his daughter, and was 14 years of age at the time of his death. Mrs. Bourne and her daughter were solely dependent upon the income earned by Mr. Bourne as an employee of the Southern Railway Company.

3. The defendant is a common carrier and operates various lines of railroad, within and without the State of North Carolina, including the line of railway between Asheville, N. C., and Murphy, N. C.

4. Plaintiff's intestate, Frederick T. Bourne, prior to his death had been a railroad engineer and had been employed by the Southern Railway Company as such over a long period of time. He had operated engines from Asheville to Bryson City, a distance of about 65 miles from Asheville and about 47 miles from Murphy; but he had not operated an engine from Bryson City to Murphy, for about 4 years prior to 7 April, 1941.

5. A rule of the defendant company was in effect on 7 April, 1941, as follows: "Enginemen—1323. They must not leave their engines while on duty except in case of necessity, and then only in the care of the fireman. They must not leave them while on the main track, except to perform duties required by the rules."

6. Plaintiff's intestate, an experienced engineer, desired to be assigned as an engineer on that part of the Southern Railway System operated from Bryson City to Murphy, but under the rules of the company it was necessary for him to obtain a permit to ride an engine, in charge of a regular engineer, in order to familiarize himself with the road and observe the tracks, sidings, physical changes, if any, and conditions of the roadbed, before he could be so assigned.

7. On 7 April, 1941, plaintiff's intestate boarded train No. 17, at Asheville, and rode as a passenger to Bryson City. The train consisted of an engine, combination mail and baggage car and one passenger coach. The train was in charge of S. E. Shook, the regular conductor, and Grover C. Jackson, the regular engineer. At Bryson City, plaintiff's intestate left the passenger coach and boarded the engine, pursuant to his permit or agreement with the company, for the purpose of familiarizing himself with the road between Bryson City and Murphy.

8. Thereafter, upon the train's arrival at Nantahala, which is a flag station between Bryson City and Murphy, and approximately 4 miles east of Topton, N. C., Engineer Jackson, in violation of Rule 1323 of the defendant company, left the engine and the operation thereof in charge of plaintiff's intestate. Engineer Jackson boarded the passenger coach. Plaintiff's intestate was permitted to operate the engine, and did so for a distance of approximately 6.3 miles, to a point 2.3 miles west of Topton, at which point the engine became derailed, left the tracks and

ran into the river bed, turning over, and instantly killing plaintiff's intestate and one Zimmerman, the regular fireman on said engine.

9. Plaintiff's intestate, while employed by defendant as an engineer, prior to 7 April, 1941, received pay on a mileage basis for the time he actually served as an engineer on his regularly assigned run.

10. The defendant denies that at the time of the death of plaintiff's intestate, it was engaged in interstate commerce. When the train left Asheville, N. C., it was carrying two interstate shipments of express, one from Redbank, N. J., to Canton, N. C., the other from Lyon, N. Y., to Sylva, N. C. Both shipments were duly delivered on 7 April, 1941, before plaintiff's intestate boarded the engine at Bryson City, N. C.

At the close of plaintiff's evidence, defendant moved for judgment as of nonsuit; motion allowed and plaintiff appeals to the Supreme Court, assigning error.

Jordan & Horner and Williams & Cocke for plaintiff.

W. T. Joyner and Jones, Ward & Jones for defendant.

DENNY, J. The exception to the judgment as of nonsuit, entered by the court below, cannot be sustained unless each of the following questions can be answered in the affirmative: 1. Was plaintiff's intestate, at the time of his death, an employee of the defendant? 2. If so, was he acting within the scope of his employment? 3. Was the defendant engaged in transporting goods in interstate commerce at the time of the death of plaintiff's intestate?

The plaintiff is not entitled to recover, under the Federal Employers' Liability Act, unless her intestate at the time of his death was an employee of the defendant, acting within the scope of his employment and the defendant at the time was engaged in interstate commerce. *Erie R. Co. v. Welsh,* 242 U. S., 302, 61 L. Ed., 319; *Illinois Central R. Co. v. Behrens,* 233 U. S., 473, 58 L. Ed., 1051; 39 C. J., sec. 402, p. 276; Roberts Federal Liabilities of Carriers, Vol. 2 (2d Ed.), sec. 723, p. 1366; *Myers v. R. R.,* 162 N. C., 343, 78 S. E., 280; *Zachary v. R. R.,* 156 N. C., 496, 72 S. E., 858, 232 U. S., 248, 58 L. Ed., 591; 35 Am. Jur., sec. 515, p. 943; 39 C. J., sec. 384, p. 263, *et seq.*

In considering the first question, it will be noted the Federal Act does not define the word "employer" or the word "employee," hence they are to be considered as having been used in the Act in their natural and ordinary sense. *Hull v. Philadelphia & R. Ry. Co.,* 40 S. Ct., 328, 252 U. S., 475, 64 L. Ed., 670; *Macgruder, Collector, v. Yellow Cab Co. of D. C.* (D. C., Md.), 1943, 49 Fed. Suppl., 605, 141 F. (2d), 324. The Act, "being remedial, is to be liberally construed to advance the remedy proposed, but it applies only when the relation of master and servant

exists." 39 C. J., sec. 385, p. 266; 35 Amer. Jur., sec. 432, p. 849; *Chesapeake & O. Ry. Co. v. Harmon,* 173 Ky., 1, 189 S. W., 1135; *Pittsburgh C., C. & St. L. Ry. Co. v. Parker,* 19 A. L. R., 751, 132 N. E., 372, 191 Ind., 686; *Payne v. Lind,* 138 N. E., 366, 106 Ohio St., 14; *Wagner v. Chicago & A. R. Co.,* 106 N. E., 809, 265 Ill., 245; *Byram v. Illinois Central R. Co.,* 154 N. W., 1006, 172 Iowa, 631.

The fact that plaintiff's intestate was an engineer, employed by the Southern Railway Company to operate an engine over the Asheville-Murphy Branch, between Asheville and Bryson City, and had been so employed for a long time prior to 7 April, 1941, does not necessarily establish the relation of master and servant between him and the defendant at the time of his death. The evidence on this record establishes the fact that plaintiff's intestate was riding the engine on Train No. 17, on 7 April, 1941, pursuant to a permit issued by the company, in order that he might qualify for a position as engineer on that part of the Asheville-Murphy Branch, between Bryson City and Murphy. He was in no sense a student engineer. He was an experienced engineer and had been employed by the Southern Railway Company for approximately eighteen years. He needed no instructions in the operation of an engine. He was present for one purpose and one purpose only—"to learn the road." For it is admitted that he "was riding said engine for the purpose of acquainting himself with the road, the curves, sidings and any changes that had been recently made in connection with the roadbed." If he had been qualified and authorized to operate the engine, under the rules of the company, it would have been unnecessary for him to obtain a permit and make this trip, in order to become eligible for assignment as an engineer on that part of defendant's road.

In view of the above facts, we do not think the decisions relative to student engineers and firemen, relied upon by the appellant, are controlling here. In *Brown v. R. I. & P. Ry. Co.,* 286 S. W., 45, 315 Mo., 409, a student fireman was held to be an employee under the Federal Employers' Liability Act, because he was subject to the orders of the engineer and fireman, and was required to perform such duties as were assigned to him, although he received no compensation. But in the case of *Chesapeake & O. Ry. Co. v. Harmon, supra,* the Supreme Court of Kentucky held that a student fireman, who received no wages or other return except information for his services, performed by virtue of a permit to ride on the engine only of defendant's trains at his pleasure, although an employee, and entitled to a reasonably safe place to work while performing his duties contemplated by the assignment, was not an employee within the meaning of the Federal Employers' Liability Act, when killed after he had abandoned his duties as a student fireman and was riding in the caboose.

We do not think, under the facts presented on this record, plaintiff's intestate was an employee of the defendant on 7 April, 1941, within the meaning of the Federal Employers' Liability Act, but at most was a licensee under and by virtue of his permit. He had no duties to perform for or on behalf of the company in connection with the operation of the train, and the engineer was without authority to engage his services for any purpose, except in case of an emergency. *Vassor v. R. R.*, 142 N. C., 68, 54 S. E., 849. The rules of the company, with which plaintiff's intestate was familiar, provided that the regular engineer, while on duty, must not leave his engine except in case of necessity, and then only in care of the fireman. The evidence shows no necessity or emergency requiring the absence of the regular engineer. Furthermore, there is no evidence to the effect that plaintiff's intestate was to receive any compensation or other return for making the trip, save and except the information he would obtain for his own benefit.

Moreover, conceding, but not deciding, that plaintiff's intestate was an employee, we think the second question presented should also be answered in the negative. For, as stated in 35 Am. Jur., sec. 437, p. 852: "It may be conceded that one has no claim upon an employer predicated upon a claim of the breach of a duty charged upon the employer by the Employers' Liability Act where it appears that the employee was in fact injured while acting outside the scope of his employment, as where he is injured while voluntarily assuming to do something that the employer did not employ him to do," citing *Roebuck v. Atchison, T. & S. F. Ry. Co.*, 99 Kan., 544, 162 P., 1153, L. R. A. 1917 E. 741; *Mellor v. Merchants' Mfg. Co.*, 150 Mass., 362, 23 N. E., 100, 5 L. R. A., 792; *Elliott v. Payne*, 293 Mo., 581, 239 S. W., 851, 23 A. L. R., 706; *Myers v. Norfolk & W. Ry. Co.*, 162 N. C., 343, 78 S. E., 280, 48 L. R. A. (N. S.), 987; *Curtis & G. Co. v. Pribyl*, 38 Okla., 511, 134 P., 71, 49 L. R. A. (N. S.), 471; *Griffin v. Baltimore & O. Ry. Co.*, 98 W. Va., 168, 126 S. E., 571, 40 A. L. R., 1326. See also 39 C. J., sec. 390, p. 269, and the cases there cited. In the instant case it will be noted that plaintiff does not even contend that her intestate was employed to do what he did do. We think his very presence on the engine under a permit, obtained for the purpose of observing the road, is evidence of the fact that he was not authorized by the defendant to act as engineer on that trip. He knew he was without authority, under the express rules of the company, to assume the duties of the engineer at the time and place he did assume them. Hence, the defendant is not answerable in damages for his death under the provisions of the Federal Employers' Liability Act.

Having reached the conclusions set forth herein, we deem it unnecessary to consider whether or not the defendant was engaged in interstate commerce at the time of the death of plaintiff's intestate.

We think the judgment as of nonsuit was properly entered. Affirmed.

IN RE CUSTODY OF AUGUSTUS REYNOLDS MORRIS.

(Filed 7 March, 1945.)

1. Appeal and Error §§ 3a, 6g—

A party litigant, who has or asserts no right or interest in the subject matter of the action, divests himself of the right to appeal.

2. Appeal and Error § 4: Assistance, Writ of, § 4: Contempt of Court § 2b—

An appellate court will not hear and decide a moot question, or one which has become such. G. S., 1-277. This does not mean, however, that the trial court should withhold available punitive measures for willful failure to comply with its appropriate decrees.

3. Infants § 1: Habeas Corpus § 3: Constitutional Law § 23—

The Superior Court, in a proper proceeding, having awarded the custody of a minor to an uncle and aunt and thereafter, because of the changed legal status of the parties, modified its former order and given the custody of the child to the mother, on application of the mother for a writ of assistance and show cause order against the uncle and aunt for failure to surrender the child, a judgment on *habeas corpus* by a court of another state, to which the child had been taken by the uncle and aunt, awarded custody to the father, is not entitled to full faith and credit here, the record disclosing that jurisdictional facts were misrepresented and suppressed in that proceeding.

4. Infants § 1: Habeas Corpus § 3—

A custodian's first duty is to the court of his appointment, and the Superior Court, having awarded exclusive custody of a minor to one of the parties litigant, thereby assumes the obligation to see that its confidence is not abused, and the court is justified in proceeding to that end with an inquiry *ex mero motu* or at the instance of an interested party.

5. Infants § 1: Clerks of Superior Courts § 7—

The duty shall be constant upon the court to give each child, subject to its jurisdiction, such oversight and control as will conduce to the welfare of the child and to the best interests of the State. G. S., 110-21.

APPEAL by respondents, William Tazewell Morris and Evelyn Bailey Morris, from *Pless, J.*, at Chambers in Asheville, 21 December, 1944, and application by petitioner, Edith Muhler, for *certiorari* to bring up record of supplemental proceeding before *Rousseau, J.*, at January Term, 1945, of BUNCOMBE.

IN RE MORRIS.

Petition in custody proceeding for appropriate order in respect of the custody of Augustus Reynolds Morris, 10-year-old son of petitioner, Mrs. Edith Muhler, and her former husband, Ben W. Morris.

The matter was heard by Judge Pless in Asheville on 21 December, 1944, and resulted in an order awarding the custody of the child to the petitioner. By a prior order entered in the cause by the judge of the Superior Court of Buncombe County, on 16 May, 1944, the exclusive custody of the child had been given to the respondents, W. T. Morris and his wife, upon the showing that, in another proceeding, they had adopted the child for life. This adoption order was vacated on appeal, *In re Morris,* 224 N. C., 487, and hence the petition herein.

On 27 December, 1944, the respondents entered formal notice of appeal from the order rendered by Judge Pless and filed specific exceptions thereto, but without obtaining stay of execution or *supersedeas. Clegg v. Clegg,* 186 N. C., 28, 118 S. E., 824.

Thereafter, on 16 January, 1945, the petitioner appealed to Judge Rousseau, then holding the courts of the Nineteenth Judicial District, for a writ of assistance, which was returned by the sheriff of Buncombe County, "Served 1-17-45 by reading the foregoing order and delivering copies of the same, together with copies of the writ, to Wm. T. Morris and Evelyn Morris. Due search made and Augustus Reynolds Morris not found in Buncombe County."

Motion was then made before Judge Rousseau, under G. S., 1-302, for an order requiring the respondents to show cause why they should not be punished as for contempt.

On the hearing of this show-cause order, the respondents set up that, while they were in Florida with the child in question, vacationing as was their custom, the father of said child, Ben W. Morris, on 8 January, 1945, took him from them by writ of *habeas corpus* issued out of the Circuit Court of Dade County, Florida; that neither of the respondents knew of the contents of either of the petitions filed before Judge Pless or the order made by Judge Pless "until they were served on him (W. T. Morris) about January 17, 1945," and that the respondents are "wholly unable and powerless to produce the said Augustus Reynolds Morris into court or into the custody of Edith Muhler."

A certified copy of the *habeas corpus* proceeding in Florida was offered in evidence. It shows allegation and admission to the effect that Augustus Reynolds Morris was then in Miami, Dade County, Florida, "where the said child is now living and is in the custody, care and control of the said brother (William T. Morris), the respondent herein." The answer filed by the respondent therein also contains averment to the effect that "because of the long period of time that Augustus Reynolds Morris has been in the voluntary possession, custody and control of the respond-

ent . . . it is the belief of the respondent that he and his wife could do more for said child than anyone else."

In his oral testimony before Judge Rousseau the respondent, William T. Morris, stated that he did not know where the child was and had no information concerning his present whereabouts. "Q. And you haven't made any inquiry to find where he was or made any attempt to comply with Judge Rousseau's order? A. I could not comply. . . . Q. Answer by telling what you have done to bring that child into court. A. I haven't done anything. I want to explain. I could not bring him into court when I didn't have possession. . . . Q. Have you inquired how Gus is getting along? A. No, I've been busy."

By judgment entered on 24 January, 1945, the respondents were adjudged "not guilty of contempt." Petitioner craved an appeal, which was denied. *Cf. Scarborough's case,* 139 N. C., 423, 51 S. E., 931. Whereupon application for *certiorari* to bring up record of the supplemental proceeding was made to this Court, and was allowed as supplementary to the record in respondents' appeal. *In re Adams,* 218 N. C., 379, 11 S. E. (2d), 163.

E. L. Loftin and Smathers & Meekins for petitioner, appellee.
Williams & Cocke for respondents, appellants.

STACY, C. J. The subject matter of this proceeding is the custody of a ten-year-old child, Augustus Reynolds Morris. Since entering an appeal from the order of Judge Pless on 27 December, 1944, the respondents have made it appear that they no longer have the custody of said child, and apparently they have lost interest in the matter. It is only in their custodial capacity or in the assertion of some claim to custody that they are entitled to appeal from the order, and as they have been divested or have divested themselves of this capacity and position, they consequently have forfeited their right to question the judgment. 2 Am. Jur., 960. Nor are they seeking by their appeal to regain custody of the subject child or to assert any claim in respect thereof. The respondents challenge the jurisdiction of the court in the premises—the same jurisdiction which they invoked on 16 May, 1944, and obtained an order giving them the exclusive custody of "little Gus," as he is called in the record. It is this order which the petitioner asked Judge Pless to modify and which he did modify on 21 December, 1944, because of the changed legal status of the parties. *In re Gibson,* 222 N. C., 350, 23 S. E. (2d), 50; *McIntyre v. McIntyre,* 211 N. C., 698, 191 S. E., 507.

It is not after the manner of appellate courts to hear and decide what may prove to be only a moot case, *Smith v. United States,* 94 U. S., 97, or to review a judgment at the instance of appellants who represent that

compliance will be forthcoming only in the event of a favorable decision. *S. v. DeVane,* 166 N. C., 281, 81 S. E., 293. They usually make short shift of an appeal by one who has or asserts no right in the subject matter of the litigation. G. S., 1-277.

This does not mean, however, that the trial court should withhold available punitive measures for willful failure to comply with its appropriate decrees. The learned judge who heard the contempt proceeding evidently thought the judgment of the Florida court on *habeas corpus* should be given full faith and credit here. The conclusion is a *non sequitur. In re Alderman,* 157 N. C., 507, 73 S. E., 126; *S. v. Williams,* 224 N. C., 183, 29 S. E. (2d), 744; *Marchman v. Marchman* (Ga., 5 January, 1945), 32 S. E. (2d), 790. The record discloses that jurisdictional facts were misrepresented and suppressed in that proceeding. A custodian's first duty is to the court of his appointment. Anno. 70 A. L. R., 526. Moreover, the Superior Court of Buncombe County, having reposed confidence in the respondents by committing the exclusive custody of the child in question to their care, thereby assumed the obligation to see that its confidence was not abused. *Hersey v. Hersey,* 271 Mass., 545, 171 N. E., 815, 70 A. L. R., 518. Even without the order of Judge Pless, on the facts subsequently appearing, the court would have been justified in proceeding with an inquiry *ex mero motu* or at the instance of an interested party. *In re Morris,* 224 N. C., 487. "The duty shall be constant upon the court to give 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." G. S., 110-21; 27 Am. Jur., 827-831.

The respondents contend that at the time of the hearing in Florida on 8 January, 1945, they were not aware of the contents of the order signed by Judge Pless on 21 December, 1944, and yet the record shows that they entered an appeal from this order and filed specific exceptions thereto on 27 December, 1944. But however this may be, whether fully advised of the provisions of the order or not, they knew from whence came their custody of the child and their duty in the premises. 31 C. J., 988 and 990.

It further appears that the respondents have made no attempt to comply with the order of Judge Pless or with the writ of assistance issued by Judge Rousseau. The decision in *Scarborough's case,* 139 N. C., 423, 51 S. E., 931, cited as *contra,* rests upon a different state of facts.

The judgment in the supplemental proceeding will be vacated, and the matter remanded for further action therein. The appeal of the respondents must be dismissed.

Appeal dismissed.

Supplemental judgment vacated.

STATE v. MRS. OLA CLARK.

(Filed 7 March, 1945.)

1. Homicide §§ 6b, 27d—

In a criminal prosecution for murder, the plea being self-defense and the solicitor asking for a verdict of murder in the second degree or manslaughter, a charge that, deceased having been admittedly shot by defendant with a deadly weapon, a pistol, if the State satisfies you, by all the evidence beyond a reasonable doubt, that deceased died as a result of said shot and that the killing was intentional, that is, willfully done on purpose, without regard to whether it was done rightfully or wrongfully, malice is presumed, and if nothing else appears murder in the second degree is constituted and it would be your duty to return a verdict of murder in the second degree, there is reversible error.

2. Homicide § 6b—

If a killing was rightfully done there would be no presumption of malice. A killing could not be unlawfully done and at the same time rightfully done, the terms being contradictory, and in order to constitute either murder in the second degree or manslaughter, the killing must be unlawful.

APPEAL by defendant from *Thompson, J.*, at October Term, 1944, of VANCE.

The evidence tends to show that the defendant, Mrs. Ola Clark, shot and killed the deceased, Will Thomas Tharrington. The defendant did not controvert the fact that she shot the deceased, but contended that she shot him in her home in her own proper self-defense. The solicitor 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. The jury returned a verdict of guilty of manslaughter. From judgment of imprisonment predicated upon the verdict the defendant appealed to the Supreme Court, assigning errors.

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

Gholson & Gholson and Yarborough & Bolmer for defendant, appellant.

SCHENCK, J. The defendant makes the following excerpts from his Honor's charge the bases of exceptive assignments of error: "Two ingredients are necessary to constitute a homicide murder in the second degree: (1) That the defendant intentionally, that is, willfully killed the deceased; that is, that she killed the deceased on purpose, without regard

to whether it was done rightfully or wrongfully; (2) that she killed him with malice," and that "the defendant in this case admitted that she shot the deceased with a pistol, which I charge you is a deadly weapon, and if the State has satisfied you from all the evidence beyond a reasonable doubt that the deceased died as a result of said shot, and has further satisfied you from the evidence beyond a reasonable doubt that the killing was intentional, that is, that it was willfully done, done on purpose, without regard to whether it was done rightfully or wrongfully, malice is presumed, and if nothing else appears murder in the second degree is constituted, and it would be your duty to return against the defendant a verdict of guilty of murder in the second degree." We are constrained to hold that the foregoing charge upon the offense of second degree murder was error, in that if the killing was rightfully done there would be no presumption of malice, the killing could not have been unlawfully done and at the same time have been rightfully done, the two terms unlawfully done and rightfully done are contradictory, and in order to constitute either murder in the second degree or manslaughter the killing must be unlawfully done. While the assailed portions of the charge relate to the offense of second degree murder and the defendant was convicted of only manslaughter, still the court charged the jury in effect that manslaughter was murder in the second degree minus the elements of malice. Hence the error in the charge upon the offense of second degree murder was germane to the charge upon the offense of manslaughter, of which the defendant was convicted. For the error the defendant is entitled to a new trial, and it is so ordered.

New trial.

N. C. MULLEN, ON BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE TOWN OF LOUISBURG WHO MAY BECOME PARTIES PLAINTIFF HEREIN, v. THE TOWN OF LOUISBURG, N. C., THE COMMISSIONERS FOR THE TOWN OF LOUISBURG, W. C. WEBB, MAYOR OF SAID TOWN, AND T. K. STOCKARD, CLERK OF SAID TOWN (ORIGINAL PARTIES DEFENDANT), AND CAROLINA POWER & LIGHT COMPANY (ADDITIONAL PARTY DEFENDANT).

(Filed 21 March, 1945.)

1. Parties § 4—

A third party, before he will be permitted to become a party defendant in a pending action, must show that he has some legal interest in the subject matter of the litigation. His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment, and it must be involved in the subject matter of the action. One whose interest in the matter is not a direct

or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend.

2. Appeal and Error §§ 37c, 37e: Injunctions § 12—

While in appeals from orders granting or denying injunctive relief, the findings of fact made by the court below are not conclusive, such findings are presumed, in the absence of exceptions, to be supported by evidence, and it does not behoove this Court to seek for cause to upset or reverse the same.

3. Contracts § 7f: Municipal Corporations § 19a—

The provisions of G. S., 143-129, are not applicable to a contract between a municipal corporation and a public utility for the purchase wholesale of electric current for redistribution through the municipality's local plant.

4. Statutes § 5a—

It is the duty of the Court, where the language of a statute is susceptible of more than one interpretation, to adopt the construction and practical interpretation which best expresses the intention of the Legislature, for "the heart of a statute is the intention of the lawmaking body."

5. Contracts § 7f: Municipal Corporations § 19a—

The purpose of G. S., 143-129, is to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition, which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money.

6. Same: Public Utilities § 2b—

The statute (G. S., 143-129) applies only to contracts in relation to supplies and materials where the bidders have the right to name the price for which they are willing to furnish the same. It has no application whatever to a contract between a municipality and a public utility, where there can be no competition between bidders because the municipality or the State has the power and authority to fix the price of the service to be rendered or the commodity to be furnished.

7. Municipal Corporations §§ 19b, 26—

A municipality is authorized by the express terms of the statute, G. S., 160-2 (6), to grant franchises to public utilities. The terms and conditions upon which they are to be granted, unless clearly unreasonable or expressly prohibited by law, rest in the sound discretion of the local body.

8. Municipal Corporations §§ 19b, 20: Contracts § 7f—

It is a general rule that officers of a municipal corporation, in the letting of municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or palpable abuse of discretion, have no power to control their actions.

9. Same—

Where a municipality decides to abandon the generation of electricity by the use of Diesel engines and substitute therefor electricity purchased wholesale for distribution through its electric plant, and in pursuance of such change of policy, advertises a sale of its Diesel engines, under G. S., 160-59, there is no sale by such municipality of its electric plant requiring approval of a majority of the qualified voters under G. S., 160-2 (6).

APPEAL by plaintiff from *Williams, J.,* in Chambers at Raleigh, N. C., 23 January, 1945. From FRANKLIN.

Civil action in which plaintiff seeks injunctive relief.

Defendant Town of Louisburg owns and operates an electric light plant for the benefit of its citizens. Diesel engines furnish the motor power necessary to generate the required electricity. The plant has paid the cost of its operation and in addition has contributed a substantial sum to the town treasury.

For years citizens have advocated a change of policy. They proposed that the town cease generating its electricity and in lieu thereof purchase wholesale the required supply from the Carolina Power & Light Company (hereafter referred to as the Power Company). There was strong opposition to the proposed change. Until recently a majority of the Town Board has opposed the change. A recent appointment to fill a vacancy has changed the balance of power within the board.

On 20 September, 1944, the Town Board, by resolution, requested the Power Company to make a survey and appraisal of electric light and power properties of the town.

On 3 November, 1944, a representative of the Power Company appeared before the board at a regular meeting and proposed that the town sign a tendered application for the purchase of electric energy and power from the Power Company for redistribution to its customers through its local plant in lieu of generating same as theretofore. As a part of the same general plan, the Power Company proposed that the town grant it a franchise for the use of its streets by the Power Company in transmitting and distributing electric energy.

At said meeting the Town Board authorized the mayor and clerk to execute the proposed application for the purchase of electric energy and passed on its first reading an ordinance granting a franchise for the use of its streets by the Power Company.

On 13 November, 1944, the town gave public notice that on 16 December, 1944, it would offer three of its four Diesel engines for sale at public auction to the highest bidder.

On 6 December, 1944, plaintiff instituted this action in which he seeks to restrain the sale of the Diesel engines, the granting of the proposed

franchise, and the purchase of electric energy wholesale from the Power Company for redistribution. In his complaint he alleges that the sale of the engines constitutes a sale of its light plant and is unauthorized and unlawful until and unless approved by vote of the electorate of the town. He also alleges that the Town Commissioners have disregarded positive provisions of the law, ignored the wishes of the people, proceeded without due investigation, acted arbitrarily, breached campaign promises, and otherwise abused the discretion reposed in them by law.

On plaintiff's application, Carr, J., on 6 December, 1944, issued a temporary restraining order and notice to show cause returnable before Harris, J., 22 December. On the return date of the notice the Power Company appeared and moved that it be made a party defendant and be allowed to defend as such. The motion was granted and an order making the Power Company a party defendant was duly signed. Plaintiff excepted. Thereupon Harris, J., continued the hearing on the notice to show cause to be had before Williams, J., 27 January, 1945.

When the cause came on to be heard before Williams, J., pursuant to said continuance, he found certain facts, made certain conclusions of law, and entered judgment dissolving the temporary restraining order and dismissing the action. Plaintiff excepted and appealed.

G. M. Beam and Smith, Leach & Anderson for plaintiff, appellant.

Malone & Malone for defendant, appellee, Town of Louisburg.

W. L. Lumpkin and A. Y. Arledge for defendant, appellee, Carolina Power & Light Company.

BARNHILL, J. Plaintiff has properly preserved and brought forward his exception to the order of Harris, J., making the Power Company a party defendant. In our opinion the exception is meritorious and must be sustained.

A third party, before he will be permitted to become a party defendant in a pending action, must show that he has some legal interest in the subject matter of the litigation. His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment, and it must be involved in the subject matter of the action. One whose interest in the matter in litigation is not a direct or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend. 39 Am. Jur., 900, 935.

Although the enforcement of the judgment, when rendered, might benefit or prejudice the applicant, this does not entitle him to intervene as a defendant if its effect is indirect, as where the party for or against

whom the judgment is rendered may, because of it, become more or less able to satisfy some obligation existing from him to the intervener. 39 Am. Jur., 935; *Cleveland R. Co. v. North Olmsted,* 130 Ohio St., 144, 101 A. L. R., 426; *School Dist. v. Royal Oak Twp. School Dist.,* 293 Mich., 1, 127 A. L. R., 661; *Wightman v. Evanston Yaryan Co.,* 217 Ill., 371, 75 N. E., 502; *Grand Rapids v. Consumers' Power Co.,* 216 Mich., 409, 185 N. W., 852.

Creditors and distributees of an estate may be materially affected by a judgment against the administrator, as would taxpayers by a judgment against the municipality. Yet, in the absence of peculiar circumstances, it would hardly be contended that these would be entitled to appear, become parties to the action, and defend. The Power Company is in no better position than one of these. Its only interest in the litigation rests upon the fact that the judgment rendered may or may not prevent the defendant town from consummating the proposed transactions which have not yet reached a contract status. This is not such an interest as will support the order entered.

Counsel for plaintiff stressfully contend that the Town Commissioners acted in bad faith and abused the discretion reposed in them by law in the many respects pointed out in their brief. This question has passed the point of debate. The court below expressly found as a fact: "That in all its acts and proceedings in connection with the matters or things in controversy herein the said Board of Commissioners of the Town of Louisburg was acting in good faith without abuse of any discretionary power or authority conferred upon them by law." To this finding plaintiff did not except. Hence the finding is presumed to be supported by evidence. *Joyner v. Stancill,* 108 N. C., 153; *Hawkins v. Cedar Works,* 122 N. C., 87; *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992; *Hickory v. Catawba County,* 206 N. C., 165, 173 S. E., 56; *Wilson v. Robinson,* 224 N. C., 851.

It is true that in appeals of this character from an order granting or denying injunctive relief, the findings of fact made by the court below are not conclusive. *Smith v. Bank,* 223 N. C., 249. Yet it does not behoove us to seek for cause to upset or reverse a finding the correctness of which appellant at least impliedly concedes when he fails to except thereto.

G. S., 143-129, provides that neither any institution of the State nor any county, city, or town shall award a contract for the purchase of apparatus, supplies, materials, or equipment requiring an estimated expenditure of public money in an amount equal to or in excess of $1,000 except to the lowest responsible bidder after due advertisement as provided in the Act.

It is conceded that the proposed contract for the purchase of electricity involves a sum in excess of $1,000. Is the purchase wholesale of electric current from a public utility for redistribution through the defendant's local plant a "letting" of a public contract for "supplies" within the meaning of the Act?

While there is a conflict of judicial opinion on this question, the great weight of authority is to the effect that such contracts are not within the intendment of such requirement. Anno. 128 A. L. R., 168. Indeed some, if not all, the cases cited *contra* are not in point either factually or by reason of the provisions of the applicable statute. Clearly the terms "apparatus," "materials," and "equipment" denote particular types of tangible personal property and could not be construed to include electric energy. Hence, if the purchase of a required quantity of electricity is within the purpose and intent of the Act, it is by virtue of the use of the term "supplies." As this term is used in conjunction with other terms having a particular connotation, it might be said that its meaning as used in the statute is confined to property of like kind and nature.

Conversely, given its broadest and most comprehensive meaning "supplies" are things supplied, the quantity or amount of a commodity at hand, needed or desired. And "commodity" means that which affords convenience or profit, especially in commerce. Webster's New International Dictionary. Thus it might be construed to include electricity furnished for redistribution.

"Hundreds of words in the English language bear more than one meaning. 'Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension.'" Crawford, Statutory Construction, 276, sec. 174.

It is the duty of the court then to find the legislative intent. In so doing, the context of the Act and the spirit and reason of the law must be considered, for it is the intention of the Legislature, as expressed in the statute, which controls. Crawford, *supra,* 292. Cases within the letter of a statute, if without its spirit, will not come within its interpretation. Crawford, *supra,* 293.

It is the universal rule that in seeking the intent it is the duty of the Court, where the language of a statute is susceptible of more than one interpretation, to adopt the construction and practical interpretation which best expresses the intention of the Legislature, *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278, for "the heart of a statute is the intention of the lawmaking body." *Trust Co. v. Hood, Comr.,* 206 N. C., 268, 173 S. E., 601; *Dyer v. Dyer, supra;* Crawford, *supra,* 291.

The purpose of the statute, G. S., 143-129, is to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts

by giving notice to prospective bidders and thus assuring competition which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money. It has application to contracts for the purchase of materials and supplies where the bidders are free to name the price for which they are willing to furnish the same.

Where in the very nature of things competition would be impossible, it could not be supposed with any degree of justification that the legislative purpose was to compel the municipality to go through the useless form of letting to the lowest bidder when in fact there could be but one bidder who could name only the rate or price fixed by an agency of the very government that prescribed the procedure.

The better reason dictates the conclusion that the statute applies only to contracts in relation to supplies and materials where the bidders have the right to name the price for which they are willing to furnish the same. It has no application whatever to a contract between a municipality and a public utility where there could be no competition between bidders because the municipality or the State has the power and authority to fix the price of the service to be rendered or the commodity to be furnished. *Mutual Electric Co. v. Village of Pomeroy,* 124 N. E., 58; *Hartford v. Hartford Electric Light Co.,* 32 Atl., 925; *State v. Oconto Electric Co.,* 161 N. W., 789; *Los Angeles Gas & Electric Corp. v. Los Angeles,* 205 Pac., 125; 3 McQuillin, Municipal Corporations (2nd), 866; Anno. 128 A. L. R., 168.

It seems clear that such provisions are intended to apply to contracts where the public policy requires that competition be had to obtain a reasonable charge for work performed or for materials and the like supplied to municipal corporations. *Hurley Water Co. v. Town of Vaughn,* 91 N. W., 971; *State v. Oconto Electric Co., supra.*

It does not apply when competition would be impossible or unavailing, 2 Dillon, Municipal Corporations (5th), 1199, or as to a monopoly, *ibid.,* 1202; *Harlem Gaslight Co. v. New York,* 33 N. Y., 309; Anno. 128 A. L. R., 168; *Hartford v. Hartford Electric Light Co., supra; Tanner v. Town of Auburn,* 79 Pac., 494.

The State has long since recognized that competition is an inadequate and unsatisfactory regulator of the rates and services of public utilities and has substituted public supervision and control for haphazard competition. G. S., ch. 62. The Utilities Commission, an agency of the State, has general control over and fixes the rates to be charged by public utilities. G. S., 62-27, 30, 36; G. S., ch. 62, Art. 4. Discrimination is prohibited. G. S., 62-70. Territory to be served is allocated in such manner as to meet the needs of the particular community. G. S., 62-101.

Here the defendant Power Company has already entered and is serving the territory which includes and embraces the defendant town. The court below so found and to such finding there is no exception. Its rates are subject to the approval of the Utilities Commission. Other public utilities are without authority to enter that territory and engage in competitive bidding for customers. The application for electric power filed by defendant town is on the standard form of the power company for the supply of electric power to municipalities for the purposes and under the conditions involved and the rate schedule and rules and regulations composing a part of said application are on file with and approved by the Utilities Commission, thereby constituting it the only application, the only rate and the only rules and regulations under which the defendant Power Company could, without discrimination, furnish said electric service to said town, whether by private negotiations as employed herein, or in the form of a bid in response to the town's advertisement. (Judgment of court below.) Hence advertisement for bidders would be a vain and useless undertaking and a foolish and absurd performance. An interpretation which required it would be against reason.

The plaintiff likewise attacks and seeks to enjoin the granting of the proposed franchise. But in this respect the board is acting within the express terms of the statute which empowers it to grant franchises to public utilities—and in this instance it has acted "in good faith without abuse of any discretionary authority" vested in it by law. G. S., 160-2 (6). The terms and conditions upon which they are to be granted, unless clearly unreasonable or expressly prohibited by law, rest in the sound discretion of the local board.

"It is a general rule that officers of a municipal corporation, in the letting of municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or a palpable abuse of discretion, have no power to control their action." 38 Am. Jur., 175; *Pue v. Hood,* 222 N. C., 310, 22 S. E. (2d), 561; *Lee v. Waynesville,* 184 N. C., 565, 115 S. E., 51; *Pickler v. Board,* 149 N. C., 221; *Crotts v. Winston-Salem,* 170 N. C., 24, 86 S. E., 792.

The courts may not interfere with the exercise of the discretionary powers of local administrative boards for the public welfare "unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion." *Reed v. Highway Com.,* 209 N. C., 648, 184 S. E., 513. The finding of the court below in this respect is against the plaintiff.

The judicial branch of the Government was never intended to be and it will not presume to act as a super agency to control, revise, modify,

or set at naught the official acts of local administrative and governmental agencies. The plaintiff must show as a prerequisite to court intervention that some legal right has been or will be infringed. This the plaintiff has failed to do.

If the local board is acting contrary to the wishes of a majority of the citizens it serves, the remedy is at the ballot box. The suggestion that such remedy may come too late is not sufficient to justify judicial interference.

But plaintiff contends that in any event a sale of the Diesel engines is a sale of the light plant and is unauthorized unless and until approved by a majority of the qualified voters of the town. G. S., 160-2 (6).

It may be that under some circumstances the sale of the motor power of an electric light plant would constitute in effect a sale of the plant. On this record such is not the case here.

The proposed plan is nothing more than a proposed change in policy regarding the manner and method of obtaining electricity for redistribution—a substitution of the purchase wholesale for local generation. Necessarily such a change will eliminate the need for some of the equipment on hand. Such would be the case if the shift was from electric power to water power or from steam power to electric power. The plant will remain on hand and continue in full operation. Good judgment and sound common sense dictate the plan to sell the machinery which will no longer be needed in its efficient operation.

Raynor v. Comrs. of Louisburg, 220 N. C., 348, 17 S. E. (2d), 495, cited and relied on by plaintiff is not in point. We there held that the purchase of Diesel engines is a purchase of apparatus and equipment within the meaning of G. S., 143-129. The record discloses that the Commissioners of the defendant town were complying with the terms of the statute, G. S., 160-59, at the time the restraining order herein was issued.

The order of Harris, J., making the Power Company a party defendant is reversed. The clerk will tax against said defendant one-half the costs incurred by plaintiff on this appeal in addition to the cost incurred on its own behalf.

The judgment of the court below is

Affirmed.

ERNEST BUCKNER, BY HIS NEXT FRIEND, CLYDE BUCKNER, v. DR. THOMAS WHEELDON.

(Filed 21 March, 1945.)

1. Trial § 22a—

On motion for judgment of nonsuit, the defendant's evidence, unless favorable to plaintiff, is not considered, except when not in conflict it may tend to make clear or explain that offered by plaintiff; and the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issue involved which may reasonably be deduced from the evidence.

2. Courts § 13: Physicians and Surgeons § 15a—

In an action for damages against a physician or surgeon for malpractice, the standard of the defendant's duty in the premises, as affecting his liability for negligence, must be determined by the law of the place where the tort was committed.

3. Physicians and Surgeons §§ 15b, 15c—

A physician or surgeon, who undertakes to treat a patient, implies that he possesses the degree of professional learning, skill and ability which others similarly situated ordinarily possess; that he will exercise reasonable care and diligence in the application of his knowledge and skill to the patient's care; and exercise his best judgment in the treatment of the case entrusted to him.

4. Physicians and Surgeons § 15e: Negligence § 5—

The liability of a physician or surgeon cannot be predicated alone upon unfavorable results of his treatment. He may be held liable only when the injurious result flows proximately from his want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to exercise reasonable care and diligence in the application of his knowledge and skill in the treatment of his patient.

5. Physicians and Surgeons § 15e—

An inference of want of due care may be drawn from evidence tending to show that harmful foreign substances were introduced into a patient's body during a surgical operation and left there.

6. Same—

A departure, by a physician or surgeon, from approved methods in general use, if injurious to the patient, suffices to carry the case to the jury on the issue of negligence.

7. Same—

In an action for damages based upon the alleged negligent treatment of plaintiff's broken leg by defendant, an orthopedic surgeon, where plaintiff's evidence, tended to show that he was struck by a motor vehicle and thrown into a sandy ditch, the right leg below the knee suffering a compound comminuted fracture, the broken bones protruding through an open wound, that he was given temporary treatment and

placed within two days in a hospital under the care of defendant, who had specialized in such cases for many years, that defendant failed to sterilize or cleanse the open wound, immediately putting a closed cast on plaintiff's leg from toes to groin, that pus and sand came out of the top of the cast and out of the wound upon a hole being cut in the cast over same, such pus taking the "hide" off plaintiff's leg, and that upon consulting other physicians an operation resulted in the removal of pieces of bone from the leg, and that plaintiff suffered great pain from the first treatment and still suffers, there is sufficient evidence for the jury and allowance of motion for nonsuit was erroneous.

APPEAL by plaintiff from *Rousseau, J.,* at August Term, 1944, of YANCEY. Reversed.

This was an action for damages for injuries alleged to have resulted from negligent treatment of plaintiff's broken leg by the defendant, a physician and orthopedic surgeon.

Plaintiff alleged defendant failed to use reasonable care and diligence and failed to exercise his best judgment and skill in treating plaintiff's case, resulting in increased pain, a second operation and permanent injury. Defendant denied all allegations of negligence, and alleged that whatever injury plaintiff suffered was due to the force which broke his leg and not to any want of skill or failure to exercise proper care on the part of the defendant.

At the close of the evidence defendant's renewed motion for nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Watson & Fouts for plaintiff.

C. P. Randolph and Armistead W. Sapp for defendant.

DEVIN, J. The only question presented to us is the propriety of the judgment of nonsuit entered by the court below. Was there sufficient evidence to carry the case to the jury?

The facts upon which the plaintiff contends he was entitled to go to the jury were substantially these:

On 17 January, 1942, the plaintiff, then 19 years of age, was residing at Toano, Virginia. While walking on the left side of the highway he was struck from behind by a motor vehicle and thrown into a sandy ditch. His right leg below the knee suffered a compound comminuted fracture, the broken bones extruding. He was picked up, temporary assistance given by Dr. Sneed, and he was placed in a hospital in Williamsburg, Virginia. On 19 January defendant Dr. Wheeldon was called in and took charge of the case. Dr. Wheeldon specializes in bone and joint surgery and has been in active practice and lecturing on orthopedics in College of William and Mary and University of Virginia for twenty-five years.

According to plaintiff's testimony, as a result of the accident there was an open wound in his lower leg with the broken bone protruding through the flesh, and that defendant Wheeldon did nothing to sterilize or cleanse the wound except to wipe off the blood, and then immediately put on a closed cast extending from plaintiff's toes to his groin. Thereafter gravel, sand and pus came out from the cast at the top at the groin. Eighteen days after the cast was put on, plaintiff's brother-in-law cut an opening in the cast over the wound, and pus and sand came from the opening. Later the defendant placed another cast on the leg and left a window in it for dressing. On 6 March plaintiff returned to his former home in Yancey County, North Carolina. There he consulted other physicians, and on 5 April Dr. Cherry performed an operation on his leg, removing pieces of bone. Plaintiff suffered great pain from the time defendant first undertook his case, and still suffers. On the back of the leg, where the pus ran along, it "took all the hide off." One leg is now an inch shorter than the other.

There was evidence from medical experts that the lack of attempt to disinfect and cleanse the wound and limb was improper treatment, and that it would not be proper to put a cast on a leg without sterilizing it; and that failure to sterilize an open wound with sand in it would tend to set up or increase infection.

There was evidence *contra* offered by defendant tending to show that the wound was properly cleaned and sterilized, and dressed and treated in the best approved manner. However, on a motion for judgment of nonsuit under the law in this jurisdiction the defendant's evidence, unless favorable to plaintiff, is not considered, except when not in conflict it may tend to make clear or explain that offered by plaintiff. *Gregory v. Ins. Co.,* 223 N. C., 124. Furthermore, on the 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. *Davis v. Wilmerding,* 222 N. C., 639, 24 S. E. (2d), 337.

We note the fact that plaintiff's leg was broken, and the employment of defendant to treat it, as well as the services rendered in consequence, occurred in the State of Virginia. It follows therefore that in an action for damages for malpractice in the treatment of the fracture the standard of the defendant's duty in the premises as affecting his liability for negligence must be determined by the law of the place where the tort complained of was committed. *Howard v. Howard,* 200 N. C., 574, 158 S. E., 101; *Wise v. Hollowell,* 205 N. C., 286, 171 S. E., 82; *Farfour v. Fahad,* 214 N. C., 281, 199 S. E., 52.

Deduced from the decisions of the Court of last resort in Virginia, in the cases of *Hunter v. Burroughs,* 123 Va., 113, 96 S. E., 360; *Fox v. Mason,* 139 Va., 667, 124 S. E., 405; *Henley v. Mason,* 154 Va., 381,

153 S. E., 653; *Alexander v. Hill,* 174 Va., 248, 6 S. E. (2d), 661; *Reed v. Church,* 175 Va., 284, 8 S. E. (2d), 285, it would seem that one who practices the profession of physician and surgeon is bound to bestow upon the treatment of his patient such reasonable and ordinary skill and diligence as those practicing in the same general line ordinarily exercised in like cases; and that one who accepts employment as a specialist must not only possess that degree of skill and knowledge ordinarily possessed by those engaged in that specialty but must also exercise his best judgment in the application of his skill, and in the use of ordinary care. This degree of skill and care is to be exerted both in the performance of the operation and in the subsequent necessary treatment following. The physician or surgeon, however, is not an insurer of a cure, or even of beneficial results, nor is he held to the highest degree of care known to his profession. The mere fact that his treatment was not successful or was deleterious will not alone raise a presumption of negligence. He must exhibit only that degree of skill and diligence employed by the prudent practitioner in his field. The standard for the measurement of the skill exercised is to be shown largely by the testimony of experts. Where there is conflicting testimony of experts as to the standard of professional skill and care, as well as to the ultimate facts upon which the expert evidence is based, it presents a question to be considered by the jury. *Hunter v. Burroughs,* 123 Va., 113.

The principles thus announced are not in conflict with standards of professional conduct established by the decisions of this Court. Specifically it has been repeatedly held here that the physician or surgeon who undertakes to treat a patient implies that he possesses the degree of professional learning, skill and ability which others similarly situated ordinarily possess; that he will exercise reasonable care and diligence in the application of his knowledge and skill to the patient's care; and exert his best judgment in the treatment and care of the case entrusted to him. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Covington v. Wyatt,* 196 N. C., 367, 145 S. E., 673; *Lippard v. Johnson,* 215 N. C., 384, 1 S. E. (2d), 889.

And in accordance with rules of general application the liability of a surgeon cannot be predicated alone upon unfavorable results of his treatment (*Ferguson v. Glenn,* 201 N. C., 128, 159 S. E., 5), and he may be held liable for an injury to his patient only when the injurious result flows proximately from want of that degree of knowledge and skill ordinarily possessed by others of his profession, or from the omission to exercise reasonable care and diligence in the application of his knowledge and skill to the treatment of his patient. *Davis v. Wilmerding,* 222 N. C., 639, 24 S. E. (2d), 337; *Groce v. Myers,* 224 N. C., 165. "A departure from approved methods in general use, if injurious

to the patient, suffices to carry the case to the jury on the issue of negligence. *Covington v. James,* 214 N. C., 71, 197 S. E., 701." *Davis v. Wilmerding, supra.* "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." *Groce v. Myers,* 224 N. C., 165 (171). And inferences of want of due care may be drawn from evidence tending to show that harmful foreign substances were introduced into a patient's body during surgical operations and left there. *Pendergraft v. Royster,* 203 N. C., 384, 166 S. E., 285; *Mitchell v. Saunders,* 219 N. C., 178, 13 S. E. (2d), 242.

Applying these principles of law, it is apparent that, while there was no evidence that defendant did not possess requisite knowledge and skill in his profession, the plaintiff has offered some evidence of negligence on the part of the defendant in respect to his failure to cleanse and sterilize the open wound before applying the closed cast. *Gower v. Davidian,* 212 N. C., 172, 192 S. E., 28.

But the defendant seeks to sustain the nonsuit on the ground that there was no substantial evidence that any negligence in this respect was the proximate cause of the result complained of. *Gower v. Davidian, supra; Smith v. Wharton,* 199 N. C., 246, 154 S. E., 12; *Boger v. Ader,* 222 N. C., 758, 23 S. E. (2d), 832; *Mitchem v. James,* 213 N. C., 673, 197 S. E., 127; *Reed v. Church, supra.*

While all the injurious results complained of may not be attributed to the negligence of the attending physician, if established (*Payne v. Stanton,* 211 N. C., 43, 188 S. E., 629), we think there is some evidence tending to show that suffering was aggravated, another operation necessitated, and the epidermis on plaintiff's leg removed as result of malignant infection set up or increased by defendant's want of due care as alleged.

While defendant's evidence traversed the allegations of fact, as well as the inferences and conclusions therefrom, upon which plaintiff's action was based, we think there was sufficient evidence to warrant submission of the case to the jury, and that the court below was in error in granting the motion for nonsuit.

Reversed.

LEE COLEY v. JOHN A. DALRYMPLE, ADMINISTRATOR.

(Filed 21 March, 1945.)

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

An oral contract, to devise specific realty for services rendered deceased, is contrary to the statute of frauds and not enforceable, that issue being raised.

2. Pleadings § 3a—

Recovery is to be had, if at all, on the theory of the complaint and not otherwise.

3. Executors and Administrators § 15d—

Where a plaintiff alleges a contract by the deceased to pay for services performed, in an action against deceased's personal representative, and upon trial fails to prove a special contract, but does prove the performance of the services and their value, he may not recover on special contract, though he is entitled to recover on implied *assumpsit* or *quantum meruit* without amending the complaint.

4. Same—

Services rendered to a mother-in-law by plaintiff and his family, while residing in a separate house as tenants on the mother-in-law's farm, are not such as to indulge the presumption of gratuitous attention prompted by natural ties of affection.

5. Husband and Wife § 15: Executors and Administrators § 15d—

In an action by plaintiff against the personal representative of his deceased mother-in-law for personal services rendered by himself and his family, the services rendered by plaintiff's wife, which were performed outside their home and not within the scope of her household or domestic duties, would properly be recoverable, on implied *assumpsit* or *quantum meruit*, in her own name.

6. Husband and Wife § 1—

While the statute provides that the earnings of a married woman, by virtue of any contract for her personal services, shall be her sole and separate property, G. S., 52-10, still this does not relieve her of her marital obligations, or deny to her the privilege of sharing in the family duties and aiding in such work, as the helpmeet of her husband, when minded so to do.

7. Same—

A married woman is still a *feme covert* with the rights, privileges and obligations incident to such status under the law.

8. Appeal and Error § 48—

Where a case has been tried on a misapplication of the pertinent principles of law, the practice is to remand it for another hearing.

COLEY *v.* DALRYMPLE.

APPEAL by defendants from *Johnson, Special Judge,* at September Term, 1944, of LEE.

Civil action to recover for services rendered by plaintiff and his wife and children to plaintiff's mother-in-law, Mrs. J. F. Coley, during the last three years of her life, it being alleged that in 1934 the said Mrs. J. F. Coley "contracted with the plaintiff to move in a house on the place owned by her and promised and agreed to pay the plaintiff for his work and the work and services of the plaintiff's wife and their children in looking after, caring for and waiting upon her."

It is in evidence that in September, 1934, the plaintiff moved with his family from Raleigh to his mother-in-law's farm in Lee County and worked as a "half-share tenant" until the death of his mother-in-law on 15 February, 1941. The evidence further tends to show that plaintiff's father and mother-in-law were in poor health; that plaintiff and his wife and children ministered to their many wants, looked after them in their afflictions, cared for plaintiff's mother-in-law in her last years when she was sick, in bed, and needed assistance, and discharged many onerous duties of a menial nature, under such circumstances and in such manner as reasonably called for compensation, which was intended to be given and expected to be received. Most of the work for which plaintiff seeks to recover was done by his wife.

There is also evidence to the effect that plaintiff's mother-in-law "told him (the plaintiff) that if he would come back she would see that the place went to him at her death, if he would look after her and Mr. Coley."

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

"1. Did the plaintiff and Mrs. J. F. Coley, deceased, enter into an express contract, under the terms of which it was agreed that the plaintiff should move into a house on her place and be paid by her for his work and the work and services of his wife and children in looking after and caring for and waiting upon her, as alleged in the amended complaint? Answer: Yes.

"2. Did the plaintiff and his wife and his son, in performance in said contract, render to Mrs. J. F. Coley during the last three years of her life services which were not paid for or settled for; and, if so, what was the reasonable value of such services? Answer: $1,200.00.

"3. Did the plaintiff and his son, during the last three years of the life of Mrs. J. F. Coley (whether under express contract for pay or not) perform services for Mrs. J. F. Coley which she knowingly accepted and did not pay or settle for; and, if so, what was the reasonable value of such services? Answer: $300.00."

From judgment on the verdict for $1,200, the defendants appeal, assigning errors.

Gavin, Jackson & Gavin for plaintiff, appellee.
K. R. Hoyle for defendants, appellants.

STACY, C. J. The outcome of the case depends upon whether it is made to rest on special contract or on implied *assumpsit* or *quantum meruit*. *Lawrence v. Hester*, 93 N. C., 79. If on the former, it must fail. *Graham v. Hoke*, 219 N. C., 755, 14 S. E. (2d), 790. If on the latter, it may survive in part. *Hayman v. Davis*, 182 N. C., 563, 109 S. E., 554.

I. THE SPECIAL COUNT.

The record is wanting in sufficiency to establish any express contract, such as alleged in the complaint, or to support the jury's finding on the first issue. Hence, the principal question, debated on argument and in briefs, namely, whether, in the circumstances, plaintiff can recover for his wife's services, rendered as his assistant or to him, and not with a view to a charge by her in her own name, is not perforce presented for decision. *McCurry v. Purgason*, 170 N. C., 463, 87 S. E., 244; *Switzer v. Kee*, 146 Ill., 577, 35 N. E., 160; *Stevenson v. Akarman*, 83 N. J. L., 458, 85 Atl., 166, 46 L. R. A. (N. S.), 238, and note; Anno. 46 L. R. A. (N. S.), 238; L. R. A., 1917 E, 288; 41 C. J. S., 413; 27 Am. Jur., 68. While the statute provides that the earnings of a married woman "by virtue of any contract for her personal earnings" shall be her sole and separate property "as fully as if she had remained unmarried," G. S., 52-10, still this does not relieve her of her marital obligations, or deny to her the privilege of sharing in the family duties and aiding in such work as the helpmeet of her husband, when minded so to do. *Helmstetler v. Power Co.*, 224 N. C., 821; Kelly's "Contracts of Married Women," 153. A married woman is still a *feme covert* with the rights, privileges and obligations incident to such status under the law. *Buford v. Mochy*, 224 N. C., 235, 29 S. E. (2d), 729.

Nor is the plaintiff in position to insist on the promise, if made by defendant's intestate, that she would devise the place to him, or see that it went to him at her death, in exchange for services to be rendered to her and to her husband. *Neal v. Trust Co.*, 224 N. C., 103, 29 S. E. (2d), 206. In the first place, it is not according to the allegations of the complaint, *Whichard v. Lipe*, 221 N. C., 53, 19 S. E. (2d), 14; and, secondly, it rests only in parol. *Price v. Askins*, 212 N. C., 583, 194 S. E., 284; *Grantham v. Grantham*, 205 N. C., 363, 171 S. E., 331. It is not subject to specific enforcement. *Daughtry v. Daughtry*, 223 N. C.,

528, 27 S. E. (2d), 446; G. S., 22-2. "Recovery is to be had, if allowed at all, on the theory of the complaint, and not otherwise." *Balentine v. Gill,* 218 N. C., 496, 11 S. E. (2d), 456.

II. THE GENERAL COUNT.

The complaint is broad enough, however, to support a recovery on implied *assumpsit* or *quantum meruit,* and there is evidence to warrant the submission of the case to the jury on this theory. *Neal v. Trust Co., supra; Lindsey v. Speight,* 224 N. C., 453, 31 S. E. (2d), 371; *Grady v. Faison,* 224 N. C., 567; *Price v. Askins, supra; Edwards v. Matthews,* 196 N. C., 39, 144 S. E., 300; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Norton v. McLelland,* 208 N. C., 137, 179 S. E., 443; *Lipe v. Trust Co.,* 207 N. C., 794, 178 S. E., 665; McIntosh on Procedure, 420. See *Graham v. Hoke, supra,* and *Hayman v. Davis, supra.* "Where the plaintiff alleged a contract to pay for services performed, and, upon the trial, failed to prove a special contract, but did prove the performance of the services and their value: *Held,* that he was entitled to recover upon *quantum meruit* without amending the complaint." Third headnote, *Stokes v. Taylor,* 104 N. C., 394, 10 S. E., 566. See *Roberts v. Woodworking Co.,* 111 N. C., 432, 16 S. E., 415, and McIntosh on Procedure, 421.

It will be noted that plaintiff was a tenant on his mother-in-law's farm. They lived in separate houses, though not far apart. The services rendered by plaintiff and members of his family to his father and mother-in-law were not as members of his own household so as to indulge the presumption of gratuitous attention prompted by natural ties of affection. *Staley v. Lowe,* 197 N. C., 243, 148 S. E., 240; *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540. The inference is permissible that compensation was reasonably intended on the one hand and expected on the other. *Francis v. Francis,* 223 N. C., 401, 26 S. E. (2d), 907; *Landreth v. Morris,* 214 N. C., 619, 200 S. E., 378; *Nesbitt v. Donoho,* 198 N. C., 147, 150 S. E., 875.

The services rendered by plaintiff's wife, which were performed outside the home and not within the scope of her household or domestic duties, would properly be recoverable on implied *assumpsit* or *quantum meruit* in her own name. G. S., 52-10; *Neal v. Trust Co., supra; Burton v. Styers,* 210 N. C., 230, 186 S. E., 248; *Patterson v. Franklin,* 168 N. C., 75, 84 S. E., 18; *Croom v. Lumber Co.,* 182 N. C., 217, 108 S. E., 735; *Helmstetler v. Power Co., supra;* 27 Am. Jur., 69; 41 C. J. S., 741-742.

The case will be remanded for trial on the theory of implied *assumpsit* or *quantum meruit.* While the third issue may have been submitted

with this theory in mind, yet the verdict as rendered is insufficient to dispose of the matter. *Lipe v. Trust Co.*, 206 N. C., 24, 173 S. E., 316; *Lawrence v. Hester, supra.* Where a case has been tried on a misapplication of the pertinent principles of law, the practice is to remand it for another hearing. *Moffitt v. Glass,* 117 N. C., 142, 23 S. E., 104; *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324; *S. v. Williams,* 224 N. C., 183, 29 S. E. (2d), 744. Accordingly, it is so ordered here.

New trial.

STATE v. LACY SCOGGINS AND NEWT THOMPSON.

(Filed 21 March, 1945.)

1. Criminal Law § 52b—

The established rule, on a motion for judgment of nonsuit in a criminal prosecution, requires that the evidence be considered in the light most favorable for the State, and that, if there be any competent evidence to support the charge contained in the bill of indictment, the case is one for the jury.

2. Homicide §§ 7b, 25—

In a criminal prosecution, defendants having been convicted of manslaughter, where the State offered evidence tending to show that defendants, deceased and two women were in two boats on a pond, that all of them were drinking except one of the women and there was a jar of whiskey in one of the boats, that defendant S., in a boat by himself, tilted the other boat so that all of its occupants except deceased were thrown into water three feet deep, and upon the refusal of deceased to give S. the remainder of the whiskey, S. struck the deceased three sharp blows on the head with a paddle, knocking him flat in the boat and apparently rendering him unconscious, and then both defendants, standing in the water, took hold of the boat in which deceased was lying and turned it bottom up, throwing deceased into the pond, his inert body floating away, with no attempt to aid or rescue him, and the next morning the dead body was recovered and the death being due to drowning, there is evidence of involuntary manslaughter at least, and motion of nonsuit was properly overruled and the case submitted to the jury.

3. Criminal Law § 41e—

Upon an attempt to impeach the credibility of a State's witness, it is competent for the State to show that previously the witness had made statements similar to the testimony of such witness on the stand, the jury being cautioned that such statements may be considered only for the purpose of corroborating the witness and not as substantive evidence. Discrepancies between such previous statements and the testimony of the witness, not material or prejudicial to defendant, do not affect the competency of the corroborative evidence.

4. Criminal Law § 53c—

In a criminal prosecution for manslaughter, the use by the court of the word "killing," in referring to the degrees of homicide cognizable under the bill of indictment, is not harmful error, where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used.

5. Criminal Law §§ 40, 53f—

On trial under an indictment for manslaughter, no prejudicial error may be predicated upon failure of the court to charge the jury that evidence of good character of defendants should be considered as substantive evidence, in the absence of a request so to charge.

APPEAL by defendants from *Bone, J.*, at October Term, 1944, of LEE. No error.

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

Walter D. Siler and Gavin, Jackson & Gavin for defendants.

DEVIN, J. The defendants were convicted of manslaughter in connection with the death by drowning of Leonard Hall. From judgment imposing prison sentence they appealed, assigning errors.

1. The defendants contend there was error in the denial of their motion for judgment as of nonsuit. They argue that there was no substantial evidence of malice, intentional slaying, or culpable negligence which would warrant submission of the case to the jury, or support a conviction for manslaughter, particularly as to defendant Thompson.

The established rule in this jurisdiction, on a motion for judgment of nonsuit, requires that the evidence be considered in the light most favorable for the State, and that if there be any competent evidence to support the charge contained in the bill of indictment the case is one for the jury. Examination of the record in the case at bar, in accord with this rule, discloses that the State offered evidence tending to show that on the afternoon of Sunday, 4 June, 1944, the two defendants, the deceased, and two girls, Nellie Fore and Martha Ray Hall, were in two boats on Morris Pond. The three men were drinking, as was also Nellie Fore. There was a jar of whiskey in one of the boats. The boats were close together when defendant Scoggins, who was at the time alone in one boat, tilted the other boat so that all of its occupants except the deceased were thrown into the water. The depth there was about three feet. Following the refusal of the deceased to give him the remainder of the whiskey, Scoggins struck the deceased three sharp blows on the head with a boat paddle, knocking him flat in the boat and apparently rendering him unconscious. To a witness who was on the bank the blows sounded

like pistol or rifle shots, and the two girls began screaming. Then defendants Scoggins and Thompson, standing in the water, took hold of the boat in which deceased was lying and turned it bottom up, throwing deceased into the pond, and his inert body floated away. No attempt was made by defendants to aid or rescue him. The body of deceased was next morning recovered from the bottom of the pond. It was found that while there were bruises on his face and head, death was due to drowning. It also appeared that Scoggins, in the presence of Thompson, threatened Nellie Fore if she told what had happened.

We think this evidence, which tends to show that an assault was made upon the deceased and that immediately thereafter his apparently unconscious body by the act of both defendants was thrown into the water and allowed to drown, permits the reasonable inference of an unlawful slaying, and was properly submitted to the jury. If the defendants be absolved of the imputation of malice there is still evidence of such unlawful conduct and intentional acts of violence causing the death of the deceased as would render the defendants amenable to the charge of manslaughter, or at least to involuntary manslaughter as defined by this Court in *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. The principles of law applicable to these phases of the evidence were properly presented to the jury by the trial judge.

True, the defendants testifying in their own behalf denied having any difficulty with deceased, and asserted that they were all friendly, that deceased was brother-in-law of defendant Thompson, that the boat was accidentally overturned, and that as deceased was a good swimmer they paid no attention to him but helped the girls out. But the jury has accepted the State's testimony as true and upon it has found both defendants guilty of unlawfully causing the death of Leonard Hall, and as there was competent evidence to support that finding the verdict must be upheld.

2. The defendants noted exception to the admission in evidence, over objection, of a previous statement in writing by Nellie Fore. This was admitted by the court with the caution to the jury that it was to be considered only for the purpose of corroborating the testimony of Nellie Fore, if they found it did corroborate her, and that it was not substantive evidence and should not be so considered. In this ruling we see no error. The credibility of Nellie Fore's testimony for the State was sought to be impeached. It was therefore competent for the State to show that previously she had made statements similar to her testimony on the stand. *S. v. Maultsby,* 130 N. C., 664, 41 S. E., 97; *S. v. Bethea,* 186 N. C., 22, 118 S. E., 800; *S. v. Gore,* 207 N. C., 618, 178 S. E., 209. While there were some discrepancies between the previous statement and her testimony, these were not material or prejudicial to the defendants.

Limitations upon the rule stated are pointed out in *S. v. Melvin,* 194 N. C., 394, 139 S. E., 762. An exhaustive collection of North Carolina cases on this point will be found in 140 A. L. R., 29, *et seq.* See also Supreme Court Rule 21, 221 N. C., 558.

3. Defendants' exception to the use by the court of the word "killing," in referring to the degrees of homicide cognizable under the bill, is untenable. Considering the charge as a whole and the connection in which the word was used, this could not be interpreted as an expression of opinion by the court.

4. Defendants noted numerous other exceptions to the charge, and argued that the manner of statement of the law and of the evidence and contentions of the State and defendants was prejudicial, but we do not concur in this view, and after an examination of the charge, in the light of this criticism, we conclude that none of the exceptions can be sustained. Nor may prejudicial error be predicated upon failure of the court to charge the jury that evidence of good character of the defendants should be considered as substantive evidence, in the absence of request so to charge. *S. v. Sims,* 213 N. C., 590, 197 S. E., 176.

All the assignments of error based upon exceptions noted by the defendants during the trial, whether herein specifically referred to or not, have been duly considered, and found without substantial merit.

In the trial we find

No error.

STATE v. THADDEUS HILL.

(Filed 21 March, 1945.)

1. Criminal Law §§ 42, 48c: Evidence § 42b—

In the trial of defendant on an indictment for assault with a deadly weapon, inflicting serious injury not resulting in death, with intent to kill, the admission of evidence that the prosecutrix, who was present and testified at the trial, said just after she was shot by defendant, "I am going to die," is harmless and it is immaterial whether or not her statement was hearsay or part of the *res gestæ,* there being no controversy about her serious condition or the fact that she was shot by defendant.

2. Criminal Law § 52b—

A motion for judgment as of nonsuit, in a criminal case under G. S., 15-173, must be made at the close of the State's evidence and, if denied, renewed at the close of all the evidence, otherwise the benefit of the exception to the court's refusal to grant the motion is lost.

3. Appeal and Error § 29—

Exceptions, not brought forward in the brief and argued as required by the Rules of this Court, are treated as abandoned. Rule 28.

4. Jury § 1—

The competency of jurors is a question to be passed upon by the trial judge.

5. Same—

Upon a motion to set aside a verdict in a criminal case, on account of the presence of two newspaper reporters in the jury room during the jury's deliberation, where the court, after a full investigation, found that the reporters went into the jury room by mistake but said nothing to any member of the jury and that no member of the jury spoke to the reporters and that the deliberation and verdict of the jury were in no way influenced by the presence of the reporters, there is no error in the court's denial of the motion.

APPEAL by defendant from *Bone, J.*, at November Term, 1944, of WAYNE.

Criminal prosecution tried upon indictment charging the defendant with an assault upon one Anna Bell Massengill with a deadly weapon, to wit, a pistol, inflicting serious injury, not resulting in death, with the intent to kill and murder the said Anna Bell Massengill.

The defendant is a married man and has a wife and two children living in Fremont, N. C. In 1941 he obtained a job in Goldsboro. After that time he kept a room in Goldsboro, going back and forth to his home in Fremont, from time to time. The prosecuting witness is a widow. She and the defendant had been associating with each other for several years. They made many trips together, he often called on her at her home or apartment and she often visited him in his room, and frequently spent the night with him. On 19 September, 1944, about 7:30 o'clock p.m., they met at a local drug store and the prosecuting witness testified the defendant was mad and threatened her life, that he insisted she go with him to his room in a local hotel. There, according to the evidence, both took several drinks of liquor, and around 12:00 o'clock midnight, when the prosecuting witness started to leave, the defendant shot her with a pistol through the abdomen and through the neck. The defendant denies any knowledge of the shooting, claiming that his mind went blank and that he was too drunk to have any knowledge of what he was doing.

Verdict: "Guilty of assault with deadly weapon, with intent to kill, inflicting serious bodily injury, not resulting in death." Judgment: Imprisonment in the State's Prison for a term of not less than seven nor more than ten years.

Defendant appeals, assigning error.

STATE *v.* HILL.

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

N. W. Outlaw for defendant.

DENNY, J. The first assignment of error is based upon an exception to the admission of the testimony of Dave Shipp, a police officer of the city of Goldsboro. This officer testified that when he arrived at the hotel he found Mrs. Massengill, Thaddeus Hill and Officer Gurley. "They were taking Mrs. Massengill up to take her to the hospital. When I got there I thought Mr. Hill was shot and I rushed to him and heard Mrs. Massengill say, 'I am going to die.'" The defendant contends the statement of Mrs. Massengill was incompetent as evidence against him and that its admission was prejudicial error. We do not so hold. It is immaterial whether or not the statement made by Mrs. Massengill was a part of the *res gestæ*. She was in a serious condition at the time, but she did not die and was present and testified at the trial below, and so did the defendant. There is no controversy as to the extent of her injuries or doubt as to how or by whom they were inflicted. The defendant told Mr. Gurley, one of the investigating officers, that he shot Mrs. Massengill. We consider the evidence harmless, even if conceded to be hearsay, as contended by the defendant. The exception cannot be sustained. *S. v. Smith,* 221 N. C., 278, 20 S. E. (2d), 313; *S. v. Wells,* 221 N. C., 144, 19 S. E. (2d), 243; *S. v. Wray,* 217 N. C., 167, 7 S. E. (2d), 468; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

The defendant, pursuant to G. S., 15-173, moved for judgment as of nonsuit at the close of all the evidence, the motion was denied and this forms the basis of the fourth assignment of error. This statute serves the same purpose in a criminal prosecution, as does G. S., 1-183, in a civil action. The time when the motion for judgment as of nonsuit should be made, and if denied renewed, is the same under both statutes. The exception here cannot be sustained for two reasons: First, no motion to dismiss under the statute was made at the close of the State's evidence, but made for the first time at the close of all the evidence. *Avent v. Millard, ante,* 40; *S. v. Ormond,* 211 N. C., 437, 191 S. E., 22; *S. v. Norris,* 206 N. C., 191, 173 S. E., 14; *S. v. Sigmon,* 190 N. C., 687, 130 S. E., 854. Secondly, the exception is not brought forward in the brief and argued, as required by the Rules of this Court, and is, therefore, treated as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562.

The 19th assignment of error is based upon the refusal of his Honor to set aside the verdict on the ground that two reporters of the *News Argus* were in the jury room several minutes while the jury was deliberating on this case. When the motion was made to set aside the verdict

on the above ground, his Honor conducted a thorough investigation, and called as witnesses the two reporters and each member of the jury. The reporters testified they did not know the jury was deliberating, but thought "the jury was just coming back in." The reporters were discussing their notes and heard nothing that was said by any member of the jury. They were just inside the door of the jury room and the members of the jury were over near the window. Each member of the jury testified he saw the young ladies enter the jury room, but did not hear anything they said and that no member of the jury spoke to them. At the close of the investigation, the court said: "I don't want to embarrass you ladies any more than the situation creates embarrassment. It is very unfortunate that you were thoughtless enough to go in the jury room and it is causing us to have to stop and make this investigation and threatens a mistrial of the case; but after making this thorough investigation I am satisfied no harm was done and I am satisfied that neither of you ladies intended to do any harm or affect the verdict; I am absolutely satisfied about that but I hope it will make you and others a little more careful next time when entering the courtroom not to go through the jury room." Whereupon the court found as a fact: "That during the deliberation of the jury Mary Elizabeth Hart and Mary Medley, through mistake, went into the jury room but that they did not say anything to any member of the jury about this case or about any other matter and that no member of the jury said anything to either of them. That neither the deliberation of the jury nor the jury's verdict were in any manner influenced by their entrance into the jury room." Thereupon the court denied the defendant's motion to set aside the verdict and for a new trial.

The competency of jurors is a question to be passed upon by the trial judge, and the ruling herein on the evidence and facts found therefrom is not reviewable. The exception cannot be sustained. *S. v. DeGraffenreid,* 224 N. C., 517, 31 S. E. (2d), 523, and the cases there cited.

The remaining assignments of error are without merit or must be treated as abandoned, for failure to bring them forward in the brief, as required by the Rule cited herein. Nevertheless, a careful review of all the exceptions set forth in the record leads to the conclusion that in the trial below, there was

No error.

STATE v. ERNEST SMITH.

(Filed 21 March, 1945.)

1. Criminal Law § 42: Evidence § 42b—

In a prosecution for arson, exclamation of a witness, "E. has set the house on fire," made at the time the fire was discovered on the outside of the house, where the witness had just seen the defendant E., is competent as part of the *res gestæ*.

2. Criminal Law § 32a—

Testimony of a witness that, on hearing her daughter screaming, she said to defendant, "E., what in the world is the matter?" and defendant replied that his wife had told a damn lie on him and he had tried to break her damn neck, is competent in a criminal prosecution for arson, defendant being charged with the burning of his mother-in-law's home where his wife and daughter had taken refuge in consequence of marital trouble.

3. Criminal Law § 53g: Trial § 33—

Errors in the court's statement of the contentions of the parties must be called to the court's attention in time for the court to have an opportunity to correct them, and a failure to so call them to the court's attention is a waiver of any objection thereto.

APPEAL by defendant from *Burgwyn, Special Judge,* at October Term, 1944, of JOHNSTON.

Criminal prosecution upon indictment charging defendant with the crime of arson. G. S., 14-58.

In the trial court the State offered evidence tending to show these facts: That the two-room house owned and occupied by Lula Stevens, a State's witness and mother of Connie Smith, wife of defendant, situated in Greytown across the river from Smithfield, was burned between 10 and 12 o'clock on the night of 2 September, 1944; that at that time Connie Smith, wife of defendant, and a child of her and defendant, were in bed in the house; that previously Lula Stevens had had the defendant arrested in connection with trouble between him and his wife, and defendant had threatened to get even with her for "putting the law" on him; that during the afternoon before the fire occurred defendant walked up and down the road in front of the house of Lula Stevens, saying nothing, but looking at her and "rolling his eyes"; that he came to the house and asked if his wife were there, and on being told that she had gone to town, he whirled around and left; that later he came back and said to Lula Stevens, "You got my child in your house and I am going to get even with you"; that later on that night Lula Stevens, hearing a noise at the back corner of her house, opened the door and there saw defendant in reaching distance and saw him run into a corn-

field; that in a few minutes fire was discovered in the corner of the house on the outside, and Lula Stevens exclaimed, "Lord, have mercy, Ernie has set the house on fire"; and that she called for others to bring water, repeating "Ernie has set the house on fire." Exception by defendant.

Also the State was permitted, over objection by defendant, to offer testimony of Lula Stevens that previously, when she had heard her daughter screaming, she had said to defendant, "Ernie, what in the world is the matter?" and he replied, "Connie told Danza a damn lie on me and I tried to break her damn neck." Exception.

On the other hand, the defendant offered evidence tending to negative the evidence of the State.

Verdict: Guilty of the felony of arson whereof he stands charged in the bill of indictment, but with recommendation that he be sentenced to life imprisonment.

Judgment: Confinement in Central Prison at Raleigh, North Carolina, for the term of his natural life.

Defendant appeals to Supreme Court, assigning errors.

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

Levinson, Pool & Batton for defendant, appellant.

WINBORNE, J. The exceptive assignments brought forward and debated by defendant in brief on this appeal have been examined and found to be without merit.

First: The evidence as to exclamation of the witness Lula Stevens at the time the fire was discovered on the outside of the house where she had just seen defendant is competent as a part of the *res gestæ*. The subject has been fully discussed in many decisions of this Court, among which are these: *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995; *Batchelor v. R. R.,* 196 N. C., 84, 144 S. E., 542. See also 20 Am. Jur., 551, Evidence, sections 661, 662, and cases cited, and *S. v. Lasecki* (Ohio), 106 N. E., 660.

Second: The testimony as to statement of defendant regarding his wife is competent and relevant as tending to show ill will towards the occupants of the house at the time of the fire, and a motive for the act. *S. v. Millican,* 158 N. C., 617, 74 S. E., 107; *S. v. Thompson,* 97 N. C., 496, 1 S. E., 921.

Third: The portions of the charge to which exceptions are taken and pressed for error are statements of contentions of the State. As to these, an examination of the record on this appeal discloses evidence from

which inferences might reasonably, logically and fairly be made as related by the court. And the record fails to show that any objection thereto was made by defendant at the time the court stated the contentions. Hence, objection thereto is waived. *Mfg. Co. v. R. R.*, 222 N. C., 330, 23 S. E. (2d), 32; *Ward v. R. R.*, 224 N. C., 696, 32 S. E. (2d), 221.

No error.

J. OTIS TAYLOR v. BESSIE A. TAYLOR.

(Filed 28 March, 1945.)

1. Divorce § 8—

In an action for divorce on the ground of two years separation, where the complaint alleges and there is evidence for plaintiff tending to show that the parties have lived separate and apart for two years next immediately preceding the institution of the action and that plaintiff has resided in the State for a period of six months, G. S., 50-6, and defendant pleaded and offered evidence of wrongful abandonment and recrimination, the case is one for the jury and there is error in allowing a motion for judgment as of nonsuit.

2. Divorce § 2a—

The separation contemplated by the statute is apparently unrestricted. A separation by the act of the parties, or one of them, or under order of court *a mensa et thoro*, suffices; but not an involuntary living apart, where there had been no previous separation, such as might arise from the incarceration or insanity of one of the parties.

3. Divorce § 5—

It is not necessary to set out in the complaint the cause of the separation, or to allege that it was without fault on the part of the plaintiff, or to aver that it was by mutual agreement of the parties.

4. Same—

The plaintiff may particularize as to the character of the separation by alleging that it was by mutual consent, abandonment, etc., in which event, if material to the cause of action, the burden would rest with the plaintiff to prove the cause *secundum allegata*.

5. Same: Pleadings § 3b—

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

6. Divorce § 5—

The material facts in every complaint asking for divorce shall be deemed to be denied by the defendant, whether actually denied by pleading or not, and no judgment is to be given in favor of plaintiff until such facts are found by a jury. G. S., 50-10.

7. Same—

Where defendant, in an action for divorce on the grounds of two years separation, set up the plaintiff's wrongful conduct and willful abandonment of defendant and also recrimination, either defense, if established, would defeat the plaintiff The burden, however, rests upon the defendant to establish these defenses, which are affirmative and deemed controverted and not cross causes.

APPEAL by plaintiff from *Rudisill, Special Judge,* at February Term, 1945, of CATAWBA.

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

The complaint alleges that plaintiff and defendant were married on 13 November, 1924, and lived together as husband and wife until 18 May, 1942, when they separated and have since continuously lived separate and apart; that two children were born of the marriage and are being supported by the plaintiff; that plaintiff now resides in Catawba County and has so resided for more than a year immediately preceding the commencement of this action on 20 September, 1944, and that defendant is now a resident of Buncombe County.

The defendant admits the allegations of marriage and residence, but denies that there has been any separation within the meaning of the divorce statute. She further alleges wrongful abandonment and frequent "adultery with various women" on the part of the plaintiff, which has not been condoned by the defendant.

The evidence discloses that following a period of marital infelicity between the parties, the plaintiff finally went to Asheville on 18 May, 1942, to see the defendant and while out driving notified her they would not try to live together any longer. Thereafter, all relations were severed, except the plaintiff continued to send her money for the support of herself and their two children. The oldest child is now married.

Plaintiff testified: "My wife was living with her people and she wouldn't live with me as a wife. . . . We separated in May, 1942, when she refused to live with me."

In answer, the defendant testified: "We certainly didn't mutually agree to live separate and apart." On 18 May, 1942, "He said he was going to get a divorce. . . . I didn't give him any cause to abandon me." There was also evidence of plaintiff's association with other women.

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

J. C. Stroupe and Theodore F. Cummings for plaintiff, appellant.

No counsel appearing for defendant.

STACY, C. J. The complaint alleges, and there is evidence tending to show, that plaintiff and defendant, who are husband and wife, "have lived separate and apart for two years" next immediately preceding the institution of the action, and that plaintiff "has resided in the State for a period of six months." G. S., 50-6. Nothing else appearing, the establishment of these allegations by proof would entitle the plaintiff to a divorce. *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549. The statute so provides. *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466.

The language of the enactment is, that marriages may be dissolved and divorces granted "on application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of six months." G. S., 50-6; *Campbell v. Campbell,* 207 N. C., 859, 176 S. E., 250.

It is also provided that when there is a minor child or children of the marriage, the name and age of such child or children shall be set forth in the complaint; and, if there be no minor child, the complaint shall so state. G. S., 50-13.

The separation contemplated by the statute is apparently unrestricted. *Lockhart v. Lockhart,* 223 N. C., 559, 27 S. E. (2d), 444; *Long v. Long,* 206 N. C., 706, 175 S. E., 85. It is unnecessary to set out in the complaint the cause for the separation, or to allege that it was without fault on the part of the plaintiff, or to aver that it was by mutual agreement of the parties. *Kinney v. Kinney,* 149 N. C., 321, 63 S. E., 97; *Byers v. Byers,* 222 N. C., 298, 22 S. E. (2d), 902. "The plaintiff is not bound to anticipate and negative in advance all grounds of defense to the action he brings, and petitions for divorce do not constitute an exception to the general rule." *Steel v. Steel,* 104 N. C., 631, 10 S. E., 707. A separation by act of the parties, or one of them, or under order of court *a mensa et thoro,* suffices to meet the terms of the statute. *Lockhart v. Lockhart, supra.* See *Dudley v. Dudley, post,* 83. It would not include an involuntary living apart, where there had been no previous separation, such as might arise from the incarceration or insanity of one of the parties. *Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641; *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352.

Of course, the plaintiff may particularize as to the character of the separation by alleging that it was by mutual consent, abandonment, etc., in which event, if material to the cause of action, the burden would rest with the plaintiff to prove the case *secundum allegata. Williams v. Williams,* 224 N. C., 91, 29 S. E. (2d), 39; *McQueen v. McQueen,* 82 N. C., 471.

It is further provided by statute that the material facts in every complaint asking for a divorce shall be deemed to be denied by the de-

fendant, whether actually denied by pleading or not, and no judgment is to be given in favor of the plaintiff until such facts are found by a jury. G. S., 50-10; *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7; *Moody v. Moody, post,* 89.

In addition to the denial of the allegations of the complaint, the defendant alleges by way of "further answer and defense" that whatever estrangement exists between the parties was occasioned by the plaintiff's own wrongful conduct and willful abandonment of the defendant. *Hyder v. Hyder,* 215 N. C., 239, 1 S. E. (2d), 540; *Page v. Page,* 161 N. C., 170, 76 S. E., 619. The defendant also pleads recrimination. Either defense, if established, would defeat the plaintiff's action for divorce. *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466; *Brown v. Brown,* 213 N. C., 347, 196 S. E., 333; *Pharr v. Pharr,* 223 N. C., 115, 25 S. E. (2d), 471; *House v. House,* 131 N. C., 141, 42 S. E., 546. The burden rests with the defendant, however, to establish the defense or defenses as set up in the answer and relied upon. *Lockhart v. Lockhart,* 223 N. C., 123, 25 S. E. (2d), 465. They are not like pleas of the statute of limitations or of the statute of frauds (McIntosh on Procedure, 486), requiring the plaintiff to overcome them, but are in the nature of affirmative defenses requiring proof to support them. *Kinney v. Kinney, supra; Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; McIntosh on Procedure, 476. And as they do not amount to a cross cause, they are deemed controverted by the adverse party. G. S., 1-159; *Askew v. Koonce,* 118 N. C., 526, 24 S. E., 218; McIntosh on Procedure, 509.

On the hearing, both the plaintiff and the defendant offered evidence in support of their respective allegations. The facts are in dispute. The case is one for the jury. There was error in sustaining the defendant's demurrer to the evidence.

Reversed.

RUFUS L. DUDLEY v. FANNIE E. TRIPP DUDLEY.

(Filed 28 March, 1945.)

1. Divorce § 8—

In an action by a husband against his wife for absolute divorce, under the two years separation statute, G. S., 50-6, where plaintiff's evidence tended to show that, although the parties lived in the same house and for a large part of the time in the same room, they lived separate and apart for more than two years preceding the action because of a total discontinuance of sexual relations between them, judgment as of nonsuit was proper.

2. Divorce § 2a—

The word "separation," as applied to the legal status of a husband and wife, means a cessation of cohabitation, and cohabitation includes other marital duties besides marital intercourse.

3. Same—

The discontinuance of sexual relations is not in itself a living "separate and apart" within the meaning of the statute, and a divorce will be denied where it appears that, during the period relied upon, the parties had lived in the same house.

4. Marriage § 1: Divorce § 2a—

Marriage is not a private affair between the parties. Society has an interest in the marital status, and a divorce will not be granted for separation, where the only evidence thereof must "be sought behind the closed doors of the matrimonial domicile."

APPEAL by plaintiff from *Dixon, Special Judge,* at November Term, 1944, of PITT.

Summons was issued 4 October, 1944, and served the following day. Plaintiff seeks an absolute divorce, alleging that he and the defendant have lived separate and apart continuously for a period of more than two years next preceding the institution of this action.

The facts pertinent to this appeal are as follows:

1. Plaintiff and defendant were married 9 September, 1908, and eight children were born of said marriage. All the children have reached their majority except Lindsey Wooten Dudley, who is 13 years of age.

2. The plaintiff has been a citizen and resident of North Carolina all his life, and the defendant is not in any manner connected with any branch of the Military, Naval, Marine, or Coast Guard service of the United States of America.

3. Counsel for plaintiff, at the trial below, ask the plaintiff how long he and his wife had been living separate and apart. The defendant objected for the reason hereinafter set forth, and the objection was sustained. The plaintiff and defendant had consented to a judgment at the September Term, 1944, of the Superior Court of Pitt County, and executed a separation agreement pursuant thereto, on 12 September, 1944, by the terms of which their respective marital and property rights were fixed. The judgment contained the provision that from the signing of said judgment "The plaintiff and defendant are to live separate and apart from each other"; and in the separation agreement it is stated "That the said parties have mutually agreed to separate and not live together as man and wife in the future."

4. In view of the provisions contained in the consent judgment and the separation agreement, his Honor declined to admit any evidence as

to the length of time the plaintiff and defendant have lived separate and apart. Whereupon, at the request of his counsel, plaintiff was permitted to testify as to the separation, in the absence of the jury, for the record. He testified that his wife abandoned him about five years ago. His explanation of the abandonment was that she refused to sleep with him, although they slept in the same room thereafter for two and a half to three years, and since that time they had slept in adjoining rooms. He further testified that there was nothing physically wrong with either of them and that on various occasions he had gone to her bed and tried to reason with her, but she would have nothing to do with him.

His Honor, being of the opinion the plaintiff was not entitled to the relief demanded, entered judgment as of nonsuit, from which plaintiff appeals, assigning error.

Jack Edwards for plaintiff.

J. B. James for defendant.

DENNY, J. The statute relied upon by the plaintiff for the relief sought, provides that: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of six months." G. S., 50-6. Therefore, the question presented is whether or not the plaintiff and the defendant lived separate and apart for two years next preceding the institution of this action.

The plaintiff testified he had lived separate and apart from his wife for a period of five years, although they had lived in the same house, and occupied the same or adjoining rooms during the entire period. The appellant takes the position that the discontinuance of sexual relations between him and his wife for a period of more than two years next preceding the institution of this action, was a living "separate and apart," within the meaning of our statute. We do not so hold.

There is no evidence on this record showing a cessation of cohabitation between the plaintiff and defendant in the usually accepted sense, except as to their sexual relations. As stated in *Parker v. Parker,* 210 N. C., 264, 186 S. E., 346: "The word 'separation,' as applied to the legal status of a husband and wife, . . . means 'A cessation of cohabitation of husband and wife.'" Cohabit, according to Winston's Dictionary, Encyclopedia Edition (1943), means: "To live together as man and wife; usually, though not necessarily, implying sexual intercourse." Black's Law Dictionary, Third Edition, defines the meaning of cohabitation, as: "Living together, living together as man and wife; sexual

intercourse." Cohabitation includes other marital duties besides marital intercourse.

The overwhelming weight of authority as to what is meant by living "separate and apart," is in accord with the view expressed in 17 Am. Jur., sec. 162, p. 232, as follows: "The discontinuance of sexual relations is not in itself a living 'separate and apart' within the meaning of some statutes, and a divorce will be denied where it appears that during the period relied upon the parties had lived in the same house. It has been said that what the law makes a ground for divorce is the living separately and apart of the husband and wife continuously for a certain number of years. This separation implies something more than a discontinuance of sexual relations, whether the discontinuance is occasioned by the refusal of the wife to continue them or not. It implies the living apart for such period in such a manner that those in the neighborhood may see that the husband and wife are not living together." 27 C. J. S., sec. 36, p. 570; 19 C. J., sec. 111 (b), p. 59; *Singleton v. Rogers,* 160 La., 196, 106 So., 781; *Quinn v. Brown,* 159 La., 570, 105 So., 624; *Arnoult v. Letten,* 155 La., 275, 99 So., 218; *Gates v. Gates,* 192 Ky., 253, 232 S. W., 378, 51 A. L. R., Anno., 768; *Burton v. Burton,* 184 Ky., 45, 220 S. W., 1065; *McCurry v. McCurry,* 126 Conn., 175, 10 A. (2d), 365; *Black v. Black,* 48 Nev., 220, 228 P., 889; *Smith v. Smith,* 116 W. Va., 271, 180 S. E., 185; *Albert v. Albert,* 137 Va., 1, 119 S. E., 61; *McNary v. McNary,* 8 Wash. (2d), 250, 111 P. (2d), 760.

Marriage is not a private affair, involving the contracting parties alone. Society has an interest in the marital status of its members, and when a husband and wife live in the same house and hold themselves out to the world as man and wife, a divorce will not be granted on the ground of separation, when the only evidence of such separation must, in the language of the Supreme Court of Louisiana (in the case of *Hava v. Chavigny,* 147 La., 331, 84 So., 892), "be sought behind the closed doors of the matrimonial domicile." Our statute contemplates the living separately and apart from each other, the complete cessation of cohabitation. See *Taylor v. Taylor, ante,* 80.

The judgment of the court below is

Affirmed.

NINA C. RUDASILL v. CHARLES CABANISS, JR., AND WIFE, MARIE CABANISS.

(Filed 28 March, 1945.)

1. Husband and Wife § 11—

Where a husband purchases land, in the absence of his wife, and takes a deed to himself and wife as tenants by the entireties, giving the seller his unsecured note for the entire purchase price, the wife is not a maker of the note and cannot be held liable for its payment.

2. Husband and Wife § 4a: Gifts § 1—

The conveyance of an interest to the wife, the husband having paid or agreed to pay the purchase money, is presumed to be a gift from the husband to his wife.

3. Equitable Lien § 1: Vendor and Purchaser § 21—

There is no lien for purchase money in North Carolina. A vendor cannot reserve a lien unless he take his security in writing and have it registered—in the shape of a mortgage or deed of trust.

APPEAL by plaintiff from *Armstrong, J.,* at November Term, 1944, of CLEVELAND. Affirmed.

Civil action to recover balance due on an unsecured promissory note executed by defendant Charlie Cabaniss, Jr.

On 3 December, 1923, T. P. Cabaniss, with the joinder of his wife, conveyed to defendants as tenants by entirety a certain tract of land in Cleveland County. Charlie Cabaniss, Jr., was the purchaser, and the grantor accepted his promissory sealed note in the sum of $2,000 in payment of the purchase price. The *feme* defendant was not present at the bargain and sale, did not participate therein, and did not sign the note. She was made one of the grantees at the request of her husband.

On 6 January, 1937, the maker of the note executed a renewal note for the balance then due in the sum of $1,000.

On 16 February, 1942, T. P. Cabaniss died testate. His personal estate was insufficient to pay his debts. As a result plaintiff, one of the devisees, to prevent a sale of the land, purchased the interest of the other devisees therein, arranged with the executor to take an assignment of all the personal property shown on the inventory and, in consideration thereof, assumed all the indebtedness of the testator. The settlement was approved by the clerk and the judge.

The assignment of the personal property, including the note of the male defendant, having been executed, plaintiff on 23 November, 1942, instituted this action to recover the balance due on the note.

Consent judgment has been entered against the male defendant. When the cause came on to be heard to determine the liability of the *feme* defendant the facts were stipulated, trial by jury was waived, and the cause was submitted to the judge on the facts agreed. The court below, being of the opinion that the *feme* defendant is not liable on said note, entered judgment dismissing the action as to her, at the cost of plaintiff. Plaintiff excepted and appealed.

Falls & Falls for plaintiff, appellant.
Henry B. Edwards for defendants, appellees.

BARNHILL, J. The male defendant purchased certain land and the grantor, at his request, made deed to the defendants as tenants by entirety. The grantor in turn accepted an open, unsecured note signed only by the husband in payment or as evidence of the unpaid purchase price. It is this obligation that has come into the possession of plaintiff. Upon it she bases her cause of action. She is bound by its terms. The *feme* defendant is not a maker and cannot be held liable for its payment.

Concede, as contended, that the note is conditional payment only and we have left an open, unsecured debt for the purchase price—a debt of the purchaser, Charlie Cabaniss, Jr, who, under the original contract, was the sole obligor.

The conveyance of an interest to the wife, the husband having paid or agreed to pay the purchase money, is presumed to be a gift from the husband to his wife. *Ricks v. Wilson,* 154 N. C., 282, 70 S. E., 476; *Flanner v. Butler,* 131 N. C., 151; *Trust Co. v. Black,* 198 N. C., 219, 151 S. E., 269; *Nelson v. Nelson,* 176 N. C., 191, 96 S. E., 986; *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 45.

Even so, plaintiff insists that the *feme* defendant received a part of the consideration and that simple equity requires that she pay, at least to the extent of the interest received. This contention is untenable.

Some jurisdictions, it is true, recognize and enforce an equitable lien for purchase money. But there is no lien for purchase money in North Carolina. *Womble v. Battle,* 38 N. C., 182; *Blevins v. Barker,* 75 N. C., 436; *White v. Jones,* 92 N. C., 388; *Lumber Co. v. Lumber Co.,* 150 N. C., 282, 63 S. E., 1045; *Jarrett v. Holland,* 213 N. C., 428, 196 S. E., 332.

"It is a natural equity that when a vendor sells his land, that he should have a lien upon it for the security of his purchase money . . . the law tenders it to him in the shape of a mortgage or deed of trust properly registered. If he do not choose to avail himself of it, it is his own fault . . ." *Womble v. Battle, supra.* A vendor cannot reserve a

lien unless he take his security in writing and have it registered. *Blevins v. Barker, supra.*

The judgment below is

Affirmed.

STEWART MOODY v. JEWELL McGUIRE MOODY.

(Filed 28 March, 1945.)

1. Divorce § 8—

There being no competent evidence offered, in a divorce action based on the grounds of two years separation, G. S., 50-6, of the living separate and apart by plaintiff and defendant, the court properly allowed a motion for judgment as in case of nonsuit at the close of plaintiff's evidence. G. S., 1-183.

2. Divorce § 5—

The statute, G. S., 50-10, requires that the material facts in every complaint for divorce shall be deemed denied, whether the same be actually denied by a pleading or not, and no judgment shall be given in favor of plaintiff until such facts have been found by a jury.

APPEAL by plaintiff from *Warlick, J.,* at October Term, 1944, of AVERY.

This is an action for an absolute divorce under G. S., 50-6, which reads: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of six months." The plaintiff did not testify, orally or by deposition, but filed a verified complaint. His mother testified: "He (the plaintiff) is now overseas some place, serving with the United States Navy." The defendant filed verified answer containing as a plea in bar the plaintiff's wrongful conduct toward her. The competent evidence tended to show only that the plaintiff and the defendant were married and that the plaintiff had resided in the State of North Carolina for a period of more than six months; that the defendant lived with her father and while she was at her father's home the separation took place; and that the plaintiff was inducted into the Navy about seven months after such separation commenced.

When the plaintiff had introduced his evidence and rested his case the defendant moved to dismiss the action and for a judgment as in case of nonsuit, which motion was allowed, and judgment predicated upon this

ruling entered, to which ruling and judgment the plaintiff preserved exceptions and appealed to the Supreme Court, assigning errors.

J. V. Bowers for plaintiff, appellant.
Charles Hughes and Burke & Burke for defendant, appellee.

SCHENCK, J. We are impelled to hold that, under the evidence in this case, his Honor was correct in sustaining the defendant's demurrer thereto at the close of the plaintiff's evidence, G. S., 1-183, since there was no competent evidence of the living separate and apart by the plaintiff and defendant as contemplated by law. True, paragraph 2 of the complaint, which reads: "That the plaintiff and the defendant have not lived together as man and wife since April 1, 1942," together with the corresponding paragraph of the answer that "Paragraph 2 of the Complaint is not denied," were introduced in evidence, still G. S., 50-10, provides: "The material facts in every complaint asking for divorce shall be deemed to be denied by the defendant, whether the same be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, . . ."

Without deciding whether an admission of separation in the defendant's answer would be competent as evidence to prove such fact, it will be noted the answer to the second paragraph of the instant complaint is not such an admission. *Perkins v. Perkins,* 88 N. C., 41. It only says the allegation that plaintiff and defendant "have not lived together as man and wife since April 1, 1942," is not denied. Note this paragraph of the complaint does not allege a "separation."

The only competent evidence in the record bearing upon the essential allegation was the testimony of Mrs. Claude Pritchard that "He (the plaintiff) asked her (the defendant) if she was going back. She said: 'No, she couldn't go because she had to stay with her mother.' That was in the spring of 1942. Stewart (the plaintiff) was working at Radford, Va. Stewart told his wife that he had a furnished apartment and had come for her." The testimony of this witness also divulged the fact that the defendant was at this time pregnant. This testimony is not sufficient evidence to carry the case to the jury upon the material facts, the finding of which was a requisite of the plaintiff's alleged cause of action. It follows that his Honor's ruling in sustaining the demurrer to the evidence was correct, and the judgment entered in the Superior Court must be

Affirmed.

IN THE MATTER OF THE WILL OF M. W. BALL.

(Filed 11 April, 1945.)

1. Wills § 23c—

On the trial of an issue of *devisavit vel non*, where the evidence of caveators, considered in the light most favorable to them, tends to show that, at the time of and prior to the execution of the will, the testator suffered from chronic ailments, used narcotics, was mentally weak, and possessed a poor memory, there is no evidence of undue influence.

2. Wills § 23b—

Evidence of mental or physical condition, standing alone, is not evidence of undue influence. It is merely evidence of a circumstance to be considered by the jury in connection with, and as it may lend weight to other testimony.

3. Wills §§ 23b, 23c—

Where there is proof, direct or circumstantial, of undue influence, then evidence of old age, mental and physical weakness is pertinent and material.

4. Same: Evidence §§ 42b, 43a—

Evidence of declarations of the testator, which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. Other declarations, when relevant, may be admitted as corroborative or supporting evidence, but alone they are not sufficient to establish the fact at issue.

5. Wills § 23c—

Testimony that a wife importuned her husband to make a will in her favor, after such a will had been executed by him, is not evidence of undue influence.

6. Same—

The fact that testator gave his property to the childless wife of his bosom to the exclusion of his sister and his nephews and nieces is no evidence of undue influence.

APPEAL by caveators from *Parker, J.*, at November Term, 1944, of CRAVEN. No error.

Issue of *devisavit vel non.*

Shortly prior to November, 1929, Dr. M. W. Ball, in the adjustment and settlement of the estate of R. H. Wright, came into possession of property of considerable value. On 19 November, 1929, he executed the paper writing propounded in which he named his wife as his sole beneficiary and executrix. He had no children.

The testator died in July, 1943, and his wife, Mary Todd Ball, qualified as executrix and entered upon the administration of his estate. She died in January, 1944. Her sister, Nina T. Dickinson, then qualified as administratrix *c. t. a.* On 24 May, 1944, the caveators, collateral relatives of the testator, appeared and filed a caveat. During the progress of the trial they formally conceded that the paper writing was duly executed by Dr. Ball as his last will and testament as required by statute and at the time of its execution the testator possessed sufficient mental capacity to make and execute a will. They contend that the execution thereof was procured by the undue influence of his wife, Mary Todd Ball. This is the only contested issue of fact.

The caveators offered evidence tending to show the following facts:

From about 1925 until his death the testator had bladder and gall bladder trouble and suffered from angina pectoris. As a result he had become more or less addicted to the use of narcotics, was weak mentally and physically, his memory was bad at times, and his mental machinery would run down but would revive when he took dope. His wife was present when he executed the will but said nothing. In the summer of 1929 Mrs. Ball asked Dr. Ball several times to make a will and leave his property to her. Dr. Ball said Mary wanted the property so she could give it to Nina, and he did not want Nina to have it. As early as December, 1929, he was heard to say that he wanted his wife to have the Wright property for life and after her death he wanted it to go to his people. This statement was repeated in substance each year thereafter until 1938. In 1930-31-32-33 he said Mary had importuned him to make a will giving her his property. In 1930 he said he wished he had not gotten the Wright property. His wife had worried him to death about it. In the 1930's when they went for a pleasure ride Mary would decide where they should go. In 1932 he said he wanted to make contact with attorneys to make a will giving his wife the Wright property for life with remainder to his people but he had been deprived of doing so by the demands of Mary (his wife). On 26 August, 1932, he testified in a cause pending in Durham County that he was not normal, was not in his right mind when he signed an agreement 21 April, 1932; that he had been in very bad health for about one and one-half years; that on account of his condition he took narcotics which made him drowsy and his memory bad. In 1936 he had two automobile accidents and was on each occasion apparently under the influence of narcotics.

On the contrary there was evidence both from witnesses for the propounder and the caveators that Dr. and Mrs. Ball were very congenial, that each looked after and cared for the other, that he did not use narcotics to excess until the latter part of his life, and that he was an intelligent professional man in full possession of his faculties.

The court submitted the following issues:

"1. Was the paper writing offered for probate as the last will and testament of M. W. Ball, deceased, signed and executed according to law?

"2. If so, did the said M. W. Ball have mental capacity to make a will on the 19th day of November, 1929?

"3. If so, was the execution of said paper writing procured by undue influence?

"4. Is the paper writing propounded by Mrs. Mary Todd Ball, and every part thereof, the last will and testament of M. W. Ball, deceased?"

It gave a peremptory instruction in favor of the propounder on each issue. The jury answered the first issue "yes," the second issue "yes," the third issue "no," and the fourth issue "yes" in accord with the instructions of the court. There was judgment on the verdict and caveators appealed.

R. O. Everett, Kathrine R. Everett, J. J. Lewis, and L. T. Grantham for caveators, appellants.

L. I. Moore and R. E. Whitehurst for propounder, appellees.

BARNHILL, J. Mrs. Delia Zimmerman, one of the caveators, offered to relate a conversation with Mrs. Ball, the beneficiary. This alleged conversation took place in 1933, approximately four years after the will was executed. At the time of the trial Mrs. Ball was not living. The evidence was excluded. It relates to proposed future conduct of Mrs. Ball and is of such slight and doubtful probative force we need not decide whether technically there is error in the ruling. In any event its exclusion was not prejudicial. *Lee v. Williams,* 111 N. C., 200.

In seeking for any possible evidence of undue influence we have given a somewhat extensive summary of the testimony in behalf of caveators. We have considered excluded testimony without regard to its competency. Hence we need not discuss or decide other exceptions directed to alleged error in rulings upon the admissibility of testimony.

This brings us to the one decisive question presented on this appeal. Did the court err in charging the jury there was no evidence of undue influence?

Considered in the light most favorable to caveators the testimony tends to show that at the time of and prior to the execution of the will in 1929 the testator suffered from chronic ailments, used narcotics, was mentally weak, and possessed a poor memory.

When there is proof, direct or circumstantial, of undue influence, then evidence of old age, mental and physical weakness is pertinent and material. It is admitted upon the theory that a person of that type or in that condition can be influenced with more ease than one of strong

mind and body. But evidence of mental or physical condition standing alone is not evidence of undue influence. It is merely evidence of a circumstance to be considered by the jury in connection with and as it may lend weight to other testimony. When caveators prove susceptibility to undue influence, they establish opportunity—a field fit for cultivation. This alone is not sufficient.

"The general rule established by the overwhelming weight of authority is that declarations of testator not made contemporaneously with the execution of the will, or so near thereto as to constitute a part of the *res gestæ,* are not competent as direct or substantive evidence of the truth of the matters therein stated, when offered on the issue of undue influence inducing the execution of the will. If offered as direct or substantive evidence of an external fact, such as undue influence or fraud, statements of testator are mere hearsay, and are liable to all the objections to which mere declarations of third parties are subject. There must be proof of other facts and circumstances tending to prove circumvention or fraud in the procurement of the will, in order that declarations of the testator may be considered at all upon the issue of undue influence. And for the purpose of proving undue influence inducing the execution of a will, the testator's declarations are of themselves without the least force." Anno. 79 A. L. R., 1449.

While we have held, in apparent conflict with the general rule, that declarations of the testator which go to show testator believed the contents of his will to be different from what they are, or other circumstances which show that it is not his will, are competent whether made before or after the occurrence; *Reel v. Reel,* 8 N. C., 248; *In re Fowler,* 159 N. C., 203, 74 S. E., 117; *Linebarger v. Linebarger,* 143 N. C., 229; *In re Craven,* 169 N. C., 561, 86 S. E., 587; we have also held in *Craven's case, supra,* that a statement made by the testator six or eight months before the date of execution of the paper writing was not of sufficient importance to make its exclusion the proper basis for a new trial.

In *Linebarger v. Linebarger, supra,* we said it would be "an exceedingly dangerous innovation upon the statute which requires a will to be executed according to the formalities prescribed, to permit it to be set aside upon mere declarations of the testator in regard to undue influence, unaccompanied by any act on the part of any person."

So then with us the rule comes to this. Evidence of declarations of the testator which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. *In re Fowler, supra.* Other declarations, when relevant, may be admitted as corroborative or sup-

porting evidence, but alone they are not sufficient to establish the fact at issue. *Lee v. Williams, supra.* See also *In re Shelton's Will,* 143 N. C., 218; *In re Wellborn's Will,* 165 N. C., 636, 81 S. E., 1023; *In re Mueller's Will,* 170 N. C., 28, 86 S. E., 719; *In re Bailey,* 180 N. C., 30, 103 S. E., 896.

We find in the record no testimony showing any acts on the part of the original propounder or any other person of undue influence. There are no declarations of the testator which show or give any indication of his state of mind at the time he executed the will or of the circumstances under which he signed the same. Hence the declarations made subsequent to the execution of the paper writing propounded have no probative force as substantive evidence of undue influence.

The testator left his property to the natural object of his bounty—his wife, with whom he had lived for more than forty years. Mrs. Ball was not the controlling agency in procuring the execution of the paper writing under which she took as sole beneficiary, and she did not draft or advise the terms of the will, and the will was not in conflict with a previously expressed intention. Nor did it revoke a prior will of dif-ent tenor.

At the time of the execution of the paper writing, the testator was the "master of ceremonies." He went freely about his business for fourteen years thereafter with every opportunity to reform it. He elected to permit it to remain as it was. Surely these circumstances have no tendency to show that he was being coerced, compelled or unduly influenced to execute a will that did not express his then existing desire and purpose. *In re Will of Everett,* 153 N. C., 83, 68 S. E., 924; *In re Mueller's Will, supra.*

There is evidence that the beneficiary was present at the time of the execution of the will, but she said nothing. Indeed all the other testimony tends to show that she did not know or understand the nature of the instrument being executed. For many years thereafter she was "importuning" the testator to make a will to such an extent that he said she "worried him to death" about it, when at the very time the will was in existence, devising the property as she wished. Her conduct in this respect repels the suggestion that theretofore she had contrived to induce and compel him to make disposition of his property contrary to his own wishes.

That she importuned him to make a will after the paper writing had been executed is not evidence of undue influence. He was afflicted and was growing old. It was natural that she should be concerned about her own welfare after he was gone. That she was persistent in her discussion of this vital problem was not unnatural. Aside from the fact the importuning occurred after the will was executed, it falls short of proof of coercion.

Nor is the fact testator gave his property to the childless wife of his bosom to the exclusion of his sister and his nephews and nieces evidence of undue influence. *In re Peterson,* 136 N. C., 13 (27); *In re Will of Cooper,* 166 N. C., 210, 81 S. E., 161; *In re Broach's Will,* 172 N. C., 520, 90 S. E., 681.

The evidence relied on is confined almost entirely to acts, conduct, and declarations subsequent to the execution of the will. No part of it tends to show that the testator acted contrary to his then existing desire or to establish any fraudulent influence of the beneficiary controlling the mind of the testator so as to induce him to make a will which otherwise he would not have made. Hence the charge of the court is sustained by the record. *In re Will of Harris,* 218 N. C., 459, 11 S. E. (2d), 310; *In re Will of Evans,* 223 N. C., 206, 25 S. E. (2d), 556.

In the trial below we find

No error.

CITIZENS NATIONAL BANK, TRUSTEE, v. OLIVE ROGERS CORL ET AL.

(Filed 11 April, 1945.)

1. Wills § 31—

It is a cardinal principle in the interpretation of wills that inconsistencies are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose of the will. 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.

2. Same—

The intention of the testator is his will, unless at variance with some rule of law or contrary to public policy. This intention is to be gathered from the general purpose of the will and the significance of the expressions, enlarged or restricted according to their real intent. The courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention.

3. Same—

To invoke the general rule, in construing a will, that a later provision, repugnant to a former one, will prevail, it is necessary that the repugnant clauses must be wholly inconsistent and incapable of reconciliation.

4. Wills §§ 33d, 35—

Where a trust, created by a will for testator's son J. and his family, provided that the income therefrom should be expended by the trustee—(1) to pay all expenses for the preservation of the property, such as

taxes, insurance, repairs, assessments, etc.; (2) to pay O, the divorced first wife of testator's son J., forty dollars a month as long as she lives and does not remarry; (3) and to pay the remainder to testator's son J. during his life, and upon his death to his second wife M. if living, so long as she shall remain his widow; (4) and, upon the death or remarriage of M., to pay all profits, incomes, and proceeds, with the *corpus*, to the legitimate children of J. as they come of age, the trustee holding same for such children as are minors until their majority—upon the deaths of J. and M., the divorced wife O. surviving and not having remarried, the apparent conflict between (2) and (4) is obviated by the intent of the testator that so much of the net income as is necessary to provide the payments to O. under (2), shall take precedence over disbursements to the ultimate beneficiaries.

APPEAL by defendant, Olive Rogers Corl, from *Bobbitt, J.*, at October Term, 1944, of CABARRUS.

Proceeding under Declaratory Judgment Act to determine proper disposition of income arising from trust properties. G. S., 1-255.

After the pleadings had been filed, the case was submitted to the court for final disposition on "Facts Agreed."

1. It appears that Joe Banks Corl married Olive Louise Rogers in Pickens, S. C., on 7 August, 1921, and deserted her ten days thereafter. Criminal proceedings were instituted against the said Joe Banks Corl in South Carolina for nonsupport, and on 5 December, 1922, his father, M. J. Corl, of Concord, N. C., agreed in writing to pay to Olive Rogers Corl $40 per month "during her life or until she remarries," on condition that she withdraw all criminal proceedings against Joe Banks Corl, and not institute any other criminal proceedings against him, and not resist any divorce proceedings which he might institute—"to the faithful and full performance of which the said M. J. Corl does hereby bind himself, his heirs, executors, or administrators."

2. It is deduced from the record that divorce proceedings were thereafter instituted by Joe Banks Corl, and that he later married Maude Smith.

3. On 3 January, 1931, M. J. Corl died, leaving a last will and testament, the presently pertinent provisions of Item Eight being as follows:

"Eighth: Inasmuch as my son, J. Banks Corl, has not developed such a sense of responsibility as in my judgment is requisite for the wise use of large properties and sums of money, I am compelled . . . to limit my testamentary provisions for his benefits to trust producing such income as I deem reasonable for his support and for the support of his family. Now, therefore, in order to provide for the comfort of my said son, J. Banks Corl, and to secure to him an income for and during his natural life, I give and devise to the Cabarrus Bank & Trust Company . . . in trust for my said son, J. Banks Corl, the following real property . . . to

have and to hold the same for and during the natural life of my said son, J. Banks Corl, with remainder to his legitimate children in fee simple. . . . Said trustee is hereby authorized and directed to pay the income therefrom in the following manner:

"1st—To pay all current and incidental expenses for the use and safety of the property . . . such as taxes, insurance, repairs, assessments, etc.

"2nd—To pay to Olive Louise Rodgers, . . . first wife of J. Banks Corl, the sum of Forty Dollars ($40.00) per month so long as she lives and does not remarry and no longer.

"3rd—To pay over the remainder of the net income from said trust property devised or bequeathed to it in trust, to my said son, J. Banks Corl, for and during his natural life; and upon his death pay over the net income to his wife, Maude Smith Corl, if she be then living, and so long as she shall live and remain his widow, and upon her death or prior marriage, to pay all profits, incomes and proceeds, together with the *corpus* of said trust property to the legitimate children of said J. Banks Corl, as they may attain the age of twenty-one, to them their heirs and assigns discharged from any trust. . . . The said trustee shall serve as trustee for the legitimate children of said J. Banks Corl, and make final settlement to each of said legitimate child upon his or her attaining their majority."

4. On 9 August, 1934, Olive Rogers Corl brought suit in the Superior Court of Cabarrus County against the executor of the estate of M. J. Corl and the successor Trustee under his will, for the monthly allowances which had accrued subsequent to the death of the testator, and obtained judgment therefor at the October Term, 1934, in which it was further ordered that the plaintiff, Olive Rogers Corl, recover "$40 on November 1st, 1934, and $40 on the first day of each succeeding month thereafter until the said plaintiff dies or remarries." No appeal was taken from this judgment.

5. Thereafter, on 7 October, 1940, Olive Rogers Corl instituted another action in the Superior Court of Cabarrus County to surcharge and falsify the Trustee's account and to recover the accrued and unpaid amounts due on her prior judgment. All those interested in the trust were made parties, and the minor children of J. Banks Corl appeared by guardian *ad litem*. Judgment was rendered for the plaintiff in this action, and no appeal was taken therefrom. A number of payments have been made on this judgment.

6. J. Banks Corl died on 22 August, 1942, leaving him surviving his widow, Maude Smith Corl, and two minor children, Marshall B. Corl, born 3 March, 1926, and George F. Corl, born 20 November, 1928, the

minor children being represented herein by their duly appointed guardian *ad litem.*

7. Maude Smith Corl, surviving widow of J. Banks Corl, was married again on 18 October, 1943.

8. The accumulated income from the trust estate since 18 October, 1943, and now in the hands of the Trustee, amounts to $1,331.73.

9. Olive Rogers Corl (styled Olive Louise Rodgers in the will of M. J. Corl) is the divorced wife of J. Banks Corl, and at the time of the institution of this proceeding on 10 November, 1943, was living and had not remarried.

Upon the foregoing considerations, the trial court held:

A. That the trust created in Item "Eighth" of the will of M. J. Corl, late of Cabarrus County, is a valid and active trust.

B. That "upon the marriage of Maude Smith Corl on 18 October, 1943," any and all interest of Olive Rogers Corl in the trust estate ceased.

C. That the entire rents, profits and income accruing from and after 18 October, 1943, together with the *corpus* of the estate, are to be held by the Trustee for the use and benefit of Marshall B. Corl and George F. Corl until 3 March, 1947, at which time the Trustee is directed to pay over to Marshall B. Corl one-half of the *corpus* and accumulated income freed from any trust; and thereafter the Trustee is to hold the remaining one-half of the *corpus* and accumulated income of the trust estate for the use and benefit of George F. Corl until 20 November, 1949, at which time the Trustee is directed to pay over to George F. Corl all assets then in the trust estate, *corpus* and accumulated income, discharged from any trust.

From the judgment entered, Olive Rogers Corl appeals, assigning errors.

No counsel appearing for plaintiff.

L. E. Barnhardt and Julien D. Wyatt for defendant, appellant.

Hartsell & Hartsell for defendants, appellees.

STACY, C. J. We have here a second contest involving provisions of the will of M. J. Corl, late of Cabarrus County. For first controversy, see *Corl v. Corl,* 209 N. C., 7, 182 S. E., 725.

The question presently presented is whether the interest of Olive Rogers Corl in the trust estate has been cut short by the happening of events which brings into play other and later provisions of the will. The trial court answered in the affirmative. We are inclined to a different view.

The testator evidently wished his agreement with Olive Rogers Corl to be carried out according to its terms. He had enjoyed the satisfaction and peace of mind which it afforded during his lifetime, and had faithfully performed his engagements thereunder until his death. Notwithstanding the provision in the contract that it should be binding on "his heirs, executors, or administrators," he did not leave it as an open charge against his estate. Provision was made in his will for its observance as the first claim against the income from the trust created "for his (son's) support and for the support of his family," after payment of current expenses incident to the maintenance of the property.

The situation calls to mind a case within the experience of the writer, which is not reported, as it was concluded in the trial court: A father had become guaranty for his son's debts in order to relieve the immediate demands of pressing creditors. Later it was discovered that the son's liabilities were much larger than originally thought. The father was unable to meet the increased demands. Suit was brought to recover on the guaranty contract. When the father was being examined by his counsel, he was asked whether there had been any overreaching or misrepresentation in the creditors' meeting at the time he signed the agreement. His reply was: "I see where you are driving, but let me say this: When I signed that contract I intended to stand by my boy, and I am standing by him yet." Thus the father lost his fortune, but he saved something more important.

So here, M. J. Corl, speaking through his will, says to the court: "Regardless of the enforceability of the contract of 5 December, 1922, when I signed that agreement I intended to stand by my boy and daughter-in-law, and I am standing by them yet." He evidently remembered that performance is the fulfillment of every promise.

True, in the third clause of Item Eight it is provided that upon the happening of a double contingency, which has occurred, "all profits, incomes and proceeds," together with the *corpus* of the trust estate, shall go to the legitimate children of J. Banks Corl, as they may attain their majority, but the testator was here making ultimate disposition of the property after the other provisions contained in this Item had been met. The primary object of the trust was to provide for his son's support "and for the support of his family." The testator regarded his son's first wife as a member of his family.

When originally drawn it was not contemplated that any conflict would arise between the second and third clauses in Item Eight of the will. Subsequent events seemingly have caused them to clash in letter, if not in spirit. Hence, the present request for interpretation and guidance in the administration of the trust. G. S., 1-255.

It is a cardinal principle in the interpretation of wills that inconsistencies are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose of the will. *Holland v. Smith,* 224 N. C., 255, 29 S. E. (2d), 888. "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.

The intention of the testator is his will. This intention is to be gathered from the general purpose of the will and the significance of the expressions, enlarged or restricted according to their real intent. In interpreting a will, the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention. *Trust Co. v. Miller,* 223 N. C., 1, 25 S. E. (2d), 177; *Williams v. Rand,* 223 N. C., 734, 28 S. E. (2d), 247; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892; *Herring v. Williams,* 153 N. C., 231, 69 S. E., 140.

There can be no debate as to the *corpus* of the trust estate. It is to be held for the life of J. Banks Corl, with remainder to his legitimate children in fee. The problem here presented concerns itself with the disposition of the income and the duration of the trust. By the provisions of the third clause in Item Eight "the remainder of the net income" is to be paid to J. Banks Corl during his natural life; and upon his death, which occurred 22 August, 1942, "the net income" is to be paid to Maude Smith Corl until she remarries, which she did on 18 October, 1943, then "all profits, incomes and proceeds" are to be paid to the legitimate children of J. Banks Corl until they attain the age of twenty-one years, when the trust is to be terminated.

It is the contention of the testator's grandchildren that upon the remarriage of their mother a repugnancy resulted between the second and third clauses in Item Eight of their grandfather's will, and that the latter provision must therefor prevail in accordance with the general rule of construction. *Ledbetter v. Culberson,* 184 N. C., 488, 114 S. E., 753; *Haywood v. Trust Co.,* 149 N. C., 208, 62 S. E., 915. Compare *McGuire v. Evans,* 40 N. C., 269, and *Field v. Eaton,* 16 N. C., 283. It is conceded that to produce this effect, however, the two clauses must be wholly inconsistent and incapable of reconciliation. *Taylor v. Brown,* 165 N. C., 157, 81 S. E., 137; *Baird v. Baird,* 42 N. C., 269. The rule is, that "the intent as embodied in the entire instrument must prevail, and each and every part must be given effect if it can be done by fair and reasonable intendment before one clause may be construed as repugnant to or irreconcilable with another." *Smith v. Lumber Co.,* 155

N. C., 389, 71 S. E., 445; *Davis v. Frazier,* 150 N. C., 447, 64 S. E., 200. In short, 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, 24 S. E. (2d), 531.

We think the provisions of the instant will are adjustable to the various wishes of the testator when considered in the light of the situation as it appeared to him. *Holt v. Holt,* 114 N. C., 241, 18 S. E., 967. If the phrase "all profits, incomes and proceeds" be construed contextually and compared with the expressions, "the remainder of the net income" and "the net income," with which it stands connected, in accordance with the rule of *noscitur a sociis,* the apparent conflict between the second and third clauses of Item Eight of the will may be obviated during the existence of the trust. Indeed, the word "profits" usually signifies the gain realized from a business or investment over and above expenditures. *Samet v. Klaff,* 181 N. C., 502, 107 S. E., 2. All current expenses needed to care for the trust property would *ex necessitate* take precedence over disbursements to the ultimate beneficiaries, and it would seem that the payments called for in clause "2nd" were likewise intended to take precedence over disbursements to the ultimate beneficiaries. They are even preferred over payments to J. Banks Corl and his second wife. Also accordant with this construction are the two judgments of the Superior Court of Cabarrus County awarding Olive Rogers Corl recovery for her monthly allowance.

On the other hand, it may be conceded the testator did not foresee that his son's second wife would survive him and remarry, while his first wife continued unmarried. Even so, the trust was created for the benefit of all who come within its terms, with none excluded except in the event of remarriage on the part of the first wife or the widow. *Williams v. Thacher,* 186 Mass., 293, 71 N. E., 567; *Odescalchi v. Martin,* 96 Col., 156, 40 P. (2d), 241; *Dunn v. Hines,* 164 N. C., 113, 80 S. E., 410; *Heyer v. Bulluck, supra.*

It follows, therefore, as a necessary conclusion from the foregoing interpretation, that the interest of Olive Rogers Corl in the trust estate still subsists. Judgment accordingly.

The allowances made in the declaratory judgment will await further orders of the Superior Court.

Error and remanded.

MARYLAND CASUALTY COMPANY v. MRS. BEULAH LAWING, INDIVIDUALLY, AND AS GUARDIAN FOR KARL LANDER LAWING, AGNES LANDER LAWING, JOHN MEANS LAWING, AND DAN PHILMON LAWING, AND KARL LANDER LAWING, AGNES LANDER LAWING, JOHN MEANS LAWING, AND DAN PHILMON LAWING.

(Filed 11 April, 1945.)

1. Infants § 1: Guardian and Ward §§ 13, 21—

When the court having jurisdiction of the subject matter and the parties in a proper proceeding, after full investigation and upon sufficient evidence, undertakes supervision of infants' estates and thereupon adjudges the transaction to be for the best interests of the infants, the court's decree will be held to be conclusive.

2. Parent and Child § 5: Guardian and Ward § 12—

While it is the primary duty of a parent to support his child, whether the child has an estate or not, this obligation may be qualified by the parent's ability. And when a parent has not means sufficient to provide necessary maintenance, he should have reasonable allowance for lawful disbursements from the child's estate for that purpose.

3. Guardian and Ward §§ 12, 21—

Disbursements, made by a parent guardian prior to his appointment, may be allowed by the court on it appearing that such disbursements were made in good faith and would have been authorized if an application had been made in advance.

4. Guardian and Ward § 13—

The employment of counsel for legal advice and assistance in connection with the administration of the ward's estate is a proper expense to be charged in the guardian's account, if reasonable in amount and for the benefit of the ward. G. S., 33-42.

APPEAL by plaintiff from *Rudisill, Special Judge,* at January Term, 1945, of LINCOLN. Affirmed.

This was an action by the surety on the guardian bond of defendant, Mrs. Beulah Lawing, for an accounting of her guardianship. It was alleged that certain disbursements shown in her accounts had been improperly charged against the estate of her wards. Plaintiff sought an adjudication thereon as affecting its contingent liability.

This case was here at Spring Term, 1943, on defendants' demurrer, and it was decided that the plaintiff had right to maintain its action on the facts alleged. Thereupon defendant guardian filed an amended report, and answered pleading this as a full and correct account. The guardian *ad litem* also answered for the infant defendants. A reference was ordered. During the hearing before the referee it was found from the evidence offered that a detailed accounting would be long and expen-

sive and that a wholly accurate accounting was practically impossible, and that aside from certain questions of law involving the right of the guardian to charge for expenditures for upkeep of wards' properties in the State of Florida, and the right to charge for board and laundry of wards, the difference between the amended account and the report of auditors employed by plaintiff did not aggregate a large amount. Under these circumstances at the suggestion of the referee a conference was held between plaintiff's counsel, the guardian and the guardian *ad litem* and an agreement entered into determining the balance between guardian and each ward as of 1 January, 1945, leaving open the question of guardian's liability on the controverted matters of law. Thereupon evidence was taken on the material facts upon which this agreement was based so that the court could consider said evidence on the question of approving the agreement. After considering all the evidence bearing thereon the referee and the court approved the agreement and held same binding upon the wards.

The referee found, among other things, that K. L. Lawing died intestate 17 August, 1934, leaving surviving his widow, Beulah Lawing, and four minor children; that the property which descended to these parties consisted of certain real property in Lincolnton, North Carolina, and also certain real property in Florida; that Mrs. Lawing and her children lived a portion of the time in Florida, but retained their residence in North Carolina; that Mrs. Lawing qualified as guardian of her children in Florida 19 March, 1936, and qualified as guardian of her children in North Carolina 10 February, 1937, with plaintiff Casualty Company as surety on her guardian bond. Mrs. Lawing filed reports of receipts and disbursements in connection with Florida property in the Florida court having jurisdiction and had same approved by the county judge. Mrs. Lawing filed no account of her North Carolina guardianship until 1 September, 1941. This action was instituted August, 1942, and in September, 1942, Mrs. Lawing filed an amended account correcting the former account in numerous respects referred to in the complaint. In this account she charged herself with one-third of the items for repairs and insurance on North Carolina property as well as one-third of the cost of erecting a building (she having only a dower interest therein), and credited her wards with two-thirds of the net rents received. She also charged to her wards four-fifths of the cost of repairs and upkeep of the Florida property, she having a one-fifth interest therein. Plaintiff employed expert accountants, and certain items in the account were questioned and investigated, including charges for traveling expenses between Lincolnton and Florida, and allowance to guardian for board and laundry for her wards. There were eliminated by the accountants, and consented to in the agreement above referred to, numerous items

including expenditures for furniture for the home in which wards lived, and other items which were not covered by vouchers. Excluding allowance for board and laundry, the balance due each ward as of 1 January, 1945, was stated. The referee found these balances were correct. The referee further found:

"9. That the referee finds as a fact that the balances are correct, and that in arriving at said balances all items have been eliminated which have been charged in any of the Florida accounts.

"10. That the referee finds that the amounts taken into consideration for improvement and repairs of Florida properties were actually spent by the guardian on said properties, that the expenditures were reasonably necessary to preserve the properties, and that the value of the properties were enhanced at least to the extent of the expenditures.

"11. That the referee finds that the amount allowed for traveling expenses, in arriving at the agreed balances, is reasonable and that the guardian spent at least said amounts in making necessary trips to attend to the properties and business of the wards in the two states.

"12. That the referee finds that the guardian allowed to the wards the amounts taken into consideration in the agreement for spending money, and that the amounts so allowed were reasonable.

"13. That the referee finds as a fact that Mrs. Lawing's own property, including that received from her husband's estate, and her income therefrom, was not sufficient in amount to enable her, from her own funds, to support herself and also to support her children in accordance with their station in life.

"14. The referee finds as a fact that the reasonable cost to Mrs. Lawing of furnishing board and other living expenses not taken into consideration in the specific disbursements allowed her while the wards were in the home was at least $1.00 per day for each of them, plus 50c per week for laundry . . .

"15. That the referee finds that, in view of the needs of the wards for funds for their education and the willingness of the guardian to be charged with one-third of the costs of the new building, and have only a dower interest therein, it will be beneficial to the wards to approve the agreement of the parties in that respect and the balances arrived at under the agreement have been arrived at upon said theory.

"16. That the referee finds that Mrs. Lawing's accounts have been poorly kept, but that she had not had any business experience prior to the death of her husband, and that she has acted in good faith, and has handled the estate for the best interest and advantage of her said wards. It is further found that the settlement agreed upon between the parties involves the disallowance of many items of expense claimed by Mrs. Lawing, particularly where vouchers were not available, and where

vouchers did not show for whose benefit the expenditures were made, and that it is for the best interest of the minor defendants that the settlement be approved and that the said settlement is more favorable to the minors than would likely result upon a full and complete accounting, and that the approval of said settlement will save expense which might fall, at least in part, upon the estates of the wards."

Thereupon the referee concluded that under the evidence it was within the power of the court to make allowances for expenses incurred in the support of the wards; that the action of the guardian in borrowing money to erect a building on unimproved property was beneficial to the wards and approved by the resident judge and binding on the wards that the expenditures in Florida benefited the estate of the wards, and that the guardian should be given credit therefor upon her agreement that none of these expenditures be charged in Florida; that the services of the attorney employed by the guardian in handling wards' estate up to 31 December, 1944, were reasonably worth $1,000.

Plaintiff excepted to referee's findings Nos. 13 to 16, inclusive, and to the conclusions of law consequent thereon.

The judge of the Superior Court, after considering the report of the referee and the evidence upon which it was based, approved and confirmed the same, including the agreement referred to, and from the facts thus stablished adjudicated the correct state of account between the guardian and each of her wards. Disproportion in resulting balances of the wards was due to college expenses. The court made other orders in the cause not pertinent here, and gave directions for the future administering of the trust.

The plaintiff excepted and appealed.

Robinson & Jones and W. C. Ginter for plaintiff.

A. L. Quickel for defendant.

DEVIN, J. The right of the plaintiff surety to bring this action, now, for an authoritative determination of the questions raised by the exceptions to the guardian's accounting, involving contingent liability on her bond, was upheld on the former appeal in this case, 223 N. C., 8. G. S., 28-147.

The only questions presented by the present appeal relate to the validity and effect of the adjudication below as to certain items in the guardian's account for which credit is claimed.

1. Following investigation and testimony of accountants employed by plaintiff, and in accord with the suggestion of the referee, an agreement between the plaintiff, the guardian and the guardian *ad litem* of the wards was entered into allowing the guardian credit in her account for

expenditures for improvement of wards' property in Florida, for travel expense to and from that state in connection with the business of her wards, and for a small allowance of spending money for each ward. This agreement, which also eliminated other credits originally claimed, was based on the evidence and received the approval of the presiding judge. After consideration of the evidence the court found that it was to the best interest of the wards that the agreement be approved and held that these allowances were binding on the wards.

The exception to this holding cannot be sustained. The rule is that when the court having jurisdiction of the subject matter and the parties in a proper proceeding, after full investigation and upon sufficient evidence, undertakes supervision of infants' estates and thereupon adjudges the transaction to be for the best interest of the infants, the court's decree will be held to be conclusive. *Ferrell v. Broadway,* 126 N. C., 258, 35 S. E., 467; *Rector v. Logging Co.,* 179 N. C., 59 (62), 101 S. E., 502; *In re Reynolds,* 206 N. C., 276 (288), 173 S. E., 789.

2. Plaintiff noted exception to the allowance to the guardian for board and laundry for her wards. While it is the primary duty of a parent to support his child whether the child has an estate or not this obligation may be qualified by the parent's ability. *Sanders v. Sanders,* 167 N. C., 319, 83 S. E., 490. And when the parent has not means sufficient to provide necessary maintenance he should have reasonable allowance for lawful disbursements from the child's estate for that purpose. *Mull v. Walker,* 100 N. C., 46 (50), 6 S. E., 685; *Burke v. Turner,* 85 N. C., 500; *Gullick v. Slaten,* 169 S. C., 244, 168 S. E., 697; *Sartor v. Fidelity & Deposit Co.,* 160 S. C., 390, 158 S. E., 819; *In re Rohne,* 157 Wash., 62, 39 C. J. S., 101. While in *Jordan v. Coffield,* 70 N. C., 110, it was said the obligation of a mother to support her infant children was not the same as that of the father, and that the weight of authority was against liability of the mother to this burden, the correctness of this statement was doubted by *Ruffin, J.,* in *In re Lewis,* 88 N. C., 31, and we think the applicable rule is that the allowance of a charge by a mother guardian for the maintenance of her wards would depend upon her ability to provide suitable support, under the circumstances. Here the referee found from the evidence that the guardian's property and income were not sufficient to enable her from her own funds to support herself and her children in accordance with their station in life. It may be noted that the wards' real property in North Carolina was found to be worth $100,000 and the property in Florida $60,000, and that due to interest requirements on money borrowed pursuant to order of court for the erection of a building in Lincolnton, and improvements on Florida property, the portion of income due guardian individually was materially reduced during the period in question.

It is suggested, however, that this principle should not be extended to those disbursements made by the guardian prior to appointment. While there is authority for this position, *Barnes v. Ward,* 45 N. C., 93, we think the better rule is that credit may be allowed to the parent guardian for disbursements made in good faith which would have been authorized by the court if an application had been made in advance. *In re Vieweger,* 23 N. J. Eq., 527; *Hyland v. Baxter,* 98 N. Y., 610; *Gullick v. Slaten, supra;* 39 C. J. S., 279; 67 A. L. R., 1405 (note), and cases there cited. The widowed mother was the natural guardian of her infant children, and *de facto* guardian as well. Hence her disbursements from their estate, made in good faith for their benefit, prior to her legal appointment will not be disallowed for that reason. *Kelly v. Kelly,* 89 Mont., 229.

3. Plaintiff excepted to so much of the judgment as approved the referee's finding that the attorney of the guardian employed by her in connection with the administration of the guardianship be allowed $1,000 for his services extending over several years. The statute, G. S., 33-42, provides that "Every guardian may charge in his annual account all reasonable disbursements and expenses," and we think it well settled that the employment of counsel for legal advice and assistance in connection with the administration of the wards' estate is a proper expense to be charged in the guardian's account, if in reasonable amount, and for the benefit of the wards. *Burke v. Turner,* 85 N. C., 500; *Whitford v. Foy,* 65 N. C., 265; 25 Am. Jur., 63. Where the interests of the guardian and wards are antagonistic and the services rendered by the attorney are in the interest of the former rather than the latter the obligation to pay therefor is the individual liability of the guardian. *Lightner v. Boone,* 221 N. C., 78 (88), 19 S. E. (2d), 144. But here the services rendered by the attorney to the guardian in this case were expressly excluded. The referee found, and the judge approved, that the services charged were rendered in connection with the estate of the wards and that the amount allowed was a reasonable one under the circumstances.

The apportionment of costs in this case was a matter in the court's discretion.

We conclude that the findings of the referee, supported by evidence and approved by the judge, establish a sound basis for sustaining the judgment below, and it is so ordered.

Affirmed.

STATE v. MARVIN L. MATHESON.

(Filed 11 April, 1945.)

1. Criminal Law §§ 32a, 33, 34b—

In a prosecution for murder the testimony of a taxi driver that prisoner, when fleeing from the scene of the alleged crime, commandeered his taxicab with gun in hand, said he had killed deceased and threatened to kill the witness if he let the cops catch him, is competent.

2. Criminal Law § 81c—

Exceptions by defendant, in a criminal prosecution, to evidence of a State's witness will not be sustained, where the defendant himself testifies without objection to substantially the same facts.

3. Homicide §§ 4c, 25—

Where the defendant, in a prosecution for murder, admitted that he intentionally and without provocation fired the gun which resulted in the death of deceased, a police officer, to prevent deceased from arresting him, and offered no excuse or explanation in mitigation for his act, except that he did not make up his mind and determine to kill deceased, there is evidence of premeditation and deliberation and evidence sufficient to sustain a verdict of murder in the first degree, and motion for nonsuit, G. S., 15-173, was properly overruled.

4. Homicide § 4c—

Deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances.

APPEAL by defendant from *Rudisill, Special Judge,* at August Term, 1944, of ALEXANDER.

Criminal prosecution tried upon indictment charging defendant with the murder of one D. A. Millsaps.

The State offered evidence tending to show that the defendant, on 9 July, 1944, while being interviewed by D. A. Millsaps, Chief of Police of the town of Taylorsville, in the Alexandria Hotel, shot and killed the said Millsaps, when the officer requested the defendant to accompany him to police headquarters. After shooting the officer twice, first in the back and then in the head, the defendant fled from the hotel with his gun in hand, threatening a Negro woman whose home he attempted to enter, but did not. He then proceeded to the local ice plant, where he found the driver of a taxicab, drew his gun on him and ordered him to drive him out of town. That while riding with the taxicab driver, defendant threatened to kill him if he let the officers catch him; he told him he had killed the Chief of Police; that he was going to Winston-Salem and Greensboro and then to Shelby and he would kill a certain cop there, and that "He killed Mr. Millsaps because he wanted to meddle

in his business, and he was not going to jail with him. He knew if he caught him with the things he did not have money to pay out and he would have to go."

The Sheriff of Alexander County testified that the defendant told him that, when "Mr. Millsaps picked up his bag and said 'Come on we will go to police headquarters and see what we can find out about you,' he let him get six feet in front of him and he shot him in the back, and Mr. Millsaps turned around and he thought he reached for his gun, and he shot him again in the forehead and ran out the back way."

The defendant, in his testimony, fully corroborated the above testimony of the State's witnesses, but denied he intended to kill the Chief of Police. The substance of the defendant's testimony is as follows: He was 15 years of age on 10 March, 1944, and was discharged from Jackson Training School 15 April, 1943, after having spent two years in that institution for stealing Ten Dollars. He had been employed in Conover and quit his job on Friday, 7 July, 1944. He stole two pistols from his employer, a suit of clothes and a pocketbook containing $5.00 from a fellow employee. He rode a bus from Hickory to Taylorsville Saturday night, 8 July, 1944, and upon his arrival at the bus station in Taylorsville, he was questioned by a police officer. He told the officer his name was Paul Putnam. He registered at the Alexandria Hotel as Paul Putnam. He slept that night with the two guns under his pillow. "The reason I didn't give my name at the hotel, that policeman, when he saw me here at the bus, I thought they were looking for me because I had stole the guns. . . . I gave him a false name when I talked to him. Yes, it was to evade the law." At the time of the interview with Chief Millsaps on the following morning, in the lobby of the Alexandria Hotel, the defendant was wearing the suit of clothes and also had on his person the two pistols and the pocketbook containing $5.00, all of which he had stolen. When the Chief of Police picked up his bag and said they would go to police headquarters, "I knew they would find the guns and before I knew what I was doing, I shot him. . . . Yes, I knew if he took me to headquarters and found the gun and stolen property on me that I would have to serve a sentence. I told the Sheriff that I let him get six paces away and shot him, but I didn't make up my mind and determine to kill him."

Verdict: Guilty of murder in the first degree. Judgment: Death by asphyxiation. Defendant appeals to the Supreme Court, assigning error.

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

Horace Kennedy for defendant.

DENNY, J. The first and second exceptions are based upon the failure of the trial court to exclude the testimony of Grover Bentley, the taxicab driver, in which he testified to certain threats and statements made by the defendant. This witness merely related what took place during the defendant's efforts to evade arrest after killing the police officer, which included threats made against the taxicab driver if he did not assist the defendant in escaping. These exceptions cannot be sustained. *S. v. Payne,* 213 N. C., 719, 197 S. E., 573; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308. Moreover, the defendant, without objection, testified to substantially the same facts as those testified to by the witness Bentley, to which the defendant directs his exceptions. *S. v. Gordon,* 224 N. C., 308, 30 S. E. (2d), 43; *S. v. Williams,* 220 N. C., 455, 17 S. E. (2d), 769; *S. v. Hudson,* 218 N. C., 219, 10 S. E. (2d), 740; *S. v. Hall,* 199 N. C., 685, 155 S. E., 567.

The third and fourth exceptions are to the refusal of his Honor to sustain the defendant's motion for judgment as of nonsuit at the close of the State's evidence and renewed at the close of all the evidence. G. S., 15-173. The appellant in arguing these exceptions contends there is no evidence of premeditation and deliberation on the part of the defendant, and therefore the motion should have been allowed. We do not so hold. The defendant admitted that he intentionally fired the gun which resulted in the death of the deceased and offered no excuse or explanation in mitigation of his act. Consequently, the court properly overruled the motion for judgment as of nonsuit. *S. v. Gay,* 224 N. C., 141, 29 S. E. (2d), 458; *S. v. Jones,* 222 N. C., 37, 21 S. E. (2d), 812; *S. v. Landin,* 209 N. C., 20, 182 S. E., 689. Deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. There is no evidence of any provocation on the part of the deceased which could have aroused the sudden passion of the defendant, but, on the contrary, the defendant in describing what took place immediately preceding the killing of the police officer, testified: "I did not want him to arrest me. He had not mistreated me. He was kind to me. He didn't display any force or any gun or any black jack."

We think the evidence disclosed on this record, and set out somewhat in detail herein, is sufficient to sustain the verdict of murder in the first degree. *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 545; *S. v. Hammonds,* 216 N. C., 67, 3 S. E. (2d), 439; *S. v. Burney,* 215 N. C., 598, 3 S. E. (2d), 24; *S. v. Bowser,* 214 N. C., 249, 199 S. E., 31; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 31; *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Steele, supra; S. v. Dowden,* 118 N. C., 1145, 24 S. E., 722.

The defendant was only fifteen years of age at the time he killed the deceased. It is extremely unfortunate that one so young should commit such a heinous crime. In the trial below, however, we find

No error.

JEAN COLE HATCHER, ADMINISTRATRIX, ET AL. v. L. M. WILLIAMS ET AL.

(Filed 11 April, 1945.)

1. Pleadings § 21—

Permission to amend a pleading rests in the sound discretion of the trial court. G. S., 1-163.

2. Same—

In a suit by an administratrix against a business associate of her intestate and others for an accounting as to properties purchased, for the joint account of such intestate and such associate, with moneys furnished by plaintiff's intestate for their joint enterprise, an amendment to the complaint, alleging fraud in concealing property purchased for such joint account and failure to account therefor, is allowable as a cause of action arising out of the same transaction and connected with the same subject of action. G. S., 1-123.

3. Fiduciaries § 2: Principal and Agent § 5—

One who acts for another, or assumes the obligation of a fiduciary, is under the compulsion of fair play and good faith in respect of the interests of his principal or the confiding party.

APPEAL by demurring defendants from *Bobbitt, J.*, at Chambers, 1 February, 1945. From CLEVELAND.

Civil action for an accounting.

The complaint alleges that for many years E. A. Cole and L. M. Williams were jointly engaged in prospecting for mining properties, Cole furnishing the money and Williams doing the prospecting. From time to time large sums of money were advanced by Cole, and title to various properties were taken in the name of Williams. Among the properties so purchased were two limestone tracts in Cleveland County.

The Superior Stone Company offered to lease these two limestone tracts, provided an adjacent tract could be acquired and included in the lease, the three tracts together making a more desirable enterprise. Williams then purchased the adjacent tract with money advanced by the Stone Company which was to be repaid under the terms of a lease covering all three tracts.

Prior to his death on 9 February, 1943, E. A. Cole lost his health and became incompetent, whereupon, on 12 June, 1942, his daughter, Jean Cole Hatcher, was appointed trustee to manage his affairs.

On 2 September, 1942, Mrs. Hatcher and Williams executed a memorandum of agreement outlining the rights of the parties in and to the properties, leases and options therein described. The two limestone tracts are mentioned in this memorandum, but the "adjacent" tract is not.

This suit was instituted in July, 1944, for an accounting, and the paper writing of 2 September, 1942, is specifically referred to in the complaint. On 4 October, 1944, the defendant was examined adversely under the statute, and the plaintiff learned for the first time the facts in respect of the "adjacent" tract; whereupon the plaintiff, on petition and over objection, was allowed to file an amendment to the complaint in which it is alleged that at the time of the execution of the agreement on 2 September, 1942, Williams falsely and fraudulently misrepresented the facts in respect of the "adjacent" tract, and that plaintiff is entitled to one-half the rents arising from this tract.

The defendants, other than Solvay Process Company, filed demurrer to this "amendment" on the ground that it is inconsistent with the original complaint, and states no cause of action, and asked that it be stricken from the complaint.

From judgment overruling the demurrer, the defendants, other than Solvay Process Company, appeal, assigning errors.

McDougle & Ervin and John M. Robinson for plaintiffs, appellees.

Hal B. Adams, L. S. Spurling, and B. F. Williams for defendants, appellants.

STACY, C. J. The case involves the right of plaintiff to amend the complaint, and the appropriateness of the amendment filed.

First, in respect of the permission granted the plaintiff to amend the complaint, it is enough to say this was a matter resting in the sound discretion of the trial court. G. S., 1-163; McIntosh on Procedure, 512.

Secondly, the appropriateness of the amendment, while stressfully challenged, is to be found in its consistency with the gravamen of the complaint. The action is for an accounting. The agreement of 2 September, 1942, outlines the rights of the parties in respect of the properties mentioned therein; and as to these, it may be controlling within the limits of its provisions. It is alleged in the amendment, however, that the so-called "adjacent" tract in Cleveland County was omitted therefrom by fraud of the defendant. This is admitted by the demurrer. The parties were not at arm's length at the time of the execution of the

agreement. *May v. Loomis,* 140 N. C., 350, 52 S. E., 728. An allegation of fraud against a fiduciary in an action for an accounting calls for an answer. *McNeill v. McNeill,* 223 N. C., 178, 25 S. E. (2d), 615; *Small v. Dorsett,* 223 N. C., 754, 28 S. E. (2d), 514; *Hinton v. West,* 207 N. C., 708, 178 S. E., 356.

To say that the amendment undertakes to join an action in tort with one on contract in the same complaint is to regard the proceeding strictly as an action at law rather than a suit in equity. Even so, they both arise out of the same transaction, or transactions "connected with the same subject of action." G. S., 1-123. Where such is the case, they may be joined in the same complaint. *Cheatham v. Bobbitt,* 118 N. C., 343, 24 S. E., 13; *Solomon v. Bates,* 118 N. C., 311, 24 S. E., 478, 54 Am. St. Rep., 725; McIntosh on Procedure, 433. Anyhow, herein lies the basis for the divergent views.

It appears to be a misconception of the theory of the complaint to assert that plaintiff has assumed mutually contradictory positions in respect of the same state of facts, or that she is seeking to affirm the contract in the complaint and to deny it in the amendment. This, of course, if true, would put the plaintiff to an election. *Lykes v. Grove,* 201 N. C., 254, 159 S. E., 360.

The substance of the amendment is, that Williams took advantage of his fiduciary position, acquired an "adjacent" tract through other sources, combined it with the limestone tracts and leased the three together; that he afterwards paid for the "adjacent" tract out of royalties from all three, then made a profit which he omitted to share equitably with Cole, and that the essential facts in respect of the matter were suppressed at the time of the execution of the agreement of 2 September, 1942. This too would seem to call for an answer. *Speight v. Trust Co.,* 209 N. C., 563, 183 S. E., 734; *Bryant v. Bryant,* 193 N. C., 372, 137 S. E., 188; *Smith v. Moore,* 149 N. C., 185, 62 S. E., 892. One who acts for another, or assumes the obligations of a fiduciary, is under the compulsion of fair play and good faith in respect of the interests of his principal or the confiding party. 25 C. J., 1119.

The demurrer was properly overruled.

Affirmed.

STATE v. JOHN BUSTER MURPHY AND PATRICK SUTTON.

(Filed 11 April, 1945.)

1. Criminal Law § 52b—

The general rule, on motion for judgment as of nonsuit in a criminal case, is that if there be any evidence to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case is one for the jury; but, where there is merely a suspicion or conjecture in regard to the charge against defendant, the motion should be allowed. G. S., 15-173.

2. Criminal Law §§ 52b, 54b—

In a criminal prosecution for assault and highway robbery, where there was sufficient evidence of assault, but as to robbery the evidence disclosed no more than an opportunity for defendants to take the money, with equal opportunity for others to have stolen it, a verdict on the highway robbery charge is speculative and not supported by the evidence.

3. Criminal Law §§ 54b, 60—

Where there is a general verdict on a bill of indictment containing two or more counts charging distinct offenses, the court can impose a sentence on each count, if the verdict is free from valid objection and has evidence to support it.

4. Criminal Law §§ 60, 85—

When an indictment contains several counts as to offenses of different grades and punishments and the evidence applies to one or more counts but not to all, on a general verdict, judgment, in excess of the statutory penalty for the count or counts supported by the evidence, will be stricken out on appeal and the cause remanded for a proper judgment.

APPEAL by defendants from *Williams, J.,* at October Term, 1944, of LENOIR.

Criminal prosecution for assault and highway robbery.

The bill of indictment charges in substance that on 8 October, 1944, "on or near a public highway" in Lenoir County, North Carolina, Patrick Sutton and John Buster Murphy did unlawfully, willfully and feloniously assault and put in fear Wiley Bell, and did feloniously, unlawfully and willfully and forcibly take, steal and carry away from the person of Wiley Bell eighty-two dollars in money—his property.

In the trial court the evidence offered, taken in light most favorable to the State, tends to show: That on Sunday afternoon of 8 October, 1944, prosecuting witness, Wiley Bell, while riding his bicycle on Davis Street in the city of Kinston, North Carolina, had his pocketbook containing four twenty-dollar bills and two one-dollar bills in his shirt pocket, and he was in his shirt sleeves; that his bicycle there ran into one of the defendants, Sutton, to whom Bell apologized, and who apparently ac-

cepted the apology, but the other defendant Murphy "commenced raising a lot of sand," and Bell asked him "What are you going to do about it?"; that thereupon that defendant grabbed Bell by the neck and knocked him down, and defendant Sutton went down on him, or "was leaning over him" as one witness expressed it; that when he, Sutton, "got up" or "got up off of Wiley he said 'I have got the gun,'" and after he got up, he kicked Bell more than once; that then the defendants walked off leaving Bell lying in the street in an unconscious condition; that after they left there defendant Sutton had the pistol in his hand; that then two women came and picked Bell up and carried him to a near-by porch, where about ten minutes later he regained consciousness; that then he got on his bicycle and started home, and on the way discovered there was no money in his pocketbook, and no trace of it has been found.

On the other hand, defendants as witnesses for themselves deny taking the money, and offered evidence tending to show that while they struck Wiley Bell, and had him down, they did so in disarming him when he threatened them, and drew the gun on them.

For the State there was evidence tending to show that Wiley Bell did not own, and had no pistol at the time.

There was no evidence that anyone saw either of defendants with the pocketbook or saw either of them take the money.

Verdict: Guilty.

Judgment as to each defendant: Confinement in the State's Prison, assigned to work under the supervision of the State Highway and Public Works Commission for a period of not less than 4 nor more than 6 years.

Defendants appeal to the Supreme Court and assign error.

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

J. A. Jones and Albert W. Cowper for defendants, appellants.

WINBORNE, J. Exception to the refusal of the court to grant motions of defendants aptly made and preserved for judgment of nonsuit, G. S., 15-173, as to the charge of robbery, is well taken, and must be sustained. In considering such motions under provisions of G. S., 15-173, the general rule is that "if there be any evidence to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment against defendant, the motion for judgment of nonsuit will be allowed, *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730, and numer-

ous other decisions of this Court, including *S. v. Boyd,* 223 N. C., 79, 25 S. E. (2d), 456, where the authorities are assembled.

Applying these principles to the present case, we are of opinion that the evidence discloses no more than an opportunity for the defendants to take the money. And the evidence shows an equal opportunity for others to have taken the money. Under such circumstances to find that any particular person took the money is to enter the realm of speculation, and verdicts so found may not stand.

But as to the count in the bill of indictment in the present case charging an assault, there is sufficient evidence to sustain a verdict of guilty. Here there is a general verdict of guilty. And where there is such a verdict on a bill of indictment containing two or more counts charging distinct offenses, the court can impose a sentence on each count. That is, if the verdict on any count be free from valid objection and has evidence tending to support it, the conviction and sentence for that offense will be upheld. *S. v. Graham,* 224 N. C., 347, 30 S. E. (2d), 154, and cases cited. However, the sentences imposed in the judgment below are greater than is allowed by law for a conviction for an assault. Hence, while there may not be a new trial, *S. v. Toole,* 106 N. C., 736, 11 S. E., 168, the sentences imposed will be set aside and the cause remanded for proper judgment. *S. v. Graham, supra; S. v. Cody,* 224 N. C., 470, 31 S. E. (2d), 445.

Other assignments of error have been examined, and are found to be without merit.

Error and remanded.

STATE v. WILLIAM HENRY DAVIS.

(Filed 11 April, 1945.)

1. Indictment § 7—

The caption is no part of a bill of indictment, and its omission or its recital of the wrong county does not constitute ground for arrest of judgment. G. S., 15-155.

2. Criminal Law § 53a—

A charge must be construed contextually.

3. Homicide § 11—

The right of self-defense is available only to a person who is without fault, and if one voluntarily, that is aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it, and gives notice to his adversary that he has done so.

STATE *v.* DAVIS.

APPEAL by defendant from *Bobbitt, J.*, at November Term, 1944, of ROWAN.

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

Walter H. Woodson and C. P. Barringer for defendant, appellant.

SEAWELL, J. This defendant was tried in the Superior Court of Rowan County, upon a bill of indictment charging him with murder. At the time the prisoner was brought to trial, the solicitor announced that he would not ask for a verdict of murder in the first degree, but for a verdict of murder in the second degree or manslaughter, as the evidence warrants. The defendant was convicted of manslaughter, and was sentenced to State's Prison at Raleigh for a period of not less than five nor more than ten years, and appealed.

Out of several exceptions taken by the defendant during the course of the trial, the appeal presents two questions which merit attention:

1. It appears that the bill of indictment upon which the defendant was tried in Rowan Superior Court was, for some unexplained reason, captioned:

"STATE OF NORTH CAROLINA — SUPERIOR COURT
RANDOLPH COUNTY — SEPTEMBER TERM, 1944."

The defendant did not move to quash the indictment or except to the jurisdiction of the court when put upon trial, but, at the conclusion of the trial, made a motion in arrest of judgment upon the ground that the caption of the indictment "shows upon its face the words 'Randolph County' and the language of the bill alleges a crime committed in Rowan County." Defendant therefore contends that in the absence of any order of removal or change of venue, the case could not legally be tried in Rowan County.

The record discloses that, in point of fact, the bill of indictment was found in Rowan County by a grand jury drawn for that county, and the question either of jurisdiction or of venue is not well taken. The situation, unusual as it is, is not without precedent, or judicial determination. In *S. v. Sprinkle,* 65 N. C., 463, a bill of indictment contained the words "Iredell County" in the caption. In the body of the bill it was charged that the offense was committed in Wilkes County. The record of the case, however, showed that the bill of indictment was found by a regular grand jury for Wilkes County, and was returned in court a true bill. The defendant was convicted, and upon motion of defendant's counsel, judgment was arrested on account of the appearance of the word "Iredell" in the caption instead of the proper name of the

county, "Wilkes." The Court said: "There was error in ordering the arrest of judgment. We think this indictment would have been good before the act, Rev. Code, ch. 35, sec. 20; *State v. Wasden,* 4 N. C., 596; but however that may be, we are clearly of opinion that this defect after verdict is cured by the said statute. This will be certified that the Court may proceed to judgment agreeable to law." The statute referred to is now G. S., 15-155. See annotation.

A somewhat similar situation occurred in *S. v. Francis,* 157 N. C., 612, 72 S. E., 1041, where the name of the county in which the offense was alleged to have been committed did not appear in the caption of the indictment, and the Court said: "The fact that the county in which the bill of indictment was found does not appear in the caption of the indictment does not constitute ground for arresting the judgment. . . . The caption is not part of the indictment and its omission is no ground for arresting judgment." See *S. v. Arnold,* 107 N. C., 861, 864, 11 S. E., 990.

2. The defendant excepted to the following instruction: "The Court instructs you as to this further principle: The right of self-defense is available only to a person who is without fault, and if a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it, and gives notice to his adversary that he has done so."

This is a correct statement of the law applicable to a phase of the evidence too prominent to be ignored. A witness for the State testified: "Bill Davis and Tom Barber began to scuffle, and a few licks was passed, and Bill Davis shot Tom Barber, and then Tom Barber charged in on Bill and cut him and fell to the floor on his face . . . I do not know exactly how many licks were passed between Will and Tom, but three or four, each striking the other."

A different and contradictory statement of the occurrence was given by the defendant, with supporting testimony. But the instructions immediately preceding the exceptive bracket were ample as applied to his evidence, and we cannot find that he was prejudiced because a more meticulous form of instruction was not employed. Contextually, the charge is sufficient. *S. v. Hunt,* 223 N. C., 173, 25 S. E. (2d), 598; *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Elmore,* 212 N. C., 531, 193 S. E., 713.

Other exceptions taken have been considered, but are not regarded as meritorious.

We find

No error.

THOMAS H. ATKINSON v. MARY C. ATKINSON.

(Filed 18 April, 1945.)

1. Contracts § 8—

Where the subject of controversy is covered by exchanges in writing between the parties, manifesting no ambiguity which would require resort to extrinsic evidence, or consideration of disputed fact, the construction is for the court.

2. Trusts § 14—

A constructive trust, arising *ex maleficio, is* a remedial device, not referred to the intent of the parties, but imposed upon the wrongdoer *in invitum*, often contrary to the intent, to prevent the consummation of fraud or unconscionable practice.

3. Equity § 3—

In seeking equity a plaintiff must find his cause of action in the invasion of property rights, at which point equity takes hold and proceeds as far as it may, within the power and practice of the court, to restore the parties to the *status quo ante injuriam.*

4. Trusts § 14—

When a constructive trust is predicated on fraud in the acquisition of property, or upon fraud, actual or constructive, which, if found, the law will refer to such acquisition, the basis of jurisdiction is the continuance of the equitable interest of the aggrieved person in and to the property of which he has been fraudulently deprived. The fraudulent conduct must be substantial, tangible, and of definite import, and must strike at the root of the transaction.

5. Trusts §§ 1b, 15—

In appropriate cases a parol trust is imposed upon the legal title on an oral promise of grantee to hold in trust, made in contemplation of the conveyance or concurrently therewith, as a condition of the passing of the title and its acceptance by the grantee; and in some situations involving the violation of an established fiduciary relationship, equitable intervention may be referred to the fraud rather than to the enforcement of the parol promise *ex proprio vigore*, and may result in a constructive trust.

6. Equity § 3—

Equity acts *in personam* but it also acts in relation to the *res.*

7. Trusts § 15—

Speaking strictly of the theory of unperformed promises, and not of other conditions which might result in the creation of a constructive trust, it is manifest that a court of equity will not declare a constructive trust upon the nonperformance of an incidental promise made in connection with the purchase of land, which has no bearing upon the nature of the title or interest intended to be conveyed, although such a promise indeed may constitute a part of the consideration.

8. Same—

Upon a conveyance by plaintiff to defendant in consequence of an offer made and accepted, promises by defendant in the offer that plaintiff should have one-half of the net profits of the property and one-half of the net proceeds of timber cut from the land, are contractual in character and setting. Their maturity gives rise to money demands, for which there is an adequate remedy at law and which cannot be converted into an equitable cause of action.

9. Pleadings § 3a—

Recovery must be had upon the theory of the complaint, and the court cannot, *ex mero motu*, assert for the plaintiff a different cause of action.

10. Husband and Wife §§ 12a, 12d—

The husband, for the duration of an estate by the entirety, has both the ownership and the control of the property since in law, for that period, the rents and profits of the land belong to him.

11. Contracts § 3: Vendor and Purchaser § 5a—

Where an offer to sell necessitates or contemplates a further agreement of the parties in essential matters, the option is invalid.

12. Contracts §§ 3, 4: Vendor and Purchaser § 5a: Husband and Wife § 12c—

While an offer to sell realty remains unilateral and unaccepted, the person to whom the offer was made has no equity in the premises and a conveyance by the owner involves no breach of legal duty, and where a complete change of ownership meanwhile takes place, for example, through survivorship in an estate by the entireties, the option terminates.

13. Mortgages §§ 24, 25—

When the equity of redemption is conveyed by the mortgagor to the mortgagee, there is a presumption of fraud upon a showing of the facts.

14. Same—

Where an agreement between the parties, requiring the defendant to acquire or discharge plaintiff's mortgage as part consideration for the conveyance of the mortgaged premises by plaintiff to defendant, was made and completed before the deed was executed or the mortgage assigned, with no fiduciary relation of any sort between them, no fraud or oppression could have existed, and the acquisition of the mortgage *eo instante* extinguished the debt, and the relation of mortgagor and mortgagee never actually existed between the parties.

STACY, C. J., dissenting.

WINBORNE and DENNY, JJ., concur in dissent.

APPEAL by plaintiff from *Bone, J.*, at September Term, 1944, of JOHNSTON.

Plaintiff brought this suit against the defendant to enforce an alleged trust growing out of the transactions hereinafter related, and to compel her to reconvey to him the lands described in the complaint, and to account for profits during their occupancy. He also demanded a return of the personalty described in the complaint, or an accounting for its value.

The defendant denied that there was ever any trust relationship existing between Wade H. Atkinson, or herself, and the plaintiff with respect to either the lands or the personalty subject of the controversy.

Upon the hearing the trial judge, considering the propriety of an accounting to depend upon the other issues in the case, continued the prayer for an accounting and proceeded to trial upon the issues relating to the trust.

The facts in evidence are substantially as follows:

The plaintiff, Thomas H. Atkinson, and Dr. Wade H. Atkinson, husband of the defendant, were brothers. At the time of the transaction herein related, Thomas Atkinson was a resident of the State of Florida, and Dr. Wade Atkinson also resided outside the State. Thomas Atkinson owned a body of farm and timber land in Johnston County, North Carolina, which was the old Atkinson home place. The land was heavily mortgaged to the Atlantic Joint Stock Land Bank of Raleigh, North Carolina. Default having been made in payment of the installments due on the land and of the taxes due thereon, the bank had instituted proceedings to foreclose the mortgage.

Prior to his removal to Florida, the plaintiff had been engaged in the mercantile business in Selma, North Carolina, and had become financially embarrassed. Due to the failure of a business in Florida, and the fact that he had endorsed the notes of the concern heavily, there was imminent a judgment against him for about $50,000.00. His repeated efforts to refinance the loan with the Land Bank or to pay the installments due ended in failure, and he was unable to redeem the land. He had offered the land to his creditors for application on his debts, but in view of the encumbrance, they declined the offer. Plaintiff estimated the property to be worth $40,000.00.

Outside the mortgaged property, he had some other lands adjoining those under the lien, which were also a part of the "home place."

Under these circumstances, Wade H. Atkinson made a written proposal to the plaintiff, as follows:

"June 12—'32

"DEAR TOM:

"While in N. C. I learned of the mortgage closing on the old place. Judge Aycock said they would have trouble in serving papers on you & Mattie unless you accepted service etc. and also talked of the

final procedure on your personal effects. Also had a talk with Barden about the plantation & the stock etc. He shows activity & thrift along hay, grass and clover, stock too.

"You know my earning capacity is knocked into a cocked hat, and that Wade took a crack at it, and that I must go for another treatment in France. So under these adverse circumstances I have made an offer to take up the mortgage, or have it assigned over. If they accept, I have to borrow. Under these circumstances the old place would be worthless to me without the stock, feed & implements. If they foreclose the procedure will be attaching everything you own etc. and at the present prices the receiver or what not will take it all.

"So under the conditions, I am offering to have you & Mattie to make sale to me of all the personal belongings of feed, stock, implements, etc., provided I can secure the mortgage, also the land not included in the mortgage. For this you shall have ½ the net proceeds of the farm, mill, etc., each year. If the lumber can be sold you can come supt. sell, etc., having ½ of the profits. You shall have a welcome & free use of the place as a pleasure resort for yourself & family as long as it is in my possession. Further you may purchase the entire place mill & all any time you can & wish with a reasonable profit.

"I feel that I am undertaking a big thing at my expectancy, for I have to go slow & be so careful with my health, that it is not promising much real pleasure for me. I therefore must be as business as possible for Mary's sake.

"About the Little River Milling Co. I do not know that I would prefer it in a company or not. Would like to have you tell me about it. How much stock & who holds it? I think it best to have things in one's own name, however would like your version of it.

"I hated to see your store closed & things looking so depleted around Selma. Saw Earp only for a few minutes & talked but little to him. I heard May say, or some one told us his daughter had bought a farm somewhere near, and that he was working on it, fixing up etc. He has been selling fertilizer for someone. Saw Avery only a few minutes. He wanted to talk about the insurance due on the houses on the old place. I think he said there was none on the mill.

"Drop me a letter & tell me what you & Mattie think about this proposal.

"Love from us to you all.

Affect.

WADE."

The proposal was accepted, and Thomas H. Atkinson and his wife conveyed the property, including that under mortgage and the other

land referred to as unencumbered, together with the personalty described in the offer, in pursuance of the agreement. The deed made to Wade H. Atkinson and Mary C. Atkinson, his wife and the present defendant, conveyed an estate by the entirety, and the personalty was conveyed to Wade H. Atkinson by bill of sale. The bill of sale and the deed are both dated 1 July, 1932, but there is evidence that they were executed 20 July, 1932.

Dr. Atkinson procured an assignment of the mortgage to himself and wife 14 July, 1932. In this transaction he paid upon the mortgage liability $11,601.61, accumulated taxes of $1,286.99, with interest, which, under the Land Bank mortgage, had become a part of the principal debt, later satisfying other taxes, making the total taxes paid approximately $2,500. The mortgage was not canceled of record.

Following this transaction, Dr. Atkinson went into possession of the property and spent substantial sums in improving it, including some $6,000 in repairing and reconditioning the mill. He also paid to the plaintiff, in various checks, the sum of $8,377.58, representing one-half the gross receipts of timber cut upon the place.

Wade H. Atkinson died 14 November, 1942, and title to the lands in controversy was thereby vested in his wife, the present defendant, by survivorship.

The plaintiff testified that prior to bringing the suit he had demanded of the defendant that she reconvey the property to him, and account to him for the profits.

At the conclusion of the plaintiff's evidence, the defendant demurred and made a motion for judgment as of nonsuit, which was allowed. The plaintiff appealed.

Smith, Leach & Anderson and Abell, Shephard & Wood for plaintiff, appellant.

Albert M. Noble, W. H. Lyon, and J. C. B. Ehringhaus for defendant, appellee.

SEAWELL, J. This appeal, as argued, poses the single question whether there was error in taking the case from the jury and entering judgment as of nonsuit on defendant's demurrer to the evidence. G. S., 1-183.

There are, it seems to us, certain inconsistencies in the theories of recovery presented, to which attention will be called in due course. But since plaintiff was entitled to go to the jury upon any cause of action sufficiently stated in the complaint and supported by evidence, we have examined the record in that light.

The exchanges between the parties covering the subject in controversy are in writing, and manifest no ambiguity which would require resort

to extrinsic evidence, or the consideration of disputed fact. Their construction is, therefore, for the court. *Drake v. Asheville,* 194 N. C., 6, 138 S. E., 343.

By way of elimination, we observe that even had appellant laid the basis for such a claim in his complaint, he does not now contend that the written offer of Dr. Wade H. Atkinson, its acceptance, and the transfer of land and personalty made in pursuance thereof, as appearing in the evidence, constitute an express trust, or give rise to a resulting trust, as such trust is understood in this jurisdiction. In fact, there are provisions in the proposal and expressions in the deed which negative that theory. The appellant does contend that Dr. Atkinson and the defendant acquired title to the property in dispute, and that the defendant now retains it, under circumstances that should constrain the court to declare the defendant trustee of a constructive trust for his benefit, arising *ex maleficio.* Such a trust is a remedial device, not referred to the intent of the parties, but imposed upon the wrongdoer *in invitum,* often contrary to the intent, to prevent the consummation of the fraud or unconscionable practice. Pomeroy, Equity Jurisprudence, 5th Ed., 1044; *Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56. It is contended that since title to the property was conveyed to the wife by the entirety, she was a party or privy to the wrongful acquisition of the property by her husband, or at least took an interest in the land in dispute without consideration, and with notice of plaintiff's equity—an interest which later ripened into the sole title by virtue of her survivorship; and that she will be unjustly enriched if she is not compelled to make restitution with respect to the property thus acquired and held.

While the theory of recovery is definitely based on fraud, actual or constructive, fraud, in terms, is not alleged in the complaint. Counsel say that the facts upon which fraud is predicated are set out in the complaint, and no more is required. They regard as unique in this respect instances where the equity of redemption is conveyed by the mortgagor to the mortgagee, since in such case the law presumes fraud upon a showing of the facts. *Cole v. Boyd,* 175 N. C., 555, 95 S. E., 778; compare *Ghormley v. Hyatt,* 208 N. C., 478, 482, 181 S. E., 242; 19 Am. Jur., Equity, sec. 233. The validity of this contention may be questioned, particularly so with regard to other conduct of the parties outside of the suggested trust relation which appellant would have us consider as engendering inferences of fraud. However, the rationale of our decision does not require us to pass upon these questions of technical procedure.

The appellant rests his case on the following propositions: (a) That certain promises were made at the time the property was acquired, the failure or refusal to perform which must be held at least as constructively fraudulent, vitiating the transaction *ab initio;* (b) that Dr. Atkin-

son and wife, the defendant, acquired plaintiff's equity of redemption in the bulk of the lands transferred to them while the relation of mortgagor and mortgagees existed between them—a transaction presumably fraudulent on the part of the grantees and requiring the defendant to show that the transaction was free from fraud or oppression, and that the price paid was fair. *Cole v. Boyd, supra; McNeill v. McNeill,* 223 N. C., 178, 25 S. E. (2d), 615.

It is to be questioned whether the acquisition of the equity of redemption while the grantees held the Land Bank mortgage, if established in fact and made effective in legal principle, would not rather result in a situation foreign to the nature of a constructive trust, or at least inconsistent with the more summary remedy afforded by that device, serving merely to reactivate or restore the previously existing trust under the mortgage. We pass this for the moment to consider whether in the other respects mentioned the plaintiff's appeal is meritorious *vel non.*

The plaintiff asks that a constructive trust be declared to prevent the unjust enrichment of the defendant at his expense. Scott on Trusts, sec. 462; Bogert on Trusts (Hornbook), ch. 6, p. 194, sec. 55; Restatement, Trusts, sec. 1. Since the theory of unjust enrichment, with its broad implications, is so largely featured in the brief of appellant, we think it proper to say that an approach to the theory of constructive trusts via the doctrine of unjust enrichment should be made with caution, or at least with strict regard to the doctrinal limitations through which that subject angles back to beaten paths. The doctrine cannot be invoked, through the rather socialized connotations usually attending its expression, to broaden the basis of equity jurisdiction or to bring within its cognizance situations which have heretofore escaped the comprehension of its long recognized rules. As a matter of administration, courts are not, of course, concerned with formal classifications of trusts made by textwriters for convenience in treating the subject, so long as emphasis is permitted to remain on the factual situations out of which the trust arises or upon which it may be declared.

The plaintiff in a matter of this sort must find his cause of action in the invasion of a property right. Equity takes hold at that point, and proceeds as far as it may within the power and practice of the court to restore the parties to the *status quo ante injuriam.*

Not attempting in one impossible definition to put a fence around all instances where the court may, with propriety, declare a constructive trust, we think it safe to say that where it is predicated on fraud in the acquisition of property, or upon fraud, actual or constructive, which, if found, the law will refer to such acquisition, the basis of jurisdiction is the continuance of the equitable interest of the aggrieved person in and

to the property of which he has been fraudulently deprived—an interest which survives the fraud and persists despite the outward forms of legality under which it is held and under which the true ownership has been submerged.

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Judge Cardozo,* in *Beatty v. Guggenheim Exploration Co.,* 225 N. Y., 380, 386, 122 N. E., 378.

What are the circumstances which should arouse "the conscience of equity" and merit remedial action—their character, significance and pertinency—is the subject of anxious inquiry by the court, guided by precedent and established principles. Transactions which the law has regarded as the most solemn in which men may enter, the vast majority of which are honestly undertaken, cannot be lightly set aside upon an arbitrary or capricious view on the part of the chancellor that the proceeding was unfair. The fraudulent conduct which demands correction or frustration through equity must be substantial, tangible and of definite import, and must strike at the root of the transaction.

UNPERFORMED PROMISES: We think a preliminary statement with regard to the statute of frauds will clarify the discussion on this point and lead to a better understanding of some cases cited to us under misapprehension, we think, as to their significance—at least as to the nature of the promises with which this branch of equity is concerned. The seventh section of the English Statute of Frauds relating to the creation of trusts has not been enacted in this State. *Peele v. LeRoy,* 222 N. C., 123, 126, 127, 22 S. E. (2d), 244; *Anderson v. Harrington,* 163 N. C., 140, 79 S. E., 426; *Riggs v. Swann,* 59 N. C., 118. Here, in appropriate cases, a so-called parol trust is imposed upon the legal title upon an oral promise of the grantee to hold in trust, made in contemplation of the conveyance or concurrently therewith, as a condition of the passing of the title and its acceptance by the grantee. In some states of the Union, where the English law requiring the creation of a trust to be manifested in writing, or some substitute statute of a similar nature, is in force, it has been held that the fraud involved in the violation of the promise is sufficient to take the situation out of the statute of frauds and afford relief by the creation of a constructive trust; and in this State, in some situations involving the violation of an established fiduciary relationship, equitable intervention may be referred to the fraud rather than to enforcement of the parol promise *ex proprio vigore,* and may result in a constructive trust. *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 663. But no matter upon what principle the equity is worked out, the promises

involved are similar. The cases cited in appellant's brief, and scores of others of similar import, throw a distinguishing light upon the character of the promises with which this particular equity is concerned. Upon examination they will be found to refer uniformly to one kind of promise, although varying in form: a promise to hold the lands in trust or to preserve to the grantor, or other person, some estate in the lands conveyed inconsistent with the full beneficial interest of the holders of the legal title. *Peele v. LeRoy,* 222 N. C., 123; *Speight v. Trust Co.,* 209 N. C., 563; *Boyett v. Bank,* 204 N. C., 639; *McNinch v. Trust Co.,* 183 N. C., 33; *McFarland v. Harrington,* 178 N. C., 189; *Ballard v. Boyette,* 171 N. C., 24; *Brogden v. Gibson,* 165 N. C., 16; *Smiley v. Pearce,* 98 N. C., 185; *Burns v. McGregor,* 90 N. C., 222; *Blount v. Carroway,* 67 N. C., 396. See Pomeroy, Eq. Jur., sec. 1055. If distinguished from the other cited cases, *Burns v. McGregor, supra,* merely presents the familiar principle of equity that neither coverture nor infancy will serve as a shield or mask for the perpetration of fraud, or prevent equity from restoring the parties to the *status quo.*

Equity acts *in personam,* but it also acts in relation to the *res.* Speaking now strictly of the theory of unperformed promises, and not of other conditions which might result in the creation of a constructive trust, it is manifest that a court of equity will not declare a constructive trust upon the nonperformance of an incidental promise made in connection with the purchase of land, which has no bearing upon the nature of the title or interest intended to be conveyed, although such a promise indeed may constitute a part of the consideration.

Amongst the promises made by Dr. Atkinson in the preliminary agreement, the alleged nonperformance of which is presented by plaintiff as raising an inference of fraud, may be mentioned the promise to pay to plaintiff annually one-half the net proceeds of the farm and mill, to pay him one-half the profits of the timber cut from the lands, and the offer couched in the following terms: "Further you may purchase the entire place mill & all any time you can & wish with a reasonable profit."

These promises do not, in themselves, indicate that they are intended as conditions upon the passing of the full beneficial title by the deed subsequently to be executed, and which itself makes no reference to them. Even if we exclude from consideration the deed itself, no reasonable construction we can give to the letter of Dr. Atkinson containing his offer is consistent with the view that the grantor was to have any further equity in the subject of the conveyance, and there is no suggestion in them of a promise that the land should be held in trust for any such purpose.

Whatever the nature of the agreements brought about by these offers, and their implied acceptance, and however they may be enforced, and

against whom, if at all, the promises themselves are not of such a character that their breach will justify the court in declaring a constructive trust and thus, indirectly, make the forfeiture of the estate a sanction to their performance.

The plaintiff here is not suing for the enforcement of these promises, but asking that a constructive trust be declared because of their nonperformance, and that an accounting be had incident to that remedy.

We examine two of the promises relied upon as involving inferences of fraud upon which a constructive trust might be declared; the promise that the plaintiff should have one-half of the net profits of the farm and mill and the promise that he should have one-half the net proceeds of timber cut upon the premises. First, we observe these promises are contractual in character and in their setting not only presuppose, but for their performance directly depend upon the full enjoyment by the promisor of the beneficial estate in the granted lands. Their maturity gives rise to money demands which cannot be converted into equitable causes of action. In their legal aspect, there was and is an adequate remedy at law for their enforcement against the promisor as contractual obligations, or, for that matter, against any other person shown to be privy to them in the sense of legal liability. The plaintiff has, we think advisedly, refrained from suing to recover any amount due by reason of these promises or damages for their breach, since this would be inconsistent with the remedy to which he considers himself entitled; and the Court cannot, *ex mero motu,* assert for him such a cause of action upon the complaint as drawn, and as the parties are constituted.

The accounting demanded by plaintiff has no reference to any sum supposed to be due him by reason of these promises, but is strictly incidental to his theory of trust, which the enforcement of the promises would destroy.

These promises were made by Dr. Atkinson. There is no evidence connecting the defendant with them, except such inferences as might arise from her connection with the title. Whether they are promises running with the land we need not now stop to inquire, as it would have no bearing upon the case as now constituted in the complaint, or the theory on which it was tried in the court below. We do observe, however, that they were personal obligations of Dr. Atkinson, who, during the duration of the estate by entirety (which lasted almost to the beginning of this suit), had both the ownership and the control of the subject matter, since in law, during the existence of the estate by entirety, the rents and profits of the land belong to the husband. *Bynum v. Wicker,* 141 N. C., 95, 53 S. E., 478; *Greenville v. Gornto,* 161 N. C., 341, 77 S. E., 222. During that period this defendant raised no objection to the cutting of the timber or anything else her husband did in regard to

these promises. Not only did the plaintiff neglect to make any demand upon Dr. Atkinson with regard to the alleged breach of these promises during his lifetime and his occupancy of the premises, which lasted for upwards of ten years, but he failed to make any demand upon this defendant with respect to them after the death of Dr. Atkinson and prior to the institution of this suit. The record fails to disclose any evidence whatever that she had repudiated either of them, since their fulfillment, if an obligation of hers at all, came under her control. In other words, she has had no opportunity either to affirm or "repudiate" the alleged promises, and the central fact upon which plaintiff invokes the most drastic penalty known to equity rests upon an assumption.

It is true plaintiff testified that defendant refused to convey to him the lands and make an accounting—not an accounting for anything due upon the agreement, but an accounting, as we have said, incident to his theory of constructive trust.

Even in an action brought directly to enforce these promises, the court would not assume, without evidence on the point, that there were net profits from the farm and mill which remain unaccounted for, or that the timber transaction referred to in the evidence was not, as it appears to have been, complete.

We do not wish, however, to draw attention away from the fact that the promises themselves are not of a character which equity associates with fraud in the acquisition of the title, resulting in a constructive trust.

The offer made by Dr. Atkinson to permit the plaintiff to purchase "the entire place mill & all" is, *in totidem verbis,* a simple option of purchase and must stand or fall upon the law relating to that subject. It contemplates the purchase of the lands from the grantees as the beneficial owners, and equity will not enforce it by declaring a trust. In their brief, counsel for the appellant described it as "not as definite and explicit as it might be" and say that it will not serve as a basis for a suit for specific performance.

It is true, construed as an option to purchase, it lacks many essentials to validity. Time is of the essence of such an offer. Where no definite term is set for the acceptance of the offer, it has been sometimes held to be *nudum pactum.* Jones' Cyc., Real Property, Vol. 1, sec. 130; *Bristo v. Christin O. & G. Co.,* 139 La., 312, 71 S. E., 521. Other authorities say that it must then be accepted within a reasonable time. *Smith v. Baugham,* 156 Cal., 359, 104 Pac., 689; Jones, *supra,* 135, and cases cited. But all are agreed that where the offer necessitates or contemplates a further agreement of the parties in essential matters, the option is invalid. *Esselstine v. Bank,* 63 Mont., 461, 208 Pac., 910. The offer obviously falls within the latter class. Certainly, neither the plaintiff herein nor this Court could determine what was a reasonable profit, nor,

from any phraseology employed in the instrument, upon what that profit must be computed. The Court cannot make a contract for the parties.

But no equity arises out of the fact that it is too uncertain, vague and indefinite to be enforced; nor is any fraud to be imputed to the defendant because she declined to adopt the plaintiff's view of the whole transaction and convey to him the property upon repayment of the expenses incident to the acquisition of the Land Bank mortgage, plus a reasonable profit. The option, whatever its significance or imperfections, was not made a condition to the passing of the full beneficial interest in the premises to the grantees under plaintiff's deed, and this is sufficient to prevent its indirect enforcement upon the principle of constructive trust.

Also, it must be noted that apart from its vagueness and indefiniteness, while the offer remained unilateral and unaccepted by the plaintiff, the latter had no equity in the premises and the transfer of the property by Dr. Atkinson would involve no breach of legal duty. The same principle would apply where a complete change of ownership had meanwhile taken place—for example, through survivorship of the defendant in this case. It is also worthy of note that the plaintiff must have understood when he made the conveyance to the defendant and her husband by the entirety, such a change of ownership by virtue of the survivorship would terminate his option. Assuming, for argument only, that acceptance of the offer would have made a valid contract, the Court is constrained to hold that the plaintiff did not manifest any desire to purchase the property or accept the offer within what the law would recognize as reasonable time, and the defendant violated no duty by rejecting his demand.

RELATION OF MORTGAGOR AND MORTGAGEE: It is argued that a fiduciary relation existed between the plaintiff as mortgagor and the defendant and Dr. Atkinson as mortgagees when plaintiff executed and delivered to them his deed, raising a presumption of fraud on the part of the mortgagees which they have not rebutted. *Cole v. Boyd, supra.*

While the comparative dates of the execution of the deed and the assigning of the mortgage are in doubt, under the circumstances of this case priority is of little importance. The agreement between the plaintiff and his brother, requiring the latter to acquire or discharge the mortgage, was made and completed before the deed was executed or the mortgage assigned, and at a time when they were at "arms' length," with no fiduciary relation of any sort between them. Both the making of the deed and the acquisition of the mortgage were, therefore, agreed upon, when no fraud or oppression could have existed or have been practiced. Indeed, the acquisition of the mortgage, which between the parties meant extinction of the debt, was mentioned in the deed as part consideration. Under those circumstances, the legal presumption of fraud which, noth-

ing else appearing, arises when the mortgagor conveys to the mortgagee his equity of redemption would serve no purpose in law and does not arise, or, if it does, is rebutted by the very facts of the agreement.

Moreover, under our interpretation of the agreement between the parties, it contemplated a settlement of the mortgage debt by Dr. Atkinson, and under the agreement that was its effect. The relation of mortgagor and mortgagees never actually existed between the parties, because the debt of mortgagor to the Land Bank was extinguished *eo instante* with the assignment to the defendant and her husband, and the mortgage could not have been enforced by them. Notwithstanding the form of the transaction and the fact that the mortgage still remains uncanceled of record, there would have been an equitable estoppel if any attempt had been made to assert the Land Bank mortgage against plaintiff; and this was never at any time attempted. The estoppel is mutual.

If there should be a doubt as to the application of this principle, and we think there should be none, the plaintiff is unable successfully to assert fraud at this late date in view of the plea of the statute of limitation made by the defendant. The fraud of which he complains, if fraud it was, took place 14 July, 1932, according to plaintiff's evidence; the facts were well known to him, and he has given no reason which would operate to postpone the running of the statute.

We are not inadvertent to the testimony of Dr. Brooks to the effect that at about the time of the transaction, but upon a date he could not recall, Dr. Atkinson said that "Tom was about to lose the farm . . . that he did not want the farm to get out of the family, and that he was taking it over for the time being and holding it, hoping Tom would be able to redeem it." It is impossible to say whether this testimony relates, in point of time, to a contemplated or to an antecedent transaction. If it had been the choice of the plaintiff to rely on the establishment of an express trust, such evidence, if more definite in the particulars mentioned, might have been helpful in case it became necessary, by such evidence, to modify the written terms of the deed or of the preliminary agreement. That, however, is not the theory adopted by the plaintiff; nor did he ask for any reformation of his warranty deed on the ground of fraud or mistake. *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028. And there is no ambiguity in them which the testimony would be useful in explaining.

Upon these considerations, we are constrained to hold that the judgment of nonsuit was proper. It is

Affirmed.

STACY, C. J., dissenting: It is in evidence that the plaintiff conveyed his interest and equity in $50,000 worth of property to his brother and

the defendant on the terms set out in the letter of 12 June, 1932. Conceding that no fraud in the treaty has been shown and that the prayer of the complaint may be too broad, still it does not follow that the defendant is entitled to go without day and recover her costs.

The only consideration moving to the plaintiff was that mentioned in the letter of 12 June, 1932, to wit: "For this you shall have ½ the net proceeds of the farm, mill, etc., each year. If the lumber can be sold you can come supt. sell, etc., having ½ the profits. . . . Further you may purchase the entire place mill & all any time you can & wish with a reasonable profit."

Was the "old place," therefore, to be held for the joint benefit of both parties, with the right of the plaintiff at any time he could and wished to purchase the *entire* place, or his brother's interest therein, at a reasonable profit? *Lutz v. Hoyle,* 167 N. C., 632, 83 S. E., 749; *Sykes v. Boone,* 132 N. C., 199, 43 S. E., 645. The plaintiff so understood it, and upon this confidence the conveyance was made. No other consideration passed. *Brogden v. Gibson,* 165 N. C., 16, 80 S. E., 966; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775. Such, also, was the understanding of plaintiff's brother. In a letter dated 2 May, 1942, he expressed regret that he had overlooked plaintiff was "to have a hand in the sale of the lumber, trees, etc."; apologized for inadvertently proceeding in disregard of his rights, and said: "You may come up right now, if you wish, and take charge of the works." *Cunningham v. Long,* 186 N. C., 526, 120 S. E., 81.

In any event, as against a nonsuit, would not the plaintiff be entitled to an accounting for one-half the annual net proceeds from the grantee in possession? *Sandlin v. Yancey,* 224 N. C., 519. Equity shapes its decrees to fit the facts. *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 663. Because the plaintiff has asked for a whole loaf is no reason why he should be denied half a loaf, or even a few crumbs. Neither the form of the action nor the prayer of the complaint is a bar to a lesser recovery. McIntosh on Procedure, 423. However, the plaintiff is not reduced to this extremity.

Nor is plaintiff's grantorship in the deed fatal to the case. *Justice v. Sherard,* 197 N. C., 237, 148 S. E., 241. The terms are in writing, and they furnish the consideration for the transaction. *Anderson v. Harrington,* 163 N. C., 140, 79 S. E., 426; *Shelton v. Shelton,* 58 N. C., 292. The deed itself affords some evidence of the trust. In the warranty is the expression: "that the same is free and clear from all encumbrances except as is made a part of the consideration herein." The cases of *Jones v. Jones,* 164 N. C., 320, 80 S. E., 430, and *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028, are inapposite. See *Allen v. Gooding,* 173 N. C., 93, 91 S. E., 694.

The plaintiff's brother never repudiated the terms of the conveyance during his lifetime. He remitted plaintiff's one-half "division" of the timber sales from time to time, the last remittance being on 2 October, 1942, only a few days before his death. Indeed, had he lived, the matter would have been settled without "any outsider coming into the controversy" according to one of his last letters.

Can the defendant, who takes as grantee in the same deed, successfully claim sole seizin as survivor and repudiate the conditions on which the deed was acquired? *Oil Co. v. Baars,* 224 N. C., 612; *Ballard v. Boyette,* 171 N. C., 24, 86 S. E., 175; *Burns v. McGregor,* 90 N. C., 222; *Blount v. Carroway,* 67 N. C., 396. It is of no consequence that she did not sign the letter of 12 June, 1932. *Holden v. Strickland,* 116 N. C., 185, 21 S. E., 684. Where a conveyance is made on consideration of a confidence, equity will enforce the confidence against the grantee in the conveyance or against one in privity with the grantee. *McFarland v. Harrington,* 178 N. C., 189, 100 S. E., 257; *Cobb v. Edwards,* 117 N. C., 244, 23 S. E., 241; *Owens v. Williams,* 130 N. C., 165, 41 S. E., 93; *Lamb v. Pigford,* 54 N. C., 196; *Brogden v. Gibson, supra,* and cases there cited.

The action readily survives the plea of the statute of limitations. The defendant repudiated the terms of the agreement in 1943—so admitted in the answer—which gave rise to this suit for declaration and impression of trust and for an accounting. Not until such repudiation was the aid of equity invoked or needed. *Peele v. LeRoy,* 222 N. C., 123, 22 S. E. (2d), 244. Moreover, the defendant pleads the 10-year, the 7-year and the 3-year statute of limitations, which within itself is a repudiation of the agreement.

My vote is for a reversal of the judgment of nonsuit.

WINBORNE and DENNY, JJ., concur in dissent.

L. E. TAYLOR v. C. S. SCHAUB, APEX TRANSPORTATION, INC., AND AMERICAN TRUST COMPANY.

(Filed 18 April, 1945.)

1. Pleadings § 16c: Judgments § 32—

The relief sought by T. in a former action by S. against T., in another county, being for an accounting between defendant T. and plaintiff S., arising out of an alleged breach of contract for lease by S. to T. of certain truck operating rights, and the relief asked for by plaintiff T. in the instant case being for a restraining order against defendant S. and other

defendants in favor of T. to preserve alleged rights of T. in the same truck operating franchise, any judgment rendered in the former case would not afford the relief sought in the latter case; nor would a judgment in the former be *res judicata* in the latter.

2. Abatement and Revival § 9: Judgment § 32—

Where a judgment in a pending action would not support a plea of *res judicata* in a second action, and the two actions are not the same and the results sought are dissimilar, a plea in abatement in the second action, on the ground that another action between the parties was then pending, is properly overruled.

APPEAL by defendant Schaub from *Williams, J.,* at December Term, 1944, of DUPLIN.

The plaintiff alleged that he was "the owner of certain operating rights by virtue of which he was permitted to do a transportation business by operating a fleet of trucks in Interstate Commerce"; that on or about 27 August, 1941, the plaintiff, L. E. Taylor, and the defendant, C. S. Schaub, entered into a contract the result of which was that an application was made to the Interstate Commerce Commission for approval of the transfer of the operating authority referred to from L. E. Taylor to C. S. Schaub, which application was approved by said Commission on 13 September, 1941, and upon such approval $3,450.00 became due under said contract to the plaintiff by the defendant Schaub, as well as the obligation by said defendant to furnish the plaintiff leases for the operation by the plaintiff of his trucks in interstate commerce as lessee of said defendant; that said defendant has never paid to the plaintiff the amount he was obligated to pay nor performed the other obligations placed upon him by said contract; but that said defendant did on 13 April, 1943, lease and transfer said operating rights to Apex Transportation, Inc., and did give to said corporation at the same time an option to purchase said operating authority, and thereby failed to preserve to the plaintiff the right to operate his trucks, as lessee, under said contract, and said defendant failed to perform any of the obligations to the plaintiff placed upon him by said contract; and that if the option to purchase be exercised by the Apex Transportation, Inc., the plaintiff would be permanently deprived of all his rights under said contract between him and the defendant Schaub; that the plaintiff did not know of the purported transfer and lease from said defendant to the Apex Transportation, Inc., until several weeks after they had been bargained for, and, upon learning thereof, the plaintiff immediately notified said Apex Transportation, Inc., not to pay to the defendant Schaub any future rents under its lease; that plaintiff is advised and informed, and so alleges, that under stipulation between the parties, rentals have been put in escrow with the American Trust Company and that it now holds

several thousand dollars subject to the check of the Apex Transportation, Inc., and of C. S. Schaub, if and when it is finally decided that said Schaub is entitled to the rental proceeds; that while these funds were being accumulated the plaintiff requested the Interstate Commerce Commission to reopen the case wherein the transfer of the operating authority from the plaintiff Taylor to the defendant Schaub was approved, but said commission refused to so reopen said case; that the plaintiff is advised and believes, and therefore avers that he, the plaintiff, is entitled to have said operating rights transferred back to him by the defendant Schaub because of Schaub's total failure to comply with his contract with respect to the purchase thereof, and because of his failure to grant to the plaintiff leases for the operation of his trucks, as agreed to as a part of his contract with the plaintiff, and if the defendant Schaub is permitted to carry out his lease and sells under the option given by him to the Apex Transportation, Inc., to purchase said operating rights the plaintiff will be permanently deprived of his property rights in the aforesaid operating authority and thereby greatly damaged, as well also by being deprived of the said lease privileges contracted to be furnished him by such defendant; that the American Trust Company may be authorized to pay the funds now in its custody to the defendant Schaub and Apex Transportation, Inc., may exercise their option to purchase the operating rights and pay over the purchase price to defendant Schaub unless restrained from doing so by the court pending the determination of the rights of the parties; that unless the defendant Schaub complies with his contract of purchase from the plaintiff Taylor of the operating rights said contract should be annulled and the operating rights referred to should be restored to the plaintiff Taylor, and the defendant Schaub should have no rights by virtue of said contract; and the rental funds now being held by American Trust Company should be paid over to the plaintiff Taylor and not to defendant Schaub, as the plaintiff is the owner of and entitled to the restoration of the aforesaid operating rights, because of the breach of the contract by the defendant Schaub, and if said rights should not be restored by the court to him, the plaintiff is entitled to recover of the defendant Schaub, because of his breach of contract, the sum of $40,000.00; "12. That the conduct of the said C. S. Schaub hereinbefore related in taking over these rights, without paying the purchase price at the time of the approval of the transfer by the Interstate Commerce Commission, as per agreement, and by his failure to notify this plaintiff of the proposed lease and option agreement with Apex Transportation, Inc., and by the execution of said lease and option agreement, without reserving and providing for lease privileges for this plaintiff for the operation of his trucks and by otherwise failing in all respects to comply with his contract with this plaintiff, constitutes

a wanton and malicious attempt to defraud this plaintiff and deprive him of valuable property rights without consideration.

"13. That if the said C. S. Schaub is permitted to transfer to Apex Transportation, Inc., the operating rights referred to, and if said Apex Transportation, Inc., is permitted to pay over to him the purchase price and the rentals which have accumulated, it will cause this plaintiff irreparable damages.

"Wherefore, the plaintiff prays the Court:

"1. That this complaint be taken as an affidavit for the purpose of the restraining order prayed for.

"2. For an order restraining American Trust Company and/or Apex Transportation, Inc., from paying over to the defendant, C. S. Schaub, any of the funds which have been accumulated as rentals for the operating rights hereinbefore referred to, and from paying to said defendant any sum or sums whatsoever as a consideration in exercising the rights of Apex Transportation, Inc., to purchase said operating rights under the option agreement hereinbefore referred to; and restraining said American Trust Company from honoring any check or checks against said account by C. S. Schaub and Apex Transportation, Inc., until the rights of the parties herein are determined, and also from honoring any check that may be given to C. S. Schaub by Apex Transportation, Inc., representing the purchase price or a part of the purchase price for said operating rights by virtue of the option agreement referred to herein.

"3. For an order restraining C. S. Schaub from collecting any of the rents now being held in escrow by American Trust Company, and from collecting any sum from Apex Transportation, Inc., on the purchase price of the operating rights hereinbefore referred to and from depositing or cashing or otherwise using any check or checks that may have been given or may be given by Apex Transportation, Inc., representing any of the rents above referred to or representing any part of the purchase price on the operating rights which were leased to Apex Transportation, Inc., by the said C. S. Schaub, with option to buy.

"4. For a judgment restoring said operating rights to this plaintiff and requiring Apex Transportation, Inc., and American Trust Company to pay over and deliver to this plaintiff all rents that have accumulated and that may hereafter accumulate, and if the Court shall be of the opinion that the plaintiff is not entitled to have said operating rights restored, then and in such event, for a judgment against C. S. Schaub for $40,000.00 actual damages and $10,000 punitive damages, and for such other and further relief as to the Court may seem just and proper."

The cause came on to be heard by the judge holding the courts of the Sixth Judicial District, on application for a restraining order by the plaintiff, using the complaint as an affidavit for this purpose, and the

said judge considered, ordered, adjudged and decreed that the Apex Transportation, Inc., and the American Trust Company, be restrained from paying to the defendant Schaub any funds accumulated for rentals for the operating rights referred to in the complaint, under lease to Apex Transportation, Inc., by C. S. Schaub, and from paying to defendant Schaub any sum whatsoever as purchase price of said operating rights which resulted from the exercising of the option to purchase which said Schaub gave to said Apex Transportation, Inc., and restraining American Trust Company from honoring any checks against the account of said Schaub and Apex Transportation, Inc., for any of the funds referred to in the complaint, and also restraining said trust company from honoring any check given by Apex Transportation, Inc., to C. S. Schaub representing the purchase price of said operating rights by virtue of the agreement between the transportation and Schaub; and restraining the defendant C. S. Schaub from collecting the funds held by the American Trust Company and arising from rentals of said operating rights, and from collecting any sum from the Apex Transportation, Inc., on the purchase price of said operating rights; and directing the defendants named to show cause why said restraining order should not be continued till the final hearing.

In response to the notice to show cause why the restraining order should not be continued to the final hearing, the defendant Schaub filed answer "That there is another action pending in the Superior Court of Wake County, N. C., between the same parties for the same cause of action, as will fully appear from certified copies of the summons and pleadings in the suit of C. S. Schaub, trading and doing business as Apex Motor Lines, v. L. E. Taylor, trading and doing business as L. E. Taylor & Son, attached hereto as Exhibit 'A,' and made a part of this answer"; that the plaintiff seeks no relief in this action which cannot be obtained in said action pending in Wake County; that the plaintiff is estopped from maintaining this action by admission in his answer and allegation in his further answer and defense in said action pending in Wake County; that the plaintiff Taylor is bound by his undertaking in an application to Interstate Commerce Commission to have a suit remain *in status quo,* said undertaking being to the effect that he, Taylor, stands ready and willing to have an accounting with C. S. Schaub as prayed for by Schaub in his complaint in the action pending in Wake County; that application of the plaintiff to the Interstate Commerce Commission was denied and the plaintiff is now able and bound by his undertaking to have an accounting between him and defendant Schaub taken in the action pending in Wake County in which action not only all the plaintiff's rights referred to in the answer in that action, but also all such rights referred to in the complaint in this action, may be adjudicated;

and plaintiff may not now avoid the effect of his undertaking in the action pending in Wake County by the prosecution of this subsequent action in Duplin County.

The complaint and answer in the action in Wake County which the defendant Schaub set up as a bar to this action are to the effect that the plaintiff therein, C. S. Schaub, as purchaser, and the defendant therein, L. E. Taylor, as seller, entered into a sales agreement for the purchase and sale of certain operating rights, and made application to the Interstate Commerce Commission, under the Motor Carrier Act, 1935, for the substitution of the plaintiff as purchaser in lieu of the defendant as applicant, and for the transfer of the application for a certificate of public convenience and necessity from the defendant to the plaintiff, that the application was approved by the Commission and thereupon, under the contract between them, the transfer became consummated and the plaintiff became indebted to the defendant for the purchase price thereof, to wit: $3,500.00, less $50.00 payment theretofore made thereon; that thereupon the plaintiff undertook to make a settlement with the defendant and to lease the trucks belonging to the defendant for the operation thereof by the defendant as operating agents, as provided in the contract of purchase between the said Taylor and Schaub; that the defendant neglected and failed to co-operate with the plaintiff in carrying out said contract, and continued to operate his trucks in violation of said contract; that this misconduct on the part of the defendant was a breach of said contract and prejudicial to the certificate then pending before the Interstate Commerce Commission; that for more than seven months after plaintiff had endeavored to carry out the contract with defendant, the defendant continued to operate his trucks in his own name in violation of said contract; and the defendant continued to operate his said trucks in violation of his contract and in violation of the rules of interstate commerce notwithstanding the efforts and willingness of the plaintiff to comply with said contract, and "consequently no settlement has ever been had between the plaintiff and the defendant"; that by reason of certain payments made by the plaintiff for the benefit of the defendant "the entire purchase price of said operating rights has become extinguished, and the defendant has become indebted to the plaintiff over and above said contract purchase price in the sum of at least $525.15"; that due to the defendant Taylor's continued failure to comply with said contract with the plaintiff Schaub, and failure to conform to the rules of the Interstate Commerce Commission, and with the law, it was in March, 1943, mutually agreed by the plaintiff and defendant that the lessee operation by the defendant should be discontinued; and that since no settlement has ever been made between plaintiff and defendant, the plaintiff is entitled to an accounting in order "to deter-

mine the amount of money due the plaintiff by the defendant"; that the plaintiff on 13 April, 1943, by and with approval of the Interstate Commerce Commission, leased and transferred the operating rights to the Apex Transportation, Inc., and since said transfer said corporation has been sole operator thereof and in sole control thereof; "Wherefore, plaintiff prays that he have an accounting by and between him and the defendant in order to ascertain the amount due plaintiff by the defendant, and in order that there may be a full and complete settlement by and between the plaintiff and the defendant in all matters growing out of said purchase and sale agreement, and of the said lessee operation as herein set forth; and that plaintiff have and recover judgment against the defendant for the sum of at least $525.15, that the plaintiff have and recover of the defendant all costs hereof and such other and further relief as the Court may consider just and proper."

The defendant Taylor in answer to the complaint of plaintiff Schaub admitted that he and Schaub made application to Interstate Commerce Commission for substitution of plaintiff Schaub for defendant Taylor in certificate of public convenience and necessity, but avers that the plaintiff has violated the contract of transfer between defendant and plaintiff by not paying the purchase price agreed upon and for that reason the plaintiff is not the owner of or entitled to the possession of the said operating authority; the allegation that defendant Taylor refused to make a settlement with plaintiff Schaub is denied, and it is averred that the defendant Taylor stood ready at all times to comply with the terms and conditions of the contract just as soon as the plaintiff made settlement thereunder as he was due to do; that if the plaintiff Schaub had paid the defendant Taylor the amount due, there would have been no delay by this defendant in doing the things contracted for, and any delay or failure on the part of the defendant to carry out the terms of said contract was due to the failure on the part of the plaintiff to pay to the defendant the money due him under said contract; that it is denied that the defendant owed the plaintiff anything for payments made by the plaintiff on behalf of the defendant, it is admitted, however, that the plaintiff paid the defendant $350.00 on the purchase price of $3,500.00 named in the contract for the operating rights; it is specifically denied not only that any settlement has been made between the parties to the contract, but also that any request has been made therefor by the plaintiff; that on 13 April, 1943, the plaintiff attempted to lease and transfer said operating rights to Apex Transportation, Inc., in complete disregard of the rights of the defendant under the contract between plaintiff Schaub and the defendant; and as a further defense the defendant Taylor, on 27 August, 1941, entered into a contract with plaintiff Schaub for the sale of said operating rights and entered into an appli-

cation to the Interstate Commerce Commission for approval of a transfer of the operating authority from defendant Taylor to the plaintiff Schaub, which application was approved 13 September, 1941, at which time the plaintiff Schaub, under his contract with defendant Taylor, became indebted to the defendant Taylor for the balance of the purchase price for said operating authority, namely, $3,450.00; as well as otherwise obligated to make certain leases to the defendant Taylor for the operation of his trucks, in Interstate Commerce, as lessee; that the plaintiff Schaub has never paid the defendant Taylor the amount contracted for and has attempted to transfer the said operating authority to the Apex Transportation, Inc., without preserving for the defendant the permanent leases and operating rights and other services which he had agreed to do in his said contract with the defendant; that the defendant did not know of the attempted transfer by the plaintiff Schaub to the Apex Transportation, Inc., until several weeks thereafter, which constituted a fraud upon the defendant, and the defendant, since the discovery of said fraud, filed petition with the Interstate Commerce Commission for reconsideration of the approval for the substitution or transfer of the certificate, asking that said transfer be declared null and void and that the order approving the application for substitution of plaintiff, as owner, be reopened; that the defendant Taylor "is ready and willing to have an accounting with the plaintiff as soon as the application filed with the Interstate Commerce Commission has been passed on and no intelligent nor proper accounting between the plaintiff and defendant can be had until after it is determined by the Interstate Commerce Commission whether or not the transfer to the plaintiff of the operating rights referred to in the complaint shall be declared null and void"; and it is specifically "alleged that a proper accounting cannot be had until after said application has been disposed of"; "Wherefore, this defendant prays that this case remain *in status quo* until after the Interstate Commerce Commission has passed on the rights of the plaintiff and this defendant with respect to the operating authority referred to in the complaint, and if and when that has been done, this defendant stands ready and willing to have a proper accounting to determine the rights of the parties herein with respect to the things referred to in the complaint and in this answer."

The plaintiff Schaub in a reply filed to the answer filed by the defendant Taylor, admits that on 27 August, 1941, plaintiff and defendant entered into the contract as alleged, and that operating authority referred to therein was on 13 September, 1941, assigned and transferred to plaintiff Schaub from defendant Taylor, whereupon said plaintiff became indebted to said defendant in the sum of $3,450.00, the balance due on purchase price, which amount plaintiff alleges was duly paid by

the payment of $350.00 in cash, "and by way of rentals accruing and becoming due plaintiff by defendant on trucks leased by plaintiff from defendant" and in fact plaintiff has overpaid defendant to the extent of $525.15; admits that on 13 April, 1943, plaintiff assigned and transferred said operating authority to the Apex Transportation, Inc., under operating lease agreement approved by Interstate Commerce Commission, as he, as owner thereof, had a right to do; denies that any fraud was perpetrated upon the defendant Taylor or that he was thereby wrongfully deprived of any right, since he had previously sold and assigned any and all rights which he had therein to the plaintiff; that the defendant Taylor had no enforceable rights under said contract, except to collect the purchase price of said operating authority, and that any agreement in said contract relative to the leasing of trucks was incapable of definite interpretation and was terminable at will; denies that "a proper accounting cannot be had between plaintiff and defendant, or that an adjudication herein of their contract rights cannot be had until after said matter is considered by the Interstate Commerce Commission for that said Interstate Commerce Commission has no jurisdiction to adjudicate the contract rights arising between the plaintiff and the defendant, or of the rights to an accounting between them under said contract; but on the contrary this Court has complete jurisdiction thereof," whereupon the plaintiff renews the prayers contained in the complaint.

On 19 December, 1944, at Sanford, his Honor, Williams, judge holding the courts of the 6th Judicial District, after hearing the contentions of the parties, denied the plea in abatement filed by defendant Schaub and overruled the defendant's motion to dismiss the action, and continued the restraining order till the final hearing. Pending the final hearing, however, the Apex Transportation, Inc., is authorized to pay to the American Trust Company, as stakeholder, such payments and rents as are or may become due, subject to the final determination of the rights of the parties to this action, to be paid out on the further orders of this Court; all conditioned upon the plaintiff Schaub increasing the undertaking heretofore given by him.

To the refusal of the court to grant his motion that the action abate and that the restraining order be dissolved, and to the refusal of the court to grant his motion that the action abate as to him, defendant Schaub, and the restraining order as to him, defendant Schaub, be dissolved, the defendant Schaub preserved exception, and appealed to the Supreme Court.

The Apex Transportation, Inc., filed answer to the effect that it, said transportation, on or about 13 April, 1943, purchased the operating rights referred to in the complaint from the defendant Schaub, who

was clothed with all indicia of ownership, and without any knowledge of the claim of the plaintiff Taylor to such ownership, and that it was an innocent purchaser for value of said operating authority; and that the plaintiff Taylor, having clothed the defendant Schaub with all indicia of ownership of such operating authority, is now estopped to deny the title of the Apex Transportation, Inc., and pleads such estoppel in bar of the plaintiff Taylor's right to recover said operating authority; and prays that it be adjudged the owner of said operating rights subject to the payments of the balance of the purchase price, and that it be directed as to whom such balances should be made. No appeal was taken by the Apex Transportation, Inc.

R. D. Johnson and Langston, Allen & Taylor for plaintiff Taylor, appellee.

R. Roy Carter and Murray Allen for defendant C. S. Schaub, appellant.

SCHENCK, J. The denial of his Honor of the defendant Schaub's motion to abate the plaintiff Taylor's action and to dissolve the restraining order theretofore issued and the making by the defendant Schaub, the appellant, of such ruling on the part of the court the bases of exceptive assignments of error raise the determinative question posed on this appeal, namely: Was there another action pending in the Superior Court of Wake County between the same parties and involving the same causes of action as are involved in the instant case pending in the Superior Court of Duplin County? If the answer is in the negative his Honor's ruling was correct; if, on the other hand, the answer is in the affirmative his Honor's ruling was in error.

In the instant case, pending in the Superior Court of Duplin County, the plaintiff Taylor seeks to have the defendant American Trust Company and/or Apex Transportation, Inc., restrained from turning over to defendant Schaub any funds in payment of the operating rights which Schaub is alleged to have contracted to lease, with option to purchase, to Apex Transportation, Inc., and to restrain Schaub from collecting any of the funds held in escrow by the American Trust Company or any funds from the Apex Transportation, Inc., on the purchase price of said operating rights; and seeks further to have judgment restoring to the plaintiff Taylor said operating rights and to recover all rents that accumulate on said operating rights, or in the event the plaintiff cannot recover said operating rights that plaintiff recover $40,000.00 damages of the defendant Schaub.

The instant case pending in Duplin County is to restrain some of the defendants from paying over certain funds arising from rental and sale

of the operating rights, and to restrain the defendant Schaub from collecting any such funds; the object of such restraining order being to prevent the consummation of the contract of purchase and sale of the operating rights alleged to have been wrongfully entered into by defendant Schaub with the defendant Apex Transportation, Inc., in derogation of the rights of the plaintiff Taylor. In other words, the principal purpose of the instant case in Duplin County is to restrain any action which would render the plaintiff Taylor's suit to recover back the operating rights ineffective. Whereas in the former case pending in Wake County, the defendant therein, being the same person as the plaintiff in the instant case, the principal purpose of the defendant Taylor, as evidence by his admissions in his answer and averments in his further defense, was to obtain an accounting between him, Taylor, and the plaintiff Schaub of the matters and things growing out of the contract between them of purchase and sale of the operating rights.

The relief sought by Taylor in the former case being for an accounting between defendant Taylor and plaintiff Schaub and in the instant case being for a restraining order against defendant Schaub and others in favor of plaintiff Taylor, any judgment rendered in the former case would not afford the relief sought in the latter case; nor would a judgment in the former case be *res judicata* in the latter case.

It would therefore seem that a negative answer to the question posed is indicated and that his Honor was correct in disallowing the motion of the defendant Schaub to abate the latter action. "In accordance with the rule that the relief sought in both actions must be the same in all material respects, a test frequently applied in determining the identity of the causes of action, and which is applicable in equity, as well as law, is, whether the relief sought in the second action, to which abatement is pleaded, is fully covered by, and obtainable under, the relief asked in the prior action, which is pleaded in abatement, that is, is a judgment based on the cause of action alleged in the second action legally possible in the first action, which was brought for the purpose of obtaining such judgment. Under this test a second action should be abated, if the party who institutes it is able to obtain in the prior pending action all the relief which he asks in the second, or to which he is entitled; or, as otherwise expressed, a second action should be abated where every material right or question asserted therein could be adjudicated in the prior pending action, or where the whole purpose of the second action is attainable in the first, or where the prior action is effectual and the party can obtain his remedy therein as completely as in the second action." 1 C. J. S., Abatement and Revival, par. 43; 1 Am. Jur., Abatement and Revival, pars. 28 *et seq.*

"Where a judgment in a pending action would not support a plea of *res judicata* in a second action, and the two actions are not the same and the results sought are dissimilar, a plea in abatement in the second action on the ground that another action between the parties was then pending is properly overruled." Syllabus of *Comr. of Banks v. Gavin,* 202 N. C., 843, 163 S. E., 682.

"The plea in abatement was properly overruled. *Hawkins v. Hughes,* 87 N. C., 115. The causes of action are different in the two suits. A final judgment in the action brought in Vance County would not support a plea of *res judicata* in the subsequent proceeding instituted in Warren County. This is one of the tests of identity. *Bank v. Broadhurst,* 197 N. C., 365, 148 S. E., 452. In short, the two suits are unlike: the causes of action are not the same; and the results sought are dissimilar. 1 C. J., 56. This renders the plea in abatement bad." *Brown v. Polk,* 201 N. C., 375, 160 S. E., 357.

The plaintiff in the instant case, Taylor, is not estopped to maintain the action in Duplin County, for the reason that no counterclaim was pleaded in the former action in Wake County by the defendant Schaub, and this action in Duplin County is against the defendant Schaub for transferring the operating rights of the plaintiff Taylor, without his knowledge and consent, and in fraud of his rights to operate his trucks, as he had theretofore done, and for return of said rights, or in the event he could not recover said rights, for damages for the loss thereof; and against the Apex Transportation, Inc., to whom such rights had been transferred for any amount due for the purchase of said rights and any rentals accruing thereon; and against the American Trust Company to follow the funds so accruing; the last two defendants were not made parties to the first action, which was brought for an accounting, and no judgment in that action would be binding upon them.

The present status is the action in Wake County of Schaub v. Taylor for an accounting, and the action in Duplin County of Taylor against Schaub and two other defendants, to which the defendant Schaub has filed plea in abatement and motion to dismiss, and his codefendant, Apex Transportation, Inc., has filed answer to the merits. Under these circumstances his Honor committed no error in denying the plea in abatement and overruling the motion to dismiss for the reason that another case was pending between the same parties for the same cause of action and his order should be affirmed, and it is so ordered.

Affirmed.

MAX PERRY v. B. R. ALFORD AND J. M. ALFORD (ORIGINAL PARTIES DEFENDANT) AND O. L. ARNOLD (ADDITIONAL PARTY DEFENDANT).

(Filed 18 April, 1945.)

1. Adverse Possession § 6—

Where plaintiff alleges title by adverse possession under color but produces no evidence of acts of asserted dominion and possession, whatever acts of possession, previously exercised by his predecessors in title, were discontinued and cannot avail him.

2. Adverse Possession § 1—

The listing and payment of taxes on land may be a relevant fact in connection with other circumstances tending to show claim of title, but not sufficient alone to show adverse possession.

3. Same—

Adverse possession must have been actual, open, continuous, and denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible.

4. Adverse Possession § 19—

In an action for trespass, title being involved and plaintiff alleging adverse possession under color, where plaintiff's evidence tended to show that he lived ten or more miles from the land and saw it about once a year, that he never cultivated it, never sold or cut timber or wood, never built on it, or fenced it, but just recorded his deed and paid the taxes, there is no evidence of adverse possession and motion for judgment as of nonsuit was properly allowed.

APPEAL by plaintiff from *Rudisill, Special Judge,* at November Term, 1944, of FRANKLIN. Affirmed.

This was an action to recover damages for wrongful cutting of timber on land alleged to belong to the plaintiff. Defendants denied plaintiff's title. At the conclusion of the evidence defendants' motion for judgment of nonsuit was allowed, and plaintiff appealed.

G. M. Beam for plaintiff, appellant.
Malone & Malone for O. L. Arnold, appellee.
Lumpkin & Lumpkin for B. R. Alford and J. M. Alford, appellees.

DEVIN, J. The action was for trespass on land, and title was drawn in question. Plaintiff claimed under deed from David R. Arnold and wife dated 1 December, 1932, purporting to convey 33 acres of described land. Plaintiff admitted want of title in his grantors, but asserted adverse possession under the deed as color of title for more than seven years, sufficient to vest title under the statute, G. S., 1-38. This the defendants denied.

Upon the hearing the court below was of opinion that the evidence of adverse possession offered by plaintiff was insufficient to carry the case to the jury and granted defendants' motion for judgment of nonsuit. Plaintiff's appeal presents the question of the propriety of this ruling.

From the plaintiff's testimony it appeared that he lived ten or twelve miles from the land and only saw it about once a year; that the land had been in cultivation at one time but since he took his deed had been permitted to grow up in broomstraw and small pines; that on one occasion he permitted O. L. Coley to cut a few cedar posts. He testified: "I claim possession because I have a deed that is recorded and I have been paying the taxes. I have not been in possession any more than what Coley and Ode Arnold both told me—told me it was my land. I have never cultivated any of the land, never sold any timber, cut any wood, built any house on it or put any fence around any of it. I have just recorded the deed and paid the taxes since 1932."

We think this evidence, considered in the light most favorable for the plaintiff, fails to show such acts of asserted dominion and possession as would constitute adverse possession as defined by this Court in *Locklear v. Savage,* 159 N. C., 236, 74 S. E. 347; *Vance v. Guy,* 223 N. C., 409; *Berry v. Coppermith,* 212 N. C., 50, 193 S. E., 3; *Alexander v. Cedar Works,* 177 N. C., 137, 98 S. E., 312. Whatever acts of possession had been previously exercised by plaintiff's predecessors in title were discontinued, and cannot avail him on this record. *Malloy v. Bruden,* 86 N. C., 251. The listing and payment of taxes on the land might be a relevant fact in connection with other circumstances tending to show claim of title, but not sufficient by itself to show adverse possession. *Christman v. Hilliard,* 167 N. C., 4 (7); *Ruffin v. Overby,* 88 N. C., 369 (373); *Malloy v. Bruden,* 86 N. C., 251. To constitute adverse possession the possession must have been actual, open, continuous, and denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible. *Currie v. Gilchrist,* 147 N. C., 648, 61 S. E., 581; *Alexander v. Cedar Works, supra;* 1 Am. Jur., 865, 877.

Plaintiff's exception to the court's ruling in sustaining objection to a propounded question whether defendant O. L. Arnold had entered into possession of an adjoining tract is without merit. Evidence relating to an alleged oral exchange of lands between plaintiff's grantor and his brother, if competent, could not aid the plaintiff on the issue of title here presented. Nor was the exclusion of secondary evidence as to lost tax records for certain years prejudicial to the plaintiff, since his payment of all taxes, if admitted, must be held insufficient to carry the case to the jury on the question of adverse possession. *Ruffin v. Overby, supra.*

Judgment affirmed.

STATE v. WILLIE CRANDALL.

(Filed 2 May, 1945.)

1. Assault and Battery § 14: Constitutional Law § 32—

In case of an assault with a deadly weapon, the person convicted (or one who pleads guilty) shall be punished by fine or imprisonment, or both, at the discretion of the court. G. S., 14-33. And, when no time is fixed by the statute, imprisonment for two years will not be held to be cruel or unusual and violative of Art. I, sec. 14, of the Constitution of North Carolina.

2. Criminal Law § 17—

The retraction or withdrawal of a plea of guilty, made by a defendant in a recorder's court, is not a matter of right when the case has been appealed to the Superior Court, and motion to be allowed to so retract is addressed to the sound discretion of the court.

3. Criminal Law §§ 14½, 17—

Where a defendant pleads guilty in a court inferior to the Superior Court, such as a recorder's court, and that fact appears upon the face of the record as it comes to the Superior Court on his appeal from a judgment of the inferior court, his appeal cannot call into question the facts charged, but brings up for review only matters of law, and the defendant is not entitled to a trial *de novo*.

4. Criminal Law §§ 17, 33—

A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which defendant is arraigned.

5. Appeal and Error § 49b—

The law discussed in any opinion is set within the framework of that particular case.

6. Criminal Law § 17—

Where a plea of guilty is general it covers all offenses charged in the warrant or in the indictment.

BARNHILL, J., dissenting.

SCHENCK and SEAWELL, JJ., concur in dissent.

APPEAL by defendant from *Burney, J.*, at January Term, 1945, of BEAUFORT.

Criminal prosecution begun in the recorder's court for Washington, Long Acre, Chocowinity and part of Bath Townships in Beaufort County, North Carolina, upon a warrant issued out of said court, charging defendant with assault upon one J. E. Roberson (1) with a deadly weapon, to wit, a bicycle, and (2) with a deadly weapon, to wit, a shotgun.

The record proper shows that upon trial in the recorder's court defendant pleaded guilty. Thereupon the court entered judgment reciting therein that "Upon the trial of this case the defendant pleads guilty," and ordering and adjudging that he be confined in the common jail of Beaufort County for two years to be assigned to work the roads. From this judgment defendant appealed to Superior Court.

When the case came on for hearing on such appeal the court in its discretion refused to allow defendant to withdraw the plea of guilty entered in the recorder's court and, after hearing evidence offered by both State and defendant, entered judgment that defendant be confined in the common jail of Beaufort County and assigned to work under the direction of the State Highway and Public Works Commission for a term of two years upon the charge of assault with a deadly weapon to which he had heretofore pleaded guilty. (It is noted here that in the original transcript of the record as filed in this Court on this appeal the last clause in the judgment reads: "To which charge the defendant had heretofore pleaded not guilty." But the Clerk of the Superior Court of Beaufort County, in response to request from this Court, has sent up a certified copy of the judgment as it appears of record in his office, and as so certified the clause reads: "To which charge the defendant had heretofore pleaded guilty").

Defendant excepted to this judgment and appeals to Supreme Court, and assigns error.

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

H. S. Ward for defendant, appellant.

WINBORNE, J. The only assignment of error appearing in the record on this appeal is to the judgment as signed in the Superior Court. As grounds for the exception to the judgment, stated in brief filed through counsel for defendant, two questions are submitted for consideration, substantially these: First: That the imposition of the sentence of two years in prison, after having heard the evidence, as set forth in the judgment, taken in connection with the refusal of the court to allow a retraction or withdrawal of the plea of guilty in accordance with motion of defendant, constituted an abuse of discretion, designated by counsel for the defendant as "an erroneous view of the discretion" exercised in regard to both the refusal of the motion and the punishment imposed. Thus, apparently, it is conceded that in both respects the subjects were addressed to the sound discretion of the court, and are not matters of right.

As to the punishment imposed: The pertinent statute, G. S., 14-33, provides that "in all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court," subject to provisos not applicable here. And the decisions of this Court are to the effect that when no time is fixed by the statute, imprisonment for two years, as in the case at bar, will not be held to be cruel and unusual, and violative of Article I, section 14, of the Constitution of North Carolina. See *S. v. Moschoures,* 214 N. C., 321, 199 S. E., 92, citing *S. v. Farrington,* 141 N. C., 844, 53 S. E., 954; *S. v. Daniels,* 197 N. C., 285, 148 S. E., 244, and cases there cited.

As to refusal of motion to allow defendant to retract or withdraw the plea of guilty entered by him in recorder's court: Such a retraction is not a matter of right, and a motion to be allowed to so retract is addressed to the sound discretion of the court. *S. v. Branner,* 149 N. C., 559, 63 S. E., 169. Furthermore, where a defendant pleads guilty in a court inferior to the Superior Court, such as the recorder's court in this case, and that fact appears upon the face of the record as it comes to the Superior Court on his appeal from a judgment of the inferior court, his appeal cannot call into question the facts charged, but brings up for review only matters of law, and the defendant is not entitled to a trial *de novo. S. v. Warren,* 113 N. C., 683, 18 S. E., 498.

In the *Warren case, supra,* the Court, distinguishing it from the case *S. v. Koonce,* 108 N. C., 752, 12 S. E., 1032, held that the defendant had restricted himself by his plea of guilty, and that on such plea there can be no facts left open for consideration by a jury and, hence, the sole question presented for review on appeal to Superior Court is one of law. The *Warren case, supra,* is similar in factual situation to the case in hand. When defendant there was brought to trial before the justice of the peace he pleaded guilty and was ordered to pay a fine and costs. He appealed to Superior Court and the record on such appeal revealed the fact that he had so pleaded. Here, a plea of guilty was entered on the trial in a recorder's court and likewise appeared in the record on appeal to the Superior Court. The provisions of the statute relating to appeals from judgments of a justice of the peace in criminal cases, G. S., 15-177, and provisions of the act relating to appeals from judgments of the recorder's court in which defendant was tried, Public-Local Laws 1911, chapter 74, sec. 7 (e), are similar. In the former, it is provided that "in all cases of appeal, the trial shall be anew, without prejudice from the former proceedings." In the latter, it is provided that "upon such appeal the trial in Superior Court shall be *de novo* on papers certified from said recorder's court." Hence, the law as declared in *S. v. Warren, supra,* is applicable and controlling here. "A plea of guilty is not only

an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned." *Walker, J.*, in *S. v. Branner, supra.*

In this connection attention has been given to the cases *S. v. Ingram,* 204 N. C., 557, 168 S. E., 837; *S. v. McKnight,* 210 N. C., 57, 185 S. E., 437, and to *S. v. Cox,* 216 N. C., 424, 5 S. E. (2d), 125. These cases are distinguishable from that in hand.

The statement in the *Ingram case, supra,* that the plea of defendant was admissible against him upon the trial in Superior Court must be read in connection with the facts of the case, that is, that the record of the municipal court failed to show on its face that the defendant had pleaded guilty in that court and on the trial in the Superior Court parol testimony offered by the State was admitted tending to show that one of the two defendants had pleaded guilty in the municipal court. Reference to the record reveals that exception to this evidence related to its competency. In the *McKnight case, supra,* the record as it came from the recorder's court failed to show that the defendant entered a plea of guilty in that court, and this Court held that, without resorting to *certiorari* or *recordari,* the judge exceeded his authority in undertaking *dehors* the record to determine the question as to the plea of defendant in recorder's court. And in the case *S. v. Cox,* 216 N. C., 424, 5 S. E. (2d), 125, it is expressly stated that the question as to whether the case was in Superior Court for review or for trial *de novo*—defendant having pleaded *nolo contendere* in the county court—was not presented for determination on that appeal. "The law discussed in any opinion is set within the framework of that particular case." *Barnhill, J.*, in *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10. See also *S. v. Utley,* 223 N. C., 39, 25 S. E. (2d), 195; *S. v. Boyd,* 223 N. C., 79, 25 S. E. (2d), 456; *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466.

The hearing of evidence in the Superior Court was only for the purpose of enabling the court to pass upon the validity of the judgment of the recorder's court. And while it appears from the judgment entered in Superior Court that defendant was sentenced by the Superior Court, and to a term in prison, the length of the terms of imprisonment named in the two judgments is the same. Hence, the judgment of the Superior Court is tantamount to an affirmance of the judgment of the recorder's court. Therefore, on this record we are not called upon to say whether the Superior Court may or may not impose a greater or less sentence than was imposed by the inferior court from which the appeal is taken. The plea of guilty forecloses any further consideration of the facts.

Second: That the judgment of Superior Court referred to one charge to which defendant pleaded "not guilty," and hence that it is not clear to which charge the sentence related. This is clarified by the certified

copy of the judgment sent up at the request of this Court as set forth hereinabove in statement of the case. The plea of guilty appears to have been general, and covers all offenses charged in the warrant.

The judgment below is

Affirmed.

BARNHILL, J., dissenting: Three men were standing in a lane. Defendant approached on a bicycle and ran into one of them, the prosecuting witness, J. E. Roberson, and knocked him down. Roberson got up and said, "I ought to take this piece of board up and knock you in the head." Defendant replied, "Wait a minute, God damn you, I will get you." He then went off and got a gun but did not get nearer than 200 or 250 yards of Roberson. He testified the bicycle incident was an accident. Roberson said he thought so too until defendant replied to him in an angry tone.

Upon this evidence, stated in the light most favorable to the State, defendant was arrested under a warrant charging an assault with a deadly weapon, a bicycle, and also with a gun. At the trial he was without counsel and the record indicates that he pleaded guilty. Sentence of two years was imposed. He appealed to the Superior Court.

When the cause came on for hearing in the Superior Court, his counsel attempted to withdraw his plea of guilty and enter a plea of not guilty. His motion was denied and the court proceeded as if it was an appellate court of review, and, after hearing the evidence, pronounced judgment of two years imprisonment. The majority opinion approves. My view of the law is such that I am unable to concur.

It is said the court, in denying the defendant's motion to be allowed to enter a plea of not guilty, was exercising a discretionary power. But labels have little significance in the face of actuality. The inevitable result of the ruling was to deny the defendant a trial *de novo*. Instead, the court heard the evidence and imposed sentence without the intervention of a jury. This procedure is challenged by exception to the judgment. In deciding the question thus presented we are not circumscribed by or confined to the argument of counsel. It is the action of the judge—not the lawyer—that is under review.

So then the one question presented on this appeal is this: Was the defendant entitled to a trial *de novo* in the Superior Court? If so, he has been denied a substantial right.

The majority conclude that defendant on appeal was bound by his plea in the recorder's court and therefore he had no right to a trial *de novo*.

If only a question of procedure were presented, I would assent, but a vital question of substantial right is involved. Hence I must enter my dissent and give my reasons for so doing.

The pertinent statute, chapter 74, Public-Local Laws 1911, gives a defendant convicted in the inferior court thereby created a right of appeal and provides that "upon such appeal the trial in the Superior Court shall be *de novo* on papers certified from said recorder's court." About this there is no division of opinion.

The ideal system, no doubt, would provide one trial and one trial only, with the right of a review for alleged error in law. But, as yet, we have not reached perfection. We still maintain inferior courts which are not courts of record. They are "one man" courts. Their presiding officers, oftentimes, are not trained in the law. It is not unusual for defendants to appear without counsel. Procedure is more or less informal and at times without regard to the rules of evidence. On appeal no "case on appeal" is possible. A review by an appellate court of errors is a practical impossibility.

The law recognizes the nature, quality, and composition of these tribunals, set up for the purpose of providing speedy and inexpensive trial of petty causes. It treats their weaknesses realistically and gives the litigant adequate protection by providing the only sensible alternative—an appeal with the right to a trial *de novo.*

Thus it constitutes the Superior Court an appellate trial court. It does not review errors of law. It retries a cause anew. Unless expressly authorized by statute, as in case of general county courts, it does not exercise the functions of an appellate court of review.

Here the pertinent statute assures a trial *de novo.* The term is general, without restriction or limitation. So then we come to the question: What is the significance of the term—what is a trial *de novo?*

De novo means fresh; anew. *Estes v. Denver & R. G. R. Co.,* 113 Pac., 1005. It means anew, over again, and without any presumptions in favor of the justice's judgment. *Slaughter v. Martin,* 63 So., 689. The case stands as a new cause, *Snoden v. Humphries,* 2 N. C., 21, and is to be tried on the whole merits anew. *S. v. Koonce,* 108 N. C., 752. It should be unaffected by proceedings in the lower court, *Southern Casualty Co. v. Fulkerson,* 30 S. W. (2d), 911, and is to proceed as if there had been no trial. *S. v. McAlpin,* 26 N. C., 140; *Karcher v. Green,* 32 Atl., 225; *Nichols v. Vinson,* 32 Atl., 225.

The trial in the appellate court is to be had on the warrant, *S. v. Boykin,* 211 N. C., 407, 191 S. E., 18, as though it originated in the appellate court. *Vinyard v. Republic Iron & Steel Co.,* 87 So., 552; *S. v. Goff,* 205 N. C., 545, 172 S. E., 407, and cases cited; *Bullard v. McArdle,* 35 Am. St. Rep., 176.

Article I, section 13, of our Constitution guarantees to a defendant in a criminal prosecution the right to trial by jury. It also permits other means of trial for petty misdemeanors, with the right of appeal.

We have repeatedly held that the right of appeal thus required is the means adopted to preserve the defendant's constitutional right to a jury trial.

On an appeal in a criminal action from an inferior court the trial in the Superior Court is *de novo*. When the defendant asserts his right of appeal and the case comes up in the Superior Court, the defendant's right of trial by jury as guaranteed by the Constitution is preserved to him. *S. v. Brittain,* 143 N. C., 668; *S. v. Pasley,* 180 N. C., 695, 104 S. E., 533; *S. v. Jones,* 139 N. C., 612; *S. v. Shine,* 149 N. C., 480.

The unrestricted appeal from a sentence in an inferior court granted the defendant by statute protects a defendant's right to trial by jury guaranteed by the Constitution, *S. v. Lytle,* 138 N. C., 738, and inasmuch as the trial in the Superior Court is *de novo,* alleged errors committed in the inferior court must be disregarded. *S. v. Brittain, supra; S. v. Hyman,* 164 N. C., 411, 79 S. E., 284.

If I correctly evaluate the substance of these decisions, then the right of appeal is unrestricted. Defendant's plea is withdrawn by operation of law and the cause is to be tried again from the beginning as if it originated in the Superior Court, unprejudiced by any proceeding in the inferior court. Thus the defendant is guaranteed the right to replead and to trial by jury.

The Superior Court, as stated, is an appellate trial court and not an appellate court of review. It is not its prerogative to review trials in inferior courts for the purpose of discovering and correcting error. When a cause reaches it on appeal, it is to be again tried from the beginning, anew, as if it originated in that court. Trial *de novo* can have no other meaning.

This view is sustained by the decision in *S. v. Koonce, supra.* There the defendant was convicted in a magistrate's court. He then moved in arrest of judgment. The motion was denied and he appealed. Thus his appeal, strictly speaking, presented only a question of law. In the Superior Court he stated he wished to be heard on that question alone. The judge overruled the motion in arrest of judgment and pronounced judgment. This Court remanded, saying in part:

"The motion in the Superior Court to arrest the judgment in the court of the justice of the peace had no pertinency, because the action was there to be tried anew and without regard to the verdict, motions and judgment before the justice of the peace. The Superior Court was not a court of errors—it had jurisdiction to try and dispose of the case, which it obtained by virtue of the appeal. . . . The court should have

required him to plead or demur. If he pleaded not guilty he should have been put upon his trial. If he pleaded *nolo contendere,* or guilty, the court might have proceeded to give judgment. But there was no trial, no verdict of a jury, no plea that warranted the judgment from which the defendant appealed."

The appeal annuls the judgment of the inferior court. There is nothing to review. *S. v. Goff, supra.*

The one case cited in support of the majority view is *S. v. Warren,* 113 N. C., 683. A careful examination of that decision will disclose that it is not authoritative. The facts as disclosed by the original record are these: The defendant was arrested on a warrant charging a misdemeanor. In the trial before the justice of the peace he entered a plea of guilty and then appealed from the sentence imposed. In the Superior Court he entered a plea of not guilty and was convicted by a jury. His counsel then moved in arrest of judgment for that the Act under which he was tried, ch. 42, Public Laws 1891, was unconstitutional. Judgment was arrested and the State appealed. This Court reversed.

Thus the sole legal question presented in that case was the constitutionality of the Act under which the defendant was tried. The discussion of procedure was superfluous *dicta* of the author entirely alien to the legal question presented. The other Justices who, by their vote, concurred in the opinion were not bound thereby. Neither are we.

If, however, it is to be assumed that the point here presented was there decided, then in my opinion the decision is in direct conflict with the statutory provision giving defendant an unrestricted right of appeal and assuring him a trial *de novo.* For that reason it is unsound. The error, once made, should not be perpetuated.

S. v. Branner, 149 N. C., 559, is cited in support of the conclusion that a plea of guilty once entered may not be withdrawn as a matter of right. But there the Court is discussing procedure in the Superior Court. Having entered a plea of guilty, the defendant may offer evidence for the purpose of portraying, in mitigation, the circumstances under which the crime was committed, but he may not deny the fact of guilt. This is sound for, otherwise, he would be permitted to both admit and deny guilt in the same hearing.

As I view it, however, this rule does not apply to a plea entered in an inferior court when the trial is to be had *de novo* in the appellate court. To so hold is to deny him the protection of the statute which guarantees to him a trial afresh, from the beginning, with all the attendant rights.

There is a further reason why the procedure in the court below should be held for error. The court undertook to act as an appellate court of review. When acting in such capacity it could do nothing more than affirm or reverse the judgment of the justice of the peace. It went fur-

ther and pronounced independent judgment of imprisonment on the facts presented to it on the hearing—and this was done without a plea or verdict in that court.

I vote to remand for trial.

SCHENCK and SEAWELL, JJ., concur in dissent.

WILLIAM KEARNEY, ELIZA GREGORY AND CARRIE RICHARDSON v. JENNIE THOMAS.

(Filed 2 May, 1945.)

1. Evidence § 3: Constitutional Law § 23—

The Federal statute implements the Constitution in requiring that full faith and credit be given in each state to the public acts, records and judicial proceedings of every other state, and requires certified copies of records to be admitted in evidence when authenticated as provided by the statute. It is not intended to supplant, nor does it supplant, other modes of proof recognized as competent in the jurisdiction where the exemplification is to be made.

2. Evidence §§ 3, 34—

The purpose of certification is to avoid the necessity of bringing original documents from the places where they are kept, or of presenting witnesses who have compared copies with the original—a method still permissible under the common law.

3. Same—

Authentication guarantees that the original of the copy genuinely exists, as exemplified, and this is attained by showing: (a) The authority of the person certifying, or that he is the keeper of the record; (b) his present incumbency of the office; and (c) the genuineness of his *signature* or *seal*.

4. Same—

Where a marriage license and marriage certificate of record in the Hustings Court of the City of Petersburg, Va., attested by the signature of the Clerk of said court, has attached thereto a certificate of the Presiding judge of said court, under his hand and the seal of said court, that the said Clerk is the duly qualified and commissioned Clerk of said court and that the attestation on the said license and marriage certificate is in due form as provided by the laws of Virginia and made by the proper officer, and in turn the same seal is used by the Clerk of said court in certifying the official character of the Judge, the admission of these documents and certificates in evidence will not be held for error.

5. Marriage § 5—

A second or subsequent marriage is presumed legal until the contrary be proven, and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. The plaintiff cannot recover because of the failure of defendant to carry the burden.

6. Evidence § 6—

The laws of evidence do not recognize a presumption on a presumption. The facts upon which a presumption is based must be proved by direct evidence.

7. Same—

There is no genuine presumption of the continuance of a particular human life, with a uniform application. The pleadings will show whose duty it is to prove that a particular person was living at a certain time, and, upon his showing the mere fact of life at a preceding date, the court will usually leave it to the jury to say whether he has proved his case.

8. Trial § 27a: Evidence § 6—

There is no such thing as a directed verdict while the credibility of the evidence is still a matter for the jury; and it always is for the jury where the demand is for an affirmative finding in favor of the party having the burden, even though the evidence be uncontradicted.

9. Trial § 32—

Where no prayer for instruction, as required by G. S., 1-181, appears in the record, this Court cannot indulge in speculation as to its form.

APPEAL by plaintiffs from *Thompson, J.*, at September Term, 1944, of WARREN.

Plaintiffs are children and heirs at law of Alexander Kearney, who died intestate in Vance County in December, 1943.

The said Kearney was first married to Marina Israel some time in the year 1881, and plaintiffs were born to that marriage.

The plaintiffs, as they grew up, removed to other states; and in 1916 or 1917, Marina followed them, and thereafter resided outside of North Carolina.

Some time after Marina left the State, Alex Kearney married Jennie Thomas, the present defendant. That marriage appears to have taken place in Petersburg, Virginia, in January, 1919.

The controversy is over two small tracts of land of about one acre each, one of which was conveyed 3 July, 1922, by John S. Plummer to Alex Kearney as sole grantee, and the other of which was conveyed 20 September, 1921, by Margaret Hooper to "Alex Kearney and Jennie Kearney, man and wife." There was no change of title during the life-time of Alex Kearney.

The plaintiffs contend that the second marriage to Alex Kearney was bigamous and void because consummated during the lifetime of their mother, the first wife, and in the absence of any divorce. Upon this, they contend that defendant has no dower interest in the tract of land first mentioned and no legal right in the second tract, in which she is, as they claim, mistakenly referred to as the wife. They claim that the entire and unencumbered interest in both tracts descended to them as heirs at law upon the death of their father.

That part of the evidence taken upon the trial pertinent to this appeal may be summarized as follows:

The plaintiffs introduced the license and record relating to the marriage of Alexander Kearney and Marina Israel, showing that the same took place on the first day of June, 1881.

Eliza Gregory, one of the plaintiffs, testified that she had been living in New Jersey since 1902; that her mother left Vance County in 1916 or 1917 and went to live with a sister of the witness, Carrie Richardson, in Virginia. She lived there about six years, and then came to live with the witness in New Jersey; later she lived with William Kearney in Philadelphia until she died at his house in July, 1941.

Carrie Richardson, another plaintiff, testified that she left the home at Henderson when she was about sixteen or seventeen years old and went to New Jersey to live. About 1916, her mother left Henderson and came to live with witness at Williamsburg, Virginia. After about six years, she went to live with Eliza Gregory at Princeton, N. J.; about six years thereafter, she went to live with her son, William Kearney, in Philadelphia, and died there in 1941.

William Kearney testified that his mother, after living with Carrie Richardson and Eliza Gregory, was taken to his home in 1928, and lived there with him until her death, which took place in 1941.

The defendant introduced the deeds covering the lands described in the complaint—one in which Alex Kearney was the sole grantee, and the other in which Alex Kearney and Jennie Kearney, "man and wife," were the grantees.

Edward H. Hendrick testified for the defendant that he had lived in Warrenton all his life and knew Alex Kearney and his wife, Jennie T. Kearney. The reputation in the community was that they were man and wife.

William Carroll testified for defendant that he lived in that community all his life, knew Alex Kearney and his wife, Jennie Kearney, and that the reputation in the community was that Alex and Jennie were man and wife, that they lived there as man and wife.

To the same effect is the testimony of Mattie Arrington, witness for the defendant, James, H. Green, Willis Green, and Ossian Ellis.

Nannie Satterwhite, testifying for the defendant, stated that she lived near Henderson all her life, and was now 69 years old; that she knew Jennie Thomas was married to Alex Kearney, and also knew Marina Kearney and Alex for a long time.

She testified that the general reputation in Henderson was that Marina Kearney was dead when Alex Kearney and Jennie Thomas were married.

Louvina Henderson testified to the same effect.

Defendant thereupon offered a copy of the marriage license, marriage certificate, and certificate of the officiating minister from the records of the Hustings Court of the city of Petersburg. The marriage license purports to be signed by Robert G. Bass, Clerk, as likewise the marriage certificate; and the three items purport to bear the *teste* and *signature* of Robert G. Bass, Clerk, as follows: "A COPY TESTE, ROBERT G. BASS, Clerk." To them is attached the following certificates:

"Commonwealth of Virginia
City of Petersburg

"I, Richard T. Wilson, Presiding Judge of the Hustings or Corporation Court of the City of Petersburg, Commonwealth of Virginia, do hereby certify that Robert G. Bass is the duly qualified and Commissioned Clerk of said Court, and that the attestation appearing on the fact of the copy of marriage license issued in said court on January 1, 1919, to Alex Kearney and Jennie Kearney is in due form, as provided by the laws of the State of Virginia and made by the proper officer, to wit, the said Clerk.

"Witness my hand and seal of the Court this the 25th day of September, 1944.

RICHARD T. WILSON,
Presiding Justice of the Hustings Court of
(Seal) the City of Petersburg, Virginia."

"Commonwealth of Virginia Hustings Court
City of Petersburg

"I, Robert G. Bass, Clerk of the Hustings Court of the City of Petersburg, Commonwealth of Virginia, do hereby certify under my hand and the seal of my office, that the said Richard T. Wilson, Presiding Judge of said Court, is duly commissioned and qualified to act as said judge, and is so acting.

"Witness my hand and seal this the 25th day of September, 1944.

ROBERT G. BASS,
Clerk of the Hustings Court of the City
(Seal) of Petersburg, Virginia."

Plaintiffs excepted to the introduction of this evidence.

Mabel Alston, witness for defendant, testified that upon the death of Alex Kearney, she was called upon by the family, including plaintiffs, to write an obituary, containing in part the history of Alex Kearney. This was to be read at the funeral. "Miss Carrie told me what to put in." This writing was introduced in evidence over plaintiffs' objection, and plaintiffs excepted. This writing was read in evidence. It is as follows:

"Brother Alex Kearney departed this life Dec. 4, 1943, age 76 years. He leaves a wife, two daughters, Mrs. Carrie Richardson of Va., Mrs. Eliza Gregory of N. J., one son, Mr. William Kearney of Pa., one stepson, Mr. Louis Thompson of Henderson, one sister, Mrs. Lou Henderson, two brothers, Jack Kearney and Stephen Kearney, both of Ridgeway, three grandchildrens and a host of friends and relatives to mourn their lost. He was a loving husband and a devoted father.

"Sleep on father and take your rest
We loved you but God loved you best.
Written by the family."

The plaintiffs moved to strike, and the motion was denied; plaintiffs excepted. Witness testified that the paper was read at the burial.

Jennie Thomas, the defendant, testified that she was married to Alex Kearney 1 January, 1919, at Petersburg, Virginia. She further testified that she had shown Eliza Kearney the certificate of her marriage.

Lewis Thomas, son of Jennie by a former marriage, testified that he knew when his mother and Alex Kearney left to go to Petersburg to be married.

In rebuttal, Eliza testified that she saw Mabel Alston write the obituary; that she tried to dictate it, but Jennie always objected.

At the conclusion of this testimony, the defendant admitted that Alex Kearney and Marina Israel were married in 1881.

The plaintiffs moved for a directed verdict on the evidence, and the motion was denied. Plaintiffs excepted.

Plaintiffs took a number of exceptions to the charge of the court; amongst them the following: That the court failed to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon in that (a) the judge failed to charge the jury that the marriage relation having been shown and admitted to exist between Alex Kearney and Marina Kearney, the relation will be presumed to continue in the absence of evidence of its dissolution by death or divorce; (b) that the court similarly failed to charge the jury

that even though they found that Alex Kearney and Jennie Thomas acted in good faith at the time of the marriage, that it will be void in the absence of a dissolution of the marriage by death or divorce prior to the date of the ceremony between Kearney and Jennie Thomas; (c) that the court similarly failed to charge the jury that the absence of a person from his or her domicile without being heard from by those who would be expected to hear from him or her, if living, raises a presumption of his or her death at the end of seven years, but not that he or she died at any particular time during this period; (d) that the court erred in failing to charge the jury that while reputation was competent to show that Kearney and Jennie Thomas were married, or as to the existence of a marriage ceremony between them, it was not evidence as to the validity of the said marriage.

Five issues were submitted to the jury, and all of them answered favorably to the defendant, as follows:

"1. Were Alexander, or Alex Kearney and Marina Israel Kearney legally married as alleged in the complaint and amended complaint? Answer: Yes.

"2. If so, are the plaintiffs the only surviving issue of said marriage? Answer: Yes.

"3. Were Alexander or Alex Kearney and Jennie Thomas legally married, as alleged in the answer and amended answer? Answer: Yes.

"4. What interest, if any, does the defendant hold in the lot described in the answer as the 'Margaret Hooper lot'? Answer: "The entire fee simple.

"5. What interest, if any, does the defendant hold in the lot described in the answer as the 'Plummer Lot'? Answer: A dower interest."

Thereupon, the court adjudged that plaintiffs take nothing by their action, and that the defendant owns a dower interest in the lot known as the "Plummer Lot" conveyed to Kearney by John S. Plummer, and that she is, by survivorship, the sole owner in fee of the lot known as the "Hooker Lot," conveyed to Alex and Jennie Kearney, "man and wife." The plaintiffs moved to set aside the verdict for errors committed in the course of the trial, and the motion was denied. Plaintiffs objected and excepted to the signing of the judgment and appealed, assigning errors.

Gholson & Gholson, Charles W. Williamson, and Julius Banzet for plaintiffs, appellants.

Kerr & Kerr for defendant, appellee.

SEAWELL, J. 1. The appellants excepted to the introduction of the certified copies of the marriage license, record of marriage, and return of the officiating minister, kept, under the Virginia law, amongst the

records of the Hustings Court of the city of Petersburg. The objection is that the signature of the keeper of the record was not under his seal. We might question here whether the Clerk of the Hustings Court kept a seal as keeper of records of this kind. However, that he did keep a seal as clerk of the Hustings Court is obvious from the record.

The appellants point out that the authentication is not in accordance with the Federal statute, Title 28, U. S. C. A., sec. 688. See G. S., Appendix 3.

Had the authentication been in strict compliance with the Federal statute, and had the certified copies been rejected, it would have been error; but since the evidence was received, the situation is quite different. The Federal statute implements the Constitution in requiring that full faith and credit be given in each state to the public acts, records and judicial proceedings of every other state, and requires certified copies of records to be admitted in evidence when authenticated as provided by the statute. It is not intended to supplant, nor does it supplant, other modes of proof recognized as competent in the jurisdiction where the exemplification is to be made. 20 Am. Jur., p. 833, sec. 986.

The whole purpose of certification, as we now understand it, is to avoid the necessity of bringing original documents from the places where they are kept, a matter over which the court would frequently have no power, or of presenting witnesses who had compared copies with the original—a method still permissible under the common law. Certain assurances of genuineness must, however, attend the substitute method, and these have been afforded by providing for certified copies with conventional methods of authentication, which vary with the jurisdiction. It is not universally true that the want of a seal to the signature of the keeper of the records is fatal to the introduction of the certified copy as evidence. The defect may be supplied by a further certificate under seal relating to the same facts.

The purpose of authentication is to guarantee that the original of the copy genuinely exists, as exemplified, and this is attained by showing: (a) The authority of the person certifying, or that he is keeper of the record; (b) his present incumbency of the office; and (c) the genuineness of his *signature* or *seal*. Wigmore, 3rd Ed., sec. 1679.

"By the doctrine of the present exception, the hearsay statement of a higher officer made in the shape of an original certificate may be receivable to evidence the authority, and incumbency, and the seal or *signature* of a lower officer." *Id.*, 1679.

In this instance, these facts are supplied by the certificate of the presiding judge of the Hustings Court (in which the original records are kept) under seal of the court, which is the same seal used by the clerk in certifying the official character of the judge—the seal thus twice

appearing in connection with the certified copies. We think the defect complained of cured by the recitals, under seal, in the second certificate. The admission of the evidence will not be held for reversible error.

2. There is one consideration which goes to the heart of the case before us; that is, whether the burden of the issues submitted to the jury is properly placed on the plaintiffs or on the defendant. Determination of that question will afford a practical solution of nearly all the problems presented in appellants' exceptions to the judge's charge, without further detailed attention.

We are of opinion that when the plaintiff attempts to assert a property right which is dependent upon the invalidity of a marriage, he must, as the attacking party, make good his cause by proof. Upon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage. Chamberlayne, Trial Evidence, p. 432, sec. 475. For some unexplained reason, the trial court placed the burden of establishing the validity of the second marriage upon the defendant—although, of course, this was to the advantage of the plaintiffs and they cannot complain. Perhaps this misconception as to the burden of proof inspired some of the challenges now made to the adequacy of the judge's charge to the jury under G. S., 1-180.

While the burden was upon the plaintiffs to establish the invalidity of the second marriage, it was competent for them to carry that burden by any of the ordinary modes of proof, whether by direct evidence of fact (which the plaintiffs sought to do), or by presumptions recognized by the rules of evidence or established by statute, if there are such; but they could not recover because of a failure of the defendant to carry the burden of proof which does not in law belong to her.

The plaintiffs argue that their case is aided by the presumption of the continuance of a status, or condition, once proved to exist—namely, the first marriage—and that it was the duty of the judge, without special request, to instruct the jury that the first marriage, admitted to have taken place, is presumed to continue until the presumption is overcome by proof *contra*. This, however, involves another presumption of like character—to wit, the presumption of the continuing life of the wife of the former marriage. Assuming her to be still alive when the second marriage took place, there might be stronger reason to presume the continuance of marriage as against divorce. As a matter of fact, we shall find that the presumption cannot be indulged in either aspect. The laws of evidence do not recognize a presumption on a presumption. The facts upon which a presumption is based must be proved by direct evidence. Chamberlayne, Trial Evidence (Tompkins), 373, sec. 418. Moreover, proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon

which property rights growing out of its validity may be based. Trial Evidence, *supra,* page 432, sec. 475. *Gosset v. Gosset,* 112 Ark., 47, 164 S. E., 759; *Hunter v. Hunter,* 111 Calif., 261, 43 Pac., 756; *Turner v. Williams,* 202 Mass., 500, 89 N. E., 110. It is to be noted here that the existence, or fact, of the second marriage was supported not only by reputation and cohabitation, but by the direct evidence of the defendant as to the ceremony of marriage, and by the certified copies challenged by the plaintiffs. Conflicting presumptions usually destroy each other, unless through some policy of the law, or artificial weight given by the statute, the stronger may prevail. However, without burdening the subject with too many technicalities, we quote from Wigmore on Evidence, sec. 2531:

"It is not possible to say that there is a genuine presumption of the continuance of a *particular* human life, with a uniform application. The state of the pleadings will show whose duty it is to prove that a particular person was living at a certain time, and upon his showing the mere fact of life at a preceding date, the court will usually leave it to the jury to say whether he has proved his case."

That principle seems to us sound, and the defendant had the full benefit of it. Whether, upon request, the judge should have charged that such a presumption might be raised on direct proof that the wife of the former marriage still lived, we need not inquire. The weight of authority is against it.

We find in Chamberlayne's Trial Evidence, *supra,* p. 376, sec. 416: "A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage." This statement is so abundantly supported by well considered cases, so consonant with reason, and so consistent with analogous practices, as to justify its adoption. See, also, Jones on Evidence, Civil Cases, sec. 14, and cases cited.

Without attempting further to deal with the mathematical niceties of shifting burdens, as yet not worked out with any degree of satisfaction, it is our opinion that the case was open to the jury upon all the evidence submitted, and the trial court could only have confused them with an unsuccessful attempt to balance mere administrational presumptions, which are, after all, no more than inferences from the evidence.

The burden of proof rested on the plaintiffs, and the evidence on material issues was substantially conflicting. In this situation plaintiffs moved for a directed verdict, which was denied.

Here there is no such thing as a directed verdict while the credibility of the evidence is still a matter for the jury; and it always is for the jury where the demand is for an affirmative finding in favor of the party

having the burden, even though the evidence may be uncontradicted. *Mfg. Co. v. R. R.*, 128 N. C., 280, 38 S. E., 894, and cases cited; McIntosh, N. C. Practice and Procedure, sec. 574.

Where the evidence is contradictory, obviously no instruction can be given, hypothecated on a finding of fact by the jury, which will have the effect of a directed verdict either way. *Boutten v. R. R.*, 128 N. C., 337, 340, 38 S. E., 920; *R. R. v. Lumber Co.*, 185 N. C., 227, 117 S. E., 50; *Porter v. Construction Co.*, 195 N. C., 328, 331, 142 S. E., 27. However, no prayer for instruction, as required by the statute—G. S., 1-181—appears in the record, and we cannot indulge in speculation as to its form. *Hicks v. Nivens*, 210 N. C., 44, 47, 185 S. E., 469.

Appellants, at most, regard the evidence as overwhelmingly in their favor. As to that, we express no opinion. It is sufficient to say that such a condition, if it existed, would not, in this jurisdiction, support the plaintiffs' motion. The case was for the jury, and they have spoken.

We have considered other exceptions not involved in the foregoing discussion, and do not regard them as meritorious.

Upon the whole record, we find

No error.

JOSEPH B. CHESHIRE, JR., TRUSTEE UNDER THE WILL OF LAURA F. COSBY, v. FIRST PRESBYTERIAN CHURCH OF RALEIGH; PRESBYTERIAN ORPHANS' HOME, AND EDWIN S. HARTSHORN, ADMINISTRATOR OF B. H. COSBY.

(Filed 2 May, 1945.)

1. Estoppel § 6d—

In a suit by a successor trustee under a will, after the death of the life beneficiary, against the administrator of the life beneficiary and the ultimate beneficiaries, the said administrator attacking by cross action the authority of the former trustees, the accounts and the general handling of the trust by plaintiff and his predecessor trustees, plaintiff having pleaded estoppel against such administrator as to any claim against the former trustees and there being evidence tending to show that testatrix died in 1919 and her executor settled her estate in 1920 and acted as trustee to his death in 1928 when, in a proceeding for that purpose, the second trustee was appointed and on his death in 1932 the plaintiff was appointed in another proceeding, the life beneficiary being a party to both proceedings, and that regular accounts were filed by the executor and all three trustees and approved, all without any objection or question from the life beneficiary, who was under no disability from 1919 to his death in 1940, such conduct of the life beneficiary constitutes an estoppel against his administrator and the findings of fact and conclusions of law by the court below on the plea of estoppel must be upheld.

2. Reference § 13: Trial § 39—

A party, who would preserve his right to a jury trial in a compulsory reference, must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered.

3. Trial § 38: Reference § 13: Appeal and Error § 49a—

In a compulsory reference, objected to and jury trial demanded, on the coming in of the referee's report, issues tendered by the objecting party, which have already been answered as matters of law by this Court on a former appeal in the same case, are not appropriate issues, the opinion on the former appeal being conclusive.

4. Appeal and Error § 49a—

A ruling of the court below in accordance with a decision of this Court on a previous appeal in the same case, based upon the same facts, must be upheld, as such decision is the law of the case.

5. Trial §§ 38, 39: Reference § 13—

Where pleadings allege conclusions of the pleader and present questions of law, but do not raise issues of fact for the jury, and the issues tendered are not pointed out in the exceptions and raised by the pleadings, they are not such issues as give the party tendering them the right to a trial by jury.

6. Reference § 12—

In a hearing on exceptions filed by appellant to the report of a referee, on a compulsory reference, no proper issues pointed out in exceptions and raised by the pleadings being tendered, where the court below denied a jury trial and considered the exceptions, reviewed the evidence before the referee, gave its opinion and conclusion, both upon the facts and the law, and entered judgment accordingly, which resulted in a modification and confirmation of the referee's report, the judgment of the court below will be upheld.

7. Fiduciaries § 2: Trusts § 12—

In administering a trust fund under a will, which directed that the estate be reduced to cash and the money be invested in interest bearing securities, there is no liability on the part of the trustee for loss on loans, in the absence of evidence tending to show that they were inadequately secured at the time they were made, and there being no evidence that the investments were not made in good faith or that the trustee failed to exercise due diligence in his efforts to collect same.

APPEAL by defendant, Edwin S. Hartshorn, Administrator of B. H. Cosby, from *Grady, Emergency Judge,* at October Term, 1944, of WAKE.

This case has been here three times prior to the present hearing. First at the Fall Term, 1941, reported in 220 N. C., 392; then at the Spring

Term, 1942, reported in 221 N. C., 205, and again at the Fall Term, 1942, reported in 222 N. C., 280.

Since the last appeal, a hearing before a referee has been held, report of the referee filed, exceptions filed thereto, issues tendered and a jury trial demanded by the appellant.

His Honor heard this cause upon the exceptions filed by the defendant, administrator, and held that the right to a trial by jury had not been preserved; modified and affirmed the report of the referee and entered judgment accordingly.

The defendant, administrator, appeals, assigning error.

Paul F. Smith for plaintiff.
James I. Mason for defendant.

DENNY, J. Substantially all the facts pertinent to this appeal are to be found in the former opinions of this Court referred to above. However, we deem it proper to give a resume of them.

Laura F. Cosby died in 1919, leaving a last will and testament. She directed her executor, W. N. Jones, to pay her debts and convert her remaining property into money and hold and invest the same in interest-bearing securities, and to pay the income therefrom to her brother, B. H. Cosby, for his natural life. After the death of B. H. Cosby, the *corpus* of the fund was directed to be paid to Barium Springs Orphanage and the First Presbyterian Church of Raleigh, for certain charitable purposes. W. N. Jones qualified as executor, collected the assets, paid the debts of the estate and filed his final account as executor in 1920. Thereafter he handled the assets of the estate as Trustee until his death in 1928. In a special proceedings, instituted by the executrix of W. N. Jones, in Wake County, William Bailey Jones was appointed Trustee under the will of Laura F. Cosby, to succeed W. N. Jones. In 1932, William Bailey Jones died and another special proceedings was instituted before the Clerk of the Superior Court of Wake County, and Joseph B. Cheshire, Jr., was appointed Trustee under the will of Laura F. Cosby, 18 February, 1933, to succeed William Bailey Jones. B. H. Cosby, the life beneficiary under the will of Laura F. Cosby, was a party to both special proceedings referred to above, and during his lifetime never questioned the validity of the appointment of the respective Trustees or the correctness of their accounts.

Plaintiff acted as Trustee under the will of Laura F. Cosby, pursuant to the above appointment, which appointment was validated by an order of Carr, J., entered at the June Term, 1942, of the Superior Court of Wake County, and affirmed by this Court at the Fall Term, 1942, reported in 222 N. C., 280, 22 S. E. (2d), 566.

The present Trustee received, in February, 1933, all the assets of the trust fund, as shown in the final account filed in the office of the Clerk of the Superior Court of Wake County, 20 January, 1933, for and on behalf of William Bailey Jones, Trustee, after his death. And when the plaintiff filed his first annual report, he listed and gave a description of each security received by him from the personal representative of the former Trustee. In this report, the plaintiff stated the securities were of uncertain value and recommended to the court that foreclosure be withheld unless absolutely necessary. This recommendation was suggested by B. H. Cosby, the life beneficiary, in a letter to the plaintiff dated 1 February, 1933, and repeated several times thereafter in letters to the Trustee. Mr. Cosby likewise wrote Mr. Cheshire that he knew the difficulties "he was up against," in administering the trust, and that he did not blame him "for the conditions that existed."

To his Honor's findings of fact, conclusions of law and judgment entered pursuant thereto, the appellant presents forty-four exceptions for our consideration. We deem it unnecessary to discuss them *seriatim,* and shall not attempt to do so.

The appellant challenges the correctness of the reports of the present Trustee and the authority of the former Trustees to act under the last will and testament of Laura F. Cosby, as well as the correctness of their reports filed in the office of the Clerk of the Superior Court of Wake County, which reports have been approved by the clerk.

His Honor held that the defendant, Edwin F. Hartshorn, Administrator of B. H. Cosby, deceased, "stands in the shoes of his intestate. B. H. Cosby was under no disability between the year 1919 and the date of his death in 1940. He had a perfect right to bring action against W. N. Jones or William Bailey Jones or their personal representatives, or against the plaintiff, Mr. Cheshire, for any maladministration of the trust. The court is of the opinion that the conduct of B. H. Cosby as set forth in the findings of fact constitutes an estoppel against his administrator to maintain his cross action in so far as it relates to administration of the trusts of W. N. Jones and William Bailey Jones." W. N. Jones died in October, 1928, and William Bailey Jones died in August, 1932. B. H. Cosby did not die until 14 November, 1940, more than twelve years after the death of W. N. Jones, and more than eight years after the death of William Bailey Jones. The plaintiff, in his reply to the cross action of the defendant, Administrator, pleaded estoppel as to any claim against the former Trustees. We think his Honor's findings of fact and conclusion of law on the plea of estoppel must be upheld. *Sugg v. Credit Corporation,* 196 N. C., 97, 144 S. E., 554; *Meyer v. Reaves,* 193 N. C., 172, 136 S. E., 561; *Holloman v. R. R.,* 172 N. C., 372, 90 S. E., 292; 19 Am. Jur., sec. 62, p. 676, *et seq.*

We come now to the question whether or not the issues, nine in number, submitted by the appellant are appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings.

In the case of *Cotton Mills v. Maslin,* 200 N. C., 328, 156 S. E., 484, *Stacy, C. J.,* speaking for the Court, said: "A party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Wilson v. Featherstone,* 120 N. C., 446, 27 S. E., 124; *Yelverton v. Coley,* 101 N. C., 248, 7 S. E., 672." *Texas Co. v. Phillips,* 206 N. C., 355, 174 S. E., 114; *Anderson v. McRae,* 211 N. C., 197, 189 S. E., 639; *Gurganus v. McLawhorn,* 212 N. C., 397, 193 S. E., 844; *Brown v. Clement Co.,* 217 N. C., 47, 6 S. E. (2d), 842.

The first issue is typical of eight of the nine issues tendered and is as follows: "Was the plaintiff the duly appointed qualified and acting trustee under the will of Laura F. Cosby, as was alleged in the plaintiff's petition and denied by this defendant's answer?"

The question contained in the above issue was answered as a matter of law in the opinion of this Court, reported in 221 N. C., 205, 19 S. E. (2d), 855. The defendant herein again appealed from a judgment of the Superior Court in this action, which judgment was in accord with the above opinion, and the Court said: "The rulings of the court below were in accord with the opinion of this Court and must be upheld. The decision of this Court on the previous appeal, upon the same facts then and now presented, constituted the law of the case. *Pinnix v. Griffin,* 221 N. C., 348; *Robinson v. McAlhaney,* 216 N. C., 674, 6 S. E. (2d), 517. The decision on the former appeal decided the questions now presented, and is therefore conclusive on the points so adjudged." *Cheshire v. Church,* 222 N. C., 280, 22 S. E. (2d), 566.

The eight issues referred to above raise no pleaded issues of fact, but only questions of law.

The ninth issue tendered is as follows: "Has the plaintiff fully, justly and truly accounted for the income of the estate of Laura F. Cosby, so that from the evidence the amount of the income and *corpus* can be determined in order to close and settle the estate under the express will of Laura F. Cosby? (a) Has the plaintiff prudently and skillfully managed and attended to the affairs and received and collected the funds of the estate of Laura F. Cosby? (b) In what amount has the life beneficiary suffered a loss or damage by the failure of the plaintiff to competently, prudently, honestly and justly, as well as loyally, manage, collect and

account for the estate of Laura F. Cosby under her expressed will?" This issue is not properly raised by the pleadings. The pleadings allege conclusions of the pleader and present questions of law, but do not raise issues of fact for the jury. The appellant has tendered no issue pointed out by the exceptions and raised by the pleadings, which gives him the right to a trial by a jury.

In view of the above conclusions, it is immaterial whether or not the appellant waived his right to a trial by jury by not excepting to the second Order of Reference, which affirmed the original Order and appointed another Referee, the original appointee being unable to serve.

In the hearing below on the exceptions filed by the appellant to the report of the Referee, his Honor considered the exceptions, reviewed the evidence taken before the Referee, gave his opinion and conclusion, both upon the facts and the law, and entered judgment accordingly, which resulted in a modification and confirmation of the report of the Referee. A careful consideration of all the exceptions leads us to the conclusion that the judgment of the court below must be upheld. *Anderson v. McRae, supra.*

The funds received from the estate of Laura F. Cosby by the former Trustees were loaned to individuals and secured by deeds of trust or mortgages on real estate, except in three instances where small sums were loaned and secured by chattel mortgages. All these loans were made prior to the appointment of the present Trustee. There is no evidence tending to show they were inadequately secured at the time they were made. The security in many instances became inadequate during the financial depression which began in 1929. As a result, the life beneficiary sustained substantial loss on income and the *corpus* of the trust fund has sustained considerable losses. However, there is no evidence on this record that the investments were not made in good faith or that the present Trustee has not exercised due diligence in his efforts to collect the notes outstanding at the time he was appointed Trustee. *Sheets v. Tobacco Co.,* 195 N. C., 149, 141 S. E., 355.

It will be noted that the ultimate beneficiaries under the will of Laura F. Cosby, to wit, Barium Springs Orphanage and the First Presbyterian Church of Raleigh, have never questioned the acts or the good faith of the respective Trustees.

The judgment of the court below is

Affirmed.

J. L. CALDWELL AND D. M. McKELVEY, TRADING AS SUPERIOR CLEANERS, v. E. H. McCORKLE, TRADING AS McCORKLE'S CLEANERS & DYERS.

(Filed 2 May, 1945.)

1. Contracts § 24—

In an action by plaintiffs against defendant to recover on contract for services performed, where defendant pleads that plaintiffs, subcontractors for defendant under contract to process clothing, bedding, etc., for Army bases, though paid in full, failed to perform the services as agreed, to the damage of defendant, who was compelled himself to retransport the clothing, etc., and do the work over again to comply with his customer's contract, there being evidence offered in support of the contentions of both plaintiffs and defendant, it was error for the court to charge the jury that, should they answer the issue in favor of plaintiffs to any amount, it would constitute a finding that the contract was as plaintiffs contend and defendant would not be entitled to recover anything except what a breach of the contract had cost him, as such charge expressly excludes expenses incurred in correcting the defective work of plaintiff and money received for services plaintiffs failed to render.

2. Contracts § 25b—

If the controverted issue of breach of contract is resolved against plaintiffs, in an action for service rendered thereunder against defendant, who has pleaded breach and counterclaim for damages, then defendant is entitled to recover the losses which naturally and proximately result from the nonperformance and which were reasonably in the minds of the parties at the time of its making.

APPEAL by defendant from *Olive, Special Judge,* at October Extra Term, 1944, of MECKLENBURG. New trial.

Civil action to recover for services rendered.

Both plaintiffs and defendant are engaged in the business of cleaning and pressing wearing apparel. Defendant obtained a contract from the United States Government to process military uniforms, blankets, mattresses, and other articles for certain Army camps, including Camp Forrest in Tennessee, Camp Sutton in North Carolina, and Camp Stewart in Georgia. He furnished the transportation. When he received articles to be processed he signed a "tally-out" sheet for it and when the processed articles were returned, he received a "tally-in" sheet as a receipt. Defendant sublet a part of the work to plaintiffs and he was to pay therefor at a stipulated rate upon receipt of the Government "tally-in" sheet. There is a controversy as to the provisions of the contract in respect to the exact nature of work to be done by plaintiffs.

Plaintiffs allege that they performed certain services under the agreement for which the defendant has not paid. They allege a balance of $1,261.30 and seek judgment therefor.

The defendant, answering, admits the contract, denies the allegation of indebtedness, and pleads (1) the failure of plaintiffs to process apparel delivered to them as required by the agreed specifications, (2) that the merchandise thus improperly processed was rejected by army officials, rendering it necessary for him to reprocess the rejected articles at a total expense of $3,570, and (3) that although the plaintiffs failed to properly process such merchandise, he has, under his agreement with them, paid them the agreed price therefor. He alleges further that in addition to the expense for recleaning he was required to do extra transporting to and from the camps at a total cost of $862.50. Thus he claims a net balance due him of $3,171.20. He prays an accounting.

The parties elected to treat defendant's affirmative plea as a counterclaim and issues were submitted to and answered by the jury as follows:

"1. What amount, if any, is the defendant indebted to the plaintiffs?

"Answer: $330.00.

"2. What amount, if any, are the plaintiffs indebted to the defendant?

"Answer: 0."

There was judgment on the verdict and defendant appealed.

Uhlman S. Alexander for defendant, appellant.

No counsel contra.

BARNHILL, J. It is agreed that plaintiffs were to process and clean wearing apparel and other merchandise delivered to them by the defendant and were to be paid at a stipulated rate. Plaintiffs allege and offer evidence tending to show that defendant has not paid them in full for the services rendered under the agreement. They seek recovery for the balance due. Defendant alleges and offers evidence tending to show that plaintiffs failed to properly process the articles received by them; that the Army "turned down" or rejected the work thus improperly done; that as a result he was required to make additional trips to the Army camps and to reprocess and clean such articles at great cost to him; and that he has paid plaintiffs for all work done and services rendered, including the charges for the articles improperly and insufficiently processed and cleaned. He seeks to recover expenses incurred by reason of the alleged breach of contract.

On this conflicting evidence the court twice instructed the jury to the effect that if they answered the first issue in favor of plaintiffs, in any amount, they should not consider or answer the second issue, on the theory that an affirmative answer to the first issue would constitute a finding that the contract was as contended by plaintiffs and plaintiffs had fully complied therewith.

Some time after they had begun their deliberations the court recalled the jury and stated to them that it erred in instructing them not to consider the second issue in the event they answered the first issue in any amount, and charged them as follows:

"No matter what you answer the first issue, you will consider the second issue, and, as I say, you will apply the same law to the second issue that I gave you, to begin with."

What, then, had the court instructed the jury as to the law applicable to this issue? The record discloses the following:

"Now, gentlemen of the jury, the Court instructs you, on this second issue, if you answer the first issue in any amount, you will have found that the contract was as the plaintiffs contend, by the greater weight of the evidence, and you would have allowed them a reasonable amount for this processing of the clothing; and, if you come to this second issue, gentlemen of the jury, the Court instructs you, as a matter of law, that the defendant would not be entitled to recover anything except what a breach of the contract has cost him; and, if you come to the second issue, the defendant would not be paying the plaintiffs any amount for any processing of the clothing and he would not be entitled to recover the full amount of what it cost him to clean and press the clothing, because he has testified that he has been paid by the Government for the processing and cleaning, but only such damages as flow immediately from the breach of the contract."

Defendant's exception thereto must be sustained.

The court in the quoted charge inadvertently failed to go further and explain what elements of damage would enter into and be embraced by "what a breach of the contract would cost him." It expressly excluded expenses incurred in reprocessing articles not cleaned or processed in accord with agreed specifications. It failed to correct this inadvertence elsewhere in its charge.

Furthermore, *non constat* defendant may not have settled in full for all services rendered by plaintiffs, it still may be true, as he testified, that he has paid them for work they failed to do in accord with the terms of the contract. It does not follow as a matter of law that an affirmative answer to the first issue would constitute a finding by the jury that the contract was as plaintiffs contend. Nor does such a finding compel the conclusion that plaintiffs are not required to account for money received for services they failed to render. If the controverted issue as to the alleged breach of contract is resolved against them, then defendant is entitled to recover the losses which naturally and proximately resulted from the nonperformance and which were reasonably in the minds of the parties at the time of its making. *Monger v. Lutterloh,* 195 N. C., 274 (279), 142 S. E., 12, and cases cited.

The record fails to justify the conclusion the parties did not contemplate that a breach of the contract by plaintiffs would cause defendant to incur additional expense in reprocessing the merchandise to meet the requirements of the Army and additional trips in transporting the same to and from the Army camps.

This is not affected by the fact defendant has been paid by the Government for the processing and cleaning. On his testimony the breach of contract by plaintiffs compelled him to reprocess, at considerable expense, merchandise they agreed to clean and for the processing of which he has paid them at the agreed rate. If this be true and the jury so finds, the plaintiffs, in the settlement between the parties, must compensate defendant, under the prevailing rule or measure of damages for breach of contract, for the loss he has sustained by reason of their failure to comply with the terms of their agreement.

The disposition we have made of this appeal renders it unnecessary for us to discuss other exceptive assignments of error appearing in the record.

For the reasons stated there must be a

New trial.

STATE v. RANDALL PERRY.

(Filed 2 May, 1945.)

1. Criminal Law §§ 54b, 54c: Trial § 37—

While a verdict is a substantial right, it is not complete until accepted by the court for record.

2. Same—

When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or one which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict.

3. Criminal Law § 54b—

A verdict is not bad for informality or clerical errors in language, if it is such that it can be clearly seen what is intended, and it must not be voided except from necessity.

4. Same—

While a verdict must have a definite meaning free from ambiguity and responsive to the issue or issues submitted by the court, additional nonessential words, which are not a part of the legal verdict and do not leave the character of the verdict in doubt, may be treated as mere surplusage.

5. Same—

Upon the trial of defendant on an indictment, charging a secret and felonious assault with a deadly weapon and with intent to kill, inflicting serious injury, where the jury found and returned that defendant committed an assault with a deadly weapon and in secrecy, G. S., 14-3, but without intent to kill, G. S., 14-33, there is a valid verdict, in effect acquitting the defendant of the felony charged, and the court's refusal to accept the same for record was error.

6. Criminal Law § 54c—

Whenever a prisoner, either in terms or effect, is acquitted by the jury, the verdict as returned should be recorded.

APPEAL by defendant from *Burgwyn, Special Judge,* at October Term, 1944, of FRANKLIN. Error and remanded.

Criminal prosecution on bill of indictment charging that defendant did "unlawfully, wilfully, maliciously and in a secret manner, and feloniously assault T. E. Privett with a certain deadly weapon, to wit: shot gun, with the felonious intent to kill and murder the said T. E. Privett inflicting serious injuries, not resulting in death;" and specifying the injuries inflicted.

On the night of 24 June, 1944, defendant and Privette were in J. A. Ray's store. Defendant had been in the service of his country as a soldier for three and one-half years but had been discharged and was in civilian clothing. Privette chided him about being out of the Army and said to him, "You didn't do so damn sorry that they kicked you out, did you?" and calling him, as defendant testified, "a 4-F s. o. b." Defendant became angered, got his gun and, as Privette started out the door, shot him in the hand.

The jury, after deliberating, came into court and returned for its verdict "Guilty of a secret assault with a deadly weapon, without intent to kill." The record discloses that thereupon the following occurred:

"JUDGE: The statute does not provide for any such verdict or any such finding by the jury—I instructed you . . .

"JUROR (W. R. Vick): interrupts Court and says: 'Well, guilty of assault with a deadly weapon.' No other juror speaks, but several either nod or shake their heads.

"The Judge then sends the jury back and instructs them to 'get together on your verdict.' "

Defendant excepted to each statement of the court and also to its refusal to accept the verdict tendered.

After again deliberating, the jury returned for its verdict "Guilty of an assault with a deadly weapon with intent to kill in a secret manner as charged in the bill of indictment."

Sentence: not less than five years and not more than ten years in the State's Prison.

Defendant excepted and appealed.

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

Yarborough & Yarborough, Thorp & Thorp, and E. H. Malone for defendant, appellant.

BARNHILL, J. Was it the duty of the court below to accept and record the verdict first tendered by the jury? We are constrained to answer in the affirmative.

While a verdict is a substantial right, *Bundy v. Sutton,* 207 N. C., 422, 177 S. E., 420, it is not complete until it is accepted by the court for record. *S. v. Godwin,* 138 N. C., 582; *S. v. Bagley,* 158 N. C., 608, 73 S. E., 995; *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500; *Allen v. Yarborough,* 201 N. C., 568, 160 S. E., 833.

This does not imply, however, that in accepting or rejecting a verdict the presiding judge may exercise unrestrained discretion. While he should scrutinize a verdict with respect to its form and substance and to prevent a doubtful or insufficient finding from becoming the record of the court, his power to accept or reject the jury's finding is restricted to the exercise of a limited legal discretion. *S. v. Bazemore,* 193 N. C., 336, 137 S. E., 172.

When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict. *S. v. Arrington,* 7 N. C., 571; *S. v. McKay,* 150 N. C., 813, 63 S. E., 1059; *S. v. Bazemore, supra; S. v. Noland,* 204 N. C., 329, 168 S. E., 412; *Queen v. DeHart,* 209 N. C., 414, 184 S. E., 7.

A verdict is not bad for informality or clerical errors in the language of it if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment and is to receive a reasonable construction and must not be voided except from necessity. *S. v. Whisenant,* 149 N. C., 515; *S. v. Craig,* 176 N. C., 740, 97 S. E., 400.

Although defective in form, if it substantially finds the question in such a way as will enable the court intelligently to pronounce judgment thereon according to the manifest intention of the jury, it is sufficiently certain to be received and recorded. 27 R. C. L., 858; *Wood v. Jones,* 198 N. C., 356, 151 S. E., 732; *In re Will of Henderson,* 201 N. C., 759, 161 S. E., 387; *S. v. Snipes, supra,* and cases cited.

While a verdict must have a definite meaning free from ambiguity and be responsive to the issue or issues submitted by the court, additional nonessential words which are not a part of the legal verdict and do not leave in doubt the character of the verdict may be treated as mere surplusage. *S. v. Snipes, supra; S. v. McKay, supra; S. v. Lemons,* 182 N. C., 828, 109 S. E., 27; *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260; *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743.

Thus a verdict of "guilty of receiving more liquor than allowed by law, and not guilty of retailing or transporting liquor," *S. v. Brame,* 185 N. C., 631, 116 S. E., 164, and "guilty of assault with intent to kill," *S. v. Gregory,* 223 N. C., 415, 27 S. E. (2d), 140, were sustained; while "guilty of carrying a pistol in his suitcase," *S. v. Parker,* 152 N. C., 790, 67 S. E., 35, "guilty of receiving stolen cotton," *S. v. Whitaker,* 89 N. C., 472, and "guilty of shooting," *S. v. Hudson,* 74 N. C., 246, were rejected for insufficiency and ambiguity.

Here the verdict tendered, when given a reasonable construction, is not incomplete, insensible, or repugnant. Instead it has a definite meaning free from ambiguity. The jury found that the defendant committed an assault with a deadly weapon and that the assault was "done in secrecy," G. S., 14-3, but "without the intent to kill," G. S., 14-33. Each term has its significance in the criminal law. *S. v. Smith,* 174 N. C., 804, 93 S. E., 964; *S. v. Gregory, supra; S. v. Bentley,* 223 N. C., 563 (see also concurring opinion at p. 569), 27 S. E. (2d), 738.

Conceding that neither term is a necessary part of a verdict finding the defendant guilty of an assault with a deadly weapon, they do not render doubtful the essential nature of the finding. The court was left free to pronounce judgment thereon according to the manifest intention of the jury.

There is a further reason why the action of the court below must be held for error. An intent to kill is an essential element of the crime charged. Thus the finding that the assault was "without the intent to kill" was in effect a verdict of not guilty of the felony.

Whenever a prisoner, either in terms or effect, is acquitted by the jury, the verdict as returned should be recorded. *S. v. Hargett,* 196 N. C., 692, 146 S. E., 801; *S. v. Arrington, supra; S. v. Whisenant, supra; S. v. Craig, supra; S. v. Bentley, supra.*

It may be noted that while G. S., 14-31, and G. S., 14-32, create two separate and distinct felonies, the bill of indictment alleges in one count all elements necessary to constitute both offenses. It is somewhat uncertain as to which charge defendant was required to answer. Perhaps for this reason the jury thought it advisable to spell out the verdict. In any event a verdict of "guilty as charged" might have caused more uncertainty than does the rejected one.

The judgment entered is vacated and the cause is remanded to the end that the court below may (1) strike the verdict entered, (2) record the one first tendered by the jury, and (3) pronounce judgment on the verdict thus recorded.

Error and remanded.

E. H. McCORKLE, ROBERT L. McCORKLE AND SARA L. McCORKLE v. KEITH M. BEATTY AND WIFE, KATHLEEN BEATTY.

(Filed 2 May, 1945.)

1. Trusts § 1b—

Parol trusts may be imposed upon the legal title on proof of an oral promise to hold in trust for the promisee; and parol evidence to prove such a trust is admitted not to contradict the deed, but to bind the party to the trust which he undertook in accepting the deed.

2. Same—

The establishment of parol trusts is required to be by evidence clear, strong and convincing. This rule arises out of the theory that the written instrument contains the final expression of the agreement between the parties, and one who seeks to show otherwise should be required to do so by higher degree of proof than a mere preponderance of the evidence.

3. Same—

In a suit to fasten a parol trust upon a deed on its face in fee, where there is evidence of the trust for the plaintiff and *contra* for defendant, it is error for the court to charge that the preponderance of the evidence is defined to be evidence which is of greater or superior weight or that gives greater assurance and carries conviction to the minds of the jury, followed by the statement that the clear, strong and convincing evidence, required of plaintiff, means evidence that is clearer, stronger and more cogent and convincing in its character and weight than that required in ordinary civil cases where the burden of proof is satisfied by the greater weight or preponderance of the evidence.

APPEAL by plaintiffs from *Blackstock, Special Judge,* at 4 September, 1944, Extra Civil Term, of MECKLENBURG.

The plaintiffs brought this action to impose a parol trust on lands to which the defendants had title by a deed in fee, allegedly acquired while the defendant Beatty was in fiduciary relation to the plaintiffs and under a promise to hold the title for their benefit. The defendant Beatty denied that there was any such fiduciary relation between him and the plaintiffs or that he had made the alleged promise.

The case went to the jury, and the answer to the issue was unfavorable to the plaintiffs. The validity of the trial was challenged in several

respects, only one of which we deem it necessary to consider: The exception to the instruction to the jury as to the weight and sufficiency of plaintiff's evidence as hereinafter set out.

The evidence pertinent to this exception may be summarized as follows:

One of the plaintiffs, E. H. McCorkle, testified that at the time of the transaction between plaintiffs and defendant Beatty, the property described in the complaint had been conveyed by deed of trust to the Building and Loan Association of Charlotte to secure a note made by the plaintiffs. The plaintiffs were unable to meet the payments, and upon default, the property was advertised and sold 15 September, 1941, at which sale T. S. McPheeters became the last and highest bidder at the sum of $6,000; later, Dorothy A. Krueger raised the bid, and it was resold 20 October, 1941, at her upset bid for $6,300, and this bid had been reported to the court for confirmation.

Meanwhile, the plaintiffs had been diligently seeking some means to satisfy the deed of trust and save the property, but had been unable thus far to secure a loan. While the sale to Krueger was awaiting confirmation, the witness, in behalf of himself and other plaintiffs, approached the defendant Beatty for help in protecting the property for the benefit of all the plaintiffs.

At that time E. H. McCorkle had a contract with the Government to clean suits and articles of apparel for the personnel of the Army, upon which $10,000 was due him, payment of which was expected shortly. He testified that he proposed to the defendant Beatty that the latter would raise the Krueger bid, which would give the plaintiffs some more time to secure means to save the property; that he and the defendant Beatty came to the following agreement: That defendant Beatty would furnish the money and raise the bid in his own name, and that if the plaintiffs were able to get the money before the sale of the property and the confirmation of the bid, the defendant was to be paid $25.00 for his trouble; but if defendant had to carry out the bid and take the property, he would hold it meantime for the plaintiffs until they were able to reimburse him for his expenditures in the premises, when the title should be conveyed to them. He further testified that in accordance with this promise, the defendant did furnish the money to raise the bid by check which was handed to the witness and which he carried to the payee, Taylor, and which was used for that purpose. He further testified that they were unable to get the money before the property was sold upon the defendant Beatty's bid, the sale confirmed and the deed made to Beatty; and that although he stands ready, willing and able to reimburse Beatty and carry out the contract which he alleges was made with the defendant, Beatty now claims the property as his own and refuses to permit the plaintiffs the enjoyment thereof.

Defendant Beatty testified that McCorkle came to him and requested him to raise the bid on the land, and offered $25.00 if he would raise the bid for him, but that he thought there was too much money involved and so told the plaintiff McCorkle; that he later told him then that he, Beatty, could raise the bid for himself, which the latter said he would do. Defendant Beatty further testified that the agreement was that he should raise the bid for himself, and that if plaintiffs could not pay off the mortgage or re-raise the bid before the sale time, the land should be the defendant's; and that plaintiff told him "he would have the best buy in Charlotte." Witness said that he never at any time agreed to bid in the property and hold it for McCorkle or the plaintiffs.

The defendant Beatty offered several witnesses in corroboration of his version of the agreement.

Upon this conflicting evidence, the trial judge instructed the jury, *inter alia,* as follows:

"(a) The general rule is that, in civil matters, the burden of proof is usually carried by a preponderance of the evidence or by the greater weight, meaning evidence which is of greater or superior weight or that gives greater assurance and carries conviction to the minds of the jury, but under an issue such as the one we are considering, where plaintiffs propose to obtain relief against the apparent force and effect of a written instrument, a deed, the burden of proof is on plaintiffs to establish their allegations in respect to this issue by evidence, clear, strong and convincing. Clear, strong and convincing evidence means evidence that is clearer, stronger, more cogent and convincing in its character and weight than that required in ordinary civil cases where the burden of proof is satisfied by the greater weight or preponderance of the evidence.

"(g) Now, by the 'greater weight of the evidence' is meant that evidence which is of greater or superior weight, or is more convincing, and brings conviction to the minds of the jury."

To this plaintiffs excepted.

The following issue was submitted to the jury, and answered as indicated:

"Does the defendant, Keith Beatty, hold the legal title to the property described in the Complaint in trust for the benefit of the plaintiffs, as alleged in the Complaint?

"Answer: No."

The plaintiffs moved to set aside the verdict for errors committed in the trial. The motion was denied, and plaintiffs excepted. To the ensuing judgment, plaintiffs objected, excepted and appealed, assigning errors.

Uhlman S. Alexander and Robinson & Jones for plaintiffs, appellants.

Joe W. Ervin and W. C. Davis for defendants, appellees.

SEAWELL, J. We think that plaintiffs' exception to the instruction given to the jury as to the weight and sufficiency of the evidence required to carry the burden of the issue must be sustained.

In a jurisdiction like ours, where the Seventh Section of the English Statute of Frauds, requiring the creation of trusts to be manifested in writing, has not been enacted, parol trusts may be imposed upon the legal title upon proof of an oral promise to hold in trust for the promisee; and parol evidence to prove such a trust is admitted "not to contradict the deed, but to bind the party to the trust which he undertook in accepting the deed." 26 R. C. L., Trusts, sec. 41. However, the theory of admission of parol evidence in such cases is often confusingly stated, and the intensity of the proof required to establish such a trust is referred to the fact that it does tend to contradict the written instrument. *Hinton v. Pritchard,* 107 N. C., 128, 136, 12 S. E., 242. The propriety of applying the rule to cases of this sort is perhaps most satisfactorily explained in *Boone v. Lee,* 175 N. C., 383, 95 S. E., 659, as arising out of the theory that the written instrument contains the final expression of the agreement between the parties, and that one who seeks to show otherwise should be required to do so by higher degree of proof than a mere preponderance of the evidence.

At any rate, it is the rule here, and prevails with practical uniformity elsewhere, that the establishment of parol trusts is required to be by evidence "clear, strong and convincing," or of similar character, as variously expressed. See *Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56, 23 A. L. R., 1491; also, annotations to case beginning on page 1500.

Ordinarily, in civil matters, the burden of the issue is required to be carried only by the preponderance or greater weight of the evidence; but in his definition of the preponderance of the evidence, his Honor defined this to be "evidence which is of greater or superior weight or that gives greater assurance and carries conviction to the minds of the jury"; and further defined evidence, clear, strong and convincing, as follows: "Clear, strong and convincing evidence means evidence that is *clearer, stronger, more cogent and convincing in its character and weight* than that required in ordinary civil cases where the burden of proof is satisfied by the greater weight or preponderance of the evidence."

While it is conceded that a stricter degree of evidence is required in cases of this character, we are of the opinion that the terms used to define the intensity of the evidence required in the instant case are not susceptible of separate, analytical comparison with the greater weight of the evidence, especially as defined by his Honor. We think the terms of comparison used, particularly that the evidence should be clearer than that employed in cases where preponderance of the evidence is sufficient to carry the burden, goes beyond the simple requirement that the plain-

tiffs must prevail by evidence clear, strong and convincing, rather than by mere preponderance of the evidence, and must have been confusing to the jury.

We have not thought it necessary to consider other exceptions, which refer to incidents which may not recur upon a retrial.

For the error pointed out, the plaintiffs are entitled to a new trial. It is so ordered.

New trial.

STATE v. MOZELLE WILLIAMS.

(Filed 2 May, 1945.)

1. Criminal Law § 8: Homicide § 2—

Where two persons are present, encouraging each other in a common purpose resulting in a homicide, both are principals and equally guilty.

2. Same—

An aider and abettor is one who advises, counsels, procures or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense.

3. Homicide § 25—

In a prosecution of two persons for murder, where the State's evidence tended to show that deceased was standing near another person on a city sidewalk, when the first defendant called upon deceased to stop bothering his cousin and the deceased said he was not bothering anyone, whereupon the first defendant shot a pistol at deceased twice, and then the second defendant took the gun from the first defendant and shot at deceased twice, deceased falling to the ground at the second shot and dying on the way to the hospital, there being only one wound on deceased, a shot through the heart, there is ample evidence for the jury and the first defendants' motion for judgment as of nonsuit, G. S., 15-173, was properly denied.

APPEAL by defendant Mozelle Williams from *Burgwyn, Special Judge,* at September Extra Term, 1944, of MECKLENBURG.

The appellant, Mozelle Williams, and one DeWitt Tate were tried upon a bill of indictment charging them with the murder of Frank Porter, upon which, however, 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 guilty of manslaughter as the evidence might warrant. The jury returned a verdict of guilty of manslaughter as to both defendants, and from judgment of imprisonment, predicated on the verdict, the defendant Mozelle Williams appealed, assigning errors.

STATE *v.* WILLIAMS.

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

G. T. Carswell for defendant Williams, appellant.

SCHENCK, J. The evidence tended to show that Frank Porter, the deceased, and his common law wife, Ruthie Mae Porter, entered an eating place on Mint Street in Charlotte, called "Johnny's," that Ruthie Mae Porter left the eating place and was followed out by the deceased, Frank Porter, and they two were standing on the sidewalk, and one Alma Bradford was standing near-by on the sidewalk; that appellant, Mozelle Williams, came out of the eating place onto the sidewalk and said to deceased Frank Porter, "Don't be bothering my cousin, Alma Bradford," and Frank Porter said he wasn't bothering anybody; at that time Williams pulled out a pistol and shot twice at Porter and then DeWitt Tate appeared suddenly on the scene and took the pistol from Mozelle Williams and shot twice at Frank Porter and he fell; Frank Porter was put into a taxi and driven to a hospital, but died just before he arrived there; "the gun was pointing towards Frank Porter at the time that Mozelle Williams shot at him twice, but I don't know whether Mozelle hit Frank or not. After Mozelle Williams shot, Frank was still standing on the sidewalk in the same spot, and DeWitt Tate ran out where Mozelle was in the street and grabbed Mozelle's gun. At the time that Mozelle Williams shot him, Frank Porter did not say anything and did not do anything. He was still standing up, and he did not appear to be shot. . . . He fell the second shot when DeWitt shot. . . . Yes, sir, that's when he fell." Both Mozelle Williams and DeWitt Tate made statements to the officer arresting them to the effect that they did not know which one hit Frank Porter; they both stated that Frank Porter was jabbing something into Alma Bradford, and Mozelle Williams told Porter not to do anything to his girl or cousin, and as Frank Porter started toward him Mozelle Williams walked into the street, pulled his gun and began shooting and DeWitt Tate came up and grabbed his gun away from him and shot at Frank Porter. Mozelle Williams and DeWitt Tate were friends. Upon a *post mortem* examination made at the hospital only one bullet wound was found upon the body of Frank Porter, it being "a hole in his chest on the left side near the heart, . . . the hole was a bullet wound over his heart," and in the opinion of the physician who made the *post mortem* examination this bullet wound killed the deceased.

The exception most stressfully pressed on this appeal was to his Honor's refusal to grant the motion of appellant to dismiss the action or for judgment of nonsuit lodged when the State had produced its evidence and rested its case. G. S., 15-173. The appellant, in his brief and oral

argument, contended that since there is no evidence in the record that the defendant Tate and the defendant Williams had seen each other at any time prior to the time Tate ran out in the road and jerked the pistol out of Williams' hand, and no evidence that either of them had had any trouble with the deceased Frank Porter prior to the time of the shooting, there is no evidence upon which a finding of a conspiracy could be predicated, and since from the evidence adduced it cannot be determined which defendant fired the fatal shot, the motion for judgment as of nonsuit should have been sustained. This contention may have been tenable had the State relied upon establishing the existence of a conspiracy to make out its case. *S. v. Finley,* 118 N. C., 1161, 24 S. E., 495. However, the State did not rely upon establishing the existence of a conspiracy to make out its case against the appellant. The theory of the prosecution is not that there was a conspiracy between the defendant Williams and his codefendant Tate to kill or assault the deceased Porter and therefore it was immaterial which one fired the fatal shot, since by virtue of a conspiracy existing between them they both were principals in the unlawful homicide. The State was permitted to, and did, rely upon the theory that both of the defendants were present, encouraging each other in a common purpose, and were therefore principals and equally guilty. *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127. The evidence tends to show that the appellant Williams followed the deceased to the sidewalk and shot twice at him; that he was present when his codefendant Tate took the pistol from him and fired twice at the deceased. The evidence is plenary that either one of the shots fired by the appellant Williams or one of the shots fired by his codefendant Tate killed Porter. If the evidence tends to show that the appellant Williams fired the fatal shot he cannot complain that the case as to him was submitted to the jury; if, on the other hand, the evidence tends to show that his codefendant Tate fired the fatal shot and the appellant Williams was present, the evidence of his mere presence is evidence of his aiding and abetting his codefendant and was sufficient to carry the case to the jury as to him. "Though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement," and in contemplation of law this was aiding and abetting. Wharton's Criminal Law (12 Ed.), ch. 9, sec. 246; *S. v. Jarrell, supra; S. v. Cloninger,* 149 N. C., 567, 63 S. E., 154; *S. v. Allison,* 200 N. C., 190, 156 S. E., 547. "An aider and abettor is one who advises, counsels, procures or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense. 2 C. J., 1024." *S. v. Hart,* 186 N. C., 582, 120 S. E., 345.

We are of the opinion, and so hold, that there was sufficient evidence to carry the case as to the defendant Williams to the jury at least upon the theory that the said defendant was aiding and abetting in the unlawful homicide of Frank Porter and for that reason was guilty as a principal and that his Honor properly overruled said defendant's demurrer to the evidence and motion to dismiss the action lodged when the State had introduced its evidence and rested its case.

We have examined the exceptions relating to his Honor's charge and find in them no substantial merit.

On the record we find

No error.

CHARLIE SPEARMAN, ADMINISTRATOR OF MAXIE SPEARMAN, v. THE UNITED MUTUAL BURIAL ASSOCIATION, INC.

(Filed 2 May, 1945.)

1. Mutual Burial Association § 1: Constitutional Law § 20—

Where the certificate of membership in a burial association, as well as the general statute relating to such associations, G. S., 58-226, contains the express provision that the rules and by-laws of such associations may be modified by Act of the General Assembly, members are bound by subsequent legislation, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract.

2. Constitutional Law § 20: Contracts §§ 1, 8—

Laws in force at the time of the execution of a contract become a part of the convention. This embraces those which affect its validity, construction, discharge, and enforcement.

3. Mutual Burial Association §§ 11, 12—

The spouse or next of kin of a member of a mutual burial association serving in the armed forces, who dies overseas, may elect to have return of the paid-in assessments in settlement, or to have the prescribed funeral benefits at any time the body of deceased is returned for burial to the territory served by the burial association; and the personal representative of the deceased may not recover $100 in lieu thereof. G. S., 58-241.1.

APPEAL by defendant from *Olive, Special Judge,* at March Term, 1945, of MECKLENBURG. Reversed.

This was an action to recover the sum of $100 alleged to be due on a certificate of membership in defendant Burial Association. From judgment for plaintiff defendant appealed.

E. McA. Currie for plaintiff, appellee.

G. T. Carswell for defendant, appellant.

DEVIN, J. The case was heard below upon an agreed statement of facts. From this it appears that plaintiff's intestate, Maxie Spearman, became a member of defendant Burial Association 5 March, 1943, and so remained until his death 11 March, 1944. The purpose and plan of the Association was to provide funeral and burial service for deceased members in the amount of $100.

Plaintiff's intestate while a member of the armed forces of the United States and in the line of duty died on Guadalcanal in the Pacific and was buried there. At that time Guadalcanal was in the theater of war and it was impossible for the defendant to provide or furnish the plaintiff's intestate the funeral benefits contracted for in the certificate of membership.

The certificate of membership in defendant Association, which is in the form prescribed by statute, G. S., 58-226, specifies in section 10 that in the event a member in good standing shall die at a place beyond the territory served by local funeral directors, the secretary of the Association upon notice shall cause deceased to receive the funeral and burial service provided for, and shall make payment therefor. "If the secretary-treasurer of the Association shall fail, on demand, to provide the benefits as listed in Article 9 of these rules and by-laws (funeral and burial service) by arrangement with the official funeral director serving the community in which the services are required, then the benefits shall be paid in cash to the representatives of the deceased qualified under law to receive such payments."

The plaintiff's action is based upon the view that defendant's failure to furnish the funeral benefits contracted for entitled the personal representative of the deceased to the payment in cash provided in lieu thereof by sec. 10 of the certificate of membership, and that the requirement of previous demand was obviated by the defendant's admission that it was impossible for defendant, or any undertaker connected with it, or by arrangement with any other funeral director, to render the service contracted for. It was argued that under these circumstances a demand would have been futile and therefore unnecessary.

Conceding that this may be a reasonable interpretation of the effect of the quoted stipulation in sec. 10, we think the plaintiff's position is rendered untenable by a subsequent statute, Public Laws 1943, ch. 732, codified as G. S., 58-241.1, modifying the provisions of sec. 10 in respect to members of the Association who die while serving in the armed forces of the United States. By this statute it is provided that in such case the spouse or next of kin may elect to have return of paid-in assessments

in settlement, or to have the prescribed funeral benefits at any time the body of the deceased is returned for burial to the territory served by the burial association. True this last Act was ratified subsequent to the issuance of the certificate of membership to plaintiff's intestate, but the certificate sued on, as well as the general statute in force at the time, G. S., 58-226, contained the express provision that the rules and by-laws of the Association might be modified by Act of the General Assembly. Hence the plaintiff's intestate must be held to have accepted the certificate of membership with notice that its provisions could be "modified, canceled, or abridged" by legislative enactment. Under these circumstances this Act of the General Assembly would not be considered offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. Cons. United States, Art. I, sec. 10; *Faulk v. Mystic Circle,* 171 N. C., 301, 88 S. E., 431; *Helmholz v. Horst,* 294 F., 417. The constitutional prohibition is qualified by the measure of control which the state retains over remedial processes. *Home Building & Loan Asso. v. Blaisdell,* 290 U. S., 432 (434).

The laws in force at the time of the execution of the contract become a part of the convention. This embraces those which affect its validity, construction, discharge and enforcement. *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14. The modification imposed by the Act of the General Assembly is within the scope of the plan and purpose of the Association, and is not unreasonable. *Strauss v. Life Association,* 126 N. C., 971, 36 S. E., 352; *Wilson v. Heptasophs,* 174 N. C., 628, 94 S. E., 443. The deceased was buried in Guadalcanal by the Federal authorities. In the event his body should be returned to the territory served by defendant, the obligation to render prescribed funeral and burial service still subsists.

We conclude that the judgment that plaintiff's administrator recover of defendant $100 is not warranted by the facts agreed, and that the rights of the parties in the premises are governed by G. S., 58-241.1.

Reversed.

HARTFORD ACCIDENT AND INDEMNITY COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND THEREFORE STATUTORY RECEIVER, BANK OF BLACK MOUNTAIN.

(Filed 2 May, 1945.)

Appeal and Error § 31c—

Where appellant is not required to docket his appeal, from an order granting a motion for a change of venue, until the Fall Term of this Court, and appellee files at the Spring Term, a motion to docket and

dismiss on the ground that the appeal on the face of the record is frivolous and only for delay, which appellant controverts, motion of appellee denied without expressing any opinion on the merits of the appeal.

APPEAL by plaintiff from *Johnson, Jr., Special Judge,* at February Term, 1945, of WAKE.

This action was instituted in the Superior Court of Wake County to determine the liability of the plaintiff on certain surety bonds executed for and on behalf of the Bank of Black Mountain, indemnifying said bank against loss under circumstances and conditions set forth in said bonds.

The defendant made a motion for change of venue and to remove to Buncombe County, N. C., as a matter of right and also in the exercise of the court's discretion for the convenience of witnesses and the promotion of justice. Motion granted and plaintiff appealed to the Supreme Court.

Since the appellant is not required to docket its appeal until the Fall Term of this Court, the appellee has filed a motion to docket and dismiss the appeal for the reason he contends, that it appears upon the face of the record that the appeal is obviously frivolous and appears to have been taken only for the purpose of delay.

In reply to the motion to docket and dismiss the appeal, the appellant denies that it is seeking a review of a discretionary order. It contends that it appears conclusively from the record that there are no issues of fact presently raised and therefore an order for removal for the "convenience of witnesses," when there are no witnesses to be convenienced, is premature. That if issues of fact are raised when answer is filed, which will necessitate a jury trial and the attendance of witnesses, then and not until then will it be proper to make a motion for removal for convenience of witnesses. Furthermore, it is contended that since only questions of law are presently raised, the order of removal cannot be sustained as a matter of law.

A. J. Fletcher and J. C. B. Ehringhaus for plaintiff.

R. R. Williams for defendant.

PER CURIAM. We express no opinion on the merits of the appeal, other than to say we think the appellant is entitled to a hearing thereon.

Motion denied.

MRS. JESSIE E. SMITH v. KIRBY SMITH.

(Filed 23 May, 1945.)

1. Pleadings § 13½—

The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a defense or counterclaim. Such demurrer shall be heard and determined as provided for demurrers to the complaint. G. S., 1-141.

2. Pleadings § 20—

The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted, but the principle does not extend to the admissions of conclusions or inferences of law.

3. Husband and Wife § 19—

The following requisites are generally agreed to be necessary to the validity of deeds of separation between husband and wife: (1) A separation must have already taken place, or is to immediately follow the execution of the deed. (2) The separation agreement must be made for an adequate reason, not for mere mutual volition or caprice, and under circumstances of such character as to render it reasonably necessary to the health or happiness of the parties. (3) The agreement must be reasonable, just, and fair to the wife, having due regard to the condition and circumstances of the parties at the time it was made. And (4) it must conform to statutory requirements, where property rights are involved. G. S., 52-12 and 52-13.

4. Husband and Wife § 21—

In an action by a wife against her former husband to enforce a separation agreement between them, executed in accordance with G. S., 52-12, and affecting the wife's right of dower, support and all other rights acquired by her marriage in the property of her said husband, the defendant admitting the agreement as written and seeking in a first further defense to reform the instrument on the ground of omissions by mutual mistake of the parties and errors of draftsman, without averring that the matter omitted was considered by the officer taking the wife's acknowledgment, and seeking in a second further defense to set up a supplemental agreement, modifying the original and affecting the wife's property rights, without averring that the supplemental agreement is in writing and executed in accordance with G. S., 52-12, both further defenses and answers are fatally deficient and the court erred in overruling plaintiff's demurrers thereto.

5. Same: Pleadings § 10—

Where plaintiff sued her former husband to recover a monetary consideration under a written separation agreement, defendant's counterclaim for slander sounds in tort and is not a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of

plaintiff's claim, or connected with the subject of actions within the purview of the statute, G. S., 1-137.

6. Pleadings § 28—

The practice of allowing a motion for judgment on the pleadings is very restricted and is confined to cases where a plea confesses the cause of action and the matter relied upon in avoidance is insufficient in law.

7. Husband and Wife §§ 20, 21—

The breach by the wife of a covenant against molestation of the husband is no defense to an action by the wife to force the husband to make payments for her support based upon release of dower and rights in his property acquired by her marriage to him, in accordance with the terms of a separation agreement entered into by them.

8. Husband and Wife §§ 20, 22—

The authorities are to the effect (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability on the latter's covenants, the respective covenants must be interdependent rather than independent; and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith.

APPEAL by plaintiff from *Johnson, Jr., Special Judge,* at 8 January, 1945, Extra Term of MECKLENBURG.

Civil action for enforcement of payments by defendant to plaintiff pursuant to terms of separation agreement.

The record discloses that on 6 February, 1941, defendant and plaintiff, who were husband and wife, having separated on 1 November, 1940, entered into a written separation agreement—executed in conformity with the provisions of G. S., 52-12, formerly C. S., 2515—which provides, that "in consideration of the mutual covenants and agreement as are herein set forth, the said parties hereto agree as follows:

"1. That they shall hereafter live separate and apart from each other and independently of each other and each party hereto shall from the date hereof go his or her own way, without direction, molestation or control of the other party, and that the parties hereto further agree that they will not in any wise hereafter interfere with the other in any manner whatsoever and will refrain from molesting one another in any manner or speaking disparagingly of one another."

2. That they have "made an agreeable division of their household and kitchen furniture."

3. That upon signing and delivery of the agreement the husband paid to his wife the sum of $1,800 in cash, and agreed to pay to her "while she shall remain undivorced from the party of the first part, or be

unmarried," the sum of $150.00 per month beginning 10 March, 1941, but in no event to exceed in the aggregate the sum of $7,200.00.

4. That the husband relinquishes all right, title and interest in the property of his wife, including right of curtesy, and to administer upon or share in distribution of her estate.

5. That the wife relinquishes all right, title and interest in the property of her husband, including right of dower and to administer upon or share in distribution of his estate.

6. That each releases the other from any and all claims arising in tort or in contract "down to the signing of this agreement."

7. That the husband "shall become the owner of all real estate now held" by them "by the entireties," and that she will join in the execution of deeds or instruments necessary to vest title thereto in him, or such other party as he may direct.

8. That the agreement shall be binding and shall remain in full force and effect "even though a divorce be had between the parties hereto."

Plaintiff alleges in her complaint, summarily stated, that by the terms of the separation agreement she has (a) conveyed and quitclaimed to defendant all her right, title and interest and right of dower in both real and personal property of defendant, and right to administer upon his estate and to a distributive share of his personalty; (b) relinquished to defendant "her right for maintenance and support from the defendant"; and (c) released defendant of liability in tort and in contract, for all of which he agreed to pay a certain sum of money, and to pay $7,200.00 of it at the rate of $150.00 per month beginning 10 March, 1941; that defendant made the payments as agreed to and including 10 March, 1943, but, that, soon after obtaining a divorce on ground of two years' separation, and without any reason therefor, defendant quit paying, since which time installments amounting to $2,250.00 have fallen due under the terms of the agreement, and remain unpaid, after demand, and payment refused.

Defendant in answer to the various allegations of the complaint admits entering into the separation agreement, copy of which is attached to complaint, and avers that it is in writing and "speaks for itself as to all the terms and conditions thereof, except as the same was subsequently modified as hereinafter set forth." Defendant avers in substance that the various other allegations of the complaint are denied except in so far as "they may be found by the court to allege the true terms of the separation agreement."

And defendant, for a first further answer and defense, avers:

1. That it was the intention, understanding and agreement of the parties that the payment which "he" obligated himself to make under the terms of the separation agreement were to be conditioned upon the faith-

ful compliance by the plaintiff with all of the obligations assumed by her in said agreement, and specifically the paragraph of said agreement numbered one, wherein she promised and agreed not to molest or disturb or speak disparagingly of him.

2. That if the court should hold as a matter of law that said agreement as drawn fails to express the true intention and agreement of the parties as hereinabove averred, then defendant alleges that such omission was due to the mutual mistake of the parties and to an error of draftsmanship, and he prays the court that said instrument may be reformed and made to speak the true intention, understanding and agreement of the parties.

And defendant, for a second further answer and defense, avers (1) that within a short time after the execution of the separation agreement, plaintiff moved and established a residence out of the State, and, in breach of her agreement not to molest defendant or speak disparagingly of him, immediately entered upon a campaign of slander, vilification and personal abuse of him, which was carried on and continued with wrongful, malicious and evil intent until about the month of December, 1941, when he notified her, as he had a right to do, that, by reason of her constant breach of the separation agreement, he would no longer be bound thereby, and would seek such other relief as the law might afford him; (2) that thereafter and as a result of negotiations between their respective counsel, "the parties agreed that the payments provided for in said separation agreement should be resumed and continued and that defendant should forego resort to any other legal remedy as he might have, but that plaintiff should not thereafter violate the terms of the said agreement" relating to molesting, etc., "and that in the event she should do so the defendant's obligation to forego resort to other remedies or to make further payments pursuant to the terms of said agreement should cease and terminate"; (3) that though defendant did resume payments under said agreement, and faithfully complied with all the terms and conditions thereof, plaintiff, in violation of her express promise and agreement, continued to harass, molest, disturb and slander defendant in manner set out in defendant's third further answer and defense and counterclaim.

And defendant for a third further answer and defense and by way of counterclaim avers: That "plaintiff wilfully, maliciously and with evil intent and purpose violated her express agreement that she would not molest, disturb or speak disparagingly of defendant" in manner specified in detail, particularly in May, and the summer of 1942, and "shortly after the remarriage of this defendant, in the month of March, 1943," by reason of which "he has been held up to the public as one who is guilty of a breach of trust and of some crime; and charged expressly or by inference with crimes which would subject him to infamous and dis-

graceful punishment and imprisonment and would exclude him from decent and honorable society; that he has been humiliated, embarrassed and constantly placed in fear of his own life and safety; that the peace and tranquillity of his home have been disturbed and injured; that his feelings have been outraged and damaged; and that he has been caused to endure great mental torture and suffering all to his great damage in the sum of $10,000." Defendant thereupon prays that plaintiff take nothing by her action, and that he recover of her the sum of $10,000.

Plaintiff in reply to defendant's first and second answers and defenses denies each separate averment. Plaintiff moved to strike from defendant's answer all of the allegations contained in his third further answer and defense and counterclaim, together with prayer for relief for that same is bottomed in tort, whereas the plaintiff's cause of action is on contract, and therefore, the two causes of action as alleged in the complaint and in said further answers, defenses and counterclaim cannot be prosecuted in the same action, and the attempt to join same constitutes a misjoinder of causes of action.

When the case came on for hearing, motion to strike was treated as a demurrer for the purposes of hearing; and the plaintiff demurred *ore tenus* to the first and second further answers and defenses set up by defendant, and moved for judgment *pro confesso* upon the allegations of the complaint.

The court, being of opinion that each of the said motions and demurrers should be overruled, entered judgment accordingly. Plaintiff excepted to each ruling and appeals to the Supreme Court and assigns error.

Paul R. Ervin, G. T. Carswell, and Carrie L. McLean for plaintiff, appellant.

T. A. Adams and Brock Barkley for defendant, appellee.

WINBORNE, J. The questions involved on this appeal relate to the action of the court below (1) in overruling plaintiff's demurrer to the further answers and defenses and counterclaim of defendant, and (2) in denying plaintiff's motion for judgment *pro confesso* on the pleadings. As to these, we are of opinion that the challenge of plaintiff is well founded.

The plaintiff may in all cases demur to answer containing new matter, where, upon its face, it does not constitute a defense or counterclaim. Such demurrer shall be heard and determined as provided for demurrers to the complaint. G. S., 1-141.

"The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of the facts contained

therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom are also admitted, but the principle does not extend to the admissions of conclusions or inferences of law." *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Toler v. French,* 213 N. C., 360, 196 S. E., 312; *Vincent v. Powell,* 215 N. C., 336, 1 S. E. (2d), 826; *Merrell v. Stuart,* 220 N. C., 326, 17 S. E. (2d), 458.

It must be noted at the outset that separation agreements between husband and wife have not always been recognized as valid in this State. For instance, in the case of *Collins v. Collins,* 62 N. C., 153, decided in 1867, in an opinion by *Reade, J.,* the Court unequivocally held that "Articles of Separation between husband and wife, voluntarily entered into by them in contemplation of or after marriage, are against law and public policy, and will not be enforced in this State." This view, however, has been modified from time to time. See *Sparks v. Sparks* (1883), 94 N. C., 527; *Smith v. King* (1890), 107 N. C., 273, 12 S. E., 57; *Cram v. Cram* (1894), 116 N. C., 288, 21 S. E., 197; *Archbell v. Archbell* (1912), 158 N. C., 408, 74 S. E., 327, Ann. Cas., 1913 D, 261.

In the *Archbell case, supra,* while deciding, in opinion by *Hoke, J.,* that the deed of separation there in question was void because of an invalid certificate of the examining officer, as required by statute, Revisal, 2107, later C. S., 2515, and now G. S., 52-12, the Court said: "Since that decision was rendered in 1867, our statutes upon 'Marriage and Marriage Settlements and Contracts of Married Women' as entitled in the Code of 1883 and contained with amendments in Revisal, 1905, chapter 51, have made such distinct recognition of deeds of this character, more especially in Revisal, secs. 2116, 2108, 2107, etc., that we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law."

But we find in the decisions of this Court no collection of these "certain conditions." However, as stated in the *Archbell case, supra,* the authorities generally agree upon the requisites for a valid deed of separation. These are: (1) A separation must have already taken place, or is to immediately follow the execution of the deed. (2) The separation agreement must be made for an adequate reason, not for mere mutual volition or caprice, and under circumstances of such character as to render it reasonably necessary to the health or happiness of the parties. (3) The agreement of separation must be reasonable, just, and fair to the wife—having due regard to the condition and circumstances of the parties at the time it was made. And (4) in this State the separation agreement must conform to statutory requirements, where property rights are involved. G. S., 52-12.

The pertinent statute, G. S., 52-12, formerly C. S., 2515, Revisal, 2107, provides that no contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer period than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proved as is required for conveyances of land, and, upon privy examination of wife as in cases of execution of deeds, it shall appear to the satisfaction of the officer taking the examination that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her, and the certificate of the officer shall state his conclusions and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be.

Moreover, it is provided by statute, G. S., 52-13, formerly Revisal, 2108, C. S., 2516, that . . . "Subject to G. S., 52-12, any married person may release and quitclaim dower, tenancy by the curtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released."

Construing and applying these two sections in the *Archbell case, supra,* then Revisal, 2107 and 2108, the Court said: "Section 2108 in express terms subjects to requirements of 2107 contracts between husband and wife which purport to release or quitclaim dower, curtesy, and 'all other rights which they might respectively acquire or may have acquired in the property of each other.'" Continuing, it is there said: "While we have held that an allowance by way of alimony may be predicated in some instances on the capacity of the husband to labor, *Muse v. Muse,* 84 N. C., 35, this right of a married woman to support and maintenance is primarily a property right, or may be and very usually is made very largely dependent on the amount of property owned by the husband. *Taylor v. Taylor,* 93 N. C., 418; Nelson on Divorce, sections 908-909. Our decisions are to the effect that the identity of person between husband and wife in reference to their right to contract with each other is not further relaxed or affected than is specified and required by the Constitution and statutes (*Armstrong v. Best,* 112 N. C., 59; *Sims v. Ray,* 96 N. C., 87), and this section 2108 by correct interpretation clearly contemplates that a deed of the kind presented here, 'surrendering dower and all personal and property rights which she may have acquired against the person and property of her husband,' shall only be upheld when it complies with the forms established and required in section 2107. On this ground, therefore, the ruling of the lower court holding that the

instrument is void and of no effect on the rights of the parties is affirmed."

In the light of these principles, we have this factual situation in the case in hand: 1. A written separation agreement, affecting the wife's right of dower and all other rights acquired by her by marriage in the property of her husband, including the property right of support (*Archbell v. Archbell, supra*), executed in compliance with the forms established and required by G. S., 52-12, formerly Revisal, 2107, C. S., 2515.

2. Defendant admitting the separation agreement as written, and seeking in first further defense to reform it on ground of omission by mutual mistake of parties and error of draftsman, without averring that the matter omitted was taken into consideration by the officer, who took the examination, in finding that the contract is "not unreasonable or injurious" to the wife.

3. Defendant admitting the separation agreement as written, and seeking in the second further defense to set up a supplemental agreement modifying the original separation agreement and affecting the wife's property right of support, while the relationship of husband and wife still existed between him and plaintiff, without averring that the supplemental agreement is in writing and executed in compliance with requirements of G. S., 52-12, formerly Revisal, 2107, C. S., 2515.

Therefore, applying the principle applied in the *Archbell case, supra,* if by mutual mistake of parties and error of draftsman material matter were omitted from the separation agreement as written and not considered by the examining officer in finding that the original agreement is "not unreasonable or injurious" to the wife, the agreement of the wife as reformed would be in contravention of the provisions of the statute, G. S., 52-12. Likewise, if the original separation agreement were modified by supplemental agreement affecting the wife's property right of support, the agreement as modified would be subject to the forms and requirements of G. S., 52-12. Hence, in the absence of averments as above indicated both the first and second further defenses and answers are fatally deficient.

Regarding the third further answer and defense and counterclaim: Plaintiff sues to recover monetary consideration under written contract, a separation agreement. The alleged counterclaim of defendant sounds in tort based on alleged defamatory language, for which plaintiff, if liable at all, would be liable by operation of law, and not by reason of the deed of separation on which she sues. In such case the tort action for slander is not "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," within the purview of the statute relating to counterclaim. G. S., 1-137. Hence, it may not be

pleaded as a counterclaim in the present action. See *Weiner v. Style Shop,* 210 N. C., 705, 188 S. E., 331; *Ins. Co. v. Smathers,* 211 N. C., 373, 190 S. E., 484; *Hoyle v. Carter,* 215 N. C., 90, 1 S. E. (2d), 93; *Finance Corp. v. Lane,* 221 N. C., 189, 19 S. E. (2d), 849.

Lastly we come to plaintiff's exception to denial of her motion for judgment on the pleadings. The practice in such cases is very restricted and is confined to cases where a plea confesses the cause of action and the matter relied upon in avoidance is insufficient in law. McIntosh P. & P., 680. *Moye v. Petway,* 76 N. C., 327; *Ward v. Phillips,* 89 N. C., 217; *Walker v. Scott,* 106 N. C., 56, 11 S. E., 364; *Harrison v. Ray,* 108 N. C., 215, 12 S. E., 993; *Shives v. Cotton Mills,* 151 N. C., 290, 66 S. E., 141; *Baxter v. Irvin,* 158 N. C., 277, 73 S. E., 882.

Applying this principle to the present case, the defendant admits the separation agreement, copy of which is attached to the complaint, and defends his failure to pay in accordance with the terms of the agreement upon the ground that plaintiff, by violating her covenant against molestation of defendant, has forfeited her right to enforce defendant's covenant to pay for rights surrendered to him. Therefore, this determinative question arises: If it be true that the wife has violated the expressed covenant against molestation, as set out in the separation agreement, has she thereby forfeited her right to enforce the covenant of her husband to pay to her sums of money in lieu of support owed to her by him, as a matter of law, and for relinquishing to him her right of dower, and all other rights in his property acquired by her by marriage, as described in the separation agreement? While it does not appear that this question has been considered by this Court, mere statement of it suggests a negative answer. That the agreement of separation must be reasonable, just and fair to the wife—having due regard to the condition and circumstances of the parties at the time it was made as stated hereinabove, is a requisite condition to a valid agreement. And the authorities in other states which have considered the subject generally hold that the breach by the wife of the covenant against molestation of husband is no defense to an action by the wife to enforce the husband to make payments for her support and for release of dower and rights in his property acquired by her by marriage to him, in accordance with the terms of the separation agreement entered into by them. *Thomas v. Thomas* (N. J.), 146 A., 431; *Sabbarese v. Sabbarese,* 104 N. J. Eq., 600, 146 A., 592; *Stern v. Stern* (N. J.), 163 A., 149; *Hughes v. Burke* (Md.), 167 Md., 472, 175 A., 335; *Fifth Ave. Bank of N. Y. v. Realty Co.,* 30 F. (2d), 993; 30 C. J., 1065; 17 C. J. S., 620, Contracts, 235 (b); Lindey on Separation Agreements, 81.

These authorities are to the effect (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the

other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability from the latter's covenants, the respective covenants must be interdependent rather than independent; and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith. 30 C. J., 1065. H. & W., 845.

It is held by the Maryland Court in *Hughes v. Burke, supra,* "that the agreement not to molest him (the husband), while a part of the consideration for his covenants, was incidental and not the moving cause. All that he agreed to do in the way of support was in the performance of his common law duty." And in the *Sabbarese case, supra,* the Chancery Court of New Jersey expresses this view: "The breach of the covenant against molestation is no defense to a suit to enforce payment under the agreement. The covenants are independent, and in legal contemplation the promise of pay is in substitution of the legal duty to support." Other authorities and text writers hold to similar views. In 17 C. J. S., 620, the author states that "provisions that the parties will not molest each other . . . do not invalidate the separation agreement, since they merely affirm legal rights already existing," citing authorities.

In the case in hand, the covenant to pay is not conditioned upon the covenant against molestation. The two are of distinctive character and neither is dependent upon the other. Hence, in the light of the authorities cited, with which we agree, it is held that, on the record as it appeared in the trial court, and now appears, plaintiff was, and is entitled to have the court render judgment on the pleadings in her favor.

Reversed.

STATE HIGHWAY & PUBLIC WORKS COMMISSION OF NORTH CAROLINA, AN AGENCY OF THE STATE OF NORTH CAROLINA, v. DIAMOND STEAMSHIP TRANSPORTATION CORPORATION.

(Filed 23 May, 1945.)

1. Process § 6b—

No satisfactory general definition can be made of the phrase "doing business" as found in our statutes. The question is one of fact, and must be determined largely according to the facts of each individual case. The objective of the law in which the phrase is found must also be considered.

2. Same—

The purpose of G. S., 55-38, was, in recognition of reciprocal duties, to prevent a foreign corporation from accepting protection of our laws in the transaction of its ordinary business, create obligations and, by reason of its remoteness from any forum available to a local citizen, secure im-

munity from liability. Within reasonable limits the statute should be liberally construed to accomplish its remedial purpose.

3. Same—

In an action by a resident of this State against a foreign corporation, commenced by the issuance of summons and service thereof upon the Secretary of State under G. S., 55-38, where, on objection to the jurisdiction by special appearance, the court, upon sufficient evidence, found that a vessel of defendant, a regular carrier of freight in the coastwise trade, entered the port of Wilmington and discharged a substantial part of its valuable cargo in the regular course of business, and was there damaged by striking a bridge and remained some months in said port, undergoing repairs and having considerable business dealings with local residents, the service of process upon the Secretary of State was valid and sufficient to bring defendant into court.

4. Appearance § 1—

Upon motion by special appearance to dismiss for want of service of process on defendant, this Court is bound by the findings of fact made by the court below, when there is sufficient evidence to support them.

5. Process § 6b—

The statute, G. S., 55-38, authorizes service of process on the Secretary of State, in an action by a resident of this State against a foreign corporation, after the business, once carried on by defendant, has been discontinued.

APPEAL by defendant from *Stevens, J.*, at October Term, 1944, of NEW HANOVER.

The plaintiff brought this action to recover damages from the defendant, a foreign corporation engaged in the coastwise trade along the Southeastern Seaboard, because of an injury to a bridge across Cape Fear River, alleged to have been caused by the negligent operation of one of the defendant's vessels, the *Severance*.

The plaintiff sought to bring the defendant into court by service of summons upon the Secretary of State under the provisions of G. S., 55-38, which reads as follows:

"Every corporation having property or doing business in this state, whether incorporated under its laws or not, shall have an officer or agent in the state upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this state. In the latter event, process in an action or proceeding against the corporation may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this state, service could be made. For

this service to be performed by the secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service was made."

The plaintiff also caused service of summons to be made upon one C. D. Maffitt as defendant's local agent.

The defendant entered a special appearance and moved to dismiss the action for want of service of summons, contending that it was not, and had not been, doing business in this State within the meaning of the above cited statute, and that Maffitt was not an agent within the definition of the statute upon whom service of process could be made.

Pertinent to a decision in this matter, the judge found the following facts, which he embodied in an order adjudging the service on the Secretary of State to be valid:

"The defendant is a corporation engaged in carrying freight for hire by vessel; it owned the steamship, *Severance,* and operated her in the coast-wise shipping trade, and in such trade it took on a cargo of sulphur in Texas and discharged some of its cargo to consignees in Charleston, S. C., it hired and employed a pilot in Wilmington, N. C., to go to Charleston and bring the *Severance* into the port of Wilmington on November 22, 1940. The defendant employed and paid and provisioned the captain and crew. At Wilmington the defendant discharged part of its cargo by lighters to one consignee, and anchored in the anchorage at Wilmington and employed another pilot and tugs to assist it in going up the river to deliver the balance of its cargo of sulphur to two or more consignees, and on the way up the river on November 23, 1940, it collided with and negligently ran into and damaged the Fender Piling System and Lighting System of the plaintiff's bridge spanning the Cape Fear River—the same being a fixed structure—and damaging the plaintiff in a considerable sum, for which damage this suit is brought, and which the defendant owes the plaintiff. The cargo discharged in this State was worth upwards of $200,000. The defendant employed an agent at Wilmington, namely, C. D. Maffitt, and some of its officers came to Wilmington to attend to different matters for said defendant, but it did not designate a process agent or domesticate as is provided for in North Carolina statutes, the defendant employed a good many people to do work on the ship, to raise it, to do repairs, and bought provisions amounting to several hundred dollars over a period of more than two months. After the employees raised the ship, the ship proceeded up the river and discharged its cargo, and the defendant employed another pilot and tugs for this trip, and employed a pilot to carry it out to sea. Different purchases were made from different people, from the foundry and iron works and others; the vessel was later brought back into the port of Wilmington and was moored at a dock where it stayed for more than

thirty (30) days, during which time the defendant employed various people to do different kinds of work on said vessel and about it, paid wharfage and entered into numerous contracts with reference to its ship, and thereafter it employed a pilot to navigate it down the river and out to sea, all of which occurred in November and December, 1940, and in January, 1941, and during the hearing of this motion it was admitted by defendant's counsel in open court that at the times in question the defendant was doing such business in North Carolina, and the Court finds as a fact that the defendant was doing business in the State of North Carolina in December, 1940, and January, 1941, and constituted the Secretary of State of North Carolina as its process agent, upon whom process might be served in any suit arising out of such business transacted in this State; and the process in this case was served on C. D. Maffitt on January 26, 1944, and on the Secretary of State of North Carolina on February 3, 1944, who has sent a copy to the defendant, which it has received, and the defendant since shortly after January, 1941, has had some property in the State of North Carolina and still has the same, being deposit for Court cost in the U. S. District Court, and the Court being of opinion that under the statutes of this State, as construed by the Supreme Court, the defendant has irrevocably constituted and appointed the Secretary of State as its process agent in North Carolina, and that said process was properly served, so finds, and it is

"ORDERED, CONSIDERED, AND ADJUDGED that the defendant's motion be, and the same is hereby denied, and it is adjudged that the process was properly served on the defendant, and that it is in Court, and it is further ordered, considered, and adjudged that the defendant have thirty (30) days to file answer or other pleading."

To the foregoing order defendant excepted and appealed to this Court.

Charles Ross, General Counsel; I. C. Wright, Special Counsel—for plaintiff, appellee.

Rountree & Rountree for defendant, appellant.

SEAWELL, J. Only the validity of the service of process on the Secretary of State was passed on by the court below and is presented on this appeal. That validity depends upon an affirmative answer to two questions, to which the controversy has been narrowed in the argument: Was the defendant doing business in this State, upon the facts found by Judge Stevens? Does the statute authorize service of process on the Secretary of State after the business, once carried on, has been discontinued?

It has been frequently pointed out that no satisfactory general definition can be made of the phrase "doing business" as found in our statutes,

and that, generally speaking, each case must be determined on its own facts. "No all-embracing rule as to what is 'doing business' has been laid down. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite, and precise rules." *Timber Co. v. Ins. Co.*, 192 N. C., 115, 133 S. E., 424; *C. T. H. Corporation v. Maxwell*, 212 N. C., 803, 195 S. E., 36.

The objective of the law in which the phrase is found—its purpose and orientation to the carrying on of business—must also be considered. For instance, licensing and taxing laws have been held to contemplate more extensive activities than would be required of a statute the purpose of which is to bring a corporation into the jurisdiction of the court. In *Knutson v. Campbell*, 300 F., 241, this distinction is recognized.

" 'Doing business,' to bring an alien within jurisdiction of local courts, does not mean that corporation must maintain such relation to 'doing business' as to bring it within statute requiring license, though enough business must be done to enable court to say that corporation is present." *C. T. H. Corporation v. Maxwell, supra.*

In *Parris v. Fischer Co.*, 219 N. C., 292, 13 S. E. (2d), 540, it is said: "The doing of a single act pertaining to a particular transaction will not be considered doing business, as the phrase denotes some degree of continuity. . . . But this rule does not apply when the evidence permits the inference that the act is done pursuant to a course of business, and indicates the intention to engage in a continuing business in the State, rather than in a single, isolated transaction."

The Court has been careful not to bring within the purview of the statute sporadic activities of a foreign corporation which are not directly in performance of its charter functions, or which are not of such a character as to indicate a course of business which might be expected to recur as opportunity offered; but the nature of the activities themselves, their magnitude, the multiplicity of contacts, the possibility that incidents may occur and liabilities be created—especially where the entrance into the State is in the ordinary prosecution of the business which the corporation is chartered to carry on and is carrying on, and which definitely regards the State as a theater for future transactions of a like sort as often as occasion might arise—these are important considerations in determining whether a corporation is, in a given instance, doing business in the State. On a single visitation to the State the matter in hand may explode into a multitude of transactions of far-reaching importance.

Perhaps what is said by *Chief Justice Stacy* in *Ruark v. Trust Co.*, 206 N. C., 564, 174 S. E., 441, comes as near to the solution of the problem as anything yet devised: "The expression 'doing business in this State' as used in C. S., 1137, means engaging in, carrying on, or exer-

cising in this State, some of the things, or some of the functions, for which the corporation was created."

Reference to the purpose of the statute may throw some light upon the propriety of its application in particular instances, as in this. Obviously, that purpose was, in recognition of reciprocal duties, to prevent a foreign corporation from accepting the protection of our laws in the transaction of its ordinary business, create obligations, and by reason of its remoteness from any forum available to a local citizen, secure immunity from liability. Within reasonable limits the statute should be liberally construed to accomplish its remedial purpose.

In the case before us, the single trip of the *Severance* into our waters resolved itself into numerous transactions, lasting over a considerable period of time, and in one alleged liability of considerable moment. The *Severance* entered the port and discharged a part of its cargo in the regular course of the business for which it had been chartered, and as a regular carrier of freight in the coastwise trade, was not making a casual entry into port, but one which would be repeated as often as it could obtain a cargo. Under the construction of the statute contended for by the appellant, the *Severance* might ply its trade in every port from Seattle to Bangor and back again, leaving a trail of obligations in its wake, and never "do business" in any state, or become subject to any statute designed to bring it into court upon that basis.

The statute imposes no hardship upon the corporation comparable to that which would be imposed upon the ordinary citizen by forcing him to bring his suit in a distant court. It is a manifestation in the law of the principle of "live and let live"; and we are of the opinion that appellant accepted its terms when, under the conditions set out, it entered the Port of Wilmington and engaged in the various activities disclosed in the findings of fact. *Anderson v. U. S. Fidelity Co.*, 174 N. C., 417, 93 S. E., 948.

The evidence is sufficient to support the findings of fact made by the court below, and we are bound by them. *Shoenith, Inc., v. Mfg. Co.*, 220 N. C., 390, 391, 17 S. E. (2d), 350.

We do not regard the second query—that is, whether the statute authorizes service upon the Secretary of State upon discontinuance of the business out of which the obligation arises—as an open question here. In *Fisher v. Ins. Co.*, 136 N. C., 217, 225, 48 S. E., 667, *Justice Walker*, speaking for the Court, said: "The fact that the defendant had ceased to do business in this State, if such is a fact, cannot affect our conclusion. If it had taken out a license to do business in the State, it could neither revoke it, nor could it withdraw from the State to the plaintiff's prejudice. The statute will not cease to operate as to it until its debts due to

citizens of this State are paid." *Sisk v. Motor Freight, Inc.*, 222 N. C., 631, 24 S. E. (2d), 488.

We think the service of process upon the Secretary of State is valid, and sufficient to bring the defendant into court, and we so hold.

Judgment of the lower court is

Affirmed.

DANIEL H. NEWTON AND CLARA B. NEWTON v. H. M. CHASON, TAX COLLECTOR OF BLADEN COUNTY, NORTH CAROLINA.

(Filed 23 May, 1945.)

1. Pleadings § 20—

A demurrer admits only relevant facts well pleaded and relevant inferences of fact readily deducible therefrom, but does not admit the conclusions of law or inferences of law contained in the complaint.

2. Injunction § 2: Pleadings § 15—

Courts will not grant the equitable relief of injunction when there is an adequate remedy at law, and a demurrer *ore tenus* to the complaint in a suit asking such relief will be sustained and the action dismissed.

3. Taxation §§ 38b, 38c—

Our tax law provides a method to be followed by the injured taxpayer in cases where a tax levy is deemed illegal, which is to pay the tax under protest and then bring suit to recover the same, G. S., 105-406. Drainage assessment shall be collected in the same manner as State and county taxes under the law existing at the time of the collection. G. S., 156-105. No sale of tax liens on realty shall be delayed or restrained by order of any court of this State. G. S., 105-387.

4. Judgments § 22b—

An action, which seeks to restrain acts and things directed to be done by *mandamus* in a suit involving the same subject matter, is a collateral attack by independent suit upon a valid, final and subsisting judgment, contrary to the consistent holding of this Court.

5. Drainage Districts § 1—

A drainage district is a *quasi*-municipal corporation, and neither its existence nor the regularity of its proceedings can be collaterally impeached.

6. Drainage Districts § 10—

Parties to drainage proceedings, and in reference to their lands situated within the drainage district, are estopped, from questioning by independent suit, the judgment establishing the district or the validity and amount of the assessments made in the cause or the burdens and benefits affecting the property. These, and like rulings, must be challenged at the proper

time and in the course of the proceeding, and unless objection is successfully maintained, the parties are concluded.

7. Same—

Drainage proceedings are never closed, and a party aggrieved therein may, by motion in the cause at any time, raise questions as to his right affected thereby.

APPEAL by plaintiffs from *Stevens, J.,* at October Term, 1944, of PENDER.

The defendant, H. M. Chason, Tax Collector of Bladen County, had been ordered and directed by *mandamus* in the case of Ruth Smith by her General Guardian, T. F. Wood, and R. F. McClammy *v.* Lyon Swamp Drainage and Levee District, to make sale of the plaintiffs' land in Bladen County, and had advertised such sale, and was served with a temporary restraining order in this action, enjoining the sale as advertised; and upon hearing upon the temporary order the same was continued till the final hearing; and when the matter came on for trial the defendant demurred *ore tenus* to the complaint, which demurrer was sustained and the action dismissed.

The complaint alleged that the plaintiffs are "the owners in fee simple and as tenants in common are in possession of those tracts of lands containing in the aggregate 386 acres, situated in Frenches Creek Township, Bladen County, North Carolina, and more particularly described in a deed from I. M. Newton and others to plaintiffs, dated 6 April, 1939, and recorded on May 18, 1939, in Book 102, page 202, of the Registry of Bladen County, a part of said lands being shown as lots Nos. 1 and 23 on a map which is recorded in the Registry of Bladen County and purports to be a map of a supposed drainage district and known as Lyon Swamp Drainage and Levee District, said map having been recorded on August 11, 1942, in Map Book 4, page 11, of the Registry of Bladen County;" that the defendant, H. M. Chason, is the Tax Collector of Bladen County, and as such officer has advertised in the *Bladen County Journal* the sale for alleged nonpayment of drainage assessments, together with others, the said lands of the plaintiffs, being described as Lots 1 and 23; and that pursuant to said advertisement the defendant proposed to sell the said lands of the plaintiffs and thereby create, enforce and impose a lien upon said lands and to divest the plaintiffs of the title thereof or place a cloud upon said title; that the defendant is without authority to make a valid sale of said lands for the reason that the purported drainage assessments against the same "is defective on its face and is as a matter of fact and law invalid, illegal, irregular and void, and was unlawfully levied and assessed for an illegal and unauthorized purpose"; that the defendant tax collector should be restrained and

enjoined from selling the aforedescribed lands of the plaintiffs as he proposes to do under the aforesaid notice, for that said sale, while it would be void, would place a cloud upon the title of the plaintiffs, and would place a lien upon the public records that would be vexatious and burdensome to the plaintiffs; and prays that an order permanently restraining and enjoining the defendant tax collector from selling the aforesaid lands of the plaintiffs as he proposes to do under the aforesaid notice.

The defendant first filed answer to the complaint of the plaintiffs, and the case came on for hearing upon these pleadings, at the October Term, 1944, of Pender County, when and where the defendant demurred *ore tenus* to the complaint "on the grounds that the plaintiffs were not entitled to the equitable relief sought in this action and could not attack the validity of a final, valid and subsisting judgment of the Superior Court by the independent action"; and the court sustained the demurrer and dismissed the action. To this ruling of the court the plaintiff preserved exception and appealed to the Supreme Court, assigning errors.

Moore & Corbett for plaintiffs, appellants.

Louis Goodman, Clayton C. Holmes, and W. E. Blake for defendant, appellee.

SCHENCK, J. This appeal poses the single determinative question: Does the complaint state facts sufficient to constitute a cause of action? If the answer be in the negative the ruling and judgment of the trial judge was correct; while if the answer be in the affirmative the ruling and judgment of the trial judge was erroneous. We are constrained to hold that the answer is in the negative.

A demurrer admits only relevant facts well pleaded and relevant inferences of fact readily deducible therefrom, but does not admit the conclusions of law or inferences of law contained in the complaint. *Whitehead v. Telephone Co.*, 190 N. C., 197, 129 S. E., 602, and cases there cited.

The complaint in this action seeks only equitable relief, namely, an injunction, and the courts will not grant such relief where there is an adequate remedy at law. Our tax law provides a method to be followed by the injured taxpayer in cases where a tax levy is deemed illegal, which is to pay the tax under protest and then bring suit to recover the same, G. S., 105-406 (C. S., 7979). G. S., 156-105 (C. S., 5361), provides that drainage assessments shall be collected in the same manner as State and county taxes under the law existing at the time of the collection. Ch. 310, sec. 1715 (b), Public Laws 1939, now G. S., 105-387, provides that "No sale (of tax liens on real property) shall be delayed or restrained by order of any court of this State." It is therefore apparent

from the complaint itself that the alleged action of the plaintiffs is untenable, and his Honor was correct in dismissing the same.

It would also seem that his Honor was correct in sustaining the demurrer and dismissing the action for the reason that it appears from the complaint that the plaintiff seeks to restrain acts and things directed to be done by a *mandamus* in a suit involving the same subject matter. This action is a collateral attack by an independent suit upon a valid, final and subsisting judgment, contrary to the consistent holding of this Court. In *Spencer v. Wills,* 179 N. C., 175, 102 S. E., 275, it is written, at bottom of page 177: "In various decisions appertaining to the subject, we have held that parties to proceedings of this character and in reference to their lands situate within the district are estopped from questioning by independent suit the judgment establishing the district or the validity and amount of the assessments made in the cause or the matter of burdens and benefits affecting the property. These, and other like rulings, must be challenged at the proper time and in the course of the proceedings, and unless objection is successfully maintained, the parties are concluded. *Craven v. Comrs.,* 176 N. C., 531; *Lumber Co. v. Comrs.,* 174 N. C., 647; *Griffin v. Comrs.,* 169 N. C., 642; *Newby v. Drainage District,* 163 N. C., 24; *Shelton v. White,* 163 N. C., 90." And further in *Newby v. Drainage District, supra,* it is held that: ". . . a drainage district is a *quasi*-municipal corporation, and neither its existence nor the regularity of its proceedings can be collaterally impeached. . . . It is elementary that the validity of such districts cannot be collaterally attacked. . . . The plaintiffs, of course, stand in the shoes of their grantors, who were parties to the proceedings for the establishment of the district, as a pendency of the proceedings is notice with respect to all lands embraced in the district. . . . The statute in terms, declares that the order of the court confirming the final report of the viewers 'shall be conclusive and final that all prior proceedings were regular and according to law, unless they were appealed from.' And this statutory declaration that the regularity of the proceedings shall not be subject to collateral attack is in line with the decisions of the courts and text-writers of good repute."

The plaintiffs' remedy, if any they have, would be by motion in the cause. A drainage proceeding is never closed, and the plaintiffs could have moved in the cause, and thereby have raised the questions set out in their complaint. *Banks v. Lane,* 170 N. C., 14, 86 S. E., 713; *ibid.,* 171 N. C., 505, 88 S. E., 754; *Staton v. Staton,* 148 N. C., 490, 62 S. E., 596; *Mann v. Mann,* 176 N. C., 353, 97 S. E., 175.

We are of the opinion, and so hold, that the judgment of the Superior Court sustaining the demurrer *ore tenus* and dismissing the action should be affirmed for the reason that the court will not grant the equitable relief of injunction when an adequate remedy at law existed; an act

directed by a court order in one action will not be restrained by an order in another action collaterally attacking the former; courts will not by injunction restrain a sale of tax liens on real property, and a valid, final and subsisting judgment of the Superior Court cannot be collaterally attacked.

The judgment of the Superior Court is

Affirmed.

LULA JOHNSON, ADMINISTRATRIX OF THE ESTATE OF GEORGE JOHNSON, DECEASED; LULA JOHNSON, WIDOW; PEARL J. MOORE, JOHN LUTHER, DON, EUGENE, EUNICE AND HAZEL JOHNSON, HEIRS-AT-LAW OF GEORGE JOHNSON, v. J. BUREN SIDBURY, ADMINISTRATOR OF THE ESTATE OF V. SIDBURY, DECEASED.

(Filed 23 May, 1945.)

1. Judgments § 22e—

Where, notwithstanding the summons and complaint in a civil action were duly served on defendant and copies left with him, defendant failed for a period of thirty days to acquaint himself with their contents and to file an answer or other defense, attributing his inattention and neglect to the similarity of the title of the case to a former action and to his preoccupation in the duties of his profession, this should not be held in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his conduct as against diligent suitors proceeding in accordance with the statute.

2. Same—

The judge is empowered by G. S., 1-220, to relieve a defendant from a judgment regularly taken against him only when he finds upon sufficient evidence that the judgment was taken through mistake, inadvertence, surprise, or excusable neglect, and that the defendant has a meritorious defense, so that, in the absence of excusable neglect, the question of meritorious defense becomes immaterial.

APPEAL by plaintiffs from *Johnson, Special Judge,* at December Term, 1944, of NEW HANOVER. Reversed.

Motion to set aside default judgment on ground of excusable neglect. Motion allowed and plaintiffs appealed.

Rodgers & Rodgers and J. H. Ferguson for plaintiffs.

Carr, James & Carr and Clayton C. Holmes for defendant.

DEVIN, J. The appeal in this case presents the question whether the defendant offered sufficient evidence of excusable neglect to warrant

setting aside a judgment by default and inquiry heretofore rendered against him for want of an answer. G. S., 1-220.

It appears that the action was properly instituted in the Superior Court of New Hanover County to recover damages for injury to real property, and that summons and verified complaint were duly served on the defendant 13 June, 1944. G. S., 1-89; G. S., 1-121. No answer or other plea having been filed by defendant, on 14 July, 1944, judgment by default was rendered by the clerk, with order for inquiry as to amount of damages sustained by plaintiffs. G. S., 1-209; G. S., 1-212. On 14 October, 1944, defendant moved before the clerk to set aside the judgment, under G. S., 1-220, on the ground of excusable neglect. This motion was denied and defendant appealed to the judge of the Superior Court. On such appeal the judge held the judgment was taken through mistake, inadvertence or excusable neglect and that defendant had shown a meritorious defense, and ordered that the judgment be set aside and the defendant allowed to plead. Plaintiff's appeal brings this ruling here for review.

The findings of fact upon which the order of the trial judge was based were substantially these: In 1941 a suit had been instituted by plaintiff's intestate George Johnson against V. Sidbury, defendant's intestate, and another, for a cause of action similar to that now sued on. At May Term, 1944, a voluntary nonsuit had been entered in that action, and the defendant was so advised. It was found by the court that when summons and complaint in the present action were served on defendant 13 June, 1944, through mistake and inadvertence, because of his knowledge of the former suit and the similarity of the papers, he concluded these were some papers in connection with the disposal of that suit, and did not need attention. The court also found the following facts: "But the court further finds as a fact that at the time said summons and complaint were served upon the defendant, J. Buren Sidbury, administrator of the estate of V. Sidbury, deceased, on 13 June, 1944, he was a physician practicing in Wilmington and Eastern North Carolina; that he had a very large practice; that at that time and for some time prior thereto the city of Wilmington and the surrounding communities because of war activities had had a great influx of population, while the practicing physicians had decreased about one-third in number, thus throwing a great strain upon the practicing physicians in order to give the necessary attention to the sick and afflicted, and that the defendant, J. Buren Sidbury, because of the demands upon him as a physician was under great strain and unable to give the attention to personal affairs not involving the treatment of the sick and afflicted that he would have been able to give under normal conditions; that the defendant, J. Buren Sidbury, was at said time operating the Babies Hospital at Wrightsville Sound, which was filled to

capacity, and was also treating patients at the James Walker Memorial Hospital, and in addition thereto was treating patients at his private offices."

It thus appears that notwithstanding the summons and complaint were duly served on him by an officer, and that copies of these papers were left with him, the defendant failed for the period of thirty days to acquaint himself with their contents. While his inattention and neglect are attributed to the similarity in the title of this case to a former action, and to his preoccupation in the duties of his profession, commendable and highly important though they were, we do not think this should be held in law to constitute such excusable neglect as would relieve an intelligent and active business man from the consequences of his inattention, as against diligent suitors proceeding in accordance with the provisions of the statute. *White v. Snow,* 71 N. C., 232; *Churchill v. Ins. Co.,* 88 N. C., 205; *Williamson v. Cocke,* 124 N. C., 585, 32 S. E., 963; *Pepper v. Clegg,* 132 N. C., 312, 43 S. E., 906; *School v. Peirce,* 163 N. C., 424, 79 S. E., 687; *Pierce v. Eller,* 167 N. C., 672, 83 S. E., 758; *Lumber Co. v. Blue,* 170 N. C., 1, 86 S. E., 724; *Jernigan v. Jernigan,* 179 N. C., 237, 102 S. E., 310; *Lumber Co. v. Chair Co.,* 190 N. C., 437, 130 S. E., 12; *Dunn v. Jones,* 195 N. C., 354, 142 S. E., 320; *Kerr v. Bank,* 205 N. C., 410, 171 S. E., 367; *Carter v. Anderson,* 208 N. C., 529, 181 S. E., 750.

In *White v. Snow, supra,* it was said: "The summons was duly served on the defendant by the delivery of a copy. But he supposed it to be some notice or other paper in another suit pending between the same parties, and paid no attention to it. He does not say whether he read it or not. It is impossible to hold such neglect excusable." In *Sutherland v. McLean,* 199 N. C., 345, 154 S. E., 662, it was said that the imperative duty was imposed upon a defendant in a civil action to give to the litigation "such attention as a man of ordinary prudence usually bestows upon his important business."

The judge is empowered by G. S., 1-220, to relieve a defendant from a judgment regularly taken against him only when he finds upon sufficient evidence that the judgment was taken through mistake, inadvertence, surprise or excusable neglect, and that the defendant has a meritorious defense. *Lumber Co. v. Chair Co., supra; Dunn v. Jones, supra.* In the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial.

The ruling of the court below upon the facts presented that the defendant's inattention and neglect to plead within the time limited by statute was excusable must be held for error, and the judgment setting aside the judgment heretofore rendered in the cause is

Reversed.

JAMES BRADY BARBEE AND WIFE, AUTIE INEZ BURRIS BARBEE, v. S. G. LAMB.

(Filed 23 May, 1945.)

1. Frauds, Statute of, § 11—

A parol lease agreement for more than three years is void. G. S., 22-2.

2. Landlord and Tenant § 6—

One, who enters into possession of premises under a void lease or under an agreement which is for an indefinite and uncertain term, or for so long as the tenant may wish to occupy the premises, becomes a tenant at will.

3. Same—

Tenancy at will may be terminated at any time by either party to the agreement. And it is terminable *instanter* by demand for possession, or by a conveyance of the property by the landlord.

4. Frauds, Statute of, § 11: Deeds § 8—

To affect a purchaser with notice, a lease for a term exceeding three years must be in writing and recorded in the proper county.

5. Trusts §§ 1a, 15—

An agreement with the owner, that the tenant may occupy the premises, without rent and free of taxes, so long as the tenant and his family would live thereon, is insufficient to create a trust estate or other equitable interest.

APPEAL by defendant from *Rudisill, Special Judge,* at October Term, 1944, of STANLY. Affirmed.

Civil action in ejectment, heard on demurrer to the further affirmative defense pleaded in defendant's answer.

Plaintiffs purchased the *locus in quo* from D. J. Skidmore, 22 May, 1944. Defendant was then in possession. Plaintiffs demanded possession which was refused. Thereupon this action to recover possession and damages for the wrongful detention was instituted.

Defendant, answering, admits the deed from Skidmore to plaintiffs, possession by him, notice or request to vacate, and his refusal to vacate. He then pleads a further defense in substance as follows:

He is the son-in-law of Skidmore. In 1924 Skidmore persuaded him to move back to Norwood, home of Skidmore, and told him if he would do so he (Skidmore) would build defendant and his family a house on the *locus* and "they might occupy same, free of rent and taxes, so long as this defendant and his family would live thereon." Defendant consented and in the latter part of 1924 moved his family into the house Skidmore had in the meantime constructed on such property as agreed.

The defendant and his family have since openly occupied said premises under said agreement. Skidmore never demanded possession. Plaintiffs, when they purchased, knew, or by the exercise of ordinary care, should have known of defendant's possession and the terms thereof.

He asserts his right to continue to occupy said premises under said agreement notwithstanding the purchase by plaintiffs and the notice to quit.

Plaintiffs demur, in short, for that the further answer and defense fails to allege any fact or circumstance sufficient to constitute a valid defense to their action.

When the cause came on for hearing the parties stipulated that the defense set out in defendant's further answer was his sole and only defense to the plaintiffs' cause of action for the possession of the property, and that if the demurrer filed is sustained, then judgment may be entered for the plaintiffs without the submission of issues raised by the general denials of the defendant.

The court below sustained the demurrer and entered judgment for plaintiffs in accord with the stipulation. Defendant excepted and appealed.

Brown & Mauney for plaintiffs, appellees.

Fred J. Coxe and W. L. Mann for defendant, appellant.

BARNHILL, J. It sufficiently appears on the face of the further answer that the agreement of rental was an oral understanding. The contemplated occupancy was for an indeterminate period—so long as the defendant and his family would live thereon. No annual rental was reserved. The landlord conveyed the premises. Hence the facts admitted by the demurrer are insufficient to constitute a valid defense or to defeat plaintiffs' present right to the premises.

A parol lease agreement for more than three years is void. G. S., 22-2; *Mauney v. Norvell,* 179 N. C., 628, 103 S. E., 372.

One who enters into possession of premises under a void lease or under an agreement which is for an indefinite and uncertain term, *Barnes v. Saleeby,* 177 N. C., 256, 98 S. E., 708; *Rental Co. v. Justice,* 212 N. C., 523, 193 S. E., 817; *Sappenfield v. Goodman,* 215 N. C., 417, 2 S. E. (2d), 13, or for so long as the tenant may wish to occupy the premises, *Mhoon v. Drizzle,* 14 N. C., 414, becomes a tenant at will.

Some authorities hold that if such agreement provides for the payment of an annual rental and the landlord accepts payment on an annual basis, it is converted into a lease from year to year. But those authorities are not in point for no rental was reserved or accepted. Instead, the agree-

ment expressly provides that the defendant is to occupy "free of rent and taxes."

Tenancy at will may be terminated at any time by either party to the agreement. *Mhoon v. Drizzle, supra; Mauney v. Norvell, supra; Rental Co. v. Justice. supra; Simons v. Lebrun,* 219 N. C., 42, 12 S. E. (2d), 644.

When it is terminable at the will of one party, it is terminable at the will of the other also. *Mhoon v. Drizzle, supra; Sappenfield v. Goodman, supra.* And it is terminable *instanter* by demand for possession, *Love v. Edmonston,* 23 N. C., 152; *Howell v. Howell,* 29 N. C., 491; *Mauney v. Norvell, supra,* 32 Am. Jur., 83, or by a conveyance of the property by the landlord. *Howell v. Howell, supra;* Anno. 120 A. L. R., 1008.

That plaintiffs knew, or by reasonable inquiry could have ascertained, that defendant was in possession is immaterial for, to affect the purchasers with notice, a lease for a term exceeding three years in duration must be in writing and registered in the proper county. *Mauney v. Norvell, supra.*

The defendant does not claim ownership of the premises. He acknowledges his status as a tenant under agreement with the true owner. Hence his open, notorious, exclusive possession as such would not avail him either as notice to plaintiffs or as a source of title superior to that of the plaintiffs.

The agreement under which defendant occupies the premises is insufficient to create a trust estate or other equitable interest. *Frey v. Ramsour,* 66 N. C., 466; *Wood v. Cherry,* 73 N. C., 110; *Cobb v. Edwards,* 117 N. C., 245. Indeed it is not so alleged. See *Grimes v. Guion,* 220 N. C., 676, 18 S. E. (2d), 170.

It follows that there was no error in the judgment sustaining the demurrer and adjudging, under the stipulation of record, that the plaintiffs are the owners and entitled to the immediate possession of the land in controversy. It must be

Affirmed.

STATE v. ELBERT W. MILLER.

(Filed 23 May, 1945.)

1. Criminal Law § 63—

When prayer for judgment is continued, the judgment is suspended. When judgment is pronounced and sentence is suspended, execution of sentence is stayed. When either judgment or sentence is suspended on condition, the ultimate purpose is the same.

2. Same—

The inherent power of a court having jurisdiction to suspend judgment, or stay execution of sentence, on conviction in a criminal case, for a determinate period or for a reasonable length of time, has been recognized and upheld in this jurisdiction. Such disposition of the case does not serve to delay or defeat the defendant's right of appeal.

3. Criminal Law §§ 62, 63: Constitutional Law § 15d—

An order, suspending the imposition or execution of sentence on condition, is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law.

4. Criminal Law §§ 62, 63—

Defendant in a criminal action, after judgment suspended on conditions, is relegated to contest judgment and execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed.

5. Criminal Law §§ 62, 63, 76, 77—

Where on conviction of defendant in a criminal case and judgment and execution are suspended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is provided by statute from an adverse ruling, so that defendant's remedy is by *certiorari* or *recordari.*

6. Courts § 1a: Appeal and Error §§ 1, 30b—

This Court's jurisdiction is derivative and where the Superior Court was without jurisdiction to entertain an appeal from a county criminal court, this Court has none. No circumstance or condition is sufficient justification for the assumption of jurisdiction not possessed.

APPEAL by defendant from *Phillips, J.,* at September Term, 1944, of ANSON. Appeal dismissed.

Criminal prosecution in the county criminal court of Anson County on warrant charging that defendant unlawfully contributed to the delinquency of a minor, heard in the Superior Court on appeal from an order imposing sentence under a suspended judgment for breach of conditions of probation.

The defendant was convicted in the county criminal court of Anson County on said charge 20 September, 1939. Prayer for judgment was continued and defendant was released on probation under stipulated

conditions. He was arrested in September, 1943, on complaint of the probation officer, charged with a breach of the conditions of probation. The county court judge, on 14 December, 1943, heard the evidence, found as a fact that defendant had failed to comply with the terms of his probation, and imposed sentence of imprisonment. Defendant appealed. The court below affirmed and directed that commitment issue. Defendant appealed to this Court, assigning error.

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

J. Shepard Bryan for defendant, appellant.

BARNHILL, J. When prayer for judgment is continued, the judgment is suspended. When judgment is pronounced and sentence is suspended, execution of sentence is stayed. When either judgment or sentence is suspended on condition, the ultimate purpose is the same. 15 A. Jur., 134, 142. *S. v. Greer,* 173 N. C., 759, 92 S. E., 147.

The inherent power of a court having jurisdiction to suspend judgment or stay execution of sentence on conviction in a criminal case for a determinate period and for a reasonable length of time has been recognized and upheld in this jurisdiction. *S. v. Crook,* 115 N. C., 760; *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011; *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630; *S. v. Wilson,* 216 N. C., 130, 4 S. E. (2d), 440; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Ray,* 212 N. C., 748, 194 S. E., 472; *S. v. Henderson,* 206 N. C., 830, 175 S. E., 201; *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9. The authority so to do is now conferred by statute. G. S., 15-197.

Such disposition of the cause does not serve to delay or defeat the defendant's right of appeal. 15 Am. Jur., 135; *S. v. Calcutt, supra.*

But the order suspending the imposition or execution of sentence on condition is favorable to the defendant in that it postpones punishment and gives him an opportunity to escape it altogether. When he sits by as the order is entered and does not then appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not be heard thereafter to complain that his conviction was not in accord with due process of law. *S. v. Crook, supra; S. v. Everitt, supra; S. v. Tripp, supra; S. v. Ray, supra; S. v. Henderson, supra; S. v. Pelley,* 221 N. C., 487, 20 S. E. (2d), 850.

He is relegated to his right to contest the imposition of judgment or the execution of sentence, as the case may be, for that there is no evidence to support a finding that the conditions imposed have been breached,

S. v. Johnson, 169 N. C., 311, 84 S. E., 767, or the conditions are unreasonable and unenforceable, or are for an unreasonable length of time. *S. v. Shepherd,* 187 N. C., 609, 122 S. E., 467.

It follows as a corollary that such order is in substitution of the right of the court to pronounce judgment or invoke execution, after the adjournment of the term, so long as the defendant observes the conditions imposed. *S. v. Hilton, supra; S. v. Phillips,* 185 N. C., 614, 115 S. E., 893; *S. v. Rogers,* 221 N. C., 462, 20 S. E. (2d), 297; Anno. Cas., 1912 B, 1193.

It is otherwise when the order continuing prayer for judgment is not predicated upon stipulated conditions. *S. v. Graham, post,* 217.

The defenses available to the defendant involve questions of fact for the judge and not issues of fact for a jury, *S. v. Hardin, supra; S. v. Johnson, supra,* and the pertinent statutes fail to provide for an appeal from the adverse findings of a judge of an inferior court upon which judgment is imposed or execution is invoked. The remedy of the defendant is by *certiorari* if the trial court is a court of record, otherwise by *recordari. S. v. Crook, supra; S. v. Tripp, supra; S. v. Rhodes,* 208 N. C., 241, 180 S. E., 84; *S. v. King,* 222 N. C., 137, 22 S. E. (2d), 241.

Our jurisdiction is derivative. As the Superior Court was without jurisdiction to entertain the defendant's appeal from the county criminal court, we have none. *Burroughs v. McNeill,* 22 N. C., 297; *Reid v. Reid,* 199 N. C., 740, 154 S. E., 733; *Washington County v. Land Co.,* 222 N. C., 637, 24 S. E. (2d), 338; *Shepard v. Leonard,* 223 N. C., 110; *S. v. King, supra.*

To any suggestion that the course here pursued is unnecessarily technical and dilatory, impeding the prompt and efficient administration of the criminal law, there is a simple answer. No circumstance or condition is sufficient justification for the assumption of jurisdiction we do not possess. If we are to interpret and apply the law, we must first abide by the law.

The defendant should be allowed a reasonable time within which to apply for a proper writ which will assure him an orderly review of the order of the judge of the Anson County Criminal Court, revoking the probation.

For the reason stated the appeal is dismissed and the cause is remanded for further proceedings in accord with this opinion.

Appeal dismissed.

STATE v. CHESLEY GRAHAM.

(Filed 23 May, 1945.)

1. Appeal and Error § 48—

Where defendant, in a criminal prosecution for violation of various provisions of the prohibition law, was convicted by a general verdict of guilty as charged and judgment entered on the count of manufacturing and prayer continued on the other counts, and upon appeal this Court held the evidence insufficient to support a verdict on any count except that of possession for sale and remanded the case for a lawful sentence, on the cause coming on for hearing, it was the duty of the court below to pronounce judgment as directed by this Court.

2. Criminal Law § 63—

A judge may suspend judgment over a criminal *in toto* until another term.

3. Criminal Law §§ 55, 63—

In the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had, and courts of general jurisdiction, having stated terms for the trial of criminal actions, have the power to continue the case to a subsequent term for sentence. And if through inadvertence or oversight sentence is not pronounced during the term at which the case was tried, or if the clerk neglects to enter a sentence duly pronounced, the court may impose sentence at a subsequent term.

4. Criminal Law §§ 62, 63—

A judge of the Superior Courts may exercise the power to continue a prayer for judgment from one term to another, and when no conditions are imposed, he may exercise this power with or without the defendant's consent. It is otherwise where conditions are imposed, except perhaps when the judge proceeds under the probation statutes. G. S., Art. 20, ch. 15.

5. Appeal and Error § 48: Criminal Law § 65—

Where a defendant, in a criminal prosecution based on several counts, was convicted by a general verdict and judgment of imprisonment rendered on a count as to which there was insufficient evidence, and on appeal the case was remanded for a lawful sentence, an objection, that no judgment was rendered by the court below at the first term after the decision of this Court was certified down, is without merit.

APPEAL by defendant from *Nimocks, J.*, at January Term, 1945, of BLADEN. Affirmed.

Defendant was tried at the January Term, 1944, under a warrant containing five counts, charging the violation of various provisions of the prohibition law. There was a general verdict of guilty as charged. The

court pronounced judgment of imprisonment on the count of manufacturing and continued prayer for judgment on the other counts.

The defendant appealed and we held that there was no sufficient evidence to support the verdict on any count except the third, which charged unlawful possession of intoxicating liquor for the purpose of sale. As to that count we found no error. The judgment entered was vacated and the cause was remanded for judgment on the third count. *S. v. Graham,* 224 N. C., 351.

At the January Term, 1945, the solicitor prayed judgment on the verdict of guilty of unlawful possession of intoxicating liquor for the purpose of sale affirmed by this Court. Thereupon, after hearing evidence and argument of counsel, the court pronounced judgment and defendant appealed.

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

Hector H. Clark and James R. Nance for defendant, appellant.

BARNHILL, J. The defendant, in the court below, objected to the pronouncement of judgment and moved in arrest of judgment on the theory that the court, having failed to pronounce judgment on the third count at the January Term, 1944, at which the defendant was convicted, was without jurisdiction to impose sentence at a subsequent term. He contends "(1) That the counts in the warrant are closely related; (2) That the Court at the January 1944 Term had all the facts before it; (3) That the defendant's plea of not guilty and his appeal to the North Carolina Supreme Court challenged any right of the court to retain jurisdiction sufficiently to at a later Term impose sentence; (4) That the Court without hearing some evidence could not proceed to sentence the defendant as set forth in the record; (5) That if the Court had intended to punish the defendant on the third count in the warrant it could and should have done so at the January 1944 Term."

The defendant's fourth contention is answered by the record. The judgment discloses that the court heard evidence before imposing sentence. He cites, in support of his other contentions, *S. v. Crook,* 115 N. C., 760; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Pelley,* 221 N. C., 487, 20 S. E. (2d), 850, and other decisions of like import. But those decisions discuss the authority of the court to proceed at a subsequent term when judgment is suspended or execution is stayed on condition, or judgment is pronounced on one or more closely related counts, and prayer for judgment is continued as to the others. They are not in point.

Here the defendant appealed. The judgment entered was vacated at his instance and the cause was remanded for a lawful sentence. *S. v. Shipman,* 203 N. C., 325, 166 S. E., 298; *S. v. Langley,* 204 N. C., 687, 169 S. E., 705; *S. v. Dingle,* 209 N. C., 293, 183 S. E., 376. When the cause came on for hearing on the prayer for judgment, there was no judgment on any count. The defendant stood convicted and it was the duty of the judge to pronounce judgment as directed by this Court.

On the oral argument here the defendant also challenges the jurisdiction of the court below on the ground that sentence was not imposed at the next succeeding term after the opinion of this Court was certified; that the court was without authority to continue prayer for judgment and impose sentence at a subsequent term.

There was an intervening criminal term scheduled by statute for Bladen County. Whether said term was convened for the transaction of business does not appear. Nor does the record disclose that the prayer for judgment was not continued at the instance or upon the request of defendant. We do not concede that his consent was essential. Even so, for these reasons alone the defendant, perhaps, has failed to disclose error.

Waiving the silence of the record in these respects, the objection to the jurisdiction of the court cannot be sustained.

It is familiar learning that a judge may suspend judgment over a criminal *in toto* until another term. *S. v. Crook, supra.*

In the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had, and courts of general jurisdiction, having stated terms for the trial of criminal actions, have the power to continue the case to a subsequent term for sentence. It is well settled that if, through inadvertence or oversight on the part of the court, sentence is not pronounced during the term at which the case is tried or if the clerk neglects to enter a sentence duly pronounced, the court may impose sentence at a subsequent term. 15 Am. Jur., 141; Anno. 3 A. L. R., 1014; 97 A. L. R., 806. In this jurisdiction the right so to do is not denied either by statute or usage. *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011; *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630.

The court has the power to continue prayer for judgment from one term to another, without the defendant's consent, if no terms or conditions are imposed. It is sometimes found to be expedient, if not necessary, to continue a prayer for judgment and when no conditions are imposed, the judges of the Superior Court may exercise this power with or without the defendant's consent. *S. v. Burgess,* 192 N. C., 668, 135 S. E., 771. It is otherwise when conditions are imposed, *S. v. Jaynes,* 198 N. C., 728, 153 S. E., 410; *S. v. Miller, ante,* 213, except perhaps

when the judge proceeds under the probation statute. G. S., Art. 20, ch. 15.

Applying these principles of law, this Court, in *S. v. Overton,* 77 N. C., 485, decided the exact question here presented. The Court said: "A second objection taken by the defendant is that no judgment was rendered against him by the court below at the first term after the decision of this Court was certified; that judgment could (not) be rendered after the first term. There is no force in this objection. It was at defendant's request that judgment was not rendered at the first term and the case continued. And without such request, the court had the power to suspend the judgment and continue the case until the next term."

The defendant has been duly convicted of a violation of the criminal law of the State. This Court has found no error in the trial on the count charging unlawful possession of liquor for the purpose of sale. He may not complain that there has been some delay in exacting the penalty, for he cannot in this manner discharge the debt he owes society for the breach of its rules of good conduct.

The judgment below is

Affirmed.

STATE v. BAXTER HEGLAR AND WADDELL HOWIE.

(Filed 23 May, 1945.)

1. Criminal Law § 52b—

Where the evidence, taken in the light most favorable to the State, on motion by defendants for judgment as of nonsuit in a criminal prosecution, raises no more than a suspicion as to the guilt of defendants, the same is insufficient to support a verdict of guilty and the motion must be allowed.

2. Gaming § 5—

In a criminal prosecution under G. S., 14-290, 14-291, and 14-291 (1), relating to lotteries, where the evidence for the State tended to show that defendants, residents of an adjoining county, were seen together at various times in and about the town of Albemarle and passing through in cars, and that they were arrested together, in an automobile parked on a public road near said town, one of them having in his possession two envelopes, containing money and marked with numbers and letters on the outside and also containing slips of paper with numbers and letters and several words, as "short," "shorties," "today," "took" and "still" thereon, and that when arrested one of defendants said, "You haven't got anything on me. I have been expecting this," and the other defendant tried to put the money in his pocket, without evidence of the operation of any variety of lottery, or that defendants were agents for a lottery or engaged in sell-

ing numbers or lottery tickets, the court erred in the refusal of defendants' motion of nonsuit. G. S., 15-173.

APPEAL by defendants from *Phillips, J.*, at November Term, 1944, of STANLY.

Criminal prosecutions upon two warrants issued out of county court of Stanly County, one as to defendant Baxter Heglar, and the other as to defendant Waddell Howie, which, on appeals to Superior Court from said county court were consolidated, by consent, for the purpose of trial, and amended so as to conform to provisions of the statutes, G. S., 14-290, G. S., 14-291, and G. S., 14-291 (1), relating to dealing in lotteries, selling lottery tickets, acting as agents for lotteries, and possessing "numbers" tickets, and tried as two counts in the same warrant.

The defendants having entered pleas of not guilty, the State offered as witnesses the sheriff of Stanly County and the chief of police of the town of Albemarle, whose testimony tended to show these facts:

1. Defendants, who live in Concord, had been seen (a) together "at various times," "on different occasions" in Concord and in Stanly County, (b) "passing through," and "on the streets of Albemarle in different cars," (c) "in," and "coming through" West Albemarle, "a white residential section," and (d) "in South Albemarle," part of which is "a colored section."

2. Thereafter, in September, 1944, while the sheriff, a deputy sheriff, and the chief of police were riding in the sheriff's car, defendants were seen in a Buick automobile, Howie under the steering wheel and Heglar on the other or opposite side, parked beside the road from Badin to New London, about a half mile from Badin, "headed into the main highway." The officers stopped. Heglar, who was getting out of the car, had two packages or envelopes in his hand, one marked "Sixteen B" and the other "Seventeen B," each containing money and papers and figures as hereinafter described, and "tried to put the money in his pocket," but the chief said: "Don't do that, let me have that, might burn your hand." Then the officers "looked over this car" and found a big hollow jack in the rear of the car—a jack the top of which screwed off. And when the officers "got through looking, Howie said, 'Well, you haven't got anything. You haven't found a thing on me. I was expecting this.'" The chief testified that Howie said: "You haven't got anything on me. You haven't found anything this time," and that "Heglar didn't make any statement about it."

3. The two envelopes, with contents, offered in evidence were described by the sheriff: One of these envelopes was marked "16 B" in the left-

hand corner with the figures "4500" in the right-hand corner. In the envelope was a slip of paper on which the following appears:

16 B	58055	2	1000
16 B		34	2500
16 B		26	1000
			4500
			101
9 - 12 Short 101			4399

Also in this envelope there was currency in the amount of $44.00.

The other envelope was marked "17B" in the left-hand corner with the figures "5000" appearing in the right-hand corner. In this envelope there were two slips of paper. On one of them the following appears:

17 B	48788	31	5000
			1000
Shorties	1384		4000
Today	245		
	1629		
Took	1000	out	
	629	Still Ow	629

On the other, the following appears: "We cannot take care of 17 B Book if its coming Short—You Will have to Send your Work Right or better than you Are Sending it if you want us to Take care of it." Also in this envelope there was currency in the amount of $40.00.

The "00" in the numbers "4500" and "5000" on the outside and the last two figures of each of the numbers on the right-hand side of the slips of paper were smaller and slightly above the lower level of the figures to the left thereof. There were no dollar marks. All of the figures and writing on the two envelopes and the several slips of paper were hand-written in ink.

4. The chief of police testified: "I don't know any more about a lottery than what I have heard." Then, referring to defendants, the chief concluded, "I wouldn't say I have seen them pass any money or put it on any numbers."

And the sheriff testified: "I have no knowledge of how this numbers game is played. I never did see it played; just information is all I know." Then over objection of defendants, the sheriff testifying from information, and one Greer testifying from experience and observation "in times past and beyond the reach of the statutes of limitations," gave testimony concerning the operation of lotteries generally, but did not attempt to connect these defendants with the operation of any of the lotteries about which they testified.

Motions of defendants, and each of them, for judgments as of nonsuit were denied, and each of them excepted.

Verdict: "That each of the defendants is guilty."

Judgment: That each defendant be confined in common jail of Stanly County and assigned to work on the roads under the supervision and direction of the State Highway and Public Works Commission for a period of twelve months.

Defendants appeal to Supreme Court and assign error.

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

C. M. Llewellyn and Hartsell & Hartsell for defendants, appellants.

WINBORNE, J. The evidence shown in the record on this appeal, taken in the light most favorable to the State, as is the rule in considering motions for judgment as of nonsuit in criminal prosecutions, G. S., 15-173, raises no more than a suspicion as to the guilt of the defendants in respect of the offenses with which they stand charged, G. S., 14-290, G. S., 14-291, and G. S., 14-291 (1), and in accordance with well settled principles is insufficient to support a verdict of guilty. *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730; *S. v. Goodman,* 220 N. C., 250, 17 S. E. (2d), 8; *S. v. Boyd,* 223 N. C., 79, 25 S. E. (2d), 456; *S. v. Murphy, ante,* 115, and numerous other cases. There is no evidence of the operation of any variety of lottery. Nor is there evidence that defendants were operating or were agents for others in the operation of a lottery. Nor is there evidence that they were engaged in selling, or were the agents for others in the sale of lottery tickets. Nor is there evidence that the jack found in the car in which defendants were seated was used in the operation of a lottery, or that the envelopes and their contents were tickets so used. And the envelopes and their contents, and all the writing thereon, and the jack fail in themselves to bear indicia that they were used in the operation of any lottery. Moreover, the statements the defendant Howie made to the officers are too indefinite to provide the deficiency in the evidence.

Hence, there is error in the refusal of motions of defendants for judgments as in case of nonsuit, G. S., 15-173.

The judgment below is

Reversed.

STATE v. MAE MURDOCK.

(Filed 23 May, 1945.)

1. Criminal Law § 52b—

When the court is to rule upon a demurrer to the evidence in a criminal case, G. S., 15-173, it is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment, the evidence being construed in the light most favorable to the State.

2. Criminal Law §§ 2, 28c—

Intent being a mental attitude, it must ordinarily be proven by circumstantial evidence, that is, by proving facts from which the facts sought to be proven may be inferred.

3. Assault and Battery § 11—

In a criminal prosecution for a felonious assault with intent to kill, where the State's evidence tended to show that defendant, while the prosecuting witness was having a row in her place of business with one of her servants, left the room and returned almost immediately with a shotgun and shot the prosecuting witness at close range, inflicting serious injury, there was sufficient evidence for the jury, and motion for judgment as of nonsuit was properly denied.

APPEAL by defendant from *Bobbitt, J.*, at November Term, 1944, of IREDELL.

The defendant was tried upon a bill of indictment charging that on 28 March, 1944, she "did unlawfully, wilfully, maliciously and feloniously assault, beat and wound one James L. Warren with intent to kill, with a deadly weapon, to wit, a shotgun and did inflict serious injury, not resulting in death upon the said James L. Warren in the following manner, to wit: By shooting the said James L. Warren in the leg thereby necessitating the removal of said leg by an operation."

There was evidence tending to prove that James L. Warren, in company with his wife and one James Milstead and his wife, went to the place of business of the defendant, where meals were served to the public; that they had some beer with them and were told by the husband of the defendant that Milstead would not be served. Milstead then went out of the place, and Warren went to get his wife and the wife of Milstead, who had gone into the dining room. When they returned Warren,

according to the testimony of the State's witnesses, spoke to one of the waiters about not being served; according to the evidence of the defendant, Warren assaulted a waiter and beat and kicked him; later the shooting took place, but the evidence as to the immediate details and circumstances of the shooting is not all in accord. The State's evidence tends to show that the defendant shot Warren, and the defendant's evidence tends to show that the defendant did not intend to kill Warren, that the actual shooting was an accident.

The jury returned a verdict of "guilty as charged in the bill of indictment," and from 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.

Lewis & Lewis and Hugh G. Mitchell for defendant, appellant.

SCHENCK, J. The defendant appellant states in her brief that "while there are several exceptions in the record, the main contention of the defendant is that there is not sufficient evidence to take the case to the jury on the felony charge." The defendant contends that there is no evidence that she committed upon the prosecuting witness Warren an assault with intent to kill, and therefore her motion to dismiss this charge duly lodged under G. S., 15-173, should have been allowed. In fact, the exception to the refusal to sustain the demurrer to the evidence and exceptions to the charge which appear in the record present but a single question for decision, namely, was there sufficient evidence to be submitted to the jury on the question of the existence in the mind of the defendant Murdock of an intent to kill the prosecuting witness Warren. Since we are to rule upon a demurrer to the evidence as to charge of a felonious assault we are required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. *S. v. Landin,* 209 N. C., 20, 182 S. E., 689, and cases there cited.

When the evidence be construed in the light most favorable to the State, as it must be on a demurrer thereto, *S. v. Coal Co.,* 210 N. C., 742, 188 S. E., 412, and cases there cited, it appears that the defendant, without any cause fired a shotgun at the prosecuting witness when she was only 14 or 16 feet away from him, the shot struck the witness in the leg and as a result of the wound the leg had to be amputated. The defendant herself testified, "He then came up with the chair and drew it on me, and when he came up with the chair the gun was down, and just as I got the gun to my stomach it went off." Notwithstanding the defendant testified that the actual shooting was accidental the jury declined to adopt her statement and found the defendant guilty as

charged in the bill of indictment which contained the allegation that assault was committed with intent to kill.

Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred. It should have been left to the jury to determine, from all the facts and circumstances, whether the ulterior criminal intent to kill existed in the mind of the defendant at the time the shooting took place. *S. v. Smith,* 211 N. C., 93, 189 S. E., 175. It would seem, and we so hold, that there was present evidence of such facts as would authorize the jury to infer an intent to kill on the part of the defendant. The evidence that the defendant left the room and returned almost immediately with a shotgun, and shot the prosecuting witness at close range, inflicting serious injury, was sufficient to carry the case to the jury upon the question of the existence in the mind of the defendant at the time of the shooting of an intent to kill.

Attention is called to the fact that the brief of the defendant appellant falls short of compliance with Rule 28 of Rules of Practice in the Supreme Court of North Carolina, 221 N. C., 562, in that it does not "contain, properly numbered, the several grounds of exception and assignments of error with reference to printed pages of transcript." However, we have examined all of the exceptions in the record and we find no substantial merit therein.

The judgment of the Superior Court is affirmed, since there is in the record

No error.

CORA ALEXANDER ROSS v. STERLING DRUG STORE ET AL.

(Filed 23 May, 1945.)

1. Negligence § 4b—

The proprietor of a store is not an insurer of the safety of customers while on the premises. But he does owe them 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.

2. Negligence §§ 4b, 20—

In an action for damages for injuries to a customer, on the premises, by the alleged negligence of the proprietor of a store, a charge by the court, imposing the duty on the defendant "to give warning of any hidden peril," without more, is in excess of the legal requirement, and entitles defendant to a new trial.

APPEAL by defendant Drug Company from *Gwyn, J.,* at December Term, 1944, of MECKLENBURG.

ROSS *v.* DRUG STORE.

Civil action to recover damages for an alleged negligent injury.

The defendant Drug Company operates a drug store on the first floor of the Professional Building in the city of Charlotte. The building is owned by the Realty Company. It is in evidence that on 9 February, 1943, plaintiff was a customer in the drug store. As she was leaving through a double-door exit, which opens on Tryon Street, her coat caught on the lock or keeper of the half door that was closed or fastened, and while she was yet in the open doorway trying to release her coat, the other half door which was equipped with top door check, closed with great force, knocked her out of the doorway and down on the sidewalk, and inflicted serious injury.

The door check, which exerted force on the door to close it, and to keep it closed, was not in proper working order. It required inspection and repair, especially with reference to the fluid which it contained and which controlled its operations. Neither the landlord nor the tenant had inspected it for some time.

Upon denial of liability and plea of contributory negligence, the jury returned a verdict against the defendant Drug Company. From judgment on the verdict, the defendant appeals, assigning errors.

Guy T. Carswell, John M. Robinson, and Hunter M. Jones for plaintiff, appellee.

Jones & Smathers for defendant, appellant.

STACY, C. J. In addition to the allegations of negligence in respect of the condition of the doorway and the operation of the door in question, it is specifically alleged that the defendants "negligently failed to give any warning thereof."

The court instructed the jury that the defendant Drug Company owed to the plaintiff, a customer and invitee, "the duty to exercise due care to keep the premises in a reasonably safe condition and to give warning of any hidden peril. That duty to use due care, to keep the premises in a reasonably safe condition, extends to any doors, door-checks and instrumentalities used to facilitate entry into and exit from the drug store."

Near the end of the charge, the jury was told that if the plaintiff had satisfied them from the evidence and by its greater weight, "the defendant was negligent, in the manner set forth in the complaint," and that such negligence was the proximate cause of the injury, the issue of negligence should be answered in favor of the plaintiff.

Thus, the defendant says, the duty to warn the plaintiff of any hidden peril was made absolute, whether known to the defendant or discoverable in the exercise of reasonable inspection and supervision. The record is

susceptible of this interpretation. We cannot say the jury did not so understand it.

The proprietor of a store is not an insurer of the safety of customers while on the premises. But he does owe to them 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." *Watkins v. Taylor Furnishing Co.*, 224 N. C., 674; *Griggs v. Sears, Roebuck & Co.*, 218 N. C., 166, 10 S. E. (2d), 623; *Williams v. Stores Co.*, 209 N. C., 591, 184 S. E., 496; *Bowden v. Kress*, 198 N. C., 559, 152 S. E., 625.

The duty imposed on the defendant, "to give warning of any hidden peril," period, appears to be in excess of the legal requirement. It doubtless prejudiced the defendant as it was reasonably calculated to do. Hence, a new trial seems necessary. It is so ordered.

New trial.

CHRISTOPHER W. RYAN v. R. O. BATDORF.

(Filed 23 May, 1945.)

1. Process § 1—

The sole purpose of a summons is to bring a party into court and to notify him that a complaint has been or will be filed against him.

2. Process §§ 2, 12—

An *alias* or *pluries* summons, improperly issued as such, may still be sufficient as an original summons. But when it is desired that the action shall date from the issuance of the original summons, or when it is necessary for it to do so, in order to toll the statute of limitations, the successive writs must show their relation to the original process.

3. Process § 12—

While an original summons cannot be changed into an *alias* summons by merely endorsing the word "*alias*" thereon, such process, however, can be converted into an *alias* by a memorandum or order, endorsed or subscribed thereon, specifying the date of the original writ.

APPEAL by defendant from *Stevens, J.*, at October Term, 1944, of NEW HANOVER.

Summons issued 28 March, 1944, returned with the following endorsement thereon: "After due and diligent search R. O. Batdorf is not to be found in New Hanover County. This 7th day of April, 1944. C. David Jones, Sheriff—By Sam Yopp, Deputy."

Complaint was filed at the time the original process was issued.

On 12 April, 1944, plaintiff requested the issuance of an *alias* summons, and the clerk of the Superior Court of New Hanover County entered the following order: "It appearing to the Court that summons was issued to the Sheriff of New Hanover County on the 28th day of March, 1944, for service on the defendant, R. O. Batdorf, and has been returned as follows: 'After due and diligent search R. O. Batdorf is not to be found in New Hanover County. This 7 April, 1944,' and it now appearing to the Court that the defendant is now to be found in New Hanover County. It is therefore Ordered that Alias Summons be issued to the said Sheriff of New Hanover County for service on the said defendant. Witness my hand and seal of office, this 12th day of April, 1944. A. L. Meyland, Clerk Superior Court."

Whereupon the clerk marked an ordinary summons "Alias Summons" and wrote the above order on the face of the *alias* summons in the upper right-hand corner thereof. The *alias* summons was served on the defendant 14 April, 1944, by leaving copies of the *alias* summons and complaint with the defendant.

The defendant, through his counsel, entered a special appearance before the clerk of the Superior Court of New Hanover County, on 9 May, 1944, and moved to dismiss the action on the ground that the purported process was invalid as an *alias* summons, and subject to dismissal as an original process, because no cost bond or complaint had been filed as of the date of its issuance.

The motion was overruled, and the defendant appealed to the judge of the Superior Court. The ruling of the clerk of the Superior Court was sustained by the judge on 17 October, 1944.

Defendant appeals to the Supreme Court, assigning error.

E. L. Yow and Rountree & Rountree for plaintiff.

Isaac C. Wright for defendant.

DENNY, J. It has been held by this Court that "The character of a process purporting to be original is not changed by an endorsement of the word *'alias.' Mintz v. Frink,* 217 N. C., 101, 6 S. E. (2d), 802. The character of the process purporting to be original may be changed, however, when the process is made referable to the original writ, and sued out as required by G. S., 1-95. It is said in *Hatch v. R. R.,* 183 N. C., 617, 112 S. E., 529, quoting from Chitty's Practice: 'If it be necessary to continue the first writ of summons, then an *alias* or *pluries* may be issued into the same or another county; and it is very essential to take care that the first writ, whether of summons or capias, be in due time returned *non est inventus,* and that every continued process to save the

statute of limitations must have a memorandum endorsed or subscribed, specifying the date of the first writ.' Chitty's Practice, 408; 3 Bl., 280, *et seq.;* Tidd's Practice, 111; Elliott's Gen. Practice, 459; 20 Ency. P. & P., 1178; 32 Cyc., 445; 21 R. C. L., 1266."

While an original summons cannot be changed into an *alias* summons by merely endorsing the word *"alias"* thereon, such process, however, can be converted into an *alias* by a memorandum or order endorsed or subscribed thereon specifying the date of the original writ. The sole purpose of a summons is to bring a party into court and to notify him that a complaint has been or will be filed against him. *Battle v. Baird,* 118 N. C., 854, 24 S. E., 668. An *alias* or *pluries* summons, improperly issued as such, may still be sufficient as an original summons. *Neely v. Minus,* 196 N. C., 345, 145 S. E., 771. But when it is desired that the action shall date from the date of the issuance of the original summons, or when it is necessary for it to do so, in order to toll the statute of limitations, the successive writs must show their relation to the original process.

The information contained on the face of the summons in the instant case made it referable to the original writ as required by our decisions, and it is, therefore, a valid *alias. Hatch v. R. R., supra.*

The judgment of the court below is

Affirmed.

FANNIE P. HOLLADAY v. GENERAL MOTORS CORP. ET AL.

(Filed 23 May, 1945.)

Corporations § 13b—

In a suit in this State against an individual and a corporation, both citizens of Delaware, to prevent the transfer of stock in the corporate defendant belonging to plaintiff, where, prior to time for answering, the individual defendant on special appearance moved to dismiss for want of service, and the corporate defendant also moved to dismiss for want of service on the individual and for lack of jurisdiction of the subject matter, an order by the court, impounding the stock and dissolving a temporary restraining order against the individual, was proper and suffices to protect the corporate defendant from any failure to transfer the stock.

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

APPEAL by defendant, General Motors Corporation, from *Burney, J.,* at Chambers in Wilmington, 30 September, 1944. From NEW HANOVER.

Civil action to recover stock certificates and to restrain their transfer.

The plaintiff alleges that she is the owner of 1,575 shares of the common stock of General Motors Corporation, represented by certificates registered in her name; that about fifteen years ago, upon the solicitation of her brother-in-law, Charles B. Holladay, and reposing confidence in his integrity, the stock was delivered to him for safekeeping and for such disposition as the plaintiff should direct; that at the same time the plaintiff executed certain blank assignments and powers of attorney for use in transferring the stock, if and when needed to carry out the plaintiff's instructions; that thereafter the defendant, Charles B. Holladay, wrongfully and in violation of plaintiff's rights threatened to have the stock transferred in his name, whereupon the plaintiff placed a stop-transfer order with the defendant corporation and notified both defendants that the assignments and powers of attorneys were thereby revoked; and that notwithstanding these instructions, Charles B. Holladay has presented the certificates to the General Motors Corporation with request that they be transferred to him.

This suit was instituted in New Hanover County on 19 August, 1944, against Charles B. Holladay, a resident of the State of Delaware, General Motors Corporation, a Delaware corporation domesticated and doing business in North Carolina with local process agent, and A. B. Hull, a resident of New York and transfer agent of the corporate defendant.

A temporary restraining order was entered in the cause returnable on the 1st day of September, 1944.

Thereafter and prior to time for answering, the defendant, Charles B. Holladay, filed special appearance and moved to dismiss for want of proper service. This motion has not yet been heard or ruled upon.

The General Motors Corporation also filed motion to dismiss for want of service on Charles B. Holladay and for lack of jurisdiction over the subject-matter of the controversy.

On the hearing of this latter motion, the court found that the stock in question had been presented to the corporate defendant by Charles B. Holladay with request that it be transferred to him; that no transfer had been made, and that the certificates were still in the hands of the corporate defendant. The injunction was thereupon dissolved as to Charles B. Holladay, the stock was impounded and ordered to be delivered to the clerk of the Superior Court to await further orders in the cause.

From this order, General Motors Corporation appeals.

Carr, James & Carr for plaintiff, appellee.

Rountree & Rountree for defendant, appellant.

STACY, C. J. The status of the named defendant, Charles B. Holladay, whether properly in court and subject to its orders, is an open and

disputed question. No determination of the matter has been made in the Superior Court. This suffices to sustain the order impounding the stock and to protect the corporate defendant from any claim for failure to transfer it. Indeed, it may be doubted whether an agent who executes a power of attorney in his own favor, without specific authorization, would do more than convert himself into a trustee. *Hatcher v. Williams, ante,* 112; *LaVecchia v. Land Bank,* 218 N. C., 35, 9 S. E. (2d), 489. But however this may be, we apprehend, the basis of the dissolution of the injunction against Charles B. Holladay was the plaintiff's revocation of his authority and the fact that he no longer had possession of the stock. 2 Am. Jur., 39.

No error has been shown in respect of the order from which the corporate defendant appeals. The cause has not yet been reached for hearing upon the merits.

Affirmed.

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

L. R. SINK, ADMR., ET AL. v. ROBERT SECHREST.

(Filed 23 May, 1945.)

1. Bailment § 1: Principal and Agent § 1—

Where a son leaves his automobile in the custody of his parents, with instructions that the parents use the car to keep the battery from running down, driving it enough for that purpose, the relationship of the parties is that of bailor and bailee, rather than principal and agent.

2. Bailment § 6: Principal and Agent § 10a—

Generally a third party may not recover of the bailor for the negligent use by the bailee of the bailed chattel, in the absence of some control exercised by the bailor at the time, or of negligence on his part which proximately contributed to the injury. The doctrine of *respondeat superior* ordinarily is inapplicable to the relationship of bailor and bailee, unless made so by statute.

APPEAL by defendant from *Olive, Special Judge,* at October Term, 1944, of DAVIDSON.

Civil actions to recover (1) for death of Larry Sink, (2) for personal injuries of Louise Sink, and (3) for losses and expenses of L. R. Sink, all alleged to have been caused by the negligence of the defendant, and as the three cases arose out of the same fact situation, for convenience,

they were consolidated and tried together. *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171.

In 1943, the defendant, Robert Sechrest, a minor, seventeen years of age, lived with his father, M. L. Sechrest, and stepmother, Ruby P. Sechrest, in High Point. He owned a second-hand, 1938 Ford Coupe which he kept in the street in front of the house. When he left for school in September he gave each of his parents a set of keys to the car, "placed it in their custody, control and management," and asked them "to use the car to keep the battery from running down, to drive it enough to keep the battery up." It continued to remain in the street in front of the house.

The record discloses allegation and finding to the effect that on 19 October, 1943, Ruby P. Sechrest in attempting to start the car for the purpose of driving it to keep the battery up, negligently had her servant to get some gasoline in a milk bottle and pour it into the carburetor or about the engine to prime it, as they had seen the defendant do, and at the same time she negligently stepped on the starter, which caused the motor to backfire and ignite the gasoline. In an effort to escape from the peril, the servant threw the flaming gasoline container from him and in the direction of Louise Sink and her son Larry, who without the knowledge of the servant, had come out of the house and were standing behind him in the edge of the yard. The *feme* plaintiff was severely burned and the boy died from his injuries.

L. R. Sink is the husband of Louise Sink and the father of Larry Sink. He sues in his own right and as administrator of his son. Louise Sink sues to recover for her injuries. She is the daughter of Ruby P. Sechrest by a former marriage and was visiting her mother at the time of the injuries.

The plaintiffs seek to recover upon the theory that Ruby P. Sechrest was the agent of Robert Sechrest, the owner of the car, and was acting in the scope of her agency at the time of the injuries. The defendant rested his defense upon demurrer to the evidence. Overruled; exception.

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

J. F. Spruill for plaintiffs, appellees.

Armistead W. Sapp for defendant, appellant.

STACY, C. J. Counsel have discussed with much learning and manifest research the rationale of proximate cause and the liability of a minor for the tort of his agent, complicated on the present record by the fact that in two of the cases the defendant pleads his infancy, while in the other he, not only does not plead it, but denies it. However, we put these matters aside because it appears the relation existing between the

defendant and his stepmother in respect of the Ford Coupe at the time of the injuries was that of bailor and bailee, rather than principal and agent. *Hanes v. Shapiro,* 168 N. C., 24, 84 S. E., 33; 6 Am. Jur., 184.

The cases are in accord that generally a third party may not recover of the bailor for the negligent use by the bailee of the bailed chattel, in the absence of some control exercised by the bailor at the time, or of negligence on his part which proximately contributed to the injury. 8 C. J. S., 318; 19 A. L. R., 1194; *Tyson v. Frutchey,* 194 N. C., 750, 140 S. E., 718. The doctrine of *respondeat superior* ordinarily is inapplicable to the relationship of bailor and bailee, unless made so by statute. 6 Am. Jur., 396.

While the plaintiffs' injuries are great and the accident a most unfortunate one, still we cannot say on the present record that negligence has been shown for which the defendant, in law, may be held liable. The demurrer to the evidence was well interposed.

Reversed.

STATE v. MADGE HARRISON.

(Filed 23 May, 1945.)

1. Assault and Battery § 7d—

In a criminal prosecution for assault with a deadly weapon, a charge by the court that a commonly used implement, such as a hoe or ice pick, is *per se* a deadly weapon, with no evidence to disclose its weight, size, length, or other description, is reversible error.

2. Same—

Where a deadly weapon is referred to in an indictment, its use being a necessary element of the offense charged, it might be an act of proper precaution to procure another bill containing a description of the implement allegedly used, such as its weight, size and material out of which made.

APPEAL by defendant from *Olive, Special Judge,* at January Term, 1945, of GUILFORD (High Point Division).

The defendant was tried upon a bill of indictment charging that she "did unlawfully, wilfully, maliciously and feloniously assault, beat and wound one Irene Gibbs with intent to kill, with a deadly weapon, to wit, a certain ice-pick to the great damage and serious injury of the said Irene Gibbs in the following manner, to wit: Stabs on or about the body, contrary to the statute in such case made and provided, and against the peace and dignity of the State."

The evidence tended to show that the defendant, Madge Harrison, and the prosecuting witness, Irene Gibbs, engaged in a fight wherein the defendant stabbed with an ice pick the prosecuting witness about the body several times. The defendant contended that she stabbed the witness in her own proper self-defense as the witness had broken into her room in the early morning and was assaulting the defendant and committing depredations in her room. The prosecuting witness contended that she entered the room of the defendant because she (witness) heard the voice of her (witness') husband in defendant's said room, and entered said room as witness' husband left it, and that a fight ensued between the witness and defendant in which fight glass in the door and elsewhere was broken, and the defendant stuck the witness several times with an ice pick.

The jury returned a verdict "Guilty of Assault with Deadly Weapon" and from judgment of imprisonment, predicated upon the verdict, the defendant appealed, assigning errors.

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

Silas B. Casey and Rupert T. Pickens for defendant Harrison, appellant.

SCHENCK, J. The court charged the jury, *inter alia:* "Second, it (the assault) must be with a deadly weapon, and the Court instructs you that an ice pick such as described would be a deadly weapon, as a matter of law; . . ." This excerpt from the charge is made the basis for an exceptive assignment of error, and we are constrained to hold that such assignment must be sustained.

Barnhill, J., in *S. v. Davis,* 222 N. C., 178, 22 S. E. (2d), 274, writes for the Court that a charge to the effect that an assault with a hoe would be an assault with a deadly weapon was in error, since such a charge assumes or holds as a matter of law that a hoe is *per se* a deadly weapon.

The *Davis case, supra,* was similar to the instant case in many ways, particularly in that the evidence in both cases failed to disclose the weight, size, length or other description of the implement alleged, and in neither case was produced to be viewed by either judge or jury. The question as to whether the implement alleged was a deadly weapon should have been submitted to the jury under proper instructions. *S. v. Watkins,* 200 N. C., 692, 158 S. E., 393, and cases there cited.

It may not be amiss to call attention to the fact that the deadly weapon in the bill of indictment is simply designated as "a certain ice pick" without further description, and that it might be an act of proper precaution to procure another bill of indictment containing a description of

the implement alleged to have been used, such as its weight, size, and material out of which made.

For the reasons stated there must be a

New trial.

STATE v. CORA KING.

(Filed 23 May, 1945.)

1. Appeal and Error § 39a—

To warrant a new trial it should be made to appear that the ruling complained of was material and prejudicial to defendant's rights, and that a different result would have likely ensued.

2. Appeal and Error § 39d—

In a criminal prosecution where one of defendant's witnesses, on cross-examination, admitted that she had been convicted of larceny and on redirect the court refused to allow the witness to answer questions to explain such admission and show that it was erroneous, but later admitted the substance of the excluded testimony, there is no harmful or prejudicial error warranting a new trial.

3. Appeal and Error § 47a—

It is the established rule in this jurisdiction that new trials will not be awarded by the Supreme Court for newly discovered evidence in criminal cases.

APPEAL by defendant from *Sink, J.*, at January Term, 1945, of RICHMOND. No error.

The defendant was charged with aiding in the robbery of $160 from the person of the State's witness Lindsay Nelson. 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.

Jones & Jones for defendant.

DEVIN, J. The evidence offered by the State in the trial below was sufficient to sustain the verdict of guilty. There was no exception to the charge. The only assignments of error relate to the rulings of the trial judge in the exclusion of certain testimony offered by the defendant.

The exception chiefly relied upon was the refusal of the court to permit one of defendant's witnesses, Eleanor Covington, to explain and

correct her answer to an impeaching question. On cross-examination, in response to a question propounded by the solicitor for the purpose of impeaching her, this witness admitted she had been convicted of larceny. On her redirect examination she was asked if she understood what conviction meant, and if she had not been found not guilty the only time she was ever tried. The State's objection to these questions was sustained and defendant excepted. However, subsequently the witness was permitted to testify she had never been tried but once and that was in the recorder's court, and the entry on the record of that court was admitted showing she had been found not guilty.

It was competent for the defendant to show by this witness, in explanation, that she did not understand the meaning of the word "convicted" when asked if she had been convicted of a criminal offense, and the witness thus impeached should have been permitted to state that as a matter of fact she had been acquitted of the only charge ever brought against her. The witness was entitled to full opportunity to correct or explain her answers in response to the impeaching questions. *Keller v. Furniture Co.,* 199 N. C., 413 (416), 154 S. E., 674. But it appears here that the substance of the excluded testimony was permitted to go to the jury, and we perceive no harmful or prejudicial result to defendant's cause on this account. *S. v. Elder,* 217 N. C., 111 (114), 6 S. E. (2d), 840. To warrant a new trial it should be made to appear that the ruling complained of was material and prejudicial to the defendant's rights, and that a different result would have likely ensued. *S. v. Stancill,* 178 N. C., 693, 100 S. E., 241; *S. v. Beal,* 199 N. C., 278 (303), 154 S. E., 604; *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863.

Other exceptions noted by the defendant to the court's ruling on matters of evidence have been examined and found without substantial merit. No prejudicial error was shown. In the trial we find no error which would require setting aside the result.

No error.

MOTION FOR NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE.

Defendant's motion for a new trial on the ground of surprise and newly discovered evidence, filed in this Court, must be denied. It is the established rule in this jurisdiction that new trials will not be awarded by the Supreme Court for newly discovered evidence in criminal cases. *S. v. Casey,* 201 N. C., 620 (625), 161 S. E., 81, and authorities there cited.

Motion denied.

WILLIAM R. EVANS v. D. TALMAGE JOHNSON, TRADING AS JOHNSON MOTOR COMPANY, AND BANNER SHOE AND H. JEROME JOHNSON.

(Filed 23 May, 1945.)

1. Torts § 6—

The right of a defendant sued in tort to bring into the action another joint tort-feasor and, upon sufficient plea, to maintain his cross action against him, for the purpose of determining his contingent liability for contribution, is given by statute. G. S., 1-240.

2. Torts §§ 5, 6—

The purpose of the statute, G. S., 1-240, is to permit defendants in tort actions to litigate mutual contingent liabilities before they accrue, so that all matters in controversy, growing out of the same subject of action, may be settled in one action; though the plaintiff may be thus delayed in securing his remedy.

3. Torts § 4—

Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury.

4. Torts § 6: Principal and Agent § 10b: Negligence § 11—

In an action to recover damages resulting from an automobile collision, plaintiff alleging that he was at the time of the collision a passenger in his own car which was being operated by a driver, where the defendants allege a cross action against the driver of plaintiff's car as a joint tort-feasor, alleging that the said driver was the agent of plaintiff and acting within the scope of his authority and apparently under plaintiff's control, and the said driver was made a party defendant and thereupon demurred to the cross action on the ground that it failed to state a cause of action, proof of negligence by the said driver, contributing to the injury, would constitute a complete bar to plaintiff's claim and would afford no ground for contribution, hence judgment overruling the demurrer reversed.

APPEAL by defendant H. Jerome Johnson from *Clement, J.*, at February Term, 1945, of GUILFORD. Reversed.

Defendant H. Jerome Johnson demurred to the cross complaint of his codefendants wherein they sought to establish his liability for contribution as a joint tort-feasor.

The plaintiff Evans had alleged a cause of action against defendants D. Talmage Johnson and Banner Shoe for damages for injuries resulting from the negligence of these defendants in the operation of an automobile which collided with plaintiff's automobile. Plaintiff alleged he was at the time a passenger in his automobile which he owned and which was being driven by H. Jerome Johnson.

In their answer to the complaint defendants D. Talmage Johnson and Banner Shoe denied the allegations of negligence on their part, and

alleged that plaintiff's automobile was at the time being driven by H. Jerome Johnson at a high, careless and illegal rate of speed; that H. Jerome Johnson was acting as agent for the plaintiff and at the time was acting in the course and scope of his agency; that the negligent acts of H. Jerome Johnson are imputed to the plaintiff and constitute the sole proximate cause of plaintiff's injury; and that if the answering defendants were negligent as alleged in the complaint, the negligent conduct of H. Jerome Johnson, plaintiff's agent, constituted a proximate contributing cause of plaintiff's injury which was pleaded in bar.

The answering defendants further averred that if they were in any respect negligent as alleged in the complaint, proximately causing plaintiff's injury, the negligence of H. Jerome Johnson was also a proximate cause of plaintiff's injury, and that he was and is jointly and concurrently liable with them to the plaintiff, and they ask that his liability be determined in this action.

On the answering defendants' motion, H. Jerome Johnson was made party defendant, and demurred to the cross complaint on the ground that sufficient facts were not therein set out to enable his codefendants to maintain action against him for the establishment of contingent liability for contribution as a joint tort-feasor.

The demurrer of defendant H. Jerome Johnson was overruled, and he appealed.

Armistead W. Sapp for appellees.
Benj. T. Ward for appellant.

DEVIN, J. The question presented by this appeal relates only to the defendants' pleadings. The sufficiency of the answer of defendants D. Talmage Johnson and Banner Shoe to constitute a valid cross action against H. Jerome Johnson to determine his contingent liability for contribution as a joint tort-feasor is challenged by demurrer.

The right of a defendant sued in tort to bring into the action another joint tort-feasor and upon sufficient plea to maintain his cross action against him for the purpose of determining his contingent liability for contribution is given by statute, G. S., 1-240, and upheld by numerous decisions of this Court. *Wilson v. Massagee,* 224 N. C., 705; *Godfrey v. Power Co.,* 223 N. C., 647. The purpose of the statute is to permit defendants in tort actions to litigate mutual contingent liabilities before they have accrued, *Lackey v. R. R.,* 219 N. C., 195, 13 S. E. (2d), 234, so that all matters in controversy growing out of the same subject of action may be settled in one action, *Freeman v. Thompson,* 216 N. C., 484, 5 S. E. (2d), 434, though the plaintiff in the action may be thus delayed in securing his remedy. *Montgomery v. Blades,* 217 N. C., 654,

9 S. E. (2d), 397. Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury. *Bost v. Metcalf,* 219 N. C., 607, 14 S. E. (2d), 648. The right thus conferred by the statute is "rooted in and springs from the plaintiff's suit, but projects itself beyond that suit." *Godfrey v. Power Co., supra.*

The appellant contends, however, that, conceding the right of a defendant sued in tort to file a cross-complaint against one alleged to be a joint tort-feasor and to determine his contingent liability for contribution in the same action, the allegations of fact contained in the answer of his codefendants are not sufficient to entitle them to maintain a cross action against the appellant for that purpose, in this case.

From an inspection of pleadings as set out in the record, it appears that at the time of the collision the plaintiff was a passenger in his own automobile and was being driven by his agent who was acting within the scope of his agency, and presumably under plaintiff's control. *Baird v. Baird,* 223 N. C., 730. Under these circumstances any negligence on the part of the driver was in law the negligence of the plaintiff. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

Hence proof of negligence on the part of the driver proximately causing or contributing to the injury would constitute a complete bar to plaintiff's action, would relieve the answering defendants of all liability, and afford no ground upon which to base an action for contribution. Nor is there any allegation of fact in the answer, or complaint, from which it could be inferred that H. Jerome Johnson, the driver, was at the time acting independently, or otherwise than solely in the relationship of agent of the plaintiff, his principal. We perceive no phase of the transaction under the allegations as now set out in the answer which would justify imputing contingent liability for contribution to the defendant H. Jerome Johnson. We think the appellant was entitled to have his demurrer sustained. The judgment overruling the demurrer is

Reversed.

STATE v. JOHN FRIDDLE AND GLENN PROCTOR.

(Filed 23 May, 1945.)

Appeal and Error § 39c—

Evidence material to the decision on a former trial was not offered: hence exception to the charge on this point was untenable.

APPEAL by defendants from *Olive, Special Judge,* at October Term, 1944, of GUILFORD. No error.

IN RE STATE *v.* GORDON.

The defendants were charged with breaking and entering a store building and with the larceny of a quantity of sugar therefrom. There was verdict of guilty, and from judgment imposing sentence defendants appealed.

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

P. W. Glidewell, Geo. Younce, and J. Hampton Price for defendants, appellants.

DEVIN, J. This case was here at Spring Term, 1943, and is reported in 223 N. C., 258. On that appeal a new trial was awarded for errors pointed out in the opinion written for the Court by *Justice Barnhill.* It was held that defendants' testimony raised certain questions as to felonious intent which were not properly submitted to the jury.

On the second trial below the defendants did not testify, or offer evidence. There was no evidence on this record, such as appeared in defendants' testimony on the former trial, that an employee of the prosecuting witness had authorized the removal of the sugar. It would seem therefore that the exceptions to the charge debated in defendants' brief on this point are without support in the record. In his charge the trial judge correctly instructed the jury that before they could convict the defendants they were required to find beyond a reasonable doubt not only the breaking and entry and asportation of the sugar, but also by the same degree of proof that this was done with intent to steal.

Exceptions noted by defendants to the ruling of the court on matters of evidence have been abandoned. Rule 28. They were admittedly inconsequential.

In the trial we find

No error.

IN RE INTERVENTION IN STATE v. JOHN GORDON.

(Filed 6 June, 1945.)

1. Intoxicating Liquor §§ 4b, 7, 8—

Where a truck-load (579 cases) of intoxicating liquor, in the possession of a common carrier, was lawfully passing through this State in interstate commerce and the agent in charge was arrested here, prosecuted and convicted for unlawful possession and transportation, without naming any amount, and the entire truck-load ordered confiscated, upon intervention by the common carrier, within the time prescribed by the court order, alleging that at no time was its possession changed or broken, or the character of the shipment altered and that, if its agent committed

any illegal act, it was confined to seven cases of the liquor, such intervener is entitled to a full opportunity to be heard and to present evidence on its allegations, and there was error in the court's entering judgment on the pleadings and on the record in the criminal case.

2. Intoxicating Liquors §§ 7, 8—

The statute, G. S., 18-6, provides, not for the seizure of any and all intoxicating liquor found in the vehicle, but for the seizure of any and all intoxicating liquor found therein being transported contrary to law.

3. Carriers § 3: Constitutional Law § 25b—

Interstate commerce is protected by Federal law, but the semblance of it is not to be used to circumvent the State law.

4. Intoxicating Liquors § 7—

The Supreme Court of the United States has decided that intoxicating liquor is a legitimate subject of commerce, within the protection of the Commerce Clause; and, in the absence of regulation by Congress, its movement therein is like that of all other merchantable goods, free from State control.

5. Constitutional Law § 15a—

Absence of notice or opportunity to be heard violates the due process of law provision.

6. Same—

The basic elements of a fair and full hearing on the facts include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence.

7. Intoxicating Liquors § 8—

While G. S., 18-6, provides only for a hearing in respect of the seized vehicle used in transporting intoxicating liquor contrary to law, because thereunder the liquor itself is to be destroyed, G. S., 18-13, provides for the return of the seized liquor to the established owner, upon the acquittal of the person charged with unlawful possession of such liquor, otherwise it may be turned over to the county commissioners for disposition as therein provided; and this latter statute clearly contemplates a hearing in the criminal case to determine the "established owner" or rightful claimant. This remedy appears adequate and is approved.

DEVIN, J., concurring.

BARNHILL, J., concurring.

SEAWELL, J., dissenting.

APPEAL by intervener from *Burgwyn, Special Judge,* at November Term, 1944, of WAKE.

Intervention by common carrier, Atlantic States Motor Lines, Inc., to obtain possession of whiskey seized in the case of *State v. John Gordon,* 224 N. C., 304, 30 S. E. (2d), 43.

At the time of his arrest by the officers of Wake County on 10 July, 1943, John Gordon was driving a truck which had been leased by the petitioner for the purpose of transporting 579 cases of tax-paid Calvert Whiskey—a part of an interstate shipment—from Baltimore, Md., to Charleston, S. C. Gordon was prosecuted on a warrant charging him, in three counts, (1) with the unlawful transportation of "intoxicating liquors," (2) with the unlawful possession of "intoxicating liquors," and (3) with the unlawful possession of "intoxicating liquors" for the purpose of sale. He was convicted, and the entire truck load of whiskey, consisting of 579 cases, was ordered confiscated.

The criminal prosecution was tried upon the theory and instruction that notwithstanding the interstate character of the shipment, if the jury were "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 be your duty to find him guilty."

The verdict was: "Guilty as charged in the warrant on all three counts."

It is the contention of the petitioner that at no time was its possession of the shipment ever changed or broken; or the character of the interstate shipment in any way altered; "and further, in the alternative, that if John Gordon ever committed any illegal act or had any illegal intent with respect to any part of such whiskey said act and said intent was confined in its scope to not more than 7 cases of whiskey."

The petitioner sought to appear at the trial and protect its interest, as both consignor and consignee were looking to it and insisting upon delivery in accordance with the original bill of lading. This was denied except upon condition, which the petitioner did not feel at liberty to accept.

In the order of confiscation, provision was made that any and all persons claiming an interest in the matter might come in and assert their rights within thirty days. The petitioner duly intervened in the time allowed.

In upholding the conviction of John Gordon, it was observed that the petitioner had been granted an opportunity to present its claim, which had not been heard, and that "it should have full opportunity to be heard."

When the matter came on for hearing at the November Civil Term, 1944, Wake Superior Court, the petitioner moved for judgment by default on its petition. The court "on hearing the motion, overruled the same," and granted the motions of the Board of Education of Wake County and the Board of Education of Chatham County "for judgment on the pleadings, and on the record in the criminal case." The court thereupon found certain facts from the record in the criminal case and

adjudged that the petition of the Atlantic States Motor Lines, Inc., "be and the same is hereby denied . . . that the whiskey seized in this case be confiscated in accordance with the former order of this court, and this cause is retained for a determination of the rights of the Board of Education of Wake County and the Board of Education of Chatham County to the proceeds derived from a sale of the whiskey herein ordered confiscated."

From this order the petitioner appeals, assigning errors.

Horace Haworth and William T. Joyner for intervener, Atlantic States Motor Lines, Inc., appellant.

Walter D. Siler and W. P. Horton for Board of Education of Chatham County, appellee.

William Y. Bickett and L. S. Brassfield for Board of Education of Wake County, appellee.

STACY, C. J. We said on the former appeal that the common carrier was entitled to a hearing on its petition. Has this been accorded? The appellant says not, as the matter was determined on counter-motions based on the record in the criminal case, to which it was not a party.

It is provided by G. S., 18-6, that when any officer of the law shall discover any person in this State in the act of transporting, in violation of law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, "it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law," take possession of the vehicle and team or conveyance and arrest the person in charge thereof. And further, upon conviction of the person so arrested, the court "shall order the liquor destroyed," unless it be tax-paid liquor, in which event it is to be disposed of in accordance with the provisions of G. S., 18-13. Section 18-48 also provides for the forfeiture of nontax-paid liquor, unlawfully possessed, together with the vehicle used in its transportation, etc. *S. v. Davis,* 214 N. C., 787, 1 S. E. (2d), 104.

The question then arises whether all the whiskey found in the truck driven by John Gordon, or only a part of it, was "being transported contrary to law." This question was neither mooted nor determined in the trial of the criminal prosecution, since it was immaterial under the language of the warrant. It was initially raised by the intervener.

If a truck load of produce or merchandise were passing through the State in interstate commerce and the agent in charge should pilfer a small quantity and offer it for sale, it would hardly be contended the entire truck load had thereby lost its character as an interstate shipment. And while the same reasoning applies to a truck load of intoxicating

liquor, lawfully passing through the State in interstate commerce, the ease with which the particular commodity seems to find its way into forbidden channels makes it a problem subject, both in the field of legislation and law enforcement. *Duckworth v. Arkansas,* 314 U. S., 390, 86 L. Ed., 294. Also, as might be expected, the ascertainment of the legislative will on the subject is sometimes fraught with difficulty. Hence, the one duty of the courts is to hold the balance "nice, clear and true," and let the result be as it may. *Tumey v. Ohio,* 273 U. S., 210, 50 A. L. R., 1243; *In re Steele,* 220 N. C., 685, 18 S. E. (2d), 132. Interstate commerce is protected by Federal law, but the semblance of it is not to be used to circumvent the State law. *S. v. Davis, supra.* Nor is the innocent to be punished or the guilty allowed to escape. In other words, justice is to be administered regardless of the character or subject matter of the controversy.

In the instant case the driver of the truck was arrested and charged with the unlawful possession and transportation of "intoxicating liquors," without naming the amount. The extent of his illegal intent and acts, therefore, was not at issue on his trial. The jury was instructed that notwithstanding the character of the shipment, whether interstate or not, if Gordon "took possession of it and had it in his possession for the purpose of sale," the duty would devolve upon the jury to find him guilty. The quantity of "intoxicating liquors" which he took into his possession for the purpose of sale was neither specified nor considered. The statute provides, not for the seizure of any and all intoxicating liquor found in the vehicle, period, but for the seizure of "any and all intoxicating liquor found therein being transported contrary to law." The intervener says that while Gordon may have filched a small part of the cargo, which the jury has found was "being transported contrary to law," still the bulk of the shipment was being transported in interstate commerce and under sanction of the law. *Johnson v. Yellow Cab Transit Co.,* 321 U. S., 383, 88 L. Ed., 814. The Supreme Court of the United States "in a long series of cases . . . decided that intoxicating liquor is a legitimate subject of commerce . . . and as such within the protection of the Commerce Clause. In the absence of regulation by Congress, the movement of intoxicants in interstate commerce, like that of all other merchantable goods, was 'free from all state control' "—*Mr. Justice Frankfurter* (concurring) in *Carter v. Virginia,* 321 U. S., 131, 88 L. Ed., 605.

In deference to the jury's finding, but without conceding loss of its right thereto, the intervener foregoes any claim to the part which it says was purloined. It insists, however, that the allegations of fact set out in its petition should be determined in keeping with the requirements of due process and agreeably to the law of the forum. *Morgan v. U. S.,*

304 U. S., 1, 82 L. Ed., 1129. These allegations remain undetermined on the record, since the judgment was entered on counter-motions, without any evidence being taken, or any hearing had on the petition other than the motion for judgment by default, which was overruled. "It is a sound and just principle of law and one worthy of acceptation that 'absence of notice or opportunity to be heard, violates the due process of law provision' "—*Brogden, J.*, in *Hart v. Comrs.*, 192 N. C., 161, 134 S. E., 403.

Seemingly the facts alleged by the intervener were overlooked or disregarded. They are quite sufficient to survive a demurrer or to withstand the counter-motions for judgment on the petitions. There was no agreement upon the facts or that the judge should find the facts from the record in the criminal case. Indeed, the matter now at issue was neither in focus nor decided on that record; otherwise the right to a full hearing would hardly have been announced as the law of the case when it was here on the former appeal. The same petition was before us at that time. "The basic elements" of a fair and full hearing on the facts "include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence"—*Mr. Justice Murphy* in *Carter v. Kubler*, 320 U. S., 243, 88 L. Ed., 26.

The procedure here followed—the same as in other cases—is authorized by order of the Superior Court entered herein and was approved in our former opinion. It is now suggested that the petition should be dismissed and the intervener remitted to equity for its relief. *McCormick v. Proctor*, 217 N. C., 23, 6 S. E. (2d), 870. The basis of the suggestion is that G. S., 18-6, provides only for a hearing in respect of the seized vehicle used in transporting intoxicating liquor contrary to law, and then "with the right on the part of the claimant to have a jury pass upon his claim." The statute is so framed because by the terms of this section the liquor itself is to be destroyed. But in section 18-13 provision is made for the return of the seized liquor to the established owner upon the acquittal of the person so charged, otherwise it may be turned over to the board of county commissioners for disposition as therein provided. Thus this latter section clearly contemplates a hearing in the criminal case to determine the "established owner" or rightful claimant to the liquor. The parties have not questioned the appropriateness of the procedure. The remedy appears to be adequate for the purpose. Anyhow, it has been approved in this case. 30 Am. Jur., 539 and 550. The procedural provisions of section 18-6 are specifically referred to in section 18-48 and made applicable to proceedings thereunder. 30 Am. Jur., 552.

There is no challenge here of any North Carolina law on the subject of intoxicating liquor. The intervener alleges, and at every turn in the case has contended, that the whiskey in question was lawfully moving in interstate commerce, and was therefore beyond the reach of the local law. This is the only issue raised by the intervention. It was not determined in the criminal case. The complete good faith of the carrier is in no way questioned. *Johnson v. Yellow Cab Transit Co., supra.*

The controversy then ranges to whether the liquor in excess of the seven cases shall continue in interstate transportation or be forfeited and sold in North Carolina. The intervener is seeking to recover the shipment in order to discharge its obligations as a common carrier. The respondents are asking that it be sold and the proceeds turned over to the appropriate school fund. There is no apparent reason why the pertinent facts should not be duly ascertained and the law properly applied as in other cases. 30 Am. Jur., 552. If the allegations of the petition be true, the liquor in question is not subject to condemnation under the statute. And as between a summary disposition of the matter and an adequate hearing on the merits, there appears little ground for debate, if established principles are to be observed. *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *Markham v. Carver,* 188 N. C., 615, 125 S. E., 409.

The case is not like *S. v. Hall,* 224 N. C., 314, 30 S. E. (2d), 158, where the defendant was charged with the unlawful possession and transportation of the whole cargo—323 cases of intoxicating liquor—and he pleaded guilty to the offense as charged in the warrant. There the liquor "so unlawfully possessed and transported" was admittedly the whole cargo. Here the carrier contends that the faithlessness of Gordon in wrongfully extracting not more than seven cases of "intoxicating liquors" from an otherwise lawful interstate shipment, without its knowledge or consent, does not and cannot change the character of the entire shipment. The facts in respect of this position are yet undetermined. The subject of the intervention is lawful interstate transportation. Of course, if it should turn out to be something else, that is another matter. The carrier is entitled to make good its allegations, if it can. *S. v. Hall, supra.*

To this end the matter will be remanded for another hearing.

New trial.

DEVIN, J., concurring: The judge who heard the petition below found certain facts and adjudged that "the whiskey seized in this case"—the entire truck load of 579 cases—was subject to condemnation and confiscation under the laws of North Carolina, but in his judgment he based his findings entirely upon the record in the criminal case, and, apparently, without considering the facts alleged in the petition. A

remand for hearing and finding as to the allegations in the petition would seem to be in order.

But in agreeing to this disposition of the appeal I desire to call attention to certain significant facts that appear in the record of this case.

While the warrant under which Gordon was tried and convicted did not specify the quantity of whiskey he was charged with unlawfully transporting and possessing for the purpose of sale, the uncontroverted evidence disclosed that at the time of the arrest of Gordon, petitioner's truck driver, he was in the actual possession of 579 cases of whiskey, all contained in a single vehicle, with no distinguishing marks or designations on any of the packages. Though Gordon was in the act of selling 7 cases only, the entire truck load was in his possession, and all of it equally open to disposition and sale. The witness Mills, who admitted intention to purchase 7 of the cases, had on his person at the time an amount in cash sufficient to buy a much greater quantity than 7 cases.

The facts shown in the trial of Gordon reveal unmistakable evidence to my mind that the method employed in this case, as also in the *Hall case,* was one of the frequently used means of distributing and selling unlawfully great quantities of intoxicating liquor throughout the State, and that the profits therefrom are enormous, as shown in the *Hall case* and the *Lippard cases.* Here we have a situation where a truck load of whiskey, valued at more than $20,000, was being transported in open violation of Federal regulation, without seals, fastenings or marks, and in such a way as to facilitate, without check, the sale of the contents of the truck en route. The driver was caught red-handed making one such sale. Under these circumstances, and with profits so large and apparently so easily obtained, does not a compelling inference arise that Gordon's purpose was to sell all the whiskey and that he therefore had 579 cases in possession for the purpose of sale? It would seem that a finding to that effect would have been justified.

The petitioner here claiming possession of the 579 cases is the lessee of the truck owner. It alone comes into court. Both the consignor and the consignee are conspicuous by their absence. Presumably, if it was a *bona fide* shipment, the title to the whiskey passed to the consignee upon delivery to a carrier. Doubtless the distiller received its pay when the whiskey left the warehouse. Who paid for it? Did the alleged consignee? If so, he would hardly have left to the trucker to make claim for so valuable a cargo. Significantly the petitioner trucker says in his petition, "your petitioner does not have sufficient information to form a belief as to which of the two (consignor or consignee) is the legal owner, but is informed and believes that there is lack of agreement between the

two as to the title and ownership," and is informed and believes that both are looking to the petitioner for delivery.

The uncontroverted evidence in the *Gordon case* would seem to rebut the claim that this was a *bona fide* shipment in interstate commerce, but the court below has failed to make specific findings on this point, and as the jurisdiction of this Court is appellate its province in this instance is confined to review of the rulings of the Superior Court. Insufficient findings below require remand. I concur in that view.

BARNHILL, J., concurring: When this cause was here on the appeal of Gordon, *S. v. Gordon,* 224 N. C., 304, we held that on the record before us the petitioner was entitled to a hearing. We did not then attempt to limit or define the hearing to which it was entitled other than to call attention to the fact that this Court, at that time, had not decided whether the provision of G. S., 18-6, "the court, upon conviction of the person so arrested, shall order the liquor destroyed," is in the nature of a forfeiture or a confiscation as contraband. The question has since been decided. *S. v. Hall,* 224 N. C., 314.

"Confiscate" is ordinarily used to mean a transfer of property from private to public use or a forfeiture of the property to the State as an act of penal justice for the punishment of crime. *Skelley v. St. Louis & S. F. R. Co.,* 161 S. W., 877.

When the State acts against a rebellious citizen, who has violated the laws of the State, by confiscation of the property used in connection with or in furtherance of the crime committed, the chattel so confiscated is outlawed and becomes contraband in the nature of a public nuisance. It loses its quality as property subject to private ownership. To the extent the order is lawfully entered, it is good against the world and the right of ownership by private individuals ceases to exist.

Confiscation is invoked not only against liquor unlawfully possessed and transported, G. S., 18-6, 13, and 48, but also against gaming tables, punch boards and slot machines, G. S., 14-298, 299, property used in conducting bawdy houses, G. S., 19-1, and the like.

Why then is the petitioner entitled to be heard when Gordon has been duly convicted and the liquor found in his possession has been confiscated?

The original record in some respects is ambiguous. In the language of the street, it leaves the questions of interstate shipment and of the quantity of liquor being unlawfully possessed and transported "up in the air." These questions do not affect the guilt of Gordon, but they do, in a large measure, determine the extent to which the order of confiscation is legal and binding, and hence the extent of the rights of the petitioner.

Gordon was indicted, charged with the unlawful possession, transportation, etc., of "a quantity of intoxicating liquor." The evidence offered permits at least three inferences:

1. The cargo of liquor in his possession was not a *bona fide* interstate shipment. If not, the whole cargo was illegally possessed and transported. As to this, that the truck was not sealed and the packages were not labeled and the defendant spent much time around Raleigh and Apex constitute very suspicious, but not conclusive, circumstances.

2. Gordon, having the cargo in possession, while in Apex, agreed to sell Mills a part of the cargo and in furtherance of that agreement transported the whole cargo to a point on the Pittsboro road for the purpose of making delivery in accord with his unlawful agreement. Upon such finding it would follow that the whole load was unlawfully possessed and transported.

Those who deal in liquor know that it is prone to drift into unlawful channels. When a transportation company delivers to an agent a cargo of unlabeled liquor in an unsealed truck in violation of the Federal law, it takes the risk, and when the employee prostitutes the shipment to unlawful purposes, it must suffer the consequences.

3. The cargo was a *bona fide* shipment in interstate commerce and the employee in charge, while on his way on a regular or permissible route to his destination, came in contact with a bootlegger to whom he agreed to sell a part of the cargo, all without previous agreement. To accomplish his purpose he purloined or was in the act of purloining a few cases, without any intent to divert any other part of the shipment. If so, the unlawfulness of his act would relate only to the liquor he pilfered or intended to pilfer. The shipment was being transported in good faith in interstate commerce. The bailee transportation company was acting in good faith. The employee intended, in good faith, to complete the shipment—less the few cases pilfered by him. Under these circumstances it would be unjust to conclude that the whole load had been diverted into unlawful channels, justifying its condemnation or confiscation so as to deprive the petitioner of its property rights therein.

The petitioner insists that the inference last stated represents the true facts and should be drawn from the evidence in the original trial as supplemented by the allegations in the petition treated as an affidavit.

In the original trial, whether the liquor was in course of interstate shipment was not decided. The court instructed the jury that this was immaterial on the question of Gordon's guilt or innocence. On that record it is impossible to determine whether the jury convicted Gordon on the theory he had diverted the whole cargo or only purloined and sold, or was about to sell, a small portion thereof while in good faith transporting the cargo, as a whole, to its destination in Georgia.

The petitioner seeks to raise these questions which materially affect its rights. In the hearing below, the court disregarded the allegations in the petition and found the facts set out in its judgment "from the record in the criminal cause." In so doing, it did not find the determinative facts. Herein lies the error.

The record in the criminal cause, if clear and unambiguous on the questions here raised, would be as binding upon petitioner as upon Gordon. *S. v. Hall, supra.* But such is not the case. Additional facts must be found.

Under some circumstances injunctive relief is permissible. *McCormick v. Proctor,* 217 N. C., 23, 6 S. E. (2d), 870. When, however, there is an action pending, as here, motion in the cause is the proper procedure. *Humphrey v. Churchill, Sheriff,* 217 N. C., 530, 8 S. E. (2d), 810.

I vote to remand for further hearing.

SEAWELL, J., dissenting: I dissent from the main opinion in its holding that (a) Atlantic States Motor Lines, Inc., has any legal right to intervene in this criminal proceeding, either before or after the conviction of Gordon, since the statute does not provide for such procedure; or (b) if it be conceded, for the purpose of discussion only, that it had such right, in the holding that it has not already exercised it or had an opportunity to exercise it; or (c) further, that the petition shows any merit to sustain the intervention. My conclusion is that this, the second appeal of the carrier, presents a question of law only and that remand of the case for further hearing is unwarranted.

The significance of any opinion rendered in this case will not be clear without further information as to the proceedings already taken. The importance of the case demands a statement of its history.

John Gordon was tried at the November Criminal Term, 1943, of Wake County Superior Court upon a warrant charging him with: (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. He was convicted on all three counts. The evidence fully described the liquor in his possession—579 cases—and its disposition in the truck.

At the trial the petitioner in this proceeding asked to intervene in the trial, claiming the liquor and anticipating the confiscation thereof in the event of Gordon's conviction, and this was refused. Counsel for this intervener, however, did participate in the trial and brought into the record voluminous evidence, which may be found in the record in that case.

Gordon appealed his case to this Court, and the Court found no error. 224 N. C., 304. At the same time, the present petitioner appealed from the order refusing intervention and was heard here. The appeal was dismissed. *S. v. Gordon, supra.*

The opinion of the Court with reference to the proposed intervention, by *Justice Barnhill,* is as follows:

"Whether this provision (G. S., 18-6, G. S., 18-13, G. S., 18-48) 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."

The reference in this opinion is to the order of Judge Burgwyn made at the same time sentence was pronounced upon Gordon at his trial by which the whiskey was confiscated and those interested were permitted to assert their claims.

Before the opinion was handed down in that case—*S. v. Gordon, supra*—the Atlantic States Motor Lines, Inc., filed a so-called petition of intervention before Judge Burgwyn, presiding at the November, 1944, Civil Term of Wake Superior Court, setting up certain claims, as the innocent owner of the whiskey found in the possession of Gordon and confiscated by the former order, and making the entire record in the criminal case against Gordon an exhibit. This petition purports to be filed under Judge Burgwyn's order.

Thereafter, there was a petition filed by Chatham County, North Carolina, demanding that the confiscated liquor be sold as provided by the statute—ch. 310, Public Laws of 1941—see G. S., 18-13, *supra*—and the proceeds turned over to the School Fund of Chatham County.

At the hearing upon these petitions, the Atlantic States Motor Lines, Inc., demanded judgment by default upon its petition, on the theory that it was the duty of the intervener, Chatham County, or some undesignated person or agency, to deny, or be subject to judgment *pro confesso,* and tendered judgment. Judge Burgwyn declined to sign the judgment.

The petitioner did not produce or offer any evidence whatever in support of its petition, but apparently had relied upon its motion for a default judgment. The petitioner has not anywhere in the record suggested that it was denied a hearing before Judge Burgwyn, nor did it, in its exception to the judgment, point out any error it claimed, other than refusal of its motion for judgment by default on its petition.

However, Judge Burgwyn did find the facts in the case, substantially as follows:

"About 3 O'clock P. M., on the 10th day of July, 1943 a large truck was seen by the law enforcement officers of Wake County parked in front of Otis Mills' service station on Highway #64 in White Oak Township, Wake County. No one was in the truck at that time. In about ten minutes the defendant, John Gordon, got in the truck and drove it in a Westerly direction along Highway #64, and Otis Mills, the operator of Mills Service Station, drove off immediately behind the truck in a Ford Coupe automobile. The truck and automobile went down the highway about 300 yards in a ravine, and pulled off on the shoulder of the road, and the driver of both the truck and the car got out and after seeing one of the officers got into their respective vehicles, and proceeded in a Westerly direction on Highway #64. The officers followed the vehicles, and found the truck parked on the shoulder of the highway headed in a Westerly direction, and the automobile parked on the shoulder of the road headed in an Easterly direction immediately in the rear of the truck and about two or three feet distance from it. When the officers arrived Mills was on the ground and Gordon, the driver of the truck, was in the truck, and three cases of whiskey had been removed from the lines in which it was packed, and was stacked on top of each other near the rear door of the truck, and on one case appeared the following figures:

36
7

252
33

285

The truck contained 579 cases of whiskey labeled 'Calvert's Reserve' and 'Calvert's Special,' all in pint, half-pint and one-fifth gallon bottles. The truck was the tractor trailer type, the trailer being enclosed with doors in the rear which were without lock or fastening. There was no seal on the truck, and no Interstate Commerce license number in view."

Here follows transcript of certain papers found in the truck. The finding of facts continues:

"The truck loaded with whiskey arrived at M. C. Garner's truck terminal in the City of Raleigh in the early morning of July 10, 1943 in charge of John Gordon. Upon arrival in Raleigh the driver of the truck, John Gordon, borrowed the automobile of M. C. Garner, and drove to Otis Mills' Service Station, about 17 miles from the City of Raleigh, on Highway #64, and after a conference with Mills returned to the City of Raleigh, and drove the truck loaded with the whiskey to Mills Service Station when he had another conference with Mills, and

at which time he told him that he had a load of whiskey, and if he would go down the road he would let him have some of it.

"None of the packages of liquor were anywhere labeled to show the name of the consignee. The whiskey was not being transported to or from a North Carolina A. B. C. Store. No North Carolina A. B. C. stamps were attached to any of the containers of the whiskey."

Thereupon, the court ordered that the whiskey be confiscated in accordance with the former order of the court, and retained the cause for a determination of the rights of the Board of Education of Wake County and the Board of Education of Chatham County to the proceeds derived from the sale of the whiskey which had been ordered sold. The intervener, Atlantic States Motor Lines, Inc., appealed from this order, basing its appeal on exception to the refusal of its motion for a default judgment, and upon the invalidity of the judgment upon the facts found.

Before proceeding further with the discussion, I wish to say as pointedly as I know how that if the Motor Company was entitled to any hearing by an intervention order, such as was originally entered in this cause, it has had it, with a full opportunity to present to the court any evidence it may have had in support of its claim; and there is not the slightest suggestion in the record that it was denied a full hearing. The appeal, if it has any place at all in our procedure, brings up a question of law only to be decided in this Court.

I make no apology for the space I may have to occupy in discussing this case—one which I consider of great and immediate importance to the public—but will be as brief as the circumstances permit.

I. The statute, in obedience to which the lower court undertook to confiscate the liquor possessed and transported by Gordon contrary to law—G. S., 18-6—is copied from the National Prohibition, or Volstead, Act of similar import. It makes no provision for a hearing with respect to intoxicating liquor confiscated by the court because of its possession or transportation contrary to state law, although it does provide for a hearing before condemnation of innocuous property used in the transportation. The omission is intentional, deliberate. It is based on the universally recognized fact that intoxicating liquors passing into illegitimate channels are a nuisance, a menace to society, and where the state provides confiscation, no property right can be asserted in them against the superior and often exigent demands of the public welfare. In other words, intoxicating liquor, when possessed or transported contrary to law, loses its character as property. *Ziffrin v. Reeves,* 308 U. S., 132, 84 L. Ed., 128, loc. cit. L. Ed., p. 136, in considering a similar law and a factual situation like that presented here, observes: "Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband."

The statutes of many states, including ours, expressly deprive contraband liquor, in the sense I have described, of its character as property. G. S., 18-4. So did the National Prohibition Act. U. S. C. A., Title 27, sec. 39. Nevertheless, any statute which summarily confiscates intoxicating liquor upon conviction of a person unlawfully possessing or transporting it has that effect.

The confiscatory feature of the law was not affected by the enactment of the Beverage Control Act as we now have it, although some of the features of the more recent law are held to be State-wide. *S. v. Davis,* 214 N. C., 787, 1 S. E. (2d), 104; *S. v. Carpenter,* 215 N. C., 635, 3 S. E. (2d), 34.

Cases cited in intervener's brief bearing on the question of due process and want of notice and hearing are too general for application to the particular situation presented in this case.

Similar provisions of the law have been uniformly upheld as constitutional and valid by the courts of many states and by the Supreme Court of the United States.

"An excellent illustration of the extent of the power of the state, consistent with due process of law, to provide for the summary destruction of property declared by statute to be illegal is found in the case of intoxicating liquors . . . Liquors brought for sale into a district in which sale is prohibited may be summarily seized and destroyed without compensation." 12 Am. Jur., Constitutional Law, sec. 681; 30 Am. Jur., Intoxicating Liquors, sec. 554.

In *Sentell v. New Orleans & C. R. Co.,* 166 U. S., 698, 705, 41 L. Ed., 1169, 1172, it is said: "It is true that under the 14th Amendment no state can deprive a person of his life, liberty, or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction." *Samuels v. McCurdy,* 267 U. S., 188, 69 L. Ed., 568; *Crane v. Campbell,* 245 U. S., 304, 62 L. Ed., 304.

In *Samuels v. McCurdy, supra,* it is pointed out that the proper remedy for one who claims the ownership of liquor and denies the right of the state to confiscate it is by injunction.

"Finally it is said that the petitioner here has no day in court provided by the law, and therefore that, in this respect, the liquors have been taken from him without due process. The supreme court of Georgia has held in *DeLaney v. Plunkett,* 146 Ga., 547, 565 . . . that,

under the 20th section of the Act of November 17, 1915 (Georgia Laws Extr. Sess. 1915, p. 77), quoted above, which declares that no property rights of any kind shall exist in prohibited liquors and beverages, no hearing need be given the possessor of unlawfully held liquors, but that they may be destroyed by order of the court. . . . The law provides for an order of destruction by a court, but it does not provide for notice to the previous possessor of the liquor, and a hearing before the order is made. Under the circumstances, *prima facie* the liquor existed contrary to law, and it was for the possessor to prove the very narrow exceptions under which he could retain it as lawful. If he desired to try the validity of the seizure, or the existence of the exception by which his possession could be made to appear legal, he could resort to suit to obtain possession and to enjoin the destruction under the Georgia law, as he has done in this case. This, under the circumstances, it seems to us, constitutes sufficient process of law under the Federal Constitution, as respects one in his situation. *Lawton v. Steele,* 152 U. S., 133, 142, 38 L. Ed., 385."

There is no question that intoxicating liquors, under proper conditions, may be transported through the state into another state as an interstate shipment under the protection of the Commerce Clause, while that is being done without violation of valid police powers of the state; but in the repeal of the 18th Amendment, neither the U. S. Constitution nor the Congress left prohibition territory helpless to prevent importation of liquor in the prohibition territory in violation of valid state law.

In *Carter v. Commonwealth of Va.,* 321 U. S., 131, 88 L. Ed., 605, this principle is expressed: "In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause."

If the liquor concerned in this controversy ever entered the State under the protection of the Commerce Clause—as to which there may be doubt—it lost that protection when found being possessed and transported contrary to law. Upon conviction of the offender, confiscation of the liquor seized and concerned in the illegal act depends upon the facts developed upon the trial for the criminal offense, and is made the subject of a judicial order upon such conviction. The liquor itself under such circumstances is regarded as the thing offending, and the confiscation is summary. *Goldsmith, Jr.—Grant Co. v. U. S.,* 254 U. S., 505, 65 L. Ed., 376, 379.

I do not mean to say that the action of the court in confiscating the liquor is beyond review. Certainly, by injunction, an interested person may be heard to dispute the arbitrary and capricious exercise of this power or its exercise beyond the authority of the statute. *Samuels v. McCurdy, supra.* What might be the scope of such a hearing, it is not

necessary now to inquire. I am sure, however, that it is not such a hearing as is contemplated in this remand. As far as the present proceeding is concerned, it is not, in my opinion, contemplated or authorized by the statute; although, indeed, a full hearing, restricted only by the unembarrassed judgment of counsel for the intervener, has been accorded it.

II. If the so-called intervener had a right to a hearing under G. S., 18-6, or any other State law, it has had a full opportunity to be heard upon its present petition purportedly filed under the original order of Judge Burgwyn—the court sitting at a later date for that purpose. The only thing absent at that hearing was evidence, or any offer of evidence, on the part of the intervener in support of its petition. The case comes here without any suggestion in the record that the intervener was denied an opportunity to present its case without let or hindrance in such manner as it saw fit.

This is what actually took place at the hearing:

The defendant moved for judgment by default on its petition for want of an answer—apparently on the theory that the proceeding was governed by the rules of civil procedure relating to adversary actions. The court declined to sign the judgment tendered, and the intervener excepted. It offered no evidence. The judge finding the facts upon which the confiscation was based signed judgment affirming and re-promulgating the former order of confiscation, and the intervener excepted. What is now before this Court? And, what is of equal importance, how is the main opinion (which, without intending to give offense, I find wholly cryptic) to be interpreted?

In its brief the intervener still insists it is entitled to a judgment by default; this is its main contention. In a similar light appellant makes the unique argument that Judge Burgwyn had no power to find any facts *except those contained in the allegations of the petition.* The gist of these allegations is contained in paragraph 14 of that document:

". . . *that John Gordon was not guilty of the crimes with which he was charged, or any of them; that there was no illegal transportation or possession or possession for purpose of sale of the 579 cases of whiskey or any part of it;* that the possession of your petitioner was never changed or broken; that the interstate journey of the 579 cases of whiskey was never changed or broken; that the interstate commerce status of said whiskey was never changed or broken; and, further, in the alternative, *that if John Gordon ever committed any illegal act or had any illegal intent with respect to any part of such whiskey said act and said intent was confined in its scope to not more than 7 cases of whiskey.*"

Since the demands of the intervener are of that character and no discrimination seems to be made in the main opinion as to what posi-

tions of the appellant are approved and what rejected, is the hearing awarded the intervener a trial *de novo* before a jury, upon which all the facts, even the guilt or innocence of Gordon, are again to be put in evidence? That possibility seems too radical for discussion. *Mugler v. Kansas,* 123 U. S., 623, 31 L. Ed., 205; *Southerman v. State,* 66 Neb., 302, 92 N. W., 303. Appellant, under an apparent misconception of what is held in *S. v. Davis, supra,* insists that it is now entitled to be heard before "a fact finding body," although it neither expected nor demanded a trial by jury at the hearing below.

III. The petitioner bases his right to be further heard in this matter upon an untenable distinction, and his petition is not meritorious. Coming now to the feature most stressed in the main opinion and assuming, without further clarification, that the remand is mainly grounded on that narrow point, I turn to the proposition that Gordon was convicted of having in his possession an amount of liquor—undesignated in the warrant—for the purpose of sale, and that this is not sufficient to warrant forfeiture of the whole cargo of 579 cases constituting the truck load. The contention is that Gordon's purpose, as well as possession, was confined to the three to seven cases of liquor he had pulled out of the stacks and lined up for immediate delivery. As to his *possession,* we find it variously stated that he had "filched," "pilfered," "purloined" these cases of liquor from the intervener "in breach of faith" with his employer and, therefore, the owner should not be penalized by forfeiture of the remaining liquor as to which his intentions were doubtless honorable. All these euphonies add up to "stealing," and that is the climaxing term finally applied.

The contention is in conflict with substantial evidence upon the trial of Gordon and contrary to reasonable inferences therefrom which must be conclusively held to have been within the contemplation of the jury in its verdict of guilty and of the court in judicially ordering the confiscation upon conviction.

First, Gordon was no "hi-jacker." He stole nothing. He was put in actual possession of the truck load of liquor in what intervener's petition admits was the regular custom of the business. His actual possession and custody extended to every part of the load. The car was not sealed. At Baltimore the seal was hung to a link of the chain at the tailgate, offering no obstruction to opening the doors. Employees of the intervener testified on the trial that if applied properly, the doors could not have been opened without breaking the seal. Gordon had physical, actual, manual possession and control of every case of liquor in the load; and the statute affords no room for a distinction between the actual possession of Gordon and the supposed constructive possession of the intervener.

Under these circumstances Gordon was found with the rear doors of the truck open, a pick-up truck backed up to it by a man with a thousand dollars in his pocket, ready to receive such part of the truck load as Gordon saw fit to deliver. All this was by previous arrangement. And the case is to be sent back so that the intervener may re-explore the mind of Gordon and show that he was virtuous with respect to the bulk of the load which he was transporting with no regard whatever for the State law. The intervener is to take up the fight just where it seems to have thrown in the towel at its last appearance before Judge Burgwyn.

The fallacy of the decision lies in its assumption that the court is without power to make an order confiscating contraband whiskey unless the warrant under which the defendant is tried specifies the amount and description, such as would be necessary in a civil action to try the title. The authority for the order of confiscation, however, is seated upon the evidence adduced in the trial, and for the purpose of the order this is addressed to the court. Hence, if there are inferences in that evidence upon which the order can be justified, the confiscation should be upheld. That there are such inferences in the present case has, as far as I am able to discover, not been denied.

The law, as I have said, contemplates that confiscation should rest upon the facts of the case as developed on the criminal action. To allow these to be refuted in a subsequent hearing by evidence *de novo* destroys the effectiveness of a well considered law and lets in all the evils which it was destined to prevent.

But suppose the intervener could make good on this point at a rehearing, what then? No reference is made in the main opinion to the effect of the conviction of Gordon on the two other counts in the warrant which do not have to do with sale, or the purpose to sell. These offenses, too, are stated in the warrant in general terms; but conviction under similar indictments has been upheld, *even when a verdict of not guilty has been rendered* on the count charging possession for purpose of sale. *S. v. Davis, supra.* Why should this case be sent back upon such tenuous ground, relating solely to one count in a warrant, when Gordon was convicted of transporting a whole cargo contrary to law, and conviction for this offense, also, carries with it confiscation of the liquor? The effect is to annul the order of confiscation on an inconclusive finding, if the issue as defined in the main opinion is favorable to the intervener. The result is achieved by the simple process of ignoring the basis of the conviction.

Writing in my present capacity, I am not interested in promoting the ideologies of any political or social group. That I might do as a private citizen if I so desired. But looking at the law as coldly and objectively as I know how, I am not willing to admit that contraband liquor has,

under that law, an indestructible quality as property of which the State cannot deprive it by summary action when found to be contraband. If so, the remedy is to declare the confiscatory provisions of the present law unconstitutional and be done with it. If not, they deserve to be enforced according to their tenor. Perhaps in some portions of the State the popular opinion as to property in whiskey has undergone a change, but that feeling has not crystallized into law or repeal of law. The statute under which we are working was molded under a different conception of the inherent evils of intoxicating liquor, especially when allowed to flow in illegitimate channels, and should be construed in that light.

It does us no good to be mindful of the spigot and take no care for the bung. The wholesale distribution of contraband liquor in North Carolina under the guise of transportation through the State under the protection of Interstate Commerce has fallen into a pattern, which the present case closely follows. Not doubting in the least that my colleagues of a different opinion have as much conscience and zeal as I, and perhaps greater wisdom, in the enforcement of the law, I feel that we are in danger of striking down the most effective provision of the statute by which wholesale violations of the law may be prevented.

I vote to dismiss the petition, or failing that, to affirm the order of the court below.

CLARA C. HARPER v. T. H. HARPER.

MRS. PHIL S. WICKHAM v. T. H. HARPER.

PHIL S. WICKHAM v. T. H. HARPER.

(Filed 6 June, 1945.)

1. Courts § 13—

The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done.

2. Same: Automobiles § 19—

The South Carolina guest statute, S. C. Code, sec. 5908 (1), as interpreted by the Supreme Court of that State, comes to this: If the negligent failure to exercise due care was the result of mere inadvertence or casual inattention, it is simple negligence and a guest passenger may not recover. On the other hand, if there was a conscious failure to be careful for the safety of others or to observe the rules of the road, then an inference of recklessness is permissible. And, when there is testimony tending to show that defendant failed to keep a proper lookout or to observe the positive commands of the traffic statute, it is for the jury

to say, under all circumstances, whether such conduct evidences a heedless and reckless disregard of the rights of others.

3. Negligence § 19a: Automobiles § 18a—

In an action to recover for injuries to plaintiffs as the result of an automobile wreck, where plaintiffs' evidence tended to show that defendant, the driver of the car in which both plaintiffs and defendant were riding, became drowsy, knew he was drowsy, lost consciousness, and failed to keep a proper lookout and to attend to what he was doing and thereby, or intentionally, disregarding the screams of one plaintiff, swerved the car to the left, ran off the road, causing the injuries, there is sufficient evidence for the jury and motion for judgment as of nonsuit was properly denied.

4. Automobiles §§ 20b, 24d—

Where plaintiff predicates her cause of action, for damages from injuries in an automobile accident, on allegations and her own evidence that she was a guest passenger in her automobile, which she had lent to her husband for the purpose of a business trip, with the intent at the time that he should have exclusive control while so used, and which was being operated by her husband for that purpose at the time of the accident, there was error in the court's charge to the jury that they should answer "No" to the issue, "Was defendant at the time of the alleged injury acting as agent and under the control and supervision of plaintiff?"

5. Automobiles § 24a—

The owner of an automobile has the right to control and direct its operation. So when the owner is an occupant of an automobile, being operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner.

APPEAL by defendant from *Sink, J.*, at October Term, 1944, of GUILFORD (High Point Division).

Three separate civil actions to recover damages resulting from an automobile wreck, consolidated for trial by consent.

On 22 October, 1943, plaintiff Clara C. Harper was the owner of a Pontiac automobile. On that day she and her husband and plaintiffs Phil S. Wickham and Mrs. Wickham started on a trip from the Harper home, near High Point, to Augusta, Ga., on Mrs. Harper's automobile. They spent the night in Augusta. The next day, about 5:00 p.m., after defendant had transacted some business, they started on the return trip. When about seventeen miles out of Augusta, just across the South Carolina line, the car began to pull over from the right to the left side of the road and ran off the road, fell over some tree tops down a thirty-foot embankment into a tree. When the car began to swerve to the left, Mrs. Harper, who was sitting on the rear seat, began to scream, but apparently the driver "paid no attention to her." Each plaintiff received personal injuries. Those sustained by Mrs. Harper, being more

serious than the others, resulted in pneumonia and left her permanently injured. Her car was also practically demolished.

The defendant Harper was operating the car both going to and returning from Augusta. Mrs. Harper testified that defendant's automobile was out of repair; that at his request she loaned him her car to make a business trip to Augusta; and that later, at his suggestion and invitation, she consented to go along as his companion and guest. He also invited Mr. and Mrs. Wickham to accompany him.

Some time after the wreck, defendant stated that he was very sleepy and dozed off shortly before the wreck; that he realized it was a very dangerous thing for him to keep on driving; that he felt nauseated; that he tried to shake it off but he went on anyway and again fell asleep; that he woke up hearing Mrs. Harper scream but by that time the car was going over the top of the trees and that he did not shake off his drowsiness enough to do anything about it; that he felt drowsy and sleepy.

Plaintiffs base their cause of action on the allegation that defendant was operating the automobile without keeping a proper lookout. They allege his conduct was in heedless and reckless disregard of the rights of plaintiffs.

Defendant denies negligence and alleges that if he was negligent in any respect his negligence was imputable to Mrs. Harper, the owner of the automobile, who was present, possessing the right to direct and control the operation of the automobile, and that in any event she is not entitled to recover.

Separate issues in each case were submitted to and answered by the jury in favor of plaintiffs. From judgments thereon defendant appealed.

Goebel Porter for plaintiffs, appellees.

Gold, McAnally & Gold and Rupert T. Pickens for defendant, appellant.

BARNHILL, J. There are only two exceptions in the record which require discussion: (1) Did the court err in denying the defendant's motion to dismiss as in case of nonsuit, and (2) was there error in the court's charge on the second issue in the case of *Harper v. Harper?*

The accident occurred in the State of South Carolina. "Hence, in ascertaining the liability of defendants, the standard of conduct of the parties must be measured by the law of that State. *Harrison v. R. R.,* 168 N. C., 382, 84 S. E., 519; *Hale v. Hale,* 219 N. C., 191, 13 S. E. (2d), 221; *Russ v. R. R.,* 220 N. C., 715, 18 S. E. (2d), 130. 'The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done.'

Howard v. Howard, 200 N. C., 574, 158 S. E., 101." *Baird v. Baird,* 223 N. C., 730.

The South Carolina statute denies a right of action by a guest passenger on an automobile against the owner or operator "for injury, death or loss, in case of accident unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others." S. C. Code, sec. 5908 (1).

The language of the statute indicates an intention to limit such liability to two classes of cases: First, when the accident was caused by intentional misconduct; and, second, when it was caused by a heedless or reckless disregard of the rights of others, meaning thereby something more than the mere failure to exercise the care of a reasonably prudent man, which is the familiar definition of negligence. *Fulghum v. Bleakley,* 177 S. C., 286, 181 S. E., 30; *Cummings v. Tweed,* 195 S. C., 173, 10 S. E. (2d), 322.

In applying the statute the phrase "caused by his heedlessness *or* his reckless disregard of the rights of others" must be construed to read "caused by his heedless *and* his reckless disregard of the rights of others." *Fulghum v. Bleakley, supra; Cummings v. Tweed, supra; Peak v. Fripp,* 195 S. C., 324, 11 S. E. (2d), 383.

"Heedless" in this connection means careless. It does not add to the significance or the characterization or the force of the act or conduct done in reckless disregard of the rights of others by the owner or operator. Act or conduct in reckless disregard of the rights of others is improper or wrongful conduct, and constitutes wanton misconduct, evincing a reckless indifference to the life or limb or health or reputation or property rights of another. *Fulghum v. Bleakley, supra; Cummings v. Tweed, supra; Pardue v. Pardue,* 166 S. E., 101; *Peak v. Fripp, supra; Spurlin v. Colprovia Products Co.,* 185 S. C., 449, 194 S. E., 332; *Proctor v. Southern Ry. Co.,* 39 S. E., 351; *Gosa v. Southern Ry.,* 45 S. E., 810; *Cole v. Blue Ridge Ry. Co.,* 55 S. E., 126; *Siesseger v. Puth,* 239 N. W., 46.

Evidence of a conscious failure to perform a positive duty or to observe a statutory requirement—a conscious failure to do a thing that is incumbent upon one to do or the doing of a thing intentionally that one ought not to do—is sufficient to warrant a reasonable inference of recklessness, willfulness, or wantonness, and, therefore, sufficient to carry that issue to the jury. *Lumpkin v. Mankin,* 134 S. E., 503 (S. C.); *Ford v. R. R. Co.,* 168 S. E., 143 (S. C.); *Ralls v. Saleeby,* 182 S. E., 750 (S. C.).

If any testimony is introduced touching or supporting allegations as to the defendant's failure to keep a proper lookout or have proper control,

it would ordinarily be a question for the jury whether such conduct constituted a reckless disregard of the rights of the passengers. *Spurlin v. Colprovia Products Co., supra; Cummings v. Tweed, supra; Callison v. Ry. Co.,* 106 S. C., 123, 90 S. E., 260.

So then the South Carolina guest statute, as interpreted by the Supreme Court of that State, comes to this: If the negligent failure to exercise due care was the result of mere inadvertence or casual inattention, it is simple negligence and a guest passenger may not recover. On the other hand, if there was a conscious failure to be careful for the safety of others or to observe the rules of the road, then an inference of recklessness is permissible. And, when there is testimony tending to show that defendant failed to keep a proper lookout or to observe the positive commands of the traffic statute, it is for the jury to say, under all circumstances, whether such conduct evidences a heedless and reckless disregard of the rights of others.

It is the duty of a motorist, while operating his automobile, to keep a proper lookout an to keep his car under proper control. There is evidence tending to show that defendant admits that he failed to do so. He attributes his inattention to drowsiness followed by complete unconsciousness. In any event, on this record, he either failed to keep a proper lookout and to give due attention to the manner of operation or, looking where he was going, he intentionally swerved his car to the left and drove his automobile down a thirty-foot embankment. His conduct can be explained only on one postulate or the other. It is more charitable to assume that his act was not deliberate.

Even so, he knew he was drowsy. He had fallen asleep once before. Sleep, "tired nature's sweet restorer," is usually indicated by certain premonitory symptoms and does not come upon one unheralded. These premonitory symptoms were present on this occasion. If defendant disregarded these warnings and instead, knowing that he was in no condition to exercise that degree of alertness and care in keeping the lookout required of a motorist, continued to operate the automobile, then the inference that his conduct was not mere inadvertence but amounted to a conscious failure to be careful of the safety of others is permissible. The nature and quality of his act, whether an inadvertence or a conscious failure to perform a positive duty, was for the jury to decide.

Decisions in other jurisdictions are to like effect. *Ryan v. Scanlon,* 168 Atl., 17 (Conn.); *Blood v. Adams,* 169 N. E., 412 (Mass.); *Manser v. Eder,* 248 N. W., 563 (Mich.); *Marks v. Marks,* 31 N. E. (2d), 399 (Ill.); *Rice-Stix Drygoods Co. v. Self,* 101 S. W. (2d), 132 (Tenn.); *Perkins v. Roberts,* 262 N. W., 305 (Mich.); *Wismer v. Marx,* 286 N. W., 149 (Mich.); *Koufman v. Feinberg,* 10 N. E. (2d), 91 (Mass.).

There is no variance between the allegation and proof. The plaintiff alleges:

"That the injuries to the plaintiff herein alleged were caused directly and proximately by the heedlessness and recklessness of the defendant in that he was driving the said Pontiac automobile without looking where he was going; that after the defendant had heedlessly and recklessly driven the car from his proper part of the highway, the defendant was warned by screams to change his course, but notwithstanding the said screams, and in a heedless and reckless disregard of the rights of the plaintiff, the defendant continued to drive said automobile heedlessly on the left and wrong side of the road and recklessly and in absolute disregard of the rights and safety of the plaintiff."

This the evidence tends to prove. That defendant's inattention and lack of due care was the result of drowsiness was for the jury to consider on the question of recklessness, but it does not change the essential nature of the cause of action thus alleged.

The second issue submitted to the jury in *Harper v. Harper* is as follows:

"2. Was the defendant at the time of the alleged injury acting as the agent and under the control and supervision of the plaintiff, Clara C. Harper, as alleged in the Answer?"

On this issue the court instructed the jury as follows:

"Issue No. 2 in Harper against Harper will be answered NO by you under the instructions of the Court, the defendant, Harper, having offered no testimony upon his allegation that he was driving the automobile as his wife's agent and under her supervision and direction. In view of the fact that no evidence has been adduced, either from the plaintiff or from the defendant, in substantiation of his allegation relating to that issue, and the burden being upon him to satisfy you of his relations thereto by the greater weight of the evidence, the Court instructs you to answer Issue No. 2 in Harper against Harper, NO."

This instruction is prejudicial to defendant in two respects. Exception thereto must be sustained.

1. Plaintiff Harper predicates her cause of action on the allegation that she was a guest passenger riding on the automobile at the invitation of the defendant. This is denied by affirmative allegation in the answer.

She admits that she was the owner. Nothing else appearing, she had the right to become an occupant at any time without invitation, even though it was being used by defendant for his own benefit. Therefore, in view of her admission of ownership, to establish her relationship of invited guest at the time, it was essential for her to prove that there had

been a bailment under the terms of which she relinquished, for the time being, the incidents of ownership, and particularly the right to control.

For that purpose she testified that she had loaned the car to the defendant to be used by him on a business trip with the intent at the time that he should have exclusive control and management thereof while being so used. This testimony was in negation of her presumptive right to control and of the implied agency resulting from her presence at the time. Its credibility was for the jury. Inadvertently the court assumed that the fact of bailment and relinquishment of control had been fully proven, thus establishing her relationship to defendant as guest passenger.

2. Likewise the court inadvertently concluded as a matter of law that there was no evidence "adduced, either from the plaintiff or the defendant in substantiation" of the defendant's allegation relating to the second issue.

Defendant developed by examination of the plaintiff that she was the owner and was an occupant at the time of the accident. Nothing else appearing, his negligence is imputable to her and bars her right to recover. Thus he made out a *prima facie* case on the second issue.

The owner of an automobile has the right to control and direct its operation. So then when the owner is an occupant of an automobile being operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner. *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608; *Baird v. Baird, supra;* 4 Blashfield Cyc. L. & P., 302, 303, 311; *Crampton v. Ivie,* 126 N. C., 894; *Campbell v. R. R.,* 201 N. C., 102, 159 S. E., 327; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Nash v. R. R.,* 202 N. C., 30, 161 S. E., 857; *Keller v. R. R.,* 205 N. C., 269, 171 S. E., 73; *Harper v. R. R.,* 211 N. C., 398, 190 S. E., 750; *Dillon v. Winston-Salem,* 221 N. C., 512, 20 S. E. (2d), 845; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Evans v. Johnson, ante,* p. 238; *Lucey v. Allen,* 117 Atl., 539 (R. I.). Under some circumstances the doctrine applies even when the automobile has been loaned to the operator. *Williamson v. Fitzgerald,* 2 Pac. (2d), 201; 4 Blashfield Cyc. L. & P., 303.

Strictly speaking, the person operating with the permission or at the request of the owner-occupant is not an agent or employee of the owner, but the relationship is such that the law of agency is applied.

Conversely, where the owner loans his car and relinquishes the right to direct the manner and method of its use, *Gaffney v. Phelps,* 207 N. C., 553, 178 S. E., 355, or delivers it to another as bailee, *Sink v. Sechrest, ante,* p. 232, the negligence of the driver is not imputable to the owner.

In determining whether the doctrine applies, the test is this: Did the owner, under the circumstances disclosed, have the legal right to control the manner in which the automobile was being operated—was his rela-

tion to its operation such that he would have been responsible to a third party for the negligence of the driver? 38 Am. Jur., 931. If the owner possessed the right to control, that he did not exercise it is immaterial. *Baird v. Baird, supra.*

It is true plaintiff, having admitted ownership and occupancy, went further in explanation and testified to facts which tend to show a bailment, giving the husband exclusive control and rebutting the presumption that she, as owner, had the right to control. Even so, the jury might, under the circumstances, reject this testimony. At least the defendant had the right to demand that it be submitted to them for their consideration under proper instructions from the court.

In *Wickham v. Harper* (two cases) we find no error. In *Harper v. Harper* there was error in the charge which entitles the defendant to a new trial.

In *Wickham v. Harper* (two cases), No error.

In *Harper v. Harper,* New trial.

PAUL R. ERVIN, ADMINISTRATOR OF THE ESTATE OF MRS. LEONA S. REID, DECEASED, v. MRS. NANNIE S. CONN.

THE COMMERCIAL NATIONAL BANK OF CHARLOTTE, N. C., EXECUTOR U/W CHARLES H. FREDERICKSON, DECEASED, v. MRS CAROLYN G. FREDERICKSON.

(Filed 6 June, 1945.)

1. Courts § 11: Constitutional Law § 34—

The Federal Government has authority, under its constitutional grant of power, to borrow money, Art. I, sec. 8, clause 2 and clause 18, to regulate and adjust its contracts within the compass of that power, so that property in them may be subject to succession by survivorship, according to the terms of the contract, irrespective of the succession laws of the state generally applicable to that subject.

2. Constitutional Law § 34—

The Congress has power, under the Federal Constitution, to authorize the Secretary of the Treasury, with the approval of the President, to issue bonds of the United States, including therein restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe.

3. Same: Courts § 11—

The Constitution, Art. VI, clause 2, grants to the Federal Government an exclusive authority, in order to achieve results, looking to internal order and external security, beyond the reach of any single state. This

exclusiveness is the life of the powers thus granted; and, when a conflict arises between the state and Federal law with regard to the exercise of power within the reasonable scope of such exclusive grants, it is axiomatic that the state law must yield.

4. Same—

Immunity of interference by local law with instrumentalities created for the Government of the United States is a familiar principle, frequently applied to taxation and many other forms of attempted regulation.

5. Same—

As Federal contracts, bonds of the United States are governed by Federal rather than state law.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at 24 April, 1945, of MECKLENBURG.

These two cases come here upon appeals by the respective plaintiffs from judgments of the Superior Court in Mecklenburg County, rendered upon an agreed statement of facts submitted in a controversy without action under G. S., 1-250.

The cases are similar in their main features, although the stipulations somewhat vary. They were argued together here, and will be considered together in the opinion.

In No. 527, the controversy is between the administrator of the estate of Mrs. Leona S. Reid, deceased, and Mrs. Nannie S. Conn, and involves the ownership of one U. S. Savings Bond, Series D, issued in April, 1941, with maturity value of $1,000, registered in the names and payable as follows:

"Mrs. Leona S. Reid, 809 South Tryon Street, Charlotte, N. C., payable on death to Mrs. Nannie S. Conn, R. F. D. #2, Adairville, Ky."

The bond was found by the plaintiff administrator in a lock box of Mrs. Leona S. Reid in her bank in Charlotte, N. C., to which box she alone had access during her lifetime. The defendant is a surviving sister of Mrs. Reid. Mrs. Reid left surviving her, also, one son, J. Cheston Woodall, as her only heir and next of kin, who is not a party to this submission.

The bond contains on its face, and as part of it, the following provision:

"This is a U. S. Savings Bond of Series D, authorized by the Second Liberty Bond Act, approved September 24, 1917, as amended, and issued pursuant to Treasury Department Circular No. 596, dated December 15, 1938, to which reference is made for a statement of the rights of holders, as fully and with the same effect as though herein set forth."

Circular No. 596 referred to, in its turn refers to Circular No. 530, Second Revision, dated 15 December, 1938, containing the regulations

issued by the Treasury Department, defining the rights of the parties. A pertinent part of those regulations is as follows:

"4. Payment or reissue after death of owner and later death of beneficiary.—Upon proof of the death of the registered owner and of the subsequent death of the beneficiary, the bond will be paid or may be reissued as though the beneficiary had been the registered owner."

After the date of the issue of this bond, the Treasury regulations then in force provided that such bonds could be issued in the name of one person, payable on death to a single designated beneficiary in his own right.

In No. 528, the controversy is between the executor of the will of Charles H. Frederickson, deceased, as plaintiff, and Mrs. Carolyn G. Frederickson, his surviving wife, as defendant.

Immediately after its qualification as executor, the plaintiff found in an inner box or drawer in a safe located in the office or place of business of the testator, to which both testator and defendant had equal access prior to testator's death, and took into its possession, certain U. S. Savings Bonds of Series C; U. S. Savings Bonds of Series D; U. S. Defense Savings Bonds of Series E; and U. S. Savings Bonds of Defense Series F.

The several bonds of Series C, D, and F, and all but one of Series E, as described in the submission, were issued and registered in the following names and form: "Charles H. Frederickson or Mrs. Carolyn G. Frederickson." One Series E Defense Savings Bond, dated January, 1943, in the maturity amount of $500, was issued and registered as follows: "Mrs. Carolyn G. Frederickson or Charles H. Frederickson." All of the bonds described are issued in the names of co-owners, have upon the face of each proper references to the Circulars and Treasury Regulations under which they are issued, which regulations by reference are made a part of the bond. They all have substantially the following provisions, which are quoted from the regulations applicable to Series E, issued prior to January 1, 1943:

"(2) AFTER THE DEATH OF ONE CO-OWNER.—If either co-owner dies without having presented and surrendered the bond for payment to a Federal Reserve Bank or the Treasury Department, the surviving co-owner will be recognized by the Treasury Department as the sole and absolute owner of the bond, and payment will be made only to him:"

There are minor differences in the regulations relating to the bonds purchased from time to time which are not controversial, and which do not affect the decision.

Upon the facts as stated, the plaintiff in each case, and the respective defendants, claimed the ownership of the bonds in controversy.

In No. 527, the judgment of the court was that "defendant is the absolute owner of and entitled to the possession of the bond described in the

submission and agreed facts and that the plaintiff shall surrender and deliver the aforesaid bond to the defendant." From this judgment plaintiff appealed, assigning errors.

In No. 528, a similar judgment was entered, adjudging that "the defendant is the sole and absolute owner of and entitled to the possession of each, every and all of the bonds mentioned and described in the submission, and that the plaintiff surrender and deliver all of the aforesaid bonds to defendant." Plaintiff excepted and appealed, assigning errors.

Taliaferro & Clarkson for plaintiffs, appellants.
Jones & Smathers for defendants, appellees.

SEAWELL, J. If nothing else appeared, the conception of the Federal Government as creating a species of property, intended to have a *situs* within the State, and investing it with qualities and incidents of succession at variance with the State laws of descent and distribution, would make a disturbing picture. It would, indeed, be cause for challenge if the Congress undertook to legislate on the subject by general regulation of property rights within the field of State control. But there is no such general invasion of State governmental power or function involved in the controversy submitted to the Court. We are dealing with a special situation—the authority of the Federal Government, under its constitutional grant of power to borrow money, to regulate and adjust its contracts within the compass of that power, so that property in them may be subject to succession by survivorship, according to the terms of the contract, irrespective of the succession laws of the State generally applicable to that subject. It is the contention of the appellee in each case that the authority to make a contract with that provision and with that result is within the reasonable and necessary exercise of the constitutional power to borrow money and pledge the faith and credit of the Government for its repayment, and within the scope of the Acts of Congress, implementing the constitutional provision.

Clause 2 of sec. 8, Art. I, of the Federal Constitution, empowers Congress to borrow money on the credit of the United States; Clause 18 empowers Congress to make necessary laws for the execution of powers vested by the Constitution in the United States Government. Pursuant thereto the Congress enacted the Second Liberty Bond Act, sec. 22 of which, as amended, reads as follows:

"The Secretary of the Treasury, with the approval of the President, is authorized to issue, from time to time, through the Postal Service, or otherwise, bonds of the United States to be known as 'United States Savings Bonds.' The proceeds of the Savings Bonds shall be available to meet any public expenditures authorized by law and to retire any

outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the Savings Bonds shall be in such forms, shall be offered in such amounts within the limits of section 752 of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b) and (c) hereof, and including any restriction on their transfer, as the Secretary of the Treasury may from time to time prescribe." Act of Sept. 24, 1917, ch. 56, Sec. 22, as added by Act of Feb. 4, 1935, ch. 5, sec. 6, 49 Stat. 21, 31 U. S. C. A., sec. 757c.

Looking at the Constitutional grant of power and the implementing act alone, in their independent setting, it can hardly be denied that there is a clear and indisputable line of authority from the Constitution to Congress, and a delegable power in the Congress with respect to the Treasury Regulations involved, so long as they have a reasonable relation to the ends sought to be attained by the Constitution, and are fairly within the powers actually delegated to the Secretary of the Treasury. Assuming that the Regulations are of that character conflict with State law is immaterial. But as one of the recurring conflicts of authority, real or assumed, in our dual form of government, the appellants raise the question whether the Congress, in the details of its attempted exercise of power, has not transgressed on the reserved powers of the State.

Primarily, the possibility of conflict with State law has nothing to do with the question whether the transactions under review (referring to the contested feature of survivorship), are within the proper exercise of the constitutional power, and necessary or expedient to its exercise. Independently considered, they seem to have that logical and reasonable relation to the constitutional grant of power and the ends sought to be reached that would make the transaction impeccable.

The borrowing of money by the Government on the scale it has been carried on and is yet to be done, reaching incomprehensible billions in figures, is not a simple matter of getting a loan here and there and issuing a note of hand as an obligation to repay it. Under the Constitution, the Government might borrow from foreign governments or money lenders, if any might be found able to lend, or it might seek such loans in this country exclusively from big industry, banking institutions, private syndicates, or, intermediately, from government-created agencies; or it might, as it has undertaken to do, and with gratifying success, borrow directly from all its citizens and all other legitimate sources in the country. It would be well nigh criminal if the Government, in the placing of such vast loans, did not consider the political, economic, and social phases and consequences of its intended action, since, in all these aspects, the people are, necessarily, profoundly affected. These consid-

erations must be read into the constitutional grant of power which has been made to the Government.

None can question that it is a sound policy for the Government to borrow of its own people. The extension of these loans to as much of the citizenry of the country as might be possible tends to promote the stability of the Government, to strengthen its financial structure, to promote the prosperity of the people, and to establish relations of confidence and mutual understanding between the people and their Government. Moreover, in the scheme of financing the enormous national debt, so rapidly accumulating, it was necessary, and is necessary, for the Government to draw upon every resource the country affords; and to offer a form of investment loan which would appeal to persons of medium or low income, or to purchasers in small amounts, who constitute the great majority of the country's inhabitants.

There is no doubt that the survivorship feature in the form of investment offered by these bonds has been, and is, peculiarly attractive to millions of purchasers throughout the nation, and has been strongly influential in their widespread distribution. A recent statement from Washington estimates that at least eighty-five million persons in this country are holders of E type bonds. The security acquired by the simple act of purchase can hardly be overestimated as a factor in their sales and the satisfaction with which they continue to be held. $7,000,000,000 of the $14,000,000,000 bond offer now being made is expected to be bought by private individuals. To question their validity, or deprive them of their most attractive feature, would seriously embarrass the Government in its attempt to make good its promises, cripple its bond sales, and no doubt have a serious effect on the permanence of these individually small, but in the aggregate large, investments.

This is, briefly, the background of policy and necessity behind the bond issues we are considering. We would not overstress the evident necessity which arises from the emergency of war and the immediacy of its demands, since the principles and policies we have tried to outline are as soundly observed in peace-time borrowings. We are simply stating the considerations which lead us to the conclusion that there is no feature of the bonds concerned in this controversy so extraordinary as would make them unfit subjects to be included, as necessary or expedient to the exercise of the borrowing power granted by the Constitution and implemented by the pertinent Act of Congress.

The case might end here with the statement of a corollary. But the appellant, in each of these cases, contends that in the resulting conflict of laws, the State law of distribution is paramount in its application to the disputed ownership of bonds and that such law, rather than the Federal

law, is controlling. And, although treading a rather beaten path, we come to that issue.

Article VI, Clause 2, of the Constitution of the United States, provides: "This Constitution and the laws of the United States which have been made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Even without such a provision in the Constitution, the principle stated is a fair conclusion to be drawn from a realistic and common sense appraisal of our dual form of government, as established by the Constitution. It is a question of livability in the relation of partners in the so far successful American adventure in democracy.

In the decided cases on this subject, reference is sometimes made to the fact that a treaty made with this Government by a foreign power is the supreme law of the land, as an instance of the supremacy of Federal law. There is at least an analogy. The Constitution of the United States is not a treaty; but the supremacy of the commitment which each state (and we mean also the people of the state), has made with each of the several states, and with all of them collectively, and embodied in the Constitution by grants to the newly created Federal Government, in order to achieve results looking to internal order and external security—objectives beyond the reach of any single state, rests upon the same principle. Exclusiveness is the life of the powers thus granted; and when a conflict arises between the state and Federal law with regard to the exercise of power within the reasonable scope of such exclusive grants, it seems to us axiomatic that the state law must yield.

But following the chain of authority through the special grants of power to which it relates, and the Acts of Congress made in pursuance thereof, we might make a categorical affirmance of the trial court without a serious break in the consecution.

The power given to the Secretary of the Treasury to make the regulations which we find incorporated by reference into the Savings Bonds was properly delegated by Congress. *Hampton v. U. S.,* 276 U. S., 394, 72 L. Ed., 625; *Buttfield v. Stranahan,* 192 U. S., 470, 48 L. Ed., 525; *U. S. v. Grimaud,* 220 U. S., 506, 55 L. Ed., 563; *Bowles v. Willingham, et al.,* 321 U. S., 503, 88 L. Ed., 892; *U. S. v. Sacks,* 257 U. S., 37, 66 L. Ed., 118; *U. S. v. Janowitz,* 257 U. S., 42, 66 L. Ed., 120; *Warren v. U. S.,* 281 U. S., 739. The regulations have the force and effect of Federal law. *U. S. v. Birdsall,* 233 U. S., 223, 58 L. Ed., 930; *U. S. v. Janowitz, supra; Maryland Casualty Co. v. U. S.,* 251 U. S., 342, 64 L. Ed., 297; *U. S. v. Sacks, supra.* Thus they become, under and by virtue of Art. VI, Cl. 2, of the Constitution, cited *supra,* "the supreme law of the land."

Immunity of interference by local law with the instrumentalities created for the Government of the United States is a familiar principle. It has been frequently applied to taxation and many other forms of attempted regulation. *Farmers Bank v. Minnesota,* 232 U. S., 516, 58 L. Ed., 706; *Missouri v. Gehner,* 281 U. S., 313, 74 L. Ed., 830; *McCulloch v. Maryland,* 4 Wheat., 316; *Osborne v. Bank of United States,* 9 Wheat., 738; *Ohio v. Thomas,* 173 U. S., 276, 43 L. Ed., 698; *Johnson v. Maryland,* 254 U. S., 51, 65 L. Ed., 126; *Hunt v. U. S.,* 278 U. S., 96, 73 L. Ed., 200; *Arizona v. California,* 283 U. S., 423, 75 L. Ed., 1134; *Stewart & Co. v. Sadrakula,* 309 U. S., 94, 84 L. Ed., 596; *Mayo, et al., v. U. S.,* 319 U. S., 441, 87 L. Ed., 1504; *Irvine v. Marshall,* 20 How., 558; *Ruddy v. Rossi,* 248 U. S., 104, 63 L. Ed., 148; *U. S. v. Emory,* 314 U. S., 423, 86 L. Ed., 315. The principle in all these cases is applicable to the subject under discussion.

Independently of this line of argument, we have no doubt that the validity of the contested feature of survivorship can be sustained against conflicting State law upon considerations applying to them as Federal contracts. It must be conceded that the regulations under review are a part of the bonds as contracts, not only because of the proper delegation of power to the Secretary of the Treasury to make them, which we conceive to be valid in the form made, but also because they are incorporated in the face of the bonds by adequate reference. *Russell Co. v. U. S.,* 261 U. S., 514, 67 L. Ed., 778. As Federal contracts, the bonds are governed by Federal rather than State law. *Irvine v. Marshall, supra; U. S. v. Clearfield Trust Co.,* 130 F. (2d), 93, C. C. A. 3d, affirmed 318 U. S., 363; *Byron Jackson Co. v. U. S.,* 35 F. Supp., 665 (S. D. Calif.); *U. S. v. Grogan,* 39 F. Supp., 819 (D. Mont.); *Kolker v. U. S.,* 40 F. Supp., 972 (D. Md.); *Garrett v. Moore-McCormack Co., Inc.,* 317 U. S., 239, 87 L. Ed., 239; *Warren v. U. S.,* 68 Ct. Cl., 634, cert denied 281 U. S., 739, 74 L. Ed., 1154.

Perhaps on close analysis, the exclusive application of Federal law to contracts of the United States stems from the principles already discussed, and assumes that the contracts are within the constitutional authorization. However, assuming that the contracts are appropriate to the exercise of the powers confided to Congress, it is quite clear that in determining the implications and consequences of the transaction, the Federal law applies to rights created under the Federal statute or arising out of it. Thus construed, the instant contracts made by the purchaser in behalf of himself and of the named beneficiary, or with named co-owners for the benefit of either or both, and in each case carrying with it full right of ownership to the surviving beneficiary or co-owner, are valid and beyond the reach of conflicting State law to modify or destroy.

The suggestion of the appellants that the provisions, here considered as conferring the absolute right of ownership on the survivor, merely constitute the designated persons as agents to make the collection, or receive payment of the bonds, must be rejected. The character of the instruments, the circumstances under which they are issued and sold, as well as the phraseology employed with reference to the final payment, negative the suggestion. We are not prepared to assume that the United States Government, after having given every assurance in the sale of the bonds, and more especially in their terms, which may readily be construed as conferring absolute ownership upon the surviving beneficiary or co-owner, would then, for its mere convenience, wash its hands of the transaction and further liability as to the proper application of the funds, by appointing, for the purpose of collection and payment only, a random person, without reference to his ability, in case of default, to respond to the real owner. Moreover, one clause in the regulations applicable to the whole question provides:

"Section 315.17: (a) *Judicial proceedings.*—The ownership of a savings bond or interest therein may be transferred or established through valid judicial proceedings; *Provided, however,* That no such proceedings will be recognized if they would give effect to an attempted voluntary transfer *inter vivos* of the bond or would defeat or impair the rights of survivorship conferred by these regulations upon co-owners and beneficiaries." (1943 Cumulative Amendments to Dept. Cir. No. 530, Fourth Revision.)

We have not overlooked the suggestion of the appellees that contracts of a similar nature have been held permissible under the State law; *Jones v. Waldroup,* 217 N. C., 178, 7 S. E. (2d), 366; but we prefer to rest decision on the fundamental principles above outlined, both for the sake of uniformity of decision and in order that we may not be supposed to have left the effectiveness of these contracts subject to the vicissitudes of State legislation.

Bonds of like issue and tenor as those involved in the submission, and containing the same provisions as to ownership and survivorship, with two or three exceptions, have been upheld in every jurisdiction where the question has been raised. *Warren v. U. S., supra; In re Estate of Louis DiSanto,* 142 Ohio St., 223, 51 N. E. (2d), 639; *In re Stanley's Estate,* 102 Colo., 422, 80 P. (2d), 332; *In re Deyo's Estate,* 42 N. Y. S. (2d), 379, 18 Misc., 32; *Franklin Washington Trust Co. v. Beltram,* 133 N. J. Eq., 11, 29 Atl. (2d), 854; *Laufersweiler v. Richmond,* 22 Ohio Opinions, 265, 8 Ohio Supp., 76; *In re Briley's Estate,* 41 So. (2d), 595; *Harvey v. Rackliffe* (Me.), 41 A. (2d), 455. To this may be added many unreported cases.

Appellants seem unable to cite any authority in support of their position except the two much criticized cases of *Decker v. Fowler,* 199 Wash., 549, 92 P. (2d), 254, and *Sinift v. Sinift,* 229 Iowa, 56, 293 N. W., 841. They might have added the case of *Deyo v. Adams* (N. Y., 1942), 36 N. Y. S. (2d), 734. For comments on the *Decker case,* see 139 A. L. R., 967; 14 Wash. Law Rev., 312 (1939); 27 Minn. Law Rev., 401 (March, 1943). Both *Deyo v. Adams* and *Decker v. Fowler* have been repudiated by the legislatures of the respective states by statutes confirming the rights of surviving co-owners and beneficiaries as provided in the savings bonds. Wash. Rev. Stat. (Remington's Supp., 1943), secs. 1548-60, 61, and 40 McKinney's Consol. Laws of New York, Ann. (Supp. 1943), sec. 24.5. *In re Deyo's Estate, supra,* is *contra* the holding in *Deyo v. Adams, supra.*

Our rather full discussion of these cases has been unavoidable because of issues raised in the argument.

The judgment of the lower court in both of these cases must be affirmed.

In No. 527, Affirmed.

In No. 528, Affirmed.

STATE v. HENRY FRENCH.

(Filed 6 June, 1945.)

1. Homicide § 25—

In a prosecution for murder, where the State's evidence tended to show that deceased, her husband and others, in the husband's automobile, were driving out of an alley into the highway, the defendant in his own car following, that the first car ran into the highway and stopped and defendant, following and in trying to get around the first car, hit a telephone pole, when the first car drove off and defendant backed from the post and drove home, that shortly thereafter defendant came up to the first car demanding damages and cursing and when deceased and other occupants of the car walked off, defendant followed, still arguing about his damages and cursing and threatening the whole party, none of whom apparently had any weapons, and finally defendant, telling deceased's party to wait until he got back, ran off to his house near-by and coming back in a few minutes with a rifle, stuck the barrel into the car and fired four or five times and when deceased got out of the car, defendant shot her in the back, as she looked away from him, and she fell and defendant ran, deceased being dead a few minutes thereafter, there was ample evidence for the jury and motion for judgment as of nonsuit properly denied.

2. Same—

Testimony, in a prosecution for murder, of a mortician, who examined deceased's body shortly after her death, that deceased's veinous system

had broken down, is insufficient to prevent the case being submitted to the jury, where the State's evidence tended to show that deceased was alive and active one moment, and immediately after repeated shots from a rifle in the hands of defendant, was found dead with a rifle wound in her chest.

3. Criminal Law § 53a: Homicide § 27a—

A charge by the court to the jury must be construed contextually.

4. Homicide § 4c—

Deliberation means to think about, to revolve in one's mind; and if a person thinks about the performance of an act and determines in his mind to do that act, he has deliberated upon that act. Premeditation means to think beforehand; and where a person forms a purpose to kill another and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon or how late, and pursuant to said fixed design, kills said person, this would be a killing with premeditation and deliberation, and would be murder in the first degree.

STACY, C. J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by defendant from *Bobbitt, J.*, at October Term, 1944, of MONTGOMERY.

The defendant was tried at the October Term, 1944, of the Montgomery Superior Court, upon an indictment charging him with murder of Duck LeGrand.

The evidence of the State tended substantially to show that James Richardson, driving Shang LeGrand's car, in which were Shang and his wife, Duck LeGrand, the deceased, and other persons, was going out of an alleyway towards the highway. French was driving his car along behind them. As Richardson came out of the alleyway and turned along the highway, French came out, also, and in trying to go around the car, hit a telephone pole. There was no collision between the cars. When the French car struck the telephone post, the LeGrand car stopped, then pulled off and went on to Wadeville. French backed away from the post and carried his car towards home. About 25 minutes later, a State's witness met defendant going up the road, and defendant asked him "where that damn Shang LeGrand was." Witness said that he did not know, and French replied that somebody was going to pay for his G—— damn car. About that time Shang LeGrand's car passed, and defendant went on to where Shang's car was parked on the right-hand side of the road. Later witness found French at the LeGrand car arguing about his own car and talking to James Richardson. Duck LeGrand and her husband were there also. French told Richardson that he wanted pay for the "damn damages." Richardson told him to wait until tomorrow

and he would talk about it. Duck and Shang and the rest of them walked down the road to "Craven's house." Another person went up and got LeGrand's car and drove it, French standing on the side of it. The car was driven about 40 yards from where they had been talking. French kept arguing about damage to the car, and James kept telling him he would see him tomorrow. French replied, "G—— damn it, wait till I come back, I will kill all you s. o. b.'s." Duck LeGrand, Shang LeGrand, James Richardson and Margaret Ingram were present. Witness had not seen any previous fight, nor had he seen any weapons of any kind in the hands of LeGrand and his wife, or any of that party.

The defendant then ran down through a cornfield about six or seven hundred yards to his house; and some ten minutes later came running back with a rifle and ran around the side of the car where the driver was. He came by the side of the car where Shang LeGrand was, stuck the barrel of the rifle in the car and shot four or five times into the car. Duck LeGrand and Shang LeGrand were sitting on the front seat of the car as the defendant approached on the driver's side. Witness did not hear either of the LeGrands or French say anything. French fired five or six times and Duck started to get out of the car. She got out on the running board, and defendant fired again, and she fell. He was standing near the front of the car when he shot Duck Legrand. Her face was turned away from defendant, her back to him, and when she fell, defendant turned around and ran.

E. T. Reynolds, a mortician of fifteen years' experience, and licensed by the State, testified that on the night of September 2nd he saw the bodies of Duck LeGrand and Shang LeGrand, both in front of the bank building. Duck LeGrand was in the back of the car, down in the foot. Witness prepared her body for burial, finding a bullet wound in her back, about an inch to the left of her spinal column and down below the shoulder blade. The veinous system was punctured somewhere in the thorax or the chest. The bullet wound in the back was about the size of a .22-caliber rifle bullet.

Another witness for the State testified that he pulled the Shang LeGrand car out from the "piccolo" (restaurant) out in front of Craven's, and drove it a distance. French was standing on the running board on the driver's side. There was no one in the car at that time. After the car was pulled in front of Craven and Beatrice Turner's house, the defendant began to curse Duck LeGrand and Margaret, her daughter, in the presence of Shang, Arthur Hill and Henry Ingram, Duck LeGrand's boy, a lad about 15 or 16 years old. Defendant called Duck a s. o. b., and after he called her that, he left and said he was going home and get his gun and come back and kill all the s. o. b.'s. He broke and ran through a cornfield. Witness was not present when he came back.

Arthur Hill testified that he was with Shang LeGrand and Duck, the deceased woman, and James Richardson. Duck and Shang drove in front of Miss Flora's, on the right-hand side, and stopped, and the party was there a few minutes when defendant walked up and began talking to Richardson about the damage. Richardson asked him to wait until tomorrow and defendant said, "I am going to have some damn damage tonight. He was talking to Richardson, Duck and Shang LeGrand. French was cursing Duck LeGrand and Shang LeGrand, and then John D. McCall came, got the car and drove it on down in front of Craven's, with French hanging on the side of the car. Duck and Shang went on down behind the car after it had been driven on. Then the argument started again, with defendant cursing them and repeating that he intended to have some damn damages. He then ran up the road, telling Shang and his wife to be there when he got back, he was going to kill every s. o. b. that was there. He came back in about 20 minutes, had his rifle up when witness broke and ran. Defendant ran around on the driver's side and poked the rifle into the car, and witness heard four or five shots. Duck and Shang were in the car at the time. Later, he saw Duck lying on the back seat, dead.

Henry Ingram testified that Duck LeGrand was his mother and Shang LeGrand was his stepfather. Witness was standing in his grandmother's yard when defendant came up to the automobile. Witness was about 25 or 30 yards from the automobile in which his mother and stepfather were sitting. The defendant was standing there shooting into the LeGrand car in which were his mother and stepfather when the witness first saw him. He saw him fire four or five shots into the car.

Witness started towards the car, and defendant turned around and shot him in the leg. The defendant was standing beside the car when he fired on the witness, and witness heard him fire again after he went back into his grandmother's house.

Witness returned to the car, found his mother lying on her face in the back of the car, picked her up, put her in an automobile and carried her to Dr. Harris' office. She was dead when witness picked her up. Witness did not have any weapon, nor did he find any weapon about the body of his mother when he picked her up.

Ivey Hall, Chief of Police of Troy, testified that he brought the defendant to the sheriff's office or jail. He asked French why he shot those people, and the reply was that they had been "picking at him and he got tired of it, and said he would show them who to mess with."

At the close of the State's evidence, the defendant moved to dismiss as of nonsuit and for a directed verdict of not guilty as to the count or allegation of murder in the first degree. The motions were overruled, and the defendant excepted.

The defendant testified that he was 34 or 35 years old and lived in Troy; that he had known Duck LeGrand and Shang Legrand all his days.

Defendant testified that they were at "Miss Flora Kelly's 'piccolo,'" a short distance at the rear of the courthouse. He saw Duck and Shang LeGrand come out from the "piccolo" in a car; that they started up ahead of witness "and made a bad drive in front of me," in consequence of which defendant bore to the left and hit a "telegram" post and cut it down. Defendant testified that he carried his car to the house and returned to the "piccolo," saw Shang LeGrand when he left the highway and turned to go into the "piccolo walk." They were up where the post had been cut down and were talking about it, and Duck LeGrand and her two daughters and her son, Arthur Hill and Henry Ingram and McCall's boy came out from the "piccolo." Duck said, "Shang, come on and get in the car, this ain't no place to settle a wreck; get in the car and we will go down here and settle it." One of the women asked him to stand on the fender. There were seven in the car, and defendant standing on the fender. They drove down close to where the shooting took place and stopped. There they tried to throw witness off, saying that he did not have any G—— damn business on there. Witness testified they all got out of the car and "began to surround me with weapons in hand, and I begged and pleaded to them not to jump on me with the weapons. Duck LeGrand had a pocket knife; her two daughters, Margaret and Judy, had a pocket knife; Shang had a pocket knife, and her son, Henry, had a stick; and Arthur Hill had his hand stuck down in his pocket; I don't know what he had. I began to back up and beg and plead to them to not jump on me. Arthur Hill stepped around sort of behind me in this direction. He said, 'G—— damn it, don't back up this way; stay in there; don't come up this way.' Henry Ingram came through the crowd and said, 'Let me get over there with that stick, I will fix him, G—— damn him,' and so I ran."

"When I ran toward the house some of them ran after me. I didn't look back to see which ones it was after me; and I ran on and got tangled up in some wire. Some of them, I don't know who it was, threw a rock or two at me, and I got out of the wire and ran to the house. They absolutely ran after me when I went running towards my house. I was followed pretty close to the house."

Defendant further testified, in substance, that they had him scared, and he was begging them not to jump on him with their weapons; that when he got to the house he picked up a rifle and went out into the yard and found two people. He went on and saw Shang LeGrand and Arthur Hill going back in the direction of the "piccolo." Defendant then went back down to the car and walked up to it with his rifle; "they didn't

know I had a rifle." He told Shang he wanted to speak to him and see what he had done to them and why they wanted to treat him like they had. Shang cursed him and told him he was going to kill him, had his knife in his hand. Defendant testifies he backed up and pointed his gun and told him to stop, and he didn't stop; "he advanced towards me, and I pointed up my gun and I shot at him." He turned about and went to his door and said, "Dulcie, hand me that thing, this s. o. b. has got a gun; I am going to kill him." He went to the driver's side and Duck, or Dulcie, was standing on the right-hand side of the car with the door open. That was the opposite side from the one Shang went to. He opened the door and reached over and told her, "hurry up." Defendant then shot through the windshield, didn't know whether Shang had a gun in there or anything; said they made him think they wanted to kill him, so he shot through the windshield, then stepped around to the side of the car and shot through the car. Defendant testified he didn't try to shoot Duck LeGrand, and that he had no intention to kill Duck or Shang LeGrand.

Defendant testified that when he got his rifle from the house he went straight back to where the LeGrands were, "right behind the automobile and didn't stop."

After some evidence in rebuttal, the State rested and defendant renewed his motion for judgment as of nonsuit and for a directed verdict of not guilty on the count of murder in the first degree. The motions were overruled, and defendant excepted.

Inter alia, the judge charged the jury as follows:

"Before you can return a verdict of guilty of murder in the first degree, the burden is upon the State to satisfy you further from the evidence beyond a reasonable doubt that the defendant killed Duck LeGrand not only unlawfully and with malice, but with premeditation and deliberation, and the Court charges you that if the State has satisfied you from the evidence beyond a reasonable doubt that the defendant unlawfully killed Duck LeGrand with malice, and has further satisfied you from the evidence beyond a reasonable doubt that prior to the time the defendant inflicted upon Duck LeGrand the fatal wound, the defendant had formed a fixed purpose in his mind to kill her, and that, pursuant to that purpose he did kill Duck LeGrand because of the purpose in his mind, and not because of any legal provocation given him, then the Court charges you that if the State has so satisfied you from the evidence beyond a reasonable doubt, the defendant would be guilty of murder in the first degree, and it would be your duty to so find." (Defendant's Exception No. 6.)

"Now, if the State has satisfied you from the evidence beyond a reasonable doubt that the defendant unlawfully killed Duck LeGrand

with malice and with premeditation and deliberation, it would be your duty to return a verdict of guilty of murder in the first degree, and you would return your verdict in these words: 'Guilty of murder in the first degree.'" (Defendant's Exception No. 9.)

The jury returned a verdict of murder in the first degree. Defendant moved to set aside the verdict for errors committed in the trial, and the motion was denied.

To the judgment of death rendered upon the verdict of the jury, the defendant objected and excepted, and appealed to this Court.

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

Brown & Mauney for defendant, appellant.

SEAWELL, J. We find no merit in the exceptions based on demurrer to the evidence as not being sufficient to sustain a verdict of guilty of murder in the first degree. The evidence, which, because of these motions, we have summarized at some length, is ample in that respect and needs no special comment.

Appellant's more serious assignments of error relate to the instructions given to the jury.

One of these assignments of error challenges the correctness of the judge's instruction on the necessity of proving guilt beyond reasonable doubt, contending that he assumed there was evidence tending to show that deceased came to her death at the hands of defendant, whereas the evidence, particularly that of the mortician, who testified that deceased's veinous system had been broken down, was deficient on that point. But without this testimony, evidence that deceased was bodily active the moment before, and immediately after repeated shots from a rifle in the hands of defendant was found dead with a wound through her chest, subsequently found to have been inflicted by a rifle bullet, is certainly sufficient to go to the jury as to the cause of death and its infliction by the defendant. Also, later in the charge the court made appropriate reference to the necessity of proving that the wound so inflicted was the cause of death. The charge must be considered contextually. *S. v. Hunt,* 223 N. C., 173, 25 S. E. (2d), 598; *S. v. Utley,* 223 N. C., 39, 25 S. E. (2d), 195; *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885.

The appellant further contends that the instruction to the jury set out in the statement of the case under Exception No. 9 deprived him of the benefit of his plea (and evidence thereunder), that the killing was done in his necessary and lawful self-defense. In support of this he cites *S. v. MeHaffey,* 194 N. C., 28, 138 S. E., 337, in which the instruction given was held to have deprived the defendant of his right of self-defense.

Upon comparison of the cited case with the instruction here given, we are of opinion that the contention is not meritorious.

However, there is a further challenge to the instruction as not having again and immediately defined "deliberation," although that had been adequately and accurately defined in a preceding instruction. Beyond the familiar rule that the charge must be interpreted contextually, we have direct approval of the challenged instruction in *S. v. McClure,* 166 N. C., 321, 327, 81 S. E., 458. The instructions are practically identical, and for convenience in a word by word comparison, we quote from *S. v. McClure, supra:*

"Deliberation means to think about, to revolve over in one's mind; and if a person thinks about the performance of an act and determines in his mind to do that act, he had deliberated upon the act, gentlemen. Premeditation means to think beforehand, think over a matter beforehand; and where a person forms a purpose to kill another, and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon or how late, and pursuant to said fixed design kills said person, this would be a killing with premeditation and deliberation, and would be murder in the first degree. And the court charges you if you should find beyond a reasonable doubt, gentlemen, that prior to the time he killed the deceased he formed the fixed purpose in his mind to kill him, and that pursuant to that purpose he did kill the deceased because of the purpose in his mind, and not because of any legal provocation that was given by the deceased, then the court charges you that the prisoner would be guilty of murder in the first degree, and it would be your duty to so find."

We have carefully considered the exceptions taken to the trial and examined the record for error, and we see no reason that would justify us in interfering with the result of the trial. We find

No error.

STACY, C. J., dissenting: One of the vital issues in the case was whether the defendant slew the deceased in cold blood or in the heat of passion, suddenly aroused by argument over the damage to his automobile. After correctly stating the elements of murder in the first degree to be the unlawful killing of a human being with malice and with premeditation and deliberation, the court then said: "And the court charges you that if the State has satisfied you from the evidence beyond a reasonable doubt that the defendant unlawfully killed Duck LeGrand with malice, and has further satisfied you from the evidence beyond a reasonable doubt that prior to the time the defendant inflicted upon Duck LeGrand the fatal wound, the defendant had formed a fixed purpose in his mind to kill her, and that, pursuant to that purpose he did kill Duck LeGrand

because of the purpose in his mind, and not because of any legal provocation given him, then the Court charges you that if the State has so satisfied you from the evidence beyond a reasonable doubt, the defendant would be guilty of murder in the first degree, and it would be your duty to so find."

This charge as applied to the facts of the instant record fails to draw any distinction between a fixed purpose "deliberately formed" and one engendered from passion suddenly aroused. *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431; *S. v. Walker,* 173 N. C., 780, 92 S. E., 327. It sufficiently defines premeditation, but makes no reference to deliberation. *S. v. Fuller,* 114 N. C., 885, 19 S. E., 797. "Premeditation" imports prior consideration, "thought of beforehand," while "deliberation" signifies reflection, "in a cool state of the blood." *S. v. Exum,* 138 N. C., 601, 50 S. E., 283; *S. v. Evans,* 198 N. C., 82, 150 S. E., 678. It may not be necessary in every case to refer to the two terms separately, but both ideas are essential to a complete definition of the capital offense. *S. v. Exum, supra; S. v. Spivey,* 132 N. C., 989, 43 S. E., 475. This was so at common law, and our statute dividing murder into degrees denominates any "willful, deliberate and premeditated killing" as murder in the first degree. G. S., 14-17; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284.

Had the instruction excluded the idea of a killing from anger presently incited, and conveyed only the thought of a homicide from a fixed determination previously formed after weighing the matter, it would have sufficed without separate definition of premeditation and deliberation. *S. v. Coffey,* 174 N. C., 814, 94 S. E., 416; *S. v. Exum, supra.* But this is hardly its significance. *S. v. Thomas, supra.* An unlawful killing with malice and with premeditation falls short of murder in the first degree. The additional element of deliberation is necessary to make out the capital offense. *S. v. Payne,* 213 N. C., 719, 197 S. E., 573; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Thomas, supra.* "Any unlawful killing of a human being with malice aforethought is murder; but if nothing further characterizes the offense, it is murder in the second degree—to constitute the higher offense, there must be willfulness, deliberation, premeditation." *People v. Cox,* 76 Cal., 285, quoted with approval in *S. v. Fuller, supra.*

True it is, in other portions of the charge both terms are correctly defined, but here the court was undertaking to sum up the whole matter in a single sentence or instruction, as was attempted in *S. v. McHaffey,* 194 N. C., 28, 138 S. E., 337, which resulted in a new trial.

The case of *S. v. McClure,* 166 N. C., 321, 81 S. E., 458, is cited as a controlling authority. There, after some hesitancy and much contextual interpretation, a similar instruction was upheld as applicable to the

facts of that case. A deputy sheriff had been killed while attempting to make an arrest, following a small "riot" and repeated threats on the part of the prisoner "that there was no G— d— s— o— b— in the county who could arrest him; that he would kill any officer that undertook it." The prisoner offered no testimony. Here, the evidence of a "willful, deliberate and premeditated killing" is not so clear, and the crucial facts are in dispute. The paucity of the instruction seems apparent.

I would remand the case for another hearing.

WINBORNE, J., concurs in dissent.

THE AMERICAN LAUNDRY MACHINERY COMPANY, A CORPORATION, v. W. L. SKINNER, TRADING AND DOING BUSINESS AS LUMBERTON FAMILY LAUNDRY.

(Filed 6 June, 1945.)

1. Fraud § 1—

There can be no all-embracing definition of fraud. Each case must be considered upon peculiar facts presented. The best definition of actionable fraud requires it to be a false representation of a subsisting fact.

2. Same: Evidence § 40—

It is important to distinguish between the legal effect of fraud in the inducement, which vitiates the contract, and a parol warranty, which would have to be set up by amendment or contradiction of the written instrument. Parol evidence to vary, add to, or contradict a written instrument can be admitted only on the theory that the representations constitute fraud in the inducement and destroy the contract.

3. Fraud § 3—

Ordinarily, a mere statement of opinion cannot be held for fraud; and, where representations held for fraud are partly or wholly stated in the outward form of opinion, they will be found to relate to some essential character, quality or capacity inherent in the thing sold, absolute in their nature and indistinguishable from factual statements.

4. Same—

Promissory representations, looking to the future as to value, use, as well as commendatory expressions or exaggerated statements of prospects, quality or gain, are opinion and do not generally constitute legal fraud.

STACY, C. J., dissenting.

WINBORNE and DENNY, JJ., concur in dissenting opinion.

APPEAL by plaintiff from *Harris, J.*, at December Civil Term, 1944, of ROBESON.

The plaintiff brought this action to recover a balance of $549.98, and interest, alleged to be due on the purchase price of laundry machinery sold to the defendant under a written sales contract, accompanied by installment notes. The defendant denied the indebtedness, and by way of affirmative relief demanded $591.75 damages by reason of fraud alleged to have been practiced upon it in the sale—"false and fraudulent representations, warranties and guarantees" made by the agent of the plaintiff, which it is alleged induced the defendant to purchase the machinery and make certain payments upon it. The allegation is as follows:

". . . the representative and agent of the defendant, one H. T. Radermacher, approached this defendant with the suggestion that defendant purchase from the plaintiff certain new equipment to replace the equipment above named, which equipment then owned and being operated by the defendant was in good condition and sufficient to do the work for which it was used, but the said agent and representative of the defendant represented to this defendant and guaranteed and warranted to him that the equipment which it was proposed to sell to this defendant was of superior and advanced design, and could and would do the work of defendant in a better and more economical manner, and that relying upon the aforesaid representations, warranties and agreements that the said machinery was in accordance with what it was represented to be, and would do the work of this defendant in a better and more economical manner than the machinery then owned by him, and which said representations, guarantees and warranties were the material inducement upon which this defendant purchased said machinery, this defendant ordered from the plaintiff, through its said representative and agent Radermacher the machinery described and referred to in the complaint herein, and at the same time executed a written order therefor, which he is now advised is also a conditional sales contract, for which said equipment plaintiff was to charge and the defendant was to pay to the plaintiff the machinery above described which he then had on hand, and the additional sum of $1,141.73 in monthly installments. That at the time of the aforesaid agreement and order, this defendant contracted and agreed to buy the aforesaid machinery and equipment solely upon the representations, warranties and guarantee of the plaintiff made by and through its agent, the said Radermacher, that the same when shipped would be as the said plaintiff represented and warranted the same to be, and would do the work for which defendant was purchasing the same in a more economical and better manner than the machinery defendant then had on hand. . . . That immediately when the same was received and installed, defendant ascertained that the said machinery and equipment was not in accordance with the representations, promises, warran-

ties and guarantees made to him by the said plaintiff, and that the same could not do the work for which defendant required the same in a more economical and better manner than defendant's old equipment . . ."

There was a written contract of purchase purporting to cover the entire agreement and containing the following provisions:

"This conditional sales contract constitutes and expresses the entire agreement between the parties; all previous memorandums, either written or oral, are hereby abrogated. There are no representations, agreements, promises or warranties relating to the subject matter of this contract other than those expressed herein." The contract was signed by both plaintiff and defendant in the presence of a witness. It contains no representations, warranties or guarantees such as were alleged to have been made by plaintiff's selling agent, Radermacher.

On the trial the defendant admitted making the contract and executing the installment notes, and assumed the burden of establishing his "further defense."

Pertinent to the alleged representations of Radermacher, the defendant was permitted to testify over the objection of the plaintiff, as follows:

"Q. What representations, if any, did he make about the kind of work they would do and the manner they would do it and the economy in operation?

"A. He said it would do better work, more economically and with less labor." Plaintiff excepted.

Again, the defendant was permitted to testify, over objection, as follows:

"Q. How does the old Prosperity presses, he told you to junk or continue to use, compare with the stuff you bought to take the place of it, how does it operate?

"A. They give me less trouble than the new ones; I have to work on the new presses two or three times to once on the old ones." Plaintiff excepted.

Numerous exceptions were taken to the charge, which, for the most part, were intended to preserve plaintiff's position that the representations of Radermacher could not be held for actionable fraud and could not be admitted as warranties against the terms of the written instrument. Some were addressed to other phases of the case. They may be disregarded here as not pertinent to the decision.

The following issues were submitted to the jury, and answered as indicated:

"1. Was the execution of the said sales contract and notes, described in the pleadings, induced by the fraudulent misrepresentations of the plaintiff, as alleged by the defendant in his answer?

"Answer: Yes.

"2. If so, what amount of damages, if any, is the defendant entitled to recover of the plaintiff?

"Answer: $549.98."

Plaintiff moved to set aside the verdict and for a *venire de novo* for errors committed during the trial. The motion was denied and the plaintiff excepted. To the signing of the judgment, plaintiff objected and excepted, and appealed to this Court.

James A. Shaw and Varser, McIntyre & Henry for plaintiff, appellant.

F. D. Hackett for defendant, appellee.

SEAWELL, J. The appellant has made many assignments of error covering exceptions to the admission of evidence and to the instructions given to the jury. Most of them, but by no means all, are intended to protect the view taken by the plaintiff that the theory on which the case was tried was erroneous, and, therefore, led to numerous and persistent errors throughout the trial. The main objection to the trial, and the one which may be determinative of the controversy, is the refusal of the court to nonsuit the defendant's cross action based on the allegedly false representations of plaintiff's sales agent, whereby defendant was induced to purchase the machinery, the subject of the controversy; and the refusal to enter judgment for the plaintiff upon the pleadings and admissions of the defendant in his answer and upon the trial.

Our first inquiry, therefore, is whether these representations, conceding them to have been made, can be held to constitute actionable fraud.

While these representations, as alleged in the complaint and testified to by plaintiff, are called "representations, warranties, and guarantees," (*sic*)—indicating how they appeared to complainant—the labels may not be of decisive importance; but it is important to distinguish between the legal effect of fraud in the inducement, which vitiates the contract, and a parol warranty, which would have to be set up by amendment or contradiction of the written instrument. *Furst v. Merritt,* 190 N. C., 397, 130 S. E., 40. Such a warranty, in the absence of fraud in the inducement, which would render the contract void, cannot be asserted by parol; not merely because the instrument here contains a positive agreement that all the representations are contained in the written instrument, but because the writing is presumed to contain all the agreement, and there is nothing in the written contract to indicate any incompleteness. *McLain v. Ins. Co.,* 224 N. C., 837, 840, 32 S. E. (2d), 592; *Coppersmith v. Ins. Co.,* 222 N. C., 14, 17, 21 S. E. (2d), 838; *Colt v. Conner,* 194 N. C., 344, 139 S. E., 694; *Colt v. Springle,* 190 N. C., 229, 129 S. E., 449; *Murray Co. v. Broadway,* 176 N. C., 149, 96 S. E., 990;

Harvester Co. v. Carter, 173 N. C., 229, 91 S. E., 840; *Guano Co. v. Livestock Co.,* 168 N. C., 442, 84 S. E., 774; *Unitype Co. v. Ashcraft,* 155 N. C., 63, 66, 71 S. E., 61; *Machine Co. v. McClamrock,* 152 N. C., 405, 67 S. E., 991. As a matter of fact and legal inference, the parol evidence offered by the defendant does "vary, add to, or contradict" the written instrument, and, as we have indicated, could only be admitted on the theory that the representations constitute fraud in the inducement and destroy the contract.

Without attempting to resolve the indecision manifest in defendant's pleading and reflected throughout the trial, we examine the alleged representations in that light.

It has frequently been said, with reference, however, to the more general significance of the word, that there can be no all-embracing definition of "fraud"—but each case must be considered upon peculiar facts presented. 23 Am. Jur., Fraud and Deceit, sec. 2; *Furst v. Merritt, supra.* However, as the subject becomes more narrowly classified when we deal with particular acts alleged to be fraudulent, and more concrete rules may be applied, making the term more definitive in its content and meaning in the eyes of the law, and limiting its sufficiency as a basis of action or defense. As to positive representations constituting actionable fraud, the best known and most widely used definition of a false representation—and the one which we think comes closest to bedrock—requires it to be "a false representation of a subsisting fact." *Cash Register Co. v. Townsend,* 137 N. C., 652, 50 S. E., 306.

It is true that even under such guidance, judicial precedents, hastily examined, appear to drag the subject back and forth across the line, on similar factual situations, according as a supposed sense of justice might require in each particular case, without much regard for the syllogism; and that is true in cases dealing with the sale of machinery or mechanical devices where dissatisfaction with the bargain so often develops. *Harvester Co. v. Carter, supra; Pate v. Blades,* 163 N. C., 267, 79 S. E., 608; *Machine Co. v. McKay,* 161 N. C., 584, 77 S. E., 848; *Machine Co. v. Bullock,* 161 N. C., 1, 76 S. E., 634; *Unitype Co. v. Ashcraft, supra; Machine Co. v. Feezer,* 152 N. C., 516, 67 S. E., 1004; *Cash Register Co. v. Townsend, supra.*

If contradiction may be found in some of these cases, it is not necessary that we follow those less inclined to protect, against parol evidence, the integrity of contracts which have been reduced to writing, and thus, in trying to prevent fraud on the one part, open an even wider door for its perpetration on the other.

Ordinarily, a mere statement of opinion cannot be held for fraud. The Court is aware that there are exceptions to the rule and also cogni-

zant of the exceptional circumstances which give rise to them. *Machine Co. v. Feezer, supra.* We do not think they appear in the instant case.

There is throughout the judicial treatment of this subject a manifest attempt to follow the definition which we have given, and where the representations held for fraud are partially or wholly stated in the outward form of an opinion, they will be found to relate to some essential character, quality or capacity inherent in the machines sold, absolute in their nature and indistinguishable from factual statements. *Machine Co. v. Feezer, supra; Machine Co. v. McKay, supra.* Without going into a dialectic discussion of what may be a fact and what may not be a fact, we are convinced the representations upon which the defendant relies stand too far away from factual misrepresentations to constitute actionable fraud. *Harvester Co. v. Carter, supra; Cash Register Co. v. Townsend, supra.* At most, they are mere comparisons of one kind of machinery with another, of purely relative import, much as if a trader said to a prospect: "My horse is better than the one you have, will do more work, and save you money." In any other view, they are merely promissory statements which cannot be held for factual misrepresentations.

In principle the representation under review is more like that in *Cash Register Co. v. Townsend, supra* (approved and distinguished in *Machine Co. v. Feezer, supra*), as to which *Judge Brown,* speaking for the Court, said: "What has been called 'promissory representations,' looking to the future as to what the vendee can do with the property, how much he can make on it, and, in this case, how much he can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud"; citing Benjamin on Sales (7th Ed.), 483, *et seq.; Gordon v. Parmele,* 2 Allen (Mass.), 212; *Long v. Woodman,* 58 Me., 52, and cases there cited; and upon these authorities, observes: ". . . commendatory expressions or exaggerated statements as to value or prospects, or the like, as where a seller puffs up the value and quality of his goods or holds out flattering prospects of gain, are not regarded as fraudulent in law." Such statements were held not to be misrepresentations of a "subsisting fact."

Since we are of opinion that the representations attributed to Radermacher cannot be held to constitute actionable fraud, it follows that defendant's further defense, based entirely upon such representations, cannot avail him. Upon the admissions of the defendant in the pleadings and upon the trial, plaintiff was entitled to the relief demanded in his complaint, and the trial court erred in refusing to sign the tendered judgment. The cause is remanded for judgment in accordance with this opinion.

Error and remanded.

STACY, C. J., dissenting: There is nothing new in this case. The Court has heretofore tramped all over the same ground many times. See *Whitehurst v. Ins. Co.,* 149 N. C., 273, 62 S. E., 1067, and *Robertson v. Halton,* 156 N. C., 215, 72 S. E., 316, for statement of applicable principles and collection of authorities. See also full annotation 56 A. L. R., 13.

The defenses alleged are breach of warranty and fraud. The first is not available to the defendant because of the stipulation in the contract. *Harvester Co. v. Carter,* 173 N. C., 229, 91 S. E., 840; *Machine Co. v. McClamrock,* 152 N. C., 405, 67 S. E., 991. The second is. *Machine Co. v. McKay,* 161 N. C., 584, 77 S. E., 848. Warranty is contractual. Fraud is not. No contract or stipulation can stand in the face of fraud. *Machine Co. v. Bullock,* 161 N. C., 1, 76 S. E., 634; *Miller v. Howell,* 184 N. C., 119, 113 S. E., 621; *Tyson v. Jones,* 150 N. C., 181, 63 S. E., 734; Anno. 95 A. L. R., 768. The case was tried on this latter theory.

The allegations of fraud are to be read in the light of the circumstances and the situation of the parties. *Small v. Dorsett,* 223 N. C., 754.

For many years the defendant had operated a laundry and dry-cleaning business in Lumberton with machinery of old type and style. On 3 June, 1940, plaintiff's agent, who said "he had been having lots of trouble" with the model used by the defendant, induced the defendant to exchange his old machinery for machinery of a later design and model, representing to the defendant that the later type and model machinery would "do better work, more economically and with less labor" than the machinery then used by the defendant in his business. Upon these representations, the defendant, who was not familiar with the machinery which plaintiff wished to sell, agreed to the exchange, and executed his notes for the difference in the trade. The new machinery was installed in defendant's place of business and it was immediately discovered that the machines were not as represented. It took more labor to operate them, and even then they did not run satisfactorily. Plaintiff's agent came to see about them. "He saw at that time that they would not operate," and he sent a representative from the factory to fix them. The representative said he could not fix them without some parts from the factory, which he promised to send but they never came.

As compared with the old machines "they don't turn out as good work, and they don't turn out as much work, and it takes more people to operate them." The witness explained in some detail wherein the machines were defective.

Plaintiff's agent admitted the substance and purpose of the representations. He said: "I told Mr. Skinner that my Company had had some difficulty with the kind of press that he then had in his place of business, but that my Company had remedied that and had built a new press

which was an advanced design and that it would do the work that was required of machines of that character in a laundry, and I told him it would do it with greater economy than the machines he then had and that it would turn out more work than the machines he then had, and would turn out superior work to the machines he then had, and I meant for him to rely on my statements and I made these statements for the purpose of inducing him to buy my machines."

There is evidence that these representations were false. The jury has found they were fraudulently made. Are they sufficient in law to withstand motion for judgment on the pleadings? The trial court answered in the affirmative. He is supported by the pertinent authorities. Anno. 56 A. L. R., 25 and 113.

It will be noted that the measure of performance was what the old machinery would do. This is the standard which the plaintiff's agent voluntarily selected for purpose of comparison. The quality of performance of the old machinery was known to both parties; that of the new was unknown to the defendant. The representations relate to measurable and ascertainable facts, not merely to the agent's opinion of them. 23 Am. Jur., 788; 12 R. C. L., 384; 37 C. J. S., 228. They were made by the agent of a manufacturer of machinery to a user of such machinery for the purpose of inducing a sale. *Wolf Co. v. Mercantile Co.,* 189 N. C., 322, 127 S. E., 208; *Peebles v. Guano Co.,* 77 N. C., 233. If falsely made, they seem quite sufficient to support the defense of fraud. See *Register Co. v. Bradshaw,* 174 N. C., 414, 93 S. E., 898, and *Audit Co. v. Taylor,* 152 N. C., 272, 67 S. E., 582, where similar representations were under consideration; also, *Food Co. v. Elliott,* 151 N. C., 393.

The present case is controlled by the decision in *Unitype Co. v. Ashcraft,* 155 N. C., 63, 71 S. E., 61. For all practicable purposes, the two cases are on all-fours. There, *Walker, J.,* speaking for the Court, said: "There have recently been several cases of this kind before the Court, and we have held that while expressions of opinion by a seller, amounting to nothing more than mere commendation of his goods—puffing his wares, as it is sometimes called—or extravagant statements as to value or quality or prospects, are not, as a rule, to be regarded as fraudulent in law, yet 'when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been fraud perpetrated; and though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury.' 14 A. & E., 35; 20 Cyc., 124."

The cases of *Wolf Co. v. Mercantile Co.,* 189 N. C., 322, 127 S. E., 208; *Machine Co. v. McKay, supra;* and *Machine Co. v. Bullock, supra,* are likewise directly in point. Also accordant in principle is the case of *Machine Co. v Feezer,* 152 N. C., 516, 67 S. E., 1004.

If these cases are to stand, the judgment below is correct.

WINBORNE and DENNY, JJ., concur in this dissent.

JEFFERSON STANDARD LIFE INSURANCE COMPANY v. GUILFORD COUNTY.

(Filed 6 June, 1945.)

1. Equity § 3—

A plaintiff may not invoke the aid of a court of equity for application of the principle of restitution, it appearing on the face of the record that plaintiff is not without adequate remedy at law.

2. Same—

Equity will not lend its aid in any case, where the party seeking it has a full and complete remedy at law.

3. Counties §§ 9, 10—

Where plaintiff lent money to an individual evidenced by a promissory note, with an understanding between plaintiff, such individual and defendant, a county, that, with the money so furnished, the individual would purchase a certain piece of realty in said county and erect thereon a building to be used by the county for municipal purposes, securing the plaintiff by a deed of trust, the county also contracting with the individual to purchase from him, within a specified time, the said property by deed, reciting that the conveyance was subject to the debt and deed of trust, which the county assumes and agrees to pay, all of which was done, no trust or agency is created, and until or unless there be a reformation of the deed, the note and deed of trust, the legal remedy of foreclosure, under the terms of the deed of trust or by civil action, would seem to be available to plaintiff. On the other hand, the provisions in the deed from the individual to the county, by which the county undertook to assume and agreed to pay the indebtedness to the plaintiff secured by the deed of trust, is not enforceable as an express contract. Const. of N. C., Art. VII, sec. 7, Art. V, sec. 4.

4. Counties § 5: Taxation § 4—

The courts determine whether a given project is a necessary expense of a county, but the board of commissioners for the county determine, in their discretion, whether such project is necessary or needed in the designated locality.

5. Counties §§ 1, 5, 9—

Every county is a body politic and corporate and has only such powers as are prescribed by statute, and those necessarily implied by law, and such powers can only be exercised by the board of commissioners, or in pursuance of resolution adopted by the board. G. S., 153-1. Hence, in order to make a valid and binding contract, the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law.

6. Counties §§ 9, 10: Taxation § 4: Municipal Corporations § 44—

The Legislature has prescribed the machinery by which a county may issue lawful and valid obligations for public purposes and necessary expenses, and pledge its faith, G. S., Art. 9, 153-69, *et seq.* And the Legislature has expressly provided that approval by the Local Government Commission of bonds or notes of a county, or other governmental unit, shall not extend to or be regarded as an approval of the legality of the bonds or notes in any respect. G. S., 159-12.

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

APPEAL by defendant from *Clement, J.*, at 19 February, 1945, Civil Term of GUILFORD.

Civil action to recover balance due on promissory note executed by C. Clair Conner to plaintiff for money loaned—payment of which is alleged to have been assumed by defendant, etc.

I. Plaintiff bases its alleged right to recover on three separate causes of action as set forth in its complaint:

First: On express contract, for payment of $79,674.45, with interest thereon at rate of 4 per cent per annum, from certain date, balance due upon a promissory note for $100,000.00, dated 1 December, 1936, executed and delivered by one C. Clair Conner to plaintiff as evidence of a *bona fide* loan in the full amount of principal of said note, payable $5,000.00 on 1 December, 1937, and a like amount on 1 December each year thereafter until the full amount be paid, with acceleration clause therein, and secured by a duly registered deed of trust of even date therewith executed and delivered by C. Clair Conner, unmarried, to Julian Price, Trustee, conveying therein a certain lot of land in the city of High Point, payment of which note defendant Guilford County agreed to assume, and assumed by the terms of a deed dated 10 January, 1938, executed and delivered by C. Clair Conner and wife conveying to Guilford County the said lot of land (less a portion thereof which they had conveyed to the city of High Point for street widening purposes), and on which note Guilford County thereafter made payments, leaving the balance of principal as hereinabove stated, payment of which has been demanded and refused.

Second: On *quantum meruit* and to establish equitable lien therefor, for that pursuant to an agreement between C. Clair Conner and defendant Guilford County the money loaned by plaintiff, as evidenced by the note of C. Clair Conner as described in the first alleged cause of action, was used in the purchase of a lot of land in the city of High Point, the one described in the deed of trust from C. Clair Conner to Julian Price, Trustee, and in the erection of a county building thereon, at the cost and reasonable worth of more than $121,000.00, to house and accommodate branch offices of the county government in said city, for, among, other things, sessions of the Superior Court, which building was erected and is used for a public purpose, and is a necessary expense, and, hence, defendant is obligated to pay to plaintiff the balance of $79,674.45 with interest, due on said money loaned and invested in said property, and that plaintiff having furnished substantially all the moneys with which said lot and building were acquired, is entitled to an equitable lien on the land and building for the amount of said balance, and that defendant is estopped to deny said indebtedness to plaintiff and its right to such equitable lien.

Third: On the equitable principle of restitution, for that defendant, having elected not to rescind the transaction, and place parties *in statu quo,* but to hold and retain property, is obliged to do justice, under the circumstances, that is, to compensate plaintiff in the sum of $79,674.45, with interest.

II. Defendant, in answer to the various allegations in the several causes of action set up by plaintiff, denies liability to plaintiff in any aspect of the factual situation. And for further defense, summarily stated, avers:

1. That on 16 November, 1936, the then board of commissioners for the county of Guilford, at an adjourned meeting, adopted the following resolution:

"Motion made by Joe F. Hoffman, Jr., and seconded by J. W. Burke and carried, that Geo. L. Stansbury, Chairman, is hereby given power to negotiate with Clair Conner for the Bradshaw home place property in High Point, N. C., and to sign a contract for the purchase of same provided the property can be bought not to exceed $32,000.00. This deal to be consummated by the Chairman provided Conner will agree to furnish the County money to erect on said lot a building such as the Commissioners may specify and direct, the total purchase price of lot and building not to exceed $100,000.00, Conner to negotiate loan on said property for the complete cost price of lot, building and other improvements, said loan to run for twenty (20) years at an interest rate of four (4) per cent per annum, interest to be paid semi-annually and principal to be reduced 1/20 each year. As soon as building is completed or within

one year from this date the County will take deed to this property, and in said year formally assume Conner's total obligation on same. It is also agreed that the County will hold Conner harmless from the obligations incurred by him in connection with this project on behalf of the County."

2. That thereafter on 23 November, 1936, and pursuant thereto, the then chairman of said board of commissioners in the name of Guilford County, as party of first part, entered into a contract with C. Clair Conner, as party of the second part, substantially as follows: That whereas an agreement had been entered into between the parties thereto, Guilford County, and C. Clair Conner, with the plaintiff here "to provide funds for the purchase price of said property, and to erect a building and make other improvements thereon," the parties thereto, for valuable consideration "contract and agree as follows:

"(1) The party of the second part is to take title in his own name by a good deed in fee simple to the above referred to property, and to pay therefor in cash with funds to be provided by said Jefferson Standard Life Insurance Company the sum of Thirty Two Thousand Dollars ($32,000.00).

"(2) The party of the second part is to execute to Julian Price, Trustee for the Jefferson Standard Life Insurance Company, a deed of trust on said property to secure the payment of the purchase price of said lot, and also the money to be furnished to erect on said lot a building and other improvements as the Board of County Commissioners may specify and direct, the total price of lot and building and other improvements not to exceed One Hundred Thousand Dollars ($100,000.00), said loan to run for twenty (20) years at an interest rate of four (4) per centum per annum, interest to be paid semi-annually, and principal to be reduced one-twentieth (1/20) each year, and the party of the second part agrees to furnish to the party of the first part the money to erect said building and make said improvements on the lot above referred to as said money may be needed by the party of the first part for the purposes aforesaid.

"(3) As soon as said building is completed, or within one (1) year from the 16th day of November, 1936, the party of the first part will take deed to the above described property, and in said deed formally assume the party of the second part's total obligation on same, and the party of the second part hereby contracts and agrees that as soon as said building is completed, or within one (1) year from the 16th day of November, 1936, he will convey all of the above referred to property to the party of the first part, and will execute and deliver to the party of the first part a good fee simple deed therefor.

"(4) It is understood and agreed that in carrying out and discharging the conditions and obligations of this contract, the party of the second part is acting solely as the agent of, for the benefit of, and on behalf of the party of the first part, and the party of the first part hereby agrees to hold the party of the second part harmless from the obligations incurred by him in connection with this project on behalf of the party of the first part.

"(5) The party of the second part is not to receive any compensation for acting as agent as herein provided for."

3. That pursuant to the agreement last above set forth C. Clair Conner, as agent for Guilford County, purchased and acquired the Bradshaw lot in the city of High Point from Mrs. Sallie J. Bradshaw, by deed dated 1 December, 1936, and duly registered in office of register of deeds of Guilford County, and thereafter executed and delivered a note to plaintiff in the principal sum of $100,000.00 bearing interest at the rate of four per centum per annum, securing same by execution and delivery of a deed of trust to Julian Price, Trustee, for the benefit of plaintiff, conveying the said lot of land.

4. That shortly thereafter the then board of commissioners of Guilford County let a contract, privately and without advertising for bids, etc., for the construction of said county building in the city of High Point, and had same constructed at cost of approximately $89,679.61, which together with purchase price of lot, and incidental expense, $32,004.00, amounted to a total of $121,683.61, part of which was paid out of the general funds of the county and a part of which was obtained from plaintiff on the note and deed of trust executed by C. Clair Conner, as hereinabove set forth.

5. That on 10 January, 1938, C. Clair Conner and wife executed a deed to Guilford County, which is duly registered, conveying the said Bradshaw lot and the building erected thereon, and in which deed the following appears:

"This conveyance is made subject to that certain deed of trust executed by C. Clair Conner to Julian Price, Trustee for Jefferson Standard Life Insurance Company, in the sum of One Hundred Thousand Dollars ($100,000.00) recorded in Book 797, page 211, in the office of the Register of Deeds, Guilford County, North Carolina, which indebtedness the party of the second part hereby assumes and agrees to pay."

6. That C. Clair Conner did not, at any time, have or claim to have any right or interest in said property, but only was the medium chosen by the then board of commissioners and the plaintiff for the purpose of circumventing the limitations and provisions of law relating to county finances, and the issuance of county obligations, and that plaintiff was kept informed as to all the facts in connection with the transaction.

7. That the note and deed of trust executed by C. Clair Conner and held by plaintiff are invalid and void for these reasons: (a) County of Guilford had no right to mortgage or otherwise create a lien on county property either directly or indirectly; (b) that the county of Guilford at the time of their execution was prohibited under Article V, section 4 of the Constitution of North Carolina to contract a debt in the sum of $100,000.00 without a vote of the people for that said amount exceeded two-thirds of the amount by which the outstanding indebtedness was reduced during the next preceding fiscal year, 1935-36; (c) that the provisions of the County Finance Act, now Article 9 of Chapter 153 of the General Statutes, and of the Local Government Act, now Chapter 159 of the General Statutes, prescribing procedure by which a county may lawfully incur indebtedness for an authorized purpose, were not complied with. And for all of which reasons the assumption of the payment of the said note held by plaintiff, as set forth in the deed of C. Clair Conner to Guilford County, is invalid and void.

III. When the case came on for hearing in Superior Court the parties through their respective counsel waived jury trial and stipulated the facts in detail bearing upon matters pleaded in the three alleged causes of action set up by plaintiff, and in the further defense averred by defendant—the phases pertinent to disposition of this appeal being substantially these:

1. That in 1936 the building facilities for conduct of county governmental affairs were crowded and there was then need for a county public building at High Point to take care of various county governmental agencies serving High Point Township, with more than 40,000 population and with taxable values in excess of $41,000,000, and that "it was the judgment of the several members of the board of county commissioners of Guilford County that such a public building for the city of High Point was necessary and the erection of such a building would be for the best interests of Guilford County."

2. That the resolution of 16 November, 1936, set out in the further defense of defendant, was the only corporate action taken by the board of commissioners of Guilford County with respect to the purchase of the Bradshaw property and the erection of a county building thereon, other than a resolution to the effect that the board had decided to buy the property from Mrs. W. G. Bradshaw for the price of $32,000.00 provided the county could get the money from plaintiff for 20 years at 4 per cent, and also upon further condition that plaintiff would lend the money to the county to build a county office building on the same terms.

3. That a contract was made with C. Clair Conner, as described hereinabove as part of defendant's further defense.

4. That on 1 December, 1936, Sallie J. Bradshaw, by regular warranty deed, in due form and under seal, duly acknowledged and registered, conveyed the Bradshaw property to "C. Clair Conner."

5. That the note for $100,000.00 executed by C. Clair Conner was dated 1 December, 1936, was in form of a promissory note, as direct obligation solely of C. Clair Conner, and was signed "Given under my hand and seal: C. Clair Conner (Seal)."

6. That in the deed of trust executed by C. Clair Conner to Julian Price, Trustee, dated 1 December, 1936, "C. Clair Conner, unmarried," is named as the maker and Julian Price the trustee, and the deed of trust is in form security for the note of C. Clair Conner to plaintiff for $100,000.00, and contains power of sale in the event of default in the manner specified and it is signed and sealed "C. Clair Conner (Seal)."

7. That the deed from C. Clair Conner and wife to Guilford County, dated 10 January, 1938, conveying the Bradshaw lot contains this covenant: "This conveyance is made subject to that certain Deed of Trust executed by C. Clair Conner to Julian Price, Trustee for Jefferson Standard Life Insurance Company, in the sum of One Hundred Thousand ($100,000.00) Dollars, recorded in Book 797, at page 211, in the office of the Register of Deeds of Guilford County, North Carolina, which indebtedness the party of the second part hereby assumes and agrees to pay."

Upon the facts as so stipulated, defendant tendered further findings of fact that plaintiff did not act in good faith and suggested conclusions of law and form of judgment. Denied. Exceptions. Thereupon the court finds facts as so stipulated to be true, and further finds that both plaintiff and board of commissioners of Guilford County acted in good faith.

And, upon the facts so found, the court concludes as matters of law in pertinent part as follows:

"1. The purchase of the Bradshaw property and the erection of the County Public Building thereon in the City of High Point were necessary expenses of Guilford County, the advisability of which was within the discretion and judgment of the Board of County Commissioners of Guilford County. Said Board of County Commissioners had full authority to pay for said property such an amount as they, in their discretion, deemed proper. The fact that the method of financing used was irregular, and the further fact that the assumption of the Clair Conner deed of trust to Julian Price, Trustee, by Guilford County is unenforceable against the County as an express contract did not and do not abrogate the right and obligation of Guilford County to pay the cost of said Bradshaw lot and the County building erected thereon. Guilford County

has now, as it had in the beginning, the authority to pay for said property. (Exception No. 11.)

"2. Guilford County having acquired the County Public Building in High Point under the circumstances set out in the Stipulation of Facts, and with full knowledge that $100,000.00 of the cost thereof was supplied by the Jefferson Standard Life Insurance Company, and having had the use of said building, made possible by the said expenditure of $100,000.00 by the Jefferson Standard Life Insurance Company, the general law, independent of express contract, implies an obligation upon Guilford County to do justice and said County of Guilford, in equity and good conscience, is liable for the return to the Jefferson Standard Life Insurance Company of the remaining portion of said $100,000.00, not heretofore accounted for, with interest in an amount commensurate with the value of the benefits received by said County. These benefits equal or exceed $100,000.00, with interest thereon at the rate of 4% per annum." (Exception No. 12.)

And, thereupon, the court rendered judgment that plaintiff have and recover of defendant $79,674.45 with interest thereon at the rate of 4 per cent per annum from 1 June, 1941.

Defendant appeals therefrom to Supreme Court and assigns error.

Smith, Wharton & Jordan for plaintiff, appellee.

Thomas C. Hoyle and Rupert T. Pickens for defendant, appellant.

WINBORNE, J. It is apparent from the language of the judgment below that the court, in arriving at the decision made, applied the equitable principle of restitution. However, upon the face of the factual situation in hand, we are of opinion and hold that plaintiff may not, at this time, invoke the aid of a court of equity for application of that principle, since it appears that plaintiff is not without an adequate remedy at law. Equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law. *Town of Zebulon v. Dawson,* 216 N. C., 520, 5 S. E. (2d), 535; *In re Estate of Daniel, ante,* 18.

What, then, is the remedy at law? The plaintiff holds the sealed promissory note of an individual obligor, C. Clair Conner, secured by a deed of trust signed, sealed and delivered by C. Clair Conner, in whom the deed, signed, sealed and delivered by Mrs. Sallie J. Bradshaw purports to vest the title. The deed is made to C. Clair Conner individually, and in executing the note and the deed of trust securing the note he signed and sealed each as an indivdual, and does not purport to sign in a representative capacity. Moreover, the deed, the note and the deed of trust are clear and unambiguous, and there is in neither any expression

tending to show agency or from which agency may be inferred. Under such circumstances, so long as the deed, the note and the deed of trust remain as they now are, a trusteeship may not be read into the deed, nor may an agency or the name of another party be read into the note and into the deed of trust.

See Restatement of the Law of Agency, section 325, 1 Mechem on Agency (2 Ed.), section 1405 *et seq.,* particularly sections 1420 and 1425. Also, *Bryson v. Lucas,* 84 N. C., 680; *Hicks v. Kenan,* 139 N. C., 337, 51 S. E., 941; *Basnight v. Jobbing Co.,* 148 N. C., 350, 62 S. E., 420.

Thus, until or unless there be a reformation of the deed, the note and the deed of trust, the legal remedy of foreclosure under the terms of the deed of trust or by civil action would seem to be available to plaintiff.

And so far as the rights of Guilford County in and to the Bradshaw property are concerned, it holds a deed from C. Clair Conner which is made expressly subject to the deed of trust securing the note which plaintiff holds.

On the other hand, we agree with the court below that the provision in the deed from C. Clair Conner to Guilford County, by which the county undertook to assume and agreed to pay the indebtedness to plaintiff secured by the deed of trust as aforesaid, is not enforceable as an express contract. The Constitution of North Carolina, Article VII, section 7, declares: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." The Constitution, Article V, section 4, further prescribes the limit by which counties may be authorized to incur public debt.

And the decisions of this Court uniformly hold that what are necessary expenses is a question for judicial determination. The courts determine whether a given project is a necessary expense of a county, but the board of commissioners for the county determine in their discretion whether such project is necessary or needed in the designated locality. Among others, see the cases of *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25; *Palmer v. Haywood County,* 212 N. C., 284, 193 S. E., 668; *Sing v. Charlotte,* 213 N. C., 60, 195 S. E., 271; *Power Co. v. Clay County,* 213 N. C., 698, 197 S. E., 603, and cases cited.

Moreover, every county in the State is a body politic and corporate and has only such powers as are prescribed by statute, and those necessarily implied by law, and such powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by the board. G. S., 153-1. Hence, in order to make a valid and binding

contract the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law. *London v. Comrs.*, 193 N. C., 100, 136 S. E., 356; *O'Neal v. Wake County,* 196 N. C., 184, 145 S. E., 28.

Furthermore, the Legislature has prescribed in the County Finance Act, Article 9 of chapter 153, G. S., the machinery by which a county may issue lawful and valid obligations for public purposes and necessary expenses, and pledge its faith. The Act applies to all counties. G. S., 153-71. And the Legislature, in the Act creating the Local Government Commission, expressly provides that approval by the commission of bonds or notes of a county, or other governmental unit, shall not extend to or be regarded as an approval of the legality of the bonds or notes in any respect. G. S., 159-12.

Testing the present case by these constitutional limitations and statutory provisions, and decisions of this Court interpretive thereof, it is sufficient to point to the lack of any corporate finding that the proposed undertaking, the purchase of a lot and the erection of a building thereon, was necessary or needed in the city of High Point for county governmental purposes. This is fundamental to the undertaking. And the fact that "in the judgment of the several members" of the board of commissioners such a public building was necessary is not a corporate action, and determinative of the fact. See *London v. Comrs., supra.* Whether the present board of commissioners for Guilford County may now supply the deficiency *nunc pro tunc* and proceed to act in the premises is not now before us.

For reasons stated in this opinion, in the judgment below there is error.

Error and remanded.

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

WACHOVIA BANK & TRUST COMPANY, TRUSTEE, v. STEELE'S MILLS, A CORPORATION; J. W. McKENZIE, W. F. SUMMERS, J. C. McKENZIE, O. D. BLAND, I. B. PITTMAN, F. M. MORRIS, AND J. PICKETT LEAK, A STOCKHOLDER OF STEELE'S MILLS WHO IS SUED IN BEHALF OF HIMSELF AND IN BEHALF OF ALL OHER STOCKHOLDERS OF SAID CORPORATION, AND H. C. DIGGS, AN EMPLOYEE OF STEELE'S MILLS WHO IS SUED IN BEHALF OF HIMSELF AND ALL OTHER EMPLOYEES OF SAID CORPORATION.

(Filed 6 June, 1945.)

1. Corporations § 17: Trusts §§ 1a, 8a—

For the purpose of promoting loyalty and good will between itself and its employees, by providing financial assistance in emergencies to certain of its employees and their dependents, thereby relieving suffering and helping such employees when they are unable to help themselves, a corporation, employing about 500 operators in an isolated village, may transfer such funds, as may be reasonably necessary to carry out this purpose, to a trust foundation to be administered by a corporate trust company and a committee of employees, and the expenditure of such corporate funds is an ordinary and necessary expense of the corporation.

2. Trusts §§ 1a, 8a—

While the beneficiaries in a trust, created by a corporation for its employees, are not ordinarily so limited as they are here, the instrument under consideration gives a committee of employees authority to make loans to employees, who are financially unable to cope with an emergency caused by illness or accident, and to invest a limited amount of the trust funds in such loans and, where the employee is unable, in the opinion of the committee, to repay the loan, the committee may remit the obligation and cancel the debt; and while the trustee is not liable for losses on loans to employees, it is the duty of the trustee to require the custodian, of the notes representing loans and of the trust funds, to make reports and give an accounting from time to time, in order that the limitations set forth in the trust agreement on all classes of loans, as well as on other benefits, may be observed. The instrument is not, therefore, too vague and indefinite and is valid and enforceable.

3. Trusts § 8b—

The judgment entered below goes beyond the terms of the trust in so far as it instructs the trustee that the primary purpose of the trust is to improve the labor conditions of the grantor by providing for the general welfare of the employees of the corporation, and that the funds of the trust may be used for any emergency giving rise to financial need, even though the need is not caused by sickness or accident.

4. Same—

A trust agreement has the status of a contract, and the right to amend this trust has been reserved to the grantor and has not been delegated to the court.

5. Trusts § 8a—

The primary rule in the construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the creator, unless forbidden by law.

6. Same—

Where a trust is created for a specific purpose and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, the trust may be dealt with only to carry out the appointed purpose.

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

APPEAL by plaintiff and defendant J. Pickett Leak, from *Phillips, J.*, at February Term, 1945, of MECKLENBURG.

An action to test the validity and to construe the terms of a Trust Agreement, as hereinafter set forth.

Steele's Mills, a corporation organized and existing under the laws of North Carolina, called the Grantor, executed a Trust Agreement, 30 December, 1941, naming the Wachovia Bank & Trust Company, Trustee, and certain employees of Steele's Mills as a Committee, and set forth in the Agreement the respective duties of the Trustee and the Committee.

The pertinent parts of the Trust Agreement are as follows:

1. "WITNESSETH: That Whereas, the Grantor has enjoyed the loyal and satisfactory support of its employees for many years, and desires to further and strengthen the same by establishing a foundation to be called the 'Steele's Mills Foundation,' to which there shall be transferred properties and funds which may be used for their benefit and the benefit of their dependents in case of illness or emergency, thereby relieving suffering and helping them when they are unable to help themselves; and

"Whereas, the Grantor realizes that the establishment of the Foundation will materially aid the Grantor in the furtherance and strengthening of the loyalty and good will of its employees and in the improvement of labor conditions which the Grantor considers essential to the satisfactory operation of its business," . . .

2. *"Beneficiaries.* (1) Only employees (and members of their immediate families who are entirely dependent upon them for support), who have been employed by the Grantor for at least one continuous year immediately preceding their request for help, shall be eligible for the benefits provided hereunder.

"(2) Employees who leave the employ of the Grantor shall forfeit any rights they may have to the benefits hereunder, and they cannot be reinstated until they shall have returned and completed at least one continuous year of employment by the Grantor.

"(3) No one shall be eligible to receive the benefits provided hereunder unless he or she, or the person upon whom he or she is solely dependent, is financially unable to cope with an emergency caused by illness or accident. It is intended that no employee shall take a selfish advantage of the Foundation by trying to obtain help from the Foundation when he or she is able financially to provide for himself or herself.

"(4) No one shall receive any benefits hereunder unless and until his or her application or request shall have received the approval in writing of the majority of the Committee hereinabove named or their successors. The decision of the Committee on each application or request for help shall be final, and if any applicant appeals therefrom and/or attempts

to compel the Committee to render assistance, such applicant shall thereupon forfeit his or her right to any and all benefits provided hereunder.

"(5) If the benefits extended to the employee are in the nature of a loan which he or she fails to repay as agreed upon, he or she shall forfeit all rights to further benefits unless it is decided by the majority of the Committee that said employee is utterly unable to repay the sum advanced, in which event the Committee may convert the loan into a donation if they deem it advisable.

"(6) No loan to an employee shall exceed $100 and the Committee shall require security for the loan whenever it is available. Interest at the rate of 6% per annum shall be charged on said loans.

"(7) No loans shall be made to any employees for the use of themselves or their dependents if the illness or accident causing the emergency resulted from the violation of any of the criminal laws, or from intoxication.

"(8) Expenditures of the trust fund, including costs of administration, shall not exceed in any one year, the income for that year plus 5% of the original principal except, under extraordinary conditions such as epidemics, as to which the Committee shall be the sole judge, additional sums may be expended with the written approval of the Grantor. At no time shall loans to employees exceed 20% of the original trust funds.

"(9) No expenditure of the trust funds, except for expenses of administration, may be made within one year of the date of this agreement unless during said year the Grantor is compelled to operate its business on a short time basis, thereby causing an emergency with which its employees may not be able to cope, as to all of which the Committee shall be the sole judge.

"(10) Any and all expenses which may be incurred in connection with the establishment of the Steele's Mills Foundation, its administration, taxes, or otherwise, shall be paid out of the trust fund."

3. *"Termination of Trust.* The trust hereby created shall continue for a period of twenty years from the date of this agreement, but the Grantor may sooner terminate it by giving written notice thereof to the Committee and the Trustee. Upon the termination of the trust all funds and properties then in the hands of the Trustee shall be distributed to such of the employees of the Grantor as the aforesaid Committee shall determine to be most deserving, based upon their faithful and loyal services to the Grantor and the amount of their salaries or wages rather than their financial needs at the time. No employee shall share in the distribution of the trust funds unless he or she shall have had at least five years continuous service with the Grantor immediately preceding the termination of the trust. Under no circumstances shall

any of the funds or properties held under this agreement inure directly or indirectly to the Grantor or be used in its behalf.

"The Grantor reserves the right at any time and from time to time to change or amend any of the provisions herein contained except that the Grantor hereby renounces the right to change or modify the primary purpose of the Steele's Mill Foundation or this trust and the Grantor further renounces any and all right to revest in itself, its successors or assigns, any of the funds or properties at any time constituting the trust estate created by this agreement."

4. At the time of the execution of the above Agreement, the Steele's Mills delivered to the Trustee, cash and securities in the sum of $28,610, and during the year 1942 the sum of $25,000.00.

5. The Government of the United States, in computing the income and excess profits taxes of Steele's Mills, for the year 1941, disallowed the deductions claimed for payments to the Steele's Mills Foundation, and assessed a deficiency tax against the Corporation in the sum of $22,257.27; whereupon, on 10 December, 1943, the Grantor amended the original Agreement creating Steele's Mills Foundation, and provided in substance that if payments to the Steele's Mills Foundation were not deductible as an ordinary and necessary expense of the corporation, and therefore exempt from State and Federal income taxes, the trust fund should be liable for said taxes and any expenses incurred in contesting the payment thereof.

Jury trial was waived and by written stipulation his Honor was authorized to hear the evidence, find the facts and enter a declaratory judgment on the questions raised by the pleadings. Judgment was entered holding that the Trust Agreement was not too indefinite and vague, either as to beneficiaries or as to the purposes to which the funds may be devoted, to enable the court to enforce the same, but that on the contrary, the said Agreement is valid and enforceable; and that funds turned over to the Trustee under the said Trust Agreement were expended for the ordinary and necessary expenses of the business of the corporation, and for a proper corporate purpose.

Among other things, the judgment also contained the following: "The plaintiff trustee is advised and instructed that the primary purpose of Steele's Mills Foundation is to improve the labor conditions of Steele's Mills by providing for the general welfare of the employees of said corporation, and by providing financial assistance to individual employees in times of emergency; that the specific means for accomplishing said primary purpose set out in the trust agreement are not exclusive, especially in view of the right of amendment therein reserved. The plaintiff trustee is advised and instructed, and it is hereby declared as between all the parties to this action, that under the terms of the trust

instrument, without amendment, funds of the Foundation may be used with the approval of the majority of the Committee referred to in the agreement, not only for making loans to employees within the limits therein specified, but also for making outright gifts which are not subject to said limitation, and for providing financial assistance through furnishing medical aid or other material benefits; and that these things may be done not only in cases of emergency caused by sickness or accident, but in case of any emergency giving rise to, or accompanied by, or caused by, financial need; and that the grantor has the right at any time to so amend the trust instrument as to make said funds available upon the exercise of a proper judgment and decision, either by the trustee or by the committee, for any purpose which promotes the general welfare of the employees of Steele's Mills and their dependents."

From the judgment entered, the plaintiff and the defendant, J. Pickett Leak, a stockholder of Steele's Mills, appealed to the Supreme Court, assigning error.

James A. Bell and Neal Y. Pharr for plaintiff, appellant.

Plummer Stewart for defendant, appellant, J. Pickett Leak.

John M. Robinson and Hunter M. Jones for defendants.

DENNY, J. This appeal presents three questions for determination.

1. Did the corporation, Steele's Mills, have the right to make payment to the Steele's Mills Foundation (a trust) as a part of the ordinary and necessary expense of carrying on its business?

2. Is the trust instrument itself too vague and indefinite to be effective?

3. Does the judgment below properly construe said trust instrument and give to the Trustee correct instructions as to the administration and final distribution of the trust funds?

The village of Steele's Mills is somewhat isolated from other populous communities and constitutes a separate and distinct community of its own. The corporation employs about 500 operators and they, together with their families, constitute a village of approximately 1,500 people.

The primary purpose for creating this trust was to promote loyalty and good will between the Steele's Mills and its employees by providing financial assistance to certain of its employees and their dependents in emergencies. Ordinarily the beneficiaries in such a trust are not so limited as they are in the instrument under consideration. However, the Grantor fixed the terms of the Trust Agreement, limited the beneficiaries and prescribed the procedure for obtaining the benefits thereunder.

Who are the primary beneficiaries under this trust? It is stated in the Trust Agreement that the properties and funds transferred to the Steele's Mills Foundation may be used for the benefit of the employees of Steele's Mills and the benefit of their dependents "in case of illness or emergency, thereby relieving suffering and helping them when they are unable to help themselves." And further that "No one shall be eligible to receive the benefits provided hereunder unless he or she, or the person upon whom he or she is solely dependent, is financially unable to cope with an emergency caused by illness or accident." We think such funds as may be reasonably necessary to carry out this purpose, may be transferred by the Grantor to the Steele's Mills Foundation and that the expenditure of such corporate funds is an ordinary and necessary expense of the corporation. *Corning Glass Works v. Lucas,* 68 A. L. R., 736, 37 F. (2d), 798; *American Rolling Mill Co. v. Com'r of Internal Revenue,* 41 F. (2d), 314; *Forbes Lithograph Mfg. Co. v. White,* 42 F. (2d), 287; *Commissioner v. Heininger,* 320 U. S., 457, 88 L. Ed., 197; *Poinset Mills,* 1 B. T. A., 6; *Elm City Cotton Mills,* 5 B. T. A., 309; *Elgin National Watch Co.,* 17 B. T. A., 339.

In *American Rolling Mill Co. v. Com'r of Internal Revenue, supra,* it is said: "It is accepted as true in the industrial world that strikes and shifting labor conditions impair efficiency of production, and that contentment and well-being add to the skill and productivity of workmen. Acting upon that principle, the large industries of the country almost without exception have engaged in mutual interest work in one form or another with their employees, with the view of contributing to their comfort and pleasures, encouraging them to purchase homes, and giving them such interest in the community as to make them an asset of the business. Such work has been considered by the courts as a corporate function having a substantial relation to the progress and success of the industry. Thus it has been held that expenditures for hospitals, dispensaries, medical services, schools, libraries, churches, and recreational centers are all necessary and proper expenditures in aid of corporate purposes."

The authority given to the Committee in the Trust Agreement to make loans to employees of the Steele's Mills is incidental. Investment of a limited part of the trust funds in loans to employees of Steele's Mills, under certain conditions, is authorized by the Trust Agreement. And, if in the opinion of the Committee the employee is unable to repay the loan, the Committee has the authority to remit the obligation and cancel the note.

The designated agent who disburses the proceeds from these loans, holds the notes executed by the employees of Steele's Mills, and collects the principal and interest thereon, is a fiduciary and accountable to the

Trustee for all funds that may come into his hands in such capacity. *Hatcher v. Williams, ante,* 112, 33 S. E. (2d), 617. While the Trustee is not liable for losses sustained in making loans to employees of Steele's Mills, under the terms of the Trust Agreement, nevertheless it is the duty of the Trustee to require the custodian of the aforesaid notes and trust funds, to make reports and to give an accounting from time to time, in order that the limitations set forth in the Trust Agreement on this class of loans, as well as on other benefits, may be observed.

We think his Honor properly held the Trust Agreement valid and enforceable.

In considering the third question presented, it will be noted that the Court below, in giving the Trustee instructions as to the administration and final distribution of the trust funds, advised and instructed the Trustee "that the primary purpose of Steele's Mills Foundation is to improve the labor conditions of Steele's Mills by providing for the general welfare of the employees of said corporation, and by providing financial assistance to individual employees in times of emergency; that the specific means for accomplishing said primary purpose set out in the Trust Agreement are not exclusive, especially in view of the right of amendment therein reserved." And further, that the benefits are available, "not only in cases of emergency caused by sickness or accident, but in case of any emergency giving rise to, or accompanied by, or caused by, financial need." We think the judgment entered below goes beyond the terms of the Trust Agreement in so far as it instructs the Trustee that the primary purpose of the trust is to improve the labor conditions of Steele's Mills by providing for the general welfare of the employees of such corporation, and the funds of the Trust may be used for any emergency giving rise to financial need, even though the need is not caused by sickness or accident.

It is true that the Grantor has reserved the right at any time, and from time to time, to change or amend any of the provisions contained in the Trust Agreement provided such change or amendment shall not "change or modify the primary purpose" for which the trust was created. But, thus far it has not seen fit to amend the Trust Agreement so as to authorize the Trustee and the Committee to expend any part of the trust funds for the general welfare of its employees, other than in the manner set forth in said instrument. This agreement has the status of a contract, and the right to amend it is reserved to the Grantor and has not been delegated to the Court. "The primary rule in the construction of trusts is that the Court must, if possible, ascertain and effectuate the intention of the creator, unless forbidden by law." 65 C. J., sec. 241, p. 497, and it is also stated in sec. 264, p. 514: "Where a trust is created for a specific purpose and is so limited that it is not repugnant to the rule

against perpetuities, and is in other respects legal, the trust may be dealt with only to carry out the appointed purpose." It is the duty of the Court, therefore, to interpret and construe the Trust Agreement as written.

The instructions given to the Trustee in the declaratory judgment entered below will be modified as pointed out herein. This modification will necessitate a further finding as to whether or not the funds transferred to the Steele's Mills Foundation are reasonably necessary to meet the expenditures authorized under the Trust Agreement, including expenses incident to its administration. It is disclosed in the evidence adduced in the hearing below that the Steele's Mills Foundation is but carrying out an established policy of the Steele's Mills of many years standing. Therefore, it should not be difficult to ascertain the amount reasonably necessary to meet the requirements of this trust.

This cause will be remanded for further proceedings in accordance with this opinion.

Error and remanded.

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

STATE v. JOHN ISAAC.

(Filed 6 June, 1945.)

1. Criminal Law § 53g: Trial § 33—

In a criminal prosecution for murder, argument and contention of the State, given in the court's charge to the jury, that prisoner was armed with a shotgun when he inquired for deceased at her home shortly before the homicide, which was not only unsupported by the evidence, but was in direct conflict with the State's undisputed evidence on the very point, constitutes harmful error, even though not called to the attention of the court at the time.

2. Same—

The rule, that requires an objection at the time to an erroneous statement in the charge of the contention of the parties, does not apply on the trial of first degree murder, when such statement includes the assumption of sworn evidence against the prisoner, tending to show previous malice and vitally necessary upon the question of premeditation, where this evidence had been excluded or where no such evidence had been given.

DEVIN, J., dissenting.

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

STATE *v.* ISAAC.

APPEAL by defendant from *Armstrong, J.*, at November Term, 1944, of CATAWBA.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Mrs. Floyd Sigmon.

Mrs. Floyd Sigmon and her husband, Russell Sigmon, lived about ten miles from the town of Conover, where they both worked in a furniture factory. The defendant, John Isaac, lived about a quarter of a mile from the home of the Sigmons. J. E. Sigmon, an uncle of Russell Sigmon, lived about halfway between the homes of Russell Sigmon and the defendant.

On the morning of 16 August, 1944, between 7:30 and 9:00 o'clock, the defendant and his sister's boy, Kenneth Hollar, went in defendant's car to the home of Russell Sigmon. Kenneth Hollar and Bobby Lee Poovey, 15 years of age, a son of Mrs. Russell Sigmon by a former marriage, worked most of the morning changing the tires on defendant's car. Mr. and Mrs. Russell Sigmon had gone to work before the defendant and Kenneth Hollar arrived. The defendant remained with the boys while they were changing the tires and left in his car about 11:30 a.m., according to the testimony of Bobby Lee Poovey. This witness further testified: "The next time I saw him was about 2:00; he came down the road to our house and wanted to know where my mother was and I told him I did not know; mother was not at home then. Isaac was walking and he did not have anything in his hand. He stayed there about five minutes. Our home is off the main road and he came down to the house. When I told him Mother was not there he left and went back up the road towards his home."

J. E. Sigmon, testifying for the State, said, in substance: The defendant kept his gun at his house and on 16 August, 1944, he talked with him but did not see him. That he was not well and was in his bedroom. The defendant came in the house and he heard him and talked to him and knew his voice. The time was between 2:00 and 4:00 o'clock in the afternoon. He said, "Where are you going, John?" and he said "I am going to watch for squirrels." He left and was next seen at the home of Russell Sigmon, about 6:00 o'clock that same afternoon, where he shot and killed Mrs. Floyd Sigmon.

The defendant at the trial below interposed a plea of insanity caused by the excessive use of bromides and intoxicants.

Evidence for the defendant tended to show that he had been addicted to the use of whiskey and narcotics for many years. In 1943 he was a patient at Broad Oaks Sanatorium for about six months. In March, 1944, he had an automobile accident in which he sustained a broken neck. Since he left Broad Oaks Sanatorium, he has used "Stanback"

excessively, averaging six to eight packages and sometimes as many as fifteen packages a day.

Verdict: Guilty of murder 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.

John W. Aiken and John C. Stroupe for defendant.

DENNY, J. During the concluding argument on behalf of the State, the solicitor stated to the jury that the defendant went to the home of J. E. Sigmon about 2:00 p.m. on the day of the homicide, and got his shotgun and went from there to the home of the deceased and asked Bobby Lee Poovey where his mother was, and, at the time he made the inquiry, he had the shotgun with him. Whereupon, defendant's counsel objected to this argument and requested the court to direct the jury that this argument was not substantiated by the record, which would show that at the time defendant went to the home of the deceased and asked Bobby Lee Poovey where his mother was, the defendant did not have a shotgun. The court overruled defendant's objection, denied his request, and instructed the jury "that they should rely upon their own recollection of the testimony and not the solicitor's recollection or counsel for defendant's recollection," to all of which the defendant in apt time excepted. Thereafter, his Honor, in his charge to the jury, in reviewing the testimony, gave as a contention of the State "That after the defendant left there that he went back towards his own home and later went over to Mr. J. E. Sigmon's where he had been keeping his gun and the shells, and there talked to Mr. Sigmon and got his gun; that that was about 2:00 p.m. Then the State contends that the defendant from there went to Mr. Russell Sigmon's at about 2:30 and asked Bobby Lee where his mother was or if she was working. Then the State contends that he had planned this killing; that he went and got the shotgun and ammunition from Mr. Sigmon's and asked Bobby Lee where his mother was, and when he found she was not there, the State contends he went some place where the toilet was; . . . and waited there in the afternoon until Mrs. Sigmon went there to the toilet about 6:00 o'clock."

The defendant likewise excepted to the foregoing part of the charge. These exceptions must be sustained.

The argument of the solicitor and the contention of the State given in the charge to the jury, to the effect that the defendant was armed with a shotgun when he went to the home of Russell Sigmon about 2:00 p.m.,

on 16 August, 1944, and inquired of Bobby Lee Poovey where his mother was, are not supported by the evidence, but, on the contrary, are in direct conflict with the State's undisputed evidence on this point.

The argument of the solicitor and the contentions of the State, to which the defendant objected, had a direct bearing on the question of premeditation and deliberation, and were prejudicial.

The State contends that since counsel for the defendant failed to call this matter to the attention of the court at the time, he has waived his right to object. Ordinarily this is true. *S. v. Britt, post,* 364. But we think the facts here constitute an exception to the general rule and come within the principle laid down in *S. v. Love,* 187 N. C., 32, 121 S. E., 20, in which case the holding is succinctly stated in the syllabus thereof, as follows: "The rule that requires an objection at the time to an erroneous statement in the charge of the contention of the parties, does not apply on the trial of first degree murder, when such statement includes the assumption of sworn evidence against the prisoner upon the trial, that had been excluded, tending to show previous malice of the prisoner, vitally necessary upon the question of his premeditation." Moreover, the defendant had already challenged the correctness of the evidence on which the contentions were based and requested the court to instruct the jury as to what the evidence did show. This should have been done. *Curlee v. Scales,* 223 N. C., 788, 28 S. E. (2d), 576. The court, however, overruled the objection and denied the request for instructions. It is equally as harmful to base an argument or a contention on a statement of facts unsupported by the evidence as it is to base them on incompetent evidence which has been withdrawn from the jury, and when such argument or contention is prejudicial, an exception thereto will be sustained. *Howell v. Harris,* 220 N. C., 198, 16 S. E. (2d), 829; *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473; *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83. In the latter case, in considering contentions of the plaintiff based on excluded evidence, *Stacy, C. J.,* speaking for the Court, said: "The testimony undoubtedly found lodgement in the court's mind, and to have called the matter to his attention, as a correctible inadvertence, would only have served to emphasize the error. *Bank v. McArthur,* 168 N. C., 48, 84 S. E., 39; *Medlin v. Board of Education,* 167 N. C., 239, 83 S. E., 483; *Speed v. Perry, ibid.,* 122, 83 S. E., 176; *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6; *S. v. Cook,* 162 N. C., 586, 77 S. E., 759; *S. v. Dick,* 60 N. C., 440. Where the judge himself fails to disregard incompetent evidence, or to eradicate it from his own mind, it would seem to be asking rather much to require a higher standard of the jury. Its harmful effect is obvious. *Credit Corp. v. Boushall,* 193 N. C., 605, 137 S. E., 721; *Morton v. Water Co.,* 169 N. C., 468, 86 S. E., 294."

We deem it unnecessary to discuss the other exceptions, since they may not arise on a new trial.

New trial.

DEVIN, J., dissenting: Unquestionably the evidence was sufficient to warrant the verdict of guilty of murder in the first degree. It appeared from the testimony that several hours before the homicide the defendant secured his shotgun and shells, and after waiting some time for the deceased to return to her home from work, approached within a few feet of the outhouse where she had gone and deliberately shot her through the heart, saying "You have talked your last word." Then after reloading his gun and threatening a like fate to her husband, he left the scene, and later gave himself up. It was testified that he said afterwards he had no regrets and would do the same again, that "he had his reasons." The deceased was a woman 34 years of age and a wife and the mother of five children.

The evidence as to the circumstances of the homicide was uncontradicted. The only defense interposed was insanity. It was contended the excessive use of liquor and headache remedies had rendered defendant mentally irresponsible. All the testimony offered by him and the cross-examination of the State's witnesses were pointed to that plea. Of the twenty-seven exceptions noted during the trial, all but one were in that connection. It was on the plea of insanity the contest was waged. In their brief counsel for defendant frankly admit the charge of the court on questions of law was free from error. The record, I think, shows that the defendant has had a fair and impartial trial, before an able and painstaking judge and an intelligent jury. The result should not be nullified save for some matter of evidence or judicial instructions which seriously would challenge the integrity of the trial.

The only ground upon which the order for a new trial is based, as set out in the majority opinion, is the ruling of the trial judge in relation to the testimony of the witness Poovey and the remarks of counsel thereon. The circumstances in connection with defendant's exception on this point, which the opinion sustains, as shown by the record, were these:

The homicide occurred at 6 p.m. The witness Poovey, son of the deceased, testified that the defendant came to the home of deceased about 2 that afternoon and inquired for the boy's mother. In response to a question inferentially the witness puts the time at 2:30. Defendant was walking and did not have anything in his hand. Being told deceased was not at home defendant went back towards his home. J. E. Sigmon testified the defendant came to his house, which was situated between

defendant's home and the home of deceased, and secured his gun and shells about "2 or 3 or 4" o'clock in the afternoon.

During his argument to the jury the solicitor stated that the defendant went to the home of J. E. Sigmon about 2 p.m. on the day of the homicide and got his shotgun and went from there to the home of the deceased and asked Poovey where his mother was and at the time he made the inquiry he had the shotgun with him. Counsel for defendant objected and requested the court to direct the jury this argument was not substantiated by the record, which would show that at the time the defendant went to the home of deceased and inquired where she was he did not have a gun. The court told the jury they should rely upon their own recollection of the testimony and not the solicitor's recollection or that of counsel for defendant, and denied defendant's request. Apparently no further reference was made to the matter by the solicitor in his argument. However, in his charge to the jury, in recapitulating the evidence, the court stated that Poovey had testified "that the defendant came and asked where his mother was working; that he had nothing in his hand then, and that he went towards his home then, that the next time he saw him was about 6 p.m." Also in his charge the court instructed the jurors to be governed by their own recollection of the evidence, and if their recollection differed from that stated by the court to take their own recollection and not the court's, and "if counsel on either side in this case have stated some parts of the evidence and your recollection differs you take your own recollection and not counsel's."

The solicitor had the right to argue the evidence in the light most favorable to the State. There was evidence that defendant secured the gun at 2 p.m., and that he went to the home of deceased inquiring for her at 2:30. It was not unreasonable to argue that at that time he had secured the gun and had it available, notwithstanding Poovey had said "he did not have anything in his hand." The court's caution to the jury to be governed by their own recollection of the evidence, repeated in his charge, coupled with the court's quotation of Poovey's testimony "that he had nothing in his hand," would seem to rob this incident of any suggestion of prejudice.

In *S. v. Beal,* 199 N. C., 278 (304), 154 S. E., 604, it was said: "The general rule is that what constitutes legitimate argument in a given case is to be left largely to the sound discretion of the trial court, which will not be reviewed on appeal unless the impropriety of counsel be gross and well calculated to prejudice the jury."

In the course of stating the contentions of the State, the court used this language: "The State contends . . . that after defendant left there he went back towards his own home and later went to J. E. Sigmon's where he had been keeping his gun and shells . . . and got his gun; that

that was about 2 p.m. Then the State contends the defendant from there went to Russell Sigmon's (home of deceased) at about 2:30 p.m. and asked Poovey where his mother was or if she was working. Then the State contends he had planned this killing; that he went and got the shotgun and ammunition from Mr. Sigmon's and asked Poovey where his mother was, and when he found she was not there, the State contends he went some place (near) where the toilet was . . . where Sheriff Pitts found the grass mashed down and the cigarette butts and matches . . . and waited there until Mrs. Sigmon went to the toilet about 6 o'clock."

I am unable to agree that the court's statement of the State's contention on this point was prejudicial or unfair. The defendant's alert and experienced counsel heard it all and sat by without objection. If they thought it prejudicial they should have called the court's attention to it at the time. Certainly the evidence showed that defendant secured his gun from J. E. Sigmon's home, and also that he went to the home of deceased looking for the deceased. The question which movement preceded the other should not be regarded as important in the face of the uncontradicted evidence that both movements actually occurred, and were followed in two or three hours by the deliberate shooting of the deceased for whom the defendant had been looking, with the gun he had thus secured. I do not think a jury of average intelligence who heard all the evidence could have been misled or their verdict influenced to the prejudice of the defendant.

It seems to me the record discloses a willful, deliberate and premeditated killing, unprovoked and without palliation. The only defense was insanity, of which there was substantial evidence. As to that, under a correct charge, the jury has determined the issue against the defendant. I think the judgment should be affirmed.

SCHENCK and SEAWELL, JJ., concur in this dissent.

LERNER SHOPS OF NORTH CAROLINA, INC., v. JEROME ROSENTHAL.

(Filed 6 June, 1945.)

1. Deeds §§ 5, 14a: Vendor and Purchaser § 5a—

A parol agreement of the conditional delivery of a deed conveying lands is valid, and it does not contradict the written instrument, but only postpones its effectiveness until after the condition has been performed or the event has happened. Such conditional delivery may be from grantor to grantee.

2. Contracts § 11b: Vendor and Purchaser § 5a—

An option or offer is just as much subject to the law of conditional delivery as any other instrument; and where the delivery imposes a condition precedent to the effectiveness of the option itself, it cannot be converted into a contract without performing the condition. It takes the act of both parties to consummate a contract.

3. Deeds § 5—

Whether a deed has been delivered in the legal sense is not dependent exclusively upon the question of its manual or physical transfer from the grantor to the grantee, but also upon the intent of the parties. Both the delivery of the instrument and the intention to deliver it are necessary to the transmutation of title.

STACY, C. J., dissenting.

SCHENCK, J., concurs in dissenting opinion.

APPEAL by defendant from *Grady, Emergency Judge,* at April Civil Term, 1945, of WAKE.

(Pertinent facts are stated in the opinion.)

Bailey, Holding, Lassiter & Wyatt for plaintiff, appellee.

J. C. B. Ehringhaus for defendant, appellant.

SEAWELL, J. The plaintiff brought this action to compel the specific performance of a contract for the lease of certain real estate of the defendant, located at the northwest intersection of Fayetteville and Hargett Streets in the city of Raleigh, North Carolina. The plaintiff set up in his pleading an option signed by the defendant, offering to lease the property at the stipulated terms, and acceptance by the plaintiff.

The defendant admitted that he signed and delivered the option, and, in due time, received notice in writing of the acceptance and intention to exercise the option; but in a further defense set up that the documents were signed and delivered only upon the condition that they would not become effective or binding for any purpose until the plaintiff had also, within the time mentioned in the option, secured options for the purchase or lease of certain adjoining properties described in the answer, which might materially add to the value of the leased property; and that, specifically, "the instrument and writings referred to in the complaint should not become effective and binding unless and until and only upon the contingency that said adjoining properties also should be similarly optioned for lease or purchase within the time mentioned in said instrument." Defendant further alleged that this condition had not been complied with, and that the "period allowed to the plaintiff to make said clauses and delivery effective has now expired."

Upon the trial the defendant assumed the burden of establishing his further defense.

Substantially, the evidence was as follows:

"I remember the time I executed this Exhibit B the time that I signed it. Preliminary to its signing I had been talking with Mr. Robin and Mr. Newsome representing Lerner Stores in that connection. In reply to the question, what, if anything, was said between you all with reference to delivery and effectiveness of that instrument, the witness stated, 'They told me positively if they didn't get the other leases on the Heller, Dillon and Thompson property they couldn't use my property, the 27 feet would be no good to them and they had to have somebody to start off and they wanted all four of the properties, that is, the Thompson, the Dillon and Heller, and they wanted to go all the way back and take in Thompson's property on Hargett Street. On no condition did they want my property unless they got that and if I would sign up that was the condition.' . . . I agreed to that."

"With reference to that I told them I would give them an option on that understanding. That understanding was prior to the time I signed to deliver that paper."

"They were the first to put forward the idea of it being conditioned on that, after thinking it over they said they would agree and I did agree to it, too. Preliminary to its signing I said under that condition I would sign it. I signed it on that condition. I delivered the option on that condition. They did not obtain options or conveyances of either of those other three properties before the time of this option expired. I don't think they have yet obtained them. Mr. Robin, the representative of Lerner Stores, said there was too little space there for the store building. I think that my property had a special value as to saleability and leaseability in connection with the adjoining property."

On cross-examination, the witness further reiterated the statement that he signed and delivered the instrument upon the condition stated, and added that "We discussed every phase of the situation and we discussed about the other property too. I started to leave and they said under that condition we had to have somebody first to sign up to get the options on the other three. . . . I didn't sign it until we had that understanding."

"He proposed that and Newsome said that under those conditions that somebody had to start rolling so they could get the other conditions."

After this evidence had been offered, the court excused the jury without submitting it to them, and, upon motion of counsel, signed a judgment giving the plaintiff the relief demanded, and requiring the defendant to execute a lease upon the described property according to the tenor of the options signed by him and their acceptance by the plaintiff. The defendant excepted and appealed.

Two questions only are posed upon this appeal: Whether delivery of an instrument relating to the lease or sale of real property may be the subject of conditional delivery by the grantor to the grantee, where the condition rests in parol, so as to defeat the effectiveness of the instrument when the condition is not performed; and if so, whether in this case the defendant was entitled to have his evidence of such conditional delivery submitted to the jury.

In many other jurisdictions it is an accepted rule that a deed, especially a deed for lands, cannot be the subject of conditional delivery from the grantor to the grantee. 16 Am. Jur., secs. 123, 124. In such case it has been held that the delivery is good but the condition is a nullity. This holding is generally upon the ground that the written instrument is not subject to parol contradiction.

This rule has been greatly relaxed with regard to deeds and instruments not purporting to convey real estate; and there are many reasons, not necessary now to state, why promissory notes and papers of like character, which it is contemplated shall have numerous signatures, might be excepted from the rule. One potential reason is that usually the parol condition cannot be said to contradict the written paper. Therefore, many of the cases of that character cited in the appellant's brief may not be considered as decisive of the matter, although they comprise a principle which in similar relations, our Court has applied to deeds relating to land; that is, that the parol agreement respecting delivery does not, in reality, contradict the written instrument, but only postpones its effectiveness until after the condition has been performed or the event has happened. *Jones v. Casstevens,* 222 N. C., 411, 23 S. E. (2d), 303; *Kindler v. Trust Co.,* 204 N. C., 198, 167 S. E., 811; *Metropolitan Life v. Dial,* 209 N. C., 339, 183 S. E., 609; *Jefferson Standard Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606.

While we have frankly stated the contrary rule, there can be no doubt that, as we have suggested, our Court has extended the doctrine of conditional delivery to cover instances where deeds or instruments affecting lands were so delivered directly by the grantor to the grantee, thus perhaps creating or adopting a minority rule. *Garrison v. Machine Co.,* 159 N. C., 285, 74 S. E., 821; *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028; *Building Co. v. Sanders,* 185 N. C., 328, 117 S. E., 3, and cases cited; *Thomas v. Carteret,* 182 N. C., 374, 109 S. E., 384. Disregarding immaterial factual differences, relating to the form and substance of the conditions, the cases are too pointed to ignore.

In *Gaylord v. Gaylord, supra,* the delivery of the deed, the record shows, was made directly from the grantor to the grantee, and of such delivery, *Justice Hoke,* speaking for the Court, said: ". . . in the case before us, if the instrument having been prepared and signed was then handed

over by Ebenezer to Sam Gaylord, not with the intent that the title should pass, but with the intent that Sam Gaylord should hold the same as a depository or subject to the control and call of Ebenezer, there was no delivery, and the title to the property descended to the plaintiffs, the children and heirs at law of Ebenezer, subject to the dower of his widow." There is cited with approval *Tarlton v. Griggs,* 131 N. C., 216, in which the Court said: "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so with the intent that it shall be taken by the grantee *or by someone for him.* Both the intent and act are necessary for a valid delivery. Whether such existed is a question of fact to be found by the jury." (Above italics ours.) Supporting decisions of like import are cited; especially an extended quotation from *Porter v. Woodhouse,* 59 Conn., 568 (loc. cit. pp. 234, 235), that leaves little for speculation as to what the Court meant. A delivery upon condition that the instrument should never become effective according to its terms is, in principle, as much a conditional delivery as one made upon condition that the deed should become effective only upon the happening of a specific event.

Thomas v. Carteret, supra, is cited in appellee's brief in support of the position that the condition relied on by defendant contradicts the contract and cannot be shown by parol. Counsel seem to have overlooked the fact that the opinion recognizes and approves the principle of conditional delivery, saying: "The principle applicable to a conditional delivery has been sanctioned and approved by us in a number of carefully considered decisions; and it is now very generally recognized in this and other jurisdictions. *Farrington v. McNeill,* 174 N. C., 420; *Hughes v. Crooker,* 148 N. C., 318; *Aden v. Doub,* 146 N. C., 10; *Pratt v. Chaffin,* 136 N. C., 350; *Kelly v. Oliver,* 113 N. C., 442, and *Ware v. Allen,* 128 U. S., 590," citing Anson on Contracts (Am. Ed.), 318; *Wilson v. Powers,* 131 Mass., 539, and *Garrison v. Machine Co., supra,* all of which authorities are directly opposed to appellee's position. *Bank v. Mfg. Co.,* 213 N. C., 489, 493, 196 S. E., 484.

The decision in *Thomas v. Carteret, supra,* rested upon the fact that the defendant had admitted in open court that Carteret County was entitled to a judgment on the note and mortgage in question, thus cutting him out of the suggested defense. The Court observed: "To admit their present validity and binding force for any purpose, in advance of the happening of the contingent event upon which it is alleged they were to take effect, is at variance with the theory of a conditional delivery, and brings into operation other principles of law."

We can find no plausible distinction in principle between the cases we have cited and the case at bar.

It has been suggested that the plea of conditional delivery is not available against a consummated contract. What is a consummated contract? Can an optionee consummate a contract merely by notifying the optionor of acceptance, at the same time ignoring the condition on which the option is delivered? It takes the act of both parties to make a consummated contract; and an option or offer, although unilateral, is, *ex necessitate,* just as much subject to the law of conditional delivery as any other instrument. Under the defendant's evidence, the condition imposed was a condition precedent to the effectiveness of the option itself, and the plaintiff could not convert it into a contract without performing the condition. Its performance may have benefited the plaintiff as well, but defendant alleges, and attempted to prove, that he imposed it for his own benefit

In *Insurance Co. v. Cordon,* 208 N. C., 723, 725, 182 S. E., 496, the Court quotes, with approval, from *Gillespie v. Gillespie,* 187 N. C., 40, 41: " 'Whether a deed has been delivered in the legal sense is not dependent exclusively upon the question of its manual or physical transfer from the grantor to the grantee, but also upon the intent of the parties. Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title. Upon the evidence adduced, the ultimate question of delivery was therefore properly submitted to the jury. *Gaylord v. Gaylord,* 150 N. C., 222; *Fortune v. Hunt,* 149 N. C., 358; *Tarlton v. Griggs,* 131 N. C., 216.' *Carroll v. Smith,* 163 N. C., 204; *Lee v. Parker,* 171 N. C., 144."

The defendant is entitled to the benefit of his evidence and all the inferences from it, taken in the best light, as well as a fair and liberal construction of his pleading. Neither can be fairly construed at any point into an admission that he had signed or made any contract. He did admit the execution and delivery of the paper upon the conditions alleged in his answer, and so testified upon the trial in an attempt to establish the fact before the jury.

It follows that the defendant was entitled to go to the jury upon his plea of conditional delivery if the evidence offered tended to support such defense. We think it does.

The action of his Honor in dismissing the jury and signing the judgment tendered by the plaintiff was, in effect, a denial to the defendant of the benefit of his further defense and was erroneous. The judgment is stricken out, and the cause is remanded for a further hearing in accordance with this opinion.

Error and remanded.

STACY, C. J., dissenting: Civil action for specific performance of contract to lease land. *Knott v. Cutler,* 224 N. C., 427, 31 S. E. (2d), 359.

It is alleged in the complaint that on 8 May, 1944, the defendant gave the plaintiff a 60-day written option to lease his store building on the terms therein specified; that within the time allowed, the plaintiff notified the defendant in writing of its election to exercise the option according to its terms; that a contract was thereupon consummated; that thereafter plaintiff requested execution and delivery of lease, and that defendant has refused and still refuses to comply with his contract. *McAden v. Craig,* 222 N. C., 497, 24 S. E. (2d), 1.

The defense set up in the answer is that as a condition to the effectiveness of the option, it was understood the plaintiff would also obtain options to purchase or lease three adjoining properties and exercise them within the specified sixty days, which was not done. This understanding was by word of mouth. *Garrison v. Machine Co.,* 159 N. C., 285, 78 S. E., 821; 20 Am. Jur., 956.

The judgment contains the following recital:

"The defendant in open court admitted the contract as alleged in the complaint, subject only to the defense set up in the answer, and assumed the burden thereon, and the defendant having presented his testimony and rested his case, and the court being of opinion that the testimony of the defendant does not constitute a defense; It is, therefore, ordered, adjudged and decreed that the plaintiff is entitled to specific performance of the contract as set up in the complaint," etc.

It may be conceded the defendant's testimony is equivocal or contradictory. At one place he says: "We had an understanding that I wouldn't deliver it unless they got options on the adjoining property." Later, he said: "I had no understanding that is not in that letter." But this aside.

The defense of conditional delivery of the option is not available as against the subsequently consummated contract. Once an instrument becomes a binding agreement between the parties, it is no longer open to amendment, modification or contradiction by parol. *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Bank v. Dardine,* 207 N. C., 509, 177 S. E., 635. Parol evidence is admissible to show conditions precedent, which go to the effectiveness of the instrument, as that it shall only become operative on certain conditions or contingencies, *Roebuck v. Carson,* 196 N. C., 672, 146 S. E., 708, but such evidence is not admissible to show conditions subsequent, which provide for the nullification or modification of an existing contract. *Building Co. v. Sanders,* 183 N. C., 413, 111 S. E., 705; 32 C. J. S., 857.

Here the defendant "admitted the contract as alleged in the complaint," subject only to the defense of conditional delivery of the option. To admit the resulting contract was to forego the defense of conditional delivery of the prior instrument. *White v. Fisheries Products Co.,* 183

N. C., 228, 111 S. E., 182. "The unconditional written agreement cannot be nullified by appending an antagonistic unwritten condition." *Watson v. Spurrier,* 190 N. C., 726, 130 S. E., 624.

Moreover, the defense alleged is not strictly one of conditional delivery of the option, but of conditional right of acceptance on the part of the optionee (all alleged conditions were to be performed by the optionee), which was likewise defeated by an admission of the resulting contract. *Thomas v. Carteret,* 182 N. C., 374, 109 S. E., 384. The real defense is, that no effective contract was ever consummated *Bowser v. Tarry,* 156 N. C., 35, 72 S. E., 74; *Pratt v. Chaffin,* 136 N. C., 350, 48 S. E., 768. The allegation of the complaint is, that under and by virtue of the option and its acceptance "a contract to enter into a lease agreement exists between the plaintiff and the defendant." This is the contract which the judgment recites the defendant admitted in open court. *Building Co. v. Sanders, supra.*

It may be the recital contains an inaccurate statement of the admission, or what was intended to be admitted, and doubtless it does, nevertheless it clearly appears in the judgment and we are bound by it. *S. v. Dee,* 214 N. C., 509, 199 S. E., 730.

The manner of reaching the judgment will do, even if somewhat irregular. *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32. The practice is to affirm in the face of harmless error. *Cherry v. Canal Co.,* 140 N. C., 422, 53 S. E., 138. A directed verdict and judgment thereon would perhaps have been the practice usually followed, but as the same result has been accomplished by the judgment as entered, it would serve no useful purpose to disturb it.

SCHENCK, J., concurs in dissent.

DAVID J. HOBBS v. QUEEN CITY COACH COMPANY AND FRANKLIN A. BROOME, AND GREENSBORO-FAYETTEVILLE BUS LINE, INC.

(Filed 6 June, 1945.)

1. Master and Servant § 21c: Automobiles § 23: Appeal and Error § 8—

In an action to recover damages for alleged injuries resulting from an automobile collision, while there are other allegations of negligence in the complaint, the trial below was had on the alleged theory that, at the time of the collision, the bus of the corporate defendants was being driven by the individual defendant, an employee and agent of corporate defendants, at a reckless and high rate of speed and out of control, and without keeping a proper lookout for the safety of others traveling upon the

highway, thereby permitting the bus to move from its right-hand side to its left-hand side of the public highway and immediately in front of plaintiff's automobile. Hence, the liability of the corporate defendants is grounded solely, and is wholly dependent upon the negligence, if any, of the individual defendant, under the doctrine of *respondeat superior.*

2. Evidence §§ 42b, 42c—

It is not necessary to the competency of an admission by a party to the record that it shall have been made as part of the *res gestæ.* Admissions, when offered as those of a party to the record, are competent against him when they are against his interest, material and pertinent or relevant to an issue in the case. Such admissions are original, primary, independent and substantive evidence.

3. Evidence § 42c—

While declarations by a party to the record, who is one of several defendants, are competent against him when against his interest, material, pertinent and relevant, their admission is not prejudicial to his co-defendants, where the court rules that they are competent only against the defendant making them and instructs the jury not to consider them as against the other defendants.

4. Evidence § 28: Automobiles §§ 12a, 18a—

Allegations, in a complaint for alleged personal injuries to plaintiff by an automobile collision, and evidence supporting same, as to the presence of soldier-passengers in plaintiff's car and the fact that one of them was killed and others injured by the collision, were proper and competent solely to be considered by the jury with respect to the momentum of the vehicle at the time of the crash (which was admitted), the attendant destruction and death bearing on the question of negligence and proximate cause of the injury.

5. Automobiles §§ 18g, 24c: Negligence §§ 19a, 19b—

In an action to recover damages for alleged injuries to plaintiff resulting from an admitted automobile collision, where plaintiff's evidence tended to show that, at the time of the accident, the bus of the corporate defendants was being driven on the public highway, by the individual defendant, employee and agent of corporate defendants, at a reckless and high rate of speed (in excess of 45 miles per hour, no special hazard existing, G. S., 20-141) and out of control and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the bus to move over from its right-hand side to its left-hand side of the highway, in violation of G. S., 20-148, and immediately in front of plaintiff's automobile, a head-on collision resulting, and while plaintiff was offering his evidence, as an accommodation to the witness, a medical expert was allowed to testify for defendants, and then plaintiff completed his evidence and rested, defendant introducing no other evidence and also resting, upon motion by defendants for judgment as of nonsuit, G. S., 1-183, the motion was properly denied, there being ample evidence for the jury, and there being no sufficient evidence of contributory negligence; and it is not necessary to decide whether or not defendants' motion under G. S., 1-183, was aptly made.

6. Automobiles § 8—

The operator of a motor vehicle on a public highway may assume that other operators of motor vehicles will use reasonable care and caution commensurate with visible conditions, and that they will approach with their vehicles under reasonable control and will observe and obey the rules of the road. As between operators their duties are mutual and each may assume that others will comply with their obligations.

7. Evidence § 27—

Objection to the admission of evidence is rendered harmless by the subsequent admission, without objection, of evidence to the same effect as that objected to and bearing upon the identical matter.

8. Same—

Where evidence is improperly admitted and, at the conclusion of all the evidence, the court rules that the same is incompetent and instructs the jury not to consider it, the error in the admission of the evidence is cured.

APPEAL by defendants from *Sink, J.*, at February Term, 1945, of MOORE.

Civil action to recover for personal injuries and property damage allegedly resulting from actionable negligence of defendants.

These facts appear from admission in answer to amended complaint offered in evidence: Defendants Greensboro-Fayetteville Bus Line, Inc., and Queen City Coach Company are corporations operating motor buses in the transportation of passengers for hire over certain public highways in North Carolina. The latter company owns the capital stock and had some control over the operation and management of the defendant Greensboro-Fayetteville Bus Line. And on 17 July, 1943, one of the buses of Greensboro-Fayetteville Bus Line, transporting passengers for hire and operated and driven by its employee and agent, the defendant Franklin A. Broome, over and along U. S. Highway No. 1, between the towns of Sanford and Aberdeen near the town of Vass in said State, collided with an automobile proceeding northward along said highway, and operated by the plaintiff with whom several soldiers were riding.

Plaintiff alleges other facts briefly stated as follows: That on 17 July, 1943, in daytime and perfectly clear weather, he left his home at Aberdeen, traveling in his Plymouth Tudor sedan, and proceeding northward along U. S. Highway No. 1; that after leaving the vicinity of the town of Vass he picked up three soldiers, paratroopers of the U. S. Army, who were standing by the roadside soliciting a ride; that after so doing he continued north along said highway—traveling on his side of the road and at a lawful rate of speed and keeping a proper lookout; that when he reached a point about one mile of the town of Cameron a large "passenger omnibus" owned by corporate defendants, traveling

south of said highway, and driven by defendant Franklin A. Broome, approached him at a reckless, negligent, dangerous and unlawful rate of speed; that when in a short distance of plaintiff's automobile the bus suddenly and without warning, notice or signal left its proper and legal side of the public highway and swerved over to the plaintiff's side of the road, immediately in front of plaintiff's car and ran into the car of plaintiff with tremendous force and violence, totally wrecking and demolishing plaintiff's car, killing William H. Willett, one of the soldiers in the plaintiff's car, and seriously injuring the other soldiers, and dangerously, seriously and permanently injuring plaintiff in manner thereinafter alleged; and that the injuries sustained by plaintiff and damage to his automobile were directly and proximately due to and caused by the carelessness and negligence of the defendants (1) in that the bus was being driven and operated by the defendant driver (a) when he knew that the brakes, steering gear and other portions of the bus were defective and out of order, and (b) when he knew, or by the exercise of due diligence should have known, that the brakes, steering gear and other portions of the bus were so defective and out of order, as to cause the brakes to become locked and the driver to lose control of the bus, by reason of which it would swerve from one side of the road to the other, and (2) in that with such knowledge he negligently operated the bus in its defective condition at a rate of speed in excess of that prescribed by law, with the result that when in the immediate vicinity of plaintiff's automobile, the brake on said bus became locked, the steering gear unmanageable, and the driver lost control of the bus and permitted it to swerve over to plaintiff's side of the road immediately in front of plaintiff's car—crashing into it with terrific force, and (3) in that the defendants at the time caused and permitted said bus "to be operated . . . at a reckless and high rate of speed without keeping a proper and diligent lookout for the safety of others who might be traveling on said highway, and negligently and recklessly permitted said automobile to be moved from its right-hand side of the public highway to its left-hand side of the public road, and immediately in front of the automobile being driven at the time by plaintiff, as aforesaid . . ."

Defendants answering the amended complaint deny that the collision between the bus and the automobile of plaintiff was due to any negligence of the defendants, and aver that "by no wrongful act or omission on the part of defendants, the brakes on said bus became locked and the steering gear became unmanageable, and that the bus on account thereof left its right-hand side of the highway and proceeded over to the left-hand side, where the plaintiff, under the circumstances hereinafter set out, negligently drove his automobile into and against the bus of said defendant."

Defendants as further answer and defense plead contributory negligence of the plaintiff in the operation of his automobile in these respects, (1) in violation of statute regulating speed, C. S., 2621 (287), now G. S., 20-141, (2) in failing to keep proper lookout ahead for traffic upon the highway, (3) in carelessly driving car into the bus, (4) in driving without having car equipped with adequate brakes, and (5) in failing to seasonably apply such brakes as were upon his automobile immediately; and further avers that so far as defendants had any connection therewith the collision was an unavoidable accident.

Defendants further moved to strike out the portion of the allegations as to killing one of the soldiers and injuring the others, as being irrelevant, immaterial and improper. Denied. Exception.

The evidence offered by plaintiff tends to show this narrative of pertinent facts: The collision took place on U. S. Highway No. 1 at the crest of a very slight hill from which point the roadway can be seen for several hundred feet to the north and to the south. To the north of the point of collision the highway is straight and almost level for three hundred to four hundred yards. Just south of it the highway makes a very slight curve and goes down grade through a depression and "could be seen three hundred yards." Traveling toward the point from the south the wreck was seen from another automobile moving in same direction at a point half-way up this incline in the roadway. The highway is paved to the width of twenty-one feet and ten inches with "very good shoulders" about eight feet wide. There is a white line along the center of the pavement. The collision occurred about mid-afternoon—around four o'clock. "It was nice, pretty weather." Plaintiff's automobile, a 1940 Plymouth Tudor sedan, was traveling north on his right side—the east side of the center line. The bus, of approximately thirty-passenger capacity, had been traveling south on its right side—the west side of the center line, but gradually went to the left just before the collision and collided with plaintiff's automobile on the east side of the center line. As indicated by condition of automobile, by position of bus and automobile as they came to rest "tied together," and by several scars or marks on the pavement, the front end of the bus was driven up over the motor of the automobile, and on in past the dashboard—just about half-way inside the automobile—and the bus knocked the automobile backward from the point of collision—three or four feet east of the center line—across the highway on an angle of about forty-five degrees for a distance of eighty-eight feet entirely onto the shoulder of the road on the west side—the bus resting at an angle from center of highway out to the shoulder. The right front of the automobile was broken down. Plaintiff had head injury, concussion of the brain causing unconsciousness, four of his teeth were knocked out, his chest was bruised, his finger

cut to the bone, and his thigh injured, and his knee caps fractured. One soldier was killed and another painfully hurt. (Exception.) As plaintiff's automobile approached point of collision it was traveling at speed of between thirty and thirty-five miles an hour. The bus, when seen by one who heard the noise of the collision, "was going anywhere from 45 to 60, somewhere in there . . . making good time."

Testimony was offered that twenty or thirty minutes after the collision the driver of the truck, defendant Franklin A. Broome, in response to question by someone present at the scene as to "What happened?" stated, "I don't know. I must have gone to sleep." The court overruled objection thereto in so far as it relates to defendant Broome, and instructed and cautioned the jury that the statements could be considered as against him, but that they are not competent as to, and should not be considered against his co-defendants, Queen City Coach Company and Greensboro-Fayetteville Bus Line, Inc. Exception. And again testimony was offered that defendant Broome responded to inquiry of State Highway patrolman that "he didn't know what happened; that he didn't know how the accident happened and he didn't see the car until just at the instant they hit." This testimony was admitted as against defendant Broome, but not against his codefendants, and the court gave similar instruction as hereinabove just stated. Exception.

Plaintiff further offered evidence bearing upon the issue of damages—pertinent portions of which, to which exceptions are taken, are referred to in opinion hereinafter, and need not be incorporated in this statement of facts.

The case was submitted to the jury upon issues as to (1) negligence of defendants, (2) contributory negligence of plaintiff, and (3) damages. The jury answered the first "Yes," the second "No," and the third "$10,875.00."

From judgment thereon in favor of plaintiff, defendants appeal to Supreme Court and assign error.

U. L. Spence and J. Talbot Johnson for plaintiff, appellee.
Dameron & Young and M. G. Boyette for defendants, appellants.

WINBORNE, J. The record on this appeal discloses that while there are other allegations of negligence in the amended complaint as set out in the foregoing statement of the case, the trial in the Superior Court was had upon the alleged theory that at the time of the collision the bus of the corporate defendant was being driven by the individual defendant, employee and agent of corporate defendants, at a reckless and high rate of speed and out of control, and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the

bus to move from its right-hand side to its left-hand side of the public highway, and immediately in front of plaintiff's automobile. Hence, the liability of the corporate defendants is grounded solely, and is wholly dependent upon the negligence, if any, of the individual defendant under the doctrine of *respondeat superior. Leary v. Land Bank,* 215 N. C., 501, 2 S. E. (2d), 570, and numerous other cases.

In the light of this setting we have considered the several exceptions brought up by defendants, and grouped here according to related subjects, and find in them no prejudicial error.

I. Exceptions Nos. 4 to 11, both inclusive, and No 38 relate (1) to the admission in evidence of statements of witnesses as to declarations of defendant driver of the bus, made 20 or 30 minutes after the accident, as to what happened at the time of the accident, (2) to the instruction of the court as to the competency of such declarations, and (3) as to allegations of negligence upon which the case was tried.

It is not necessary to the competency of an admission by party to the record that it shall have been made as part of the *res gestæ.* It is a rule of evidence that admissions when offered as those of a party to the record are competent against him when the admissions are against his interest, material and pertinent or relevant to an issue in the case, and offered when the declarant is a party to the record at the time of the offer. Such admissions are original, primary, independent and substantive evidence of the facts covered thereby, and may be used to make out the opponent's case by proving or disproving the fact in issue. 10 C. J. S., 1091, Evidence, *et seq.* IV Wigmore on Evidence, 3d Ed., 1078.

In the light of these rules of evidence, declarations of the defendant driver of the bus were admitted not as a part of the *res gestæ,* but as declarations of a party then defendant to the record. They were against his interest, were material and pertinent to the issue of negligence on the theory upon which the case was being tried, and, hence, were competent against him. The court ruled that the declarations were not competent as against corporate defendants and so instructed the jury, and further cautioned and instructed the jury not to consider them as against the corporate defendants. Hence, it will not be held that the corporate defendants are prejudiced by the admission of the testimony.

II. Exceptions Nos. 1 to 3, both inclusive, and No. 33 relate (1) to the refusal of the court to strike the allegation in the amended complaint as to one soldier being killed and others injured in the collision, (2) to the admission of evidence to like effect, and (3) to the charge of the court in that respect. It is admitted in a portion of the answer, offered in evidence, that "several soldiers were riding" with plaintiff. And the court instructed the jury that "with respect to the soldiers and what may

have happened to them or may not have happened to them . . . is not a matter that concerns you. (The sole purpose that the soldiers, and what may have occurred to them, may be considered by you is with respect to the momentum of the vehicle at the time of the crash—if a crash you shall find there was—and it is admitted there was a crash. There should not be and there must not be any consideration given with respect to the soldiers or what may have happened to them in your verdict other than the consideration in the gathering of the facts for the purpose for which that testimony is allowed and that purpose is as the court has just given you.)" That part in parentheses is covered by exception.

The evidence is competent for the purpose for which it was admitted. See *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88, where the "attendant destruction and death," caused by the force with which the car in question ran into the truck there is said to establish the negligence of the driver of the car as the proximate cause of the injury. Hence, the allegations in the pleading and evidence pursuant thereto were proper for the purpose indicated.

III. Exception No. 28 is to refusal of motion for judgment as in case of nonsuit. G. S., 1-183. The record shows that, while the plaintiff was offering evidence and as an accommodation to the witness, Dr. Lenox Baker, a medical expert, was allowed to testify as a witness for defendants. Then plaintiff resumed the offering of evidence. But defendants introduced no other evidence. The record also shows these entries written one under the other after the narrative of the testimony of the last witness for plaintiff: "The plaintiff rests. The defendants rest." Then this entry follows: "The defendants, and each of them, now rests and each of them collectively and individually moves for judgment as of nonsuit upon the closing of the testimony. The motion is denied and defendants collectively and individually except."

Plaintiff makes the point that defendants having offered evidence were required under the statute, G. S., 1-183, to make a motion for judgment as in case of nonsuit at the close of plaintiff's evidence, and preserving exception thereto, to renew the motion at close of all the evidence, and having made the motion only at the close of all the evidence—lost their rights under the statute. But be that as it may, we need not here decide, for we are of opinion and hold that timely motions for judgment as of nonsuit would have been unavailing to defendants for that the evidence taken in the light most favorable to plaintiff as we must do in such cases is abundantly sufficient to take the case to the jury on the issue as to negligence of defendants. And we agree with the court below in instructing the jury that there is no sufficient evidence to support an affirmative finding on the issue as to contributory negligence of plaintiff, to which Exception No. 39 relates. The court could not have held as a matter of

law, under such circumstances, that the plaintiff should be nonsuited for his contributory negligence.

There is evidence that the speed of defendants' bus immediately before the collision was in excess of forty-five miles per hour, and, therefore, *prima facie* evidence that the speed was not reasonable or prudent, and that it is unlawful—there being no evidence of special hazard existing, G. S., 20-141. There is also evidence that the driver of the bus was not passing the plaintiff's car on the right, nor giving to it at least one-half of the main traveled portion of the roadway as nearly as possible, in violation of the statute relating to meeting of vehicles. G. S., 20-148. Violation of this latter statute would be negligence *per se*. *Tarrant v. Bottling Co.*, 221 N. C., 390, 20 S. E. (2d), 565.

Moreover, it is a general rule of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty requires that the operator be reasonably vigilant, and that he must anticipate and expect the presence of others. And, as between operators so using the highway, the duty of care is mutual, and each may assume that others on the highway will comply with this obligation. 5 Am. Jur., Automobiles, sections 165, 166, 167. *Murray v. R. R.*, 218 N. C., 392, 11 S. E. (2d), 326; *Reeves v. Staley*, 220 N. C., 573, 18 S. E. (2d), 239; *Tarrant v. Bottling Co., supra*. And in the present case there is evidence from which the jury might find that in the operation of the bus there was a failure in the performance of such duties.

Furthermore, as to the alleged contributory negligence of plaintiff: "One is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption that others will exercise care for their own safety." 45 C. J., 705. Indeed, the operator of a motor vehicle on a public highway may assume that other operators of motor vehicles will use reasonable care and caution commensurate with visible conditions, and that they will approach with their vehicles under reasonable control, and that they will observe and obey the rules of the road. See *Shirley v. Ayers*, 201 N. C., 51, 158 S. E., 840, and *Murray v. R. R., supra*, where other authorities are cited.

IV. Exceptions Nos. 14 to 20, both inclusive, and 25 to 27, both inclusive, are to the admission of evidence bearing on the issue of damages. The record shows that in the main other evidence to same effect

and bearing upon identical matter was admitted without objection. This rendered harmless the admission of the evidence to which exception is taken. *Ledford v. Lumber Co.,* 183 N. C., 614, 112 S. E., 421; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Ingle v. Green,* 202 N. C., 116, 162 S. E., 476; *Gray v. High Point,* 203 N. C., 756, 166 S. E., 911, and numerous other cases. But in any event, we do not find the evidence, admitted over objection, to be incompetent. It was relevant particularly to element of diminished earning capacity within the measure of damages recoverable as result of personal injury. *Ledford v. Lumber Co., supra; Smith v. Thompson,* 210 N. C., 672, 188 S. E., 395.

V. Exceptions Nos. 21 to 24, both inclusive, relate to admission of evidence as to value of a watch and a suitcase and its contents lost by plaintiff on the occasion in question. However, at the conclusion of all the evidence the court ruled that evidence in these respects is incompetent, and instructed the jury that in no event should recovery be allowed for the loss of these articles. By such action any error in the admission of the evidence is cured. See *Gray v. High Point, supra,* and cases cited.

VI. Exceptions Nos. 29 to 32, both inclusive, 34 to 37, both inclusive, and 40 to 43½, both inclusive, relate (1) to refusal of requests for instruction, (2) to statement of contentions to which no objection was made at the time, (3) to charge of the court (a) in defining actionable negligence, and (b) on certain phases of law bearing on damages recoverable, and (4) to failure to define and explain the term "greater weight of evidence." Careful consideration of each of these exceptions in the light of the theory of the trial, and of the charge as a whole, fails to disclose prejudicial error.

VII. All other exceptions are either formal or have been abandoned and require no discussion.

In the trial we find

No error.

STATE v. CHARLES T. SUTTON.

(Filed 6 June, 1945.)

1. Criminal Law §§ 31f, 41e: Evidence § 18—

Evidence of prosecutrix, in a trial on an indictment charging rape, that, when confronted with defendant in the sheriff's office the day after the alleged crime was committed, she said "that is the man," and that defendant made no denial or reply, was clearly competent for the purpose of corroborating the witness' former testimony that defendant was the man who assaulted her.

2. Evidence § 27: Criminal Law § 48b—

Evidence competent for one purpose is, in the absence of a request to restrict it to the one purpose, admissible generally; and the court, in the absence of a request to restrict, is not required to do so.

3. Rape § 1c—

Prosecutrix' evidence, on a trial for rape, as to what became of her pants and sanitary pad, was competent to show why these articles were not introduced in evidence.

4. Same—

The exclusion of testimony of prosecutrix, on cross-examination, relative to her testimony theretofore given as to whether she knew the penalty for the crime of rape, was not prejudicial to defendant.

5. Same: Criminal Law § 41e—

The testimony of a witness, as to her impressions and suggestion by her that the prosecuting witness, in a trial for rape, go to a doctor for examination, was competent when offered for the purpose of corroborating the prosecutrix, where the court fully instructed the jury that it should receive the testimony only for that purpose and not as substantive evidence, if they found it did in fact so corroborate the evidence of prosecutrix.

6. Criminal Law § 32a—

There was no error, on trial for rape, in excluding evidence, sought to be elicited from a witness on cross-examination by defendant's counsel, as to the crowded condition of a certain highway about the time of the alleged crime, it nowhere appearing that there were any people at or near the scene of the alleged crime at the time of its commission and all the evidence for the State tending to show that such crime was committed on a side road, off the said highway.

7. Criminal Law § 41b—

An exception by defendant, in a prosecution for rape, to the court's permitting a State's witness, over objection, to testify to a statement made to him by defendant's sister-in-law, in the absence of defendant, as to where defendant worked, is untenable for the reason that the statement assailed was in direct answer to an interrogatory propounded by defendant's counsel.

8. Criminal Law § 41e—

Where the solicitor, in a criminal prosecution, objects to questions asked a witness, for the purpose of corroborating the defendant before the defendant has been upon the stand, it is clearly within the discretion of the court as to whether or not it will admit such evidence, even after assurance that defendant will be examined as a witness.

9. Appeal and Error § 29—

Exceptions to evidence are deemed abandoned, when the party so excepting fails in his brief to give reason, authority or argument in support thereof.

10. Rape § 1d—

In a criminal prosecution for rape, where the State's evidence tends to show that prosecutrix was waiting for a bus to go to her work in a near-by town, when the defendant stopped his car and offered to give her a ride therein to her work, and on her acceptance took her instead off the main road to town and into a side road, there feloniously assaulting and ravishing her, threatening her with death should she tell anyone, and thereafter dropping her near her work to which she immediately went and told her fellow employees what had occurred and the next day identified the defendant on sight in the sheriff's office, there is ample evidence for a jury, and motion to nonsuit and to dismiss the action, G. S., 15-173, properly denied.

11. Criminal Law §§ 54b, 59, 65—

Where there is sufficient evidence to support the verdict and judgment, in a capital case, exceptions to the court's refusal to set aside the verdict and to the judgment, are untenable, the granting of the motion to set aside the verdict being in the discretion of the court and the verdict furnishing sufficient predicate for the judgment.

12. Criminal Law § 53b—

An exception, that the court did not state the law relative to circumstantial evidence, is untenable where the State did not rely primarily on circumstantial evidence, but upon direct evidence of positive identification of defendant and of the fact that defendant committed the crime of rape upon prosecutrix.

13. Same—

Recapitulation of all the evidence is not demanded, and the requirements of the statute in this respect are met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. An omission from the charge of an important feature of the evidence should be called to the attention of the court before the verdict is returned.

APPEAL by defendant from *Burgwyn, Special Judge,* at October Special Term, 1944, of NEW HANOVER.

The defendant was tried upon a bill of indictment charging that he "did unlawfully, wilfully and feloniously ravish and carnally know Mrs. Walter Sansbury, a female, by force and against her will."

The State offered evidence, including the testimony of the prosecuting witness, which tended to show that on 1 August, 1944, the prosecuting witness was waiting to catch a bus at the bus stop in Maffitt Village at about 3:00 o'clock p.m., to come to her work with the Western Union Telegraph Company in Wilmington; that while she was standing at the bus stop the defendant drove up in a Dodge automobile and offered to bring her into Wilmington and she accepted his offer and got into his automobile with the defendant; that she told defendant where she was going, and defendant instead of taking her to her work in Wilmington

turned off the highway into a side road, and there by force and against her will had carnal intercourse with her in the automobile; that she protested and defendant threatened to kill her if she told anyone of what he had done; that defendant then drove her into Wilmington and let her out of his automobile near the telegraph office where she worked; that she went into the telegraph office and there told her fellow employees of what had happened; that the next day in the sheriff's office she, the prosecuting witness, identified the defendant as the man who had assaulted her.

The defendant offered evidence, including his own testimony, which tended to show that he, in company with his brother and another, on 31 July, 1944, left Wilmington for Fort Bragg for the purpose of purchasing a truck from the Government, that he spent the night of 31 July at the home of another brother, Major Sutton, about 70 miles from Fort Bragg, and left there between 9 and 9:30 the next morning and went in to Fort Bragg, and then and there found that the truck had been sold, and they started back home, leaving Fort Bragg about 12 or 12:30 o'clock, losing about 40 minutes between Fort Bragg and Fayetteville when they stopped to lend their jack to a man on the highway; they got to Fayetteville and stayed there doing some shopping and seeking to have some repairs made on the car, and left Fayetteville about 2:35 o'clock p.m., and came on until they got within 25 or 30 miles of Wilmington and stopped at a place called Acme at about 4:00 o'clock to get something to eat; they then came directly to Wilmington and went to the defendant's brother's store, getting there about 10 minutes after five o'clock, and defendant took his sister-in-law and two children to their home on Vance Street, Maffitt Village, and then defendant immediately came back to his room and took a bath; that defendant was not in Wilmington between the afternoon of 31 July, 1944, and 10 minutes after five o'clock 1 August, 1944; that between 2:35 o'clock p.m., 31 July, and 5:10 o'clock p.m., 1 August, he was on the road between Fayetteville and Wilmington, and the distance between these two towns is about 90 miles; that the first the defendant knew of the accusation against him was when he was informed thereof by an officer on the afternoon of 2 August, 1944, and was at the same time warned by the officer that anything he said would be used against him in court.

The jury returned a verdict of "Guilty of an Assault with intent to Commit Rape," and from 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.

Rivers D. Johnson for defendant, appellant.

SCHENCK, J. This case presented a clear-cut question of fact for the jury's decision, namely, was the defendant in or near Wilmington between 3 and 5 o'clock on the afternoon of 1 August, 1944, and did he commit an assault upon the prosecuting witness at that time? This question, by their verdict, was answered by the jury in the affirmative. Upon appeal from the judgment of imprisonment predicated on the verdict the defendant in his brief sets forth the assignments of error relied upon by him for reversal or a new trial, and we will endeavor to discuss the assignments in the order they are contained in appellant's brief.

Exceptions Nos. 1 and 2 are to the court's allowing the prosecuting witness, over objection by defendant, to testify that when confronted with the defendant in the sheriff's office the day after the alleged assault upon her she said "that was the man," and that the defendant made no denial or reply. Without deciding the question as to whether the failure to make denial or reply by the defendant of such accusation in view of the statements made to the defendant by the deputy sheriff that what he said would be used against him in court, could be considered by the jury as evidence against him, the evidence objected to was clearly competent for the purpose of corroborating the witness' former testimony that the defendant was the man who had assaulted her, and being competent for one purpose was admissible generally in the absence of a request that the evidence be restricted. Rule 21, Rules of Practice, Supreme Court, 221 N. C., 558; *S. v. Tuttle,* 207 N. C., 649, 178 S. E., 76; *S. v. Casey,* 212 N. C., 352, 193 S. E., 411; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284; *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469.

Exception No 3 was to the failure of the court to exclude the testimony of the prosecuting witness as to what became of her pants and sanitary pad. The effect of this testimony was simply that the pad had disappeared and that her sister had burned the pants. This evidence was competent to explain why these articles were not introduced in evidence. In any event, it is not perceived how this evidence could be prejudicial to the defendant, and the defendant in his brief states no reason or argument nor cites any authority in support of the exception and therefore it should be taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562-3.

Exceptions Nos. 4 and 5 are to the exclusion of the testimony of the prosecuting witness, on cross-examination, relative to her testimony theretofore given in evidence as to whether she knew the penalty for the crime of rape. It is not perceived how the exclusion of this evidence was in any way prejudicial to the defendant, and also no reason or argument is stated nor authority cited in the appellant's brief to support

the exceptions, and they should therefore be taken as abandoned. Rule 28, *supra.*

Exceptions Nos. 6 and 7 relate to the testimony of the witness, Mrs. Patterson, who was allowed to testify as to her impressions and suggestion by her that the prosecuting witness go to a doctor for examination. This witness was offered for the purposes of corroborating the prosecuting witness and the court fully instructed the jury that it should receive her testimony only for that purpose and not as substantive evidence if they found it did in fact tend to corroborate the prosecuting witness' testimony. The evidence assailed by the exceptions appears to have been competent for the purpose of corroborating the prosecuting witness, but, however this may be, the jury were definitely instructed not to consider it if it did not corroborate her—that it was not substantive evidence. These exceptions cannot be sustained.

Exception No. 8 was to the exclusion of certain evidence, on cross-examination, of the witness Yopp, a deputy sheriff, sought to be elicited by counsel for the defendant to show the condition of the storm and of the traffic conditions on the Carolina Beach Road, when the people were being evacuated from the beach, and to show that there were many people on the highway. The record discloses that the witness, if permitted to answer the interrogatories propounded would have answered that he knew the army had ordered trucks to evacuate the people on the beach, but he did not see any on the road, they did actually evacuate people from the beaches, both the Carolina and the Wrightsville Beach. This place was out on the Carolina Beach Road. The exclusion of this testimony was harmless as it nowhere states that there were any people at or near the scene of the alleged crime at the time of its commission which all the evidence of the State tends to show was about 3:30 o'clock p.m., off from the Carolina Beach Road.

Exception No. 9 was to the court's permitting the witness Yopp, deputy sheriff, over objection by defendant, to testify to a statement made to him by Mrs. B. F. Sutton, sister-in-law of defendant, in the absence of the defendant as to where the defendant worked. This exception is untenable for the reason that the statement assailed was in direct answer to an interrogatory propounded by the defendant's counsel. The witness was asked by the counsel for defendant to explain why he called the shipyard and dry dock when he says he already knew he (defendant) worked at the Ice Cream Company, and he replied that Mrs. B. F. Sutton stated she thought her brother-in-law worked at the dry docks. The defendant in his brief states no reason or argument nor cites any authority in support of the exception and therefore it should be taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, *supra;*

and further it is not perceived how the evidence involved was in any wise prejudicial to defendant's cause.

Exception No. 11 was to the court's sustaining an objection by the State to the testimony of Mrs. B. F. Sutton, a sister-in-law of the defendant, to the effect that the defendant told her that he had been to Fayetteville. The evidence was offered for the purpose of corroborating the defendant, although the defendant had not at the time been examined as a witness. The court had prior thereto permitted the witness to testify in advance in corroboration of the defendant in regard to certain matters, upon the assurance that the defendant would be placed upon the stand as a witness later on, but when the solicitor objected to certain questions asked the witness in corroboration of the defendant it was clearly within the discretion of the court as to whether to admit the evidence in advance of the testimony which it was offered to support. The cause of the defendant could have been in no wise prejudiced by the exclusion of the evidence, since it was competent only for the purpose of corroboration and the witness whom it was offered to corroborate had not testified. The defendant could have obtained the benefit of this evidence by introducing it after the witness whose testimony she sought to corroborate had testified.

Exception No. 12 was to the exclusion of a letter from the Treasury Department. The defendant in his brief states no reason or argument nor cites any authority in support of his exception and it is therefore taken as abandoned. Rule 28, *supra.*

Exception No. 13 relates to an interrogatory by the solicitor to the witness M. C. Sutton as to what time he (witness) and the defendant got to Fort Bragg. No reason or argument is stated nor any authority cited in defendant's brief in support of this exception. It is therefore taken as abandoned. Rule 28, *supra.*

Exceptions Nos. 10 and 14 are to the court's refusal to sustain defendant's motion to nonsuit and to dismiss the action duly lodged under G. S., 15-173. These exceptions are untenable for the reason that the testimony of the prosecutrix alone was sufficient evidence to carry the case to the jury upon the charge in the bill of indictment.

Exceptions Nos. 15 and 16 relate to the court's refusal to allow the defendant's motion to set aside the verdict and to the judgment imposed. These exceptions are untenable for the reason that there was ample evidence to support the verdict and the verdict supported the judgment; and the granting of the motion to set aside the verdict was in the discretion of the court and the verdict furnished sufficient predicate for the judgment.

Exception No. 17 relates to the contention of the defendant that the court failed in its charge to review the evidence and to explain to the

jury the defendant's contention as to why he did not deny the prosecuting witness' identification of him as the perpetrator of the crime charged in the bill of indictment. We are of the opinion that the court in its charge gave the defendant the full benefit of all the evidence in his favor, and at the end of the charge the court specifically inquired if there were further contentions by the defendant and the counsel for defendant stated that there were not. The evidence which the defendant contends should have been elaborated upon as to the silence of the defendant when identified by the prosecutrix as her assailant was competent for other purposes than identification, as aforesaid for the purpose of corroborating the prosecutrix, and being competent for one purpose it was, in the absence of a request to restrict it to the one purpose, admissible generally, and the court, in the absence of a request to restrict the purpose of the evidence, was not required to do so.

Exception No. 18 relates to the defendant's contention that the court did not state the law relative to circumstantial evidence. This exception is untenable for the reason that the State did not rely primarily upon circumstantial evidence, but upon direct evidence of positive identification of the defendant and of the fact that the defendant committed the crime of rape upon the prosecutrix. *S. v. Wall,* 218 N. C., 566, 11 S. E. (2d), 880, and cases there cited.

In *S. v. Graham,* 194 N. C., 459, 140 S. E., 26, it is written: ". . . that recapitulation of all the evidence is not demanded and that the requirements of the statute in this respect are met by presentation of the principal features of the evidence relied on respectively by the prosecution and the defense. An omission from the charge of an important feature of the evidence should be called to the attention of the court before the verdict is returned. . . . *S. v. Grady,* 83 N. C., 643; *S. v. Pritchett,* 106 N. C., 667; *Boon v. Murphy,* 108 N. C., 187; *S. v. Ussery,* 118 N. C., 1177."

The defendant has been convicted of a heinous and sordid crime but is fortunate that he was found guilty of only a lesser degree of the offense charged in the bill of indictment. The jury might well have found him guilty of the capital offense of rape, for as in *S. v Hairston,* 222 N. C., 455, 23 S. E. (2d), 885, the defendant does not controvert the fact that the prosecutrix was raped, but merely offers evidence of an alibi, so that the jury might well have returned a verdict of guilty of the capital offense.

On the record we find

No error.

JAMES S. YOUNG v. MARY STEWART YOUNG.

(Filed 6 June, 1945.)

1. Divorce §§ 3, 4—

In an action for divorce the affidavit, required by the statute in connection with the complaint, is jurisdictional, G. S., 50-8, and a complaint accompanied by a false statutory affidavit, if it be properly so found, would be regarded as insufficient to empower the court to grant a decree of divorce; and the correct procedure for relief against the judgment is by motion in the cause.

2. Divorce §§ 8, 10—

On motion in the cause by defendant to set aside a judgment of divorce, granted September, 1944, for alleged two years separation by mutual consent, on the ground that the judgment was fraudulently obtained, where affidavits on the part of the wife, the defendant, show that the parties were married, in Atlanta, Ga., where she lived, on 9 June, 1941, and lived together in Atlanta until plaintiff entered the U. S. Navy (to which he still belongs), when defendant remained with her parents, with plaintiff's approval, spending portions of her time with her husband at various places, visiting his parents, living with plaintiff in 1944 in Washington, where their friends thought them a happy married couple, that she received an allotment from his pay and plaintiff paid her expenses on trips, wrote regularly and sent her checks as late as 29 June, 1944, and she heard of this action first on 1 August, 1944; while plaintiff contents himself with the categorical statement that he did not live with defendant as husband and wife after 15 June, 1942, admitting support and referring to the separation by mutual agreement only as agreed to by defendant in April, 1944, without denying any of the instances of association in defendant's affidavits—there is no sufficient evidence of the separation by mutual agreement and the living separate and apart as is contemplated by statutes, G. S., 50-5 (4), and G. S., 50-6, and plaintiff has practiced imposition upon the court.

3. Divorce §§ 5, 8—

As the allegations in a petition for divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise, the court cannot grant a decree.

4. Divorce § 2a: Appeal and Error § 8—

Where a suit for divorce is tried on the theory of separation by mutual consent, to establish his cause of action, 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. There can be no voluntary separation without the conscious act of both parties.

5. Divorce § 2a—

For the purpose of obtaining a divorce under G. S., 50-5 (4), or G. S., 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and

wife living together, nor when the association between them has been of such a character as to induce others, who observed them, to regard them as living together in the ordinary acceptation of that descriptive phrase.

APPEAL by defendant from *Clement, J.,* at November Term, 1944, of FORSYTH. Error and remanded.

Motion in the cause by the defendant to set aside the judgment in a divorce action, on the ground that the judgment was fraudulently obtained.

At September Term, 1944, of Forsyth Superior Court plaintiff was granted an absolute divorce from defendant for the alleged cause of two years separation by mutual agreement. Service was had upon defendant by publication begun 20 June, 1944, it being alleged that plaintiff was a resident of Forsyth County, North Carolina, and that the defendant was a resident of the State of Georgia. Defendant, who had no actual notice of the divorce action until after verdict and judgment, on 18 September, 1944, moved to vacate the judgment, alleging fraud and imposition upon the court and the defendant, in that plaintiff was not a resident of North Carolina, and that there had been no separation, by agreement or otherwise, up to the time of the divorce.

Upon the affidavits offered the court made certain findings of fact, and thereupon denied defendant's motion. Defendant appealed.

J. M. Wells, Jr., for plaintiff.

W. R. Bentley, Archie Elledge, and Richmond Rucker for defendant.

DEVIN, J. The defendant's motion to vacate the judgment against her in the divorce action was based upon allegations of lack of jurisdiction for that plaintiff was not a resident of North Carolina, and also for intrinsic fraud in the procurement of the judgment for that it was based upon false and fraudulent allegation of separation by mutual agreement between plaintiff and defendant since 15 June, 1942.

In an action for divorce the affidavit required by the statute in connection with the complaint is jurisdictional, G. S., 50-8, and a complaint accompanied by a false statutory affidavit, if it be properly so found, would be regarded as insufficient to empower the court to grant a decree of divorce; and the correct procedure for relief against the judgment is by motion in the cause. *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5.

The court below denied defendant's motion, and based its ruling upon the findings of fact set out in the order. The question presented by defendant's appeal is whether there was evidence to support the findings of fact upon which the ruling was based.

It may be conceded that there was evidence to sustain the finding that the plaintiff, at the time of the institution of the divorce action, was a resident of Forsyth County. However, the defendant contends that the finding contained in the court's order "that the defendant nowhere in her affidavits alleges that she lived with the plaintiff as husband and wife within two years next preceding the institution of this action," is not borne out by the record, and that the finding that plaintiff and defendant had not so lived together within that period was contrary to the facts disclosed by the testimony.

An examination of the record leads us to the conclusion that the defendant's exception on this point is well taken, and that the court was inadvertent to the import of the defendant's evidence, and that his ruling was based upon findings not warranted by the evidence.

It appears from the affidavits offered by the defendant, in support of her motion, that she was a resident of Atlanta, Georgia, and that plaintiff, whose parents resided in Winston-Salem, North Carolina, was a student at Georgia School of Technology; that upon the day of his graduation, 9 June, 1941, plaintiff and defendant were married, and plaintiff remained in Atlanta, employed by a local power company, until 26 June, 1941, when he entered the U. S. Navy, and still is a member of that branch of the armed forces; that defendant continued to live with her parents in Atlanta though she has spent a portion of the time since with her husband at the various places where he was on shore duty; that in June, 1942, she visited his parents in Winston-Salem, and in June and July and on numerous trips thereafter visited him in Washington; that he sent her checks for her support each month and wrote regularly; that in April, 1944, plaintiff made a brief visit to Atlanta and defendant saw him at her home and at his hotel; that in May, 1944, defendant again went to Washington and her husband met her and they stayed at the Hotel Ambassador for about four days, and then for several days she stayed with a friend in Washington (Mrs. Grainger), where her husband came frequently to see her; that her friend testified "that they both appeared to be very happily married and their actions toward one another were actions that this deponent observed as being two young people very much in love and very fond of each other"; that the expenses of this and other trips were paid by plaintiff; that plaintiff told defendant he was going to be sent away on duty, and wanted her to remain with her parents; that during this visit she told him as she had nothing to do she wished to go into the service, but her husband objected and told her if she would not do so he would have her allotment increased, and at his instance she agreed and returned to Atlanta; that she received checks and letters from him each month, the last written from Miami 29 July, 1944, being received 1 August; that he gave her no notice that

he intended to or was entering suit for divorce; that not hearing from him after 1 August, she made inquiries and then for the first time learned of the divorce action.

The plaintiff, in his answer to the defendant's motion, contents himself with the categorical statement that he did not live with her as husband and wife after 15 June, 1942, but does not contradict the instances of association set out with particularity in defendant's affidavits, and admits he sent her checks each month and wrote her up to 29 July, 1944. The only reference made by him to separation by mutual agreement is that on the occasion of his visit to her in Atlanta in April, 1944, he says "she agreed to the fact that the separation had existed since 15 June, 1942."

Upon this point the court held "that the evidence concerning the mutuality of the separation is conflicting, but the evidence is undisputed that the plaintiff supported defendant until he was granted a divorce from her and the mutuality of the separation is immaterial."

It is apparent that the court was inadvertent to the language of the complaint in the divorce action, G. S., 50-5 (4); *Parker v. Parker,* 210 N. C., 264, 186 S. E., 346; *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5; *Williams v. Williams,* 224 N. C., 91, and that the ruling was based upon a misapprehension of the import of the evidence bearing on the question of separation. *Dudley v. Dudley, ante,* 83.

"As the allegations in a petition for divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise, the court cannot decree a divorce." Headnote in *Foy v. Foy,* 35 N. C., 90.

In *Byers v. Byers,* 222 N. C., 298, 21 S. E. (2d), 898, the effect of the Act of 1937, now G. S., 50-6, upon actions for divorce for two years separation was under consideration, and it was there held, in an opinion by *Justice Seawell,* that as to actions brought under this Act proof of plaintiff's residence in the State and that the husband and wife have lived separate and apart for two years would entitle the plaintiff to a divorce—except where the separation was caused by the wrongful acts of the plaintiff as pointed out in *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466. See also *Moody v. Moody, ante,* 89, opinion by *Justice Schenck.* This statement of the law as to actions under G. S., 50-6, was upheld in *Taylor v. Taylor, ante,* 80. But in the opinion in that case by *Chief Justice Stacy* it was said: "Of course, the plaintiff may particularize as to the character of the separation by alleging it was by mutual consent, abandonment, etc., in which event if material to the cause of action the burden would rest with the plaintiff to prove the case *secundum allegata,*" citing *Williams v. Williams,* 224 N. C., 91. In *Williams v. Williams, supra,* where the plaintiff relied upon separation

by mutual agreement this Court said, in an opinion by *Justice Barnhill,* "To establish his cause of action, based on separation by mutual consent, plaintiff must not only show that he and 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 parties." And in *Byers v. Byers,* 222 N. C., 298, 22 S. E. (2d), 902, it was said: "There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period." *Byers v. Byers,* 222 N. C., 298, 22 S. E. (2d), 902.

In *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549, it was said by *Justice Winborne,* writing the opinion for the Court, "the case was tried upon the theory advanced by plaintiff that their separation was by mutual consent."

Separation, as this word is used in the divorce statutes, implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. For the purpose of obtaining a divorce under G. S., 50-5 (4), or G. S., 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase. This was the holding in *Dudley v. Dudley,* 225 N. C., 83, in an opinion written for the Court by *Justice Denny.* Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties. *Dudley v. Dudley, supra; Williams v. Williams, supra; Woodruff v. Woodruff, supra.*

In the case at bar we think the frequent association of the parties, such as the exigencies of the husband's service in the Navy permitted, the continued exercise by him of marital authority and responsibility, together with total lack of evidence of estrangement or cause for estrangement between these young people, viewed in connection with the plaintiff's concealment from her of his action for divorce for the cause alleged and verified in his complaint, would seem to afford ground for her contention that the plaintiff, for some reason undisclosed, has dealt unfairly with his wife, and that under the forms of law he has practiced imposition upon the court, to her injury.

In justice to the able judge who heard this case below, it may be said that his ruling was made before the opinions of this Court in *Dudley v. Dudley* and *Taylor v. Taylor* were available.

The cause is remanded for further proceedings in accord with this opinion.

Error and remanded.

BOLICH-HALL REALTY & INSURANCE COMPANY v. C. C. DISHER.

(Filed 6 June, 1945.)

1. Brokers and Factors § 10—

A prime requisite, for the recovery of commission from his principal by a rental broker, is that the broker must find, while his contract of agency is still in effect, a prospect ready, able and willing to lease the premises on the terms specified by the owner in his contract with the broker.

2. Brokers and Factors § 11—

It is not enough that a broker has devoted his time, labor, or money to advance the interest of his employer. Unsuccessful efforts, however meritorious, afford no ground for action. Where his acts bring about no agreement or contract between his employer and a purchaser, by reason of his failure, the loss must be all his own.

3. Principal and Agent § 4—

An agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party, provided the contract contains no time limit and the revocation is made in good faith. The only exception is an agency coupled with an interest. and that must be an interest in the subject of the agency, and not merely something collateral, as commissions or compensation for making the sale.

4. Principal and Agent § 6: Brokers and Factors § 12—

In an action by a broker against his principal for commissions, where all the evidence showed that the plaintiff had a right to lease the defendant's property for $385 per month, less 5% commissions, and that the best offer plaintiff was able to get, before the agency was revoked, was $350 per month, a motion for judgment as in case of nonsuit, made at the close of plaintiff's evidence, and renewed at the close of all the evidence, G. S., 1-183, should have been allowed.

APPEAL by defendant from *Clement, J.*, at November Term, 1944, of FORSYTH.

This is a civil action by a broker against a real estate owner to recover commission for allegedly procuring a lease of real estate to the North Carolina Baptist Hospital, Inc., which the owner, the defendant, subsequently leased directly to said lessee. The lease of the property involved, the Victoria Court Apartments, is admitted by the defendant, the owner thereof, but he denies liability for commission to the plaintiff, claiming that he himself made a direct lease of the property to said lessee.

From verdict and judgment for the plaintiff, the defendant appeals, assigning error.

Felix L. Webster for plaintiff, appellee.

W. H. Boyer, Fred S. Hutchins, and H. Bryce Parker for defendant, appellant.

SCHENCK, J. The defendant demurred to the evidence and moved to dismiss the action or for judgment as in case of nonsuit when the plaintiff had introduced its evidence and rested its case, and renewed his motion when all the evidence on both sides was in, G. S., 1-183, which motion was refused and the defendant preserved exception. We are constrained to hold that such exception is well taken.

A prime requisite for recovery by a broker in a case of this nature is that the broker must find, while his contract of agency is still in effect, a prospect ready, able and willing to lease the premises on the terms specified by the owner in his contract with the broker.

The evidence tends to show, and no more, that the agreement between the plaintiff, the broker, and the defendant, the real estate owner, gave the plaintiff a right to lease the apartment house of the defendant for $385.00 net per month, less 5% commission to the broker, and that the best offer the plaintiff was ever able to procure was for a lease of said premises at $350.00 per month. "A broker who negotiates a sale of an estate is not entitled to his commissions until he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and vendor." *Mallonee v. Young,* 119 N. C., 549, 26 S. E., 141. To the same effect is *Trust Co. v. Adams,* 145 N. C., 161, 58 S. E., 1008, where it is written: "It is not enough that the broker has devoted his time, labor, or money to advance the interests of his employer. Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts bring about no agreement or contract between his employer and the purchaser, by reason of his failure in the premises, the loss of expended and unremunerated effort must be all his own. He loses the labor and skill used by him which he staked upon success." See also *McCoy v. Trust Co.,* 204 N. C., 721, 169 S. E., 144. The law relative to the negotiation of a lease of real estate by a broker is the same as that relative to the sale of real estate by a broker.

It is established by the evidence of both the plaintiff and the defendant that the plaintiff never secured a prospect to lease the premises at $385.00 per month, and, not having done so, it is not entitled to recover commissions.

Furthermore, it appears from the evidence of the plaintiff itself that before the plaintiff produced any prospective lessee the defendant re-

voked the agreement he had with the plaintiff relative to the leasing of the premises, such revocation being a letter from the defendant to the plaintiff dated 18 May, 1942, introduced by the plaintiff. It is well settled law that the owner of real estate may revoke a broker's authority to sell his real estate, or to lease it, at any time prior to the procurement of a prospective purchaser or lessee, provided there is no time limit fixed in the agreement, and the revocation is made in good faith. "But aside from that, an agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party. The only exception is an agency coupled with an interest, and that must be an interest in the subject of the agency, and not merely something collateral, as commissions or compensation for making sale." *Abbott v. Hunt,* 129 N. C., 403, 40 S. E., 119. See also *Trust Co. v. Adams, supra; Olive v. Kearsley,* 183 N. C., 195, 111 S. E., 171. In the instant case not only was no time limit specified in the brokerage agreement, but the president of the plaintiff company testified he did not want such a limit therein and had expressly had it excluded.

"An owner has a right to terminate the authority of the broker at any time before the broker, performing his undertaking or complying with the terms of the offer, has fully earned his commissions." *Walsh v. Grant,* 152 N. E., 884 (Mass.). "Ordinarily, unless a contract of employment is coupled with an interest or is given for a valuable consideration, the authority of the agent may be terminated at will by giving notice, subject only to the requirement that it be given in good faith, and before the broker finds a purchaser." Walker, Law of Real Estate Agency, section 15.

It is the established law in this jurisdiction that a real estate broker is not entitled to commissions or compensation unless he has found a prospect, ready, able and willing to purchase in accordance with the conditions imposed in the broker's contract, and, further, that the owner may revoke the agency at any time without liability, provided the broker's contract contained no time limit and the revocation was made in good faith. Such being the law, and there being no evidence in the record tending to show that the plaintiff ever found or tendered a prospect willing to lease the property involved for $385.00 per month as stipulated in the broker's contract, and the evidence of both plaintiff and defendant tending to show that the brokerage contract was revoked before any contract of lease was made by the defendant with the North Carolina Baptist Hospital, Inc., and there being no evidence to the effect that the said hospital corporation would ever have leased the premises upon the basis named in the brokerage contract, namely, $385.00 per month, the plaintiff's action must fail, and the court's refusal to sustain the defendant's motion to dismiss the same must be held for error.

The plaintiff contends that the evidence tends to show that its efforts were the procuring cause of the lease of the premises finally made by the defendant to the hospital corporation, but, however this may be, there is no evidence that the premises was ever leased for the figure named in the brokerage contract, that is, upon the principal's terms. There was therefore a failure on the part of the plaintiff to accomplish its principal objective under the broker's contract, namely, to procure a lessee ready, able and willing to lease the premises for $385.00 per month, and failing in this it is not entitled to recover any commission, although his efforts may have been advantageous to the owner. In *Mallonee v. Young, supra,* it is written: "We can see that the plaintiff (the broker) rendered some services, but he did not perform his part of the agreement, and we cannot see that he was the efficient agent in the sale. The sale was by the defendant to the purchaser, after the plaintiff had failed on his part and the property was out of his hands." For the plaintiff to recover on the theory that its efforts were the procuring causes of the lease by the defendant to the hospital corporation it must have established not only a valid contract of agency, but also the procurement of a prospect able, ready and willing to lease the premises on the terms of the brokerage contract. There is no evidence in the record that the plaintiff at any time, either before or after the revocation of the brokerage contract, ever procured a prospect willing to lease the premises on the terms of the contract. Therefore, the contention that the evidence was sufficient to carry the case to the jury upon the theory that the plaintiff's efforts were the procuring cause of the lease finally entered into by the defendant and the hospital corporation is not tenable.

For the reasons given, his Honor's refusal to allow the defendant's motion to dismiss the action upon demurrer to the evidence was in error, and the judgment below is therefore

Reversed.

JAMES WILSON v. S. W. THAGGARD, ADMINISTRATOR OF THE ESTATE OF WALTER ROBINSON,

and

WILLIE STONE v. S. W. THAGGARD, ADMINISTRATOR OF THE ESTATE OF WALTER ROBINSON.

(Filed 6 June, 1945.)

1. Appearance § 2a—

A defendant who makes a general appearance thereby waives irregularities in the service of summons and subjects himself to the jurisdiction

of the court. G. S., 1-103. The same result follows when defendant obtains time within which to answer.

2. Appearance § 2b: Judgments § 10—

A defendant, having made a general appearance, by motion to set aside a default judgment, which was allowed and time granted defendant in which to plead, it is his duty to answer or demur, even though a copy of the complaint filed has not been delivered to defendant, G. S., 1-121, and, upon his failure to do either, the court has authority to enter judgment by default and inquiry, without notice. And the court is without discretion to vacate the same, except upon a finding of fatal irregularity or excusable neglect and meritorious defense. G. S., 1-220.

APPEAL by plaintiffs from *Harris, J.*, at March Term, 1945. Reversed.

Motion to vacate judgments by default and to dismiss actions.

These causes were here on a former appeal. *Wilson v. Robinson,* 224 N. C., 851. This Court at that time affirmed the order of Hamilton, J., vacating and setting aside judgments by default theretofore entered. The adjudicating paragraph of the original judgment in that cause contains the clause "and defendant allowed thirty days to file answer or other pleadings after final determination of this motion." In the judgment certified here and copied in the judgment of Harris, J., this clause was deleted. This error has been corrected by certificate from the clerk of the Superior Court of Durham County.

After the opinion in the former case was certified down, plaintiff again, on 9 February, 1945, applied to and obtained from the clerk judgments by default and inquiry.

Defendant appeared and moved to dismiss the actions under motions theretofore filed and also to vacate the default judgments last entered. Harris, J., found the facts appearing of record and, being of the opinion that the judgment of Hamilton, J., affirmed by this Court, required the dismissal of the actions, entered judgment vacating the judgments by default and dismissing the actions at the cost of the plaintiff. The plaintiff excepted and appealed.

Bennett & McDonald for plaintiffs, appellants.

Malcolm McQueen and Marshall T. Spears for defendant, appellee.

BARNHILL, J. The brief filed and the argument made by the appellee discloses that the defendant has misconceived the record on the former appeal. *Wilson v. Robinson,* 224 N. C., 851. His written motion appearing of record was to vacate and set aside the judgments by default. The motion was allowed and the defendant was granted time within which to plead. The actions were not dismissed.

So then, when the cause came on for hearing on the motion last filed, summons had been issued and duly served. Complaints had been filed in the office of the clerk but copies thereof had not been delivered to defendant. G. S., 1-121. The defendant had made a general appearance and moved to vacate the judgments by default and had obtained time within which to answer. After the judgment was affirmed he failed to answer. Judgments by default were entered.

On this state of the record the court below was without authority to dismiss the actions.

A defendant who makes a general appearance thereby waives irregularities in the service of summons and subjects himself to the jurisdiction of the court. G. S., 1-103; *McDonald v. MacArthur,* 154 N. C., 122, 69 S. E., 832; *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175; *Ashford v. Davis,* 185 N. C., 89, 116 S. E., 162; *Tucker v. Eatough,* 186 N. C., 505, 120 S. E., 57; *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1; *Burton v. Smith,* 191 N. C., 599, 132 S. E., 605; *Bizzell v. Mitchell,* 195 N. C., 484, 142 S. E., 706; *Bank v. Derby,* 215 N. C., 669, 2 S. E. (2d), 875; *Credit Corp. v. Satterfield,* 218 N. C., 298, 10 S. E. (2d), 914; *Vestal v. Vending Machine Co.,* 219 N. C., 468, 14 S. E. (2d), 427; *Williams v. Cooper,* 222 N. C., 589, 24 S. E. (2d), 484.

The same result follows when the defendant obtains time within which to answer. *Cook v. Bank,* 129 N. C., 149; *Scott v. Life Association,* 137 N. C., 516; *Lexington v. Indemnity Co.,* 207 N. C., 774, 178 S. E., 547; *Vestal v. Vending Machine Co., supra.*

The defendant, having made a general appearance and moved to vacate the judgments by default and having been granted time within which to file answer, was in court and subject to its jurisdiction. It was his duty to answer or demur. He failed to do so at his peril.

The court below vacated the default judgments entered 9 February, 1945, for that "each of said judgments was entered without notice to the defendant and that the court had no jurisdiction to render said judgments." Thus it acted upon a misapprehension of the law. As the defendant had subjected himself to the jurisdiction of the court and had failed to answer, the court had authority to enter the judgments. Notice of an intention to apply therefor is not required.

The record fails to disclose that the judgments were entered before the time for answering had expired or other irregularity in regard to the entries thereof. It likewise fails to disclose excusable neglect or meritorious defense. Indeed, neither is alleged. The court was without discretion to vacate the same except upon a finding of fatal irregularity or excusable neglect and meritorious defense. G. S., 1-220; *Johnson v. Sidbury, ante,* p. 208.

The judgment below is

Reversed.

STATE v. TAFT WHITE.

(Filed 6 June, 1945.)

1. Bastards § 2—

Neither paternity nor failure to support, nor both, without willfulness, is sufficient to convict a father for failure to support his illegitimate child.

2. Bastards § 5—

Where defendant was tried on a warrant charging the willful refusal, failure and neglect to support defendant's illegitimate child, and the evidence for the State tended to show that not only had the mother made no demand on defendant for support of the child, but that she had said to him if he paid $20 (which he did), there would be no more of it, and that she thought she could care for the child as it ought to be cared for, there is not sufficient evidence to support the verdict and judgment.

BARNHILL, J., concurring.

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

APPEAL by defendant from *Armstrong, J.*, at November Term, 1944, of CALDWELL.

On appeal from the recorder's court, the defendant was tried *de novo* in the Superior Court of Caldwell County on a warrant preferring the following charge:

". . . that at and in said County and .....Township, on or about the 1 day of February, 1944 Taft White did unlawfully, and wilfully refuse, fail and neglect to support and maintain an illegitimate child belonging to him, the said Taft White, begotten upon the body of the said Hattie Bryant, which said child was born November 30, 1943 and still wilfully fails and refuses to maintain and support said child contrary to the form of the statute and against the peace and dignity of the State."

The evidence for the State was substantially as follows:

Hattie Bryant testified that she was the mother of a bastard male child, of whom the defendant was the father. The child was begotten while she lived in Valmead, Caldwell County. When witness discovered her pregnancy, she informed the defendant, who tried to get her to destroy the child, which she refused to do. Defendant made the arrangements for Dr. Fetner to "check her up," and gave her, on each of two occasions, $10.00 to pay for this service. After the birth of the child, defendant gave it a gown, two pairs of bootees and a shirt. Defendant promised to help her with the child. Witness did not ask him for support, except that she asked him "if he would do it willingly."

Witness stated that White paid $20.00 on the hospital bill, but not until he was forced to pay it. That she had told him if he paid that it

would be the "last of it." That she didn't do anything about it because she thought she could raise the child "as it was supposed to be raised."

Mrs. Bryant, the mother, testified that the defendant came to the house Christmas with a little package under his arm, sat on the bed with Hattie and gave her the package. He took the baby on his lap, saying, "I have a fine boy, don't I?" Also defendant stated at the hospital he had a fine son.

Dr. Fetner testified that defendant made arrangements with him to see the mother during her pregnancy. "The money came through the hospital for my pay, but it was paid by Mr. White."

At the conclusion of the State's evidence, the defendant demurred and moved for judgment as of nonsuit. The motion was overruled, and defendant excepted. The defendant offered no evidence. Two issues were submitted to the jury and answered as indicated:

"1. Is the defendant, Taft White, the father of the child born to Hattie Bryant on November 30, 1943?

"Answer: Yes.

"2. If so, has the defendant, Taft White, wilfully neglected or refused to support and maintain the said illegitimate child?

"Answer: Yes."

Upon the coming in of this verdict, defendant moved to set it aside for error committed upon the trial. The motion was overruled and defendant excepted.

Defendant then moved for arrest of judgment. The motion was overruled and defendant excepted.

Judgment was entered upon the verdict, and defendant excepted and appealed.

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

W. H. Strickland for defendant, appellant.

SEAWELL, J. Cases under our present bastardy act constantly present difficulties of construction, as to some of which the Court may not be wholly agreed. Many of these, no doubt, must be cleared up by legislative action before we have an unchallengeable procedure. The instant case is suggestive of many particulars in which the law might receive clarification, but in view of the rationale of our present decisions, anything we might say as to them would be *obites dictum*.

On this point we are agreed. Evidence on the part of the State fails to disclose one of the essential elements of the offense created by the statute and charged against the defendant—that of willfulness in the

failure or neglect to support the illegitimate child. Neither paternity nor failure to support, nor both, without willfulness, is sufficient to convict. Upon this point the testimony of the mother, which is the evidence of the State, is to the effect that not only had she made no demand on defendant for support of the child, but that she had told him if he paid $20.00, there would be no more of it. This he had done. She thought she could care for the child as it ought to be cared for. Perhaps the defendant thought so too.

To make out a case evidence like that calls for rebuttal, and the State is never in position to rebut its own evidence.

There should have been judgment as of nonsuit. It is so ordered.

Reversed.

BARNHILL, J., concurring: I concur in the conclusion that the sentence imposed in the court below should be vacated and defendant discharged. My conclusion is bottomed on reasons other than those stated in the majority opinion.

The trial judge submitted issues but inadvertently failed to instruct the jury that if they answered both issues in the affirmative they should, upon the facts thus found, return a verdict of guilty, and the jury failed to return a verdict on the principal issue of guilt or innocence.

It is fundamental with us that a defendant charged with crime, other than a petty misdemeanor, who pleads not guilty, can be punished only after conviction by a jury. Art. I, secs. 11 and 13, N. C. Const. As there was no verdict of guilty, the court was without power to impose sentence. It follows that the motion in arrest of judgment should have been allowed.

As pointed out in the majority opinion, the record fails to disclose evidence sufficient to support the answer to the second issue or to warrant a conviction. Hence a verdict of not guilty of a willful failure or refusal to support his illegitimate child should be entered.

On the other hand, there is evidence in the record tending to show that the defendant is the putative father of the bastard child of the prosecutrix sufficient to sustain the answer to the first issue. Whether the court, on the answer to that issue, may now enter a decree adjudging the paternity is not presented for decision. Discussion of that question is not now in order.

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

STATE v. CLARENCE LORD.

(Filed 6 June, 1945.)

1. Jury § 1—

Where there is nothing to show that members of the Negro race were excluded from the regular panel of jurors or from the special venire ordered by the court of its own motion in a capital case, the trial court having found as a fact that they were not excluded from the jury box and that the Negroes, called as prospective jurors, from the special venire, were challenged for cause by the solicitor as not being freeholders, and there being nothing to show whether the remaining Negroes of the special venire were freeholders or required to be such, no jury defect, bias or harmful error is shown.

2. Same—

Upon challenge for cause, in a murder trial, of a juror who has formed and expressed an opinion of prisoner's guilt, where the juror states that he can give a fair and impartial verdict on the evidence in spite of his opinion, the court's finding of indifferency presents no reviewable question of law.

3. Criminal Law § 33—

A statement in the nature of a confession, made voluntarily to officers after his arrest by a prisoner charged with a capital crime, is competent and admissible as evidence. It is not essential that the officers should have cautioned their prisoner that any statement he might make could be used against him and that he was at liberty to refuse to answer questions or to make any statement and that such refusal or failure to make any statement could not be used against him.

APPEAL by defendant from *Gwyn, J.*, at January Term, 1945, of CABARRUS.

Criminal prosecution tried upon indictment charging the prisoner with the murder of one Elder Phifer.

The record discloses that the deceased was a girl about seventeen years of age. The defendant had been keeping company with her and had become jealous of her attentions to others, or angered because of her coolness to him, and had threatened to take her life. On Saturday night, 21 October, 1944, between 9 and 10 o'clock, the defendant saw the deceased at a cafe in company with another girl and a boy. He called to her, but she refused his attentions and went into the cafe. The defendant then went to his rooming-house and obtained a shotgun belonging to another occupant of the same house and returned to the cafe. Not finding the deceased there, he took a taxi and went to another cafe, about two and a half miles away, where he stayed until it closed around midnight; then he went to a cotton patch near the home of the deceased and lay in wait for her. As she approached, between 12 and 1 o'clock, the

defendant came from the cotton patch out into the road, and shot and killed her. The defendant then carried the gun back to its owner, said that he had shot the deceased, and asked that the police be notified where he could be found.

On the following day, after his arrest, the defendant made a statement to the officers and recited the facts substantially as above.

The defendant offered no evidence.

Verdict: "We, the jury, find Clarence Lord, the defendant, guilty of murder in the first degree. The jury wishes to announce to the court that we asked for Divine guidance before our deliberation."

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

C. M. Llewellyn for defendant.

STACY, C. J. The case presents little more than an issue of fact, determinable alone by the jury. The evidence amply supports the verdict. *S. v. Satterfield,* 207 N. C., 118, 178 S. E., 466.

The first assignment of error seeks to raise the question of jury defect and bias, but the exceptions upon which it is based hardly suffice for the purpose. *S. v. Levy,* 187 N. C., 581, 122 S. E., 386. There is nothing to show that members of the Negro race were excluded from the regular panel or the special venire. The trial court found as a fact that they were not excluded from the jury box. The Negroes who were called as prospective jurors from the special venire, which was ordered by the court of its own motion, were challenged by the solicitor for cause, in that they were not freeholders of the county, and the defendant complains that he was thereby deprived of any opportunity to accept or reject any of them. Perhaps every trial lawyer has seen his adversary challenge prospective jurors whom he would like to have serve, but there is nothing he can do about it. The rule works both ways. Nor does it appear whether the remaining Negroes of the special venire were freeholders, or indeed whether any of them were required to be freeholders, depending on whether they were summoned by the sheriff under G. S., 9-29, or drawn from the box pursuant to G. S., 9-30. See G. S., 9-16; G. S., 15-165; *S. v. Levy, supra.* The defendant also complains because he was required to use one of his peremptory challenges to reject a juror who had formed an adverse opinion of his guilt. The court's finding of indifferency or impartiality of the juror presents no reviewable question of law. *S. v. DeGraffenreid,* 224 N. C., 517. Both the challenge to the

array and the challenge to the poll were properly overruled, or at least no error has been made to appear in respect of either.

The statement made by the defendant to the officers in the nature of a confession was found by the court to have been voluntarily made. This rendered it admissible in evidence. *S. v. Biggs,* 224 N. C., 23, 29 S. E. (2d), 121. It was not essential to its competency that the officers should have cautioned the defendant that any statement made by him might be used against him and informed him that he was at liberty to refuse to answer any questions or to make any statement and that such refusal could not thereafter be used to his prejudice. *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193. It is enough that the statement was a voluntary expression. It was made to the officers after the defendant's arrest, but not on the preliminary hearing.

The record is free from reversible error. Hence, the verdict and judgment will be upheld.

No error.

STATE v. JAMES SPRUILL.

(Filed 6 June, 1945.)

1. Assault and Battery § 12b: Trespass § 12—

The right of a person to defend his home from attack is a substantive right, as is the right to evict a trespasser from his home.

2. Assault and Battery §§ 12b, 13: Trespass § 12—

When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, G. S., 1-180, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home.

APPEAL by defendant from *Thompson, J.,* at January Term, 1945, of WAYNE.

Criminal prosecution upon a bill of indictment charging that defendant, "with force and arms . . . unlawfully, willfully and feloniously" assaulted "Ernest Tice with a deadly weapon, to wit, a pistol, inflicting serious injury not resulting in death, with intent to kill said Ernest Tice, etc."

In the trial court defendant pleaded not guilty and, as shown by the record, based his defense upon his legal right (1) to defend himself against a murderous assault made upon him by Ernest Tice and (2) to defend, and to evict trespassers from his home.

In the light of defendant's pleas, the evidence tends to show that Ernest Tice, accompanied by a woman, went to the home of defendant "just about the edge of dark on the night" of Saturday, 29 July; that Ernest Tice bought and drank half a pint of corn whiskey; that several others, men and women, were there, "cutting up and picking the guitar"; that defendant asked the guitar picker to go out of the house and "maybe the crowd would leave"; that the request was heeded, and Ernest Tice and two women went out and got in his automobile, after which defendant fastened the screen door; that then, while defendant and two others, a man and a woman, were in the house, talking about the woman leaving, Ernest Tice and one of the women who had gone out with him, came back to the door of the house, and defendant said, "Don't open the door"; that thereupon Ernest Tice "broke the staple on the door," and defendant forbade him to come in and he stopped, but the woman entered, and defendant "shot the door back, and Ernest ran against the door and came on in anyhow"; that he had a knife and made for defendant, who first shot at the door facing, and then as Ernest didn't stop, he shot him in the neck; and that "the screen on the outside was pulled open or torn off from the top hinge and inside the door the latch had been bursted off."

Verdict: Guilty as charged in the bill of indictment.

Judgment: Imprisonment in county jail for three years to be assigned to work upon the public roads under supervision of 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.

N. W. Outlaw for defendant, appellant.

WINBORNE, J. Defendant complains, and rightly so, that while the law arising upon the evidence given in the case in so far as it relates to his plea of self-defense was declared and explained in the charge to the jury, as it should have been, the court failed to declare and explain the law arising upon the evidence given in the case as it relates to defendant's legal right to defend his home from attack, and to evict trespassers therefrom.

The right of a person to defend his home from attack is a substantive right, as is the right to evict trespassers from his home. These principles of law have been discussed in numerous decisions of this Court,

among which are these: *S. v. Crook,* 133 N. C., 672, 45 S. E., 564; *S. v. Scott,* 142 N. C., 582, 55 S. E., 69; *S. v. Gray,* 162 N. C., 608, 77 S. E., 833, 45 L. R. A. (N. S.), 71; *Curlee v. Scales,* 200 N. C., 612, 158 S. E., 89; see also *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Marshall,* 208 N. C., 127, 179 S. E., 427; *S. v. Reynolds,* 212 N. C., 37, 192 S. E., 871; *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526; *S. v. Anderson,* 222 N. C., 148, 22 S. E. (2d), 271; *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340; *S. v. Ellerbe,* 223 N. C., 770, 28 S. E. (2d), 519; *S. v. Pennell,* 224 N. C., 622, 31 S. E. (2d), 857.

Hence, when in the trial of a criminal action charging an assault, or other kindred crime, there is evidence from which it may be inferred as in this case that the force used by defendant was in defending his home from attack by another, he is entitled to have evidence considered in the light of applicable principles of law. In such event, and to that end, it becomes the duty of the court to declare and explain the law arising thereon, G. S., 1-180, formerly C. S., 564, and failure of the court to so instruct the jury on such substantive feature, as in this case, is prejudicial. This is true even though there be no special prayer for instruction to that effect. See *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Bost,* 189 N. C., 639, 127 S. E., 689; *S. v. Thornton,* 211 N. C., 413, 190 S. E., 758; *School District v. Alamance County,* 211 N. C., 213, 189 S. E., 873; *S. v. Robinson,* 213 N. C., 273, 195 S. E., 824; *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530; *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630; *Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889; *Ryals v. Contracting Co.,* 219 N. C., 479, 14 S. E. (2d), 531; *Smith v. Kappas,* 219 N. C., 850, 15 S. E. (2d), 375.

And the same rule applies in respect of the right to evict trespassers from one's home.

Hence, let there be a

New trial.

J. G. DAUGHTRY v. LORENA G. DAUGHTRY.

(Filed 6 June, 1945.)

Husband and Wife § 4b—

A contract between husband and wife, which does not purport to divest the wife of dower or the husband of curtesy, but which does fix the sum of money the wife is to receive from her husband each month thereafter, as long as the agreement remains in effect, for her support and the support of their minor child, is within the class of contracts which, in order to be valid and binding on the parties, must be executed in the manner and form required by G. S., 52-12, and, not being so executed, the same is void as to the wife and also as to the husband.

DAUGHTRY *v.* DAUGHTRY.

APPEAL by defendant from *Blackstock, Special Judge,* at November Term, 1944, of ALAMANCE.

Civil action challenging the validity of a contract between husband and wife.

A difference having arisen between the plaintiff and defendant as to the use and occupancy of their property and with reference to the amount to be paid to Lorena Daughtry and their daughter, the parties mutually agreed to settle their differences and executed a contract on 1 October, 1942, wherein J. G. Daughtry agreed "to pay to his wife, Lorena Daughtry, for herself and daughter, Lovestine G. Daughtry, the sum of $150.00 per month, beginning as of 1 November, 1942, and continuing on the first day of each month thereafter as long as the agreement is in effect." The wife was to have the use and occupancy of the home in Clinton, N. C., where she and their daughter lived, together with its furnishings, while the husband was to have the use and occupancy of their Sampson County farm, together with the income therefrom. It was provided in the agreement that the title to the aforesaid real estate was to remain unchanged.

At the time of the execution of the contract, the plaintiff was carrying life insurance upon his own life, and upon the life of his wife and the lives of their children, in an aggregate total in excess of $48,000.00. It was agreed that the beneficiaries in said policies were to remain unchanged.

The contract was not executed in accordance with the requirements of G. S., 52-12, and his Honor held it is null and void, and entered judgment accordingly.

Defendant appeals, assigning error.

Long & Long for plaintiff.

John B. Williams, Jr., and Faircloth & Faircloth for defendant.

DENNY, J. It is alleged in the complaint and admitted in the answer that plaintiff and defendant were married in 1912, and lived together as husband and wife until May, 1942. Therefore, the contract under consideration was executed after separation and provides for the support of the defendant and their minor daughter. The contract also determines the rights of the respective parties thereto as to the use and occupancy of certain properties and the income therefrom.

The appellant insists that this agreement is not such a contract between husband and wife as to require the separate examination of the wife, and a finding by the probate officer examining the wife that it is not unreasonable or injurious to her, as required by G. S., 52-12. The agreement

does not purport to divest the wife of dower or the husband of curtesy in any real property owned by them or that might be acquired thereafter. Moreover, there is no contention that the wife had any legal right to the income from their Sampson County farm, which, under the terms of the agreement, the husband was to receive and retain for his own use. Nevertheless, it is apparent that this agreement fixed the sum of money the wife was to receive from the husband each month thereafter, for her support and the support of their minor child, so long as the agreement remained in effect. The provision for support brings this agreement within that class of contracts, which in order to be valid and binding on the parties must be executed in the manner and form required by G. S., 52-12. It was so held in *Archbell v. Archbell,* 158 N. C., 408, 74 S. E., 327, where *Hoke, J.,* in speaking for the Court, said: "While we have held that an allowance by way of alimony may be predicated in some instances on the capacity of the husband to labor (*Muse v. Muse,* 84 N. C., 35), this right of a married woman to support and maintenance is primarily a property right, or may be and very usually is made very largely dependent on amount of property owned by the husband." *Walton v. Walton,* 178 N. C., 73, 100 S. E., 176; *Smith v. Smith, ante,* 189, 34 S. E. (2d), 148. It follows, therefore, that his Honor was correct in holding this contract null and void because it was not executed in conformity with the statutory requirements for the execution of such contracts. This Court has held uniformly that a contract between husband and wife, which must be executed in the manner and form required by G. S., 52-12, is void, if the statutory requirements are not observed. *Singleton v. Cherry,* 168 N. C., 402, 84 S. E., 698; *Butler v. Butler,* 169 N. C., 584, 86 S. E., 507; *Wallin v. Rice,* 170 N. C., 417, 87 S. E., 239; *Davis v. Bass,* 188 N. C., 200, 124 S. E., 566; *Whitten v. Peace,* 188 N. C., 298, 124 S. E., 571; *Barbee v. Bumpass,* 191 N. C., 521, 132 S. E., 275; *Garner v. Horner,* 191 N. C., 539, 132 S. E., 290; *Bank v. McCullers,* 201 N. C., 440, 160 S. E., 494; *Fisher v. Fisher,* 217 N. C., 70, 6 S. E. (2d), 812; *S. c.,* 218 N. C., 42, 9 S. E. (2d), 493.

The appellant contends that G. S., 52-12, was enacted for the benefit and protection of married women, and therefore, if it be conceded that this contract is void, it is void only as to the wife and not as to the husband, and that he is estopped from repudiating the contract. We do not so hold. The statute decrees that such contracts, unless executed in the manner and form therein provided, are invalid. And we held in *Fisher v. Fisher, supra* (218 N. C., 42), that where a deed is void for failure to comply with the provisions of G. S., 52-12, the husband or his heirs will not be estopped by such deed. It was also said in *Archbell v. Archbell, supra,* the contract not having been executed as required by Revisal, 2107 (now G. S., 52-12), "The ruling of the lower court

holding the instrument is void and of no effect on the rights of the parties is affirmed."

The judgment of the court below is

Affirmed.

HARTFORD ACCIDENT AND INDEMNITY COMPANY v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND THEREFORE STATUTORY RECEIVER, BANK OF BLACK MOUNTAIN.

(Filed 6 June, 1945.)

1. Venue § 1b: Banks and Banking § 13—

In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks, G. S., 53-20, G. S., 53-22.

2. Venue § 4a—

In an action by plaintiff against a fiduciary, brought in the county of the personal residence of the defendant, seeking to have the legal effect of certain written agreements construed, defendant is not entitled, as a matter of law, to removal; and, until the allegations of the complaint are traversed, the occasion for the exercise of discretion will not arise upon motion for removal for the convenience of witnesses and the promotion of justice.

3. Venue § 4b—

The exercise of the court's discretion, in granting or refusing to grant a motion for removal for the convenience of witnesses and the promotion of justice, after the issues are joined, is not reviewable on appeal in the absence of abuse of discretion.

APPEAL by plaintiff from *Johnson, Jr., Special Judge,* at February Term, 1945, of WAKE.

The facts pertinent to this appeal will be found in the *per curiam* opinion disposing of appellee's motion to dismiss the appeal, *ante,* 187.

From the order granting the defendant's motion to remove this cause from Wake to Buncombe County, as a matter of right and also in the exercise of the court's discretion, for the convenience of witnesses and the promotion of justice, the plaintiff appeals, assigning error.

A. J. Fletcher and J. C. B. Ehringhaus for plaintiff.

R. R. Williams for defendant.

DENNY, J. The defendant is statutory receiver of the Bank of Black Mountain and as such is subject to the provisions of Article thirteen,

Chapter fifty-five, relating to receivers, when not inconsistent with the provisions of G. S., 53-20. G. S., 53-22. This Court, in *Biggs v. Bowen,* 170 N. C., 34, 86 S. E., 692, held that Revisal, 424 (now G. S., 1-82), governed the venue of an action brought by the receiver of a corporation. The Court said: "The authorities seem to be uniform that in determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators. 11 Cyc., 869, and notes." *Lawson v. Langley,* 211 N. C., 526, 191 S. E., 229; *Barber v. Powell,* 222 N. C., 133, 22 S. E. (2d), 214.

It will be noted that the right of the appellant to have its written contracts construed, and its status determined in relation thereto in a declaratory judgment, as provided in our Uniform Declaratory Judgment Act, is not challenged by demurrer, answer or otherwise. Therefore, the sole question presented for our determination on this appeal, is whether or not the defendant is entitled, as a matter of law and for the convenience of witnesses and the promotion of justice, to have an action removed, in which the plaintiff is seeking to have the legal effect of certain of its written agreements construed as provided in our Uniform Declaratory Judgment Act, no issues of fact having yet been joined.

We are of opinion that upon the allegations of the complaint, the defendant is not entitled, as a matter of law, to a removal of this cause from Wake County, the residence of defendant, receiver. Of course it is impossible to anticipate what issues may be raised, when answer or other pleadings are filed. But, until the allegations of the complaint are traversed, the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice. If issues of fact are raised when the answer is filed, which will necessitate a jury trial and the attendance of witnesses, the court may in its discretion grant defendant's motion to remove to Buncombe County for the convenience of witnesses and the promotion of justice. *Riley v. Pelletier,* 134 N. C., 316, 46 S. E., 734; *Howard v. Hinson,* 191 N. C., 366, 131 S. E., 748. The exercise of the court's discretion in granting or refusing to grant a motion for removal for the convenience of witnesses and the promotion of justice, after the issues are joined, is not reviewable on appeal in the absence of an abuse of discretion. *Power Co. v. Klutz,* 196 N. C., 358, 145 S. E., 681; *Causey v. Morris,* 195 N. C., 532, 142 S. E., 783; *Curlee v. Bank,* 187 N. C., 119, 121 S. E., 194; *Perry v. Perry,* 172 N. C., 62, 89 S. E., 999; *Ludwick v. Mining Co.,* 171 N. C., 60, 87 S. E., 949; *Craven v. Munger,* 170 N. C., 424, 87 S. E., 216.

The judgment of the court below is

Reversed.

STATE v. BILL JONES, W. F. STANLEY AND M. J. BOVE.

(Filed 6 June, 1945.)

1. Appeal and Error §§ 18a, 31c—

Where appellant fails to file his case on appeal fourteen days before the call of the district to which it belongs, he may apply for *certiorari* to preserve his right of appeal and appellees' motion filed thereafter to docket and dismiss under Rule 17 will be denied.

2. Appeal and Error § 40a—

Upon the trial of three defendants for unlawful possession and transportation of intoxicating liquor, seized at the home of the first defendant, who with the second defendant was found guilty on both counts, while the third defendant was found to be the owner of the liquor but not guilty, an order of forfeiture being entered by the court in all three cases, upon hearing on appeal by third defendant from order of forfeiture, preserved by *certiorari*, the only exception being to the judgment of forfeiture and refusal to sign judgment of restoration, no errors appearing on the face of the record, the judgment of forfeiture is affirmed.

3. Intoxicating Liquor § 8—

An alleged invalidity of a search warrant is of no avail to appellant, the owner of intoxicating liquor, on his challenge to an order of forfeiture, since his codefendants, who had possession of the intoxicating liquor, did not appeal from their convictions, and appellant was acquitted of the criminal charge.

APPEAL by M. J. Bove from *Stevens, J.*, at January Term, 1945, of LENOIR.

The defendants, Bill Jones, W. F. Stanley and M. J. Bove, were indicted separately, and by consent, tried together in the municipal-county court of Kinston and Lenoir County on warrants charging them with the unlawful possession and transportation of 288 cases of intoxicating liquor. Jones was adjudged guilty of the unlawful possession of the 288 cases; Stanley was found guilty of the unlawful possession and transportation of the 288 cases; and Bove was declared not guilty.

M. J. Bove was found to be the owner of the liquor, all of which had been seized at the home of Bill Jones.

An order of forfeiture was entered in the consolidated cases, from which the defendant Bove appealed to the Superior Court of Lenoir County. No appeal was taken by the other defendants.

On the hearing in the Superior Court the order of forfeiture was affirmed; and the seized liquor was directed to be turned over to the commissioners of Lenoir County for disposition as provided by G. S., 18-13.

M. J. Bove gave notice of appeal, but failed to file the same in this Court on or before 13 March, 1945 (fourteen days before the call of the district to which the case belongs). It was filed 15 March. Two days later, the appellees filed motion to docket and dismiss under Rule 17, and appellant applied *for certiorari* to preserve the appeal.

Appellees' motion was denied under authority of what was said in *Bell v. Nivens, ante,* 35, and appellant's application was allowed under the same authority and *S. v. Moore,* 210 N. C., 459, 187 S. E., 586.

Allen & Allen, John G. Dawson, and Raymond S. Norris for appellant.

Charles F. Rouse and Thomas J. White for appellee.

STACY, C. J. The case is here on the record proper in response to *certiorari* which was issued at the instance of appellant to preserve his right of appeal. *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713; *Hicks v. Westbrook,* 121 N. C., 131, 28 S. E., 188. The only exception is to the "judgment (of forfeiture) as set out in the record" and the failure to sign judgment of restoration as prayed. *Smith v. Smith,* 223 N. C., 433, 27 S. E. (2d), 137; *Cooper v. Cooper,* 221 N. C., 124, 19 S. E. (2d), 237; *Holding v. Daniel,* 217 N. C., 473, 8 S. E. (2d), 249.

The alleged invalidity of the search warrant is of no avail to the appellant on his challenge to the order of forfeiture, since the defendants, Jones and Stanley, who had possession of the liquor, have not appealed from their convictions, and the appellant was acquitted on the criminal charge. *S. v. Wallace,* 162 N. C., 622, 78 S. E., 1. In addition, there is no exceptive assignment of error addressed to the point.

No error appears on the face of the record as filed in this Court. *Edwards v. Perry,* 208 N. C., 252, 179 S. E., 892; *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. Hence the judgment of forfeiture will be upheld. *S. v. Hall,* 224 N. C., 314, 30 S. E. (2d), 158.

Affirmed.

STATE v. HILBRETH BRITT.

(Filed 6 June, 1945.)

1. Criminal Law § 41d—

On trial upon an indictment for homicide, it is competent for the State to contradict the testimony of defendant's wife, by showing prior inconsistent statements made by her, and a person, to whom the said wife made such contradictory statements, is a competent witness for that purpose.

2. Criminal Law §§ 41d, 48b, 53g—

In a criminal prosecution, where the State offered evidence of statements made by defendant's wife, as to the circumstances of the killing, inconsistent with her testimony for defendant, and defendant failed to request that same be considered only for the purpose of impeaching or contradicting his wife's testimony, such evidence becomes substantive and a contention of the State based thereon, given in the charge to the jury, without objection at the time, will not be held for error.

3. Criminal Law § 53g—

Ordinarily, the failure to object in apt time to a statement of contention by the court constitutes waiver of the right to object.

4. Appeal and Error §§ 24, 29—

An argument unsupported by exception is as ineffective as an exception without argument or citation of authority.

5. Appeal and Error §§ 23, 24: Criminal Law § 53g—

An exception, for failure to charge the jury as required by G. S., 1-180, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception.

APPEAL by defendant from *Hamilton, Special Judge,* at October Term, 1944, of ROBESON.

Criminal prosecution tried upon indictment charging the defendant with the felonious slaying of one Jetter T. Connor.

On 9 July, 1944, the defendant and his wife, while in their automobile going from their home to the home of the defendant's mother, Mrs. Emeline Britt, picked up the deceased. The deceased had a fruit jar containing about a quart of liquor. Both the defendant and the deceased drank some of the liquor after arriving at the Britt home. Immediately thereafter they began to quarrel and to curse each other. The quarreling began while the defendant and the deceased were in the kitchen of the Britt home. Shortly thereafter, the defendant was standing in the front yard of the Britt home, talking to his mother, who was sitting on the porch. The deceased came from the kitchen and sat down on the porch. The quarrel was renewed, and the evidence is sharply conflicting as to what was said and done. The defendant offered testimony to the effect that the deceased approached him with a knife and that he wrung the knife from his hand, flipped him over his shoulder and threw him on the porch, and that the defendant never touched him thereafter. The State offered evidence tending to show that the defendant was a young man, 30 years of age, and weighed about 168 to 175 pounds. The deceased was a man

64 years of age, and weighed from 130 to 140 pounds. The defendant was a member of the United States Naval Forces and had been trained in the art of jiujitsu. That after the deceased had been thrown on the porch, that the defendant jumped on him and choked him or doubled up the body of the deceased in such manner as to prevent him from breathing. When the defendant got off the body of the deceased, at the request of his stepfather, Heman Britt, the face of the deceased was purple and he died without regaining consciousness.

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 error.

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

T. A. McNeill and F. D. Hackett for defendant.

DENNY, J. The appellant has abandoned his first seven and the tenth exceptions.

The court, over the objection of the defendant, permitted Willie M'White, a State's witness, to testify to a conversation which he had with the wife of the defendant, in the absence of the defendant, as to the manner in which the deceased, Jetter T. Connor, came to his death. The wife of the defendant had already been on the witness stand and testified that the deceased attacked the defendant with a butcher knife. Her testimony was in conflict with her prior statements, according to the testimony of the witness M'White. And, in giving the State's contentions in the charge to the jury, his Honor said: "The State contends . . . that you should be satisfied from the testimony of another M'White, Willie, I believe they called him, who shortly thereafter had gone to talk with the witness, Columbia, and that she told him that her husband had killed him with his hand, and no mention was made of any knife, and from all the statements you should be satisfied, in the first place, beyond a reasonable doubt, there was no knife, and in the second place, you should be satisfied the knife had been taken from the possession of the decedent and he was wholly and completely unarmed or disarmed at the time the blow was administered that proved to be fatal to the decedent, and that at least you should return a verdict of at least guilty of manslaughter."

The exceptions to the admission of the above evidence and to the foregoing part of the charge, constitute the defendant's sixth assignment of error.

It was competent for the State to contradict the testimony of the defendant's wife, by showing prior inconsistent statements made by her,

and the evidence of the witness M'White was competent for that purpose. However, the defendant did not request that this evidence be considered only for the purpose of contradicting or impeaching the testimony of his wife and not as substantive testimony against him. Therefore, the objection to its admission cannot be sustained. *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469; *S. v. Casey,* 212 N. C., 352, 193 S. E., 411; *S. v. Ray,* 212 N. C., 725, 194 S. E., 482; Rule of the Supreme Court, 221 N. C., 558. Likewise, the evidence having been generally admitted, a contention of the State based thereon, given in the charge to the jury, without objection at the time, will not be held for error. *S. v. King,* 219 N. C., 667, 14 S. E. (2d), 803; *S. v. Johnson,* 219 N. C., 757, 14 S. E. (2d), 792; *S. v. Bowser,* 214 N. C., 249, 199 S. E., 31. Ordinarily the failure to object in apt time to a statement of contention by the court, constitutes waiver of the right to object. *S. v. Wells,* 221 N. C., 144, 19 S. E. (2d), 243.

Exceptions eleven through fifty-six are also directed to the charge of the court. But none of these exceptions are brought forward in appellant's brief and argued or authorities cited in support thereof, as required by Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 563. Hence, these exceptions will be treated as abandoned.

The appellant does argue in his brief that the trial court failed to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," as required by G. S., 1-180, but there is no exception in the record based on such failure on the part of the court, to comply with the statute. An argument unsupported by exception is as ineffective as an exception without argument or citation of authority. *Curlee v. Scales,* 223 N. C., 788, 28 S. E. (2d), 576. An exception for failure to charge the jury as required by G. S., 1-180, must be taken in the same manner as any other exception to the charge and an assignment of error based thereon, "must particularize and point out specifically wherein the court failed to charge the law arising on the evidence." *S. v. Dilliard,* 223 N. C., 446, 27 S. E. (2d), 85. Failure to particularize and point out wherein the court failed to comply with the statute will constitute such exception a mere broadside exception, and it will not be considered, unless it is pointed out in some other exception or exceptions to the charge wherein the court failed to comply with the statute. *S. v. Friddle,* 223 N. C., 258, 25 S. E. (2d), 751, and *S. v. Dilliard, supra,* and cases there cited. A careful consideration of the charge, however, discloses no prejudicial error.

The remaining exceptions are formal and cannot be sustained.

In the trial below, we find

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1945

IN THE MATTER OF EARL PARKER.

(Filed 19 September, 1945.)

1. Criminal Law § 62½—

In the absence of a statute to the contrary, and unless it sufficiently appears otherwise in the sentence itself, it is generally presumed that sentences imposed in the same jurisdiction, to be served at the same place or prison, run concurrently, although imposed at different times, and by different courts and upon a person already serving a sentence. No presumption will be indulged in favor of sustaining a sentence as cumulative.

2. Criminal Law §§ 61a, 62½—

Where the judgment in a criminal case, imposing sentence, concludes in part, "this sentence to begin at the expiration of the sentence in case number C. P. 31355," the sentence is not merely vague, standing alone it is meaningless; and is only explained, by resort to evidence *aliunde*, that these words refer to the administrative record in the State Prison of a sentence in another case against defendant.

3. Criminal Law § 61a—

The intention of the court imposing sentence should prevail where clearly expressed, but this does not imply that such intention should be sought through evidence *dehors* the record—as here made necessary. The mode of reference lacks the certainty required in criminal judgments and is not approved.

APPEAL by petitioner from *Parker, J.*, at May Term, 1945, of LENOIR.

Petitioner seeks, by *certiorari*, to have reviewed an order of Honorable R. Hunt Parker, Judge of the Superior Court, made in a *habeas corpus*

proceeding heard at May Term, 1945, of Lenoir Superior Court, substantially upon the following facts:

At October Term, 1935, of Lenoir County Superior Court, the defendant was convicted of larceny of an automobile and sentenced to confinement in State's Prison for seven years. Minute Docket X, Clerk's office, Lenoir County Superior Court; Permanent Criminal Docket, p. 279. At June Term, 1937, of Martin County Superior Court, the petitioner, who had meantime escaped from prison, was charged with larceny, pleaded guilty, and the following sentence pronounced: "That the defendant be confined in the State's Prison at Raleigh for a term of three years. This sentence to begin at the expiration of the sentence in case number C. P. #31355."

At the June Criminal Term of Lenoir County Superior Court, petitioner pleaded guilty of breaking and entering and larceny, and was sentenced as follows: "Let the defendant be confined to the State's Prison for a term of five years. Sentence to begin at expiration of sentence now serving for larceny of automobile in Martin County." Docket Y, p. 219.

The prisoner was returned to custody of the State's Prison immediately after his trial at Lenoir Superior Court in June, 1937, and resumed service of the sentences imposed.

It is conceded that unless the sentence imposed on petitioner in Martin County Superior Court 17 June, 1937, does not in law begin at the expiration of the sentence imposed at the 1935 Term of Lenoir Criminal Court, but, on the contrary, runs concurrently therewith, the petitioner, at the time he sued out the writ of *habeas corpus* now under review, had completed the entire period of service under the several sentences imposed, and is entitled to his discharge.

At the hearing the petitioner introduced the records of the various criminal judgments involved, of dates and in substance as above stated.

In reply the respondent, over objections and exceptions of petitioner, introduced evidence *aliunde* the court records to explain the reference in the 1937 Martin County sentence to "case number C. P. #31355," and to connect it with the 1935 sentence imposed in Lenoir County. In part, this evidence was to the effect that the Lenoir County sentence had been duly certified to the State Prison authorities; and that in accordance with the custom of that institution, it was thereupon given upon the State Prison records a designating name and number for administrational purposes, to wit: "Case No. 31355."

Further, respondent introduced the prison records of three commitments purporting to be upon the several sentences involved; and a letter of Mary G. Goldsborough, Principal General Clerk of the Prison Division, purporting to give the record of petitioner as a prisoner, and includ-

ing prison data as to dates of conviction, offense, sentence; with much other matter concerning petitioner's prison record.

From the answer to the petition, it appears that at the request of Sheriff Roebuck, of Martin County, the prison authorities furnished him a copy of the prisoner's record, including a statement of the sentence imposed on petitioner, at October, 1935, Term of Lenoir Court, designated on the prison record as "CP #31355."

Where necessary, other facts of record as may be pertinent to the decision will be referred to in the opinion.

At the conclusion of the evidence, the judge hearing the writ made his findings of fact, including inferences and conclusions of fact made from the evidence above summarized, and stated his conclusions of law. His Honor found, substantially, that the notation "CP 31355 means Central Prison 31355, and means the sentence imposed at the October, 1935, Term of the Superior Court of Lenoir County against the petitioner, Earl Parker, and that the reference to the sentence imposed at the October Term, 1935, of the Lenoir Superior Court is certain and definite, and that it was clearly the intention of the Judge who presided at the June Term, 1937, of the Superior Court of Martin County to make his sentence begin at the expiration of the sentence imposed at the October Term, 1935, of Lenoir County against this petitioner, and that his intent is clearly and definitely fixed in his judgment." He therefore found as a matter of law that the Martin County sentence began at the expiration of the aforesaid sentence imposed in 1935 in Lenoir County, and that the sentence imposed against petitioner at June Term, 1937, of the Superior Court of Lenoir County began at the expiration of the prison sentence imposed against petitioner at the June Term, 1937, of the Superior Court of Martin County.

Concluding that there was no evidence before the court that Parker has served in full the three prison sentences, as thus interpreted, the court remanded petitioner into custody of the prison officials to be returned to the State's Prison until the sentences had been completely served in accordance with his judgment.

The petitioner, preserving his objections and exceptions, brings the case here for review by proper writ.

George B. Patton, general counsel and attorney for respondent, appellee.

J. A. Jones for petitioner, appellant.

SEAWELL, J. The question presented upon this appeal is whether the sentence imposed upon the petitioner at the June, 1937, Term of Martin

Superior Court has the legal effect of causing that sentence to run consecutively with a prior sentence of seven years imposed upon him at Lenoir Superior Court in 1935. It is conceded that if the Martin County sentence runs concurrently with the Lenoir sentence referred to, petitioner has "paid his debt to society"—at least as far as may be done by completing his penal servitude under all the sentences imposed—and is now entitled to his discharge.

In the absence of a statute to the contrary, and unless it sufficiently appears otherwise in the sentence itself, it is generally presumed that sentences imposed in the same jurisdiction, to be served at the same place or prison, run concurrently, although imposed at different times, and by different courts and upon a person already serving a sentence. 15 Am. Jur., Criminal Law, ss. 464, 465; *S. v. Duncan,* 208 N. C., 316, 180 S. E., 595; *In re Black,* 162 N. C., 457, 78 S. E., 273. The burden is, therefore, on the respondent in the present proceeding to show that the challenged sentence in legal effect is cumulative, running consecutively instead of concurrently with the sentence or sentences with which it is supposed to stand in relation. Where the intention of the court to make the sentence begin at the expiration of a prior sentence is clearly and adequately expressed in the sentence itself, that burden is carried, of course, by a manifestation of the judgment or record. In the case of inherent ambiguity in the sentence, the question arises whether this vagueness is capable of being removed at all; and whether public policy, which requires a high degree of certainty in judicial actions affecting the liberty of the individual, will permit a sentence to be clarified by resort to evidence *aliunde,* such as that offered in this case; or whether, indeed, a reference such as we find in the sentence under review can be held to meet the requirements of certainty or definiteness demanded in a criminal judgment. "No presumption will be indulged in favor of sustaining a sentence as cumulative." 15 Am. Jur., Criminal Law, S. 465, *supra. Davis v. Anderson,* 207 F., 263.

The controversy hinges around the expression used in the concluding part of the Martin County judgment: "This sentence to begin at the expiration of the sentence in case number C. P. #31355."

Standing alone, this sentence is not merely vague, it is meaningless. It does not name the county or court in which that trial was had and in which the judicial record was made and is kept, or the date or term of the court, or even the name of the defendant; nor does it give any description of the offense of which the defendant was convicted, or designate the term of the sentence imposed—by means of which the Lenoir County sentence, the expiration of which is to determine the beginning of the Martin County sentence, could be identified from the

judicial records themselves and the sentence given significance. Also, there is nothing in the sentence to explain what is meant by "case number C. P. #31355," or to direct the inquirer where such a thing might be found.

Respondent undertook upon the *habeas corpus* hearing to explain this reference by evidence partly parol, partly from the State Prison records, and partly circumstantial, to the effect that this petitioner had been committed to State Prison on a seven-year sentence imposed in Lenoir County in 1935; that "CP" meant "Central Prison," and the number "31355" was the number assigned to that case on the prison records for administrational purposes. Further, that the State Prison authorities furnished this information to Sheriff Roebuck of Martin County a few days prior to the sentencing of the petitioner in that county, from which it was assumed that the information was passed on to the presiding judge.

Without discussing the propriety of this sort of reference, or the nature of the evidence by which it is sought to clarify it, counsel for respondent seeks to apply the principle *"id certum est quod certum reddi potest,"* so often applied in civil matters, but ignores the rest of the maxim—*"sed id magis certum est quod de semetipso est certum"*—to the guidance of which we are so often committed by public policy, especially on the judicial side of criminal law administration. "That is certain which can be made certain, but that is more certain which is certain of itself."

The question here is not merely one of the intention of the judge imposing the sentence, and the method of ascertaining it; it is also a question of the adequate expression of that intent within acceptable standards of certainty in dealing with the liberty and lives of those charged with violations of the law. We are, therefore, not bound by the findings of fact we find in the record as we might be, under proper conditions, in civil cases.

From the nature of the subject, no general rule and usually no precedent can be found for specific application to cases of this sort, which are apt to be highly individualized. Each case must be decided on its own merits. North Carolina has been referred to as one of the states requiring "rigid specificity" in a sentence intended to be cumulative in its effect. We need not go that far in expressing our disapproval of the sentence under review.

We are familiar with the rule that criminal laws must be construed strictly against the State and in favor of the liberty of the citizen. That is but manifestation or cropping out of a broader public policy, firmly established amongst English speaking people, which requires a high degree of certainty in the procedure by which a person is deprived of his

liberty or his life. The protection it affords follows him through the incidents of trial, and is not withdrawn when most needed: when he stands before the court, *in invitum* and at arms length with the State, to receive sentence for his misdemeanor; or to shift the picture to a more sensitive spot on the retina, when society, through its authorized agency, undertakes to budget the life of an errant member and take out of it the years forfeit to the law. The policy of the law which will not permit the accused to be convicted of crime unless his guilt is proved beyond a reasonable doubt will certainly interpose to prevent his punishment under a vague and ambiguous sentence—an instrumentality less certain than the proceeding upon which its authority is based.

It is true, of course, that the intention of the court imposing the sentence should prevail where clearly expressed. 15 Am. Jur., *supra,* s. 465; Anno. 70 A. L. R., 1512. But we do not think this implies that such intention should be sought through evidence *dehors* the record—at least such as is here made necessary;—that it is open to the same sort of proof as if the judge were writing a will or making a contract.

A sentence is not merely a directive from which those who are to execute it may obtain information as to the extent of that duty, but, put on the official court record, it is a guarantee to the prisoner that prosecution will not again be attempted within its scope and that punishment shall not exceed its reasonably definite limits.

We seriously question the legal propriety of the reference in this sentence. The court records of Lenoir County were as easily accessible to the Martin County court as were the administrational records of the Prison. The sentence itself could have been made clear and definite by an accurate reference to these court records in such detail as might be required for identification without resort to evidence *aliunde.* The ambiguity upon the face of the sentence leads us to the conclusion that the offices of the sentence, as above outlined, were not adequately served.

We are, therefore, unable to sustain the sentence under review as cumulative in its legal effect. Since it was served concurrently with the other sentences set out in the record, and petitioner has, therefore, completed the total time of service for which he could be lawfully held, he is entitled to his discharge. It is so ordered. The judgment of the court below is

Reversed.

G. R. FERGUSON v. DOLLIE FERGUSON.

(Filed 19 September, 1945.)

1. Ejectment § 9b—

Where both parties to an action for recovery of land claim title from a common source, prior ownership of the land may be taken as a "fixed fact" so far as the action is concerned.

2. Deeds §§ 6, 8—

A deed of gift is absolutely void, when not registered within two years after its making. G. S., 47-26.

3. Wills § 32—

There is always a presumption that one who makes a will is of disposing mind and memory, does not intend to die intestate as to any part of his property, and does intend to dispose of all of his property.

4. Same—

The presumption against intestacy does not mean that one must choose between a will or no will. A testator may elect to dispose of part of his property by will, and leave the remainder for disposition as in case of intestacy.

5. Wills §§ 3, 31—

The intention of the testator is the paramount consideration in the construction of his will. All rules of construction are in aid of discovering the testator's intent and effectuating it, unless it be contrary to some rule of law or at variance with public policy.

6. Wills §§ 31, 34—

Where testator devised and bequeathed to his wife "all my personal property, horses, cattle, sheep, hogs, and all farming tools of all kinds, engines, automobiles, wagons and all money, notes, mortgages, in fact everything that I possess," there is nothing to restrict or to limit the property passing thereunder to personal property or to property of like nature with that designated, and these words dispose of all of testator's property, including realty.

7. Wills § 38—

The rule of *ejusdem generis* is not generally applied to the residuary clause in a will or to what amounts to a residuary clause.

8. Wills § 31—

The word "devise," which usually signifies a gift of real property by will, may extend to embrace personal property where so intended by the testator; while "bequeath" aptly applies to a gift of personal property by will.

9. Same—

The terms employed by a testator to dispose of his property are to be given their well known legal or technical meaning, unless it appears from the will itself that they were used in some other permissible sense.

10. Same—

A will speaks as of the date of the death of the testator and any property acquired after its making, by reversion or otherwise, would be subject to its terms. G. S., 31-41.

APPEAL by plaintiff from *Pless, J.*, at January Term, 1945, of HAYWOOD.

Civil action to remove cloud upon title.

Plaintiff alleges that on 15 May, 1905, his father, by deed of gift, conveyed to plaintiff's brother, Gaither B. Ferguson, a 300-acre tract of land in Haywood County; that the latter sold 40 acres of it during his lifetime, and died intestate as to the remainder on 24 November, 1941; that the deceased left him surviving no lineal descendants, and that the plaintiff is a collateral heir of his brother and has acquired by assignment the interest of all the other collateral heirs and is entitled to the immediate possession of the land. Additionally, the plaintiff alleges that on 3 August, 1937, Gaither B. Ferguson executed and delivered to his wife, Dollie Ferguson, a deed of gift purporting to convey to her the 260 acres or the remainder of the 300-acre tract, but that the same was not registered until after the death of the donor, and that this deed, while void, constitutes a cloud on plaintiff's title; wherefore he asks that it be so declared and removed as a cloud agreeably to the provisions of G. S., 41-10.

The defendant admitted the relationship of the parties as alleged in the complaint, but claimed title to the land under the deed from her husband, dated 3 August, 1937, which recites a "consideration of $10.00 to him paid by Dollie Ferguson"; and further that if this deed be void, as alleged by the plaintiff, which is denied, the defendant claims sole ownership of the land and the right to continue in possession thereof under the second item in the will of her deceased husband.

The trial court held the deed of 3 August, 1937, from Gaither B. Ferguson to Dollie Ferguson to be a deed of gift and therefore void as it was not registered within two years after its making. It was further held, however, that title to the land vested in the defendant under her husband's will, and judgment of nonsuit was thereupon entered at the close of all the evidence.

From this ruling, the plaintiff appeals, assigning errors.

Smathers & Meekins for plaintiff, appellant.

Morgan & Ward for defendant, appellee.

STACY, C. J. It is conceded that both parties claim title to the land in question under Gaither B. Ferguson; the plaintiff by descent and

assignment; the defendant by deed and devise. Prior ownership of the land, therefore, by Gaither B. Ferguson may be taken as a "fixed fact" so far as the present action is concerned. *Newlin v. Osborne,* 47 N. C., 164; *Stewart v. Cary,* 220 N. C., 214, 17 S. E. (2d), 29, 144 A. L. R., 1287.

The trial court was of opinion that the deed of 3 August, 1937, from Gaither B. Ferguson to Dollie Ferguson appeared on its face to be a deed of gift, *Reeves v. Miller,* 209 N. C., 362, 183 S. E., 294, and held it to be void because not registered within two years after its making as required by G. S., 47-26. This ruling is not challenged by either party. It accords with the plaintiff's view, and the defendant is not appealing. See *Winstead v. Woolard,* 223 N. C., 814, 28 S. E. (2d), 507.

The question then arose and the case was made to turn on whether Gaither B. Ferguson devised the land to his wife under the following clause in his will:

"Second: I will, devise and bequeath to my beloved wife all my personal property, horses, cattle, sheep, hogs, and all farming tools of all kinds, engines, automobiles, wagons and all moneys, notes, mortgages, in fact, everything that I possess."

It is the contention of the plaintiff that only personal property passed under this provision; that the operation of the words "everything that I possess" is restrained by the language with which they are associated, and that the testator died intestate as to his land. *Brawley v. Collins,* 88 N. C., 605; *McCallum v. McCallum,* 167 N. C., 310, 83 S. E., 250; *Capehart v. Burrus,* 122 N. C., 119, 29 S. E., 97; *S. c.* (on rehearing), 124 N. C., 48, 32 S. E., 378; *Alexander v. Alexander,* 41 N. C., 229. The trial court held otherwise, and the appeal presents for review the correctness of this ruling.

In searching for the intent of the testator, as expressed in the language used by him, we start with the presumption that one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property. *Holland v. Smith,* 224 N. C., 255, 29 S. E. (2d), 888; *Gordon v. Ehringhaus,* 190 N. C., 147, 129 S. E., 187; *Case v. Biberstein,* 207 N. C., 514, 177 S. E., 802; *Foust v. Ireland,* 46 N. C., 184. "There is always a presumption that a testator did not intend to die partially testate and partially intestate." *McCullen v. Daughtry,* 190 N. C., 215, 129 S. E., 611. Testacy presupposes no intestacy. *Reeves v. Reeves,* 16 N. C., 386. "The rule, *ut res magis valeat quam pereat,* comes in aid of the general presumption, that one who makes a will intends to dispose of all of his property." *Boyd v. Latham,* 44 N. C., 365.

Even where a will is reasonably susceptible of two constructions, the one favorable to complete testacy, the other consistent with partial intes-

tacy, in application of the presumption, the former construction will be adopted and the latter rejected. *Holmes v. York,* 203 N. C., 709, 166 S. E., 889; *Morris v. Waggoner,* 209 N. C., 183, 183 S. E., 353. This does not mean, however, that one must choose between a will or no will. A testator may elect to dispose of part of his property by will, and leave the remainder for disposition as in case of intestacy. *Kidder v. Bailey,* 187 N. C., 505, 122 S. E., 22; *McCallum v. McCallum, supra; Galloway v. Carter,* 100 N. C., 111, 5 S. E., 4. The intention of the testator is the paramount consideration in the construction of his will. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. All rules of construction, therefore, are in aid of discovering the testator's intent, and effectuating it, unless it be contrary to some rule of law or at variance with public policy. *Jolley v. Humphries,* 204 N. C., 672, 167 S. E., 417; *Ellington v. Trust Co.,* 196 N. C., 755, 147 S. E., 286.

In addition to this presumption against partial intestacy, there is nothing in item two of the testator's will to restrict or to limit the property passing thereunder to personal property or to property of a like nature with that designated. *Case v. Biberstein, supra; Wilce v. Wilce,* 7 Bing., 664; Anno. 128 A. L. R., 822. The rule of *ejusdem generis* is not generally applied to the residuary clause in a will or to what amounts to a residuary clause, for to do so would usually result in a partial intestacy, and as stated above, the presumption of law is against such intention. *Gordon v. Ehringhaus, supra; Faison v. Middleton,* 171 N. C., 170, 88 S. E., 141; Anno. Cas. 1917-E 72; *In re Champion,* 45 N. C., 246; Anno. 128 A. L. R., 825. "The law does not favor a condition of intestacy, and we should be slow to adopt a construction leading to such result." *Crouse v. Barham,* 174 N. C., 460, 93 S. E., 979. See, also, *Allen v. Cameron,* 181 N. C., 120; *Powell v. Woodcock,* 149 N. C., 235, 62 S. E., 1071; *Harper v. Harper,* 148 N. C., 453, 62 S. E., 553; *Austin v. Austin,* 160 N. C., 367, 76 S. E., 272.

It may be noted that the testator uses the word "devise" which usually signifies a gift of real property by will, though it may be extended to embrace personal property where so intended by the testator. *McCorkle v. Sherrill,* 41 N. C., 173. In the instant case, the testator also uses the word "bequeath," which aptly applies to a gift of personal property by will. Then, as if to make assurance doubly sure, he concludes with the words, "in fact, everything that I possess." This language is broad enough to cover both realty and personalty. *Hollowell v. Manly,* 179 N. C., 262, 102 S. E., 386; *Chamberlain v. Owings,* 30 Md., 447.

The terms employed by a testator to dispose of his property are to be given their well-known legal or technical meaning, unless it appear from the will itself that they were used in some other permissible sense. *Whit-*

ley v. Arenson, 219 N. C., 121, 12 S. E. (2d), 906; *Goode v. Hearne,* 180 N. C., 475, 105 S. E., 5; *May v. Lewis,* 132 N. C., 115, 43 S. E., 550; *Grandy v. Sawyer,* 62 N. C., 8. So, here, if we ascribe to the words used by the testator their usual signification, they seem quite sufficient to pass the land as well as the personal property. *Pate v. Lumber Co.,* 165 N. C., 184, 81 S. E., 132; *Jones v. Myatt,* 153 N. C., 225, 69 S. E., 135; *Foil v. Newsome,* 138 N. C., 115, 50 S. E., 597; *Page v. Foust,* 89 N. C., 447.

The Chancery Court of New Jersey in *Tzeses v. Tenez Const. Co.,* 95 N. J. Eq., 145, 122 Atl., 371, held that the words "all I have in clothes, money, jewelry, in fact all I have" were sufficient to carry the testator's real estate. See I Page on Wills (2d Ed.), sec. 834.

In *Harrell v. Hoskins,* 19 N. C., 479, *Gaston, J.,* speaking for the Court, said: "The words 'all my property,' unless they are explained by other words in the will to have a different meaning, embrace every subject of property and every interest therein which belonged to the testator." "Everything that I possess" would seem to be the full equivalent of "all my property."

The plaintiff concedes that the dispositive and descriptive words in item two of the will, unless restricted by the context or by the circumstances surrounding the testator at the time, are sufficient to pass the land. The testator executed a deed of gift to his wife for the land on the same day that he made his will. The parties draw opposite conclusions from this circumstance. The plaintiff says the testator owned no land at the time of the execution of his will, and hence he could not have had the land in mind. The defendant says the clear intent of her husband was to give her the property, if not by his deed, then by his will. The all-inclusive expression "everything that I possess" would embrace all of testator's property, however acquired. The will speaks as of the date of the death of the testator, and any property acquired after its making, by reversion or otherwise, would be subject to its terms. G. S., 31-41; *Faison v. Middleton, supra; Brown v. Hamilton,* 135 N. C., 10, 47 S. E., 128; *In re Champion,* 45 N. C., 246.

We conclude that the trial court properly construed the will as sufficient to pass the real estate. This defeats the plaintiff's action.

Affirmed.

W. C. SAMPLE v. LEM JACKSON AND H. P. WILLIAMS, CONSTABLE OF ELIZABETH CITY TOWNSHIP, PASQUOTANK COUNTY, NORTH CAROLINA.

(Filed 19 September, 1945.)

1. Bankruptcy § 7½: Homestead and Personal Property Exemption § 9—

Exempt property is expressly excepted from the operation of the Federal Bankruptcy Act, and the trustee must set apart and allot to the bankrupt such exemptions as are allowed by the State law. When there is no trustee this may be done by the court itself.

2. Bankruptcy §§ 4, 7½—

It is generally held that the provision of the Bankruptcy Act, making void a judgment obtained against bankrupt within four months of adjudication, does not avoid liens as against all the world, but only as against the trustee, and those claiming under him. The lien is not avoided for the benefit of the bankrupt save as to his exempt property.

3. Homestead and Personal Property Exemptions § 1—

Homestead exemptions are granted by and subject to State law. With us the homestead is not an estate in land. It is a mere exemption from sale under execution or like process, which relates only to the remedy.

4. Same: Judgments § 21—

A judgment is a lien on the land in which the homestead is allotted but collection by sale under execution or other process is prohibited during the life of the exemption.

5. Bankruptcy § 7½—

A bankrupt may assert the invalidity of a lien created within four months of bankruptcy by attachment or like process, the enforcement of which would defeat the exemption.

6. Bankruptcy §§ 7, 7½—

Where a bankruptcy court adjudges no assets available for unsecured creditors, declines to administer the property as too burdensome, assigning all realty to bankrupt as his homestead, creditors abandon any claim thereto, title to the land, subject to the homestead exemption and existing liens, reverts to the bankrupt, and the lien of a judgment within four months is not discharged.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at June Term, 1945, of PASQUOTANK. No error.

Civil action to restrain levy and sale under execution.

On 20 June, 1932, judgments were rendered in favor of the defendant Jackson and against the plaintiff in two actions pending in the Pasquotank Superior Court. One was for $300, interest and costs, and the other for $1,000, interest and costs. The judgments were duly docketed in Pasquotank County.

On 19 October, 1932, within four months after the docketing of said judgments, plaintiff filed a voluntary petition in bankruptcy and was duly adjudged bankrupt. The bankruptcy proceeding was adjudged a "no assets" case. The real property (110 acres in Pasquotank County) owned by plaintiff and described in the complaint was set apart to him as his homestead, subject to existing liens, and plaintiff was discharged. No trustee was appointed.

Defendant Jackson, about 1 January, 1944, procured the issuance of execution on said judgments and defendant Williams as constable levied upon and proceeded to advertise said land for sale under execution. Plaintiff instituted this action and obtained a temporary restraining order.

Plaintiff pleads the invalidity of the judgments rendered within four months of bankruptcy proceeding. The defendant alleges in defense fraud in the contract upon which the judgments were rendered and no notice of bankruptcy.

When the cause came on for hearing issues were submitted to and answered by the jury in favor of defendant.

Thereupon the court perpetually restrained any further proceeding under the judgment for $300 and further decreed "that the said defendant, Lem Jackson, be likewise restrained and enjoined from causing the land described in the complaint to be levied upon and sold under execution issued upon that certain judgment for $1,000, entered and docketed in favor of the defendant, Lem Jackson, and against the plaintiff on June 20, 1932, and referred to in the complaint, until the expiration of the Homestead allotted to the plaintiff in said lands in the course of the bankruptcy proceeding aforesaid or until a Homestead is re-allotted under a new execution or as provided by law."

The quoted provision is substantially in the language of a judgment tendered by plaintiff.

Plaintiff excepted and appealed.

J. B. McMullan and J. W. Jennette for plaintiff, appellant.

M. B. Simpson and Robert B. Lowry for defendants, appellees.

BARNHILL, J. Whether the personal liability of plaintiff on the judgments described in the pleadings was discharged by the bankruptcy was not adjudicated in the court below. The court held only that the judgment lien is not enforceable during the existence of the homestead but is enforceable against the homestead land after the expiration of the exemption. The correctness of this ruling is the crucial question presented on this appeal.

The purpose of bankruptcy legislation is to effect an equitable distribution of the bankrupt's property among his creditors and discharge the debtor from his obligations.

Exempt property is expressly excepted from the operation of the Act, 11 U. S. C. A., sec. 110, and the trustee must set apart and allot to the bankrupt such exemptions as are allowed by the State law. 11 U. S. C. A., sec. 75 (a). When there is no trustee, this may be done by the court itself. *Smalley v. Laugenour,* 196 U. S., 93, 49 L. Ed., 400.

Except as expressly stated in the Act the bankruptcy statute does not serve to discharge liens upon the property of bankrupt. It does provide that "all . . . judgments . . . obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, . . . shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the . . . judgment . . . shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." 11 U. S. C. A., sec. 107 (f).

While there is some conflict of State authority, it is generally held that this section does not avoid liens as against all the world, but only as against the trustee, and those claiming under him. 6 Am. Jur., 698; 8 C. J. S., 910. The lien is not avoided for the benefit of the bankrupt save as to his exempt property. This view has been approved and adopted by the Supreme Court of the United States. *Fischer v. Gas Co.,* 309 U. S., 294, 84 L. Ed., 764. See also *Connell v. Walker,* 291 U. S., 1, 78 L. Ed., 613; *Credit Co. v. Miller,* 9 Am. Bankr. Rep. (NS), 728.

Homestead exemptions are granted by and subject to State law. With us the homestead is not an estate in land. It is a mere exemption from sale under execution or like process. Art. X, sec. 2, N. C. Const.; *Caudle v. Morris,* 160 N. C., 168, 76 S. E., 17; *Sash Co. v. Parker,* 153 N. C., 130, 69 S. E., 1.

A judgment is a lien on the land in which the homestead is allotted but collection by sale under execution or other process is prohibited during the life of the exemption. G. S., 1-369; *Rankin v. Shaw,* 94 N. C., 405; *Jones v. Britton,* 102 N. C., 166; *Hardware Co. v. Jones,* 222 N. C., 530, 23 S. E. (2d), 883. The exemption relates only to the remedy. *Goodwin v. Claytor,* 137 N. C., 225; *Sexton v. Ins. Co.,* 132 N. C., 1.

It may be conceded that the bankrupt may assert the invalidity of a lien created within four months of bankruptcy by attachment or like process, the enforcement of which would serve to defeat the exemption. *Fischer v. Gas Co., supra.* But with us a judgment is not a lien on the homestead. It is a lien only on the land burdened by the exemption. Hence defendant's judgment is not a lien on the debtor's homestead to be avoided at the instance of the bankrupt.

Here the bankruptcy court adjudged no assets available for unsecured creditors and declined to administer the property as being too burdensome. Creditors abandoned any claim thereto. Plaintiff's homestead was allotted in the whole tract of land owned by him and title to the land, subject to the homestead exemption and existing liens, reverted to him. The lien of defendant's judgment was not discharged. It continues in full force and effect and may be enforced upon termination of the homestead exemption. His rights in this respect were fully protected by the judgment below.

In view of the disposition we have made of this appeal, the other questions discussed in the briefs are immaterial.

No error.

JOHN NEAMAND AND WIFE, FLORENCE M. NEAMAND, v. RALPH S. SKINKLE AND WIFE, ALVINA T. SKINKLE.

(Filed 19 September, 1945.)

Easements §§ 2, 6—

In a civil action for permanent injunction against interference with the use of an easement in an alleyway, where plaintiffs' evidence tends to show that a developer of realty for residential purposes put a map of his property on record, sold some of the lots in a certain block thereof and thereafter, with the approval and consent of the purchasers of the lots sold and for the convenience of all lots in said block, the developer and the purchasers of lots in such block, including predecessors in title of plaintiffs and defendants, by written agreement, which is now lost and which was not put on record, agreed to, and did lay out and establish, locate and grade a common alleyway for ingress, regress and egress for the then owners of plaintiffs' and defendants' lots and other lots in said block, and for the benefit of subsequent owners and the public, and that thereafter owners of lots on said alleyway constructed homes, garages and other improvements thereon with reference to the use of such alley as the only entrance to their property and used the same for many years without question, until recently when defendants wrongfully placed barriers at both entrances to said alleyway and also notices forbidding the use thereof, there is sufficient evidence for the jury and the court below erred in allowing defendants' motion for judgment as of nonsuit.

APPEAL by plaintiffs from *Olive, Special Judge,* at Regular July Civil Term, 1945, of BUNCOMBE.

Civil action for permanent injunction against interference with use of easement in alleyway.

Plaintiffs allege in their complaint, and on the trial below offered evidence tending to show this state of facts:

In the year 1925 Montford Hills, Inc., called herein the developer, subdivided into blocks of building lots for residential purposes with

system of streets, a boundary of land which it owned in the western part of the city of Asheville, N. C., and caused a plat of the subdivision to be prepared and registered in the office of the register of deeds of Buncombe County. According to this plat a section designated as Block A was completely encircled by a street, Tacoma Circle, laid out to conform to the topography, and all the lots in this Block had in the main fifty feet frontage on said Circle,—lots Nos. 1 to 12, both inclusive, on the north and west sides, lots Nos. 22 to 27, both inclusive, on the east and lots Nos. 14 and 15 on the south. Lots Nos. 1 to 4, both inclusive, run back to the north line of lot No. 27; lots Nos. 5, 6 and 7 run back to the northwest corner and west line of lot No. 27; the back lines of lots Nos. 8, 9, 10 and 11 join the back lines of lots Nos. 26, 25, 24 and 23; lots Nos. 12 and 14 join lot No. 11 on the south; and lots Nos. 15 and 22 join lot No. 23 on the south. But on the plat no alleyway was shown in this block.

However, in the summer of 1925, after Montford Hills, Inc., common source of title, had sold some of the lots above enumerated, it was discovered by the developer and others interested in purchasing property in the subdivision that certain of the lots in Block A on both sides of Tacoma Circle "by reason of their limited frontage and extreme elevation," could not be serviced by private driveways without great expense and effort.

Hence, in order to promote the sale of a number of unsold lots in this block and "to furnish to the then owners, subsequent purchasers and the general public, means of ingress, regress and egress," the developer, Montford Hills, Inc., and those owning lots, including the predecessors in title (a) of plaintiffs, who now own lots Nos. 24 and 25, (b) of defendants Ralph S. Skinkle and wife, Alvina T. Skinkle, who now own lot No. 3, and (c) of defendant R. F. Williams, who now owns lots Nos. 4 and 11, by written agreement dated 28 August, 1925, agreed to, and did lay out and establish a common alleyway eight feet in width to be used jointly by the then and subsequent owners of said lots above enumerated. But the written agreement has been lost and is not registered, and the plat on record is not amended to show the alleyway. Nevertheless, the alleyway so agreed upon was surveyed and located and cleared and graded by and at the expense of developer, Montford Hills, Inc. As so agreed upon, located and graded the alleyway extends southward from the north side of the block along, and four feet in width on each side of the dividing line between lots Nos. 3 and 4 to the north line of lot No. 27; then same width southwest across the northwest corner of lot No. 27 and the back portion of lots Nos. 4 and 5; then continuing southward along and four feet in width on each side of the dividing line between lots Nos. 6

to 11, both inclusive, on the west, and Nos. 27, 26, 25, 24 and 23 on the east, with an extension at the south end of said dividing line eastwardly along the line between lots Nos. 15 and 27 to west line of lot No. 22; and then westwardly along and four feet in width on each side of the dividing line between lot 11 on the north side and lots 14 and 12 on the south to Tacoma Circle on the west side of the block.

Thereafter, owners of lots abutting on said alleyway, as so laid, located, graded and dedicated, constructed homes and garages thereon and improved same with reference to the use of the alleyway as the only entrance. And in the summer or early fall of 1925 the alleyway so located and constructed was dedicated to the use of the owners of lots which it touched, and has been kept open and used as the only entrance for persons and vehicles in going to and from their homes, and in the delivery of coal, wood and groceries, as well as mail and in the collection of garbage.

And the predecessors in title of defendants did not at any time, or in any manner, seek to revoke the dedication of the alleyway, and have acquiesced in the use of same as a common alleyway. But recently defendants have wrongfully placed barriers for both pedestrians and vehicles at both entrances to said alleyway, and have placed notices forbidding others to use same.

Further the parties stipulated: (1) That Montford Hills, Inc., is common source of title of all parties here concerned. (2) That the deeds from Montford Hills for lots 4 and 12 referred to the common driveway or alley for lots Nos. 3 to 12, both inclusive, 14, 15 and 22 to 27 inclusive in Block A. (3) That in no other deeds conveying lots subsequent to 28 August, 1925, nor in any of the deeds in the chain of title of defendants Skinkle, nor in the deed from plaintiffs' predecessor in title to them for lots 24 and 25, under which plaintiffs claim, is there any reference to the alleyway across said lots or reservation of any right of third parties in and to said alleyway, but they do convey the lot or lots, respectively, with "all privileges and appurtenances thereunto belonging." (4) Defendant Williams filed answer admitting ownership of lots Nos. 4 and 11 and the existence of an easement of four feet running across said lots, and judgment was taken against him as shown by the record.

Defendants Skinkle in answer filed deny the material allegations of the complaint, but admit the location of the alleyway and claim the use of it has been permissive only.

From judgment as of nonsuit at close of their evidence, plaintiffs appeal to Supreme Court and assign error.

Chas. G. Lee, Jr., and Don C. Young for plaintiffs, appellants.
George H. Wright and Irwin Monk for defendants, appellees.

WINBORNE, J. The sole exception brought up for consideration on this appeal challenges the correctness of the ruling of the court below in sustaining defendants Skinkle's motion for judgment as in case of nonsuit. In the light of the principle enunciated in recent decision of this Court in the case of *Packard v. Smart,* handed down at Fall Term, 1944, and reported in 224 N. C., 481, 31 S. E. (2d), 517, applied to the evidence in the present case, taken in the light most favorable to plaintiffs, we are of opinion that plaintiffs have offered sufficient evidence to carry the case to the jury. Hence, without discussing the subject further, the judgment below will be reversed on authority of *Packard v. Smart, supra.*

Reversed.

HENRY EBORN, EPHRIAM HARDY, SARAH HARDY MANN AND SAMUEL MANN v. J. T. ELLIS AND CHARLES W. ELLIS.

(Filed 19 September, 1945.)

1. Clerks of Superior Courts § 3—

Clerks of the Superior Courts, under provisions of G. S., 105-394, relating to the use and the authorization of the use of facsimile signatures in signing summons, complaints, verifications of pleadings, notices, judgments or other papers in tax foreclosure proceedings, may not delegate to another the authority to render judgments in such proceedings.

2. Judgments §§ 1, 5—

The rendering of a judgment is a judicial act, to be done by the court only.

3. Same—

In its ordinary acceptation, a judgment is the conclusion of the law upon facts admitted or in some way established, and, without this essential fact, the court is not in a position to make final decision on the rights of the parties.

4. Judgments § 22b: Ejectment § 15—

A purported judgment, signed with a facsimile rubber stamp signature and relied upon by defendants as muniment of title, is subject to collateral attack in an action to recover land.

APPEAL by defendants from *Frizzelle, J.,* at May Term, 1945, of BEAUFORT.

Civil action to recover land.

The record on appeal, in so far as pertinent to decisive question presented, shows that:

In the trial court plaintiff offered evidence tending to show that the land in controversy in this action is the 24-acre tract allotted to Amanda Hardy in 1893 or '94 in the division of her father's land—the Martin Bonner land, acquired by him in January, 1875, less 9⅔ acres representing the interest inherited by three of Amanda's children, including her son Ephriam Hardy upon her death in 1903, which was set apart to and sold and conveyed by them to William Henry Eborn—the remaining 14⅓ acres being set apart to the other six children of Amanda Hardy; that this land had been in the actual possession of Amanda Hardy's children for more than thirty-seven years; that Ephriam Hardy, who had paid taxes on the whole tract, including the 9⅔ acres, becoming paralyzed and confined to his bed, quit paying five or six years ago and the land was sold for taxes.

Plaintiff then offered in evidence for the purpose of attack (1) papers in a so-called tax foreclosure suit entitled "Beaufort County *vs.* Ephriam Hardy and Mrs. Ephriam Hardy," purporting to be (a) a summons in the name of the Clerk of the Superior Court with the name of the clerk stamped thereon with a rubber stamp, received by the tax collector 29 September, 1941, and served by him on Ephriam Hardy on 1 October, 1941, but not served upon defendant Georgia Anna Hardy, who after due diligence could not be found in Beaufort County, and (b) the complaint alleging that the taxes for 1939 amounting to $8.95 were unpaid on a tract of land containing 24 acres, known as the Ephriam Hardy land, and in which all the names were stamped by rubber stamp. And (2) a deed from W. A. Blount, Jr., Commissioner, to Beaufort County, reciting a consideration of $44.23 purporting or undertaking to convey the lands in controversy and reciting that it was made because of nonpayment of taxes.

Plaintiffs also offered in evidence deed from Beaufort County to J. T. Ellis and C. W. Ellis, dated 7 April, 1942, on consideration of $75, duly registered.

Defendants, having reserved exception to refusal of the court to grant their motion for judgment as of nonsuit at the close of plaintiff's evidence, offered oral testimony tending to show that prior to the tax sale W. A. Blount, Jr., tax collector of Beaufort County, gave notice to Ephriam Hardy that his taxes for the year 1939 in the amount of $9.95, and for year 1940 in the amount of $8.95, were delinquent.

Defendants then offered a book claiming that it was a tax foreclosure judgment docket, to which plaintiffs objected—declining to admit the authenticity of the book. Thereupon, defendants offered as a witness

N. Henry Moore, Clerk of the Superior Court, who testified as follows: "The paper which the counsel for defendants exhibited to me has stamped thereon at the bottom the name 'N. Henry Moore.' I did not sign that paper; the name is stamped thereon by rubber stamp. I can't say who stamped my name to it. I don't know whether it was done in my office or outside of my office. Enormous quantities of these tax foreclosure suits were instituted. We were bringing 3,500 tax suits at one period. It was impossible for me to attend to and see about the entering of all the judgments. I understand that the Legislature authorized me to delegate to someone the right to enter judgments in cases of this kind (G. S., 105-394) and I delegated to the County Attorney, who is the attorney for defendants in this case, the power to enter judgments and to enter decrees of confirmation, using a rubber stamp with my name on it. I can't say whether I ever saw these papers or not. The law which I have referred to was passed because it was a physical impossibility for the clerk to consider each case and render a judgment and I acted for that reason. The book which has been referred to is a document in my office, designated as Tax Foreclosure Judgment No. 36. The papers with my name on them designated as judgment and decree of confirmation of the sale, were not signed by me, but my name was stamped thereon."

Whereupon, the court excluded the book offered in evidence, to which defendants excepted, rested, and renewed their motion for judgment as of nonsuit, which was overruled.

The defendants then requested the court to instruct the jury that they are the owners of the land in fee simple, and that the deed from Blount, Commissioner, to Beaufort County divested Ephriam Hardy and wife of all right, title and interest to property described in the complaint and that the judgment signed by N. Henry Moore, Clerk, is the judgment of the Superior Court, recorded in tax docket No. 36, page 101, and is a sufficient authorization of W. A. Blount, Jr., to sell the land described in the complaint. Instruction was refused and defendants except.

Thereupon, under peremptory instruction the jury answered the issue submitted finding that the plaintiffs, other than plaintiff Henry Eborn, are the owners of the land described in the complaint, except the 9⅔ acres described in the deed from Ephriam Hardy to William Henry Eborn.

From judgment upon the verdict defendants appeal to Supreme Court, and assign error.

John A. Mayo and Rodman & Rodman for plaintiffs, appellees.

E. A. Daniel for defendants, appellants.

WINBORNE, J. May the Clerk of the Superior Court, under provisions of G. S., 105-394, relating to the use and the authorization of the use of facsimile signatures in signing summons, complaints, verifications of pleadings, notices, judgments or other papers in tax foreclosure proceedings, delegate to another the authority to render judgments in such proceedings? This is the question decisive of this appeal, and must be answered in the negative.

"The rendering of a judgment is a judicial act, to be done by the court only," *Hall, J.*, in *Mathews v. Moore,* 6 N. C., 181. "Judgments are the solemn determinations of judges upon subjects submitted to them," *Hall, J.*, in *Williams v. Woodhouse,* 14 N. C., 257. "A judgment is not what may be entered, but it is what is considered and delivered by the court," *Reade, J.*, in *Davis v. Shaver,* 61 N. C., 18. "In its ordinary acceptation, a judgment is the conclusion of the law upon facts admitted or in some way established, and, without this essential fact, the court is not in a position to make final decision on the rights of the parties," *Sedbury v. Express Co.,* 164 N. C., 363, 79 S. E., 288.

These quotations are expressive of the accepted principles, and the course and practice in the courts of this State. Moreover, from a reading of the statute, G. S., 105-394, it is manifest that the General Assembly intended only to authorize the use, and the delegation of authority to use facsimile signatures to save labor and time in ministerial matters, and not to invest the clerk with authority to delegate to others the right to exercise the judicial functions of his office.

Applying these principles to the case in hand, defendants fail to show that the clerk made any determination on the subject of this action, or that any judgment was entered in accordance with the course and practice of the courts.

The purported judgment relied upon by defendants as muniment of title is subject to collateral attack in this action for the recovery of land. *Powell v. Turpin,* 224 N. C., 67, 29 S. E. (2d), 26, and cases cited.

Hence, in the judgment below we find

No error.

J. N. TURPIN AND WIFE, PEARL TURPIN, v. COUNTY OF JACKSON.

(Filed 19 September, 1945.)

1. Deeds § 11—

A deed, which did not purport to convey the lands described therein, but merely whatever right, title, and interest the grantors had in the lands, is limited by the grant and is in legal effect no more than a quitclaim deed, even though it might have contained a covenant of warranty.

2. Same: Contracts § 5—

A quitclaim deed for land, without reference to the character of the title, is, in the absence of fraud or mistake, a sufficient consideration to support a contract; money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance.

3. Deeds § 17—

There are no implied covenants with respect to title, quantity or encumbrance, in the sale of real estate. In the absence of fraud, mistake, or overreaching, the doctrine of *caveat emptor* applies.

APPEAL by defendant from *Pless, J.*, at May Term, 1945, of JACKSON.

This is an action to recover from the county of Jackson the sum of $369.34, paid by the plaintiffs as consideration for the conveyance to them of all the right, title and interest of the county of Jackson, in and to certain lands purported to be held by said county, under and by virtue of a tax foreclosure proceeding, in which the county became the last and highest bidder at said foreclosure sale and accepted a Commissioner's deed, which purported to convey the lands described therein to said county. After the plaintiffs herein took possession of said lands, the original owners instituted an action in ejectment against them, alleging that the tax foreclosure proceedings, and the conveyances executed pursuant thereto, under which the grantees purported to hold, were null and void, because the aforesaid owners were never served with summons in the tax foreclosure proceedings. That litigation ended adversely for these plaintiffs, hence this action. See *Powell v. Turpin,* 224 N. C., 67, 29 S. E. (2d), 26.

At the trial below it was stipulated that his Honor should hear the evidence, and find the facts without intervention of a jury. After hearing the evidence his Honor found that the plaintiffs were entitled to recover the consideration paid to the defendant, county of Jackson, because of (1) mutual mistake, and (2) total failure of consideration, and entered judgment accordingly. The defendant appeals, assigning error.

R. L. Phillips and M. V. Higdon for plaintiffs.

W. R. Sherrill and E. P. Stillwell for defendant.

DENNY, J. The question presented for determination on this appeal is whether or not the grantees in a quitclaim deed may recover the consideration paid therefor, in the event a paramount title to said lands was outstanding in a third party or parties at the time of the execution of the conveyance and the grantees have been evicted by the holder or

holders of the paramount title. In the absence of fraud or mistake, our decisions answer this question in the negative.

The conveyance executed on behalf of the county of Jackson did not purport to convey the lands described therein, but merely whatever right, title and interest the grantor had in the lands. Such a deed is limited by the grant and is in its legal effect no more than a quitclaim deed even though it might have contained a covenant of warranty. *Coble v. Barringer,* 171 N. C., 445, 88 S. E., 518; *Olds v. Cedar Works,* 173 N. C., 161, 91 S. E., 846; *Morton v. Lumber Co.,* 178 N. C., 163, 100 S. E., 322; *Cook v. Sink,* 190 N. C., 620, 130 S. E., 714.

A quitclaim deed for land, in the absence of fraud or mistake, is a sufficient consideration to negative a plea of total failure of consideration, and this Court so held in *Pritchard v. Steamboat Co.,* 169 N. C., 457, 86 S. E., 171, in an opinion by *Walker, J.,* in which it is stated: "It seems, therefore, to be settled now that at law, and even in equity, a vendee has no remedy on the ground of failure of title, if he has no covenants, and there is no fraud or mistake. *Chesterman v. Gardner,* 5 Johnson Ch. (N. Y.), 29; *Gouveneur v. Elemendorf, ibid.,* 79; *Snyder v. Laframboise,* 12 Am. Dec., 187, and note in Extra Annotated Edition at p. 191, citing *Dorsey v. Jackson,* 7 Am. Dec., 611; *Doyle v. Knapp,* 3 Scam., 334; *Owings v. Thompson, ibid.,* 505; *Slack v. McLagan,* 15 Ill., 242; *Sheldon v. Harding,* 44 Ill., 68, and other cases. See, also, *Maney v. Porter,* 3 Mumphreys (Tenn.), 346-363; *Botsford v. Wilson,* 75 Ill., 132. The Court said in *Sheldon v. Harding, supra:* 'There can be no doubt that a quitclaim deed for land, without reference to the character of the title, is, in the absence of fraud, a sufficient consideration to support a contract; money paid for such a conveyance cannot be recovered back, or a plea of failure or consideration maintained to a note given for such a conveyance. Such deeds are made because the vendor is unwilling to warrant the title, and they are accepted because the grantee is willing to take the hazard of the title, and believes it is worth the price he pays or agrees to pay. And, unless fraud is practiced upon the grantee, the law permits such contracts to be made, and will uphold and enforce them.' " Likewise, *Stacy, C. J.,* in speaking for the Court, in *Guy v. Bank,* 205 N. C., 357, 171 S. E., 341, said: "It is the rule with us that there are no implied covenants with respect to title, quantity or encumbrance, in the sale of real estate. *Peacock v. Barnes,* 139 N. C., 196, 51 S. E., 926; *Barden v. Stickney,* 130 N. C., 62, 40 S. E., 842; *Zimmerman v. Lynch, ibid.,* 61, 40 S. E., 841. In the absence of any fraud, mistake or overreaching, the doctrine of *caveat emptor* applies, *Smathers v. Gilmer,* 126 N. C., 757, 36 S. E., 153; *Walsh v. Hall,* 66 N. C., 233. Speaking to the subject in *Foy v. Haughton,* 85 N. C., 169, *Ruffin, J.* (the younger) delivering the opinion of the Court, said:

'But the rule of law is, that in sales of land it is the duty of a purchaser to guard against all defects, as well of title as of encumbrances or quantity, by taking proper covenants looking to that end, and if he fail to do so, it is his folly, against which the law, that encourages no negligence, will give him no relief.' "

The plaintiffs in their complaint allege neither fraud nor mutual mistake, but bottom their action on a total failure of consideration. It is unfortunate for these plaintiffs that their purported title was defective. However, a careful examination of the title would have disclosed its defectiveness. Therefore, the county of Jackson is under no legal obligation to refund the consideration paid to it for its quitclaim deed.

The judgment below is

Reversed.

H. A. PADGETT v. GROVER C. LONG ET AL.

(Filed 19 September, 1945.)

1. Statutes § 5d—

One who predicates his cause of action on a statute, where no such right existed at common law, must bring himself within its provisions.

2. Homestead and Personal Property Exemptions §§ 1, 10—

In a suit to recover damages (G. S., 95-75) for violation of the provisions of G. S., 95-73, an allegation, that the forbidden purpose of the statute was accomplished by instituting in the foreign state an action, suit or proceeding for the attachment or garnishment of the debtor's earnings in the hands of his employer, would seem to be an essential element of the cause of action. An allegation, that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same, is not sufficient.

3. Same—

The resident creditor is not forbidden (G. S., 95-73) to send his claim out of the State for collection by suit or otherwise, provided no effort is made, in the foreign state by attachment or garnishment, to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State.

4. Pleadings § 13½—

A demurrer admits the truth of factual averments well stated and relevant inferences of fact properly deducible therefrom, but it takes no account of legal inferences or conclusions of law asserted by the pleader.

APPEAL by plaintiff from *Rousseau, J.*, at March Term, 1945, of MADISON.

Civil action to recover damages for violation of the provisions of G. S., 95-73.

For his cause of action, the plaintiff alleges:

1. That plaintiff is a resident wage-earner or salaried employee of the Southern Railway Company, a corporation engaged in interstate business, and has for the past several years resided with his family in the town of Hot Springs, Madison County, this State.

2. That the defendants are residents of the town of Hot Springs and conduct therein a mercantile business under the name of Clover Leaf Store.

3. That plaintiff and defendants were at all times herein mentioned under the jurisdiction of the courts of this State.

4. That on or about 4 June, 1943, the defendants, having a book account against the plaintiff, sent the same to an attorney in Tennessee and had suit brought thereon while plaintiff was temporarily in said State working with a bridge construction crew as an employee of the Southern Railway Company, and obtained judgment against the plaintiff in a justice's court, "which this plaintiff was forced to pay in order to avoid an attachment or garnishment of his wages."

5. That it was the purpose and intention of the defendants, by the institution of the aforesaid suit in Tennessee, to deprive the plaintiff of his legal exemptions as a resident of the State of North Carolina.

6. That the defendants brought suit against the plaintiff in the State of Tennessee and had process served upon him while he was temporarily within that State, "and thereupon threatened to attach or garnishee plaintiff's wages."

Wherefore plaintiff demands "the full amount of the debt thus collected" (G. S., 95-75) and damages.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. Demurrer sustained. Plaintiff appeals, assigning error.

James E. Rector for plaintiff, appellant.

Guy V. Roberts and Jones, Ward & Jones for defendants, appellees.

STACY, C. J. The statute on which the plaintiff predicates his cause of action, G. S., 95-73, forbids any resident creditor of a resident wage-earner or other salaried employee of a railway corporation or other employer engaged in interstate business, to send his book account or other contract demand out of the State, assign or transfer it for value or otherwise, with intent thereby to deprive such debtor of his personal earnings and property exempt from application to the payment of his debts under

the laws of this State, "by instituting or causing to be instituted thereon against such debtor, in any court outside of this State, any action, suit or proceeding for the attachment or garnishment of such debtor's earnings in the hands of his employer, when such creditor and debtor and the railway corporation, . . . firm or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this State."

It will be noted that the right which the plaintiff seeks to enforce is statutory. No such right existed at common law. It is essential therefore that the cause of action be laid within the terms of the statute. 1 Am. Jur., 410. One who predicates his cause of action on a statute must bring himself within its provisions. *Chicago & E. R. Co. v. Biddinger,* 63 Ind. App., 30, 113 N. E., 1027. See *Moose v. Barrett,* 223 N. C., 524, 27 S. E. (2d), 532. "Where a right is statutory, the claimant cannot recover unless he brings himself within the terms of the statute"—2nd headnote, *United States v. Perryman,* 100 U. S., 235, 25 L. Ed., 645.

Plaintiff alleges that he was threatened with attachment or garnishment of his wages and was forced to pay the Tennessee judgment "in order to avoid an attachment or garnishment of his wages," but it is not alleged that the forbidden purpose was accomplished by instituting in the foreign state an action, suit or proceeding "for the attachment or garnishment of such debtor's earnings in the hands of his employer." This would seem to be an essential element of the cause of action created by the statute. Its omission is fatal to the case.

A resident creditor is not forbidden to send his claim out of the State for collection by suit or otherwise, provided no effort is made in the foreign state by attachment or garnishment to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State. The statute inveighs against the institution of foreign proceedings in attachment or garnishment, in the circumstances described, with intent thereby to reach the wages or salary of the wage-earner in the hands of his employer, when the creditor, the wage-earner and his employer are all under the jurisdiction of the courts of this State. The present complaint falls short of an allegation of this kind.

True, it is alleged that by sending their book account to an attorney in Tennessee and having it reduced to judgment in the courts of that State, the defendants thereby intended to deprive the plaintiff of his legal exemptions as a resident of North Carolina. This, however, is only the conclusion of the pleader. It is not supported by the requisite statutory allegations of fact. A demurrer admits the truth of factual averments well stated and relevant inferences of fact properly deducible therefrom, but it takes no account of legal inferences or conclusions of law asserted

by the pleader. *Ins. Co. v. Stadiem,* 223 N. C., 49, 25 S. E. (2d), 202; *Leonard v. Maxwell, Comr.,* 216 N. C., 89, 3 S. E. (2d), 316; *Harris v. R. R.,* 220 N. C., 698, 18 S. E. (2d), 204.

The demurrer was properly sustained.

Affirmed.

P. H. BELL v. VICTOR H. NIVEN, VANDER E. NIVEN, BEATRICE M. WHITLEY, BERTHA E. NIVEN, WALTER B. NIVEN, THOMAS J. NIVEN AND BLANCHE NIVEN ENNIX.

(Filed 19 September, 1945.)

1. Trial § 50—

Under the Soldiers' and Sailors' Civil Relief Act (U. S. C. A., sec. 520 [4]), in order to entitle defendant to set aside a judgment already rendered and to reopen the case, it must appear that he was prejudiced by reason of his military service in making defense to the action.

2. Same—

In an action by plaintiff to recover for professional services as an attorney at law rendered the defendants, where the trial court found that defendants were brothers and sisters, who had employed plaintiff about a matter in which all were equally interested and all of whom had fully empowered one of their number, T. J. N., to act for them as he might deem best, including W. B. N., one of the brothers in the U. S. Armed Forces, who had authorized T. J. N. to waive on his behalf the provisions of the Soldiers' and Sailors' Civil Relief Act, which was done, the court ordering the trial to proceed and finding that the interests of W. B. N. were fully protected, and thereupon plaintiff recovered and defendant W. B. N. moved to set aside the judgment, without contradicting or excepting to the findings of the trial court or the evidence, which motion was denied by the judge hearing same, after finding the facts as they had been found by the trial court, to which no exception was taken, on appeal the judgment below should be affirmed.

APPEAL by defendant Walter B. Niven from *Burney, J.,* at July Term, 1945, of WASHINGTON. Affirmed.

Carl L. Bailey and W. L. Whitley for plaintiff, appellee.

E. D. Flowers for defendant, appellant.

DEVIN, J. The defendant Walter B. Niven appealed from the denial of his motion to set aside the judgment heretofore rendered in the cause, in so far as it affects him, on the ground that at the time the judgment was entered he was serving in the armed forces of the United States and

was unable to attend the trial, and that no attorney was appointed to represent him.

The action was originally instituted by the plaintiff to recover for professional services as an attorney at law rendered to the defendants, including this defendant Walter B. Niven, in certain litigation wherein final recovery was had of real property of the value of eight or ten thousand dollars, together with a thousand dollars rent. Plaintiff conducted the litigation through the lower courts and in the Supreme Court of North Carolina wherein he obtained reversal of an adverse judgment below. *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311.

The defendants are brothers and sisters and equally interested. Plaintiff sued for $1,500 as the value of his services. All the defendants were duly served with process and filed joint answer admitting the employment of the plaintiff and that the services were rendered by him substantially as alleged, but resisted payment of any amount in excess of $500. Upon the hearing jury trial was waived. The presiding judge, Judge Carr, heard all the evidence and arguments for both sides, and rendered judgment that plaintiff was entitled to recover $800.00 for his services. On appeal the judgment of Judge Carr was affirmed. *Bell v. Niven, ante,* 35.

Judge Carr took note of the fact that the defendant Walter B. Niven, then in the armed forces of the United States, was not present, and, before entering on the trial, made careful inquiry to see that this defendant's interests were not thereby prejudiced. In his judgment are incorporated extended findings of fact on this point. Summarizing these findings, it appears that the court found that the interests of each of the defendants as tenants in common were alike, and their defense a common one; that Thos. J. Niven, a brother, had been designated by all the others to represent each and all of them in this cause and at the trial as fully as if they had been personally present, with full power and authority to take such action in their behalf as might be deemed proper, and that he acted under this authority. This finding was based on statements to the court by Thos. J. Niven and Victor H. Niven. It was specifically found that Thos. J. Niven represented Walter B. Niven with full power as aforesaid, and that he had authority to and did waive the provisions of the Soldiers' and Sailors' Civil Relief Act as to this cause and the matter involved therein, "it being the desire of the said Walter B. Niven that the trial proceed in all respects as if he were not in the military service. The court found that the trial as to said defendant should proceed, his interest being adequately protected."

The other defendants also filed a written statement with the court to the effect that Thos. J. Niven had been asked by his co-defendants in this action to represent them at the trial.

In the motion now made to set aside the judgment, the appellant Walter B. Niven does not contradict the statements, written or oral, which were made to the trial judge by his co-defendants, nor does he deny that he authorized and empowered his brother and co-defendant, Thos. J. Niven, to represent him at the trial and to make the waivers as found by the court.

In denying defendant's motion Judge Burney found the facts in all respects as they had been found by Judge Carr, and made these a part of his order. From this order we quote: "The court further finds that all of the rights of the defendant Walter B. Niven have been preserved and protected by the court in all proceedings herein and including the judgment entered as aforesaid, and that none of said defendant's rights have been prejudiced by his military services. The court further finds from an examination of all the record and exhibits offered that the defendant Walter B. Niven does not have a good and meritorious defense." It may be noted that in his motion defendant admits plaintiff was entitled to $500 for his services. The judgment allowed $800. At most the appellant would be interested only to the extent of one-seventh of the difference.

Under the Soldiers' and Sailors' Civil Relief Act (50 U. S. C. A., sec. 520 [4]), in order to entitle the defendant Walter B. Niven to set aside a judgment already rendered and to reopen the case, it must appear that he was prejudiced by reason of his military service in making defense to the action. The findings of the trial judge and those of the judge hearing the motion negative the suggestion that his interests suffered injury in any respect by his absence from the trial. He makes no exception to any of these findings. No other or additional facts are offered or called to our attention.

We think the judgment below denying defendant's motion to set aside the judgment should be affirmed. See *Lightner v. Boone,* 222 N. C., 205, 22 S. E. (2d), 426; *Boone v. Lightner,* 319 U. S., 561, 87 L. Ed., 1587; *Batts v. Little,* 222 N. C., 353, 23 S. E. (2d), 41. Compare *Davis v. Wyche,* 224 N. C., 746.

Judgment affirmed.

JOHN L. WOOD v. MARY CHRISTIAN FAUTH AND HUSBAND, STERLING FAUTH; ELIZABETH WOOD RICE AND HUSBAND, WILLIAM D. RICE, AND HELEN WOOD SAWYER AND HUSBAND, I. B. SAWYER, RESPONDENTS.

(Filed 19 September, 1945.)

1. Partition § 4d—

A partition proceeding having been transferred to the civil issue docket of the Superior Court, confirmation of a sale therein is a matter for the judge.

2. Same—

The report of sale in a partition proceeding, duly confirmed by the judge at term, confers upon the bidder certain rights of which the bidder cannot be summarily deprived. Upon failure to comply promptly with the bid, the proper procedure is by rule to show cause, and a reasonable time within which to comply should be allowed before vacating the sale and ordering a resale. Upon compliance the bidder is entitled to a deed as of the day of sale.

3. Same—

Commissioners, appointed to sell land in a proceeding for partition, have the right to require the payment of the amount bid in cash; and a motion to allow the bidder to offset claims against some of the shares is properly denied.

APPEAL by defendants from *Dixon, Special Judge,* at May Term, 1945, of PASQUOTANK. Error and remanded.

This was a proceeding for sale of certain real property for partition among the heirs of John L. Wood, Sr., subject to the widow's dower therein. The proceeding was begun in 1938 on the petition of John L. Wood, Jr., and was transferred to the civil issue docket of the Superior Court. There it was determined by reference (*Edmonds v. Wood,* 222 N. C., 118, 22 S. E. [2d], 237), that the one-third share or interest of petitioner was subject to a lien in favor of the widow, the defendant Mary C. Fauth, in the principal sum of $2,425.57, and that the property was subject to the allotted dower of Mary C. Fauth, and to liens for taxes and assessments.

At October Term, 1940, Judge Burgwyn confirmed the referee's report, ordered sale of the property, subject to the liens referred to, and appointed commissioners for that purpose. The sale was made 7 April, 1941, and the property bid off by defendant Mary C. Fauth for $1,051. The sale was reported and confirmed by Judge Burgwyn at May Term, 1941, of the Superior Court.

The other defendants, owning the two other shares in the property, signified their desire that their interests in the proceeds of sale be used

in payment of the amount bid by Mary C. Fauth, and requested that settlement be made by commissioners on that basis, leaving only costs and taxes to be paid in cash. The commissioners did not agree, and pending controversy on this point the amount bid was not paid nor deed executed. No motion to close the matter was made by any of the parties.

On 17 October, 1944, the commissioners made a supplemental report that the bid previously reported had not been paid, that the property was worth considerably more than the bid, and recommended that the order of confirmation be set aside and resale ordered. The clerk thereupon ordered that the sale and confirmation be set aside and the property advertised for resale. On appeal to the judge, the order of the clerk was confirmed, and the court, finding that the defendant had failed to comply with her bid and that the property had increased in value, set aside the former order of Judge Burgwyn, and ordered a resale. The court denied defendants' motion that the bidder be permitted to use the interests of the other defendants, and her own lien on petitioner's share in settlement of amount bid. The court also denied motion of defendant that she be allowed 30 days within which to pay the full amount of her bid in cash.

Defendants excepted and appealed.

M. B. Simpson and John H. Hall for plaintiff, appellee.

J. Kenyon Wilson for defendants, appellants.

DEVIN, J. This partition proceeding having been transferred to the civil issue docket of the Superior Court, confirmation of the sale was a matter for the judge. *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579. The reported sale on the bid of Mary C. Fauth was duly confirmed by the judge at term. This conferred upon her certain rights of which she could not be summarily deprived. Upon failure to comply promptly with her bid the proper procedure was by rule to show cause. A reasonable time within which to pay before vacating the sale and confirmation and ordering another sale should have been allowed, *Ex Parte Wilson,* 222 N. C., 99, 22 S. E. (2d), 262; *Mebane v. Mebane,* 80 N. C., 34; *Pettillo, Ex Parte,* 80 N. C., 50; *Hudson v. Coble,* 97 N. C., 260, 1 S. E., 688; *Marsh v. Nimocks,* 122 N. C., 478, 29 S. E., 840; *Gilliam v. Sanders,* 198 N. C., 635, 152 S. E., 888; this by analogy to the practice in the foreclosure of mortgages. *Pettillo, Ex Parte, supra.* Upon compliance with her bid after judicial confirmation, defendant would be entitled to deed conveying title as of the day of sale. *Parker v. Dickinson,* 196 N. C., 242, 145 S. E., 231.

Under the circumstances of this case we think the court below was in error in vacating the previous order of confirmation and ordering resale

without affording defendant reasonable time as prayed within which to pay the full amount of her bid in cash. The defendants' motion that the commissioners be required to offset the lien of the bidder on petitioner's share and the assigned shares of the other defendants against the purchase price was properly denied. The commissioners had the right to require the payment of the amount bid in cash.

For the error pointed out the cause is remanded to the Superior Court of Pasquotank County for further proceedings not inconsistent with this opinion.

Error and remanded.

CLIFTON McMICHAEL AND WIFE, MARY McMICHAEL, v. SAM J. PEGRAM, ADMINISTRATOR OF THE ESTATE OF W. E. SHUFORD, DECEASED.

(Filed 19 September, 1945.)

1. Evidence § 32—

In a civil action by plaintiffs against defendant for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards defendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, is excluded by G. S., 8-51, as personal transactions and communications with defendant's intestate.

2. Deeds § 5—

It is axiomatic that delivery is essential to vest title in the grantee named in a deed. Delivery is the final act of execution.

APPEAL by plaintiffs from *Rousseau, J.*, at June Term, 1945, of BUNCOMBE. Affirmed.

Civil action for an accounting.

On 5 April, 1930, plaintiffs being the owners of Tract No. 359, being Lot 44, Sheet 11, Ward 4, located at 75 Congress Street, D. B. 476, page 76, conveyed the same by trust deed to the Central Bank and Trust Company to secure a loan of $1,000, payable in weekly installments and due the Blue Ridge Building and Loan Association of Asheville. After making 48 weekly payments plaintiffs defaulted and on or about 18 September, 1934, the trust deed was foreclosed. Defendant's intestate became the purchaser and received deed therefor from the trustee. He

remained in possession thereof, collecting rent therefor, until his death on or about 5 June, 1941.

On petition of defendant the *locus* and other property was sold under order of court to make assets, and on 11 September, 1942, deed was executed and delivered to the purchasers at the commissioner's sale. Defendant received $2,350 for the McMichael lot.

Plaintiffs contend and allege that defendant is indebted to them for all rents collected by the deceased, and also in the amount of the purchase price received at the sale to make assets.

At the conclusion of the evidence, on motion of defendant, the court entered judgment of nonsuit and plaintiffs appealed.

Geo. F. Meadows and Cecil C. Jackson for plaintiffs, appellants.
J. W. Haynes for defendant, appellee.

BARNHILL, J. Plaintiffs offered to testify that the deceased went into possession of the premises shortly after the default in the payment of the indebtedness to the building and loan association for the purpose of collecting the rent and applying it to the payment of their indebtedness. They also offered to testify that, after the deceased purchased the property at the foreclosure sale, they executed and delivered to him certain notes secured by trust deed on the premises to secure the purchase price, and that the deceased then had in his possession a deed to the premises. Presumably they were the grantees in the deed to which reference was made, but it does not affirmatively so appear. This evidence was excluded.

The excluded testimony of plaintiffs, witnesses in their own behalf, clearly relates to personal transactions and communications between them and defendant's intestate, concerning the subject matter of the litigation. It comes squarely within the prohibition of G. S., 8-51. The court below committed no error in excluding it. *Turlington v. Neighbors,* 222 N. C., 694, 24 S. E. (2d), 648; *Wilder v. Medlin,* 215 N. C., 542, 2 S. E. (2d), 549; *Wingler v. Miller,* 223 N. C., 15, 25 S. E. (2d), 160; *Walston v. Coppersmith,* 197 N. C., 407, 149 S. E., 381; *Boyd v. Williams,* 207 N. C., 30, 175 S. E., 832; *Bunn v. Todd,* 107 N. C., 266. For other authorities see annotations under G. S., 8-51.

There is no sufficient evidence in the record to sustain the contention of plaintiffs that defendant's intestate, while acting as attorney and agent for them respecting this particular transaction, purchased the property at the foreclosure sale and took title to himself. Hence no trust *ex maleficio* resulted. Indeed it is not so alleged.

The *feme* plaintiff offered to testify that she "saw a deed for the land in controversy" in the office of deceased at the time she and her husband

executed certain notes. It does not appear that this was a deed to plaintiffs or that it had been executed by the deceased. If he exhibited it to plaintiffs, as their testimony would seem to indicate, it involved a personal transaction. But granting that evidence of the mere fact a deed was seen in the possession of the deceased might be competent, *Ins. Co. v. Jones,* 191 N. C., 176, 131 S. E., 587; *Carroll v. Smith,* 163 N. C., 204, 79 S. E., 497; *Cornelius v. Brawley,* 109 N. C., 542, it is alleged and both plaintiffs testified deceased never delivered it to them.

It is axiomatic that delivery is essential to vest title in the grantee named in a deed. Delivery is the final act of execution. *Turlington v. Neighbors, supra,* and cases cited. The excluded evidence did not avail the plaintiffs. Even if competent, its exclusion was not prejudicial.

The prohibitory provisions of G. S., 8-51, render plaintiffs incompetent to testify concerning personal transactions with the deceased. They fail to offer through other witnesses evidence tending to support their alleged cause of action. Hence the judgment below must be

Affirmed.

FRED ENGLISH v. MOODY BRIGMAN, ERNEST SNELSON, FRED E. FREEMAN, E. Y. PONDER, ALVIN DOCKERY AND J. ROBERT JOHNSON.

(Filed 19 September, 1945.)

1. Quo Warranto § 2—

An action for damages by plaintiff, who was appointed acting or substitute Clerk of the Superior Court under ch. 121, Public Laws 1941, against defendants, who, in a proceeding to oust plaintiff procured his arrest and imprisonment, in consequence of plaintiff's ignoring an order of the resident judge declaring the office vacant and enjoining plaintiff from exercising the duties thereof, cannot be converted into a *quo warranto* proceeding to try title to the office.

2. Public Officers § 5b—

Whatever may be the status as a *de jure* officer of one, appointed Clerk of the Superior Court by the County Commissioners under ch. 121, Public Laws 1941, in place of the duly elected clerk who had asked for and received leave, and was afterwards appointed and accepted as an officer in the U. S. Army, on the termination of an action to oust the new clerk by voluntary nonsuit leaving the incumbent in possession of the office, he is a *de facto* officer and his acts as such have a recognized validity, growing out of public necessity, and cannot be collaterally attacked.

3. Process § 2: Clerks of Superior Court § 3—

Issuance of summons is itself a ministerial act as to which the Clerk of the Superior Court is not disqualified by his personal interest.

ENGLISH *v.* BRIGMAN.

APPEAL by defendants from *Rousseau, J.*, 27 March, 1945. From MADISON.

From the records submitted on this appeal, we summarize the pertinent facts:

On 6 September, 1943, Clyde M. Roberts, then Clerk of the Superior Court of Madison County, and anticipating military service, and acting under chapter 121, Public Laws of 1941, applied to the commissioners of that county for leave of absence for the duration of the war or until released from service. Immediately thereupon, under authority of the statute, the county commissioners granted the leave and appointed the plaintiff, Fred English, acting or substitute clerk, and he entered upon the discharge of the duties of the office. Upon induction into the service, Roberts became an officer in the United States Navy, taking the prescribed oath of office. Thereafter the defendants brought a proceeding, the purpose of which was to oust the present plaintiff English from office. During the controversy the resident judge, Honorable Zeb V. Nettles, declared a vacancy to exist in the disputed office, and, acting under the supposed authority of the Constitution, Art. IV, sec. 29, appointed J. Robert Johnson to fill the vacancy.

It further appears that no person was elected to fill the office at the general election in November, 1944.

In the proceeding referred to, the present defendants asked that the incumbent English be restrained from exercising any of the duties of the office, and he was accordingly enjoined therefrom. Subsequently, at the instance of the defendants, it was made to appear that English had, in violation of the order, refused to vacate the office and continued to exercise its functions. English was thereupon adjudged to be in contempt of court and was incarcerated in the common jail of Buncombe County, whence he was subsequently released upon order of Judge Nettles. The proceeding instituted by defendants terminated by voluntary nonsuit, leaving English in the actual possession of the office.

The plaintiff English thereupon issued the summons in this action, brought in his own behalf, and filed his complaint, seeking to recover damages for an alleged conspiracy to deprive him of his office, in the prosecution of which, he complains, the defendants procured his unlawful imprisonment. The defendants, under a special appearance, moved to dismiss the action for want of jurisdiction, basing the motion upon the ground that English, at the time he issued the summons, was not clerk of the court in which the action was brought, and that the attempted official action was a nullity.

Upon the hearing, Presiding Judge Rousseau declined to allow the motion, and defendants appealed.

Guy V. Roberts and Jones, Ward & Jones for plaintiff, appellee.
John H. McElroy and J. W. Haynes for defendants, appellants.

SEAWELL, J. Behind the skirmish line developed on this appeal, one senses the rumble of real battle. But the case here cannot be said to have reached that decisive stage. We can only consider the stipulations of the parties as to the facts as bearing upon the motion to dismiss, within the frame of the action in which it is made—within its form, purport, and theory. It cannot be converted into a *quo warranto* proceeding to try the title to office, or to settle the more fundamental differences we find to exist between the parties.

Whatever may be the status of English as a *de jure* officer, and upon this it is not within the scope of our review to pass, we have no doubt. upon the facts presented and applicable principles of law, he was, at the time of issuing the summons in this case, *de facto* Clerk of the Superior Court of Madison County, acting under color of his original appointment under authority of the cited statute, and was in the actual discharge of the duties of the office, with his right to incumbency not adversely determined in any competent judicial proceeding. As such *de facto* officer his acts, of the nature involved in this motion, have a recognized validity in law, growing out of public necessity, and cannot be collaterally attacked. 43 Am. Jur., Public Officers, ss. 470, 471; *Berry v. Payne,* 219 N. C., 171, 13 S. E. (2d), 217, and cases cited, p. 177.

We do not understand the appellants to contend that the summons issued by English is void because issued in his own behalf. Issuing the summons is itself a ministerial act as to which the clerk is not disqualified by his personal interest. *Evans v. Etheridge,* 96 N. C., 42, 1 S. E., 633.

Judge Rousseau stated no grounds for his refusal to dismiss the case. However, the judgment was proper and is

Affirmed.

EMMA FEATHERSTONE v. LOUISE KIBLER GLENN.

(Filed 19 September, 1945.)

Betterments § 7: Trial § 38—

In a civil action to cancel a deed, remove cloud from plaintiff's title and to require defendant to reconvey house and lot to plaintiff, based on allegations of fraud, undue influence and coercion, where on the trial defendant in open court tendered the property in question to plaintiff, on the condition that plaintiff pay defendant the amount expended by her for improvements, which tender was accepted, there was error by the

court below in submitting to the jury an issue, as to whether defendant made permanent improvements, under title believed by her to be good, the only matter left open by the agreement of the parties being the amount expended for improvements or their reasonable value.

APPEAL by defendant from *Olive, Special Judge,* at July Term, 1945, of BUNCOMBE.

Civil action to cancel deed and to remove cloud upon plaintiff's title, or to require the defendant to reconvey house and lot to plaintiff "upon plaintiff's paying to the defendant the value of permanent improvements, if any, made by defendant upon said residence."

On 10 August, 1943, the plaintiff executed and delivered to the defendant deed for house and lot in the city of Asheville, reserving to the plaintiff a life estate therein. A bill of sale was also executed for the personal property in the house.

It is alleged that plaintiff was induced to execute the deed and bill of sale by means of fraud, undue influence and coercion exerted upon the plaintiff by defendant.

On the trial, counsel for defendant made the following tender and asked that it be incorporated in the record:

"Defendant in open court tenders the property in question to the plaintiff, on condition that plaintiff pays defendant the amount she expended for improvements."

The tender was accepted. The defendant thereupon executed and delivered to the plaintiff a fee-simple deed for the land in controversy, and, also, a bill of sale for the personal property.

The jury returned the following verdict:

"1. Did the defendant make permanent improvements upon the lands described in Deed Book 597, page 549, Register of Deeds' office of Buncombe County, North Carolina, under a title believed by her to be good? Answer: No.

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

"3. What is the value of such permanent improvements? Answer: ....."

From judgment for plaintiff, the defendant appeals, assigning errors.

George M. Pritchard for plaintiff, appellee.

Williams & Cocke for defendant, appellant.

STACY, C. J. In the state of the record as it existed after the acceptance of defendant's offer to reconvey and redeliver the property in con-

troversy, we think the issues submitted to the jury were inappropriate. The condition attached to defendant's offer was that plaintiff should pay to the defendant the amount which she had expended for improvements. This eliminated any technical question of betterments. *Barrett v. Williams,* 220 N. C., 32, 16 S. E. (2d), 398; *Pritchard v. Williams,* 176 N. C., 108, 96 S. E., 733; *Rogers v. Timberlake,* 223 N. C., 59, 25 S. E. (2d), 167. Apparently the only matter left open was the amount expended for improvements or their reasonable value. Indeed, the plaintiff testified on her examination in chief: "I have tendered to her and I am willing that she may take out of the house anything that she put in there and pay the reasonable value of permanent improvements to my building."

Under the judgment as rendered, the plaintiff gets her property back and pays nothing for the improvements. This would seem to be at variance with the agreement reached on the hearing.

New trial.

JOE TROITINO v. AL. J. GOODMAN.

(Filed 26 September, 1945.)

1. Reference §§ 2b, 8—

Where it appears that an accounting between plaintiff and defendant is necessary, objection to a compulsory reference is without merit.

2. Appeal and Error § 29—

An exception, without reason, argument or authority in support thereof, is taken as abandoned on appeal.

3. Appeal and Error § 37e—

Findings of fact, made by a referee and approved by the trial court, when supported by competent evidence, are not subject to review on appeal, except where some question of law is involved.

4. Contracts § 25b—

In actions for breach of contract, the damages recoverable are such as may reasonably be supposed to have been in the contemplation of the parties when the contract was made. The injured party is entitled to full compensation for his loss, and to be placed as near as may be in the condition which he would have occupied had the contract not been breached. But he is not entitled to enrichment.

5. Same—

Whether special damages, arising from the breach of a contract, may be regarded as within the contemplation of the parties, and therefore recoverable, would depend upon the information communicated, or the

knowledge of the parties at the time, and the reasonable foreseeability of such damages.

6. Same—

Where plaintiff purchased from defendant road machinery, which defendant agreed to put in first-class condition for immediate use and also to secure leases thereon, on commission and at current rentals, for at least three months or until plaintiff should need the machinery, upon defendant's failure both to repair and lease, the proper measure of damages is, not necessarily the difference between the purchase price and the value of the machinery, but the difference between its actual value and what its value would have been had it been put in first-class condition for immediate use, plus a fair rental value for a period of three months less commissions on such value. If the plaintiff paid an extravagant price for the machinery, he is not to recover for this slothfulness, in the absence of an allegation of fraud or overreaching.

7. Contracts § 1—

Liberty to contract carries with it the right to exercise poor judgment as well as good judgment—"as a man consents to bind himself, so shall he be bound."

8. Contracts § 25b—

In an action for breach of contract in the sale of machinery, where plaintiff has been allowed as damages the difference between the actual value of the machinery and what its value would have been had it been put in first-class condition for immediate service, plaintiff cannot also recover sums expended by him in an effort to put the machinery in condition for operation and service. He cannot recover the difference in value and also the cost of eliminating this difference.

9. Contracts § 18½—

A plaintiff may not sue for rescission of a contract and its breach at the same time. The one is in disaffirmance of the contract; the other in its affirmance.

10. Appeal and Error § 37e—

Where there are no findings to support a referee's conclusions, exceptions thereto must be sustained and the cause remanded for additional findings.

11. Damages § 1a: Contracts § 25b—

While the courts are not disposed to permit one who breaches his contract without any valid excuse to prescribe the rights of the innocent party, nevertheless, one who is injured in his person or property by the wrongful or negligent act of another is required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense; and ordinarily, he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided.

12. Appeal and Error § 48—

Where a case is tried under a misapprehension of the law, or correct principles are erroneously applied, the appellate practice with us is to order another hearing.

APPEAL by defendant from *Olive, Special Judge,* at July Term, 1945, of BUNCOMBE.

Civil action for damages arising out of contracts made in connection with sales of second-hand machinery.

Plaintiff is a contractor engaged in road construction. Defendant is a dealer in used road machinery. Both are residents of Buncombe County.

Three separate transactions are set out in the complaint:

First. It is alleged that on 30 October, 1942, the plaintiff purchased from the defendant two Cletrac Tractors—one with bulldozer attached and the other with angledozer attached—for a cash consideration of $9,250; that as an inducement to the sale, the defendant agreed to put the equipment in first-class condition for immediate use, and to secure leases for the tractors at current rental levels for a period of at least three months, or until the plaintiff should need the machinery in his own business; that the defendant neglected, failed and refused to make the needed repairs and to lease the equipment, as he agreed to do, by reason of which the tractors were rendered of no monetary value to the plaintiff; that in an effort to repair one of these tractors, and place it in usable condition, the plaintiff expended the sum of $328.66, which inured to the benefit of the defendant.

Second. It is alleged that on 1 November, 1942, the plaintiff purchased from the defendant one TD-40 International Tractor to be equipped with angledozer and pump; that as an inducement to the sale, the defendant agreed to put the tractor in first-class mechanical condition, and to lease the same at the prevailing rental value for a period of at least three months; that the plaintiff agreed to pay the defendant therefor the sum of $3,500, and then and there made a cash payment of $2,000 on account; that the defendant failed and refused to put the equipment in first-class mechanical condition and to lease it, as he had agreed to do, by reason of which the tractor is now useless to the plaintiff.

Third. It is alleged that on 1 November, 1942, the plaintiff purchased from the defendant one Back Hoe digger for a cash consideration of $750; that as an inducement to the sale, the defendant agreed to attach the same to an Ensley Crane or Shovel belonging to the plaintiff; that the Back Hoe, "the property of this plaintiff," is now in the possession of the defendant unattached, and by reason of the defendant's failure to comply with his agreement to attach the Back Hoe to plaintiff's Ensley Crane or Shovel and deliver same to plaintiff in first-class mechanical condition, the plaintiff has been deprived of the use and possession thereof since the date of purchase.

Wherefore, the plaintiff demanded a return of all moneys paid the defendant for the several items of machinery, damages for rental losses and money expended for repairs.

The defendant filed answer, admitted the sale of the different pieces of machinery, but denied any and all liability, and set up a counterclaim for 10% commission on all rentals collected during the three months next following the purchase of the Cletracs.

It appearing that an accounting would be necessary, the court ordered a reference, and named Hon. S. G. Bernard of the Asheville bar as referee.

The referee found the facts in detail, all in favor of the plaintiff, the crucial ones, presently pertinent, being as follows:

"4. It was further agreed between plaintiff and defendant that for his services in securing leases for said Cletracs the defendant was to receive ten (10%) per centum of all rents collected on leases secured by defendant."

"17. That the plaintiff expended the following sums of money for parts and repairs to said Cletracs in an effort to put the same in condition for operation and service: . . . $791.55."

"18. That in purchasing and paying for said Cletracs the plaintiff relied and acted upon the representations and agreement of the defendant that he would put said Cletracs and equipment in first-class condition and that he would secure leases for the same for at least three months at current rental prices."

"19. That the defendant breached his said contract with the plaintiff by failing to put said Cletracs and equipment in first-class condition and to rent out the same for a period of three months at current rental values."

"21. That at the time said Cletracs were sent out by defendant and at the time the same were delivered to the plaintiff, said Cletracs were worth the sum of $2,000."

"28. That in agreeing to purchase and pay for said TD-40 International Tractor and equipment and in paying the defendant the sum of $2,000, the plaintiff relied and acted upon the representations and agreement of the defendant to attach an angledozer and a pump to said tractor and put the same and equipment in first-class condition and to secure leases therefor for at least three months at current rentals."

"29. That the defendant breached his contract with the plaintiff by failing to put said TD-40 International Tractor and equipment in first-class condition, to lease the same, or to tender delivery thereof to the plaintiff."

"30. That on or about the 12th day of November, 1942, the plaintiff purchased from the defendant one Back Hoe and the defendant agreed to attach the same to an Ensley Crane belonging to the plaintiff."

"32. That the defendant breached his contract with the plaintiff to attach said Back Hoe to said crane and still has said Back Hoe in his possession."

"33. That the failure of the defendant to attach said Back Hoe to said crane rendered said Back Hoe of no value to the plaintiff."

Upon the facts as found by the referee, the following conclusions were reached:

"1. That the plaintiff is entitled to recover from the defendant the purchase price of the two Cletracs, viz., the sum of $9,250, less the value of said Cletracs, viz., $2,000, with interest thereon from October 30, 1942.

"2. That the plaintiff is entitled to recover from the defendant the rental value of the Cletrac with bulldozer attached for a period of three months, viz., $1,980, and the rental value of the Cletrac with angledozer attached for a period of three months, viz., $2,025, less rents collected in the amount of $1,114, with interest thereon from March 13, 1943.

"3. That the plaintiff is entitled to recover from the defendant the cost of parts and repairs to said Cletracs in the sum of $328.66, with interest thereon from June 7, 1943.

"4. That the plaintiff is entitled to recover from the defendant the cash payment on one TD-40 International Tractor in the amount of $2,000, with interest thereon from November 1, 1942.

"5. That the plaintiff is entitled to recover from the defendant the rental value of said TD-40 International Tractor for three months, viz., $1,934 (balance of damages sued for), with interest thereon from March 13, 1943.

"6. That the plaintiff is entitled to recover from the defendant the purchase price of a Back Hoe, viz., $750, with interest thereon from November 12, 1942.

"7. That the defendant is entitled to recover from the plaintiff commissions at ten per cent on $1,114, viz., $111.40, with interest thereon from March 13, 1943."

(Without objection, the parties seem to have dealt with another item not covered by the pleadings.)

Exceptions were filed to the findings of fact and conclusions of the referee, all of which were overruled by the trial court, save and except the defendant was allowed commissions on rentals of $4,005 first awarded the plaintiff, rather than on $1,114 as reported by the referee. In all other respects, the report of the referee was approved and confirmed.

From the judgment thus entered, the defendant appeals, assigning errors.

Sale, Pennell & Pennell for plaintiff, appellee.

T. A. Uzzell, Jr., and J. M. Horner for defendant, appellant.

STACY, C. J. The first exception is to the order of compulsory reference entered in the cause. The appellant states no reason or argument and cites no authority in support of the exception. Hence it is to be taken as abandoned. Rule 28, Rules of Practice, 221 N. C., 562. Moreover, it is without merit. *Chesson v. Container Co.,* 223 N. C., 378, 26 S. E. (2d), 904.

Also, it may be noted, the findings of fact, made by the referee and approved by the trial court, are not subject to review on appeal, except where some question of law is involved, as they are supported by competent evidence. *Wilkinson v. Coppersmith,* 218 N. C., 173, 10 S. E. (2d), 670; *Kenney v. Hotel Co.,* 194 N. C., 44, 138 S. E., 349.

The case divides itself into three parts:

I. THE CLETRAC TRACTORS.

There is no allegation of fraud or misrepresentation in the sale of the Cletracs. The plaintiff relied upon the advice of his former partner in making the purchase. It was a cash transaction. *McAden v. Craig,* 222 N. C., 497, 24 S. E. (2d), 1. The amount paid was $9,250. In addition, and as an integral part of the sale, the defendant agreed to put the equipment in first-class condition for immediate use and to secure leases therefor at current rental prices for at least three months. The defendant was to receive 10% of all rents collected on leases secured by him.

The defendant neglected to put the equipment in first-class condition for immediate use and failed to secure leases for the full first three months, as he had agreed to do, albeit some rentals were collected during this period. As damages for breach of the agreement the plaintiff was awarded the difference between the purchase price and the value of the Cletracs with interest from the date of sale, plus the alleged cost of parts and repairs, plus the full rental value for three months following delivery of the machinery, less 10% of this rental value due the defendant as commissions. *Berbarry v. Tombacher,* 162 N. C., 497, 77 S. E., 412; *Lumber Co. v. Mfg. Co.,* 162 N. C., 395, 78 S. E., 284.

The question now presented is the correctness of the measure of damages applied by the court below.

As an inducement to the sale of the Cletracs the defendant agreed to put them in first-class condition for immediate use and to secure leases for them at current rental levels for a period of at least three months—the defendant to be paid 10% of all rents collected on leases secured by him.

It has often been said that in actions for breach of contract, the damages recoverable are such as may reasonably be supposed to have been in the contemplation of the parties when the contract was made. *Chesson v. Container Co.,* 216 N. C., 337, 4 S. E. (2d), 886; *Frick Co. v. Shelton,* 197 N. C., 296, 148 S. E., 318; *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12; *Lane v. R. R.,* 192 N. C., 287, 134 S. E., 855, 51 A. L. R., 1114; *Builders v. Gadd,* 183 N. C., 447, 111 S. E., 771; *Sprout v. Ward,* 181 N. C., 372, 107 S. E., 214; *Gardner v. Tel. Co.,* 171 N. C., 405, 88 S. E., 630, L. R. A. 1916-E, 484; *Tillinghast v. Cotton Mills,* 143 N. C., 268, 55 S. E., 621; 15 Am. Jur., 454; 55 C. J., 872. The injured party is entitled to full compensation for his loss, and to be placed as near as may be in the condition which he would have occupied had the contract not been breached. *Bowen v. Bank,* 209 N. C., 140, 183 S. E., 266; 8 R. C. L., 433. "Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach." *Machine Co. v. Tobacco Co.,* 141 N. C., 284, 53 S. E., 885, 8 L. R. A. (N.S.), 255.

Whether special damages arising from the breach of a contract may be regarded as "within the contemplation of the parties," and therefore recoverable, would depend upon the information communicated or the knowledge of the parties at the time and the reasonable foreseeability of such damages. *Iron Works v. Cotton Oil Co.,* 192 N. C., 442, 135 S. E., 343; *Gardner v. Tel. Co., supra; Barrow v. R. R.,* 184 N. C., 202, 113 S. E., 785; *Steel Co. v. Copeland,* 159 N. C., 556, 75 S. E., 1002; *Peanut Co. v. R. R.,* 155 N. C., 148, 71 S. E., 71; *Hardware Co. v. Buggy Co.,* 167 N. C., 423, 83 S. E., 557; *Hadley v. Baxendale,* 9 Eng. Exch., 321; *Gulf States Creosoting Co. v. Loving,* 120 F. (2d), 195; 46 Am. Jur., 867.

The following expression of the pertinent test is to be found in the Restatement of the Law on Contracts, page 509:

"Sec. 330. Foreseeability of Harm as a Requisite for Recovery. In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury."

Our own decisions are in full support of this statement. *Pendergraph v. Express Co.,* 178 N. C., 344, 100 S. E., 525; *Cary v. Harris,* 178 N. C., 624, 101 S. E., 486; *Kime v. Riddle,* 174 N. C., 442, 93 S. E., 946; *Winn v. Finch,* 171 N. C., 272, 88 S. E., 332; *Robertson v. Halton,* 156 N. C., 215, 72 S. E., 316; *Cable Co. v. Macon,* 153 N. C., 150, 69 S. E., 14; *Lumber Co. v. R. R.,* 151 N. C., 23, 65 S. E., 460; *Furniture Co. v. Express Co.,* 148 N. C., 87, 62 S. E., 145, 30 L. R. A. (N. S.), 483; *Spiers v. Halstead,* 74 N. C., 620.

As a general rule, the loss or injury actually sustained, rather than the price paid or agreed to be paid on full performance of the contract, is the measure of damages for its breach. 15 Am. Jur., 445. The purpose is to save the innocent party from harm, or to make him whole, so far as can be done by monetary award. 15 Am. Jur., 449. The injured party is entitled to the pecuniary difference between his position upon breach of the contract and what it would have been, had the contract been performed. But he is not entitled to be enriched by the breach. *Perry v. United States,* 294 U. S., 330, 79 L. Ed., 912, 95 A. L. R., 1335; *Texas Co. v. Pensacola Marine Corp.,* 279 F., 19, 24 A. L. R., 1336. It all comes to what was reasonably in the minds of the parties at the time of the making of the contract. The question of special damages was fully considered in the cases of *Iron Works v. Cotton Oil Co., supra; Builders v. Gadd, supra;* and *Furniture Co. v. Express Co., supra.*

The proper measure of damages for the breach of the agreement here under review would seem to be the difference between the value of the Cletracs as delivered and what the value would have been if they had been put in first-class condition for immediate use as promised, plus a fair rental value for a period of three months less commissions on such rental value. *Guano Co. v. Livestock Co.,* 168 N. C., 442, 84 S. E., 774; L. R. A., 1915-D, 875; *Underwood v. Car Co.,* 166 N. C., 458, 82 S. E., 855; *Brewington v. Loughran,* 183 N. C., 558, 112 S. E., 257, 28 A. L. R., 1543; *Brown v. R. R.,* 154 N. C., 300, 70 S. E., 625; *Mfg. Co. v. Oil Co.,* 150 N. C., 150, 63 S. E., 676, 134 Am. St. Rep., 899; *Parker v. Fenwick,* 138 N. C., 209, 50 S. E., 627; *Mfg. Co. v. Gray,* 126 N. C., 108, 35 S. E., 236; *S. c.,* 129 N. C., 438, 40 S. E., 178, 57 L. R. A., 193; *Pritchard v. Fox,* 49 N. C., 141; *Marsh v. McPherson,* 105 U. S., 709; 46 Am. Jur., 863.

Recovery is to be restricted to the difference, not necessarily between the purchase price and the value of the Cletracs, but to the difference between their actual value and what their value would have been if they had been put in first-class condition for immediate use. 46 Am. Jur., 863. The evidence here discloses quite a disparity between the purchase price of the tractors and what their value would have been if they had

been put in the condition as promised. In 1942, plaintiff's former partner, upon whose judgment the purchase was made, thought they were worth $4,600 apiece, or a total of $9,200. On the hearing, he said he had changed his opinion and he then believed they were worth "2000, if they had been in good mechanical condition." This estimate was accepted by the referee and approved by the court below. So, if the plaintiff paid $9,250 for tractors worth only $2,000, he is not to recover for this slothfulness, in the absence of an allegation of fraud or overreaching on the part of the defendant. Liberty to contract carries with it the right to exercise poor judgment as well as good judgment. *Knott v. Cutler,* 224 N. C., 427, 31 S. E. (2d), 359. It is the simple law of contracts that "as a man consents to bind himself, so shall he be bound." Elliott on Contracts (Vol. 3), sec. 1891; *Feigel v. Products Co.,* 195 N. C., 659, 143 S. E., 186; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Clancy v. Overman,* 18 N. C., 402.

True it is, that in a number of cases the rule for the admeasurement of damages for breach of warranty in the sale of personal property has been stated as the difference between the purchase price and the actual value of the goods sold, but these cases proceed upon the theory that, in the absence of evidence to the contrary, the purchase price is to be regarded as the value of the property. *Guano Co. v. Livestock Co., supra; Critcher v. Porter Co.,* 135 N. C., 542, 47 S. E., 604; 55 C. J., 872; 46 Am., Jur., 866.

It follows, from what is said above, that there was error in approving the first conclusion of the referee.

Nor is the plaintiff entitled to recover for sums alleged to have been expended by him in an effort to put the Cletracs in condition for operation and service. This would be included in arriving at the difference between the value of the Cletracs and what they would have been worth had they been put in first-class condition for immediate use. *Mfg. Co. v. Oil Co.,* 150 N. C., 150, 63 S. E., 676. It has been repeatedly held that where the articles delivered are not what the contract calls for, as in the case of defective machinery, the measure of the vendee's damage is what it would reasonably cost to supply the deficiency. *Marsh v. McPherson,* 105 U. S., 709; *Mfg. Co. v. Phelps,* 130 U. S., 520, 32 L. Ed., 1035. In any event, however, the plaintiff is entitled to but one recovery for the deficiency. He may not have the difference in value and then the cost of eliminating this difference.

The case is not like *Underwood v. Car Co., supra,* or *Kester v. Miller Bros.,* 119 N. C., 475, 26 S. E., 115, where the vendee was induced to make repairs at the instance of the vendor in an effort to see if the car in

the one case and the engine in the other could be made to come up to representations.

It would seem that the exception to the third conclusion of the referee was well interposed.

II. THE TD-40 INTERNATIONAL TRACTOR

The plaintiff purchased an International Tractor from the defendant for $3,500 and paid $2,000 on account. As an inducement to the sale, the defendant agreed to equip the tractor with angledozer and pump, put it in first-class mechanical condition, and lease it at the prevailing rental price for a period of at least three months. The referee found that this agreement had been breached, and awarded the plaintiff a recovery of the cash payment of $2,000, with interest from the date of sale, plus the rental value of the tractor for a period of three months. It is not apparent upon what theory a recovery of the "cash payment" was allowed. If upon the theory of a rescission of the contract, the rental value for three months would not be recoverable, as this would be to rescind in part and to affirm in part. 13 C. J., 623. A plaintiff may not sue for the rescission of a contract and its breach at the same time. *Lykes v. Grove,* 201 N. C., 254, 159 S. E., 360. The one is in disaffirmance of the contract; the other in its affirmance. *Machine Co. v. Owings,* 140 N. C., 503, 53 S. E., 345.

Nor has the plaintiff sought to rescind here. He is seeking to recover for breach of the contract, but there are no findings to support the recovery of the "cash payment" as an award of damages under the proper rule for their admeasurement. In a cash transaction, it is generally understood that the payment of the purchase price and the delivery of the property are to take place simultaneously or as concurrent acts. Hence, in an action for specific performance or for breach of the contract, it would seem that the plaintiff in the action, whether buyer or seller, would be required to show an offer on his part to perform, or that such offer was rendered unnecessary by the refusal of the defendant to comply. *McAden v. Craig,* 222 N. C., 497, 24 S. E. (2d), 1; *Hughes v. Knott,* 138 N. C., 105, 50 S. E., 586; *S. c.,* 140 N. C., 550, 53 S. E., 361; *Blalock v. Clark,* 137 N. C., 140, 49 S. E., 88; *Ducker v. Cochrane,* 92 N. C., 597; 55 C. J., 322 and 1116.

Much that is said above under the heading of The Cletracs may be applicable to the facts as they are finally established in respect of the sale and purchase of the TD-40 International Tractor. The exceptions to the fourth and fifth conclusions of the referee should have been sustained and additional findings made.

III. THE BACK HOE.

On 12 November, 1942, the plaintiff purchased from the defendant a Back Hoe, paying therefor in cash the sum of $750. As an inducement to the sale, the defendant agreed to attach it to plaintiff's Ensley Crane or Shovel and deliver same to plaintiff in first-class mechanical condition. This he neglected to do. The referee finds that the failure to attach the Back Hoe to the plaintiff's crane or shovel rendered it worthless to him, and awarded the plaintiff recovery of "the purchase price of a Back Hoe, viz., $750, with interest thereon from November 12, 1942." This was approved by the trial court.

It is in evidence, however, without contradiction, that the Back Hoe could have been attached to the crane or shovel for not "more than $25." In fact, this is the plaintiff's own testimony. The law, therefore, imposed upon the plaintiff the duty "to do what reasonable business prudence requires in order to minimize his loss." *Cotton Oil Co. v. Tel. Co.*, 171 N. C., 705, 89 S. E., 21; *Monger v. Lutterloh, supra; Oil Co. v. Burney,* 174 N. C., 382, 93 S. E., 912.

It is true that where a party breaches his contract without any valid excuse, the courts are not disposed to permit him to prescribe the rights of the innocent party. Nevertheless, it is a sound principle of law that one who is injured in his person or property by the wrongful or negligent act of another is required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense; and ordinarily, he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. *Construction Co. v. Wright,* 189 N. C., 456, 127 S. E., 580; *Mills v. McRae,* 187 N. C., 707, 122 S. E., 762. "The general principle is fully recognized with us that, in case of contract broken or tort committed, the injured party should do what reasonable care and business prudence require to minimize the loss"—*Hoke, J.,* in *Yowmans v. Hendersonville,* 175 N. C., 574, 96 S. E., 45.

In application of this principle, the exception to the referee's sixth conclusion should have been sustained and additional findings made.

Where a case is tried under a misapprehension of the law, or correct principles are erroneously applied, the appellate practice with us is to order another hearing. *Coley v. Dalrymple, ante,* 67; *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324; *S. v. Williams,* 224 N. C., 183, 29 S. E. (2d), 744.

The cause will be remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

ZEB HENSON, ADMINISTRATOR OF ROBERT DAVID HENSON, v. ARNOLD WILSON, B. B. PENLAND, B. R. PENLAND, PLATO PENLAND, AND LUTHER AYERS.

(Filed 26 September, 1945.)

1. Automobiles §§ 8, 9a—

It is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent man would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator to keep the vehicle under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty requires the operator to be reasonably vigilant, to anticipate and expect the presence of others, and to see what he ought to have seen.

2. Automobiles § 18g—

In a civil action to recover damages for the alleged wrongful death (G. S., 28-173, 174) of a child less than eight years of age, where plaintiff's evidence tended to show that plaintiff's intestate was on the side of the left side embankment of a narrow road cut, as the loaded truck operated by one of defendants approached him uphill and at a speed of not over five miles per hour, that if he was there the operator of the truck saw him, or by the exercise of ordinary care could and should have seen him, that the operator of the truck had knowledge of the narrowness of the road and of the uneven surface of the road and its effect in making the loaded truck lean to the left, so that collision with, and injury to a child on the left embankment was likely to ensue, while defendants' evidence contradicted that of plaintiff, issues of fact are raised which the jury alone may decide, and there was error in the court's allowing a motion for judgment as of nonsuit, when renewed at the close of all the evidence.

APPEAL by plaintiff from *Warlick, J.*, at January Term, 1945, of YANCEY.

Civil action for recovery of damages for alleged wrongful death, G. S., 28-173, and G. S., 28-174.

Plaintiff alleges in pertinent part, briefly stated, that on 14 December, 1943, his intestate, Robert David Henson, a Negro boy less than eight years of age, was killed when an International motor truck which was operated by defendant Arnold Wilson in hauling logs, as agent and servant of his co-defendants, the owners thereof, ran into said intestate as he was walking or standing on the embankment of a cut on a public road with high embankment on each side near Lincoln Park in Yancey County, North Carolina; that at the time defendant Wilson was familiar with the road and knew it to be narrow, with high embankment on each side and knew that small children who lived in the neighborhood along the road frequently used the road; and that at the time, and with such knowledge

defendant Wilson recklessly, carelessly and negligently operated said motor truck without due caution and circumspection, and without regard for the safety of persons on the road, and against the embankment on its left side of the road where plaintiff's intestate was standing or traveling, thereby causing his injury and death, etc.

Defendants in joint answer filed admit that at the time in question defendant Wilson was operating said motor truck in hauling logs as agent and servant of his co-defendants, but deny all allegations of negligence. And for further answer and defense, defendants set up their version of the occurrence and plead contributory negligence of plaintiff's intestate and of his parents in bar of recovery.

Plaintiff in reply denies the averments of the defendants in their further answer and defense, and pleads the doctrine of last clear chance.

The evidence offered upon the trial in Superior Court tends to show, in the light most favorable to plaintiff, these facts: The road, referred to as "the main road," on which plaintiff's intestate was killed, and on which the truck in question was traveling from the log yard at which it was loaded with logs, and leading by the colored Baptist Church, passes in the vicinity of the house of Zeb Henson, the father of Robert David Henson, and intersects with a path or road on the left side leading to the Henson house. From that point the main road continues on steep grade through a cut. The embankment on the left side gradually rises in height above the roadbed to about four feet at the point below which the body of Robert David Henson was found. Through this cut the road is very narrow—from seven to eight feet in width. The surface of the road slopes to the left. The surface on the right side is eighteen inches higher than that on the left. From the point of intersection with the Henson path or road toward the point where Robert David Henson's body was found the road is straight, the distance being sixty to seventy-five feet, with nothing to obstruct the view. At that point there is an oak tree on the left side of the road with root ends extending out of the embankment of the cut. Near-by there is another tree. There is a wire fence on top of the embankment. There is practically no space between the wire fence and the edge of the cut.

The bed of the truck in question is about seven feet wide, and wider than the cab. And in respect thereto, the helper on the truck as witness for defendants, testified, "This road is what might be called a cut. A high bank on the right and bank on the left. That road is just wide enough for one motor vehicle to travel at a time. It's so narrow we had to raise the mirror on the left side of the truck . . . In traveling over this road we went in same direction each trip. The wheels on our vehicle cut right along the foot of the embankment. The road is lower on the left than on the right. With a load of logs like we had that trip, the

truck pitched towards the left of the road. The sides of our truck and logs had hit the roots where they were sticking out, that is, the roots of the tree where Robert David Henson was found." Also there was evidence that the body of Robert David Henson was found "lying up and down the route which the truck had made," on the left side of the road "under the tree with his head a little up the hill," and that a piece of his overalls and some of his hair were seen on the roots of the tree. Furthermore, all the evidence tends to show that the truck was going uphill, at slow speed not over five miles per hour, described by defendant Wilson as "traveling in bulldog and dual gear—4 to 5 miles per hour." Plaintiff's witness put the speed at from 2 to 5 miles per hour. And witness for defendants testified: "At the speed we were going, the load on the truck and the condition of the road, that truck could have been stopped suddenly."

Plaintiff's witness, Lester Young, gave a narrative, substantially as follows: "I was at home on the 14th day of December, 1943. My home is about as near to the place where Robert David Henson was killed as from here across the street. I saw the truck driven by Arnold Wilson coming up the road. I saw it before it got to the curve of the road, below where the little boy was killed. I was sitting at the window . . . and the truck came and two little boys were running along the side of it and one of them caught the truck; that was the least boy . . . not Robert David Henson. Robert David Henson ran on by the truck to the bars. He ran around the big oak standing at the bars and got between another tree there and the big oak. He was standing there and the truck hadn't yet got to him. The truck pulled on pretty close to him and I heard my kids holler to run, and turned my head . . . and when I looked around Robert David was gone . . ." Then in answer to question, "Tell us just how he was standing at the time you saw him," the witness said, "It looked like it was from here up . . . from his waist up was above the top of the bank." And same witness continuing: "Robert David was on the left side of the road, his left side and driver's left side. There's a barbed wire fence along the edge of the embankment. There is no kind of a path between the fence and the embankment. . . . The little boy was still standing there when the cab and driver were against him. It looked like you could almost touch the little boy. Then I turned my head . . . I looked back and didn't see him . . . I heard some screams. I saw the truck pulling on up the road. No other person or vehicle passed by this point from the time I saw the boy standing on the side of the bank until I turned my head back . . ." Then same witness, continuing on cross-examination, said: "The last time I saw the little boy he was standing right about middleways of the two oak trees. He was not on top of the bank. The fence was between Robert David Henson

and me. And the fence is right along the top of the bank . . . The trees stood right on the edge of the bank, and the roots stick out at the point where he got killed . . . I saw the truck when it pulled up where the little boy was standing and when it got on up there . . . I saw the little boy standing there on the bank before the truck got to him . . . The last time I saw Robert David, he was standing on the embankment, he was between the top edges of the two banks. I could see from his waist up; he might have been down in the road . . . I couldn't tell whether he was down in the road or hunkering down on the bank. I could not tell whether he was in the roadbed or where. When I saw him the truck was coming up in his direction."

There is also evidence that Robert David Henson was "around seven years old" and about three feet tall.

Defendants on the other hand offered evidence tending to show an entirely different version as to how Robert David Henson came to his death.

Motion of defendants for judgment as of nonsuit at close of plaintiff's evidence was overruled, but like motion at close of all the evidence was allowed, and in accordance therewith judgment was signed.

Plaintiff appeals therefrom to Supreme Court and assigns error.

Bill Atkins for plaintiff, appellant.

Watson & Fouts for defendants, appellees.

WINBORNE, J. It is a general rule of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty requires that the operator must be reasonably vigilant, and that he must anticipate and expect the presence of others. *Hobbs v. Coach Co., ante,* 323, 34 S. E. (2d), 211, and cases cited.

Moreover, it is said in *Wall v. Bain,* 222 N. C., 375, 23 S. E. (2d), 330, "It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel, and he is held to the duty of seeing what he ought to have seen."

In the light of these principles applied to the evidence in the case in hand, we are of opinion and hold that the evidence taken in the light most favorable to plaintiff, is of sufficient probative force to take the case to the jury. The evidence is susceptible of findings by the jury: (1)

That plaintiff's intestate, Robert David Henson, was on the side of the left side embankment of the road cut, as the truck operated by defendant Wilson approached him; (2) that if he were there, the operator of the truck saw him, or by the exercise of ordinary care could and should have seen him; (3) that the operator of the truck had knowledge of the narrowness of the road and of the uneven surface of the road and its effect upon the loaded truck in relation to the left side embankment; and (4) that collision with, and injury to a child on such left side embankment was likely to ensue. If the jury should so find the facts to have been, from the evidence, and by its greater weight, it was the duty of the operator of the truck to exercise ordinary care to avoid collision with the child, and his failure to do so would be negligence.

On the other hand, defendants controvert the evidence of the plaintiff. That raises an issue of fact which alone the jury may decide. And we here express no opinion upon the weight of evidence. That is for the jury.

The judgment below is

Reversed.

DENNIS HARRILL v. SINCLAIR REFINING COMPANY AND MORGAN P. BODIE.

(Filed 26 September, 1945.)

1. Landlord and Tenant § 10—

Ordinarily at common law, in the absence of an agreement relating to repairs or warranty relating to the condition of the property when leased, the lessee takes it in its then existing condition, and the landlord is under no obligation to restore or make repairs to premises where defects have been caused by decay or use, or which have arisen after the date of lease or occupancy, or which existed at the time of the demise.

2. Same—

The burden is on the lessee to show that the lessor contracted to make repairs.

3. Landlord and Tenant § 11—

Even when a lessor in his lease assumed the duty of making repairs, a breach of that duty would not ordinarily give rise to a cause of action in tort for personal injuries to the lessee.

4. Same—

In a tort action by lessee against lessor for injuries caused by defects in the leased premises, ordinarily the doctrine of *caveat emptor* applies. To avoid this doctrine, the lessee must show that there is a latent defect

known to the lessor, or which he should have known, involving a menace or danger, and a defect of which the lessee was unaware or could not, by the exercise of ordinary diligence, discover, the concealment of which would be an act of bad faith on the part of the lessor.

5. Same—

A *latent defect* in leased premises, for which the lessor may be liable in tort to the lessee, refers to a *physical defect* and not a latent potentiality of injury from a patent physical condition, or to mere consequences unknown, unexpected or unpredictable to the parties. Two rules are deducible from this distinction: First, to render the lessor liable for an injury on the theory of concealment, the latent defect which it is his duty to disclose must be of such a nature as to give warning to an ordinarily prudent person that injury might result as a natural and probable consequence in the use of the demised premises; and second, where the supposed defect or defective condition itself is patent, and the parties have an equal opportunity of inspection, no liability in tort can be imputed to the lessor with respect to it.

6. Same: Negligence § 19a—

In a civil action to recover damages by plaintiff, lessee, against defendant, lessor, for personal injuries allegedly caused by defects in the leased premises, where plaintiff's evidence tended to show that the injuries resulted from defects in an overhead slide type door, running on a track and operated by springs and cables over pulleys, that one cable was off the pulley, and there were insufficient brackets to hold the track, causing the track to spread, that these defective conditions were in plain sight of plaintiff when the premises were let to him and he had been operating the door for some time prior thereto, there is insufficient evidence for the jury and judgment as of nonsuit was proper.

APPEAL by plaintiff from *Warlick, J.*, at April Term, 1945, of RUTHERFORD.

Action to recover damages for personal injury arising out of defects in leased premises.

The corporate defendant was the owner of a filling station in Forest City, North Carolina, which was being operated under a lease of the defendant to a partnership doing business as "Oates Motor Co." The co-defendant, Bodie, was distributing agent for the Refining Company's products in that area. Plaintiff operated the station for Oates Motor Company for a year or more, until the death of one of the partners, and the premises were then sublet to him by the surviving partner, with the consent of the Refining Company. Since the filling station was exclusively an outlet for the Refining Company's products, the rental was one cent per gallon upon the gasoline purchased, and the plaintiff continued to pay this ordinarily in cash upon delivery of the gasoline to the filling station. After his accident and injury, he made out checks for bills directly to the Sinclair Refining Company.

Some time after the plaintiff went into possession of the premises, a door to the wash rack, through which cars were admitted for washing, became hard to operate, and later required the efforts of several men to push it up and down. The plaintiff testified that in early July, he reported to Mr. Bodie, to whom he refers as agent of the defendant, that the door was "hard to push up and down." In a letter written to the Refining Company shortly after the accident, the plaintiff stated:

"This door had not been operating properly for some time prior to the accident, and this defect was reported to your local agent, Mr. M. P. Bodie, immediately after it was discovered. The repair was not made, although I continued to report the condition." When the question of repairs was mentioned to Mr. Bodie early in July, Bodie told plaintiff to get Mr. Neal to come and check the door. Plaintiff got Neal to come up, and Bodie told plaintiff he could not authorize more than $5.00 until he got the figures. "Mr. Neal told me what it would cost to fix it, and I told him to go and see Mr. Bodie, and I didn't hear anything more about it. That must have been about the middle of August."

The door mentioned was of the overhead slide type, consisting of four hinged sections, which, upon being pushed up, slide into and along a supporting overhead track. The weight of the door was counterbalanced by springs on each side, connected with the door by cables running over pulleys, making the door normally easy to operate with one hand. The plaintiff testified: "I knew the cable was off the door and something wrong with it. . . . Up until about five weeks before I was injured I pushed it up with one hand."

On the occasion of the accident, the door was being pushed up by the plaintiff and three other men in the service station, the plaintiff standing on the inside of the door. "I believe four of us were raising the door at the time. It was rather heavy. A cable had been broken. You could pull the door up with the cable. The door was connected with a spring and the cable was connected with the spring, and when the cable was broken the spring would not work."

When the door had been pushed up about waist high, it fell upon plaintiff, seriously injuring him.

L. A. Magness testified:

"I am a builder. I was in charge of the construction of the station for Mr. Weathers. Weathers and Davis were building it. I put the door up according to the blueprints. That door was approved and was an accepted overhead door of that kind. When I left it it was in good working condition. I built it according to the blueprint and put the brackets on it."

He further testified that there should have been more brackets. That in his opinion the door fell because there were not enough brackets and the track spread.

C. P. Neal testified:

"When I examined the door over the wash rack, before the accident, it did not have all the brackets shown on the blueprint handed me. I told Mr. Bodie some of the brackets were gone and some of the guide ropes were gone. . . . I found that five of the brackets at the end of the track were gone. . . . One cable being on and one off would throw the door in a twist. That would have a tendency to make it loose on one side. Four men pushing on the door in any shape would have a tendency to push it off. The guide did not have much pressure on it. It was just a guide. When it is in proper condition you can push it up with one hand. If one cable were gone that would push to the side."

He gave it as his opinion that the track spread because there were not enough brackets.

He further testified that it was "not standard use" for those doors to have five brackets gone, but did not know how many brackets were there when the station was built or the lease made.

Upon defendant's motion, at the conclusion of plaintiff's evidence, the court entered a judgment as of nonsuit, and plaintiff appealed.

C. O. Ridings, Tillett & Campbell, and Hamrick & Hamrick for plaintiff, appellant.

J. S. Dockery and O. J. Mooneyham for defendants, appellees.

SEAWELL, J. Without prejudice to the appellant, we may refrain from discussing any distinction in the reciprocal duties of the parties which might arise from the fact that plaintiff was a sub-tenant of Oates Motor Company; and may assume that the more direct relation of landlord and tenant existed between the parties *ab initio.*

The common law applies in this jurisdiction on the general subject of repairs between landlord and tenant. Ordinarily, in the absence of an agreement relating to repairs or warranty relating to the condition of the property when leased, the lessee takes it in its then existing condition, and the landlord is under no obligation to restore or make repairs to premises where defects have been caused by decay or use, or which have arisen after the date of lease or occupancy, or which existed at the time of the demise. *Duffy v. Hartsfield,* 180 N. C., 151, 104 S. E., 139; *Jordan v. Miller,* 179 N. C., 73, 101 S. E., 550; *Smithfield Improvement Co. v. Coley-Bardin,* 156 N. C., 255, 72 S. E., 312; *Gaither v. Hascall-Richards Steam Generator Co.,* 121 N. C., 384, 28 S. E., 546; 36 C. J.,

p. 43, attention to Note 58; *id.*, p. 125, s. 766 (D); *id.*, p. 44; 32 Am. Jur., Landlord and Tenant, ss. 662, 657. In the case before us it does not appear that the lessor contracted to make any repairs under any circumstances, and since the burden was upon upon the plaintiff to show otherwise, if necessary, it must be assumed that the contract is negative in that respect.

However, even had the lessor in his lease assumed the duty of making repairs, a breach of that duty would not ordinarily give rise to a cause of action in tort for personal injury to the lessee. *Leavitt v. Rental Co.*, 222 N. C., 81, 82, 21 S. E. (2d), 890; see quotation from *Jordan v. Miller, supra,* on p. 82. *Mercer v. Williams,* 210 N. C., 456, 187 S. E., 556.

Ordinarily, the doctrine of *caveat emptor* applies to the lessee; *Gaither v. Hascall-Richards Steam Generator Co., supra; Hudson v. Silk Co.*, 185 N. C., 342, 117 S. E., 165; *Fields v. Ogburn,* 178 N. C., 407, 100 S. E., 583. To avoid foreclosure under this doctrine in an action for tortious injury, he must show that there is a latent defect known to the lessor, or which he should have known, involving a menace or danger, and a defect of which the lessee was unaware or could not, by the exercise of ordinary diligence, discover, the concealment of which would be an act of bad faith on the part of the lessor. "If the landlord is without knowledge at the time of the letting of any dangerous defect in the premises, he is not responsible for any injuries which result from such defect." *Covington v. Masonic Temple Co.*, 176 Ky., 729, 197 S. E., 420. And he is not liable if he did not believe or suspect that there was any physical condition involving danger. *Charlton v. Brunelle,* 82 N. H., 100, 130 A., 216, 43 A. L. R., 1281.

Plaintiff's appeal poses the single question: Whether, under the facts of this case, the plaintiff has brought himself within the narrow exception to the general principles of law applicable to his case, as above outlined.

In considering that question, we should keep in mind that within these rules a *latent defect* refers to a *physical defect* and not a latent potentiality of injury from a patent physical condition, or to mere consequences unknown, unexpected or unpredictable to the parties. Such consequences are always latent until they develop, or crop out, in experience. Two rules are deducible from this distinction which deserve to be brought into the clear: First, to render the lessor liable for an injury on the theory of concealment, the latent defect which it is his duty to disclose must be of such a nature as to give warning to an ordinarily prudent person that injury might result as a natural and probable consequence in the use of the demised premises; and second, where the sup-

posed defect or defective condition itself is *patent,* and the parties have an equal opportunity of inspection, no liability in tort can be imputed to the lessor with respect to it. 36 C. J., p. 205, s. 875; 32 Am. Jur., Landlord and Tenant, s. 662, *supra.*

It appears from the evidence that the wash door track and the brackets holding it were in plain sight of the plaintiff at the time the premises were sublet to him. In fact, for the year or more while he was in the employment of Oates Motor Company, he operated this door with apparent satisfaction and continued to do so after he took over the premises. He had, therefore, an equal opportunity with the defendant to observe the alleged defect, if any.

In support of the theory of liability based on the failure of defendant to disclose a supposedly dangerous latent defect, the *dernier resort* for recovery in a case of this kind, plaintiff stresses the testimony of Magness and Neal. But in speaking of the insufficiency of the brackets to prevent the track from spreading, it is conjectual whether they referred to normal operations, or the abnormal lateral strain placed upon the door and track by the breaking of a cable on one side, and the want of a counterbalance—a defect which, according to the evidence, developed long after the original construction and after plaintiff went into occupation of the premises. This, however, is not important to the result. Taking the evidence as a whole, and in the light most favorable to the plaintiff, it fails to bring home to the corporate defendant a knowledge, at the time of the lease, of any defective condition calculated to put it on notice that injury might at any time result from the use of the track. We can find no phase of the evidence upon which the plaintiff is entitled to recover.

There is no evidence of any liability on the part of the defendant Bodie.

The judgment dismissing the action as of nonsuit is

Affirmed.

STANDARD FERTILIZER COMPANY, INC., v. EDWIN GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 26 September, 1945.)

1. Limitation of Actions § 1b—

No statute of limitations runs against the sovereign unless it is expressly named therein.

2. Taxation § 15: Limitation of Actions § 2c—

The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax (G. S., 105-174 [b], -227), a use or excise tax, which accrued in the year 1937, is barred by the three-year statute of limitations, when assessed in 1942.

3. Same—

G. S., 105-174, deals not only with deficiencies, but it is also intended to affect assessments made where no return has been filed. In the absence of fraud, the Commissioner of Revenue can make no assessment, for deficiency or otherwise under the provisions of the statute, which shall extend to sales made more than three years prior to the date of the assessment.

APPEAL by plaintiff and defendant from *Carr, J.*, at December Term, 1944, of MARTIN.

This is an action to recover taxes paid under protest.

The parties waived trial by jury and submitted the controversy to the judge upon an agreed statement of facts, the pertinent part of which is as follows:

1. On 30 April, 1937, the plaintiff entered into a contract with the Viking Sprinkler Company of Pennsylvania (hereinafter referred to as the "Sprinkler Company"), a Pennsylvania corporation, for the installation of a sprinkler system in its fertilizer plant at Williamston, North Carolina, for the sum of $36,450.00.

2. In compliance with the terms of said contract, the Sprinkler Company purchased and paid for all the materials used in the construction of the sprinkler system prior to 30 June, 1937. The proportion of the installation that had been completed prior to 30 June, 1937, was 40% of the total installation, the remaining 60% being completed subsequent to 30 June, 1937, but during said year. The plaintiff did not pay the Sprinkler Company any part of the contract price until after 30 June, 1937. The Sprinkler Company nor the plaintiff paid any tax to the defendant on the materials used in the construction of said sprinkler system, as required by section 427 of the Revenue Act of 1937, and no return was filed by either party, as required by Article 5, Schedule E, of the Revenue Act of 1937 (Public Laws 1937, ch. 127).

3. During August, 1942, the defendant, upon the asserted authority of the aforesaid section of the Revenue Act of 1937, assessed upon the plaintiff the excise tax of 3% authorized by said statute on account of the purchase and use of the materials employed in the construction and installation of the said sprinkler system. The total tax, penalty and interest thus assessed was $1,203.41. The return upon which the assessment was based was prepared by defendant's auditor. Plaintiff paid the

tax under protest on 7 September, 1943, and has complied with all the statutory requirements relating to the payment of said tax under protest, and is entitled to bring this action to determine the validity of the assessment and the collection of said tax, penalty and interest.

4. The defendant, after the collection of the tax, penalty and interest in the sum of $1,203.41, found, upon additional information obtained, that the amount should be reduced $308.75, and agreed that the court should render a judgment for said amount in favor of the plaintiff. The court, being of the opinion that the plaintiff was entitled to recover 40% of the sum of $894.66, in addition to the $308.75 tendered by the defendant, making a total of $666.61, and such sum was all the plaintiff was entitled to recover, entered judgment accordingly. The plaintiff and defendant appealed to the Supreme Court, assigning error.

R. L. Coburn for plaintiff.

Attorney-General McMullan and Assistant Attorneys-General Spruill and Tucker for defendant.

DENNY, J. The plaintiff contends that any assessment authorized by section 427 of the Revenue Act of 1937, for the collection of an excise tax on the purchase or use of materials in the year 1937, was barred by the three-year statute of limitations at the time the defendant made the assessment against the plaintiff in August, 1942.

The statute relied upon by the plaintiff was enacted by the General Assembly in 1941, being chapter 50, section 6, subsection (f), of the Public Laws of 1941, amending subsection (b) of section 414 of the Revenue Act of 1939, G. S., 105-174, which reads as follows: "Provided, however, in the absence of fraud, no assessment authorized by this article shall extend to sales made more than three (3) years prior to the date of assessment; and in cases where an audit shall have been made under the direction of the Commissioner of Revenue any assessment in respect to such audit shall be made within one year after the completion of the audit."

It has been uniformly held in this jurisdiction that "No statute of limitations runs against the sovereign unless it is expressly named therein." *Charlotte v. Kavanaugh,* 221 N. C., 259, 20 S. E. (2d), 97; *Wilmington v. Cronly,* 122 N. C., 388, 30 S. E., 9. However, the General Assembly has from time to time enacted statutes of limitation affecting the right of the State and its subdivisions, to collect delinquent taxes. But there appears to have been no effort on the part of the lawmaking body to establish uniformity in the provisions of these various Acts.

It will be noted that in Article 3, Schedule C, G. S., 105-114, *et seq.*, which provides for the collection of a franchise tax, the Commissioner of Revenue is authorized to review any return and assess such additional tax as he may determine to be due at any time within three years after the time when the return was due. However, it is expressly provided in the statute (G. S., 105-124) that, "In the case of any taxpayer who has failed to file any return or statement required under this article or schedule, the limitation of three years shall not apply and the commissioner of revenue shall, from facts within his knowledge, prepare tentative returns for such delinquent taxpayer, and shall assess the taxes, penalties and interest upon these findings; this provision shall not be construed to relieve said taxpayer from liability for a return or from any penalties and remedies imposed for failure to file proper return." While in Article 4, Schedule D, G. S., 105-130, *et seq.*, which provides for the levy and collection of an income tax, it is provided therein (G. S., 105-160), that the Commissioner of Revenue may at any time within three years (except where the taxpayer has failed to notify the Commissioner of additional assessment by the Federal Department as provided in G. S., 105-159), after the time when return was due, make a deficiency assessment. This statute provides further that: "The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns. Upon failure to file returns and in the absence of fraud the limitation shall be five years."

G. S., 105-227, provides: "All provisions not inconsistent with this article in Schedule E, secs. 105-164 to 105-187, and Schedule J, secs. 105-229 to 105-269, relating to administration, auditing, and making returns, promulgation of rules and regulations by the commissioner, imposition and collection of tax and the lien thereof, assessment, refunds, and penalties, are hereby made a part of this article and shall be applicable hereto." The foregoing statute, in substance, was contained in the Revenue Act of 1937, sec. 427, subsection (b). Hence, the collection of the excise or use tax is subject to the same statute of limitations which governs the assessment and collection of the sales tax.

The defendant contends that the statute of limitations under consideration here is in the form of a proviso contained in section 414, of the Revenue Act, as amended in 1941, G. S., 105-174, which deals with deficiencies and was not intended to affect assessments made where no return has been filed. It is further contended that when the Commissioner determines the amount due from a taxpayer who has failed to file a return, the amount ascertained to be due is not an assessment within the meaning of the statute, notwithstanding the demand made by the

Commissioner for the payment thereof. We think both contentions must be resolved against the defendant. In the absence of fraud, the Commissioner can make no assessment for deficiency or otherwise under the provisions of the Article, which shall extend to sales made more than three years prior to the date of the assessment. No distinction is made between an assessment for a deficiency and an assessment made where no return has been filed. In this respect the statute differs from the statutes of limitation relative to the collection of franchise and income taxes.

Moreover, the statute which was in effect in 1937, and has been continuously since that time, now being G. S., 105-177, provides the procedure to be followed by an aggrieved taxpayer in contesting the collection of a sales or excise tax, and denominates the amount claimed by way of a deficiency or in the absence of a report as an assessment.

The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax, and the tax involved herein having accrued in the year 1937, the same was barred by the three-year statute of limitations, when the assessment was made in August, 1942. *Raleigh v. Jordan,* 218 N. C., 55, 9 S. E. (2d), 507.

In view of the conclusion reached relative to the statute of limitations, a discussion of the remaining questions presented would be superfluous. This cause will be remanded for judgment in accord with this opinion.

Plaintiff's appeal—error and remanded.

Defendant's appeal—error and remanded.

B. F. JARRELL v. M. Q. SNOW, R. P. JONES AND SAM SMITH, COMMISSIONERS OF SURRY COUNTY.

(Filed 26 September, 1945.)

1. Mandamus § 1—

In an action for *mandamus*, in an attempt to test the constitutionality of a municipal ordinance based upon a statute, the relief demanded was properly denied.

2. Mandamus § 2c—

Mandamus lies only for one who has a specific legal right and who is without any other legal remedy.

3. Equity § 3—

Ordinarily equity will not interfere with the enforcement of a municipal ordinance, since, if valid, plaintiff cannot complain, and, if not, its validity may be attacked in an action of law.

4. Same—

Equity will not interfere to test the validity of an alleged unlawful and invalid municipal ordinance enforceable only by indictment.

5. Mandamus §§ 2a, 2b—

It is not the function of a court to reverse or direct the reversal of decisions made by administrative officers in the exercise of discretionary powers; nor will review of their decisions, once made, be compelled by judicial mandate.

6. Intoxicating Liquor § 1: Municipal Corporations § 5: Counties § 1—

Where a board of county commissioners by resolution requested the surrender of a license to sell wine, which request was declined by the licensee, on the assumption that such action by the commissioners was invalid and unconstitutional, such licensee has an adequate remedy at law, should the commissioners undertake to enforce their resolution or to prevent the exercise of the privilege granted by the license.

7. Constitutional Law § 6a: Statutes § 4: Injunctions § 9—

The constitutionality of an Act or ordinance will not be determined in a suit to enjoin its enforcement. Nor will we decide the question of its constitutionality prior to an attempt to enforce it.

APPEAL by plaintiff from *Gwyn, J.,* in Chambers, 7 August, 1945. From SURRY.

Civil action in which plaintiff seeks a mandatory order compelling defendants to rescind request for return of beer license.

The Beverage Control Act of 1939, as amended, G. S., ch. 18, Art. IV, is a statute of general application. It permits the manufacture and sale of unfortified wines in the State under the conditions therein set forth. It applies to Surry County. In 1945 the Legislature enacted H. B. 652 authorizing the Commissioners of Surry County "by resolution duly adopted to . . . prohibit the sale of wine within the part of Mount Airy Township outside the corporate limits of the Town of Mount Airy." On the first Monday in May, 1945, the said Board of Commissioners duly adopted a resolution designated "County Ordinance" declaring it to be unlawful for any person to sell wine within said territory. At the time of the passage of said Act and the adoption of said resolution, plaintiff, who operates a country store within the designated area, was the holder of a 1945-1946 "Off Premises" license to sell wine issued by the State of North Carolina and a like license issued by the County of Surry. On 7 June, 1945, defendants wrote plaintiff notifying him of the adoption of said resolution and requesting him to surrender his "Off Premises" license for cancellation. Plaintiff did not comply with the request. Instead he instituted this action in which he seeks a "mandatory order" "compelling the defendants to rescind its order of June 7, 1945, and to

leave in full force and effect the plaintiff's off premises license to sell wine in Surry County, Mount Airy Township, during the year 1945-1946, heretofore granted by said Board of Commissioners to the plaintiff."

The cause was heard in Chambers by Gwyn, J., by consent, and being heard, the court below entered judgment "that the plaintiff's petition and prayer be, and is hereby denied." Plaintiff excepted and appealed.

Allen & Henderson for plaintiff, appellant.
Fred Folger for defendant, appellee.

BARNHILL, J. The basis of plaintiff's cause of action is the alleged unconstitutionality of H. B. 652 of the 1945 session of the Legislature and the consequent invalidity of the resolution or ordinance adopted by the defendants under authority thereof. He seeks in this manner to present that question for decision. The court below declined to render judgment thereon, but instead dismissed the petition. This was in accord with well-recognized principles of law and procedure prevailing in this jurisdiction.

Mandamus lies only for one who has a specific legal right and who is without any other adequate legal remedy. 1 Chitty's Practice, 790; *S. v. Justices,* 24 N. C., 430; *Edgerton v. Kirby,* 156 N. C., 347, 72 S. E., 365; *Barnes v. Commissioners,* 135 N. C., 27; *Lyon v. Commissioners,* 120 N. C., 237; *Tucker v. Justices,* 46 N. C., 451; *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169; *Braddy v. Winston-Salem,* 201 N. C., 301, 159 S. E., 310; *School District v. Alamance County,* 211 N. C., 213, 189 S. E., 873; *Harris v. Board of Education,* 216 N. C., 147, 4 S. E. (2d), 328.

Ordinarily equity will not interfere with the enforcement of a municipal ordinance, since, if valid, plaintiff cannot complain, and, if not, its invalidity may be attacked in an action at law. *Scott v. Smith,* 121 N. C., 94; *Crawford v. Marion,* 154 N. C., 73, 69 S. E., 763; *R. R. v. Morehead City,* 167 N. C., 118, 83 S. E., 259; *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469; *Thompson v. Town of Lumberton,* 182 N. C., 260, 108 S. E., 722; *S. v. R. R.,* 145 N. C., 495; *Paul v. Washington,* 134 N. C., 363; *Chappell v. Mowery,* 202 N. C., 584, 163 S. E., 565; *McCormick v. Proctor,* 217 N. C., 23, 6 S. E. (2d), 870.

Nor will equity interfere to test the validity of an alleged unlawful or invalid municipal ordinance enforceable only by indictment. *Loose-Wiles Biscuit Co. v. Sanford,* 200 N. C., 467, 157 S. E., 432; *Flemming v. City of Asheville,* 205 N. C., 765, 172 S. E., 362; *Ry. Co. v. Raleigh,* 219 Fed., 573, affirmed 242 U. S., 15, 61 L. Ed., 121; *S. v. R. R., supra; Turner v. New Bern, supra; Thompson v. Town of Lumberton, supra.*

If the statute under which defendants acted is valid, they acted in the exercise of a discretionary power in adopting the ordinance. It is not the function of the Court to reverse or direct the reversal of decisions made by administrative officers in the exercise of discretionary powers. *Pue v. Hood,* 222 N. C., 310, 22 S. E. (2d), 896; *Mullen v. Louisburg,* 225 N. C., 53; *Reed v. Highway Com.,* 209 N. C., 648, 184 S. E., 513; *Lee v. Waynesville,* 184 N. C., 565, 115 S. E., 51.

Nor will review of their decisions, once made, be compelled by judicial mandate. *Barnes v. Commissioners, supra; Wilkinson v. Board of Education,* 199 N. C., 669, 155 S. E., 562; *Harden v. Raleigh,* 192 N. C., 395, 135 S. E., 151; *Fisher v. Commissioners,* 166 N. C., 238, 81 S. E., 1065; *Britt v. Board of Canvassers,* 172 N. C., 797, 90 S. E., 1005; *Board of Education v. Board of Commissioners,* 178 N. C., 305, 100 S. E., 698; *Board of Education v. Comrs.,* 189 N. C., 650, 127 S. E., 692; *Pue v. Hood, supra; Mullen v. Louisburg, supra.*

If the statute is unconstitutional the resolution of defendants is invalid. Plaintiff did not surrender his license. He still has it in his possession. If defendants undertake in any manner to enforce the resolution or to prevent plaintiff from exercising the privileges granted by his license, he has an adequate remedy at law. He may not resort to *mandamus* or to mandatory injunction to test the constitutionality of the statute or the validity of the resolution in anticipation of an effort to enforce it. *Loose-Wiles Biscuit Co. v. Sanford, supra; Flemming v. City of Asheville, supra; Thompson v. Town of Lumberton, supra; S. v. R. R., supra; Turner v. New Bern, supra; Latham v. Harris,* 194 N. C., 802, 139 S. E., 773.

The constitutionality of an Act or ordinance will not be determined in a suit to enjoin its enforcement. Nor will we decide the question of its constitutionality prior to an attempt to enforce it. *Latham v. Harris, supra.* As said by *Brogden, J.,* in *Barton v. Grist,* 193 N. C., 144, 136 S. E., 344: "For the Court to declare invalid an unenforced statute would be equivalent to passing upon a 'mere abstraction.'" See also *Goldsboro v. Supply Co.,* 200 N. C., 405, 157 S. E., 58, where that part of the judgment declaring an ordinance invalid was ordered stricken.

Absolute necessity is the moving cause for decision. *Burton v. U. S.,* 196 U. S., 283, 49 L. Ed., 482.

For the reasons stated the judgment below is

Affirmed.

GRIFFIN & VOSE, INC., v. NON-METALLIC MINERALS CORPORATION.

(Filed 26 September, 1945.)

1. Parties §§ 7, 10: Corporations §§ 4b, 13b—

Where an action, to compel defendant corporation to transfer to the plaintiff upon its books certain shares of stock which had been issued to one M and others, was based upon the allegation that these shares had been endorsed and transferred to plaintiff, which was denied in the answer and by affidavit of M, in support of a motion by the defendant that M and others claiming ownership of the stock be made parties, there was error in the denial of such motion, M and his associates having a right to be heard.

2. Parties § 7—

To entitle one to the benefits of G. S., 1-73, allowing new parties to be brought in, such additional parties must have a legal interest in the subject matter of the litigation; and the interest of a new party must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment.

APPEAL by defendant from *Sink, J.*, at January Special Term, 1945, of YANCEY. New trial.

This was an action to require the defendant to transfer to the plaintiff on its stock book 4,000 shares of the preferred and 56,043 shares of the common stock of defendant corporation. It was alleged that these shares had been issued as follows: to J. A. Mayberry 4,000 shares preferred and 55,000 shares common; to Walter E. Laughridge 400 shares common; to A. N. Fuller 300 shares common; and to Walter G. Pippen 343 shares common. It was alleged that the certificates representing these shares had been endorsed and transferred to the plaintiff, and that the plaintiff was now the owner thereof.

The defendant denied that these shares had been transferred to the plaintiff, and denied that J. A. Mayberry and his associates to whom the shares had been issued had ever transferred them to the plaintiff or to any other person, and moved that these holders of the described shares be made parties to this action and permitted to file answer. In support of this motion defendant filed the affidavit of J. A. Mayberry to the effect that he and his named associates were the owners of the shares of stock referred to and set out in the complaint, and that they had not transferred them to the plaintiff. The applicants prayed that they be permitted to become parties to the action in order to defend their rights in the subject matter of the litigation.

The motion was denied, and exception was duly noted.

It appeared that J. A. Mayberry was the original owner of the land and mineral rights conveyed to defendant corporation, and that notes and stock of the corporation were issued to him in payment therefor. It was contended by plaintiff that Mayberry had borrowed from the plaintiff and assigned these notes and stock as security. Robert H. Griffin was Vice-President of plaintiff corporation and also President of defendant Non-Metallic Minerals Corporation. The evidence disclosed that the certificates for the 4,000 shares of preferred stock were not endorsed by Mayberry and were not in possession of plaintiff but in the possession of Mayberry.

The defendant offered no evidence.

Issue was submitted to the jury as to whether plaintiff was entitled to have the preferred and common stock set forth in the complaint transferred on the books of the defendant, and answered in favor of plaintiff.

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

Watson & Fouts for plaintiff, appellee.

Charles Hutchins, W. C. Berry, C. P. Randolph, and Edgar C. Van Dyke for defendant, appellant.

DEVIN, J. There was error in denying the motion to make additional parties. This action, which was instituted to compel the defendant corporation to transfer to the plaintiff upon its books certain shares of stock which had been issued to J. A. Mayberry and others, was based upon the allegation that these shares had been endorsed and transferred to the plaintiff. This was denied in the answer, and in the affidavit of J. A. Mayberry filed in support of the motion. It was alleged that Mayberry and his associates were the owners of these shares and had not transferred them. Thus it appears that the real controversy was between plaintiff and Mayberry as to the ownership of the shares of stock claimed by plaintiff. On this issue Mayberry was entitled to be heard. He was a party to the transaction sued on, claimed a legal interest in the subject of the action, and his presence would seem to be necessary for a complete determination of the matter litigated. The court's ruling denied Mayberry opportunity to participate in the trial and to defend his asserted ownership of the stock.

It is provided by statute that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." G. S., 1-73. *McKeel v. Holloman,* 163 N. C., 132, 79 S. E., 445; McIntosh, 210. To entitle a party to the benefit of this statute he must have a legal interest in the subject matter of the litigation. As was said by *Justice Barnhill* in *Mullen v.*

Louisburg, ante, 53, "His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment." *Trust Co. v. Smith,* 266 U. S., 152; *Niles-Bement-Pond Co. v. Iron Moulders Union,* 254 U. S., 77; 39 A. J., 886. Here the judgment decreed the transfer to the plaintiff of shares of stock which Mayberry claims to own, some of which shares were admittedly in the possession of Mayberry and unendorsed.

The case of *Corbett v. Lumber Co.,* 223 N. C., 704, 28 S. E. (2d), 250, cited by plaintiff, is not helpful on this point. That case involved the legality of a stockholders' meeting. In *Holladay v. General Motors Corporation, ante,* 230, the corporation was enjoined from transferring plaintiff's stock to plaintiff's agent in violation of the terms of the agency. Both the agent and the corporation were made parties defendant. The appeal in that case was disposed of on a question of procedure, and is not here in point.

For the error in denying the motion for additional parties there must be a new trial. This disposition of the appeal renders unnecessary discussion of the other exceptions noted in the trial, as these may not arise on another hearing.

New trial.

JOHNSON COTTON CO., INC., v. DAVID REAVES AND J. H. REAVES, TRADING AS DAVID REAVES AND SON; DAVID REAVES, INDIVIDUALLY, AND J. H. REAVES, INDIVIDUALLY, AND J. J. WHITEHURST.

(Filed 10 October, 1945.)

1. Execution § 24—

Where the examination of the debtor, G. S., 1-352, shows that his books of account contain evidence material to the investigation, he should be required to produce them.

2. Trial § 17½—

The court has power to order the production of proper papers pertinent to the issue to be tried, and in the possession of the opposite party.

3. Execution §§ 23, 24: Partnership § 13—

In a supplemental proceeding, G. A., 1-352, *et seq.,* all parties being before the court, where it appeared that the issue was the ascertainment of the interest, if any, of partner R, one of the defendants, in the assets of a partnership W & R, which remain after the partnership debts have been paid and the partnership affairs adjusted, the plaintiff, a just creditor of R and assignee of his interest in a judgment in favor of the partnership, is entitled to a full accounting of all of the partnership affairs, so as to determine what may be applicable to plaintiff's debt, and there was error in the refusal of the court below to allow the examination of R and to

require the production of the partnership books and records for that purpose.

APPEALS by both plaintiff and defendant J. J. Whitehurst from *Thompson, J.,* on hearing at June Civil Term, 1945, of WAYNE.

Civil action in which supplemental proceedings issued.

Plaintiff instituted this action (1) for recovery of defendants David Reaves and J. H. Reaves, trading as David Reaves and Son, and David Reaves and J. H. Reaves, individually, a large sum of money for fertilizers and farm supplies delivered under a contract of agency, a part of which fertilizer and farm supplies it is alleged J. H. Reaves used in connection with the joint purchases by him and defendant, J. J. Whitehurst, of eighty-six car lots of Irish potatoes; (2) for appointment of receiver to take charge of amounts due by defendant J. J. Whitehurst to defendant J. H. Reaves out of the proceeds of sale of the said eighty-six carloads of Irish potatoes and involved in the suit then pending in Superior Court of Wayne County wherein J. J. Whitehurst was plaintiff and FCX Fruit and Vegetable Service, Inc., and others were defendants; and (3) for order restraining J. J. Whitehurst from compromising the said action against FCX Fruit and Vegetable Service, Inc., and others, and from disposing of the interest that J. H. Reaves had in the said action pending final determination.

Thereafter, on 27 November, 1943, judgment by consent was entered in this action in favor of the plaintiff and against defendants David Reaves and J. H. Reaves, trading as David Reaves and Son, and David Reaves and J. H. Reaves, individually, (1) for the sum of $20,883.59 with interest, (2) discharging the temporary receiver, and (3) discharging the temporary restraining order against J. J. Whitehurst. And on 24 November, 1944, execution issued thereon out of Superior Court of Harnett County to sheriff of Wayne County, in office of Clerk of Superior Court of which county transcript of judgment had been docketed, for the collection of the then balance due, and on 27 November, 1944, was returned by said sheriff unsatisfied.

Thereupon, on 27 November, 1944, plaintiff filed an affidavit and motion before the resident judge of Superior Court in supplemental proceedings setting forth, among other things: That no property of either defendant partnership or of its individual members can be found to satisfy said judgment, and that neither defendant partnership, nor any of its individual members has any equitable estate in lands within the lien of the judgment, but (a) that defendant J. H. Reaves is the owner of one-half of the judgment rendered at the March Term, 1944, Civil Term of Wayne County Superior Court in that action entitled "J. J. Whitehurst and James H. Reaves *v.* FCX Fruit and Vegetable Service,

Inc., and Farmers Co-operative Exchange, Inc.," in which J. J. Whitehurst and James H. Reaves recovered the sum of $20,000.00, in which recovery attorneys have an interest for services rendered in connection therewith; (b) that as security to the payment of the consent judgment in favor of plaintiff, to which reference is first above made, J. H. Reaves assigned to plaintiff all the sums to be recovered by him against the said FCX Fruit and Vegetable Service, Inc., and Farmers Co-operative Exchange, Inc.; (c) that the said FCX Fruit and Vegetable Service, Inc., and Farmers Co-operative Exchange, Inc., intend to pay the full amount of said judgment into office of Clerk of Superior Court of Wayne County within a few days for purpose of canceling said judgment; (d) that if the amount of said judgment has been paid to Clerk of Superior Court of Wayne County, then such clerk by virtue of receiving such payment is indebted to said J. J. Whitehurst and J. H. Reaves in the full amount of said judgment of which the interest of J. H. Reaves is $7,500.00, after deducting the attorneys' fees as above stated; (e) that if said Clerk of Superior Court of Wayne County has disbursed the proceeds of said judgment to J. J. Whitehurst and J. H. Reaves, said Reaves has in his possession the sum of $7,500.00 which is not exempt from execution issued on the judgment in this action, and which he unjustly and unlawfully conceals and refuses to apply to the satisfaction of said judgment; and (f) that J. J. Whitehurst has in his possession or control property of said J. H. Reaves or is indebted to him in an amount exceeding ten dollars.

And thereupon plaintiff prayed the court (1) That defendant J. H. Reaves be required to appear at a specified time and place to answer concerning any property which he unjustly refuses to apply towards the satisfaction of said judgment, and (2) that said FCX Fruit and Vegetable Service, Inc., and Farmers Co-operative Exchange, Inc., and J. F. Barden, Clerk of Superior Court of Wayne County, and J. J. Whitehurst be required to appear at the same time and place and answer concerning any property in their possession or control belonging to defendant, J. H. Reaves, or any indebtedness due by him or due by any of them to him in an amount in excess of ten dollars; (3) that the court appoint a referee to hold such examination and report the evidence and facts to the court; and (4) that the defendant or any other person be forbidden to transfer or make disposition of, or to interfere with any property belonging to defendant J. H. Reaves, which is not exempt from execution.

In accordance with the facts set forth in the said affidavit, the resident judge of Superior Court, entered an order on 27 November, 1944, as prayed, including naming of a referee, and same was duly served upon each of the parties to be affected thereby.

Thereafter by consent of counsel for plaintiff and for defendant it was ordered that the amount of the fees due attorneys out of the judgment against FCX Fruit and Vegetable Service, Inc., and Farmers Co-operative Exchange, Inc., be paid; and that the amount of said judgment and costs remaining due be paid into office of Clerk of Superior Court of Wayne County—the principal sum to be retained until further orders in this cause; and that, upon full compliance with this order, the Clerk of Superior Court of Wayne County is directed to cancel the said judgment upon the records.

Thereafter, on 1 January, 1944, J. J. Whitehurst entered motion that the order of examination of 27 November, 1944, be dismissed for that:

1. Neither this movent nor any of the other parties upon whom the order for examination was served has in possession or control property belonging to J. H. Reaves, nor is either of them indebted to the said J. H. Reaves in an amount exceeding $10.

2. The $15,000.00 paid into office of Clerk of Superior Court of Wayne County is neither the property of J. H. Reaves nor of movent, but belongs to the partnership of Whitehurst and Reaves, of which J. H. Reaves and movent are partners, and, until all indebtedness of the partnership is paid and all equities between the partners are adjusted, J. H. Reaves has no interest therein which could be reached under a supplemental proceeding.

3. The partnership of Whitehurst and Reaves is indebted (1) to many farmers for potatoes produced by them and delivered to it, upon which in part the judgment against FCX Fruit and Vegetable Service, Inc., *et al.,* as aforesaid is predicated, and (2) to movent for sums of money advanced by him to pay valid and legal indebtedness of other creditors of the partnership, as well as for certain individual indebtedness of J. H. Reaves to FCX Fruit and Vegetable Service and Farmers Co-operative Exchange which was applied in reduction of the claim of the partnership against FCX Fruit and Vegetable Service, Inc., and Farmers Co-operative Exchange, Inc.

4. The movent has the right to apply the said sum of $15,000.00, a partnership asset, to the payment of all such partnership obligations, as above set forth, before any part of same is applied to the individual indebtedness of J. H. Reaves.

And J. J. Whitehurst further in said motion to dismiss sets forth that: 1. The affidavit and motion upon which the order of examination was rendered alleges an assignment to plaintiff of an alleged interest of J. H. Reaves in the recovery against FCX Fruit and Vegetable Service and Farmers Co-operative Exchange, and supplemental proceeding is not a proper remedy for enforcing any rights thereunder, and,

accordingly, the order for examination should be dismissed; 2. That the referee named by the court, while a reputable attorney who stands high in the legal profession, has heretofore been professionally employed by plaintiff, and, hence, it would be embarrassing for him to act as such referee.

Thereafter, the cause came on for hearing at January Mixed Term, 1945, of Superior Court before the presiding judge, upon the motion of J. J. Whitehurst to dismiss said order of examination, and after reciting that "it appearing to the court that the sum of $15,000 paid into the office of the clerk of the Superior Court of Wayne County, pursuant to the consent order herein, is the property of J. J. Whitehurst and J. H. Reaves, a partnership trading as 'Whitehurst & Reaves'; that the said defendant, J. J. Whitehurst, alleges and contends that the said funds are subject to equities in his favor resulting from partnership transactions and to the claims of partnership creditors which have priority over all rights of the plaintiff herein in said funds; and it further appearing to the court that the plaintiff has the right to inquire into the validity of the alleged equities of J. J. Whitehurst and the indebtedness against the partnership and that, to this end, a Receiver should be appointed with powers and duties as hereinafter set forth," the court entered order appointing J. F. Barden Receiver with the following duties and powers, to wit:

"1. To receive, hold and retain, until further orders in this cause, possession of the said sum of $15,000 heretofore paid into the office of the Clerk of the Superior Court of Wayne County pursuant to the consent order rendered herein.

"2. To give to all creditors of the said partnership of 'Whitehurst & Reaves' written notice to present to him on or before the 24th day of February, 1945, sworn statements of all of their claims against the said partnership, such notice to be mailed to the creditors at their last known addresses and to state that all creditors not so presenting their claims will be barred from any recovery thereon.

"3. To conduct a hearing at such date or dates as may be determined by him for the purpose of determining the validity of all claims so presented and, at such hearing, to permit the examination by the plaintiff and its attorneys of J. J. Whitehurst, J. H. Reaves and the alleged partnership creditors relative to the validity of any and all equities asserted by either of the partners and of the alleged claims presented by any and all creditors and also to permit the examination of the said J. H. Reaves and J. J. Whitehurst as to any matters and things which might properly be inquired into under a supplemental proceeding. At said hearing all parties shall be permitted to introduce witnesses or offer other evidence in support of their contentions.

"4. To make and file with the Judge holding the Courts of the Fourth Judicial District a report of all claims of creditors presented to him, together with his findings thereon, and of all equities existing between the partners."

And the court further granted to J. F. Barden "all the duties, powers and obligations given by law to Receivers except such as are inconsistent with other provisions of the order," and vacated and set aside the order of examination dated 27 November, 1944, and retained the cause for further orders following the report of the said Receiver.

During the course of the hearing pursuant to above order and while J. J. Whitehurst was being examined, counsel for plaintiff moved that the court require the production of the records of the partnership of Whitehurst & Reaves pertaining to the prices received for all of the 250 cars of potatoes, including the 86 cars involved in the suit of Whitehurst *v.* FCX Fruit and Vegetable Service, Inc., *et al.*, above referred to, sold during the year 1943. The motion was denied upon the ground that the said records were not within the purport of the order under which this examination was being conducted. Plaintiff excepts.

Then while examining defendant, J. H. Reaves, creditors and defendants objected to the examination of the witness as to his records which were present in court and which deal with the sale of and money received for the 164 cars of potatoes which the witness testified were sold by the partnership during the year 1943, in addition to the 86 cars above referred to, and the money from which was deposited in partnership account. The objection was on the ground that the 164 cars of potatoes are not involved in the hearing and the individual evidence introduced would be incompetent. Objection was sustained. Plaintiff excepts—stating that under this ruling it cannot pursue the examination of witness further.

It having been agreed at the hearing by all parties that James H. Reaves might prepare a report of partnership indebtedness which would be included in the record as a part thereof as if testified to by him at the hearing, he filed such report, showing list of creditors with amount due each, totaling in excess of $25,000.00.

J. F. Barden, as Receiver, filed report on 16 April, 1945, showing (1) "That pursuant to the order rendered herein at the January Mixed Term, 1945, of the Superior Court of Wayne County, (a) he took into his possession, as Receiver, the sum of $15,000 heretofore paid into the office of the Clerk of the Superior Court of Wayne County under a consent order rendered in this cause; (b) he gave to all creditors of the partnership of 'Whitehurst & Reaves' written notice to present to him on or before the 24th day of February, 1945, sworn statements of their claims,

the names and addresses of the creditors to whom said notices were mailed and the form of said notice being set forth on Exhibits 'A' and 'B,' respectively, hereto attached; (c) he conducted a hearing on the 7th day of March, 1945, for the purposes directed in said order, at which all parties were permitted to examine under oath J. J. Whitehurst, James H. Reaves and certain alleged partnership creditors, all parties to this action and also certain creditors being represented by their attorneys, and (d) he has received and filed claims for many of the alleged creditors of the partnership, the creditors filing the same being indicated in the findings hereinafter set forth in this report." (2) That the outstanding indebtedness of partnership of Whitehurst & Reaves to partnership creditors who filed claims with Receiver is the sum of $24,841.64; and that an additional sum of $274.20 is due to creditors of the partnership who did not receive notices, making a total of $25,115.84; and that there is an additional amount of $666.87 due to creditors who received notices but did not file proof of claim, list of creditors with amounts due each in each group being attached to report.

Plaintiff filed exceptions to the Receiver's report: "(a) That the Receiver refused the motion of the plaintiff that the court require the production of the records of the partnership of Whitehurst and Reaves, pertaining to the prices received for all of the 250 cars of potatoes sold during the year 1943. The said motion being denied on the grounds that said records were not within the purport of the order under which the examination was held.

"(b) That the Receiver refused to allow the examination of James Reaves, the judgment debtor of the plaintiff, as to the records of the partnership of Whitehurst and Reaves, which records were then in court, concerning the receipts of money from 164 cars of potatoes sold during the year 1943 by said partnership.

"(c) That the Receiver allowed the claims of J. J. Whitehurst especially after denying the motions of the plaintiff that the plaintiff be permitted to elicit from the said partners, J. J. Whitehurst and James Reaves, the facts concerning the disposition of the value of 250 cars of Irish potatoes.

"(d) That the Receiver failed to allow the plaintiff the proceeds of 1,960 bags of potatoes, of the value of approximately $3,000, less pay for bags used, especially after James Reaves testified as set forth."

On appeal thereto by plaintiff, the judge of Superior Court adjudged: (1) That plaintiff's exceptions be disallowed; (2) that Receiver's report be approved and confirmed; (3) that creditors listed in report have valid claims against the partnership of Whitehurst & Reaves aggregating the sum of $23,923.84, after offsetting the indebtedness of J. J. Whitehurst

to the partnership against his claim for money advanced; (4) that plaintiff under its judgment against J. H. Reaves, has no interest in a claim upon the sum of $15,000 belonging to the partnership of Whitehurst & Reaves, and now in hands of Receiver, and that it shall not share or participate in the distribution of same; (5) and that cost of the reference and receivership be paid by the Receiver out of the funds now in his hands—the cost to include the sum of $500 which is allowed the said referee and receiver on account of his services.

Both plaintiff and defendant Whitehurst appeal therefrom to Supreme Court and assign error.

Paul B. Edmundson and I. R. Williams for plaintiff.
Royall & Smith for defendant.

WINBORNE, J. Let it be noted at the outset that the procedure followed in the court below is not questioned by any exception presented in this Court on either the appeal of plaintiff or that of defendant Whitehurst. Hence, we go directly to questions presented:

1. ON PLAINTIFF'S APPEAL:

The questions involved relate in the main to the refusal of the court (1) to require the production of the records of the partnership of Whitehurst and Reaves, and (2) to permit the examination of Reaves relative to the sale of all the 250 cars of potatoes sold by the partnership in 1943, and not just those 86 cars involved in the suit of Whitehurst & Reaves *v.* FCX Fruit and Vegetable Service, Inc., *et al.*

Where the examination of the debtor shows that his books of account contain evidence material to the investigation he should be required to produce them, *Coates v. Wilkes,* 92 N. C., 376. And the court has the power to order the production of proper papers pertinent to the issue to be tried, and in the possession of the opposite party. *McDonald v. Carson,* 94 N. C., 497.

This being a supplemental proceeding under Article 31 of chapter 1 of General Statutes, equitable in its nature, *Carson v. Oates,* 64 N. C., 115; *Righton v. Pruden,* 73 N. C., 61; *Rand v. Rand,* 78 N. C., 12; *Bronson v. Ins. Co.,* 85 N. C., 411; *Coates v. Wilkes, supra; Munds v. Cassidey,* 98 N. C., 558, 4 S. E., 353, and all the parties being before the court, it appears that in the court below the focal issue was the ascertainment of the J. H. Reaves interest in the assets of the partnership of Whitehurst & Reaves, if any, which remained after the partnership debts have been paid and the partnership affairs adjusted. The plaintiff, as judgment creditor of J. H. Reaves, and assignee of his interest in the

proceeds of the judgment against FCX Fruit and Vegetable Service, Inc., *et al.,* can only reach J. H. Reaves' interest in so much of the assets of the partnership of Whitehurst and Reaves as remains after the partnership debts have been paid and the partnership affairs adjusted. See *Tredwell v. Rascoe,* 14 N. C., 50; *Jarvis v. Hyer,* 15 N. C., 367; *Price v. Hunt,* 33 N. C., 42; *Latham v. Simmons,* 48 N. C., 27; *Roberts v. Oldham,* 63 N. C., 297; *Ross v. Henderson,* 77 N. C., 170; *Mendenhall v. Benbow,* 84 N. C., 646; *Sherrod v. Mayo,* 156 N. C., 144, 72 S. E., 216; 40 Amer. Jur., 447, Partnership, sec. 455.

And in order to ascertain if there are any assets of the partnership so remaining a full accounting of the partnership affairs is appropriate, and should be had. Plaintiff is entitled to have all the assets of the partnership ascertained and taken into account in striking a balance between assets and liabilities. Therefore, the records and the evidence relating to the sale of all the 250 cars of potatoes are pertinent, and there is error in refusing to require the production of the records, and to permit the examination in those respects. See *Coates v. Wilkes, supra,* and *McDonald v. Carson, supra.*

2. ON DEFENDANT'S APPEAL:

The only question here presented relates to matters of cost. As there is error on plaintiff's appeal, such matters are presently eliminated from consideration. Plaintiff will pay the costs of this appeal to be recovered by it if it should ultimately prevail.

On both appeals,

Error and remanded.

VIOLA C. INGRAM AND HELEN INGRAM, ADMINISTRATRICES OF THE ESTATE OF S. O. INGRAM, v. SMOKY MOUNTAIN STAGES, INC., AND H. J. SWINK.

(Filed 10 October, 1945.)

1. Negligence § 10—

The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so.

2. Same—

Under the doctrine of last clear chance, plaintiff may not recover on the original negligence of defendant for such recovery is barred by his own contributory negligence.

3. Same—

The application of the last clear chance doctrine is invoked only where there was an appreciable interval of time between plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence.

4. Same—

To sustain the plea of last clear chance it must be made to appear that (1) plaintiff by his own negligence placed himself in a dangerous situation; (2) the defendant saw, or by the exercise of reasonable care should have discovered, the perilous position of plaintiff, (3) in time to avoid injuring him; and (4) notwithstanding such notice of imminent peril negligently failed or refused to use every reasonable means at his command to avoid the impending injury, (5) as a result of which plaintiff was in fact injured.

5. Same—

The doctrine of last clear chance does not apply when the plaintiff is guilty of contributory negligence as a matter of law.

6. Same: Trial § 38: Judgment § 17b—

Where plaintiffs' intestate, driving an automobile on a private road used as an outlet to the public road, on approaching the highway, stopped or hesitated as if intending to stop, or began to stop within a few feet of the highway, the driver of an oncoming bus had a right to assume that deceased would obey the law and not proceed suddenly onto and across the highway, when the bus was only ten or fifteen feet from the intersection; and there was error in submitting an issue on last clear chance.

7. Negligence § 21: Judgment § 17b—

When there is no evidence to support an issue of last clear chance and the jury answers the issue on contributory negligence against plaintiff, the defendant is entitled to judgment on the verdict.

SCHENCK, J., dissents.

APPEAL by defendants from *Rousseau, J.*, at January Term, 1945, of BUNCOMBE. Error and remanded.

Civil action to recover damages for wrongful death.

At about 7:00 p.m. on 27 March, 1944, an automobile operated by plaintiff's intestate and a bus of the corporate defendant operated by defendant Swink collided at the intersection of the Brevard-Asheville highway and an abandoned section of road now used as a private way leading from the home of one Brooks to the public highway and known as

the Brooks road. The bus was traveling toward Asheville and the automobile approached and entered the highway to the right of the bus. The collision occurred to the left of the center of the highway—the evidence varies as to just how far to the left. The bus stopped within the intersection over the point of collision. The car proceeded across the highway, down an 8 or 10 foot embankment and stopped about 24 feet from the point of collision with its motor "wide open."

There were skid marks 3 or 4 feet long, made by the bus, located 14 or 15 feet from the point of collision.

Plaintiff's intestate, before his death, made a statement which was offered and admitted as a dying declaration. He said: "he came to the edge of the road there coming from Brooks', that he stopped and looked up and down the road, and did not see or hear a thing. That he started and got well on the road and he heard something. That he looked up the road and here was this great big bus coming as hard as it could. That he knew that the only thing in the world he could do was to get on the side of the road where he belonged, and he got just as far as he could, and the last thing he knew it was coming on him, right at him. . . . He said it was right on him coming right at him, and that he knew he was a 'goner.' . . . and he got as far on his side of the road as he could, going toward Brevard."

This is the only evidence in the nature of an eyewitness account offered by the plaintiff.

Witnesses for defendants, the bus driver and passengers on the bus, said that the bus rounded the curve 300 or 400 feet from the intersection at about 30 or 35 m.p.h.; that they saw the car approach the road when the bus was about 90 feet from the intersection and the bus driver blew his horn several times, applied his brakes, and slowed to 10 or 15 m.p.h. The car "hesitated a moment like it was going to stop," "was fixing to stop," "almost stopped," "stopped," and when the bus got within 10 or 15 feet of the intersection the car "shot right out in front of the bus," "came out on the road suddenly," "all at once dashed out in front of the bus." When the car shot out in the road the bus driver again applied his brakes and cut to the left, and the collision occurred to the left of the center of the highway. The bus did not travel over 2 or 3 feet after the collision. The bus was about three lengths away when the car entered the road.

The plaintiff in his reply alleges that notwithstanding the negligence of the deceased, if any, the defendant "by refraining from the negligent acts and omissions alleged in the complaint" could have avoided the injury and thus had the last clear chance to do so.

Issues of (1) negligence, (2) contributory negligence, (3) last clear chance, and (4) damages were submitted to the jury which answered

the first three issues "yes" and assessed damages. The court entered judgment on the verdict and defendants excepted and appealed.

Don C. Young and Chas. G. Lee, Jr., for plaintiffs, appellees.
Smathers & Meekins for defendants, appellants.

BARNHILL, J. The plaintiff's cause of action as alleged in the complaint is bottomed upon the allegation that the deceased had crossed the highway, reached his side, turned to the left, and was proceeding in a northwesterly direction, meeting the bus when the bus suddenly cut to the left across the center line and collided with his car. There is no evidence in the record to sustain the allegations thus made. They are directly contradicted by the statement of the deceased himself.

The cause was tried on the theory plaintiff had alleged that the bus driver was guilty of negligence in that (1) he was traveling at an excessive rate of speed and (2) he cut his bus to the left of the center of the road in violation of G. S., 20-146 and 20-148.

The defendants objected and excepted to the submission of the last clear chance issue. They here stress the assignment of error based on this exception for that there is no evidence in the record to support an affirmative answer thereto. This exception must be sustained.

The doctrine of last clear chance, otherwise known as the doctrine of discovered peril, is accepted law in this State. It is this: The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so. *Haynes v. R. R.,* 182 N. C., 679, 110 S. E., 56, and cases cited; *Redmon v. R. R.,* 195 N. C., 764, 143 S. E., 829; *Caudle v. R. R.,* 202 N. C., 404, 163 S. E., 122; *Jenkins v. R. R.,* 196 N. C., 466, 146 S. E., 83; *Taylor v. Rierson,* 210 N. C., 185, 185 S. E., 627.

The practical import of the doctrine is that a negligent defendant is held liable to a negligent plaintiff if the defendant, being aware of plaintiff's peril, or in the exercise of due care should have been aware of it in time to avoid injury, had in fact a later opportunity than the plaintiff to avoid the accident. 38 Am. Jur., 901.

Peril and the discovery of such peril in time to avoid injury constitutes the backlog of the doctrine. *Miller v. R. R.,* 205 N. C., 17, 169 S. E., 811; *Hunter v. Bruton,* 216 N. C., 540, 5 S. E. (2d), 719. It presupposes negligence on the part of defendant and contributory negli-

gence on the part of the party injured or killed which, in the absence of the doctrine, would preclude recovery in spite of defendant's negligence. *Redmon v. R. R., supra; Cummings v. R. R.,* 217 N. C., 127, 6 S. E. (2d), 837; *Mercer v. Powell,* 218 N. C., 642, 12 S. E. (2d), 227. Its application is invoked only in the event it is made to appear that there was an appreciable interval of time between plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence. *Bailey v. R. R.,* 223 N. C., 244, 25 S. E. (2d), 833; *Hudson v. R. R.,* 190 N. C., 116, 129 S. E., 146.

Plaintiff may not recover on the original negligence of defendant for such recovery is barred by his own negligence. The duty resting on the defendant, the breach of which imposes liability under the doctrine, arises after the plaintiff has placed himself in a perilous position and is the duty, after notice express or implied, of plaintiff's situation, to exercise reasonable care to avoid the impending injury. It is what defendant negligently did or failed to do after plaintiff put himself in peril that constitutes the breach of duty for which defendant is held liable.

To sustain the plea it must be made to appear that (1) plaintiff by his own negligence placed himself in a dangerous situation; (2) the defendant saw, or by the exercise of reasonable care should have discovered, the perilous position of plaintiff, (3) in time to avoid injuring him; and (4) notwithstanding such notice of imminent peril negligently failed or refused to use every reasonable means at his command to avoid the impending injury, (5) as a result of which plaintiff was in fact injured. *Cullifer v. R. R.,* 168 N. C., 309, 84 S. E., 400; *Fry v. Utilities Co.,* 183 N. C., 281, 111 S. E., 354; *Haynes v. R. R., supra; Redmon v. R. R., supra; Miller v. R. R., supra; McManus v. R. R.,* 174 N. C., 735, 94 S. E., 455.

The doctrine does not apply when the plaintiff is guilty of contributory negligence as a matter of law. *Redmon v. R. R., supra; Sherlin v. R. R.,* 214 N. C., 222, 198 S. E., 640, and cases cited.

Applying these principles of law to the evidence appearing on this record we are constrained to hold that the court below, in submitting the third issue, committed error prejudicial to defendants. *Mercer v. Powell, supra.*

There is no question of right of way presented by the testimony. In fact none is alleged. The deceased, traveling on a private road used as an outlet to the public road, approached the highway. He stopped (as he stated) or hesitated as if intending to stop, or "began to stop" within a few feet of the highway (as witnesses for the defendants testified). The bus driver had the right to assume that he would obey the law and not proceed in the face of an oncoming bus. *Shirley v. Ayres,* 201 N. C.,

51, 158 S. E., 840; *Cory v. Cory,* 205 N. C., 205, 170 S. E., 629; *Hobbs v. Coach Co., ante,* 323. There was nothing in the conduct of the deceased to indicate to the bus driver that he was in a position of peril or that he intended to proceed onto and across the highway until his car "jumped out" or "all at once dashed out," or "shot right out" in front of the bus into the zone of danger. *Van Dyke v. Atlantic Greyhound Corp.,* 218 N. C., 283, 10 S. E. (2d), 727.

Manifestly he thus placed himself in a position of peril. How far was the bus at that time from the automobile? Was it a sufficient distance away so that by the exercise of ordinary care the bus driver could have stopped in time to avoid the collision? Did he, after notice that deceased was attempting to cross ahead of him, fail to exercise every reasonable care to avoid the collision? Plaintiff's evidence does not speak on any of these questions. True the deceased did not see the bus before he entered the intersection, but, having entered, it was "right on him" and "he knew he was a 'goner.'"

On the other hand, defendant's evidence in positive terms gives a negative answer to each question. When the deceased stopped or hesitated as if preparing to stop, the bus was only 90 feet away. When he suddenly drove his car into the intersection it was only 10 or 15 feet away. The bus driver immediately applied his brakes, cut to the left in an effort to avoid the collision and stopped almost immediately. So then there was no evidence offered by the defendant upon which plaintiff can rely in making out his case on the third issue.

Counsel here cited and relied on the testimony of the witness Pace offered by defendants. A careful examination of that testimony discloses nothing that will avail plaintiff. It was this witness who said the automobile approached the road and was "fixing to stop" when the bus was only about 90 feet away and that the automobile "all at once dashed out in front of the bus" when the bus was "almost at the entrance into the intersection."

We do not overlook the statement of deceased that he looked and did not see the bus, and that when he got on the highway "here was this great big bus coming as hard as it could." He added, it may be noted, that it was "right on him" and "he knew he was a 'goner.'" In this connection we need not discuss his capacity or opportunity under the circumstances to judge or estimate speed for there is a physical fact upon which all witnesses agree that "speaks louder than words." *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88. The bus stopped within the intersection. It traveled just a few feet beyond and was standing over the point of collision. The suggestion that it was traveling at a high rate of speed, in the light of this admitted circumstance, is contrary to human experience. *S. v. Vick,* 213 N. C., 235, 195 S. E., 779.

That the bus driver, when he saw the automobile enter the highway just ahead of him, cut his bus to the left and crossed the center line cannot, under the circumstances of this case, be held an act of negligence. It is a human instinct when a collision is impending between two vehicles to turn or cut away from the other vehicle. The evidence here discloses that it was done in an effort to avoid the collision. There is no circumstance tending to show that it was other than what a man of reasonable prudence would have done.

Upon the coming in of the verdict defendants tendered judgment setting aside the verdict on the issues of last clear chance and damages and decreeing, on the first and second issues, that plaintiff take nothing and be taxed with costs. They excepted to the refusal of the court to sign the same. This exception is duly preserved and must be sustained.

As we have pointed out there was no evidence offered sufficient to warrant the third or last clear chance issue. The answers to the first two issues are determinative of the controversy. The contributory negligence of deceased as found by the jury and supported by ample evidence bars recovery. No error is alleged or shown in the trial. In respect to these issues it does not appear that the submission of the third issue misled the jury or prejudiced plaintiff. Hence defendants are entitled to judgment.

In view of the disposition we have made of this appeal we refrain from discussing or deciding the merits of the motion to dismiss as in case of nonsuit.

The cause is remanded to the end that judgment dismissing the action at the cost of the plaintiff may be entered in accord with this opinion.

Error and remanded.

SCHENCK, J., dissents.

MADELINE RITCHIE v. H. N. WHITE, ADMR.

(Filed 10 October, 1945.)

1. Husband and Wife § 4b: Executors and Administrators § 15d—

A widow is not entitled to recover from her husband's estate, on *quasi*-contract or implied *assumpsit*, the value of domestic services to, and support of her husband, under a promise by him to devise her their home place in his will.

2. Husband and Wife §§ 1, 2, 4a: Parent and Child § 5: Marriage § 1—

There are three parties to a marriage contract—the husband, the wife and the State; and certain incidents immediately attach to the relation

which cannot be abrogated without the consent of the State. It is the husband's duty to support his wife and children and there is no law or public policy which gives any countenance to an attempt by the husband to abdicate this duty which the law casts upon him, and impose it upon his wife through the medium of a contract. Such a contract is unenforceable.

3. Husband and Wife § 4b—

Married couples are free to contract with each other concerning their property rights in the manner provided by the statutes, G. S., 52-10, *et seq.*, but they are not at liberty, by private agreement, to transfer from one to the other or to absolve either of the obligations which the marital status imposes.

4. Husband and Wife § 1—

The wife is a *feme covert* with all the rights, privileges, and obligations incident to such status under the law. The husband is entitled to such domestic service as she may choose to perform, and to her aid, comfort, society and companionship, which the law regards as the full equivalent of support, like aid, comfort, society and companionship on the part of the husband.

5. Husband and Wife § 5—

The law will not imply *assumpsit* where the parties may not effectually agree; but this is not to say that the wife may not recover of her husband for moneys lent, or for promissory rents due from her separate estate, or for services rendered outside of the home under an agreement with her husband.

6. Husband and Wife §§ 4b, 5—

Even in a separation agreement, executed after or in immediate contemplation of separation, the measure of the husband's liability is not necessarily determined by the agreement, but by what the law pronounces a just, fair and reasonable allowance to the wife in the light of the circumstances and condition of the parties.

APPEAL by plaintiff from *Warlick, J.*, at August Term, 1945, of BUNCOMBE.

Civil action to recover for services rendered by plaintiff to her late husband and for support furnished at his instance and for his benefit upon the express promise that he would "make a will . . . and devise to the plaintiff in fee . . . (the home place) his house and lot . . . in the City of Asheville."

John Ritchie was a porter or doorman at the Langren Hotel. On 18 February, 1936, he and the plaintiff were married and they lived together in Asheville until December, 1943, when they went to Philadelphia, Pa., so that the husband could have his eyes treated by a physician in that city and the wife could secure employment in a defense plant at good wages. They lived there as husband and wife until the husband's

death on 25 February, 1945, intending, however, to return to their home in Asheville after the war. There were no children of the marriage. Plaintiff's husband was much older than she.

In July, 1942, John Ritchie became helpless from old age, feeble health and rapidly failing eyesight. He entered into a verbal agreement with his wife to devise her the home place in exchange for her "doing his cooking, sewing, mending and nursing, and furnishing medicines, physicians, lodging, gas, telephone, lights, water, coal and food," stating at the time that the property would amply compensate her, and that he expected her to be paid for "her said services in providing for his nursing, care and support."

The plaintiff, in fulfillment of her promise and in expectation of compensation, first worked in Asheville and devoted her time and earnings to her own and her husband's support, and later in Philadelphia she paid her husband's bills for house rent, medicines, physicians, hospital, water, light and telephone and devoted herself to nursing, sewing, cooking, washing and mending for him. All the moneys expended by the plaintiff for her own support and that of her husband came from her earnings.

As plaintiff's husband died intestate, she filed claim with the administrator of his estate "for services and maintenance" rendered and provided under the agreement with her husband, which she valued at $2,352.20. The claim was rejected, hence this suit.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning errors.

George M. Pritchard for plaintiff, appellant.

S. J. Pegram for defendant, appellee.

James E. Rector by brief.

STACY, C. J. The question here presented is one of first impression in this jurisdiction. A widow seeks to recover for domestic services and for support furnished her husband under a promise by him to devise her the home place in his will. The husband dies intestate. Is the widow entitled to recover from his estate on *quasi*-contract or implied *assumpsit* the value of such services and support? The law answers in the negative.

While it is true that in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, *Price v. Electric Co.*, 160 N. C., 450, 76 S. E., 502, still there is nothing in the statutes to indicate a purpose on the part of the General Assembly to reduce the institution of marriage, or the obligations of family life, to a commercial basis. G. S., 52-12; 52-13. It is the public policy of the State that a husband shall provide support

for himself and his family. 41 C. J. S., 404; 26 Am. Jur., 934. This duty he may not shirk, contract away, or transfer to another. 41 C. J. S., 407. It is not a "debt" in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment. *Garlock v. Garlock,* 279 N. Y., 337, 18 N. E. (2d), 521, 120 A. L. R., 1331. See alimony and abandonment statutes. G. S., 14-322; 14-325; 50-16.

There are three parties to a marriage contract—the husband, the wife and the State. For this reason marriage is denominated a status, and certain incidents are attached thereto by law which may not be abrogated without the consent of the third party, the State. The moment the marriage relation comes into existence, certain rights and duties spring into being. One of these is the obligation of the husband to support his wife. *French v. McAnarney,* 290 Mass., 544, 195 N. E., 714, 98 A. L. R., 530. "In the public interest the State has ever deemed it essential that certain obligations should attach to a marriage contract, amongst which is the duty of a husband to support his wife. Defendant was therefore shorn of power to enter into any arrangement or contract which would relieve him of such obligation." *Tirrell v. Tirrell,* 232 N. Y., 224, 133 N. E., 569.

Married couples are free to contract with each other concerning their property rights in the manner provided by the statutes on the subject, but they are not at liberty, by private agreement, to transfer from one to the other or to absolve either of the obligations which the marital status imposes. *Van Koten v. Van Koten,* 323 Ill., 323, 154 N. E., 146, 50 A. L. R., 347. "It is well settled that a husband is bound to support his wife." *Reynolds v. Reynolds,* 208 N. C., 254, 180 S. E., 70. And he may not by contract relieve himself of the duty to support himself and family, and cast such burden upon his wife. *Corcoran v. Corcoran,* 119 Ind., 138, 21 N. E., 468, 4 L. R. A., 782, 12 Am. St. Rep., 390. The wife, on the one hand, is a *feme covert* with the rights, privileges and obligations incident to such status under the law. *Coley v. Dalrymple, ante,* 67. The husband is entitled to such domestic 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, like aid, comfort, society and companionship on the part of the husband. *Helmstetler v. Power Co.,* 224 N. C., 821.

The case of *Corcoran v. Corcoran, supra,* is in many respects much like this one. There a husband conveyed a house and lot to his wife in consideration of her promise to provide the family support and maintenance. Upon default, the husband sued his wife in damages for breach of the contract. It was held that the alleged contract was not an enforceable agreement, and that the complaint did not state facts sufficient to

constitute a cause of action. In the course of the opinion, the Indiana Court had this to say: "The law makes it the duty of the husband not only to support himself, but his wife and children as well; and we know of no rule of law or of public policy which gives any countenance to an attempt by a husband to abdicate the duty which the law casts upon him, and impose it as an obligation upon his wife through the medium of an ordinary oral contract. . . . Under the enlightened policy of modern legislation, married women have been relieved of many common-law disabilities, but we have not yet progressed so far as to enable a married woman to bind herself by contract with her husband to assume his obligation to furnish support for both."

The mutual rights and duties growing out of the marital relationship are not affected by the statutes relating to the capacity of married women to contract and dispose of their property as if they were unmarried. G. S., 52-10, *et seq.; Bank v. Turner,* 202 N. C., 162, 162 S. E., 221. Domestic obligations incident to the marital status still subsist, and they may not be made the subject of commerce. The legal duties and liabilities of plaintiff and her husband remained the same after their agreement as they were before. Neither was relieved of any obligation and neither was bound to perform any additional duty. No new rights were created and no binding obligations were assumed. The contract was not legally enforceable. 13 R. C. L., 1188. If it were, both parties would be bound by it. And yet the husband certainly could not maintain an action for its breach or to enforce its performance. *Garlock v. Garlock, supra; Corcoran v. Corcoran, supra.* This limitation upon the right of husband and wife to renounce or to abrogate the marital obligations which attach by law applies not alone to one of the spouses, but equally to both. *Mirizio v. Mirizio,* 242 N. Y., 74, 150 N. E., 605; 17 C. J. S., 616.

Clearly, the plaintiff may not recover for domestic services which are imposed by her marital status, even upon an express promise by her husband to pay for such services, as this would be without consideration and contrary to public policy. *Frame v. Frame,* 120 Tex., 61, 36 S. W. (2d), 152, 73 A. L. R., 1512, and annotation; 17 C. J. S., 616. "The husband, as head of the family, is charged with its support and maintenance, in return for which he is entitled to his wife's services in all those domestic affairs which pertain to the comfort, care, and well-being of the family. Her labors are her contribution to the family support and care. Whether rendered in or out of the house, no implied obligation to pay arises." *Cragford Bank v. Cummings,* 216 Ala., 377, 113 So., 243.

In *Foxworthy v. Adams,* 136 Ky., 403, 124 S. W., 381, 27 L. R. A. (N. S.), 308, Ann. Cas. 1912-A, 327, it was held that notwithstanding legislative authority for husband and wife to contract with each other,

an agreement in which the husband promised to pay his wife for her services in nursing him during his last illness, or during any illness, was contrary to public policy, since she was under the duty as wife, if she performed such services, to perform them without special remuneration.

It is provided by G. S., 52-13, that contracts between husband and wife are valid, if "not forbidden by G. S., 53-12, and not inconsistent with public policy."

Likewise, if the contract for support be ineffectual, as it is here, whatever the wife expends under the agreement would be regarded as her contribution to the family budget. *Dorsett v. Dorsett,* 183 N. C., 354, 111 S. E., 541. The law will not imply *assumpsit* where the parties may not effectually agree. This is not to say that plaintiff could not recover for moneys loaned, *George v. High,* 85 N. C., 99, or for promissory rents due from her separate estate, *Battle v. Mayo,* 102 N. C., 413, 9 S. E., 384, or for services rendered outside the home under an agreement with her husband, *Dorsett v. Dorsett, supra,* but the present case partakes of none of these.

In *Oates v. Oates,* ..... W. Va., ..., 33 S. E. (2d), 457, decided 27 February, 1945, it appears that a husband had conveyed a remainder interest in a tract of land to his wife for a recited consideration of $10 "and for the further consideration that said party of the second part shall attend to and provide a home for the party of the first part at the home place known as 'Oats Farm.'" Upon failure of the wife to provide a home and support as she had agreed to do, the husband brought suit to have the deed canceled. The wife filed a cross bill and asked for specific performance of an anti-nuptial agreement. While holding the deed invalid for want of adequate consideration, the action was dismissed because it appeared that in other respects, neither the husband nor the wife had come into equity with clean hands. Anno. 109 A. L. R., 1174. It was said, however, "If the plaintiff and defendant intended that the latter (wife) should support and maintain the former (husband) such intention cannot be given effect." And further: "The marital duties of husband and wife cannot be made the subject of barter and trade, and either spouse performing such duties for compensation, either received or expected, is placed in the category of a servant. True, there are instances where the wife performs special services not of a domestic nature but in furtherance of the business of her husband, for which she may be entitled to compensation. After the marriage, it was incumbent upon defendant to perform the usual, ordinary tasks of the household, and to attend and nurse her aged husband in the event his physical condition required such attention. It follows that the implied promise on the part of the defendant given as a 'further consideration' for the conveyance to her of the plaintiff's land is invalid."

Notwithstanding the arrangement between plaintiff and her husband, the latter remained liable for the support of both. Hence, voluntary payments of her husband's bills, would not entitle the plaintiff to recover the moneys so expended as a matter of law. *Spalding v. Spalding,* 361 Ill., 387, 198 N. E., 136, 101 A. L. R., 433; 26 Am. Jur., 941. Speaking to a similar question in *Bank v. Guenther,* 123 N. Y., 568, 25 N. E., 986, 20 Am. St. Rep., 780, it was said: "So, too, her agreement to support the family in this case was, no doubt, illegal and perhaps void, in the sense that so long as it remained executory it could not be enforced against her, but as she entered into the agreement . . . she had the right to perform it, and having done so, could not undo what had been done by recalling what she had paid or requiring the husband to reimburse her for the outlay." This was later approved in *Manufacturers Trust Co. v. Gray,* 278 N. Y., 380, 16 N. E. (2d), 373, 117 A. L. R., 1176.

Even in a separation agreement, executed after or in immediate contemplation of separation, the measure of the husband's liability is not necessarily determined by the terms of the agreement, but by what the law pronounces a just, fair and reasonable allowance to the wife in the light of the circumstances and condition of the parties. *Smith v. Smith, ante,* 189; *Garlock v. Garlock, supra; Vock v. Vock,* 365 Ill., 432, 6 N. E. (2d), 843, 109 A. L. R., 1170; Anno. 120 A. L. R., 1334.

Plaintiff suggests, however, that the moneys expended by her in discharge of her husband's obligations should be regarded as advancements or loans under the principle announced in *George v. High, supra;* Anno. 101 A. L. R., 442, or as payments impelled by necessity, which, for all practical purposes, rendered them involuntary, and therefore recoverable. *McDaniel v. Trent Mills,* 197 N. C., 342, 148 S. E., 440; *Manufacturers Trust Co. v. Gray, supra; DeBrauwere v. DeBrauwere,* 203 N. Y., 460, 96 N. E., 722, 38 L. R. A. (N. S.), 508; 26 Am. Jur., 956. *Cf. Galway v. Doody Steel Erecting Co.,* 103 Conn., 431, 130 Atl., 705, 44 A. L. R., 693. It is enough to say, in reply to this position, that such is not according to the allegations of the complaint. "Recovery is to be had, if allowed at all, on the theory of the complaint, and not otherwise." *Balentine v. Gill,* 218 N. C., 496, 11 S. E. (2d), 456. Nor is the suggestion supported by the evidence.

It is conceded that the plaintiff cannot recover on her husband's promise to devise the home place to her in exchange for services to be rendered and support to be furnished, since the promise rests only in parol, *Daughtry v. Daughtry,* 223 N. C., 528, 27 S. E. (2d), 446, and that she is remitted to the doctrine of implied *assumpsit* or *quantum meruit. Coley v. Dalrymple, supra; Neal v. Trust Co.,* 224 N. C., 103, 29 S. E. (2d), 206. However, as stated above, the law will not imply a promise

to pay where the parties may not effectually bind themselves by agreement.

Finally, the plaintiff insists that she and her husband acted in good faith, and that the arrangement made, which was the only one possible in the circumstances, was in actual discharge of her husband's legal duty to provide support for himself and his family. Anno. 101 A. L. R., 442. From a practical standpoint, the argument may have a certain appeal, and had the husband devised the home place as he promised to do, the case would not be here. But we are face to face with the proposition that the agreement between the parties was ineffectual as a contract and unenforceable as such. 26 Am. Jur., 942. Hence, the law will not imply an enforceable agreement which the parties themselves could not effectually make.

The case is not like *Grady v. Faison,* 224 N. C., 567; *Price v. Askins,* 212 N. C., 583, 194 S. E., 284; *Lipe v. Trust Co.,* 207 N. C., 794, 178 S. E., 665, and others of similar import, where recoveries for support and services were upheld on implied *assumpsit* or *quasi*-contract, it appearing that the parties, not being husband and wife, were free to enter into binding agreements on the subject. Implying and upholding that which the law approves is no authority for implying and upholding that which the law will not enforce.

The plaintiff's dower interest in the land is not at issue. She is seeking to recover for services rendered and support provided.

The judgment of nonsuit was properly entered.

Affirmed.

ROBERT LANE, ANNIE COLE AND HUSBAND, ROOSEVELT COLE, EDDIE LANE, KINLEY FORT AND WIFE, ATHENE FORT, v. WILLIE BECTON AND WIFE, ADA BECTON, NED BECTON AND WIFE, CHRISTINE BECTON, ALICE TAYLOR, J. K. GULLEY AND WIFE, DANA B. GULLEY, JESSE LEE FORT AND WIFE, CORINE FORT, AND J. B. LANE.

(Filed 10 October, 1945.)

1. Judgments §§ 1, 8½—

A judgment is not necessarily to be considered integrally. It may be good in one part and void in others—good for the part authorized by law, and bad for the residue; and the invalid divisible part may be treated as a nullity. There is no necessity of appealing from a void judgment.

2. Judgments §§ 8½, 22b, 22h: Fraudulent Conveyances §§ 8, 15—

In an action by a creditor against husband and wife to set aside a conveyance by the husband to his wife as fraudulent and void as to plaintiff, no answer being filed and no consent given by defendants, the judg-

ment can give no greater relief than that demanded in the complaint, C. S., 606; G. S., 1-226; and the court acted in excess of its jurisdiction when it ordered the *feme* defendant to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title. Such provisions of the judgment are void.

3. Fraudulent Conveyances §§ 1, 6, 8—

The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from G. S., 39-15, which has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties.

4. Wills § 44: Estoppel §§ 3, 6b: Evidence § 43b—

Where a husband attempts to devise to his wife lands already belonging to her (1) the wife is not put to her election, especially when she does not offer the will for probate and fails to qualify as executrix thereunder; (2) and the wife's grantees are not estopped by her joinder, with some of the other devisees under her husband's will, in the execution of mortgages on the property, nor by evidence that she claimed only a life estate, against the assertion of a fee title by her said grantees, since their adversaries are not attempting to assert a title acquired after such declarations or in any way affected by them.

APPEAL by respondents, Willie Becton, Ada Becton, Ned Becton, Christine Becton and Alice Taylor, from *Thompson, J.*, at 4 June, 1945, Term, of WAYNE.

This case began as a special proceeding for the partition of land held in co-tenancy. On the plea of sole seizin by certain of the respondents, the case was transferred to the civil issue docket for trial at term. From admissions in the pleadings of the petitioners, and those having a like interest, and evidence introduced in their behalf on the hearing, we summarize the facts:

Some time in 1899 Caesar Fort owned the lands in controversy and conveyed them to his wife by a deed, which recites a valuable consideration, and which was promptly placed on record. Early in the following year, certain creditors brought an action to recover $95.00 and interest, and to have the deed set aside for fraud, alleging that he did not at the time of the conveyance to his wife retain sufficient property to pay his debts. At the April Term following, the plaintiffs in that action secured a judgment by default against Fort, adjudging that the plaintiffs recover $95.00, with interest and costs, and declaring that the deed executed by Fort to his wife was "fraudulent and void as to the plaintiffs, and that the same is hereby annulled and set aside as to the plaintiffs." After repeated declaration that the deed was set aside as to the plaintiffs, the judgment further ordered that the defendant Rachel Fort convey to her co-defendant, Caesar Fort, a fee simple title to the land, describing it,

and provided that the judgment itself should operate as a legal transfer of the title. The conveyance was never made. There was no controversy between the defendants, no counsel of record for them, and no consent.

Subsequently, Caesar Fort died, leaving a will containing the following provisions:

"2nd: I give and devise to my beloved wife, Rachel Fort the tract of land on which I now reside, containing (91) acres for her natural life in satisfaction of her dower, after her death it shall be

"3rd: equ*a*ly *De*vided between my beloved children and the children of my beloved wife, Rachel Fort as follows:

"Thomas Fort, *Ce*asar Fort, Jr. Annie Davis, wife of Jesse Davis, Hannah Lane, wife of Jesse Lane, Ned Becton, Willie Becton, *All*ice Taylor, wife of General Taylor."

Rachel Fort was made executrix of this will, but did not qualify or offer it for probate. It was, however, probated at the instance of L. R. S. Barnes, who was appointed administrator *c. t. a.* A proceeding was brought to subject the lands to the claims of creditors, but no sale appears to have been made.

Recitals in the deed subsequently made by Rachel Fort to the respondents indicate that the debts against the estate were settled by her with the help of the grantees in said deed.

Of the persons named as beneficiaries in Fort's will, Thomas Fort, Caesar Fort, Jr., Annie Davis and Hannah Lane were children of the testator, all of whom have died intestate since his death. Thomas Fort and Annie Davis died without leaving issue surviving; Hannah Lane left as her heirs at law her children, Robert Lane, Annie Cole, Eddie Lane and J. B. Lane; Caesar Fort, Jr., died, leaving as his heirs at law his children, Kinley Fort, Augustus Caesar Fort, and Jesse Lee Fort. Augustus Caesar Fort conveyed his interest in the lands, if any, to the defendants J. K. Gulley and wife, Dana B. Gulley.

The remaining persons mentioned in the will, Ned Becton, Willie Becton and Alice Taylor are children of Rachel Fort, born to her before her marriage to Caesar Fort. Classified by their opposing interests, therefore, the respondents Willie Becton and wife Ada Becton, Ned Becton and wife Christine Becton, and Alice Taylor, claim under a deed to them made by Rachel Fort; and the other parties, including J. K. Gulley and wife, Dana B. Gulley, Jessie Lee Fort and wife, Corine Fort, and J. B. Lane, named as respondents, claim under the will of Caesar Fort.

On 12 February, 1915, several years after the death of Caesar, Rachel Fort made a deed to the respondents, Ned Becton, Willie Becton and Alice Speight (Taylor), conveying the lands in controversy to them in

fee. In the recitals of this deed, she sets out that at the death of Caesar Fort, there were judgments against him and that other obligations had been made by Caesar Fort, Jr., and Jesse Lane, husband of Hannah, for which Rachel was surety, and that all of these persons refused to assist in paying the above mentioned debts, while Ned Becton, Willie Becton, and Alice Speight (Taylor) did assist her in paying them off. This, in part, is made the consideration in the deed.

Rachel Fort remained in possession of the premises until her death in 1944, and the grantees under her deed have been in possession since.

The plaintiffs introduced two mortgages, in the execution of which Rachel Fort joined with several of the beneficiaries named in the will of Caesar Fort. In one of these the interest of Rachel Fort in the lands is described as a life estate. The mortgages were not offered as muniments of title. Parol evidence was introduced to the effect that Rachel told a witness that she had a life estate in the lands.

Two issues were submitted to the jury: The first as to the cotenancy, as alleged in the petition; the second as to the sole seizin of respondents so pleading. The judge instructed the jury that if they believed all the evidence and found the facts to be as it tended to show, they should answer the first issue "Yes," and the second issue "No," which the jury accordingly did. The respondents (or defendants) Willie Becton, Ada Becton, Ned Becton, Christine Becton and Alice Taylor appealed, assigning error.

J. Faison Thomson for Ned Becton, Willie Becton and Alice Taylor, defendants, appellants.

D. H. Bland and B. F. Aycock for plaintiffs, appellees.

SEAWELL, J. The critical inquiry upon this appeal is whether that part of the judgment rendered in the action of Sauls, *et al., v.* Caesar Fort at April Term, 1900, of Wayne Superior Court, which orders a reconveyance to be made by Rachel Fort to Caesar Fort is within the jurisdiction of the court and valid. Otherwise, title to the property remained in Rachel Fort and was effectually conveyed to the appellants by Rachel's subsequent deed.

Preliminarily, we may say that a judgment is not necessarily to be considered integrally on such an inquiry. It may be good in one part and void in others—"good for the part authorized by law, and bad for the residue"; 31 Am. Jur., p. 68, sec. 405; and the invalid divisible part may be treated as a nullity. *Id.*

It is not questioned that the court had the power, by a default judgment, to declare the deed made by Caesar Fort to Rachel Fort fraudulent and void as to the suing creditors, but it seems equally clear that it acted

in excess of its jurisdiction when it ordered Rachel Fort to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title.

There was nothing in the cause of action stated by the plaintiffs which rendered such action either necessary, or upon which it could be properly based. C. S., 606; *Land Bank v. Davis,* 215 N. C., 100, 1 S. E. (2d), 350. There was no controversy between Caesar Fort and his wife, and no consent to give the judgment validity. Neither of the parties defendant appealed; but they were under no necessity of appealing from a void judgment.

Public policy, as expressed through the law, has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. The law does not go to the extent of putting the grantor back in *statu quo*—a position of advantage which he could not secure by an independent action against the grantee with whom he would be, on that theory, *in pari delicto.*

The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from one of our oldest statutes—G. S., 39-15—in which it is expressly stated that such conveyances "shall be deemed and taken (*only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures by such covinous or fraudulent devices and practices aforesaid are, shall, or might be in anywise disturbed, hindered, delayed or defrauded*) to be utterly void and of no effect." (Italics supplied.)

The judgment in the respect noted is in excess of the jurisdiction of the court, and that part of it is not merely irregular, but void, and, therefore, ineffectual to transfer the title of the land back to Caesar Fort.

Rachel Fort was not put to any election under Caesar's will. She did not offer the will for probate or qualify as executrix; she got nothing from the estate in lieu of the attempted devise of a portion of her own property, and nothing was offered. On the contrary, she and the appellants herein seem to have carried the burden of satisfaction of all the claims against Caesar, along with other obligations for which she was surety. *Benton v. Alexander,* 224 N. C., 800, 32 S. E. (2d), 584.

Rachel Fort's joinder with some of the devisees under the will (now represented by the petitioners) in the execution of two mortgages, introduced here as admissions against her interest, and evidence of a like character to the effect that she claimed only a life estate, are not available as an estoppel against the assertion of a full fee simple title by the appellants, since petitioners are not attempting to assert a title acquired after

such declarations or in any way affected by them. There was no reliance or action by any of the parties based upon any such representations or characterizations of her interest which would work an estoppel *in pais* or by record.

The basis of our decision does not require us to pursue the incidents of trial further. The petitioners, or plaintiffs, in this action and those of like interest named as respondents, have shown no title in themselves, and the proceeding should have been nonsuited on the motion of the defendants-respondents. The judgment to the contrary is

Reversed.

H. G. CARLISLE v. MRS. H. G. (INEZ) CARLISLE.

(Filed 10 October, 1945.)

1. Trusts § 1b—

A parol trust in favor of a grantor cannot be engrafted upon a written deed conveying a fee simple title to land, where nothing appears in the instrument to indicate otherwise than that the absolute title was to pass to the grantee.

2. Same—

Since the seventh section of the English Statute of Frauds, which forbids the creation of a parol trust in land, has never been enacted in this jurisdiction, parol trusts may be enforced where the grantee takes title to property under an express agreement to hold the property for the benefit of another, other than the grantor.

3. Trusts § 15—

Where one purchases lands, paying the purchase price and taking title in the name of another, other than his wife, a resulting trust in favor of the purchaser is created, and the grantee holds the property as trustee for the purchaser.

4. Same: Husband and Wife § 4b: Gifts § 1—

The fact that plaintiff purchased land and caused title to be taken in his wife's name does not create a resulting trust in his favor; on the contrary, the law presumes that the husband intended the property to be a gift to his wife. This presumption is one of fact and is rebuttable.

5. Husband and Wife § 4b: Trusts § 1b: Gifts § 1—

A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. G. S., 52-2. And to rebut the presumption of a gift to the wife, and to establish a parol trust in his favor, no greater degree of proof is required than is required to establish a parol trust under any other circumstances.

6. Trusts § 1b—

The evidence to establish a parol trust must be clear, strong, cogent and convincing.

7. Husband and Wife §§ 4a, 4b, 4c: Partnership § 1—

A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for or on behalf of the firm with third parties. But, as between themselves, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, or if the agreement impairs or changes the body or capital of the personal estate of the wife, or accruing income thereof for a longer period than three years next ensuing the agreement, the contract is void unless executed in accordance with G. S., 52-12.

APPEAL by plaintiff from *Warlick, J.*, at April-May Term, 1945, of HENDERSON.

This is a civil action brought by the plaintiff against his wife for the purpose of having her declared a trustee for his benefit in certain property and for an accounting of partnership funds.

Plaintiff and defendant are now living separate and apart. For some nine years, while plaintiff and defendant were living together as man and wife in the State of Georgia, they were engaged in growing and marketing vegetables. The plaintiff supervised and directed the planting, harvesting and marketing of the crops. The defendant kept the books and looked after the office. Having accumulated several thousand dollars, the plaintiff and defendant came to Hendersonville, North Carolina, for the purpose of purchasing land and constructing and operating a camp for girls. Accordingly, in the year 1931, they selected a site, containing 32 acres of land, on the Chimney Rock Highway. The plaintiff purchased and paid for the land and for convenience placed the title to said property in the name of defendant's aunt, Jennie Gaines.

Plaintiff alleges that in order to make necessary improvements on the property for its successful operation as a camp, it became necessary for him to borrow additional funds, and having agreed with his wife that she should operate the camp, on a basis of an equal division of the profits therefrom, it was further agreed verbally between them that they should request Jennie Gaines to execute a deed to the defendant, who would hold title to the camp site for the joint benefit of herself and the plaintiff until a corporation could be formed and the property conveyed thereto, whereupon the capital stock of the corporation would be equally divided between them, except for a nominal interest of one share to be held by a third party.

On 2 December, 1931, Jennie Gaines executed a deed for the property to the defendant, which instrument has been duly recorded in the office of the Register of Deeds for Henderson County.

It is further alleged that the joint investment in the camp is now approximately $40,000.00, and that the plaintiff has furnished approximately $25,000.00 of said amount.

The defendant has declined to join in the formation of a corporation and claims the property as her sole and separate estate.

Plaintiff prays that he be adjudged the owner of a one-half undivided interest in the real property described in the complaint, and that the defendant be declared a holder of same in trust for his benefit, and that the defendant be required to give an accounting for all funds received in connection with the operation of said camp.

Upon motion of defendant for judgment on the pleadings, the motion was allowed and judgment entered to the effect that defendant is the sole owner of the property described herein and that the plaintiff has no interest in the camp operated thereon nor in the profits arising therefrom.

Plaintiff appeals, assigning error.

Monroe M. Redden for plaintiff.

O. B. Crowell and J. E. Shipman for defendant.

DENNY, J. This appeal presents two questions for our determination: (1) Can a husband and wife enter into an enforceable parol agreement for the wife to hold real property for their joint benefit where the real property is conveyed to the wife pursuant to the agreement, by a third party, at the request of the husband? (2) Can the wife be required to account to the husband for profits realized under a partnership agreement, covering a period in excess of three years, when the partnership was under the management and control of the wife and her personal services inured to its benefit, and the agreement was not executed in accordance with the requirements of G. S., 52-12?

It is settled law with us that a parol trust in favor of a grantor cannot be engrafted upon a written deed conveying a fee simple title to land, where nothing appears in the instrument to indicate otherwise than that the absolute title was to pass to the grantee. *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028; *Chilton v. Smith,* 180 N. C., 472, 150 S. E., 1; *Perry v. Sou. Surety Co.,* 190 N. C., 284, 129 S. E., 721; *Penland v. Wells,* 201 N. C., 173, 159 S. E., 423. However, since the seventh section of the English Statute of Frauds, which forbids the creation of a parol trust in land, has never been enacted in this jurisdiction, parol trusts may

be enforced where the grantee takes title to property under an express agreement to hold the property for the benefit of another, other than the grantor. *Owens v. Williams,* 130 N. C., 165, 41 S. E., 93; *Sykes v. Boone,* 132 N. C., 199, 43 S. E., 645; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775; *Taylor v. Wahab,* 154 N. C., 219, 70 S. E., 173; *Ricks v. Wilson,* 154 N. C., 282, 70 S. E., 476; *Lutz v. Hoyle,* 167 N. C., 632, 83 S. E., 749; *Boone v. Lee,* 175 N. C., 383, 95 S. E., 659; *Rush v. McPherson,* 176 N. C., 562, 97 S. E., 613; *Reynolds v. Morton,* 205 N. C., 491, 171 S. E., 781; *Taylor v. Addington,* 222 N. C., 393, 23 S. E. (2d), 318.

In the instant case the plaintiff paid the purchase price for the land and took title in the name of another, to wit, Jennie Gaines. Having paid the purchase price, a resulting trust in plaintiff's favor was created, and Jennie Gaines held the property as a trustee for him. *Harris v. Harris,* 178 N. C., 7, 100 S. E., 125; *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 45. The complaint alleges, however, that the defendant took title from Jennie Gaines, pursuant to an agreement between the plaintiff and defendant, that she would hold the property for their joint benefit until a corporation could be formed under the laws of North Carolina, at which time she would convey the property to said corporation. It is further alleged that their respective interests in the partnership were to be preserved by an equal division of the capital stock of the corporation.

The plaintiff and defendant being man and wife, the fact that the plaintiff paid the purchase price and caused title to be taken in his wife's name does not create a resulting trust in his favor for a one-half undivided interest in the land which he now claims; but, on the contrary, where a husband pays the purchase money for land and has the deed made to his wife, the law presumes he intended it to be a gift to the wife. *Thurber v. LaRoque,* 105 N. C., 301, 11 S. E., 460; *Arrington v. Arrington,* 114 N. C., 116, 19 S. E., 351; *Ricks v. Wilson, supra; Singleton v. Cherry,* 168 N. C., 402, 84 S. E., 402; *Nelson v. Nelson,* 176 N. C., 191, 96 S. E., 986; *Tire Co. v. Lester, supra; Carter v. Oxendine,* 193 N. C., 478, 137 S. E., 424. This presumption, however, is one of fact and is rebuttable. *Faggart v. Bost,* 122 N. C., 517, 29 S. E., 833; *Flanner v. Butler,* 131 N. C., 155, 42 S. E., 547; *Carter v. Oxendine, supra; Bank v. Crowder,* 194 N. C., 312, 139 S. E., 604. Moreover, G. S., 52-2, provides: "Subject to the provisions of Section 52-12, regulating contracts of wife with husband affecting *corpus* or income of estate, every married woman is authorized 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, 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." Therefore, a married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. *Ritchie v. White, ante,* 450. And to rebut the presumption of a gift to the wife, and to establish a parol trust in his favor, no greater degree of proof is required than is required to establish a parol trust under any other circumstances. To rebut the presumption of a gift to the wife, and to establish a parol trust, the evidence must be clear, strong, cogent and convincing. *Avery v. Stewart, supra; Taylor v. Wahab, supra; Glenn v. Glenn,* 169 N. C., 729, 86 S. E., 622; *Anderson v. Anderson,* 177 N. C., 401, 99 S. E., 106; *Whitten v. Peace,* 188 N. C., 298, 124 S. E., 571.

We think his Honor erred in holding as a matter of law that the plaintiff cannot establish title to a one-half undivided interest in the real property involved in this action, under the allegations of his complaint.

We come now to the second question presented. The plaintiff seeks an accounting by the defendant as a partner and not as a trustee. He alleges the defendant is a trustee for him of a one-half undivided interest in the real property involved herein, but there is no allegation in the complaint to the effect that any funds have come into the hands of the defendant from rents or profits from the land which she holds as his trustee, but on the contrary, plaintiff alleges the property has been used by the plaintiff and defendant as partners since 1931, in the operation of a camp for girls.

A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for and on behalf of the firm with third parties. *Dorsett v. Dorsett,* 183 N. C., 354, 111 S. E., 541; *Bristol Grocery Co. v. Bails,* 177 N. C., 298, 98 S. E., 768. But, as between husband and wife, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, or if the agreement impairs or changes the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer period than three years next ensuing the agreement, the contract is void unless executed in accordance with the requirements of G. S., 52-12, the pertinent part of which reads: "No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such con-

tract is in writing, and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert,* it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her." *Daughtry v. Daughtry, ante,* 358, 34 S. E. (2d), 435. Furthermore, G. S., 52-10, provides: "The earnings of a married woman by virtue of any contract for her personal services, . . . shall be her sole and separate property as fully as if she had remained unmarried." *Croom v. Lumber Co.,* 182 N. C., 217, 108 S. E., 735. Therefore, we think the partnership agreement is void and unenforceable, as between the plaintiff and defendant, under the facts alleged, since the agreement was not executed in the manner and form required by law.

The judgment of the court below, in so far as it holds the defendant is the sole owner of the real estate described in the complaint in this action, is reversed. But, in so far as the judgment holds the defendant is the owner of the business operated as Camp Carlisle, situated on the real estate involved in this action, and that the plaintiff has no interest in said business nor in the profits arising therefrom, the judgment is affirmed.

Reversed in part.

Affirmed in part.

VESSIE ENGLISH AND FRED ENGLISH v. HARRIS CLAY COMPANY.

(Filed 10 October, 1945.)

1. Minerals and Mines § 1—

While the general rule, deduced from the decisions of States where subterranean mining has flourished, is that the owner of the surface has the right to subjacent support unless such right has been waived, the character of the mineral to be recovered, the manner of its occurrence, the known local custom of open or pit mining for the mineral involved render this doctrine inapplicable to the recovery of feldspar and kaolin, near the surface.

2. Minerals and Mines § 5—

In an action to recover damages to surface soil and superstructures, where all the evidence tended to show that plaintiff acquired title, by conveyance excepting and reserving all the minerals and mining rights and also a right of way granted previously to defendant, that kaolin occurred on the property in a deposit under a soft top soil about six feet deep, that the custom of open or pit mining for the recovery of this and similar minerals was in vogue in that locality and this custom known to plaintiff, and that defendant took down the structures on the land, piece

by piece, stacking and storing them on the premises and protecting them from the weather, and then proceeded to strip and remove the surface soil and recover the mineral, leaving the premises in that condition, judgment as of nonsuit was proper.

APPEAL by plaintiffs from *Bobbitt, J.*, at July Term, 1945, of MITCHELL.

This is an action to recover damages for injury sustained by the owners of the surface rights in the removal of the surface soil and destruction of superstructures thereupon by the owner of mineral rights in mining for the recovery of kaolin, a subsurface mineral.

On 24 February, 1914, the plaintiffs herein purchased from Eli Sparks and wife about four acres of land, and now hold by deed containing the following exceptions:

"Excepting and reserving all the minerals and mining rights and also a right of way for a flume line heretofore granted to the Harris Clay Company."

The plaintiffs built upon the premises what is described as "a six room frame house and garage," dug a well, planted an orchard, built another small house, fenced a garden. All of this plaintiffs complain was destroyed by the defendant company in recovering the kaolin deposited underneath the surface and superstructures, removing a great quantity of top soil and leaving the land a waste.

It appears from the evidence that the kaolin occurred in a deep deposit, at least forty-five feet thick, within this small area, under a stratum of soft top soil about six feet deep and the superstructures thereupon. There is evidence here that the custom of open or pit mining, or mining by removal of the top soil, for the recovery of this and similar minerals was in vogue in that locality.

There is a difference asserted by the parties as to the character of the superstructures, which is not material to decision. It appears that the buildings were not occupied at the time of their removal.

The evidence discloses that the defendant, conceiving it to be necessary to the recovery of the mineral, took down the structures above mentioned, removing them piece by piece, and stacking and storing them upon the premises, providing suitable covering to avoid injury by the weather. Defendant thereupon proceeded to strip and remove the burden of surface soil from the kaolin, recovered the mineral, and left the premises in that condition.

At the hearing before Judge Bobbitt at Mitchell Superior Court, upon motion of the defendant, a judgment of nonsuit was entered, and plaintiffs appealed.

R. W. Wilson for plaintiffs, appellants.
John C. McBee and E. P. Stillwell for defendant, appellee.

SEAWELL, J. From plaintiffs' evidence it appears that they bought of Eli Sparks the surface estate in the small parcel of land described in the pleading, subject to a prior grant of the mineral rights therein and right of mining the same, now held through *mesne* conveyance by the defendant. The exceptions and reservations noted above were intended to protect the prior grant.

The plaintiffs claim that it was not known at the time that there were any minerals on or within the land. They were, however, put on notice by the exception and reservation that there might be such minerals, and cannot plead, in avoidance of the reservation, surprise that the mineral should be kaolin, to be mined in accordance with the method in vogue in the locality.

The evidence is reasonably clear that the kaolin was mined or recovered in that locality by open or pit mining—that is, by removing the surface and digging up the clay, rather than tunneling underground, as is usually done for coal and other subterranean minerals. Defendant contends that the rights of the parties under the grants and reservations must be construed with reference to this fact. We are concerned principally with the subject of subjacent support.

The obligation of such support in mining operations, where the surface estate and the mining rights have been severed and are owned by different parties, has been stated by textwriters with such positiveness and the rule has been credited with such universality as to incite investigation of possible exceptions or conditions outside the experience of common law, through which the rule evolved. Examining the decisions cited in support of the texts, we find that practically one hundred per cent of them relate to subterranean or tunnel mining and perhaps eighty per cent to mining of coal, where such support may be readily afforded and parties may well be presumed to have contracted with reference to the rule. Indeed, the duty of subjacent support in ordinary cases might well be deduced from the maxim *sic utere tuo ut alienum non laedas,* and some authorities so hold. *Griffin v. Fairmont Coal Co.,* 59 W. Va., 480, 53 S. E., 24; *Simmons v. Star Coal and Coke Co.,* 113 W. Va., 309, 1933, 167 S. E., 737; W. Va. Law Q. 39:538. But the great majority, without too much attention to the manner in which the parties have come into the relationship, hold that when the surface rights and mineral rights have been severed and belong to different parties, subjacent support in operations to recover the mineral is a natural or property right incident to the ownership of the surface or "dominant" estate. Thompson, Real Prop-

erty, Permanent Ed., sec. 609; Tiffany, Real Property, 3d Ed., sec. 754. Frequently, the comparative worthlessness of the surface estate and the economic value to the public of the mining operations have been urged as modifying the rule, with indifferent success. U. Pa. L. Rev. 77:703, and citations. Especially on the question of waiver of the subjacent support, the rigid requirement that the waiver must be clearly expressed or necessarily implied has been maintained, although as applied in numerous situations it reverses the ordinary rule that the language used is to be more strongly construed against the grantor and has been used to bar consideration of attendant circumstances strongly supporting an implied waiver.

In *Noonan v. Pardee,* 200 Pa., 474, 50 A., 255, the logical end of the doctrine is thus stated: "What the surface owner has the right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land"; or, as elsewhere expressed, all that the owner of the minerals gets, in the absence of a clear waiver of the right of subjacent support, is whatever he can get without injury to the surface in its natural state. An interesting discussion of these matters may be found in U. of Pa. L. Rev. 68:399; U. of Pa. L. Rev. 77:703.

In this situation it seems to us that much of the learning relating to subjacent support is of little avail on the present inquiry, unless we undertake the task of fitting a square peg into a round hole. The exceptional facts and conditions met with here—the character of the mineral to be recovered, the manner of its occurrence, the mode of mining it in vogue in the locality, a knowledge of which is imputable to the surface owner, render many of the "musts" of subterranean mining, including the duty of subjacent support, of more than doubtful application; and if applicable at all under the circumstances of this case, those circumstances and conditions are sufficient upon a fair construction to constitute the language employed in the exceptions and reservations in the deeds a waiver of that right.

Kaolin is a fine, soft, white clay, resulting from the decomposition of feldspar, and is used for various commercial purposes, especially in the manufacture of porcelain. Feldspar, itself a component of most crystalline rocks, is found freely where upheavals and displacements of natural stratification and subsequent erosion have brought such rock near the surface and decomposition has taken place. Its occurrence is, therefore, similar to that of its parent mineral, feldspar.

Banks v. Mineral Corp., 202 N. C., 408, 163 S. E., 108, deals with feldspar mining on a factual situation which, in principle, is not dis-

tinguishable from the case at bar. In that case *Justice Brogden,* speaking for the Court, said (loc. cit. p. 410):

"This Court has not been called upon to consider many questions growing out of the mining industry, and hence no decision has been called to our attention indicating that the principle of sublateral or subjacent support has ever been adopted in this State, or that occasion had ever arisen to discuss the proposition. The general principle deduced from the decisions of states where the mining industry has flourished is that the owner of the surface has the right to subjacent support unless such right has been waived in specific terms or terms reasonably implying such waiver. 40 C. J., p. 1195, *et seq.; Hall v. Harvey Coal & Coke Co.,* 108 S. E., 491; *Continental Coal Co. v. Connellsville By-Products Coal Co.,* 138 S. E., 737; *Georgia Iron Ore Co. v. Jones,* 111 S. E., 372; *Cole v. Signal Knob Coal Co.,* 122 S. E., 268; *Goody Koontz v. White Star Mining Co.,* 119 S. E., 862; *Griffin v. Fairmont Coal Co.,* 53 S. E., 24. The various opinions in the *Griffin case, supra,* present every phase of the question together with the authorities supporting the various conclusions and deductions relating to the subject. . . . The deed held by the plaintiffs recites that 'said land, as above described, being sold subject to said mineral rights and privileges,' etc. The original deed from Smith to the grantor of the plaintiffs not only reserved the absolute ownership of the mineral or feldspar beneath the surface of the land and the right of ingress, egress and regress, but also 'the necessary mining privileges for the operation of said mineral rights.' A feldspar operation, as described in the evidence, is properly conducted by a method known as pit mining. It is not a process of tunneling beneath the surface for substantial distances, but apparently consists of digging horizontal holes in the ground. Indeed, the evidence tends to show that upon the tract of land in question the feldspar was frequently found close to the surface. Hence the expression in the deed 'operation of said mineral rights' must be construed in the light of accepted and prevailing methods of mining feldspar, and such operation does not involve the principle of subjacent support . . . Indeed, the plaintiffs did not contemplate the application of the principle of subjacent support." The plaintiffs were denied recovery.

We regard this decision as embodying a correct conclusion of law, and it is controlling in the case at bar.

It only remains to say that it was the duty of the defendant to use due care in recovering the mineral so as not to injure the surface any more than necessary. If the complaint could be construed as stating any cause of action for such negligent injury, the evidence failed to support it.

The judgment of nonsuit was proper and is

Affirmed.

SANDY V. CRISSMAN AND FRANKLIN S. CRISSMAN v. GUS PALMER.

(Filed 10 October, 1945.)

1. Judgments § 22c—

In an action instituted in 1944 by plaintiffs against defendant to remove a cloud from their title by reason of claim of defendant to an interest therein, based on a conveyance dated 30 June, 1924, the acknowledgment, upon which defendant's deed was admitted to probate and registered, having been taken by a notary public, who certified that his commission expired 27 January, 1924, where the cause was heard, by consent without a jury, and the court gave judgment for plaintiffs, no exception or appeal being taken, and at a subsequent term defendant having moved to vacate the judgment, apparently under G. S., 1-220, on the ground that the commission of the notary who took the acknowledgment did not actually expire until 1925, judgment below denying defendant's motion was proper.

2. Appeal and Error § 37a—

The proper way to review an erroneous judgment is by appeal.

3. Judgments § 22c—

Surprise at the action of the court does not constitute ground for setting aside a judgment under G. S., 1-220. This statute does not afford relief from a judgment on the ground of mistake of law.

4. Judgments § 22c—

Where the judge below denies a motion to set aside a judgment, no findings of fact being stated, there is a presumption that he declined to set aside the judgment on the facts alleged.

5. Registration §§ 2, 4b: Deeds §§ 7, 8—

Registration, based on the certificate of a notary whose commission has expired, is invalid. And where the defect in the probate is apparent on the record, the registration does not affect subsequent purchasers and encumbrances. The rule is otherwise when the incapacity of the officer is latent and does not appear upon the record.

6. Trial § 47: Appeal and Error § 47a—

Motion, for a new trial on the ground of newly discovered evidence, must be made at trial term, or upon appeal in this Court.

APPEAL by defendant from *Burgwyn, Special Judge,* at July Term, 1945, of LEE. Affirmed.

J. G. Edwards and K. R. Hoyle for plaintiffs, appellees.

J. C. B. Ehringhaus for defendant, appellant.

DEVIN, J. The defendant appealed from the denial of his motion to set aside the judgment heretofore rendered in the cause.

In support of his motion the defendant alleged that the judgment sought to be vacated was based upon an erroneous conclusion or mistake as to a fact upon which the deed conveying certain mineral rights to the defendant was held inadmissible, and that subsequently discovered evidence had disclosed the truth of the matter and the competency and validity of his deed.

The circumstances pertinent to defendant's motion were these: By deed executed 30 June, 1924, there was conveyed to defendant by Jude Palmer and wife one-half interest in the minerals and mineral rights in and upon a tract of 209 acres of land. The acknowledgment upon which the deed was admitted to probate and registration was taken by a notary public who certified "My commission expires Jan. 27, 1924." Thereafter Jude Palmer and wife executed mortgage on same land, without exception, to Greensboro Joint Stock Land Bank, under which, by foreclosure and *mesne* conveyances, plaintiffs derive their title.

In 1944 plaintiffs instituted action against defendant Gus Palmer to remove cloud from their title by reason of the allegedly unfounded claims of defendant to mineral interests in the described land. Removal of cloud in another respect was prayed, but that is not material to the questions here presented. Plaintiffs alleged, among other things, that there was no legal binding conveyance or legal registration of valid deed for the mineral interests claimed by defendant.

When the case came on for trial it was agreed by the parties that it be submitted to the court without a jury, and thereupon the court found the plaintiffs were owners of the entire mineral interests in the described land, and that defendant had no interest therein, and so adjudged. No exception to this finding or to the judgment was noted, and no appeal was taken.

At a subsequent term of the Superior Court defendant filed motion to vacate the judgment on the ground that the notary public, who took the acknowledgments to the deed to plaintiff in 1924, was in fact duly commissioned as such, and that his commission did not expire until 1925. Defendant offered certificate of the clerk in the Governor's office having charge of issuing notary public commissions that the records in that office so showed. It was alleged that "by reason of said mutual mistake it was a great surprise to this defendant, and was not due to any inadvertence on his part, or to any mistake on his part, and was excusable so far as he is concerned and so far as his counsel was concerned."

Judge Burgwyn, who heard the motion, ordered and adjudged that the motion to set aside the judgment be denied. No facts were found, nor was there any request that he find any facts.

The motion to vacate the judgment appears to have been based on G. S., 1-220. It is so denominated in the brief. However, we think defendant could hardly claim surprise or inadvertence when the deed in question with the notary's certificate thereon had been in his possession approximately twenty years, and the plaintiff in his reply, on file some time before the trial, had specifically denied that there had been a valid registration of the deed under which defendant claimed the mineral interests. The record of the commissioning of notaries was at all times available to the defendant. Nor may the defendant now be heard to complain of an erroneous ruling of the judge as to the admissibility of the deed as evidence. He is precluded by the final judgment to which he did not except and from which he did not appeal. "The proper way to review an erroneous judgment is by appeal." *Cameron v. McDonald,* 216 N. C., 712, 6 S. E. (2d), 497; *Simmons v. Dowd,* 77 N. C., 155. No irregularity in procedure is suggested. Surprise at the action of the court would not constitute ground for setting aside the judgment under G. S., 1-220. *Skinner v. Terry,* 107 N. C., 103. This statute does not afford relief from a judgment on the ground of mistake of law. *Lerch v. McKinne,* 187 N. C., 419, 122 S. E., 9.

The judge below denied defendant's motion without comment. *S. v. Fuller,* 114 N. C., 885, 19 S. E., 797. No findings of fact were stated, but presumably on the facts alleged he declined to set aside the judgment. *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269. It does not appear that this ruling was based on misapprehension of want of power or misconception of any principle of law. *Hudgins v. White,* 65 N. C., 393; *S. v. Casey,* 201 N. C., 620, 161 S. E., 81.

We perceive no substantial ground for reversal of the ruling denying defendant relief under G. S., 1-220.

It is argued that the judgment was based on the court's erroneous view that defendant's deed was inadmissible in evidence, whereas it is contended that the notary's statement as to the expiration of his commission, though required by statute (G. S., 10-7), did not vitiate its registration or prevent it from constituting notice to subsequent purchasers.

That question is not presented by this record. It may be noted, however, that in *Hughes v. Long,* 119 N. C., 52, 25 S. E., 743, it was held that registration based on the certificate of a notary whose commission had expired was invalid, and in *Bank v. Tolbert,* 192 N. C., 126, 133 S. E., 558, it was pointed out that where the defect in the probate was apparent on the record the registration was invalid and did not affect subsequent purchasers and encumbrances. It was stated that the rule was otherwise when the incapacity of the officer was latent and did not appear upon the record, citing *Blanton v. Bostic,* 126 N. C., 418, 35 S. E., 253.

The question of a new trial for newly discovered evidence is not presented by this appeal. To avail the defendant, motion on this ground must have been made at the trial term, or upon appeal in this Court. *Turner v. Davis,* 132 N. C., 187, 43 S. E., 637; *Stilley v. Planing Mills,* 161 N. C., 517, 77 S. E., 760; *Fleming v. R. R.,* 168 N. C., 248, 84 S. E., 270; *Lancaster v. Bland,* 168 N. C., 377, 84 S. E., 529; *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *S. v. Wall,* 205 N. C., 659, 172 S. E., 216; McIntosh, 676.

Nor has the defendant asked for relief on this ground. The only exception noted below was to the signing of the judgment. This presents only the question whether error appears on the face of the record. *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139. Counsel who argued the case for the defendant in this Court did not appear in the trial or hearing below.

The judgment denying defendant's motion on the grounds alleged must be

Affirmed.

STATE v. BURNETT WILLIAMS, ALIAS BILL WILLIAMS.

(Filed 10 October, 1945.)

Criminal Law § 80—

Where the record on appeal in a capital case only purports to be a transcript of the record proper in the court below, without case on appeal or assignments of error, and prisoner's counsel, in argument and brief, states that appeal as certified fails to show arraignment or plea by his client, and on *certiorari* and return the minutes of the trial court show arraignment and plea of not guilty, and the record in other respects appearing regular and proper, in the absence of error on the face of the record as corrected, we find no error.

APPEAL by defendant from *Thompson, J.,* at March-April Term, 1945, of LEE.

Criminal prosecution upon indictment charging defendant with the crime of rape of a named female person.

Verdict: Guilty of rape as charged in the bill of indictment.

Judgment: Death by asphyxiation in specific manner provided by law.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody and Tucker for the State.

C. J. Gates and R. O. Everett for defendant, appellant.

WINBORNE, J. The record on this appeal only purports to be a transcript of the record proper of the proceedings in the case in Superior Court. It contains no case on appeal and no assignment of error. But in brief filed and in oral argument in this Court in his behalf, defendant makes the point that the record on this appeal as originally certified fails to show that defendant was arraigned, or was given an opportunity to plead in Superior Court, which are essential in judicial procedure in capital cases, citing authorities.

However, upon the call of calendar of cases from the fourth judicial district for argument in this Court, the Attorney-General for the State suggested diminution of the record, and moved for *certiorari* in accordance with usual practice. The writ was granted, and upon return thereto under date of 29 September, 1945, the Clerk of Superior Court of Lee County certifies "that the minutes of Lee County Superior Court for March-April Term, 1945, show the following on Superior Court Minute Docket #9 at page 251: State *v.* Burnette Williams #5763. Defendant Burnette Williams brought into open court and duly arraigned and plead not guilty and placed himself for trial on God and his country. Gavin & Jackson of local Bar appointed to represent defendant at this trial. Court ordered special venire which was drawn in open court and in presence of defendant," and that "The minutes for this day, March 26th, 1945, in which the above record appears, is signed C. E. Thompson, Judge Presiding."

Therefore, the point made by defendant must fail.

The record in other respects appears to be regular and in accordance with the course and practice in the courts.

Hence, in absence of apparent error upon the face of the record as corrected, we find in judgment below

No error.

LEOLA C. OLDHAM v. LACY T. OLDHAM.

(Filed 10 October, 1945.)

1. Divorce §§ 13, 15—

Two separate remedies are provided by G. S., 50-16, one for alimony without divorce, and second, for reasonable subsistence and counsel fees *pendente lite*. The amounts allowed are determined by the trial court in his discretion, and are not reviewable; either party, however, may apply for a modification at any time before the trial of the action. This power is constitutionally exercised without the intervention of a jury.

2. Same—

There is no defense that limits the power of the trial court to award subsistence *pendente lite*, under G. S., 50-16, except the defense of adultery as specified in the statute, so that the reasonableness of a separation agreement need not be determined before the court can award temporary allowances.

APPEAL by defendant from *Williams, J.*, at Chambers, Sanford, N. C., 30 June, 1945. From LEE.

This is an action for alimony without divorce.

The defendant, in answering, pleads, in bar of the relief sought, among other things, a separation agreement entered into between the plaintiff and defendant 24 April, 1942, and duly recorded in the office of the Register of Deeds of Lee County, N. C., on 19 March, 1943.

Plaintiff applied for subsistence and counsel fees *pendente lite,* under G. S., 50-16. From an order making such allowance, the defendant appeals and assigns error.

K. R. Hoyle for plaintiff.

M. G. Boyette for defendant.

DENNY, J. Defendant's sole exception is to the refusal of his Honor to dismiss the action and to the signing of the order allowing temporary subsistence and counsel fees to the plaintiff.

G. S., 50-16, provides for two separate remedies, one for alimony without divorce, and second, for reasonable subsistence and counsel fees *pendente lite. McFetters v. McFetters,* 219 N. C., 731, 14 S. E. (2d), 833. The amounts allowed to a plaintiff for subsistence *pendente lite* and for counsel fees are determined by the trial judge in his discretion, and are not reviewable; either party, however, may apply for a modification of the order at any time before the trial of the action. *Tiedemann v. Tiedemann,* 204 N. C., 682, 169 S. E., 422. We know of no defense that limits the power of a trial court to award subsistence *pendente lite,* under G. S., 50-16, except the defense specified in the statute. *Expressum facit cessare tactitum. Shore v. Shore,* 220 N. C., 802, 18 S. E. (2d), 353; *Allen v. Allen,* 180 N. C., 465, 105 S. E., 11. The defense specified in the statute is: "That in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees." Therefore, in an action for alimony without divorce the validity or reasonableness of a separation

agreement need not be determined before the court can award temporary allowances. The statute expressly provides that such allowances may be made "pending the trial and final determination of the issues involved in such action." *Taylor v. Taylor,* 197 N. C., 197, 148 S. E., 171. See also *Barbee v. Barbee,* 187 N. C., 538, 122 S. E., 177, and *Peele v. Peele,* 216 N. C., 298, 4 S. E. (2d), 616. In the last cited case, *Seawell, J.,* in speaking for the Court, said: "To summarize, the allowances *pendente lite* form no part of the ultimate relief sought, do not affect the final rights of the parties, and the power of the judge to make them is constitutionally exercised without the intervention of the jury."

The judgment of the court below is

Affirmed.

STATE v. JOHN C. MILLER.

(Filed 10 October, 1945.)

1. Assault and Battery §§ 7d, 11—

In a prosecution for assault with a deadly weapon, where the fact that defendant shot the State's witness with a pistol is not controverted, the only plea being self-defense, there is sufficient evidence for the jury.

2. Assault and Battery §§ 7d, 13—

When there was evidence of an assault with a deadly weapon and none of simple assault, the court properly charged the jury that they could return one of two verdicts, either guilty of assault with a deadly weapon or not guilty.

APPEAL by defendant from *Armstrong, J.,* at March Term, 1945, of WILKES. No error.

The defendant was charged with an assault with deadly weapon, to wit, a pistol, upon the person of the State's witness. There was a verdict of guilty, and from judgment thereon the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody and Tucker for the State.

Trivette & Holshouser for defendant.

DEVIN, J. That the defendant intentionally shot the deceased with a pistol, wounding him in the thigh, was not controverted. The defendant pleaded self-defense and offered evidence tending to support his plea. However, the jury has accepted the State's view of the transaction and

has convicted the defendant of unlawfully assaulting the State's witness with a deadly weapon.

The defendant assigns error in the ruling of the court as to the introduction of certain testimony, and in the charge to the jury. We have examined each of the exceptions noted and find them without substantial merit. Since there was no evidence of simple assault, the court properly charged the jury they could return one of two verdicts, either guilty of assault with deadly weapon or not guilty. *S. v. Smith,* 201 N. C., 494, 160 S. E., 577; *S. v. Gregory,* 223 N. C., 415, 27 S. E. (2d), 140.

The evidence was sufficient to carry the case to the jury, and we perceive no ruling on the part of the trial judge which would warrant a new trial. The verdict and judgment will be upheld.

No error.

JESSE S. CREECH v. SUN LIFE ASSURANCE COMPANY OF CANADA.

(Filed 10 October, 1945.)

Insurance §§ 30a, 37—

In an action by plaintiff, the insured in a policy of life insurance with defendant, where there are allegations and evidence, *pro* and *con*, as to whether or not the plaintiff paid premiums sufficient to keep the policy in force, the jury answering the issue for defendant, there is no error.

APPEAL by plaintiff from *Thompson, J.,* at April Term, 1945, of JOHNSTON. No error.

Civil action on a life insurance policy here on former appeal. *Creech v. Assurance Co.,* 224 N. C., 144.

There was verdict and judgment for defendant and plaintiff appealed.

E. G. Hobbs and Lyon & Lyon for plaintiff, appellant.

Abell, Shepard & Wood and Smith, Wharton & Jordan for defendant, appellee.

PER CURIAM. The plaintiff contends that the insured paid the first annual premium on the policy and in addition paid four quarterly premiums during said year. The defendant contends that the insured, being unable to pay the first annual premium, arranged to convert the policy to a quarterly premium-payment policy. If the facts are as contended by the plaintiff, then the policy, by reason of its extension provisions, was in full force and effect at the time of the death of the insured. If as contended by defendant, it had lapsed. The jury answered the issue in

favor of the defendant. No prejudicial error is made to appear. The verdict and judgment must stand.

No error.

FIRST-CITIZENS BANK & TRUST COMPANY, GUARDIAN, SUCCESSOR TO C. G. GRADY, GUARDIAN OF HENRY A. HODGES, INCOMPETENT, v. JAMES D. PARKER AND WIFE, AGNES A. PARKER.

(Filed 17 October, 1945.)

1. Bankruptcy § 9: Guardian and Ward §§ 13, 21—

Where a guardian lends to himself a large part of his ward's estate, keeps no accounts, commingles the assets of the guardianship with his personal funds, and fails to account for the estate, a judgment against him, for the funds so unaccounted for, is not affected by the guardian's subsequent discharge in bankruptcy. Bankruptcy Act, sec. 17, 11 U. S. C. A. 35.

2. Guardian and Ward §§ 13, 20, 21—

It is the duty of a guardian to keep his ward's money and property separate from his own; to keep an account thereof; to make authorized investments, not in his own name, but as guardian; to keep those investments separate from his own; and, when called upon to do so, to account for same either in cash or in approved securities.

3. Guardian and Ward § 21—

While a guardian is held to a high degree of diligence and good faith, he is not ordinarily an insurer of funds which come into his hands.

4. Guardian and Ward §§ 13, 21—

If a guardian, in good faith and with due diligence, invests the funds of his ward in loans upon real estate in which he has no interest and loss occurs by reason of the subsequent depreciation in value of the security or other cause over which he has no control, he is protected from liability therefor. And he may discharge himself at the termination of his trust by turning over and accounting for authorized investments, taken in good faith as a result of prudent management, even though such securities are not then worth face value.

5. Same—

A guardian has no right to mingle guardianship funds with his own and use them as such or to profit by the use thereof, and if he does so commingle such funds and use them in his own business or for his personal advantage, he is guilty of a conversion.

6. Same—

Embarking the ward's funds in business ventures is such a violation of the trust as to make the guardian and his sureties immediately liable for a conversion of the funds, unless done in accordance with statute. (G. S., 33-23, -24.)

7. Bankruptcy § 9: Guardian and Ward § 21: Fiduciaries § 2—

"Defalcation" as used in criminal statutes implies some moral dereliction, but in sec. 17 of the Bankruptcy Act, 11 U. S. C. A. 35, it is a broader term and includes any failure of a guardian or other person acting in a fiduciary capacity to account for trust funds. Examples cited.

8. Fiduciaries § 2: Judgments §§ 1, 29—

The fiduciary character of a debt does not depend upon its form but the manner of its origin and the acts by which it is incurred, and reducing such debt to judgment does not affect it, for the court will look behind the judgment to discover the original character of the liability.

APPEAL by defendants, movents, from *Thompson, J.*, at April Term, 1945, of JOHNSTON. Affirmed.

Motion in the cause to stay executions issued on two certain judgments docketed in the office of the Clerk of the Superior Court of Johnston County.

On 28 November, 1928, movent James D. Parker, a practicing lawyer in the town of Smithfield, qualified as guardian of Henry A. Hodges, incompetent war veteran.

On 10 January, 1929, he received from a former guardian or his surety $5,179.91. On the same day he loaned to himself the sum of $4,000. In evidence of the "debt" thus created he executed a note payable to H. V. Rose, Trustee, and he also executed a trust deed to Rose conveying certain real property as security for the payment thereof.

Thereafter, through 31 May, 1932, he, as guardian, received from the Government monthly benefit payments totaling $4,250. He commingled these funds with his own.

On 4 July, 1932, after a petition for his removal had been filed, he resigned and C. G. Grady was appointed guardian in his stead.

On 26 June, 1933, Grady, guardian, instituted an action against defendant Parker and his surety to recover the guardianship funds for which he had not accounted. When the cause came on to be heard the jury found that Parker had commingled the guardianship funds with his own and, except as to some small amounts, had not accounted therefor, and fixed the amount due at $8,023.81, with interest from 1 January, 1932. Judgment was entered on the verdict. By reason of the then financial condition of Parker's surety the judgment was not satisfied but is still outstanding and unpaid.

On 6 February, 1935, Grady, guardian, instituted suit against Parker and his wife alleging the $4,000 loan by Parker to himself, the execution of the note and trust deed and the default thereon. He prayed judgment for the amount due and a decree of foreclosure of the trust deed. When the cause came on for hearing the jury answered the issues in favor of

plaintiff and judgment was entered on the verdict. The land was foreclosed. After the payment of taxes and expenses only $533.12 remained for credit on the judgment, which is still outstanding and unpaid.

The $4,000 represented by this judgment is a part of the total represented by the first judgment.

On 18 December, 1940, Parker filed a petition in the bankruptcy court alleging that he was "primarily *bona fide* personally engaged in" farming operations and seeking a composition with creditors as authorized by sec. 75 of the Bankruptcy Act, known as the Frazier-Lempke Act. Being unable to effect a composition, he amended his petition and prayed that he be adjudged a bankrupt, and he was on 18 July, 1941, adjudged bankrupt as provided by sec. 75 (s) of said Act. Thereafter his property was appraised. The appraisal disclosed that he owned farm land of the value of $3,890, livestock, $183, and farming implements, $47, together with other professional and personal property. On 20 March, 1944, he paid into court, by assumption of liens and a small sum in cash, the full amount of the appraised value of his property. Thereupon on 21 April, 1944, order was entered that title to the two farms reinvest in the bankrupt, subject to certain liens. The funds representing the appraised value were applied to liens superior to the liens of plaintiff. Thereafter, on 1 June, 1944, defendant was "discharged from all debts and claims which are provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy."

Some time after the bankruptcy proceeding C. G. Grady resigned as guardian and the First-Citizens Bank & Trust Company was appointed in his stead.

On 29 January, 1945, the clerk, on application of the guardian, issued execution on each of the judgments rendered against Parker.

On 7 February, 1945, Parker appeared before the clerk and filed a verified petition alleging that said judgments were discharged by the order of discharge in bankruptcy and moved that said executions be stayed and recalled. Notice was issued and a hearing was had, after which the clerk denied the motion. The movent appealed. On appeal the judge below found the facts, affirmed the order of the clerk and directed that new executions be issued to be proceeded with as provided by law. Movent excepted and appealed.

Lyon & Lyon for plaintiff, appellee.
J. Ira Lee for defendant, appellant.

BARNHILL, J. The Bankruptcy Act, sec. 17, 11 U. S. C. A. 35, provides that a discharge in bankruptcy shall release the bankrupt from

all his provable debts except such as ". . . (fourth) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity . . ." Do the judgments in question come within the quoted exception? This is the decisive question presented by this appeal.

It is the duty of a guardian to keep his ward's money and property separate from his own; to keep an account thereof; to make authorized investments, G. S., 34-13, not in his own name, but as guardian; to keep those investments separate from his own; and, when called upon to do so, to account for the same either in cash or in approved securities.

While he is held to a high degree of diligence and good faith, he is not ordinarily an insurer of funds which come into his hands. *Stroud v. Stroud,* 206 N. C., 668, 175 S. E., 131.

If he, in good faith and with due diligence, invests the funds of his ward in loans upon real estate in which he has no interest and loss occurs by reason of the subsequent depreciation in value of the security or other cause over which he has no control, he is protected from liability therefor. *Sheets v. Tobacco Co.,* 195 N. C., 149, 141 S. E., 355; *Robinson v. Ham,* 215 N. C., 24, 200 S. E., 903.

He may discharge himself at the termination of his trust by turning over and accounting for authorized investments taken in good faith as a result of prudent management of his ward's estate even though the securities are not then worth face value. *Cobb v. Fountain,* 187 N. C., 335, 121 S. E., 614.

Conversely, a guardian has no moral or legal right to mingle trust funds with his own and use them as such or to profit by the use of funds belonging to his ward. *Roebuck v. Surety Co.,* 200 N. C., 196, 156 S. E., 531; *Phipps v. Indemnity Co.,* 203 N. C., 420, 166 S. E., 327; *In re Allard,* 141 Pac., 661; *In re Boyer,* 174 N. E., 714; *Fincher v. Monteith,* 5 Lea (Tenn.), 144; *McIntire v. Bailey,* 110 N. W., 588.

If he commingles the guardianship funds with his own and uses them in his business or for his personal advantage he is guilty of a conversion under the statute. *Winstead v. Stanfield,* 68 N. C., 40; *Ury v. Brown,* 129 N. C., 270; *Duffie v. Williams,* 148 N. C., 530.

"Embarking the ward's funds in business ventures is even more flagrantly improper when they are used in the business of the guardian himself. Such a violation of the trust makes the guardian and his sureties immediately liable as for a conversion of the funds." 25 Am. Jur., 53. (See G. S., 33-24, enacted subsequent to the acts complained of.)

We must assume that Congress, in using the word "defalcation" in sec. 17 of the Bankruptcy Act, 11 U. S. C. A., 35, was not engaged in the redundant use of synonymous words but included the term for a purpose.

It was intended to cover defaults other than malversations implied by "fraud," "embezzlement," and "misappropriation," else it adds nothing to those terms.

"Defalcation" as used in a criminal statute implies some moral dereliction, but in this context it is a broader term and includes any failure of a guardian or other person acting in a fiduciary capacity to account for trust funds. It means the failure of a fiduciary to account for money received in his fiduciary capacity. *Bank & Trust Co. v. Herbst,* 93 F. (2d), 510, 114 A. L. R., 769; *Surety Co. v. Lanza,* 42 N. Y. S. (2d), 370; *Orndorff v. S. ex rel. McGill,* 108 S. W. (2d), 206; *In re Herbst,* 22 F. Supp., 353; *In re Messmore's Estate,* 290 Pa., 107; 26 C. J. S., 663.

It has been held to include the failure of: a treasurer, on demand, to account for overdraft of his account with his company, *Bannon v. Knauss,* 13 N. E. (2d), 733; a sheriff to account for public money, *Orndorff v. S. ex rel. McGill, supra;* a postmaster to account for Government funds, *Surety Co. v. Wittich,* 240 N. W., 888; an administrator to account to his successor, *Loan Co. v. Campbell,* 35 S. W. (2d), 75; an executor to account for money received, *In re Messmore's Estate, supra;* a receiver to return money received as compensation in accordance with a judgment modifying the original award, *In re Herbst, supra;* an attorney to account for money received for his client, *In re Gelson,* 12 Fed. Supp., 924; a receiver to account for trust funds used by him, *Bank & Trust Co. v. Herbst, supra;* a testamentary trustee to account for funds borrowed under agreement with his co-trustees, *Fine v. Saul,* 188 S. E., 439; *Brown v. Robey,* 27 S. W. (2d), 590; a trustee to pay a note given to cover loss caused by his use of funds, *Culp v. Robey,* 299 S. W., 846; and an administratrix to pay the loss resulting from improper investments, *Indemnity Co. v. Covington,* 14 N. Y. S. (2d), 683. In each instance it was held that the debt created by such defalcation was not discharged by bankruptcy.

On the very day movent received the money in the hands of his predecessor he appropriated $4,000 to his own use. That this transaction was cloaked in the form of a loan does not remove the implications of his act. As other funds were received he commingled them with his own and used them as such. Except for about $1,600 used for the support of his ward, he has failed to account for any of the trust estate.

Congress made provision to relieve an insolvent debtor of his obligations, but there is nothing in the Act to indicate an intention to discharge a debt which arose out of his mismanagement, misuse, or misappropriation of trust funds. The assets of the trust estate do not pass to the trustee in bankruptcy and debts created by a default in accounting there-

for are not within the purview of the bankruptcy statute. Otherwise the bankrupt would profit by his own wrong.

Clearly then, under the facts here disclosed, the failure of movent to account to his successor guardian constituted a defalcation while acting in a fiduciary capacity. The liability thus created is not dischargeable by a decree in bankruptcy.

As said by this Court in *Simpson v. Simpson,* 80 N. C., 332: "That the judgment recovered for the mismanagement and waste of the infant's (ward's) estate is a debt incurred or created by the defendant 'while acting in a fiduciary character' and consequently not affected by the discharge, is too plain to admit of debate." *Calvert v. Peebles,* 80 N. C., 334.

That the plaintiff's claims were reduced to judgment does not affect this conclusion. The judgment in each instance ascertains and fixes the amount of the defalcation, but it still remains a debt created by the defalcation of the movent while acting in a fiduciary capacity and, under sec. 17 of the Bankruptcy Act, is exempt from the operation of the discharge. *Simpson v. Simpson, supra; Boynton v. Ball,* 121 U. S., 457, 30 L. Ed., 985; *Rice v. Guider,* 265 N. W., 777; *Surety Co. v. Lanza, supra.* For other authorities see note 57, page 169, 11 U. S. C. A. 35. The fiduciary character of the debt does not depend upon its form but the manner of its origin and the acts by which it is incurred, *Simpson v. Simpson, supra,* and the Court will look behind the judgment to discover the original character of the liability. *Guernsey v. Napier,* 275 Pac., 724.

The judgments in question constitute liens upon the property of movents and plaintiff is entitled to execution for the enforcement thereof. *Sample v. Jackson, ante,* 380.

Since the judgment liens were not discharged by the decree of bankruptcy but are still in effect, it is unnecessary for us to discuss the contention that movent was not a *bona fide* farmer at the time he filed petition in the bankruptcy court or to decide the other questions debated in the briefs.

The judgment below is

Affirmed.

STATE v. EDWARD MAYS.

(Filed 17 October, 1945.)

1. Evidence § 48b: Criminal Law §§ 31a, 31h—

In a prosecution for murder, where, after a proper foundation was laid for the question, a physician who had examined the body was asked by the State his opinion as to the cause of death and replied, "My opinion is that she died from suffocation from the dress being crammed over her air passages," such expert testimony is proper and competent, and there being no objection to the answer and no motion to strike, the prisoner waived any ground for objection to so much of the answer as may not be responsive to the question.

2. Criminal Law § 33—

A confession, *prima facie* voluntary and admissible, is proper and competent as evidence, no fact or circumstance tending to impeach its voluntariness being made to appear.

3. Criminal Law § 38a—

Photographs to illustrate the testimony of witnesses, in a prosecution for murder, respecting wounds found on the body of deceased were competent; and being admitted, it was not improper to permit the jury to see them. Otherwise they would neither corroborate nor explain.

4. Criminal Law § 31d—

In a prosecution for murder, an exception for that the court admitted testimony as to the similarity of the footprints of defendant and certain prints found at and about the premises, where the crime was committed, cannot be sustained. The condition of the prints only goes to the weight of the evidence. It is likewise permissible to offer in evidence a cast or moulage of such footprints.

5. Homicide §§ 3, 4c—

Proof that a homicide was committed in the perpetration or attempted perpetration of rape makes the crime murder in the first degree and dispenses with the necessity of proof of premeditation and deliberation. G. S., 14-17.

6. Homicide § 27c—

There being sufficient evidence of murder in the first degree and no element of murder in the second degree or of manslaughter being made to appear, the court properly limited the possible verdicts to guilty of murder in the first degree or not guilty.

7. Homicide §§ 14, 25—

Where the bill of indictment charges the capital felony of murder in the language of the statute, G. S., 15-144, containing every necessary averment, proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata*. If defendant desired more definite information, he had the right to request a bill of particulars, in the absence of which he has no cause to complain.

8. Homicide § 10—

If a defendant possesses sufficient sanity to enable him to commit the crime of rape, then he is legally responsible for the homicide that results from his act.

APPEAL by defendant from *Burgwyn, Special Judge,* at July Special Term, 1945, of LEE. No error.

Criminal prosecution tried on bill of indictment charging the defendant with the murder of one Mattie L. Salmon.

The deceased, about 75 years of age, lived alone in a four-room house. On the morning of 17 June, 1945, she was found lying on her bed dead. Her clothing was pulled up about her shoulders, most of her body was exposed, and her bed was "all torn up."

"Her body was turned slightly to the left side, with her head towards the head of the bed, on the pillow, with her right limb drawn up slightly, her lower limb. Her hands were up, not over her head but in an upright position. Her mouth had bruise areas all the way around and there were abrasions on her lower and upper lips, bleeding slightly from the lips. The abrasions and bruises were entirely around her mouth, the worst part being on left corner and lower lip. There wasn't anything in her mouth, no foreign substance, but this dress was over her mouth and shoulder, right shoulder. This dress here, this bloody part, was over her mouth and right shoulder. No part of it was in her mouth. The blood was on that area adjacent to her mouth, was directly over it.

". . . Her arms, wrists and elbows were drawn up, some bruises on her arms and wrists, skin not broken but bluish area."

The wounds about her mouth were produced by pressure as if something were being pressed in her mouth.

A *post-mortem* examination disclosed bruises, abrasions, and tears, and the presence of spermatozoa.

There was evidence that one of the screen windows had been torn from its fastening and was placed loosely in the window. Tracks were found leading to and from the house. When compared, they appeared to have been made by the shoes of defendant. There was evidence of other facts and circumstances, including the testimony of two physicians, that deceased died from suffocation.

When defendant was arrested he made a detailed statement, the substance of which was consistent with the facts and circumstances testified to by State witnesses. He admitted he broke and entered the home of deceased and criminally assaulted her and that in so doing he crammed a cloth or dress in her mouth. He said that when he left he did not know she was dead.

Testifying in his own behalf, he denied that he knew the deceased or had ever been to her home or that he committed the crime charged. He also denied having made any of the incriminating statements about which the officer testified. He also offered evidence tending to show that he "does not have the sense of a man," "of an average white man," and "he has the mind of a 10 or 12 year old boy." He is ignorant and unlettered.

There was a verdict of "guilty of murder in the first degree." The court pronounced sentence of death and defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

E. L. Gavin and D. B. Teague for defendant, appellant.

BARNHILL, J. Dr. J. F. Foster examined the body of the deceased and being asked his opinion as to the cause of death he replied, "My opinion is that she died from suffocation from the dress being crammed over her air passages." Foundation was laid for the question which elicited this response.

Expert testimony as to the cause of the death was competent. Frequently it is the only available means of proving that fact. The question was proper and there was no objection to the answer or motion to strike the part thereof which undertook to give the means used. Defendant waived any grounds for objection to so much of the answer as may not be responsive to the question. *S. v. Lefevers,* 216 N. C., 494, 5 S. E. (2d), 55; *S. v. Hudson,* 218 N. C., 219, 10 S. E. (2d), 730; *S. v. Gooding,* 196 N. C., 710, 146 S. E., 806; *Luttrell v. Hardin,* 193 N. C., 266, 136 S. E., 726.

The confession was *prima facie* voluntary and admissible in evidence. *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657. No fact or circumstance tending to impeach its voluntariness is made to appear. *S. v. Grass, supra; S. v. Exum,* 213 N. C., 16, 195 S. E., 7; *S. v. Wagstaff, supra.*

Photographs to illustrate the testimony of witnesses respecting wounds found on her body were competent. Being admitted, it was not improper to permit the jury to see them. Otherwise they would neither illustrate nor explain. *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469; *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522; *S. v. Holland,* 216 N. C., 610, 6 S. E. (2d), 217; *S. v. Jones,* 175 N. C., 709, 95 S. E., 576. See also *Janovich v. S.,* 256 Pac., 359, where the facts were similar.

Exception for that the court admitted testimony as to the similarity of the footprints of defendant and certain prints found at and about the

premises cannot be sustained. The condition of the prints only goes to the weight of the evidence. *S. v. Lowry,* 170 N. C., 730, 87 S. E., 62; *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895.

It was likewise permissible for the State to offer in evidence a cast or moulage of such footprints. This is just another way of recording, portraying or "photographing" the appearance, shape, form and contour of this particular type of object. *Haley v. State,* 84 Tex. Cr. App., 629, 209 S. W., 675; *S. v. Simons,* 172 Wash., 438, 20 Pac. (2d), 844.

"A murder . . . which shall be committed in the perpetration or attempt to perpetrate any . . . rape . . . shall be deemed to be murder in the first degree . . ." G. S., 14-17. When a homicide is committed in the perpetration of the capital felony of rape the State is not put to proof of premeditation and deliberation. Proof that the homicide was committed in the perpetration or attempted perpetration of the felony of rape is all that is required. *S. v. Dunheen,* 224 N. C., 738.

There is abundant evidence in the record tending to establish this fact. The evidence tends to point to the defendant as the one who committed the offense. No element of murder in the second degree or manslaughter is made to appear. Hence the court properly limited the possible verdicts to guilty of murder in the first degree or not guilty. *S. v. Miller, supra; S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Wiggins,* 171 N. C., 813, 89 S. E., 58.

The bill of indictment charges the capital felony of murder in the language prescribed by statute. G. S., 15-144. It contains every averment necessary to be made. *S. v. Arnold,* 107 N. C., 861; *S. v. R. R.,* 125 N. C., 666. Proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata. S. v. Fogleman,* 204 N. C., 401, 168 S. E., 536. If the defendant desired more definite information he had the right to request a bill of particulars, in the absence of which he has no cause to complain.

Whether the evidence offered on the plea of insanity was sufficient to be submitted to the jury we need not decide. The court below submitted it to the jury for their consideration under a charge that is free from error. This was all that the defendant could demand.

In this connection we may note that the mental capacity of the defendant to deliberate and premeditate is not at issue. If he possessed sufficient sanity to enable him to commit the crime of rape then he is legally responsible for the homicide that resulted.

The other exceptive assignments of error have received consideration commensurate with the gravity of the case. They fail to disclose any cause for disturbing the verdict.

In the trial below we find

No error.

MABEL LOFTIN AND HUSBAND, ZEB LOFTIN, v. MAUDE KORNEGAY, ADMINISTRATRIX OF THE ESTATE OF PRINCE KORNEGAY, DECEASED; MAUDE KORNEGAY, INDIVIDUALLY; JOHNNIE LEE BOATWRIGHT AND HUSBAND, ... BOATWRIGHT, AND ROBERT KORNEGAY AND WIFE, ... KORNEGAY.

(Filed 17 October, 1945.)

Trusts § 1b—

A parol agreement in favor of a grantor, entered into at the time of or prior to the execution of a deed, and at variance with the written conveyance, is unenforceable in the absence of fraud, mistake, or undue influence. Such an agreement would be tantamount to engrafting a parol trust in favor of a grantor upon his deed, which purports to convey a fee title. A parol trust in favor of grantor cannot be engrafted upon such a deed.

APPEAL by defendants from *Dixon, Special Judge,* at March Term, 1945, of WAYNE.

This is an action to establish a parol trust.

Mabel Loftin, one of the plaintiffs, was the owner in fee of a tract of land situate in Wayne County, containing 18⅓ acres. On 22 October, 1927, she, with the joinder of her husband, Zeb Loftin, executed and delivered to Atlas Price a mortgage deed to this tract of land. A second mortgage deed was executed by the plaintiffs to Atlas Price on 14 December, 1927. The two conveyances were given to secure the payment of certain indebtedness to Atlas Price in the aggregate principal sum of $836.70.

On 28 January, 1931, and while the indebtedness to Atlas Price secured by the two mortgage deeds was unpaid, but after the land was advertised for sale under the powers in the mortgage deeds, the plaintiffs executed and delivered to Prince Kornegay a deed with full covenants and warranties, for the said land. This deed was not recorded until 17 December, 1941. The property had been advertised twice prior to the execution of this deed, and each time Prince Kornegay had been the last and highest bidder, and each time the bid had been raised. On 28 February, 1931, after the lands had been offered for re-sale under the powers contained in the two mortgage deeds, and after Prince Kornegay

had again been the last and highest bidder for the property, in the amount of $1,250.00, Atlas Price, mortgagee, conveyed the land in fee simple to him. Kornegay paid only the principal and interest due Atlas Price, in the sum of $978.30, for the property.

Plaintiffs allege that they were unable to pay Atlas Price the indebtedness secured by their mortgages, that the property was in the process of foreclosure and they went to Prince Kornegay, an uncle of Mabel Loftin, and requested him to pay off the indebtedness and take the land for the repayment thereof; that Kornegay agreed to do so, but suggested that since foreclosure had been started it be allowed to proceed and that he would be present at the sale and bid in the property for the plaintiffs, taking title thereto in his own name and that plaintiffs could remain in possession of the land and pay to him the sum of $100.00 per year until such time as they were in position to repay him the amount expended in their behalf, it being understood it would require approximately $1,000.00 to pay the Price indebtedness.

Beginning with the year 1931, the sum of $100.00 annually was paid by these plaintiffs to Prince Kornegay, until and including the year 1935. Kornegay died in 1936, leaving surviving him his widow, Maude Kornegay, and two children, who are defendants in this action.

Plaintiffs further allege that after the death of Prince Kornegay, they went to see Maude Kornegay, who was the duly qualified administratrix of Prince Kornegay, and offered to borrow a sufficient sum of money to pay the amount invested in the property by Prince Kornegay, and Maude Kornegay stated she understood the terms of the agreement and that she desired to continue the arrangement and that thereafter the sum of $100.00 was paid to Maude Kornegay each year through the year 1944.

Defendants deny all the pertinent allegations of the complaint, plead the three, seven and ten-year statutes of limitation and also plead estoppel and laches.

In 1938, the plaintiffs failed to pay the defendants the $100.00, whereupon the defendants, alleging they were the landlords, instituted an action in the court of a justice of the peace of Wayne County, and obtained judgment for the rent for said year. Each year after the death of Prince Kornegay, Maude Kornegay gave a receipt for the $100.00, and designated the payment as rent. She demanded possession of the premises 1 January, 1945, whereupon plaintiffs allege they tendered to defendants the amount due under the contract and demanded a deed to the premises, and upon refusal to accept tender and execute deed, this action was instituted.

Defendants moved for judgment as of nonsuit at the close of plaintiffs' evidence and renewed the motion at the close of all the evidence. Motion overruled. Defendants except.

Upon the issues submitted, the verdict of the jury was for the plaintiffs, and judgment was entered accordingly. Defendants appeal, assigning error.

D. H. Bland for plaintiffs.

J. Faison Thomson for defendants.

DENNY, J. We deem it unnecessary to discuss the provisions of the alleged oral agreement under which the plaintiffs seek to establish a parol trust in their favor against the widow and heirs at law of Prince Kornegay. Whatever the agreement might have been, the record discloses that after it was entered into, the plaintiffs executed and delivered to Prince Kornegay a deed with full covenants and warranties, for the land in controversy. A parol agreement in favor of a grantor, entered into at the time of or prior to the execution of a deed, and at variance with the written conveyance is unenforceable in the absence of fraud, mistake or undue influence. *Walters v. Walters,* 172 N. C., 328, 90 S. E., 304; *Cavenaugh v. Jarman,* 79 S. E., 673; *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028. To permit the enforcement of such an agreement would be tantamount to engrafting a parol trust in favor of a grantor upon his deed, which purports to convey the absolute fee simple title to the grantee. A parol trust in favor of a grantor cannot be engrafted upon such a deed. *Gaylord v. Gaylord, supra; Campbell v. Sigmon,* 170 N. C., 348, 87 S. E., 116; *Chilton v. Smith,* 180 N. C., 472, 150 S. E., 1; *Perry v. Surety Co.,* 190 N. C., 284, 129 S. E., 721; *Waddell v. Aycock,* 195 N. C., 268, 142 S. E., 10; *Penland v. Wells,* 201 N. C., 173, 159 S. E., 423; *Carlisle v. Carlisle, ante,* 462.

Brown, J., in speaking for the Court, in *Ricks v. Wilson,* 154 N. C., 282, 70 S. E., 476, said: "The principle is well established in this State that where the grantee accepts a deed for property for which he himself pays nothing, under agreement, accompanying the delivery, that he will hold the same for the benefit of or convey the same to a third person, a parol trust is created in favor of the latter. But it is held that the grantor, in delivering a deed, cannot retain control of the property and, by parol, create a trust to be thereafter enforced in his own favor," citing *Gaylord v. Gaylord, supra.*

Moreover, after the execution and delivery of the fee simple deed to Prince Kornegay by these plaintiffs, any agreement with the grantee, his administratrix, or his heirs, affecting the title to the land in controversy,

falls within the statute of frauds. *Walters v. Walters, supra; Kelly v. McNeill,* 118 N. C., 349, 24 S. E., 738; *Hamilton v. Buchanan,* 112 N. C., 463, 17 S. E., 159.

Inasmuch as these plaintiffs executed and delivered to Kornegay a deed with full covenants and warranties, subsequent to the time they entered into the alleged parol trust agreement with him, the defendants' motion for judgment as of nonsuit should have been allowed. *Hare v. Weil,* 213 N. C., 484, 196 S. E., 869; *Gaylord v. Gaylord, supra.*

Reversed.

JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION, v. ETHEL BOOGHER, ELISE BOOGHER, LYLES HARRIS, AND WESTERN CAROLINA HILLS, INC.

(Filed 17 October, 1945.)

Mortgages §§ 30c, 31c—

Where plaintiff claimed title by deed of trustee in a deed of trust and defendant denied plaintiff's title, evidence for plaintiff, tending to show default in payment of the indebtedness secured by the deed of trust which was foreclosed, is competent.

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

APPEAL by defendants from *Bobbitt, J.,* at April Term, 1945, of WATAUGA.

Civil action to recover land, in which defendants deny title asserted by plaintiff.

This case was here at Fall Term, 1944, and is reported in 224 N. C., 563, 31 S. E. (2d), 771. The purpose of the action and statement of essential facts are there fully set forth—thereby rendering unnecessary a restatement of them here. A new trial was ordered. And on new trial the case was again submitted to the jury upon same issues as at former trial, each of which was again answered in the affirmative. While the contest revolved in the main around the first issue as to whether the foreclosure sale, under which plaintiff asserts title, was advertised in the manner provided in the deed of trust, defendants' denial of plaintiff's title still remained. And plaintiff offered evidence tending to show default in payment of the indebtedness secured by the deed of trust under which the foreclosure was had. Exceptions by defendants. Defendants also excepted to the ruling of the court in sustaining objection to question as to whether plaintiff had foreclosed on any other loan on resort property in Blowing Rock. The question was

not answered, nor does the record show what the answer would have been.

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

Trivette & Holshouser and Smith, Wharton & Jordan for plaintiff, appellee.

John W. Aiken for defendants, appellants.

WINBORNE, J. The exceptions taken by defendants and assigned as error, as hereinabove set forth, have been given due consideration and are found to be without merit.

The evidence offered by plaintiff to which exceptions are taken by defendants is competent, particularly in view of defendants' denial of plaintiff's title. Even though defendants admit the purport of the evidence, the admission of it cannot be held for error.

The matter to which other exception is taken is immaterial and foreign to the issue, and incompetent. Moreover, no harmful effect appears since the record fails to show what the answer would have been.

Hence, in the judgment below we find

No error.

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

ROBERT H. COLEMAN v. ERNEST E. WHISNANT AND CLARENCE L. WHISNANT AND WIVES, MRS. LOUELLA P. WHISNANT AND MRS. ELSIE E. WHISNANT, TRADING AND DOING BUSINESS AS WHISNANT HOSIERY MILLS, WITH PRINCIPAL PLACE OF BUSINESS IN THE CITY OF HICKORY, NORTH CAROLINA.

(Filed 31 October, 1945.)

1. Patents § 2—

In the exercise of the rights granted under Art. I, sec. 8, cl. 8, of the U. S. Constitution, Congress has given to the Federal Courts exclusive jurisdiction of all cases arising under the patent-right laws of the United States, where the suit involves the construction of the patent laws, the validity of a patent, questions of infringement, or at least where it is made to appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of the patent laws.

2. Same—

But not every case involving rights conferred by the patent laws is beyond the jurisdiction of the State courts. When the action is brought

on a contract, or in tort, with respect to the exercise of a patent right, the State court has jurisdiction; also in a suit to enforce the payment of royalties or license fees. And a suit to enforce or set aside a contract, though connected with a patent, is not a case arising under the patent laws of the United States.

3. Contracts §§ 16, 21—

In a suit where it appears, from a liberal construction of plaintiff's pleadings, that his allegations as to conspiracy and fraud by defendants in connection with securing plaintiff's patent, the validity of which is not challenged, are incidental and by way of inducement to the gravamen of the complaint, which is that plaintiff's rights under the patent to make use of and vend the patent appliances have been tortiously interfered with by defendants to plaintiff's damage, and that plaintiff is entitled to compensation or royalties upon the use of the patented devices by defendants as licensees, in accordance with an agreement, the State court is not without jurisdiction and demurrer on that ground cannot be sustained.

4. Fraud § 8: Contracts § 21—

In a suit to avoid the effects of a contract, the execution of which is admitted, plaintiff alleging coercion by defendants in procuring his signature, where no facts are alleged by plaintiff upon which coercion may be predicated and there are no allegations of fraud, the assertions of plaintiff are mere conclusions of the pleader, and demurrer to the allegations of coercion was properly sustained.

5. Courts § 11—

All parties, to litigation growing out of a contract relative to the ownership and use of a patent, being citizens and residents of North Carolina, and the execution of the contract and all the transactions thereunder and all acts complained of having taken place in this State, Federal anti-trust laws have no application thereto.

6. Patents § 1—

The very object of patent laws is monopoly and their strength is in the restraint imposed on others to exclude them from the use of the invention. The exercise of such restraint, within the field covered by the patent, is no violation of the anti-trust laws or of the rule against contracts in restraint of trade.

7. Patents § 3—

The owner of a patent may sell his patent, or an undivided share therein, to another and lawfully agree not to compete with his vendee to the exclusion of himself. Such a contract is not invalid under the anti-trust statutes.

8. Same—

Joint owners of a patent are competent to contract with each other with respect to the exercise of the exclusive rights conferred by the patent, or to assign their interest absolutely or upon condition. Such contracts are subject to the same rules of law as other contracts.

9. Contracts § 5—

Consideration is an essential element of a contract, and want of consideration constitutes legal excuse for nonperformance of an executory promise.

10. Patents § 3: Contracts § 21—

In a suit to avoid for want of consideration the sale of an interest in a patent and to recover damages for unlawful interference by defendants with plaintiff's efforts to realize on his invention, where plaintiff alleges that, while defendants own three-quarters of his patent and have paid the patent fees and some expenses and a small amount for another similar patent, plaintiff owns a one-quarter interest in the patent, and that defendants have appropriated his patent to their own use, and for two years have consistently and continuously prevented plaintiff from making contracts for the exercise of his rights in relation to his patent, preventing his using the patent himself or licensing its use by others or manufacturing the patented articles for sale, by threats of suits against those with whom plaintiff has attempted to deal, an actionable wrong is set out which is not vulnerable to demurrer.

11. Contracts § 1—

The right to make a contract is both a liberty and a property right.

12. Contracts §§ 16, 26—

Unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring the breach of a contract, or in preventing the making of a contract, when done, not in the legitimate exercise of defendant's own rights, but with design to injure the plaintiff, or to gain some advantage at his expense.

APPEAL by plaintiff from *Bobbitt, J.*, at May Term, 1945, of CATAWBA.

This action was instituted by the plaintiff to recover damages on account of defendants' interference with his right to the use of certain patents, covering improved appliances in the manufacture of hosiery, invented by him, and for compensation for the use of his invention by defendants in their hosiery mill.

The pleadings consisted of complaint, answer and reply. At the hearing defendants interposed demurrer *ore tenus* on the ground that the plaintiff's complaint and reply failed to state a cause of action, and that on the face of these pleadings the court was without jurisdiction. The demurrer was sustained. Plaintiff's appeal from this disposition of the case requires examination of plaintiff's complaint, and of his reply in response to defendants' answer, as these pleadings relate to the questions raised by the demurrer.

The pertinent allegations of the complaint may be stated as follows: During the year 1939, while plaintiff was an employee in the hosiery mill in Hickory, North Carolina, owned and operated by the defendants, Ernest E. and Clarence L. Whisnant, he invented an appliance or

machine for putting stripes in men's hosiery while in process of manufacture on circular knitting machines. Application for patent was filed in U. S. Patent Office 7 December, 1939, and patent #2,237,270 was issued in 1940. Subsequently plaintiff devised certain improvements on the invention, for which patent #2,330,269 was issued and granted to plaintiff and Osben D. Hunt (superintendent in defendants' mill), as patentees, with an assignment of an interest therein to the two defendants. It was alleged, however, that the defendants were merely licensees, and that the use of the patented appliances was restricted to defendants' plant in Hickory. Plaintiff alleged that he was the sole inventor, and that the naming of Hunt as co-patentee was procured by defendants as result of an unlawful conspiracy on their part with Hunt in order that defendants might control the patent, and that immediately after the last patent was issued Hunt assigned his interest in the patent to the defendants, and that defendants have continuously used the appliance invented by plaintiff in their mill. Plaintiff alleged that he had demanded compensation for use of the machines invented by him but only received nominal and grossly inadequate sums therefor; that the patented device reduced the cost of manufacturing hose to the extent of 15c and 20c per dozen, and that defendants have used plaintiff's invention in the manufacture and sale of 1,500,000 dozen pairs of hose.

Plaintiff further alleged that he had made numerous efforts to make and distribute said attachments for use in various and sundry hosiery mills in North Carolina, but that on each occasion the defendants "have gone to the party approached by plaintiff and threatened, either directly or indirectly, to institute proceedings to 'protect their interest,' or to institute proceedings to prevent the use of this plaintiff's invention by himself or any other person," and, further, that when plaintiff was considering a proposition with parties in Hickory for the use of these attachments on a partnership basis defendants approached said parties with result they canceled the proposition; that defendants by threats to sue the proprietors of machine shop if they attempted to manufacture any of these appliances, have prevented plaintiff from having any of the patented devices made; that such interference has continued over a period of two years and defendants have consistently prevented this plaintiff from making, using or selling the appliances invented by him; that defendants have appropriated plaintiff's invention to their exclusive use, installed the appliances so patented in their mill, and forbidden the use or sale by plaintiff of any of said appliances. For this interference with the use of his patent plaintiff alleges he has suffered damages to the extent of $150,000. He further alleges that defendants have greatly prospered by the use of his invention, and that he is entitled to recover for royalties on the use of his invention in the amount of $75,000.

The defendants in their answer admit the issuance of the patents set out in the complaint, but allege that a contract and assignment, dated 3 October, 1939, was entered into by and between the plaintiff and Hunt, parties of the one part, and the defendants, of the other part, which contained stipulations and agreements that plaintiff and Hunt thereby assigned and sold to the defendants one-half interest in the invention for which the parties of the first part were about to apply for letters patent, and that each of the parties thereby became entitled to one-fourth interest in said invention, including letters patent to be issued, together with all improvements and subsequent patents on said invention; that it was further stipulated in the contract that defendants be granted license to use the invention in their mill as a factory right without charge for the use of the invention; that the invention and patents should not be sold, assigned, leased or licensed, or any interest disposed of without unanimous consent of the four parties, and that in event of sale or license the money derived should be equally divided. The agreement contained the further provision that the invention and any and all patents granted thereon "shall not be used by anyone except Ernest E. Whisnant and Clarence L. Whisnant at their mill in Hickory, North Carolina, except by the written consent of all parties to this agreement." This was signed by plaintiff, Hunt and the two defendants.

Defendants' answer further set out that on 5 December, 1939, and again on 31 December, 1940, plaintiff and Hunt executed written assignments to each of the defendants of a one-fourth interest in the invention. These assignments were recorded in U. S. Patent Office. It was further alleged that on 7 June, 1943, Hunt executed written assignment of his one-fourth interest to the defendants, and appended to this assignment was the written consent signed by plaintiff.

To the defendants' answer plaintiff filed reply again alleging that he was the sole inventor of the device patented, and that the naming of Hunt as co-patentee was caused by the defendants in furtherance of the conspiracy alleged in the complaint. He admits signing the contract alleged in the answer, but alleges this was done under coercion, without consideration and in furtherance of a conspiracy between defendants and Hunt to defraud him of his rights and of the rewards due him from his invention. He further alleges the contract was illegal and void "for the reason that same is in restraint of trade and contrary to the Federal statutes, and particularly the Sherman anti-trust statute." Plaintiff admits signing the assignments to the defendants set out in the answer, but alleges they were executed in furtherance of the unlawful conspiracy as alleged, were without consideration, and that at the time said assignments were executed there was a contemporary oral agreement with the

defendants that they would pay him ample royalties upon the use of his inventions in the event they proved practical.

Plaintiff admits the patent was issued in the name of Hunt and himself, but not to defendants as co-patentees, "the same having been assigned to them as assignees of a one-fourth undivided interest each and by agreement said interest was to be used in their mill at Hickory," and that their interest is only that of licensees for the use of the invention in their plant. Plaintiff again alleges the contract and the assignments to defendants were executed under coercion, without consideration, and that the contract relied on by defendants was void as being in restraint of trade. He alleges that the defendants have installed 104 machines equipped with plaintiff's invention without compensation to him, and have interfered with plaintiff's use of his invention, and prevented him from making, using or vending the patented devices. His prayer for relief is that he recover $150,000 damages for wrongful interference, and $75,000 royalties.

From judgment sustaining the demurrer and dismissing the action, plaintiff appealed.

John C. Stroupe, W. H. Strickland, and Paul B. Eaton for plaintiff.
J. L. Murphy, Bailey Patrick, and S. J. Ervin, Jr., for defendants.

DEVIN, J. The sufficiency of the plaintiff's pleadings to constitute a cause of action was challenged by the demurrer interposed by defendants upon two grounds: (1) that the cause of action attempted to be set up was one arising under the Patent Laws of the United States, and therefore cognizable only in the Federal Courts, and (2) that in any event plaintiff had failed to allege sufficient facts to constitute a cause of action. The ruling of the court below in entering judgment that the demurrer be sustained requires consideration of both grounds upon which the demurrer was based.

1. By Art. I, sec. 8, of the Constitution of the United States the Federal Government was granted power "to promote the progress of science and useful arts, by securing for limited times to . . . inventors the exclusive right to their . . . discoveries." In the exercise of this power the Congress has given to the Federal Courts exclusive jurisdiction of "all cases arising under the patent-right laws of the United States." 28 U. S. C. A., sec. 371, 41 (7). Only a Federal Court has jurisdiction to consider an action involving the construction of the patent laws, the validity of a patent, or questions of infringement. *Gen. Electric Co. v. Marvel Match Co.*, 287 U. S., 430; *Odell v. Farnsworth*, 250 U. S., 501; 40 Am. Jur., 652. However, to constitute a suit under the patent laws "the plaintiff must set up some right, title or

interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of these laws." *Pratt v. Paris Gaslight Co.,* 168 U. S., 255 (259); *Odell v. Farnsworth,* 250 U. S., 501; *Miller & Co. v. Beagen,* 293 Mass., 54. But not every case involving rights conferred by the patent laws is beyond the jurisdiction of state courts. When the action is brought on a contract, or in tort, with respect to the exercise of a patent right the state court has jurisdiction, *Henry v. Dick Co.,* 224 U. S., 1; *Briggs v. United Shoe Machinery Co.,* 239 U. S., 48; *Independent Wireless Teleg. Co. v. Radio Corp.,* 269 U. S., 459; *Becher v. Contoure Laboratories,* 279 U. S., 391; or to enforce the payment of royalties or license fees. 40 Am. Jur., 653. And a suit to enforce or set aside a contract though connected with a patent is not a case arising under the patent laws of the United States. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.,* 185 U. S., 282.

In the application of these principles to the plaintiff's pleadings in the case at bar, it may be observed that if plaintiff's action be regarded as bottomed upon the allegation that others were fraudulently, or as result of a conspiracy on the part of defendants, caused to be named in the letters-patent as joint patentees when in fact the plaintiff was the sole inventor, and relief were sought on that ground, it would undoubtedly set up a cause of action under the patent laws of the United States, and involve the validity of the patent. *Crown Die & Tool Co. v. Nye,* 261 U. S., 24; *Hise v. Grasty,* 159 Va., 535, 166 S. E., 576. It is said in Walker on Patents, 404: "If several persons obtained a joint patent for what was invented solely by one of them, that patent is void."

But giving the plaintiff's pleadings the liberal construction required as against a demurrer, *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874, it is apparent the allegations as to conspiracy and fraud in connection with securing the patent are incidental and by way of inducement to the gravamen of his complaint, which is that plaintiff's rights under the patent to make use and vend the patented appliances have been tortiously interfered with by the defendants Whisnant to plaintiff's damage, and that he is entitled to compensation or royalties upon the use of the patented devices by the defendants as licensees, in accordance with defendants' alleged agreement to pay therefor. These being the grounds of suit and upon which he seeks relief in damages and for collection of royalties, we conclude that the court was not without jurisdiction, and that demurrer on this ground cannot be sustained. The validity of the patent is not challenged. The plaintiff's action is based upon its validity and upon his right to use his invention without interference. The real issue in this case does not depend upon the construction or administration of the Federal Patent statutes.

In *Luckett v. Delpark,* 270 U. S., a suit by the owner of a patent against licensee for damages for suppression of the patented article, and for royalties, and for cancellation of agreements in relation to the patent, was held not within the jurisdiction of U. S. Courts. In delivering the opinion of the Court, *Chief Justice Taft* said: "It is a general rule that a suit by a patentee for royalties under a license or assignment granted by him, or for any remedy in respect of a contract permitting use of the patent is not a suit under the patent laws of the United States, and cannot be maintained in a Federal Court as such," citing numerous cases.

In *Kabbes v. Philip Carey Mfg. Co.,* 63 F. (2), 255, where plaintiff, one of two co-patentees, sought to enjoin defendant, former employer, from making and selling the patented article on the ground that plaintiff's assignment to the defendant of his interest was invalid, the case was dismissed for that the Federal Court had no jurisdiction under the patent laws, both parties being residents of the same state. To the same effect is the holding in *Globe Steel Co. v. National Metal Co.,* 101 F. (2), 489.

"Whenever the rights of plaintiff depend upon contract obligations which courts of general equity jurisdiction may enforce, or for breach of which courts of common law cognizance may award damages, the mere fact that a patent is incidentally or collaterally related to the controversy, does not oust the state courts of jurisdiction." *Wise v. Tube Bending Machine Co.,* 194 N. Y., 272.

State courts have jurisdiction to prevent or repair breaches in contractual relations between owners of patent rights, or to award damages for tortious conduct on the part of one toward his co-owner with respect to such rights. *Miller & Co. v. Beagen,* 293 Mass., 54.

2. Considering then that the plaintiff's pleadings have attempted to set up a cause of action which is within the jurisdiction of the state court, the demurrer next questions the sufficiency of the facts pleaded to entitle plaintiff to maintain his action.

In this phase of the case, it is apparent that the plaintiff is confronted with a barrier which he must surmount in order to proceed with his action. In his reply he admits the execution of the contract and assignments set out in the answer. In the contract it is specifically provided that plaintiff's interest in the patent is only one-fourth, and that the two defendants are co-owners to the extent of one-fourth interest each; that to the defendants is given the right to use the invention in their plant at Hickory without charge; and that the invention and letters patent issued thereon shall not be used by anyone other than the defendants in their mill, "except by the written consent of all the parties to this agreement." While this contract was signed by plaintiff before the

patent was issued, it was entered into in contemplation of application for and issuance of letters patent on plaintiff's invention, and upon issuance of the patent and subsequent assignments would be held binding and enforceable, if in other respects valid. *McGee v. Frohman,* 207 N. C., 475, 177 S. E., 327; *U. S. v. Dubilier Condenser Corp.,* 289 U. S., 178; *Cook Pottery Co. v. Parker,* 89 W. Va., 7, 109 S. E., 744. Since this contract denies the right to recover royalties, and grants to defendants power to prevent plaintiff's use of the invention except by defendants' consent, if this contract is upheld plaintiff will not be able to maintain his action for the causes set out in his pleadings. *U. S. v. Gen. Electric Co.,* 272 U. S., 476.

In his reply the plaintiff seeks to avoid the effect of the contract on three grounds: (a) that his execution of this paper was procured by the coercion of the defendants; (b) that the contract is rendered null and void by the Federal statute known as the Sherman anti-trust laws, or by the North Carolina State statutes, or under the common law rule against contracts in restraint of trade; and (c) that the execution of the contract on his part was without consideration, and hence unenforceable as to him.

(a) An examination of plaintiff's pleadings fails to reveal any facts upon which coercion may be predicated, and the assertion to this effect may be regarded merely as the conclusion of the pleader which is not admitted by the demurrer. There is no allegation of fraud.

(b) It is contended by plaintiff that the provision in the contract excluding the plaintiff and all others from use of the patent violates the Federal anti-trust statutes, tends to create a monopoly and is in restraint of trade, and hence should be held unenforceable. As all the parties here are citizens and residents of North Carolina, and the execution of the contract and all the transactions thereunder and all the acts complained of took place in this State, the Federal statutes have no application. Nor may the provisions in a contract excluding others from use of a patent right be regarded as in restraint of trade. Patent laws confer upon the owners of a patent the right to exclude others from making, using or selling the patented invention without their consent. One of the purposes of the patent laws is to exclude others from the use of the patented article, and to preserve to the patentee and his assigns rights in the invention to the exclusion of all others. In *Maxwell v. Construction Co.,* 200 N. C., 500, 157 S. E., 606, it was said: "The patent is the instrumentality by which the U. S. confers upon the patentee, his heirs and assigns the right to the exclusive use of his invention or discovery, for a limited time"; and *Justice Connor* in delivering the the opinion of the Court quoted from *Rockwood v. Commissioners,* 257 Mass., 572, as follows: "Letters patent issued by the United States give to the patentee

a right of monopoly in the invention, and with this right the State cannot interfere." The Massachusetts case was affirmed by the Supreme Court of United States in *Long, Commissioner v. Rockwood,* 277 U. S., 145. This principle was stated in *Bement & Son v. Harrow Co.,* 186 U. S., 70, as follows: "The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the Courts. The fact that the conditions in the contract keep up the monopoly or fix prices does not render them illegal." And from *United States v. United Shoe Machinery Co.,* 247 U. S., 32, we quote: "Of course there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention absolutely or on the terms the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act." "It is a grant of the right to exclude others from using it." *Special Equipment Co. v. Coe,* 323 U. S., 697. Only when the patentee uses his patent to enlarge the patent monopoly beyond the grant would the anti-monopoly statutes apply. *Ethyl Gas Corp. v. U. S.,* 309 U. S., 459; *Special Equipment Co. v. Coe, supra.* Or where as result of conspiracy among patent holders, patent rights are used to create monopoly in a particular industry. *Hartfort-Empire Co. v. U. S.,* 323 U. S., 386.

In *Becton v. Eisele,* 86 F. (2), it was said: "That the anti-trust laws do not embrace nor include contracts entered into in the legitimate exercise of rights conferred under the patent laws has been established in many cases," citing *Bement & Sons v. Harrow Co.,* 186 U. S., 70; *U. S. v. United Shoe Mach. Co.,* 247 U. S., 32; *U. S. v. Gen. Electric Co.,* 272 U. S., 476. Anti-trust statutes do not purport to curtail the patent monopoly. *International Bus Mach. Corp. v. U. S.,* 298 U. S., 131.

"A covenant by the assignor of a patent that he will not himself make, use or sell the patented article is undoubtedly valid because the Act of Congress which created the monoply expressly authorizes it to be assigned as a whole." *Transportation Co. v. Pullman,* 139 U. S., 24 (53).

While a patent right, strictly speaking, does not create a monopoly as pointed out by *Mr. Justice Roberts* in *U. S. v. Dubilier Condenser Corp.,* 289 U. S., 178, since it does not deprive the public of any right it previously had, restraint is inherent in a patent since it confers the right to exclude others.

The owner of a patent may sell his patent and lawfully agree not to compete with his vendee and to exclude himself from its use. Such a contract would not be invalid under the anti-trust statutes. *Special*

Equipment Co. v. Coe, supra; 2 Page Contracts, sec. 826; 48 C. J., 268; 2 Walker on Patents, 1401. A contract that assignee should have the exclusive right to manufacture and sell the appliance is equivalent to a sale of the exclusive right and not void under the Sherman Act. *Bement & Sons v. Harrow Co., supra; U. S. v. Gen. Electric Co.,* 272 U. S., 476; *Garfield v. Western Electric Co.,* 298 F., 659. The patentee may assign to another an undivided share of his exclusive right to use, make and sell the patented device, to the exclusion of himself. Unless reserved, all his rights to the patent pass to his assignee. "The franchise which a patent grants consists altogether in the right to exclude." *Becton v. Eisele, supra; United Shoe Mach. Corp. v. U. S.,* 258 U. S., 451; *Waterman v. Mackenzie,* 138 U. S., 252. A contrary view was expressed in *Blount v Yale & Towne Mfg. Co.,* 166 F., 555.

As was said in *Copeland v. Eaton,* 209 Mass., 139, "This (a patent) is a property right of a peculiar nature, with attributes which differentiate it from all other classes of property." The distinction between assignees and licensees is pointed out in *Wildes v. Nelson,* 154 N. C., 590, 70 S. E., 940; *Waterman v. Mackenzie, supra.*

While Mr. Barnett in his work on Patent Property and Anti-Monopoly Laws, pages 125 and 126, questions the right of one joint owner of a patent to make an agreement with a co-owner to limit competition between them, as being in restraint of trade, citing an unreported case from a U. S. District Court, we do not perceive that the contract under consideration gives rise to monopoly or to a restraint which was not inherent in the patent grant, and in the right to assign a patent in whole or in part conferred by the Federal Statute, sec. 47 of U. S. Code, title 35.

Restraint for a limited time being inherent in patent laws, under the authorities cited, we do not think the plaintiff can avoid the obligation of his contract on the ground that it was illegal and unenforceable.

(c) Was the execution of the contract relied on by defendants without consideration? Undoubtedly joint owners of a patent are competent to contract with each other with respect to the exercise of the exclusive rights conferred by the patent, *Newark Knitting Co. v. Marsh,* 57 N. J. Law., 36, or to assign their interest absolutely or upon condition, and to divest themselves of rights with respect to the patent, *Russell v. Boston Card Index Co.,* 276 F., 4. But executory contracts between co-owners, or those having an interest in patent rights, are subject to the same requirements and rules of law as other contracts. Consideration is an essential element of a simple contract, and want of consideration constitutes legal excuse for nonperformance of an executory promise. *Swift & Co. v. Aydlett,* 192 N. C., 330, 135 S. E., 141; 12 Am. Jur., 565-925. The agreement on the part of the plaintiff to the effect that only the

defendants could make use of the invention and patent rights, and that plaintiff could not do so without the written consent of all parties, including the defendants, must have been supported by a consideration in order to be enforceable against the plaintiff. 17 C. J. S., 421, 422; *Planters National Bank v. Heflin,* 166 Va., 166, 164 S. E., 216.

The contract recites as consideration the furnishing of necessary expenses incurred in making the invention and to be incurred in securing patent, and in their answer defendants allege that plaintiff and Hunt were employed to do experimental work for the purpose of devising or inventing appliances useful in the manufacture of hosiery, and that defendants provided the materials and facilities for that purpose; and in addition that defendants incurred expense in defending a patent infringement suit and in the purchase of right to use a similar patented device.

But the plaintiff in his reply denies each of the allegations in the answer tending to show consideration for the execution of the contract, though he admits defendants paid the patent fees and a small amount for another patent, and charged plaintiff his pro rata part therefor. Payment of patent fees apparently may be regarded as consideration for assignment to the defendants of an interest in the patent. Since the defendants were owners of one-half interest in the patent, and now own three-fourths, expense of defending their joint patent rights would hardly be considered as consideration for the execution of a contract in 1939 by which plaintiff purported to divest himself of all right to the fruits of his invention. Plaintiff also alleges that defendants at one time made a small increase in his salary for a few weeks, and subsequent to the execution of the assignments discharged him.

From an examination of the plaintiff's pleadings, in the light of the rule requiring that in the construction of pleadings every reasonable intendment and presumption be made in favor of the pleader (*Blackmore v. Winders, supra;* G. S., 1-151), we conclude that the plaintiff has sufficiently alleged want of consideration for the execution of those provisions of the contract referred to, and that the defendants' contention that he is debarred by this contract from maintaining his action for the causes alleged in his complaint cannot be sustained. Under the pleadings here we think the provisions of the contract should not be held to preclude the plaintiff from the use of his invention in which he still retains an interest, and that his action for damages against the defendants for wrongful interference with the rights conferred by the patent may not be dismissed, if he has otherwise pleaded sufficient facts to show an actionable wrong.

3. Are the allegations in plaintiff's pleadings sufficient to maintain an action for wrongful interference with plaintiff's rights in the premises?

In *Haskins v. Royster,* 70 N. C., 601, *Justice Rodman,* speaking for the Court, quotes at some length from *Walker v. Cronin,* 107 Mass., 555, from which we select as appropriate here this statement of a legal principle: "Every one has right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance." The right to make contracts is both a liberty and a property right. *Morris v. Holshouser,* 220 N. C., 293, 17 S. E. (2d), 115; *Stephens v. Hicks,* 156 N. C., 239, 72 S. E., 313. We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own rights, but with design to injure the plaintiff, or gaining some advantage at his expense. 30 Am. Jur., 70, 83; *Angle v. Railway Co.,* 151 U. S., 1; *Miles Med. Co. v. Parks,* 220 U. S., 373 (394). In *Kirby v. Reynolds,* 212 N. C., 271, 193 S. E., 412, *Justice Clarkson* quotes from 15 R. C. L., 68, as follows: "As a general proposition any interference with free exercise of another's trade or occupation, or means of livelihood, by preventing people by force, threats or intimidation from trading with, working for, or continuing him in their employment is unlawful." In *Kamm v. Flink,* 113 N. J. L., 582, 99 A. L. R., 1, it was said: "Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results." The word "malicious" used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff or gaining some advantage at his expense. *Stanford v. Grocery Co.,* 143 N. C., 419, 55 S. E., 815; *Downing v. Stone,* 152 N. C., 525, 68 S. E., 9; *Stancill v. Underwood,* 188 N. C., 475, 124 S. E., 845; *Betts v. Jones,* 208 N. C., 410, 181 S. E., 334; *Bitterman v. Railroad,* 207 U. S., 205. In *Lewis v. Bloede,* 202 F., 7, in an opinion by *District Judge Connor* (former Justice of this Court) it was held that an action would lie for a wrongful and unjustifiable interference, knowingly and intentionally interposed to prevent the formation of a contract which but for such interference would have been formed. *Skene v. Carayanis,* 103 Conn., 708. See cases collected in Annotations, 99 A. L. R., 18. While this principle has been held not broad enough in its application to authorize action for inducing a third person to break a single contract with plaintiff, the consequences being a broken contract for which the party has his remedy by suing upon it, *Biggers v. Matthews,* 147 N. C., 299, 61 S. E., 55; *Swain v. Johnson,* 151 N. C., 93, 65 S. E., 619; *Elvington v. Shingle Co.,* 191 N. C., 515, 132 S. E., 274; *Holder v. Bank,* 208 N. C., 38, 178

S. E., 861, we think the facts alleged in plaintiff's pleadings are sufficient to set out an actionable wrong. He alleges in substance that defendants not only appropriated his patent to their use in their mill, but that they consistently and continuously prevented his making contracts for the exercise of his rights in relation thereto, this continuing over a period of two years; and preventing (1) his sale or licensing the use of his invention in various other mills as he had a right as owner of an undivided interest therein to do; (2) his using it himself in a mill where he was negotiating with another for its use on a partnership basis, and (3) his contract for the manufacture for him of the patented appliances. He alleges that this was done by persistent threats of suit which caused the parties with whom he had begun negotiations and who would otherwise have contracted for license, use or manufacture, to decline to deal with him.

While no misrepresentations are alleged nor force used, it is thought allegations in the complaint and reply tend to show that the persistence in the activities of the defendants to threaten with suits all those with whom he negotiated for the manufacture, sale and use of a valuable patent right has effectually prevented the plaintiff from exercising his right and has wrongfully interfered with his freedom of contract and use of his trade and occupation, and that this was done without justification or legal excuse and for the purpose and design of depriving him of his rights in the patent and of gaining for themselves the exclusive use of this valuable invention at his expense. He avers that he has been met at every turn by the wrongful activities of the defendants, and finds himself helpless to obtain any of the fruits of his invention.

4. While the contract relied on by defendants provided that defendants should use the patented appliances without charge, plaintiff alleges that subsequently, at the time of the formal assignments to the defendants of an interest in the patent, there was an oral agreement with defendants that they would pay him royalties upon the use of the invention if it proved practical, that it did prove practical and defendants have used the invention in their mill to their great profit. Nothing else appearing, there is no reason why a new and different agreement by parol entered into subsequent to a written contract (one not required to be in writing), may not impose obligation. Walker on Patents, 1490, 1508.

We have considered only the plaintiff's pleadings, and in the light most favorable to him. Whether he can sustain his allegations as against the defendants' denial is another matter. As to that we express no opinion.

For the reasons stated the judgment sustaining the demurrer *ore tenus* and dismissing the action is

Reversed.

CARL B. RIDENHOUR v. FAYE K. RIDENHOUR.

(Filed 31 October, 1945.)

1. Habeas Corpus § 3: Judgments § 30—

In *habeas corpus* between husband and wife, who are living separate and apart without being divorced, for the custody of their minor children, an order of the Superior Court awarding custody of the children to one of the parties, or to both parties for specified periods, is not *res judicata*, when the court on a subsequent hearing finds as a fact that there has been a substantial change in the circumstances of the parties since the rendition of the last order in the cause. G. S., 17-39.

2. Judges § 2a: Courts § 3—

Under G. S., 7-74, a judge assigned to a district is the judge thereof for six months, and within the period of such assignment has jurisdiction of all "in Chambers" matters arising in the district.

3. Habeas Corpus § 3—

Considering the welfare of the children "the polar star" by which the judge is to be guided, in a *habeas corpus* proceeding for their custody between parents, living separate and apart without being divorced, failure to give statutory notice of the hearing, when a full hearing has been had, will not be held to invalidate an order with respect to their care and custody.

4. Same—

The Superior Court is without jurisdiction to make an order for the support and maintenance of minor children, in a *habeas corpus* proceeding for their custody between their parents, living separate and apart without divorce, after appeal to this Court by one of the parties from a former order of the Superior Court awarding custody of the children.

5. Appeal and Error § 30b—

Where it appears on the face of the record that the court below had no jurisdiction, this Court will so declare *ex mero motu*.

6. Habeas Corpus § 3—

In a *habeas corpus* proceeding between parents, for the custody of their minor children, where on appeal by the husband, this Court finds error, costs will be awarded against appellant.

APPEAL by petitioner from *Gwyn, J.*, at February and April Terms, 1945, of CABARRUS. G. S., 17-40.

Petition for writ of *habeas corpus* between husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, two sons aged 13 and 11 years, respectively, under provisions of G. S., 17-39.

The petitioner for causes set forth in his petition prayed that a writ of *habeas corpus* be granted requiring respondent to bring and produce their children, naming them, before the court; that the court inquire into the cause of their restraint; and that their custody be restored to petitioner to the end that they may be returned to their rightful home.

Pursuant thereto, a writ of *habeas corpus* directed to respondent was issued on 26 January, 1944, by Armstrong, J., of 15th Judicial District of North Carolina, requiring her to produce the said children before said judge at courthouse of Rowan County in Salisbury, North Carolina, at 2:00 o'clock p.m., on 15 February, 1944, showing authority and cause of their restraint, and "there to receive, abide by, and perform such orders as may be made in the premises."

Respondent for causes averred in her answer to the petition of petitioner prayed the court to find that she is a fit and suitable person to have the custody and control of their said children, and that the custody of them be awarded to her.

The cause was first heard in Salisbury at time and place above specified, and then was continued by consent of petitioner and of respondent to be heard at regular term of Superior Court of Cabarrus County on 28 February, 1944, before Armstrong, J., as aforesaid, and being heard then the court made these specific findings of fact, briefly stated: (1) That petitioner and respondent are husband and wife, living separate and apart without divorce; (2) that respondent left the home of petitioner on or about 14 December, 1943, without any apparent fault on part of petitioner; (3) that each of the parties hereto is a person of good moral character, and that there is nothing in the evidence reflecting on either of the parties that forgiveness and forbearance could not overcome; (4) that petitioner and respondent maintain a well furnished home, in a wholesome and Christian section, in Cabarrus County, provided with all the necessities of life, and within easy access "to the public schools of the county," where the children lived until 14 December, 1943, when respondent took them with her; and (5) that the best interests of the children will be promoted by placing them in the custody of petitioner, their father, "until the further orders of the court." Thereupon, by order dated 3 March, 1944, the court awarded to petitioner the full custody of said children "until the further orders of the court," but granted to respondent the privilege of seeing the children at any and all times without any interference on the part of petitioner, or any other person.

Thereafter, when the cause came on for hearing at June Term, 1944, of Superior Court of Cabarrus County before Armstrong, J., presiding, upon petition of respondent that the cause be reopened and the judgment theretofore entered be modified, and permanent custody of children be

awarded to her, the court made additional findings of fact, substantially these: (1) That the children remained with respondent until 2 May, 1944, when petitioner obtained their custody and has since had the care, custody and control of them; (2) that there has been no reconciliation between petitioner and respondent, and it now appears that the possibility of a complete reconciliation is remote if not impossible; and (3) that the best interest of the children will be best promoted by placing them in the custody of their mother a part of the time in order that they may have the benefit of a mother's care and love during the formative period of their childhood. And thereupon the court, in its discretion, entered an order modifying the order entered at February Term, 1944, as follows: That the children remain in the care, custody and control of the petitioner until 1 September, 1944, on which date they shall be delivered to respondent and be under her care, custody and control until 1 March, 1945; and that thereafter the children shall remain under the care, custody and control of petitioner during the period from 1 March to 1 September of each year, and under the care, custody and control of respondent during the period from 1 September to 1 March of each year, "until further order of the court," and "that this cause be retained on the docket of the Superior Court of Cabarrus County, as this judgment is not intended to be a final determination of the rights of the parties touching the care, custody and control of said children, and on change of conditions properly established the question may be further heard and determined." This order was "signed in open court—the 12th day of June 1944."

At the February Term, 1945, of Superior Court of Cabarrus County which began 26 February, 1945, the case was placed upon the regular printed trial calendar for said term. No other notice was given by the respondent that a motion to modify the order of Armstrong, J., entered 12 June, 1944, would be made, and no petition to reopen the matter and modify said judgment, and no additional affidavits were filed. But on late afternoon of 27 February, 1945, counsel for respondent asked the court, Gwyn, J., presiding, "to take up for disposition the hearing in said case and to modify the order" of Armstrong, J., entered 12 June, 1944. Counsel for the respective parties then informed the court as to the status of the matter. Whereupon, the court intimated a disposition not to disturb the said order, and "with that intimation from the court, nothing further was done at that time."

The court then announced that the term would expire by limitation "and practically everybody, including most of the lawyers, left the court room." And "the trial judge, with intention to leave the court and return to his home in Reidsville, went down the steps from the court room and into the hallway on the first floor of the courthouse building,"

and "as he was passing in close proximity to the office of the clerk of the court the minor son of respondent . . . aged fourteen, approached the judge showing considerable emotion—being in tears. The court understood by his action that he wanted to say something about the proceeding then pending between his mother and father. After he had spoken a few words, the respondent, together with the second child, approached and undertook to mention the matter of the proceeding. The court promptly informed respondent that if the matter were discussed it would have to be in the presence of the parties concerned, and in the court. Whereupon, the judge immediately requested the clerk of the court to notify all the parties that court would be held the following day, and that the Ridenhour case would be heard. The court personally called the office of the attorney for petitioner, to inform him of the fact that the case would be heard the following morning at 9:30 o'clock, and the attorney not being in his office, a message was left to that effect.

On the following morning, 28 February, 1945, at 9:30 o'clock, the petitioner and his attorney were in court, and when the matter was called, petitioner, through his attorney, objected to the action of the court in attempting to conduct a hearing in the matter (1) for that no petition therefor and no additional affidavits had been filed, (2) for that, therefore, the judgment of Armstrong, J., entered 12 June, 1944, was *res judicata,* and (3) for that no sufficient notice of the hearing had been given. The court overruled the objections, and petitioner excepted.

The court then proceeded to take oral evidence in the matter. And, after hearing oral testimony of the petitioner and respondent and other witnesses, and argument of counsel, which lasted throughout the entire day, the court entered an order reciting that the cause coming on to be heard and being heard upon the motion of respondent "for a modification of the judgment heretofore rendered in this cause" and finding facts at length, including findings that it appears to the court (1) "that there has been a substantial change in the circumstances of the parties since the rendition of the last order in the cause, which change of circumstances takes into account the change in the attitude of the various members towards each other, (2) "that the petitioner, in the light of his present state of mind, his present attitude and other pertinent facts, is an unfit person to have the custody of his said minor children," (3) "that the respondent is a fit and proper person to have the care and custody of her minor children"; and (4) "that it would be to the best interest of said minor children that the order heretofore made be modified."

Thereupon, the court adjudged that the order theretofore entered should be modified by awarding to respondent "the full custody, care and tuition" of said children, but granting to petitioner privilege of visiting

them at reasonable times and imposing upon him certain restraints, and accordingly order was entered. And the court further provided there that "no order is entered at this hearing fixing the amount of money which the petitioner shall pay toward the support and maintenance of the minor children"; that "the cause is retained to the end that the parties may agree upon such matters"; that "upon failure of the parties to agree, an order will be entered subsequently fixing the amount"; and that "the cause is retained for further orders."

To the foregoing judgment, petitioner objected and excepted, and appealed to Supreme Court, and was allowed time within which to serve statement of case on appeal, and appeal bond was fixed, and petitioner now on this appeal assigns error.

Thereafter, at April Term, 1945, of Superior Court of Cabarrus the case was again placed upon the regular printed trial calendar for said term of court. No petition for the allowance of support and no additional affidavits had been filed, and no notice, other than placing the case on the calendar, had been given. However, at said April Term of Superior Court, Gwyn, J., presiding, entered a second order and judgment in which after reciting that, "this cause having been retained on the calendar by order of the court at the February Term, 1945, for further orders, and the same having been duly placed on the calendar as a motion by counsel for the respondent for this term, and all parties to the action, with their respective attorneys, appeared in open court, and after hearing the arguments of attorneys for both the parties to the action, as well as their admissions in open court, the court being permitted to take into account the evidence offered at the former trial, and the same being retained to determine the allowance for the support of the minors; and on motion of counsel . . . for the respondent," it is adjudged that petitioner pay into office of clerk of Superior Court of Cabarrus County certain sums of money in monthly installments "for the use and benefit and for the support and maintenance of his minor children," naming them, "until the further order of the court."

Petitioner objects and excepts to this judgment also and appeals to Supreme Court and assigns error.

B. W. Blackwelder for plaintiff, appellant.

Hartsell & Hartsell and Bernard W. Cruse for respondent, appellee.

WINBORNE, J. Appellant in brief filed in this Court challenges the judgment of Gwyn, J., entered at February Term, 1945, upon two grounds: First and foremost: It is contended that Armstrong, J., having entered the order of 12 June, 1944, the matter of the custody of the

children was thereby *res judicata,* and therefore Gwyn, J., holding a subsequent regular term of court in the county was without authority to modify the former order without allegations or affidavits to the effect that conditions surrounding the situation had changed since the entry of the former order. The answer to this contention is found in the former order, the applicable statute, G. S., 17-39, and the findings of fact set out in the order of Gwyn, J., at the February Term, 1945. The order of Armstrong, J., specifies that the cause is retained on the docket of Superior Court of Cabarrus County for that the order is not intended to be a final determination of the rights of the parties touching the care, custody and control of the children, and that on change of conditions properly established the question may be further heard and determined. Moreover, the pertinent statute, G. S., 17-39, provides that "at any time after making such orders the court or judge may, on good cause shown, annul, vary or modify same." And in the order of Gwyn, J., it is found as a fact "that there has been a substantial change in the circumstances of the parties since the rendition of the last order in the cause." Hence, the exception may not be sustained on this ground.

Secondly: It is contended that no sufficient notice of the hearing before Gwyn, J., had been given to petitioner. It is contended that as this is an "in Chambers" matter, the placing of case on the civil trial calendar is not notice to the adverse party of a hearing of the case at such term. And it is further contended that the term of court expired when the judge left the bench, and he was without authority to reconvene it for the hearing of the case without statutory notice. If it be conceded that the placing of an "in Chambers" case on the civil trial calendar is not notice to the parties, and if it be conceded further that the adverse party was entitled to statutory notice, and if it be further conceded that the term of court had expired, the case was a matter within the jurisdiction of the judge presiding over the courts of the district. G. S., 7-74, formerly C. S., 1446. Under this statute, G. S., 7-74, relating to rotation of judges, a judge assigned to a district is the judge therefor for six months beginning 1 January and 1 July as the case may be. 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 *Reidsville v. Slade,* 224 N. C., 48, 29 S. E. (2d), 215. And, furthermore, the record fails to show that petitioner has been disadvantaged. He and his attorney were present. He testified orally, and the absence of his witnesses, if any were absent, was not suggested. Moreover, the record shows that witnesses other than the parties gave oral testimony, and the hearing consumed an entire day. Rather than lack of notice, the petitioner appears to have relied, in the main, upon the principle of *res judicata.* Hence, considering that the welfare of

the children is "the polar star" by which the judge was to be guided, the failure to give statutory notice of the hearing, when a full hearing has been had, as in this case, will not be held to invalidate an order with respect to their care and custody. (Compare procedure in *Johnson Cotton Co., Inc. v. Reaves et al.,* plaintiff's appeal, *ante,* 436.)

Appellant also challenges the order of Gwyn, J., entered at April Term, 1945, requiring petitioner to make payments for the support and maintenance of the children to whom the petition relates—the challenge being upon ground that as this is a petition for *habeas corpus,* the court may not enter an order for support and maintenance of the children. Be that as it may, it appears that this order was entered after the petitioner had appealed from the order entered at previous February Term. Under that circumstance, the case was then pending in this Court, and the judge of Superior Court was without jurisdiction to enter the order. See *Vaughan v. Vaughan,* 211 N. C., 354, 190 S. E., 492, and *Ragan v. Ragan,* 214 N. C., 36, 197 S. E., 554, and cases cited. Where such defect of jurisdiction is apparent the court will of necessity so declare it *ex mero motu.* See *Henderson County v. Smyth,* 216 N. C., 421, 5 S. E. (2d), 136, and *S. v. King,* 222 N. C., 137, 22 S. E. (2d), 241, and cases cited therein. Hence, there is error in the order of April Term, 1945. However, as this matter relates to the care and custody of petitioner's minor children, he will pay the cost of the appeal.

The judgment or order of February Term, 1945, is
Affirmed.

In the judgment or order at April Term, 1945, there is
Error.

W. M. GOODSON, J. L. GOODSON, J. F. GOODSON, J. R. GOODSON, BESSIE DRUM, IDA JONES, AND J. G. GOODSON v. MATTIE LEHMON, WILLIAM LEHMON AND WIFE, CONNIE LEHMON, LIZZIE BEAL AND HUSBAND, S. P. BEAL, ELLA PAINTER AND HUSBAND, JIM PAINTER, MOLLIE CALDWELL AND LESTER CALDWELL, HER HUSBAND, KERMIT K. BOLICK AND WIFE, BERNICE L. BOLICK.

(Filed 31 October, 1945.)

1. Pleadings § 2: Deeds §§ 2a, 2c—

Mental incompetency to make a deed and that weakness of mind, which often renders the subject especially amenable to undue influence, are not too far apart psychologically or too radically inconsistent as to require their assertion in separate actions. G. S., 1-123.

2. Appeal and Error §§ 37a, 49a—

This Court may render final judgment here in proper cases, and occasionally does so; but it is not the practice to render judgment here unless it may be necessary to protect some right of the litigant parties in danger of *ad interim* defeat, or where it is demanded by the public convenience or welfare. Ordinarily, the opinion is certified down and, while binding on the court of original jurisdiction, the cause is not terminated until the authority of that court has been exercised by judgment in accordance with such opinion.

3. Judgments § 33a: Trial § 25½—

G. S., 1-25, allowing a new action within one year after nonsuit, must be read into every final judgment of nonsuit entered by any court, and of this law all persons must take notice.

4. Same—

Under G. S., 1-25, the new action is considered as a continuation of the former action and they must be substantially the same, involving the same parties, the same cause of action and the same right, and this must appear from the record in the case and cannot be shown by oral testimony.

5. Lis Pendens §§ 4, 5—

In a former suit, between the same plaintiffs and some of the same defendants, to set aside a deed to the original defendants for mental incompetency and undue influence, the original notice of *lis pendens* is effective to protect plaintiffs in renewed litigation, G. S., 1-25, within the statutory period, after dismissal, reversal or nonsuit on appeal, otherwise than on the merits, where there is identity between the causes of action and procedural continuity arising out of the legal right to renew the litigation, and the new defendants were *pendente lite* purchasers in the original proceeding.

APPEAL by defendants from *Gwyn, J.*, at July Term, 1945, of CATAWBA.

In July, 1943, the present appellees brought an action against certain of the defendants in this action to set aside a deed of the lands in controversy made to them by Julia Goodson on the ground of mental incompetency of the grantor, and duress and undue influence on the part of the grantees, and filed their complaint, describing the lands, and also filed separate notice of *lis pendens*. Both plaintiffs and defendants in that action were children of Julia Goodson.

On the trial of the case defendants, at the conclusion of plaintiffs' evidence, demurred thereto and moved for judgment as of nonsuit. G. S., 1-183. The demurrer was overruled and the defendants excepted, offering no evidence. The case went to the jury and resulted in a verdict, and judgment for the plaintiffs, from which the defendants appealed.

On this appeal the judgment overruling the demurrer and motion to nonsuit was reversed. *Goodson v. Lehmon,* 224 N. C., 616, 31 S. E. (2d),

756. The opinion was certified to the Superior Court of Catawba County, and appears to have been received there on or about 5 December, 1944. At the instance of the defendants in the action, judgment in accordance with the opinion was rendered and entered in the Superior Court 15 January, 1945. Meantime, on 5 December, 1944, the defendants in the suit, holding under the Julia Goodson deed, conveyed the lands to certain other of the defendants and to Kermit K. Bolick and wife, Bernice L. Bolick, now defendants in the case at bar, in separate lots.

On 15 January, 1945, the plaintiffs in that proceeding, who are also plaintiffs here, began a new proceeding under authority of G. S., 1-25, upon the same cause of action, seeking the same relief.

Pertinent to discussion of the question raised on this appeal, the complaint, in addition to the allegation of mental incompetency, duress and undue influence, sets out that the defendants purchased *pendente lite,* setting up the notice of *lis pendens* as part of the complaint, and that each of them had not only constructive notice given by the *lis pendens* on file, but actual notice of the rights and equities of the plaintiffs respecting the lands.

The defendants demurred to the complaint as not stating a cause of action for that, it is contended, it appears upon the face of the pleading that at the time defendants took title, *lis pendens* was not in force, as the judgment of reversal in this Court was final, ending the case, and with it the effectiveness of notice of *lis pendens,* and giving them the status of innocent purchasers without notice; or, if the suit did not end then, it necessarily terminated on 15 January, with a like effect, making valid the deeds they had already taken, notwithstanding the original notice of *lis pendens.* Defendants also demurred to the complaint for defect in joinder of causes of action, in that mental incompetency and undue influence or duress are inconsistent pleas which cannot be joined under our Code of Procedure. G. S., 1-123 and 1-127.

The demurrer on both grounds was overruled and defendants appealed.

Wade H. Lefler and Eddy S. Merritt for plaintiffs, appellees.

John W. Aiken, Harvey A. Jonas, Sr., Fred D. Caldwell, and T. P. Pruitt for defendants, appellants.

SEAWELL, J. This case comes here upon the appeal of the defendants from a judgment overruling the demurrer above set out. Boiled down, the demurrer is grounded on these propositions: First, that the complaint is bad for misjoinder of causes of action since, it is contended, the plea of mental incompetency of the grantor and the plea of undue influence

on the part of the grantees are inconsistent and may not be joined in the same action under our statute, G. S., 1-123; and second, that the complaint discloses that defendants bought the property in dispute when there was no action pending or effective notice of *lis pendens,* and they are, therefore, as far as this action is concerned, innocent purchasers without notice.

1. The demurrer for defect in joinder of causes of action was properly overruled. Mental incompetency to make a deed and that weakness of mind which often renders the subject especially amenable to undue influence are not too far apart psychologically or too radically inconsistent as to require their assertion in separate actions. *Shuford v. Yarborough,* 198 N. C., 5, 150 S. E., 618; *Sprinkle v. Wellborn,* 140 N. C., 163, 52 S. E., 666; *Worth v. Trust Co.,* 152 N. C., 242, 67 S. E., 590; *Craven County v. Investment Co.,* 201 N. C., 523, 524, 160 S. E., 753. In the last cited case it is said that the statute relating to joinder of causes of action must be interpreted in the light of the equity practice. The joinder is common practice. *Wessell v. Rathjohn,* 89 N. C., 377, 16 Am. Jur., pp. 461, 462.

2. In their second objection, appellants raise the question as to the continued effectiveness of the original notice of *lis pendens* as a protection to the plaintiffs in the present action.

In *Goodson v. Lehmon,* 224 N. C., 616, 31 S. E. (2d), 756, the former appeal, the judgment of the lower court overruling the demurrer to the evidence was reversed. The case at bar is brought upon the same cause of action under authority of G. S., 1-25, which permits a "new action" to be brought within one year when the action has been nonsuited or dismissed without a hearing on the merits. It is contended by the appellants that the reversal constituted a final judgment in this Court, terminating the action at that time, and with it the effectiveness of the original notice of *lis pendens;* or that, if not so, at least when the judgment was entered in the Superior Court on 15 January, the action and *lis pendens* both terminated, giving them by relation the status of innocent purchasers without notice, although they actually purchased during the pendency of the prior proceeding.

This Court may, of course, render a final judgment here in proper cases, and occasionally does so; but it is not the practice to render judgment here unless it may be necessary to protect some right of the litigant parties in danger of *ad interim* defeat, or where it is demanded by the public convenience or welfare. Ordinarily, the opinion of the Court is certified down to the Superior Court of the county whence the appeal came, where a judgment in accordance with the opinion is entered. In that event, while the certified decision is binding on the court of original

jurisdiction, the cause is not terminated until the authority of that court has been exercised. There is nothing in the formula used by the Court on the former appeal—*Goodson v. Lehmon, supra*—which indicates any intention to depart from the usual practice. *Cf. Griffin v. R. R.*, 150 N. C., 312, 315, 64 S. E., 16; *Hospital v. Florence Mills*, 186 N. C., 554, 555, 120 S. E., 212; *Davis v. Storage Co.*, 186 N. C., 676, 683, 120 S. E., 462. The judgment of reversal was not final until its entry in the Superior Court on 15 January, at the instance of defendants. *Allen v. Gooding*, 174 N. C., 271, 273, 274, 93 S. E., 740; *Smith v. Moore*, 150 N. C., 158, 63 S. E., 735. The appellants, the present defendants, were therefore, at the time they acquired title, purchasers *pendente lite*.

The question whether under these circumstances the original notice of *lis pendens* is effective to protect plaintiffs where the litigation is renewed within the permissive period after dismissal, reversal or nonsuit otherwise than on the merits, has not been decided here. Elsewhere authorities are in conflict. But we think the better reasoning supports the view that where there is identity between the causes of action, and a procedural continuity arising out of the legal right to renew the litigation on the merits, the original *lis pendens* will be effective in the "new action," *where the defendants were pendente lite purchasers in the original proceeding.*

On this principle, it has been held, we think with reason, that where the decree of dismissal expressly reserves to the plaintiff the right to begin another proceeding, such grant of authority continues the operation of the *lis pendens*. 34 Am. Jur., Lis Pendens, sec. 32; 38 C. J., Lis Pendens, sec. 66; *Loomis v. Davenport*, 175 F., 301, 307; *Bishop of Winchester v. Paine*, 11 Ves. Jr., 200. *A fortiori*, since G. S., 1-25, giving such permission as a matter of law, must be read into every final judgment of nonsuit entered by any court, and of this law all persons affected must take notice, the same rule may apply.

Our courts have required the strictest factual identity between the original and the renewed proceeding, and have frequently, not, we think, inadvertently or casually, referred to the "new action" begun under G. S., 1-25, as a continuation of the original action.

"The time is extended because the new action is considered as a continuation of the former action and they must be substantially the same, involving the same parties, the same cause of action and the same right, and this must appear from the record in the case and cannot be shown by oral testimony." McIntosh, Civil Procedure, p. 119, sec. 126; *Young v. Atlantic Coast Line R. Co.*, 189 N. C., 238, 126 S. E., 600; *Quelch v. Futch*, 174 N. C., 395, 53 S. E., 899; *Colby v. City of Portland*, 89 Oregon, 566, 174 P., 1159, 3 A. L. R., 819. See *Van Kempen v. Latham*, 201 N. C., 505, 513, 160 S. E., 759.

On this view defendants, who were *lis pendens* purchasers during the original proceeding, would seem to have a still more unfavorable position, with reference to *lis pendens,* upon renewal of the litigation.

In *Shufeldt v. Jefcoat,* 50 Okla., 790, 151 P., 595, the Court said: "A plaintiff in a suit to cancel a deed who dismisses the action without prejudice and subsequently brings a new suit on the same cause of action some two months later, does not lose the benefit of notice of the action as to one who purchases during the pendency of the suit and prior to the dismissal."

The principle asserted in these cases assigns no new office to the doctrine of *lis pendens.* It does, however, recognize that its application should not be so strict as to defeat the statutory remedy with which it is closely associated, and which, without its aid, would be a futile gesture.

However originated, the doctrine of *lis pendens* is now, with practical uniformity, referred to the principle of notice, and is nowhere regarded as merely an arbitrary device, adopted for the convenience of the court in preserving the *status quo* so that the litigation should end somewhere, leaving something to which jurisdiction might attach. The protection of the rights involved are as much emphasized as the public convenience. It would have little significance as a rule of chancery courts without recognition of its special regard for the equities which the court is supposed to protect and adjust, as well as the frame within which it is to operate. It is not, therefore, an unreasonable view that its effectiveness ought to prevail so long as these equities have not themselves been determined or dismissed, but by appropriate statute are kept within the care of the law and the prospective adjudication by the court. It is difficult to see how G. S., 1-25, intended to accomplish this result, could be made effective in any other way, since, otherwise, the vigilant purchaser is practically invited to loose an arrow which will hit the proceeding in the joint of the harness; and the law makes a promise which it cannot fulfill. In complete accord with this holding is the decision in *Bird v. Gilliam,* 125 N. C., 76, loc. cit. 79, 34 S. E., 196:

"A purchaser of land, in litigation, is conclusively fixed with notice, and takes his conveyance from a party of the suit subject to the final adjudication—the right of appeal petition to rehear . . . and in certain cases, a writ of error (within two years) to the United States Supreme Court." Page 76, Synopsis. (Page 80)—"If, by so doing, the rights of petitioners to rehear could be defeated, the relief intended to be given by such reviews of the action of the Court, would be almost, if not altogether, denied, by anticipatory promptness of any party who might be affected by such reviews."

Without going further than the facts of this case, we are of the opinion that notice of *lis pendens* is effective against the appellants, who were

purchasers *pendente lite* in the former related action. *Shufeldt v. Jefcoat, supra.*

Equally decisive on the point, however, is the circumstance, to which appellants seem to be inadvertent. It is that plaintiffs have not relied solely on the original notice of *lis pendens,* although they have pleaded it, but have alleged that defendants had actual knowledge of plaintiffs' rights and equities in the land at the time they acquired title. This is sufficient to defeat the demurrer.

The judgment overruling the demurrer is

Affirmed.

HUGH BEAM, ADMR., v. J. CECIL GILKEY ET AL.

(Filed 31 October, 1945.)

1. Estates § 9a: Wills § 33c—

By a devise to a woman for her natural life, remainder in fee to the children of the devisee, with subsequent provision that, in case devisee should die leaving no child, or children, or child of any such children, the devise should go to another, a life estate passes under the will to such devisee and remainder in fee vests immediately in the children of life tenant who are *in esse,* subject to open and make room for any afterborn child or children, with ultimate limitation over in case the life tenant should die leaving no issue. Such remainder vests subject only to a contingency affecting the *quantum* of the children's interest, but not the quality of their estate.

2. Same—

The vested character of a remainder created by will is unaffected by a direction in the will that the property be equally divided among the remaindermen when they become of age, after the death of the life tenant.

3. Wills § 35: Deeds § 16—

Restraint on alienation, in a devise by will, is void.

4. Estates § 11—

In a suit to sell lands by life tenant against remaindermen, where remaindermen come in by counsel and join in the plaintiff's prayer for relief, this makes it for all practical purposes an *ex parte* proceeding.

5. Estates §§ 11, 12—

A court of equity is empowered to order a sale of realty, upon application of the life tenant and the remaindermen, life tenant's children *in esse,* who represent the entire class of remaindermen, including children *in posse,* and to conclude all of the same class then before the court. It is likewise in the discretion of such court to determine whether the sale shall be public or private.

6. Estates §§ 11, 14—

In a suit, before a court of general equity jurisdiction, brought by the life tenant against the vested remaindermen, to sell the lands, failure to bring in those having a contingent interest, based on the death of the life tenant without issue, is not fatal after the death of the life tenant leaving issue. Such a proceeding is not under C. S., 1744, 1745 (see G. S., 41-11, 41-12). When the purchaser pays his bid into court, he is relieved from any further responsibility.

7. Estates § 11—

The presence of a minor son of a vested remainderman as a party, in a suit for sale of the property brought by a life tenant against all remaindermen, is mere surplusage and harmless. The minor had no interest in the property then and has none now.

8. Appeal and Error § 29—

Exceptions in the record, not set out in appellant's brief or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

9. Estates § 14—

On hearing in 1945 motions in the cause to vacate the order of sale of realty and judgment of confirmation made in 1922, where the court found that defendants appearing of record had been duly served with summons; that they filed answer through counsel and joined in the request for an order of sale; that full value was paid for the property at the time, and that the purchaser has since erected valuable improvements thereon, in the absence of compelling reasons to the contrary there was no error in refusing to vacate the order of sale and judgment of confirmation.

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

APPEAL by movents from *Armstrong, J.,* at July Term, 1945, of MCDOWELL.

Motions in the cause to vacate order of sale and judgment of confirmation entered at the September Term, 1922, of McDowell.

It appears that on 31 August, 1922, Sallie E. Gilkey brought this action in the Superior Court of McDowell County, seeking authority to sell, by order of court and at private sale, a business lot in the town of Marion. The summons is entitled "Sallie Gilkey, Plaintiff, against J. Cecil Gilkey, Lois Gilkey, Eurene Gilkey and J. Cecil Gilkey, Jr., by his guardian *ad litem,* J. Cecil Gilkey, Defendants." The sheriff's return shows service of summons and complaint on all the defendants named therein.

The complaint alleges:

1. That the plaintiff is the owner of a life estate in certain town lots (description not in dispute); that the income therefrom is insufficient to meet paving charges, taxes, and support plaintiff.

2. That plaintiff's children, J. Cecil Gilkey, Lois Gilkey and Eurene Gilkey, defendants herein, are all of age and are the remaindermen or owners of said property after the life estate of the plaintiff as described in the will of George W. Seagle.

3. That plaintiff is desirous of selling said property; that J. D. Blanton has offered $200 per front foot for said lot, which is a full, fair and ample price for same.

4. That a sale be ordered and plaintiff's life estate be paid to her out of the proceeds, "and that the remainder be paid into the clerk's office, to be held under the direction of this court, for the benefit of the remaindermen as though it were real estate, to be disposed of according to the terms of the will of G. W. Seagle."

5. That D. E. Hudgins be appointed commissioner to execute deed to J. D. Blanton . . . that a guardian *ad litem* be appointed for J. Cecil Gilkey, Jr., who is a minor under two years of age, and grandson of the plaintiff; that J. Cecil Gilkey is his father and a suitable person to be appointed guardian *ad litem*.

Wherefore, plaintiff prays that the lot be sold to J. D. Blanton at private sale; that plaintiff's life estate be paid to her, and that the remainder be dealt with "as per the will of Capt. G. W. Seagle."

An answer was filed by C. C. Lisenbee, attorney for the defendants, admitting the allegations of the complaint and joining in the prayer for relief. A consent order of sale was entered, apparently without investigation on the part of the court, deed was executed, and judgment of confirmation was rendered all at the September Term, 1922.

Thereafter, on 14 March, 1931, J. Cecil Gilkey died; his son, J. Cecil Gilkey, Jr., became of age in 1942, and Sallie E. Gilkey died 28 March, 1945.

On 13 April, 1945, Eurene Gilkey and Lois Gilkey filed motion herein to vacate the order of sale and the judgment of confirmation on the ground that they were never served with summons and never appeared in said cause by counsel or otherwise.

On 11 May, 1945, J. Cecil Gilkey, Jr., filed motion herein to vacate order of sale and judgment of confirmation on the ground that they were not binding on him.

The grantee in the commissioner's deed, J. D. Blanton, came in as respondent and resisted the motions. Hugh Beam, administrator of Sallie E. Gilkey, deceased, was substituted as party plaintiff.

On the hearing of the motions, it was made to appear that title to the property was derived from the will of G. W. Seagle, which was duly probated in McDowell County, 7 June, 1919. In the first clause of the will, the property is devised to the testator's daughter, Sallie E. Gilkey, "for

and during the term of her natural life, remainder in fee to the children of the said Sallie E. Gilkey." The will also contains an additional and subsequent provision as follows: "My will is that after the death of my said daughter, Sallie, that the property hereby given to her be equally divided among her children, share and share alike, when they become of lawful age, and after the death of their mother, without selling any of said property; and if my said daughter, Sallie, shall die leaving no child or children, or child of any such children, then in that event the property bequeathed to her shall go to her sister Evelyn E. Halliburton and her children."

The court found that summons and complaint were duly served on all the defendants herein; that C. C. Lisenbee, a member of the McDowell County Bar, was employed to represent the defendants; that he filed answer and consented to the order of sale; that the respondent, J. D. Blanton, was a *bona fide* purchaser for value without notice of any defects in the proceeding; that deed was executed, money paid and distributed; that the purchaser went into possession and has erected valuable improvements on the property, and that the title thereto ought not to be disturbed.

The motions were therefore denied, and J. D. Blanton was "adjudged to be the owner in fee simple of the land described in the complaint and in the deed executed to him by D. E. Hudgins, commissioner in this action, free and clear from any adverse claims on the part of Lois Gilkey, Eurene Gilkey and J. Cecil Gilkey, Jr." Exception.

From the foregoing determination, the movents appeal, assigning errors.

J. M. Horner, Smathers & Meekins, and Hilker & Dennis for movents, appellants.

Proctor & Dameron and S. J. Ervin, Jr., for J. D. Blanton, respondent, appellee.

STACY, C. J. We have here motions in the cause to vacate order of sale and judgment of confirmation entered in a proceeding brought to sell land discharged of contingent interests. *Ex Parte Dodd,* 62 N. C., 97; McIntosh on Procedure, 1071. The life tenant, her children as remaindermen, and a grandchild were made parties to the proceeding.

The complaint contains allegation of a present vested interest in the property, but none of any contingent interest which is sought to be discharged by a sale. However, looking at the will of G. W. Seagle, to which reference is made in the complaint, it appears that the property was devised to the plaintiff, Sallie E. Gilkey, "for and during the term of her natural life, remainder in fee to the children of the said Sallie E.

Gilkey," with later and subsequent provision that in case Sallie E. Gilkey should die "leaving no child or children or child of any such children," the property is to go to her sister, Evelyn E. Halliburton and her children.

The plaintiff, therefore, acquired a life estate in the property under her father's will. *McCallum v. McCallum,* 167 N. C., 310, 83 S. E., 250. The remainder in fee vested immediately in her children who were living at the death of the testator, subject to open and make room for any afterborn child or children, with ultimate limitation over in case the life tenant should die leaving no child or chldren or child of any such children. *Lumber Co. v. Herrington,* 183 N. C., 85, 110 S. E., 656; *Powell v. Powell,* 168 N. C., 561, 84 S. E., 860; *Walker v. Johnston,* 70 N. C., 576; *Chambers v. Payne,* 59 N. C., 276; *Mason v. White,* 53 N. C., 421; 31 C. J. S., 92; 33 Am. Jur., 543 and 595. "The remainder is vested in the children of the life tenant who are *in esse,* and their interest is subject only to a contingency affecting the *quantum* of their interest, but not the quality of the estate taken by them." *Deem v. Miller,* 303 Ill., 240, 135 N. E., 396, 25 A. L. R., 766. Nor was the vested character of the remainder affected by the direction that the property be equally divided among the children of the life tenant, "when they become of lawful age, and after the death of their mother." *Vanhook v. Vanhook,* 21 N. C., 589; *Johnson v. Baker,* 7 N. C., 318; 33 Am. Jur., 574. The suggested restraint on alienation is of course of no avail. It is void. *Williams v. McPherson,* 216 N. C., 565, 5 S. E. (2d), 830; *Trust Co. v. Nicholson,* 162 N. C., 257, 78 S. E., 152; *Wool v. Fleetwood,* 136 N. C., 460, 48 S. E., 758, 67 L. R. A., 444.

It is to be noted that the children *in esse* of the life tenant, remaindermen in interest, came in by counsel and joined in the prayer for relief. Hence, for all practical purposes, this made it an *ex parte* proceeding, with the life tenant and her children, first in remainder, asking for a sale of the property. The court of equity was thereupon empowered to order a sale upon application of the life tenant and her children *in esse* who represented this entire class of remaindermen, including children *in posse,* and to conclude all of the same class then before the court. *Yancey's Case,* 124 N. C., 151, 32 S. E., 491; 70 Am. St. Rep., 577; *Branch v. Griffin,* 99 N. C., 173, 5 S. E., 393, 398; *Irvin v. Clark,* 98 N. C., 437, 4 S. E., 30; *Williams v. Hassell,* 74 N. C., 434. See *Perry v. Bassenger,* 219 N. C., 838, 15 S. E. (2d), 365; *Anderson v. Wilkins,* 142 N. C., 153, 55 S. E., 272. It was likewise in the discretion of the court to determine whether the sale should be private or public. *Thompson v. Rospigliosi,* 162 N. C., 145, 77 S. E., 113.

If it be conceded that the order of court did not discharge the contingent interest of Evelyn E. Halliburton and her children in the prop-

erty, because they were not made parties to the proceeding, *Butler v. Winston,* 223 N. C., 421, 27 S. E. (2d), 124, this circumstance now appears unimportant as the interest has been extinguished by subsequent events. The contingency upon which this ulterior limitation was to take effect never happened. The life tenant died leaving children and a grandchild.

It is the position of movents, however, that all persons "who may in any contingency become interested in said land" (C. S., 1744) were necessary parties to the proceeding, and that the failure to bring in Evelyn E. Halliburton and her children was a fatal omission. *Hutchison v. Hutchison,* 126 N. C., 671, 36 S. E., 149; *Whitesides v. Cooper,* 115 N. C., 570, 20 S. E., 295; *Watson v. U. S.,* 34 F. Supp., 777. This contention overlooks the fact that the proceeding was within the general equity jurisdiction of the court, *Branch v. Griffin, supra; Ex Parte Dodd, supra,* and it was not confined to the provisions of C. S., 1744 and 1745, the statutes then in effect relating to the sale of property affected with contingent interests. *Butler v. Winston, supra; Lide v. Wells,* 190 N. C., 37, 128 S. E., 477; *Pendleton v. Williams,* 175 N. C., 248, 95 S. E., 500; *Smith v. Witter,* 174 N. C., 616, 94 S. E., 402; *Bullock v. Oil Co.,* 165 N. C., 63, 80 S. E., 972; *Trust Co. v. Nicholson, supra; Springs v. Scott,* 132 N. C., 548, 44 S. E., 116. The proceeding is not so defective as to render it void. *Smith v. Gudger,* 133 N. C., 627, 45 S. E., 955; *Hodges v. Lipscomb,* 133 N. C., 199, 45 S. E., 556. When the purchaser paid his bid into court, or to its officer duly authorized to receive it, he was relieved of any further responsibility in connection with the interest then being sold. *Perry v. Bassenger, supra; McLean v. Caldwell,* 178 N. C., 424, 100 S. E., 888; *Dawson v. Wood,* 177 N. C., 158, 98 S. E., 459. The cases of *Hutchison v. Hutchison, supra,* and *Whitesides v. Cooper, supra,* cited by movents, are inapposite, or uncontrolling, as they deal with contingent, rather than vested, interests first in remainder after the expiration of the life estate. See *Middleton v. Rigsbee,* 179 N. C., 437, 102 S. E., 780.

The plaintiff's grandson, J. Cecil Gilkey, Jr., took nothing under his great grandfather's will. *Lee v. Baird,* 132 N. C., 755, 44 S. E., 605. His interest in the property, if any he had, was a possible inheritance from his father. *Allen v. Parker,* 187 N. C., 376, 121 S. E., 665; 69 C. J., 641; 33 Am. Jur., 543. He had no testamentary interest to foreclose and his presence in the suit was mere surplusage. Hence, the irregularity of entering a consent judgment against a minor without investigation and approval of the court, *Wyatt v. Berry,* 205 N. C., 118, 170 S. E., 131, may be disregarded. The minor had no interest to protect then and he has no interest in the property now.

The exception addressed to the adjudication of respondent's title as being in excess of the motions, or beyond the inquiry, is not discussed in appellants' brief. It is therefore deemed abandoned. *Troitino v. Goodman, ante,* 406. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rule 28, Rules of Practice, 221 N. C., 562.

On the hearing of the motions, the court found that the defendants appearing of record had been duly served with summons; that they filed answer through counsel and joined in the request for an order of sale; that full value was paid for the property at the time, and that the purchaser has since erected valuable improvements thereon.

On these findings, and in the absence of compelling reasons to the contrary, we cannot say there was error in refusing to vacate the order of sale and judgment of confirmation entered at the September Term, 1922, McDowell Superior Court. *Ipock v. Bank,* 206 N. C., 791, 175 S. E., 127.

Affirmed.

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

IN RE WILL OF ATKINSON

and

TRICINDA HENRY ET AL. v. RICHARD S. ATKINSON ET AL.

(Filed 31 October, 1945.)

1. Trial § 11—

Where error is assigned on the ground of improper consolidation, injury or prejudice arising therefrom must be shown to sustain the exception.

2. Same—

A civil action to set aside a deed and issue of *devisavit vel non* may be consolidated for trial and heard together, both being predicated on the same alleged mental incapacity and undue influence, where the allegations of undue influence are broader in one case than in the other and some of the matters transpiring between the execution of the two instruments may not be competent to show undue influence in the procurement of the deed, the record showing no disadvantage to appellants by consolidation.

3. Trial § 30—

Where the court in its charge submits to the jury for their consideration facts material to the issue, which were no part of the evidence offered, there is prejudicial error.

4. Wills § 22: Deeds § 24—

In a proceeding to caveat a will, the caveators are required to handle the laboring oar on the issue of undue influence, just as the plaintiffs, in an action to annul a deed on the ground of fraud or undue influence, are required to carry the same burden of proof.

5. Fiduciaries § 2: Fraud § 11: Wills § 23c: Deeds § 2c—

In certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation, of itself and without more, raises a presumption of fraud or undue influence as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted.

6. Evidence § 6—

It is sufficient to rebut a presumption by evidence of equal weight rather than by a preponderance of the evidence, where the burden of the issue is on the opposite party.

7. Evidence § 6—

Strictly speaking, the burden of the issue, as distinguished from the duty to go forward with the evidence, does not shift from one side to the other, for the burden of proof continues to rest upon the party who alleges facts necessary to enable him to prevail in the cause. It is required of him who thus asserts such facts to establish them before he can become entitled to a verdict; and he constantly has the burden of the issue as to these matters, whatever may be the intervening effect of different kinds of evidence or of evidence possessing varying degrees of probative force.

8. Landlord and Tenant § 1—

A landlord is not ordinarily deemed to be in the power of his tenant, and the mere fact of that relationship is insufficient to raise a presumption of fraud or undue influence against the latter in his dealings with the former.

APPEAL by defendants and respondents from *Thompson, J.*, at April-May Term, 1945, of JOHNSTON.

Civil action to set aside deed, and issue of *devisavit vel non,* consolidated for trial and heard together, as both are predicated on the same alleged mental incapacity and undue influence.

The following record facts will suffice to present the exceptions:

On 4 May, 1938, A. B. Atkinson and wife, Sarah Hales Atkinson, leased all their lands in Beulah Township, Johnston County, to their son, Richard S. Atkinson, "for and during the term of the joint lives of the parties of the first part."

On the following day, 5 May, 1938, A. B. Atkinson gave his son, Richard S. Atkinson, power of attorney to represent him in the operation of his farm in Beulah Township, Johnston County, "during the year 1938." The son testifies: "I never exercised any rights under it at all."

On 31 May, 1939, A. B. Atkinson and wife executed deed to their son, Richard S. Atkinson, for two tracts of land in Beulah Township, Johnston County, consisting of 224 acres, including their home place, reserving, however, the right to occupy the home place during the life of both or either of them. Sarah Hales Atkinson died in August, 1940.

On 18 November, 1941, A. B. Atkinson gave his son, Zeb Atkinson, power of attorney to transact all his business and to act in his stead in respect of all his properties for a period of ten years, and reciting that it was a continuation of "a previous power of attorney." Shortly thereafter, on 24 December, 1941, this power of attorney was revoked, and A. B. Atkinson went to live with his son, Richard S. Atkinson. He was then 86 years old, quite feeble and practically blind.

On 5 January, 1942, A. B. Atkinson made and executed his last will and testament. He died 13 February, 1944.

On 15 July, 1944, some of the children and grandchildren of A. B. Atkinson brought suit herein against Richard S. Atkinson and his wife to set aside the deed of 31 May, 1939, for mental incapacity on the part of the grantor and undue influence on the part of Richard S. Atkinson.

On 1 August, 1944, the same parties who instituted action attacking the deed, filed a caveat to the will of A. B. Atkinson, alleging its procurement by undue influence on the part of Richard S. Atkinson, his wife, and others.

The jury found that A. B. Atkinson had sufficient mental capacity to execute the deed and will in question, but that both were procured by the undue influence of R. S. Atkinson.

From judgment for the plaintiffs in the deed case and for caveators in the proceeding to caveat the will, the defendants and respondents appeal, assigning errors.

Lyon & Lyon and Hooks & Mitchiner for caveators and plaintiffs, appellees.

Wellons, Martin & Wellons and Paul D. Grady for respondents and defendants, appellants.

STACY, C. J. The defendants in the deed case and the propounders in the issue of *devisavit vel non* present as their first exception the consolidation of the two proceedings for trial. They duly objected to the consolidation at the time and assign this as error.

While the allegation of undue influence is broader in the caveat than it is in the deed case, and some of the matters transpiring between the execution of the two instruments may not have been competent as tending to show undue influence in the procurement of the deed, still it is not apparent from the record that the appellants were disadvantaged by the

consolidation. *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171; *Insurance Co. v. R. R.,* 179 N. C., 255, 102 S. E., 417; *Hartman v. Spiers,* 87 N. C., 28. Where error is assigned on the ground of improper consolidation, injury or prejudice arising therefrom must be shown to sustain the exception. McIntosh on Procedure, 536.

The assignments of error upon which the appellants chiefly rely are those directed to portions of the charge, especially with reference to the burden of proof.

It was stated by the court in giving the contentions of the plaintiffs and caveators, that the evidence tends to show "a power of attorney affecting his farm had been procured by R. S. Atkinson and that another power of attorney later on in 1941 was procured by R. S. Atkinson, with the same end in view." And further: "I don't recall now whether another power of attorney was executed by A. B. Atkinson to R. S. Atkinson prior to January 5, 1942, but my recollection is that he did execute such a paper writing, that is power of attorney, some time prior to January 5, 1942, and after December, 1941, or during the latter part of December, 1941. Now if you find that on January 5, 1942, R. S. Atkinson was the holder of a power of attorney from A. B. Atkinson, then, gentlemen of the jury, the burden . . . with respect to the third issue (the one addressed to undue influence) rests upon the propounders of the will, for the reason, that . . . the relation of principal and agent would be created by that power of attorney, and . . . the burden would rest upon R. S. Atkinson to show that no undue influence had been exerted by him on his father." Then later in reference of the deed: "If at the time of the execution of this deed, that is on May 31, 1939, there was a power of attorney from A. B. Atkinson to R. S. Atkinson, and that has been shown to you by the greater weight of the evidence, the burden being upon the ones attacking the deed to show that, then, gentlemen of the jury, as in the case of the will, the relationship of principal and agent would exist between A. B. Atkinson and R. S. Atkinson, and the burden would be upon R. S. Atkinson to satisfy you from the evidence by its greater weight that the deed was not executed by reason of any undue influence on his part."

There are no facts on the record to support these instructions. The only power of attorney which A. B. Atkinson gave to his son Richard was the limited one authorizing him to manage his farm in Beulah Township during the year 1938, and Richard says he "never exercised any rights under it at all." The authority granted in this instrument expired by its own terms prior to the execution of the deed 31 May, 1939. Hence, there was no power of attorney existing between A. B. Atkinson and his son Richard at the time of the execution of the deed or at the time of the execution of the will. These instructions were mis-

leading in respect of the burden of proof, since they were inapplicable to the facts of the case. *S. v. Isaac, ante,* 310; *S. v. Anderson,* 222 N. C., 148, 22 S. E. (2d), 271; *S. v. Lee,* 193 N. C., 321, 136 S. E., 877. *Cf. S. v. Cameron,* 223 N. C., 464, 27 S. E. (2d), 84. They undoubtedly weighed heavily against the appellants as the burden of proof is a substantial right of the party upon whose adversary it rests. *Vance v. Guy,* 224 N. C., 607; *Hosiery Co. v. Express Co.,* 184 N. C., 478, 114 S. E., 823. "Where the court in its charge submits to the jury for their consideration facts material to the issue, which were no part of the evidence offered, there is prejudicial error." Fourth Headnote, *Curlee v. Scales,* 223 N. C., 788, 28 S. E. (2d), 576.

In a proceeding to caveat a will, the caveators are required to handle the laboring oar on the issue of undue influence, just as the plaintiffs in an action to annul a deed on the ground of fraud or undue influence are required to carry the same burden of proof. *In re Will of Stallcup,* 202 N. C., 6, 161 S. E., 544; *In re Rawling's Will,* 170 N. C., 58, 86 S. E., 794, Ann. Cas. 1918 A, 948. True, in certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation of itself, and without more, raises a presumption of fraud or undue influence, as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted. *McNeill v. McNeill,* 223 N. C., 178, 25 S. E. (2d), 615. There are no facts on the present record, however, to call this principle into play. The trial court evidently confused Richard S. Atkinson with his brother Zeb to whom a general power of attorney was given by A. B. Atkinson in November, 1941, reciting that it was a continuation of a previous power of attorney, and this was revoked in December, 1941.

Moreover, the defendants in the deed case were required to rebut this supposed presumption of undue influence by the "greater weight of the evidence." It is sufficient to rebut a presumption by evidence of equal weight rather than by a preponderance of the evidence, where the burden of the issue is on the opposite party. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. Likewise, in the caveat proceeding the "burden" was shifted to the propounders on the issue of undue influence, upon the initial finding that "R. S. Atkinson was the holder of a power of attorney from A. B. Atkinson." Strictly speaking, the burden of the issue, as distinguished from the duty to go forward with evidence, does not shift from one side to the other, for the burden of proof continues to rest upon the party who alleges facts necessary to enable him to prevail in the cause. It is required of him who thus asserts such facts to establish them before he can become entitled to a verdict in his favor; and, as to these matters, he constantly has the burden of the issue, whatever may be the

intervening effect of different kinds of evidence or of evidence possessing under the law varying degrees of probative force. *Speas v. Bank, supra.*

In support of the charge, the appellees say the lease for the joint lives of A. B. Atkinson and his wife, executed on 4 May, 1938, was equivalent to a continuing power of attorney and cast upon the lessee, Richard S. Atkinson, the necessity of rebutting the presumption arising therefrom. No authority is cited for the position that a landlord is deemed to be in the power of his tenant, and the facts of the instant record fail to disclose such a fiduciary relationship between Richard S. Atkinson and his father as to raise a presumption of fraud or undue influence against the former in his dealings with the latter. *Gerringer v. Gerringer,* 223 N. C., 818, 28 S. E. (2d), 501; *In re Craven,* 169 N. C., 561, 86 S. E., 587. The above instructions, therefore, must be held for error.

New trial.

ROBERT V. BASINGER v. F. W. PHARR, ADMINISTRATOR OF THE ESTATE OF MOSE L. BASINGER, DECEASED.

(Filed 31 October, 1945.)

1. Executors and Administrators § 15d—

Even in the absence of an express contract, when an adult child, who has removed from the home of his parent and has married, renders services to the parent which were voluntarily accepted, the law implies a promise on the part of the parent to pay what the services are reasonably worth and there is no presumption of gratuity.

2. Executors and Administrators §§ 15a, 15d—

Where there is evidence from which the jury may draw the inference that plaintiff, who was then married and residing in Tennessee, agreed to lend, and did lend to his father, the intestate, who then resided in North Carolina, the sum of $2,000.00 to be due and payable at the death of the father, the probative force is for the jury and judgment as of nonsuit at close of plaintiff's evidence was error.

APPEAL by plaintiff from *Armstrong, J.,* at August Civil Term, 1945, of CABARRUS.

Civil action to recover on two causes of action: (1) The sum of $670.00 paid by plaintiff for hospital, doctor and drug bills incurred by intestate in his last illness and for gravestone and part of funeral expenses after death of intestate, and (2) the sum of $2,000.00 advanced by plaintiff to intestate under contract for reimbursement upon death of intestate.

These facts appear uncontroverted: Mose L. Basinger died on or about 23 April, 1937. Defendant F. W. Pharr was appointed and duly

qualified on 29 July, 1942, as administrator of the estate of Mose L. Basinger, deceased, by and before the clerk of Superior Court of Cabarrus County, North Carolina, and is now acting in that capacity. Summons issued in this action, and was served on 26 July, 1944.

Plaintiff, through his counsel on arguments of the appeal in this Court, concedes that there is no error in the ruling of the court below in granting motion for judgment as of nonsuit as to the first cause of action, and abandons exception to the ruling. Hence, only the matters pertaining to second cause of action are considered.

For a second cause of action plaintiff alleges in his complaint: "4. That pursuant to an agreement between the plaintiff and the deceased, Mose L. Basinger, the plaintiff, on August 5, 1932, purchased Cashier's check No. 14262 from the Greene County Bank, Greeneville, Tenn., and forwarded same to his father, Mose L. Basinger, and that the said Mose L. Basinger received and cashed said Cashier's check and used part of the funds to repair and remodel his home located on St. George Street, Ward 2, in the City of Concord, North Carolina, and the remainder of said funds were used for the support of himself and his wife.

"5. That the said Mose L. Basinger agreed that said sum of $2,000 was to be repaid to the said Robert V. Basinger upon the death of said Mose L. Basinger and his wife, Martha Ellen Basinger.

"6. That no part of said loan of $2,000 has been paid and that the estate of the said Mose L. Basinger is justly indebted to the plaintiff in the sum of $2,000."

Defendant, answering, denies the above allegations of the second cause of action.

And upon trial in Superior Court, plaintiff offered evidence in respect to the second cause of action substantially as follows: Plaintiff testified: "I am the plaintiff in this case. Mose L. Basinger was my father. He lived at St. George Street, Concord. Ellen Basinger was my mother. Both of them are now dead. . . . On August 5, 1932, I purchased this Cashier's check on Greene County Bank dated August 5th, 1932, made payable to Mose L. Basinger, in the sum of $2,000 (this being the plaintiff's Exhibit A). When I received this check from the Greene County Bank, mailed it to my father at Concord. CROSS-EXAMINATION. I bought that check in Tennessee. I did not present it to my father in Concord—I mailed it. I came to Concord a couple of months before August 5th. I next came to Concord about three weeks after I mailed the check. I am married. My wife is Annie Basinger. She is here today. I am still living with her."

The wife of plaintiff testified: "I am the wife of the plaintiff. I was married to him in 1932, at the time this check was purchased and mailed to Mose L. Basinger. I was in Concord prior to August 5, 1932. I saw

Mr. and Mrs. Mose L. Basinger then. They were at home and we were on the porch, Mr. and Mrs. Mose L. Basinger, Robert V. Basinger and I. I heard a conversation between Mose L. Basinger and my husband, Robert V. Basinger, with reference to getting money from my husband. They were talking about the house needing some repairs. Mose L. Basinger told him that when they were through with it, when they died, that they were going to see to it that my husband got his money back out of the place. That conversation was some time in July. My husband agreed at that time to send money. When we went back home, to the State of Tennessee, I was along when this check was purchased at the Bank. It was in August, some time after the conversation. I went to the bank. My husband had the check, he, lawyer Morris, and myself, and he had the check fixed at the Bank and mailed to Mose L. Basinger. My husband bought this Cashier's check (plaintiff's Exhibit A).

"I think I would know the handwriting of Coy Basinger. This is his signature on the back of this check (plaintiff's Exhibit A). Coy Basinger is my husband's brother. I have seen him write. We had letters from him since we have been living at Asheville and then when we lived in Concord. I have seen his writing. I have seen him write on numerous occasions. During the conversation I testified about between my husband and Mose L. Basinger in 1932, before this check was sent, Mose L. Basinger told my husband, Robert, that he would accept the money and fix up the house and then at their death that my husband could get the money out of the place. Mose L. Basinger, Robert Basinger, Ellen Basinger, and myself were involved in that conversation. Ellen Basinger is Mose L. Basinger's wife. At the time of this conversation, we were all there together. Mose L. Basinger said that he would take the money and have this house repaired and then he said at his death my husband could get the money out. He said that he would see that he got the money. Mose L. Basinger said that he was not able to repay him, but that he would be able to get his money when he died and the house was sold."

The check, Exhibit A, introduced in evidence is in words and figures as follows: "Greeneville, Tenn. August 5, 1932—No. 14262. Green County Bank 87 - 183 Greeneville, Tenn. Pay to the Order of M. L. Bassinger $2,000.00 $2000.00 DOL'S 00 CTS—DOLLARS CASHIER'S CHECK. J. P. Boles, Cashier."

On the back of the check these endorsements appear: "M. L. his X mark Basinger." Wit: "C. W. Swink, Concord, N. C." Wit: "Coy Basinger, St. George St. 124, Concord, N. C." "Pay to the order of ANY BANK,

BANKER OR TRUST CO., All prior endorsements guaranteed. Aug. 8, 1932. CABARRUS BANK & TRUST COMPANY, Concord, N. C. 66-74 C. W. Swink, Cashier."

The witness W. G. Caswell, cashier of the Cabarrus Bank & Trust Company, Concord, North Carolina, testified that C. W. Swink, whose signature he knows, and which appears as the first witness on above check, was cashier of the Cabarrus Bank & Trust Company, and that the check passed through "our bank" on 8 August, 1932, and bears the bank's endorsement.

Plaintiff further offered evidence tending to show that the estate of intestate is in process of administration; that "the estate is still open and has assets"; and that no final report has been filed by the administrator.

From judgment as of nonsuit at close of plaintiff's evidence, plaintiff appeals to the Supreme Court and assigns error.

E. T. Bost, Jr., and L. E. Barnhardt for plaintiff, appellant.

No counsel contra.

WINBORNE, J. This is the only question for decision on this appeal: Is there error in the judgment as of nonsuit in the second cause of action? While we do not have the benefit of brief on behalf of defendant, we are of opinion that there is error, and so hold.

Taking the evidence in the light most favorable to plaintiff as we must do in considering exception to judgment as of nonsuit, we are of opinion that there is sufficient evidence of an express contract between the plaintiff and his father, the intestate of defendant administrator, with respect to the alleged transaction, to take the case to the jury.

This Court has held that, even in the absence of an express contract, when an adult child, who had removed from the home of the parent, and had married, rendered services to the parent which were voluntarily accepted, the law implies a promise on the part of the parent to pay what the services are reasonably worth, and that under such circumstances there is no presumption of gratuity. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540. See also *Doe v. Trust Co.,* 211 N. C., 319, 190 S. E., 223; *Landreth v. Morris,* 214 N. C., 619, 200 S. E., 378; *Ray v. Robinson,* 216 N. C., 430, 5 S. E. (2d), 127. Compare *Bank v. McCullers,* 211 N. C., 327, 190 S. E., 217.

Here there is evidence from which the jury may draw the inference that plaintiff, who was then married and residing in Tennessee, agreed to lend, and did lend to his father, the intestate, who then resided in Concord, North Carolina, the sum of $2,000 to be due and payable at

the death of the father. The probative force of the evidence is for the jury.

The judgment below is

Reversed.

ANNANIAS CORNELISON AND HIS WIFE, LILLIE CORNELISON, v. MADISON HAMMOND AND HIS WIFE, TURA HAMMOND.

(Filed 31 October, 1945.)

1. Boundaries § 7—

In a processioning proceeding under G. S., 38-1, *et seq.*, when it is made to appear that there is a *bona fide* dispute between landowners as to the true location of the boundary line between adjoining tracts of land, the cause may not be dismissed as in case of nonsuit.

2. Boundaries § 10—

When a cause to determine the true boundary line between adjoining landowners is heard on appeal from the clerk, unless the pleadings are complicated by other allegations, there is only one issue—where is the true location of the dividing line between the lands of plaintiff and defendant?

3. Boundaries § 7—

The statute, G. S., 38-1, *et seq.*, is expressly designed to provide a means of settlement by an orderly proceeding in court and plaintiff, as a matter of right, is entitled to have the issue answered by a jury so that the controversy may be brought to an end by judicial decree.

4. Same—

The cause may be dismissed when it is made to appear that (1) there are fatal irregularities or defects on the face of the record, or (2) no *bona fide* dispute exists, or (3) plaintiff and defendant are not the owners of adjoining tracts.

APPEAL by plaintiffs from *Phillips, J.*, at July Term, 1945, of RANDOLPH. Reversed.

Processioning proceeding under G. S., ch. 38, to locate a disputed boundary line between adjoining property owners, here on former appeal. *Cornelison v. Hammond,* 224 N. C., 757.

After the pleadings were read the court, on motion of defendants, required plaintiffs to elect which line as shown on the map they contend is the true dividing line. Plaintiffs, in response thereto, announced that they contend the line from Black A to Black B is the true line. At the conclusion of the evidence for the plaintiffs, defendants moved for judgment of nonsuit. The court "being of the opinion that there was not sufficient evidence to be submitted to the jury as to the location of the

line from Black A to Black B on the map, as claimed by plaintiffs," allowed the motion and entered judgment dismissing the action at the cost of plaintiffs. Plaintiffs excepted and appealed.

J. G. Prevette for plaintiffs, appellants.

J. A. Spence for defendants, appellees.

BARNHILL, J. When, in a processioning proceeding under G. S., ch. 38, it is made to appear that there is a *bona fide* dispute between the owners as to the true location of the boundary line between adjoining tracts of land, may the cause be dismissed as in case of nonsuit? The answer is no.

The proceeding authorized by G. S., ch. 38, is an *in rem* proceeding. The petitioner is required to make the adjoining landowner party defendant and to allege only "facts sufficient to constitute the location" of the disputed line as claimed by him. If the respondent fails to answer, "judgment shall be given establishing the line according to petition." If answer denies the location as alleged, a surveyor is appointed. He makes report to the clerk who then hears the cause and locates the line. From his order either party may appeal. G. S., 38-3.

Its purpose is to judicially determine the location of a disputed boundary line between adjoining tracts of land and the gravamen of the cause of action is the existence of a controversy between plaintiffs and defendants as to the true location of the line dividing the lands owned by plaintiffs and those owned by defendants.

When it is made to appear that such controversy exists, plaintiffs have a legal right to have the line ascertained and fixed by judicial decree even though, finally, it may be located as contended by defendants.

When the cause is heard on appeal, unless the pleadings are complicated by other allegations, only one issue arises—where is the true location of the dividing line between the lands of the plaintiffs and those of the defendants? *Greer v. Hayes,* 216 N. C., 396, 5 S. E. (2d), 169; *Huffman v. Pearson,* 222 N. C., 193, 22 S. E. (2d), 440; *McCanless v. Ballard,* 222 N. C., 701, 24 S. E. (2d), 525.

It is the province of the jury to locate the line. It is for them to say, on the conflicting testimony and under the instructions of the court, where the line is. *Greer v. Hayes, supra; Clegg v. Canady,* 217 N. C., 433, 8 S. E. (2d), 246; *Huffman v. Pearson, supra; McCanless v. Ballard, supra.*

If the plaintiffs are unable to show by the greater weight of evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the

issue in accord with the contentions of the defendants. *Greer v. Hayes, supra; Boone v. Collins,* 202 N. C., 12, 161 S. E., 543. But, in the absence of an agreement, this does not imply that the jury must answer the issue either as contended by plaintiffs or as contended by defendants. *McCanless v. Ballard, supra.* They, by their answer to the issue, may fix the location wherever the evidence, in their opinion, justifies.

It is admitted that plaintiffs and defendants own adjoining tracts of land. That a dispute exists as to the true location of the boundary line between these tracts is quite evident. The one issue—where is the true boundary line—is unanswered. The dispute with all its precarious potentialities still is undetermined. The statute is expressly designed to provide a means of settlement by an orderly proceeding in court and the plaintiffs, as a matter of right, are entitled to have the issue answered by a jury so that the controversy may be brought to an end by judicial decree. Hence the cause should not be dismissed as in case of nonsuit. *Jackson v. Williams,* 152 N. C., 203, 67 S. E., 755; *Geddie v. Williams,* 189 N. C., 333, 127 S. E., 423.

We do not mean to imply that the cause may not be dismissed when it is made to appear that (1) there are fatal irregularities or defects on the face of the record, *Jackson v. Williams, supra,* or (2) no *bona fide* dispute exists, *Lowder v. Smith,* 201 N. C., 642, 161 S. E., 223; *Wood v. Hughes,* 195 N. C., 185, 141 S. E., 569, or (3) plaintiffs and defendants are not the owners of adjoining tracts. *Clegg v. Canady, supra; McCanless v. Ballard, supra.*

The judgment below is

Reversed.

JAMES A. RADER v. QUEEN CITY COACH COMPANY AND UTICA MUTUAL INSURANCE CO.

(Filed 31 October, 1945.)

1. Appeal and Error § 37e: Master and Servant § 55b—

An exception to a judgment, which approved and confirmed the findings of fact, conclusions of law and award of the N. C. Industrial Commission, presents the single question, whether the facts found and admitted are sufficient to support the judgment. It is insufficient to bring up for review the findings of fact or evidence upon which they are based.

2. Appeal and Error §§ 37c, 40a—

When the only assignment of error is based on appellant's exception to the judgment and the judgment is supported by the findings of fact, the judgment will be affirmed.

3. Appeal and Error § 23—

Where there is a single assignment of error to several rulings of the trial court and one of them is correct, the assignment must fail.

4. Master and Servant § 55d: Appeal and Error § 37c—

Findings of fact by the Industrial Commission, affirmed and approved by the judge, are binding on us when supported by evidence. It is presumed that they are correct and in accordance with the testimony and, when it is claimed that such findings are not supported by evidence, the exceptions and assignments of error entered into the court below must so specify.

APPEAL by defendants from *Bobbitt, J.*, at March Term, 1945, of BURKE. Affirmed.

Claim for compensation under the Workmen's Compensation Act.

Claimant was a relief driver for defendant bus company, operating from Salisbury to Asheville. He worked six days and was then two days off duty. His headquarters were at Salisbury. He was furnished free transportation when off duty provided he was in uniform, his uniform being his pass or permit. On 15 May, 1943, while off duty, he went to Marion to be with his family. On 16 May, 1943, on his return trip to Salisbury, his terminal station, he relieved the regular bus driver. While so doing he had a collision with another vehicle and suffered serious injury.

The Industrial Commission found the facts and concluded that the claimant suffered an injury which arose out of and in the course of his employment and awarded compensation. Defendants entered a number of exceptions and appealed.

When the cause came on for hearing in the court below the trial judge "approved and affirmed" "the findings of fact, conclusions of law and the award of the North Carolina Industrial Commission." Judgment was entered accordingly and defendants appealed.

Proctor & Dameron for plaintiff, appellee.

Jones & Smathers for defendants, appellants.

BARNHILL, J. The defendants excepted to the judgment in the court below. This is the only exception appearing in the record. Defendants' only assignment of error is in the following language:

"The defendants assign as error the approval and affirmation of the findings of fact and conclusions of law of the North Carolina Industrial Commission as will appear by Judgment in the record."

The exception to the judgment presents the single question, whether the facts found and admitted are sufficient to support the judgment.

Query v. Insurance Co., 218 N. C., 386, 11 S. E. (2d), 139; *Wilson v. Charlotte*, 206 N. C., 856, 175 S. E., 306; *McCoy v. Trust Co.*, 204 N. C., 721, 169 S. E., 644; *Dixon v. Osborne*, 201 N. C., 489, 160 S. E., 579; *Bakery v. Insurance Co.*, 201 N. C., 816, 161 S. E., 554; *Smith v. Texas Co.*, 200 N. C., 39, 156 S. E., 160; *Clark v. Henderson*, 200 N. C., 86, 156 S. E., 144; *Mesker v. West*, 192 N. C., 230, 134 S. E., 483; *Davis v. Wallace*, 190 N. C., 543, 130 S. E., 176; *Smith v. Winston-Salem*, 189 N. C., 178, 126 S. E., 514.

It is insufficient to bring up for review the findings of fact or the evidence upon which they are based. *Vestal v. Vending Machine Co.*, 219 N. C., 468, 14 S. E. (2d), 427; *Holding v. Daniel*, 217 N. C., 473, 8 S. E. (2d), 249; *Hickory v. Catawba County*, 206 N. C., 165, 173 S. E., 56; *In re Will of Beard*, 202 N. C., 661, 163 S. E., 748; *Boyer v. Jarrell*, 180 N. C., 479, 105 S. E., 9; *Sturtevant v. Cotton Mills*, 171 N. C., 119, 87 S. E., 992.

When the only assignment of error is based on appellant's exception to the judgment and the judgment is supported by the findings of fact, the judgment will be affirmed. *Efird v. Smith*, 208 N. C., 394, 180 S. E., 581; *In re Will of Beard, supra.*

On an appeal to this Court from the judgment of the Superior Court affirming an award of the Industrial Commission, this Court may consider and pass on only the contention of the appellant that there was error in matters of law at the hearing in the Superior Court. This contention must be presented to this Court by assignments of error based on exceptions to the specific rulings of the trial judge. *Smith v. Texas Co., supra.*

Where there is a single assignment of error to several rulings of the trial court and one of them is correct, the assignment must fail. *Buie v. Kennedy*, 164 N. C., 290, 80 S. E., 445. It must stand or fall as a whole. *In re Will of Beard, supra.*

The assignment of error that the court erred in overruling the exceptions of defendants entered on their appeal from the Industrial Commission is entirely too general to fulfill the requirements of the rules of this Court. It is a broadside assignment which fails to point out or designate the particular ruling to which exception is taken. It merely invites us to make an exploratory expedition through the record to ascertain error in some one or more of the several rulings made by the court. *Vestal v. Vending Machine Co., supra.*

Findings of fact by the Commission, affirmed and approved by the judge, are binding on us when supported by evidence. It is presumed that they are correct and in accordance with the testimony and, when it is claimed that such findings are not supported by evidence, the excep-

tions and assignments of error entered in the court below must so specify. *Vestal v. Vending Machine Co., supra; Hickory v. Catawba County, supra; Efird v. Smith, supra; Smith v. Texas Co., supra; Sturtevant v. Cotton Mills, supra; Wadesboro v. Atkinson,* 107 N. C., 317; *Jordan v. Bryan,* 103 N. C., 59; *Usry v. Suit,* 91 N. C., 406.

Defendants in their brief do direct our attention to their contention there is no sufficient evidence to support the findings of fact made by the Industrial Commission. Even so, matters discussed in appellants' brief will not be considered unless presented by exception and assignment of error duly entered. *Wilson v. Charlotte, supra; Bakery v. Insurance Co., supra; Clark v. Henderson, supra.*

As we are not called upon to review the testimony to ascertain whether there is any evidence to support the findings of the Industrial Commission, this opinion does not constitute a precedent on the merits of plaintiff's claim.

The judgment below is

Affirmed.

STATE v. HOWARD PETERSON.

(Filed 31 October, 1945.)

1. Homicide § 25—

In a criminal prosecution for murder, where the State's evidence tended to show that the prisoner, deceased and others were out riding at night in prisoner's automobile, and after a dispute prisoner told deceased to get out of the car which deceased did and walked down the road; that prisoner drove past him, got out and came with one of the company back near deceased and they renewed their quarrel, when there was a lick or thud and prisoner ran back to his car and said that a passing car had killed deceased and that all of the party would be held unless they so stated: that deceased was still alive, with his skull crushed by a wound on the head and no other wound on his body and his clothes not torn or disarrayed, and no car had passed, and that prisoner refused to help deceased or take him to a doctor, and deceased, a young man in good health, died almost immediately, the evidence is sufficient to repel a motion to dismiss under G. S., 15-173.

2. Homicide § 27a—

In a prosecution for murder, where the prisoner does not take the stand or offer other testimony, nor plead self-defense, but elects to rely upon the weakness of the State's evidence, there being no admission of the use of a deadly weapon, the evidence in respect thereto being circumstantial. the testimony is not such as to justify a peremptory instruction in the absence of explanation.

3. Homicide § 27b—

While the defendant in a criminal prosecution has a right to go upon the stand and explain or attempt to explain the facts and circumstances about which the State has offered testimony, there is no law which requires him to do so, and he may elect to go forward with testimony or rest on the weakness of the State's case and risk an adverse verdict. Suggestions to the contrary contained in instructions are prejudicial error.

4. Evidence §§ 45a, 45c: Criminal Law § 31a—

Ordinarily opinion evidence of a lay witness is not admissible. It is the province of the jury to decide what inferences and conclusions are warranted by the testimony. Such evidence is admissible only when a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert information from one who has special learning, skill, or experience in the matter at issue.

5. Evidence § 51: Criminal Law § 31g—

Before opinion evidence is admissible a witness must qualify as an expert in that field of knowledge. The preliminary question of competency is for the presiding judge and ordinarily his ruling is conclusive.

APPEAL by defendant from *Stevens, J.*, at February Term, 1945, of SAMPSON. New trial.

Criminal prosecution on bill of indictment charging the murder of one William Herbert Holmes.

On the night of 25 December, 1943, the defendant, the deceased, and Melvin Bryant were out with two girls on an automobile. After visiting several places, deceased suggested that they go home. Defendant, the owner of the automobile, replied: "This was his damn car, and he knew when to drive his damn car." He and deceased then began to curse each other. After driving some distance down the road defendant stopped and told deceased to get out. Deceased got out and walked down the road. Defendant drove by him and he and Bryant got out, went back of the car to or near deceased, and defendant and deceased renewed the argument. There was a lick or thud. Defendant then ran back to the automobile and said a passing car had killed Herbert. He said, "If you don't tell that Herbert came across the road over where he went to tend to his business in the woods and that a car came along and hit him we all will be held." Although deceased was still living defendant refused to give him any assistance or to take him to a doctor. There was a wound on the head of deceased and his skull was crushed. There were no other wounds on his body and his clothes were not torn or disarrayed. No other automobile had passed. The State offered evidence of other incriminating facts and circumstances.

When the case was called for trial the solicitor announced that he would not ask for a verdict of murder in the first degree. The jury

returned a verdict of murder in the second degree. The court pronounced judgment on the verdict and defendant excepted and appealed.

Attorny-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

J. Faison Thomson and E. C. Robinson for defendant, appellant.

BARNHILL, J. We do not deem it necessary to summarize all the testimony or to enter into a discussion of its probative force further than to say there was sufficient evidence offered to repel the motion to dismiss under G. S., 15-173.

The contention that there is no competent evidence of the cause of death is without merit. The deceased was a young man in apparent good health. He received a traumatic injury which crushed his skull and affected the brain tissue. He died almost immediately thereafter. Certainly this warrants the inference that death was caused by the crushed skull and the injured brain tissue.

The court instructed the jury in part as follows:

"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 a defendant in a criminal prosecution is explanation but not exculpation. The defendant is not required to show his innocence; the State must prove his guilt beyond a reasonable doubt, and the burden of this ultimate issue never shifts."

To this instruction the defendant excepts and assigns the same as error. The exception must be sustained.

The witness did not take the stand in his own behalf or offer other testimony. Nor did he plead self-defense. He elected instead to rely upon the weakness of the evidence offered by the State. There was no admission of the use of a deadly weapon and the evidence in respect thereto was circumstantial. Hence the testimony was not such as to justify a peremptory instruction in the absence of explanation. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846; *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663; *S. v. Davis,* 223 N. C., 381, 26 S. E. (2d), 869.

The defendant had the right to go upon the witness stand and explain or attempt to explain the facts and circumstances about which the State had offered testimony so as to negative their incriminating effect. But there is no law which requires him to do so. He may elect either to go forward with testimony or rest upon the weakness of the State's case, in which event he takes the risk of an adverse verdict.

That the suggestion to a contrary effect contained in the instruction is prejudicial to the defendant has already been decided by this Court. *S. v. Stone,* 224 N. C., 848.

In this connection it may be well to note that a careful reading of *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398, will disclose that the *Stone case* is not out of harmony with what is there said.

The coroner of the county, witness for the State, although not found to be an expert, was permitted to give in evidence his opinion as to the cause of death.

Ordinarily opinion evidence of a lay witness is not admissible. It is the province of the jury to decide what inferences and conclusions are warranted by the testimony. Such evidence is admissible only when a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert information from one who has special learning, skill, or experience in the matter at issue. *S. v. Dilliard,* 223 N. C., 446, 27 S. E. (2d), 85; *S. v. Smith,* 221 N. C., 278, 20 S. E. (2d), 313.

Before such evidence is admissible a witness must qualify as an expert in that field of knowledge. The preliminary question of competency is for the presiding judge and ordinarily such ruling is conclusive. *S. v. Smith,* 223 N. C., 457, 27 S. E. (2d), 114, and cases cited.

In *S. v. Smith,* 221 N. C., 278, 20 S. E. (2d), 313, the competency of the opinion testimony of an embalmer as to the cause of death was challenged by exceptive assignment of error. This Court, as reference to that opinion will disclose, did not decide the question presented. It was held only that its admission under the circumstances of that case was harmless. We there said:

"To what extent the experience of a professional embalmer, with a knowledge of the blood vessels of the human body and their functions, and with ocular evidence that they had been emptied of their life-sustaining content, might qualify him to testify that the deceased had bled to death through the severed arteries, we do not need to say . . ."

For the reasons stated there must be a

New trial.

CARL B. RIDENHOUR v. AMANDA K. MILLER AND LUCY K. KLUTTZ.

(Filed 31 October, 1945.)

1. Husband and Wife §§ 32, 34—

In an action by plaintiff against defendants, alleging that the affections of his wife had been alienated by them, the law imposes upon plaintiff the burden of showing by competent evidence—(1) That he and his wife were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; (3) that the wrongful and malicious acts of defendants pro-

duced and brought about the loss and alienation of such love and affection. Failure to so show makes the action vulnerable to nonsuit.

2. Same—

While parents and near relatives must act in good faith in dealing with the marital rights of a member of the family, nevertheless they occupy a different position from a stranger in these matters. And the mere fact that defendants, sisters of plaintiff's wife, permitted his wife and children to live with them, after the separation, is not sufficient to show bad faith on their part, in view of the family relationship.

APPEAL by plaintiff from *Gwyn, J.*, at February-March Term, 1945, of CABARRUS.

This is an action instituted by plaintiff against the defendants, who are sisters of plaintiff's wife, alleging that defendants unlawfully and maliciously alienated the affections of his wife, and seeking damages therefor.

The pertinent facts are substantially as follows: The plaintiff alleges that the defendants maliciously caused the plaintiff's wife to leave him on 14 December, 1943. That the defendants "set about a course of action, a course of speech, and a course of conduct, which was knowingly, purposely, wrongfully, ruthlessly, wickedly and maliciously designed and planned to alienate and destroy the genuine love and affection which this plaintiff's wife held for him, and to wreck and destroy the home of this plaintiff and his wife, and to destroy their happiness, and to induce, procure and compel, by virtue of their superior positions and financial power, this plaintiff's wife to leave and abandon him, and to abandon and forsake this plaintiff, the home and the two children which had been born to the marriage."

Plaintiff testified that prior to the separation the defendants gave his wife and children many presents, consisting of clothing, food, and articles of furniture for the home, but that he did not object to Mrs. Kluttz and Mrs. Miller helping his wife.

On the morning of 14 December, 1943, the plaintiff's wife announced she was leaving him. She assigned three reasons, according to plaintiff's testimony, "first was because I wouldn't help her do the work; second, because I cursed her; third, because I told her she couldn't work. That is why she said she left." Immediately after plaintiff's wife announced her intention to leave him, the plaintiff took her to Mr. Hartsell's office to see if they could get a divorce and they were informed they had no grounds for divorce. That afternoon, the defendant, Mrs. Kluttz, was in the Ridenhour home and said, "I am mighty sorry, Carl, you have two fine children, they certainly are nice and obedient . . . if you can't get along together it is better for you to be separated." Mrs. Ridenhour

sent for the other defendant and upon her arrival, in the presence of Mrs. Kluttz, Mrs. Ridenhour and the plaintiff, Mrs. Miller said, "Carl, I didn't know anything about this." The plaintiff said "Neither of you (referring to these defendants) tried to reconcile or advise Mrs. Ridenhour or myself." The plaintiff further testified that so far as he knew Mrs. Miller did not know anything about their trouble until the day they separated. That up to the day of separation he had never heard any complaint from his wife or anyone else about conditions in the home not being satisfactory.

On 15 December, 1943, these same parties undertook to divide up the household goods of the Ridenhours and to reach an agreement about the sale of the home to Mrs. Ridenhour. In this connection, the plaintiff testified: "Mrs. Miller was trying to advise to the best of her ability." Later, as Mrs. Miller was leaving, the plaintiff told her she had broken up his home, she had taken his wife and children. Mrs. Miller replied, "Yes, Carl Ridenhour, and I will do it again." Mrs. Ridenhour and her two minor children had gone to the Miller home the day before and they continued to live there for several months after the separation.

There is evidence that plaintiff tried almost daily to see his wife and children while they were living in the Miller home, later in the Kluttz home, and still later in the home of a Mrs. Litaker. These defendants were not friendly at all times, sometimes refusing to admit plaintiff into their respective homes. The wife has likewise refused to see him in her present home, where she and her children reside with Mrs. Litaker.

At the conclusion of plaintiff's evidence, judgment of nonsuit was entered. Plaintiff appealed to the Supreme Court, assigning errors.

B. W. Blackwelder for plaintiff.

Hartsell & Hartsell and Bernard W. Cruise for defendants.

DENNY, J. The disposition of this appeal turns upon whether or not plaintiff introduced sufficient evidence to entitle him to have his case submitted to a jury.

Upon the institution of this action against the defendants, alleging the affections of his wife had been alienated by them, the law imposed upon him the burden of showing, by competent evidence, the following: (1) That he and his wife were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; (3) that the wrongful and malicious acts of the defendants produced and brought about the loss and alienation of such love and affection. *Hankins v. Hankins,* 202 N. C., 358, 162 S. E., 766.

In the instant case there is no evidence tending to show that the defendants or either of them advised with or counseled plaintiff's wife with respect to her marital relationship prior to the separation. The evidence discloses that these defendants did give Mrs. Ridenhour, who is their sister, substantial gifts. Some of the gifts were for her personally, some for the children, others were for the use and benefit of the family. However, at the time these gifts were made, the plaintiff assigned no ulterior motive on the part of these defendants. He testified, "I did not object to Mrs. Kluttz and Mrs. Miller helping my wife." Moreover, there is no allegation in the complaint or evidence adduced in the trial below, to the effect that plaintiff's wife since the separation has by her words or conduct intimated a desire to effect a reconciliation with him, or that one might have been made except for the unlawful and malicious interference of these defendants. *Townsend v. Holderby,* 197 N. C., 550, 149 S. E., 855; *Brown v. Brown,* 124 N. C., 19, 32 S. E., 320. In fact, we think the record tends to show otherwise. While parents and near relations must act in good faith in dealing with the marital rights of a member of the family, nevertheless they occupy a different position from a stranger in these matters. *Johnston v. Johnston,* 213 N. C., 255, 195 S. E., 807. *Cf. Barker v. Dowdy,* 224 N. C., 742, 32 S. E. (2d), 265, and *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769. And the mere fact that these defendants permitted plaintiff's wife and children to live with them is not sufficient to show bad faith on their part, in view of the family relationship. *Townsend v. Holderby, supra; Powell v. Benthall,* 136 N. C., 145, 48 S. E., 598.

The conduct of these defendants may not have been exemplary towards plaintiff at all times, but plaintiff's evidence, when taken in the light most favorable to him, is insufficient to show that the alienation of the affections of his wife was brought about wrongfully and maliciously by these defendants. *Powell v. Benthall, supra.*

The exceptions interposed to the refusal of his Honor to admit certain orders of the court, relative to the custody of plaintiff's children, need not be considered. Had the proffered evidence been admitted it would not have in any way affected our decision.

The judgment of nonsuit is

Affirmed.

LUMBER MUTUAL CASUALTY INSURANCE CO. OF NEW YORK v. CLARENCE WELLS ET AL.

(Filed 31 October, 1945.)

Declaratory Judgment Act § 5: Insurance § 50—

The propriety of invoking the provisions of the Uniform Declaratory Judgment Act, G. S., 1-253, *et seq.*, on plaintiff's policy of liability insurance issued to one of defendants, being without challenge on the record and defendants demanding a jury trial on issues raised by the pleadings, G. S., 1-261, the question, as to whether the automobile covered by the policy was being "used as a public or livery conveyance," within the meaning of the policy at the time of the accident and injuries, is such an issue of fact as should be determined by a jury, under proper instructions, where the pleadings are not so clear in respect to the facts as to render it determinable without the aid of a definite finding.

APPEAL by defendants from *Hamilton, Special Judge,* at June Term, 1945, of WAYNE.

Proceeding for declaratory judgment to determine rights of parties under policy of liability insurance.

On 12 October, 1943, the plaintiff issued to the defendant, Clarence Wells, a policy of liability insurance on his "Dodge Truck, panel-body delivery passenger type," for use "business—pleasure," to be in force a year. On 29 October, 1943, by "Correction Endorsement," the automobile was described as "a 1934 Dodge, panel-body delivery Sedan instead of as previously stated."

The policy contains a number of exclusions, the first being:

"This policy does not apply: (a) while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor."

It is conceded that the policy covers the accident in question unless it come within exclusion "a." No extra premium was charged or paid for use of the vehicle "as a public or livery conveyance."

It is alleged that Clarence Wells converted his truck into a bus, which he used for transporting passengers for hire; that on 27 March, 1944, while so using his truck with nine (or more) passengers aboard, an accident occurred in which two of the passengers were killed and the others injured; that as a consequence suits have been, and others may be, instituted against the defendant and "if the defendant was covered by the policy herein referred to while operating said truck for hire, at the time of the accident referred to, it would be the duty of the plaintiff to defend the defendant in such litigation."

Wherefore, plaintiff asked for determination of the rights, status and legal relations of the parties under the policy in respect of the accident referred to in the complaint.

The defendant answered, alleged that the change in the truck was made prior to the issuance of the policy and that plaintiff's agent had full knowledge of the facts and actually filled out the application, claimed coverage and asked for reformation, if need be, demanded a jury trial on the issues raised by the pleadings, and moved that the plaintiffs in the actions filed against him be made parties herein. The motion to bring in these outside claimants as interested parties was allowed. Later by amendment it was made to appear that they had become judgment creditors.

Thereafter, the plaintiff moved for judgment on the pleadings, adjudging no liability on its part for the injuries sustained in the accident of 27 March, 1944. This motion was allowed and judgment entered accordingly. Defendants appeal, assigning error.

Langston, Allen & Taylor and A. J. Fletcher for plaintiff, appellee.

J. Faison Thomson, Rivers D. Johnson, and J. T. Flythe for defendants, appellants.

STACY, C. J. The propriety of invoking the provisions of the Uniform Declaratory Judgment Act, G. S., Art. 26, under the circumstances here disclosed, is without challenge on the record. *Tryon v. Power Co.*, 222 N. C., 200, 22 S. E. (2d), 450; *Myers v. Ocean Accident & Guarantee Corp.*, 99 F. (2d), 485; *S. c.*, 22 Fed. Supp., 450. *Cf. Casualty Co. v. DeLozier*, 213 N. C., 334, 196 S. E., 318. The defendants have demanded a jury trial on the issues raised by the pleadings in accordance with G. S., 1-261, which provides that when an issue of fact is involved it may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

We think the issue of exclusion, *i.e.*, whether the automobile was being "used as a public or livery conveyance" within the meaning of the policy at the time of the injury, is such an issue of fact herein as should be determined by a jury under proper instructions from the court. The plaintiff alleges exclusion from liability under this provision, and the defendants allege coverage of the injuries in question. Coverage is conceded unless the use of the vehicle at the time bring it within the exclusion. The pleadings are not so clear in respect of the facts as to render it determinable without the aid of a definite finding. *Gibbs v. Ins. Co.*, 224 N. C., 462, 31 S. E. (2d), 377; *Crowell v. Ins. Co.*, 169 N. C., 35, 85 S. E., 37.

On the question of reformation, see *Power Co. v. Casualty Co.,* 193 N. C., 618, 137 S. E., 817; Anno. 49 A. L. R., 1513.

Error and remanded.

STATE v. GERALD L. MORGAN.

(Filed 31 October, 1945.)

1. Criminal Law § 54f—

The State's evidence being sufficient to carry the case to the jury upon the charge contained in the bill of indictment and the jury returning a verdict of guilty of a less degree of the offense charged, such verdict is valid. G. S., 15-170.

2. Courts § 4½b—

The power to correct the minutes and records to make them speak the truth is within the discretion of the judge holding the court.

3. Criminal Law § 50c—

In the absence of the solicitor the judge presiding has authority to appoint members of the local bar to act for the solicitor in prosecuting for the State.

4. Criminal Law § 44—

In the absence of a motion by a defendant in a criminal prosecution for a continuance, because of the absence of the solicitor and no objection on that ground until after an adverse verdict, any rights which defendant may have had on that account are waived.

5. Appeal and Error § 22—

This Court can judicially know only that which appears in the record.

6. Trial § 32: Criminal Law § 53f—

Requests for special instructions must be in before the beginning of the argument.

7. Rape § 2: Assault and Battery § 7g—

In a criminal prosecution for an assault on a female, with intent to commit rape, the burden of showing that defendant was under 18 years of age is on the defendant. G. S., 14-33.

APPEAL by defendant from *Bone, J.,* at June Term, 1945, of CRAVEN.

The defendant was tried upon a bill of indictment which charged that Gerald L. Morgan unlawfully, willfully and feloniously did commit an assault upon one Margaret Wilkinson, a female, with intent to commit rape upon her by force and against her will, and the jury returned a verdict of guilty of an assault on a female, he being a male person over

the age of 18 years, and from judgment of imprisonment for 18 months, predicated on the verdict, the defendant appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Charles L. Abernethy, Jr., for defendant, appellant.

SCHENCK, J. The State's evidence was sufficient to carry the case to the jury upon the charge contained in the bill of indictment but the jury returned a verdict of guilty of a less degree of the offense charged, namely, an assault upon a female the defendant being a male person over 18 years of age. Such verdict was authorized by G. S., 15-170.

The brief of the defendant does not comply with Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562-3, in that such brief does not contain properly numbered the assignments of error with reference to printed pages of transcript. However, we have endeavored to consider the assignments of error which it appears the defendant intended to make. The first of such assignments seems to be the failure of the court to continue the case on account of the absence of the solicitor. It appears that the minutes of the first day of court as first written recited the solicitor was present prosecuting for the State, but on the second day of the court the judge presiding discovered the error and in his own proper handwriting altered the minutes so as to read that in the absence of the solicitor the court appointed Messrs. Nunn and Lansche of the local bar to prosecute for the State. The power to correct the minutes and records to make them speak the truth was within the discretion of the judge holding the court, *S. v. Swepson,* 84 N. C., 827; *S. v. Warren,* 95 N. C., 674, and in addition the record does not disclose that any exception to the action of the judge in making such correction was noted. His Honor likewise had authority in the absence of the solicitor to appoint members of the local bar to act for the solicitor in the prosecution of the case. *S. v. Cameron,* 121 N. C., 572, 28 S. E., 139; *S. v. Conly,* 130 N. C., 683, 41 S. E., 534; *S. v. Wood,* 175 N. C., 809 (819), 95 S. E., 1050. If the defendant suffered the loss of any rights on account of the absence of the solicitor they were waived by his failure to assert them in due time. The only objection made by the defendant was made after a verdict adverse to him was returned. This constituted a clear waiver. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *In re West,* 212 N. C., 189, 193 S. E., 134. And, too, the record does not disclose that any motion was ever made to continue the case on account of the absence of the solicitor. This Court can judicially know only that which appears in the record. *S. v. DeJournette,* 214 N. C., 575, 199 S. E., 920.

The defendant likewise appears to assign as error the failure of the court to give a certain special instruction which the record states was requested while the solicitor was arguing the case and after counsel for defendant had completed his argument. This request for special instruction was made too late to form a basis for a successful exceptive assignment of error, and can avail the defendant nothing. "The true rule, as garnered from the decided cases, seems to be that requests for special instructions must be in before the beginning of the argument." Note of annotator under G. S., 1-181. Such special instruction read: "Now, gentlemen of the jury, if you should find that there was no intent to commit rape, and no deadly weapon used and no serious bodily harm done, you may return a verdict of a simple assault," and the exception to the failure to give such instruction was therefore untenable for the further reason that all the evidence, both of the State and the defendant, was to the effect that the person assaulted was a female and the defendant was a male person. The burden of showing that the defendant was under 18 years of age is a defense and rested on the defendant. *S. v. Smith,* 157 N. C., 578, 72 S. E., 853. There was no evidence to this effect, and for this additional reason the court was not required to give same.

In the record we find

No error.

STATE OF NORTH CAROLINA ON RELATION OF LUCILLE STRICKLAND JOHNSON STEWART, TO USE AND BENEFIT OF NEW AMSTERDAM CASUALTY COMPANY, v. JAMES D. PARKER.

(Filed 31 October, 1945.)

Judgments §§ 37b, 38: Principal and Surety § 14—

A surety defendant in a judgment, in order to preserve the liens and to enforce the same for reimbursement, on payment of the judgment, must have the judgment assigned to some third person for his benefit: a surety, who pays the principal debt on which he himself is bound, without procuring an assignment to a trustee for his benefit, thereby satisfies the original obligation and can sue only as a creditor by simple contract. G. S., 1-240.

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

APPEAL by plaintiff from *Johnson, Special Judge,* at June Term, 1945, of JOHNSTON.

This is an action on behalf of the New Amsterdam Casualty Company on a judgment entered at the April Term, 1935, of the Superior Court

of Johnston County, against the said New Amsterdam Casualty Company, as surety, and the defendant, James D. Parker, as principal, on a guardian bond, said surety and principal being the plaintiff in interest and the defendant in the present action. It is alleged in the present action that after the rendition of said judgment, "the said judgment was transferred and assigned by the original plaintiff herein to the New Amsterdam Casualty Company and it is now the lawful owner thereof, and this suit is prosecuted by the original plaintiff for its use and benefit." Before time to answer had expired, there was a motion by the defendant, James D. Parker, to strike out parts of the complaint as redundant and irrelevant, which motion was allowed by the clerk, and upon appeal to the judge the order of the clerk was affirmed, and to the order of affirmation the plaintiff excepted, and appealed to the Supreme Court.

In the Supreme Court the defendant demurred *ore tenus* upon the ground that it appears on the face of the complaint that said complaint does not state facts sufficient to constitute a cause of action, in that the present action is an action on a judgment entered at the April Term, 1935, of Johnston Superior Court, in a cause entitled "State of North Carolina, on Relation of Lucille Strickland Johnson *v.* James D. Parker, Guardian, and New Amsterdam Casualty Company," and that said judgment was against both defendants, James D. Parker and the New Amsterdam Casualty Company, said defendants being the plaintiff in interest and the defendant in the present action, and it is alleged in the present action that said judgment thereafter was transferred and assigned by the original plaintiff to the New Amsterdam Casualty Company and that it is now the lawful owner thereof and this suit is prosecuted by the original plaintiff for its use and benefit; that by the transfer and assignment as alleged the judgment was extinguished, and therefore will not support a cause of action.

S. Brown Shepherd and Lyon & Lyon for plaintiff, appellant.
J. Ira Lee for defendant, appellee.

SCHENCK, J. The first question posed for our determination is the one which arises from the demurrer *ore tenus* filed by the defendant in this Court, namely, Does the complaint in the present action state facts sufficient to constitute a cause of action? We are constrained to answer in the negative. Plaintiff in interest, the New Amsterdam Casualty Company, surety, satisfied the original plaintiff, principal, and took an assignment to it of the judgment upon which it was jointly liable with the other defendant, James D. Parker, and the judgment thereby was extinguished, and the cause of action alleged in the complaint in the

present action being based upon such judgment, cannot be maintained. A surety defendant in a judgment, as was the plaintiff in interest in the judgment sued upon in the present case, in order to preserve the liens and to enforce the same for reimbursement, on payment of the judgment, must have it assigned to some third person for his benefit; a surety who pays the principal debt, on which he is himself bound without procuring an assignment to a trustee for his benefit thereby satisfies the original obligation, and can sue only as a creditor by simple contract. G. S., 1-240; *Davie v. Sprinkle,* 180 N. C., 580, 104 S. E., 477, and cases there cited. The demurrer *ore tenus* being to an alleged cause of action bottomed upon an extinguished judgment must be sustained.

Since the sustaining of the demurrer *ore tenus* upon the ground that the complaint does not state facts sufficient to constitute a cause of action, brings about a dismissal of the case, it becomes unnecessary to decide the other interesting questions presented on the record relating to the motion to strike certain portions of the complaint.

Demurrer sustained.

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

L. A. WESTMORELAND AND WIFE, EVA E. WESTMORELAND, v. J. U. LOWE AND WIFE, BEULAH LOWE.

(Filed 31 October, 1945.)

1. Frauds, Statute of, § 9—

Standing trees on land are real property and contracts and conveyances in respect thereto are governed by the same rules applicable to other forms of real property.

2. Frauds, Statute of, § 10: Deeds § 21—

The statute of frauds defeats a parol conveyance or reservation of timber: and, there being no exception or reservation as to timber in plaintiff's deed, parol evidence of a previous oral agreement between plaintiff and defendant to reserve or except timber was properly excluded.

3. Deeds §§ 4, 15—

While the recital of consideration in a deed is not contractual, and like other receipts is *prima facie* only of payment and may be rebutted by parol, this rule does not extend to authorize the admission of parol evidence to contradict or modify the terms of a deed, or to permit the conveyance or reservation of real property by parol.

WESTMORELAND *v.* LOWE.

APPEAL by plaintiffs from *Phillips, J.*, at July Term, 1945, of RANDOLPH. Affirmed.

This was a suit to recover the value of certain timber trees which defendants refused to permit plaintiffs to cut. It was alleged plaintiffs' right to recover grew out of an oral agreement for the exchange of lands.

At the close of plaintiffs' evidence, defendants' motion for judgment of nonsuit was allowed. Plaintiffs appealed.

J. G. Prevette for plaintiffs.

T. R. Wall and H. M. Robins for defendants.

DEVIN, J. It was admitted in the pleadings that plaintiffs and defendants had by parol agreed to an exchange of tracts of land. Plaintiffs agreed to convey to defendants a tract of 58 acres, and defendants agreed to convey to plaintiffs a tract of 8.83 acres. In addition $1,200 was to be paid plaintiffs.

Plaintiffs alleged that it was agreed that defendants were to have the timber on the 8.83 acres, and plaintiffs were to have or reserve the timber on the 58 acres, but defendants denied that there was any agreement for plaintiffs to reserve or, after conveyance, have right to cut the timber on the 58 acres. It was admitted defendants had cut the timber on the 8.83 acres. Separate deeds were executed about a month after the preliminary negotiations, whereby plaintiffs conveyed the 58 acres to the defendants, and defendants conveyed the 8.83 acres to the plaintiffs, but plaintiffs' deed contained no reservation or exception of the timber or timber rights.

On the trial one of plaintiffs offered to testify that there was an oral agreement entered into some time before the deed for the 58 acres was executed that the timber on this tract was reserved, and that the timber was part of the consideration. Objection to this evidence was sustained. Plaintiffs then offered admissions in the pleadings and rested their case. Defendants' motion for judgment of nonsuit was allowed, and plaintiffs excepted and appealed.

The ruling of the court below in sustaining objection to the proffered testimony, and in entering judgment of nonsuit must be upheld. Standing trees on land are real property (*Drake v. Howell,* 133 N. C., 162, 45 S. E., 539), and contracts and conveyances in respect thereto are governed by the same rules applicable to other forms of real property. The statute of frauds defeats a parol conveyance or reservation of timber trees. There being no exception or reservation in plaintiffs' deed, parol evidence of a previous oral agreement to that effect was properly excluded.

Plaintiffs' contention that reservation of the timber on the 58 acres was part of the consideration for the deed, and that this could be shown by parol cannot be sustained. While it frequently has been said that the recital of consideration in a deed is not contractual and like other receipts is *prima facie* only of payment, and may be rebutted by parol, *Barbee v. Barbee,* 108 N. C., 581, 13 S. E., 215; *Smith v. Arthur,* 110 N. C., 400, 15 S. E., 197; *Pate v. Gaitley,* 183 N. C., 262, 111 S. E., 339; *Bank v. Lewis,* 201 N. C., 148, 159 S. E., 312, this rule may not be extended to authorize the admission of parol evidence to contradict or modify the terms of a deed, or to permit the conveyance or reservation of real property by parol. *Campbell v. Sigmon,* 170 N. C., 348, 87 S. E., 116; *Price v. Harrington,* 171 N. C., 132, 87 S. E., 986; *Walters v. Walters,* 172 N. C., 328, 90 S. E., 304; *Whedbee v. Ruffin,* 189 N. C., 257, 126 S. E., 616. Here the alleged agreement was not that as consideration for the deed plaintiffs were to have the proceeds of sale of real property, as in *Michael v. Foil,* 100 N. C., 178, 6 S. E., 264, but the conveyance or reservation of real property. This falls within the statute of frauds. The alleged reservation of timber trees was contractual and constituted an integral part of the conveyance. *Deaver v. Deaver,* 137 N. C., 240, 49 S. E., 113; *Price v. Harrington, supra.*

There was neither allegation nor proof that the exception of the timber was omitted by mistake or mistake of the draftsman.

Judgment affirmed.

MARGARET PUGH v. GRADY PUGH.

(Filed 31 October, 1945.)

1. Trial § 47: Pleadings § 22—

In an action by a woman against her former husband to have them adjudged tenants in common of lands held by the entireties while husband and wife, where the wife alleged that she had secured an absolute divorce from defendant which was admitted by answer, defendant is precluded from attacking such admission in his answer, which he does not seek to amend, by a motion for a new trial on the ground of newly discovered evidence as to his wife's divorce.

2. Appeal and Error § 6e: Husband and Wife §§ 11, 12c—

In an action to have tenants by the entireties declared tenants in common, after an absolute divorce between them, where parol evidence was introduced, without objection, to the effect that the lands were held by the entireties, there is nothing this Court can do on appeal to aid the husband.

PUGH *v.* PUGH.

APPEAL by defendant from *Phillips, J.*, at July Term, 1945, of RANDOLPH.

The plaintiff petitioned to sell certain lands for partition, alleging that the lands had been held by herself and the defendant, then husband and wife, by the entirety, but that she had obtained an absolute divorce; whereupon, by operation of law, she and the defendant now hold them as tenants in common. The defendant pleaded sole seizin, and the cause was transferred to the civil issue docket for trial.

The defendant in his answer admitted that the petitioner had obtained an absolute divorce, and this admission was introduced in evidence, to which defendant excepted.

The deed to one parcel of the land was exhibited in evidence, showing upon its face that title was made to the petitioner and respondent by the entirety. As to the remaining parcel of land involved in the controversy, parol evidence was introduced, to which the defendant made no objection, to the effect that it also had been held by the entirety.

Plaintiff testified that she had delivered the deeds to her husband and had not seen them since.

On cross-examination, it was elicited from petitioner that she lacked about two months of having resided in Georgia a year at the time she filed her suit for divorce.

The defendant testified that he furnished the money to buy the property, but that he never saw the deed. Asked as to whose name the property was in, he replied, "she said it was in mine and hers."

In his charge to the jury, in reciting the evidence, the judge referred to the testimony of the plaintiff petitioner that she had delivered the deed to her husband, along with other valuable papers, and that she had not seen it since, and added, "he goes upon the stand and does not make any denial of that being true." Defendant excepted.

Four issues were submitted to the jury, as follows:

"1. Were the plaintiff and the defendant lawfully married as alleged in the complaint?"

"2. Did the plaintiff secure an absolute divorce from the defendant, as alleged in the complaint?

"3. Were the deeds to the property described in the complaint made to the plaintiff and the defendant as tenants by the entirety?

"4. Is the plaintiff a tenant in common with the defendant in the lands described in the complaint?"

As to the third issue, the court charged the jury that "if you believe the evidence on the third issue and find it to be true, it would be your duty to answer the third issue YES," and to this the defendant excepts.

Upon the fourth issue, the judge charged that if the deeds had been made to the husband and wife, and that thereafter she had obtained an absolute divorce from him, this would, as a matter of law, make them tenants in common to the lands described in the petition. The defendant excepted.

The court further charged the jury that if they answered the second issue Yes and the third issue Yes, then, as a matter of law, they should answer the fourth issue Yes, to which the defendant excepted.

The defendant, pending the trial, moved that a juror be withdrawn and a mistrial ordered because of newly discovered evidence relating to the validity of the Georgia divorce, which motion was overruled, and the defendant objected and excepted.

The case went to the jury and resulted in verdict and judgment for the plaintiff. Defendant excepted and appealed, assigning error.

J. A. Spence for plaintiff, appellee.

J. G. Prevette for defendant, appellant.

SEAWELL, J. Perhaps the exception upon which the appellant mostly relies relates to the attack attempted to be made on the validity of the Georgia divorce and the refusal to cause a mistrial in order that the attack might be sustained by evidence, or by resort to the Georgia law. We think, however, that the defendant is precluded from that line of attack by the admission in his answer, which he did not seek to amend. The implication is clear that a valid divorce had been obtained.

In a normally tried case, it is possible that the defendant had some equities which he might have defended, and correspondingly, the case of the plaintiff may have been vulnerable because of the absence of one deed to the property and the necessity for laying a basis for the introduction of parol evidence as to its contents. The defendant, however, made no objection to the proof by parol, but on the contrary rather contributed to the departure from orderly procedure in this respect by his own testimony. Upon the record there is nothing which this Court can now do in aid of his appeal.

We have examined the other objections and do not find them meritorious.

The judgment is

Affirmed.

PERCY B. HOLDEN v. W. L. TOTTEN ET AL.

(Filed 31 October, 1945.)

1. Judgments §§ 22b, 22g: Execution § 11—

In an action to remove a cloud upon plaintiff's title, based on a transcript of judgment from Durham County docketed in Greene County, where restraining order was continued and appeal taken and thereafter on call of the case for trial, it appeared that motion had been lodged in Durham County to correct the record and that plaintiff had set up his rights in the Durham County proceeding, the defendant was entitled to have plaintiff pursue his legal remedies in Durham before asking for further aid from the equity case in Greene. The apparent irregularity may be corrected by motion in the cause in Durham County, or the execution may be recalled; and for the present the remedies in Durham County seem adequate.

2. Execution § 16: Judgments § 22b—

A sale under execution may be restrained if the deed of the officer who sells will not pass title and will only throw a cloud upon the title of plaintiff; but the invalidity of the judgment upon which the execution was issued may not be collaterally attacked unless it be void or unenforceable.

APPEAL by defendant, W. L. Totten, from *Frizzelle, J.*, at February-March Term, 1945, of GREENE.

Civil action to remove cloud upon title created by transcript of judgment from Durham County, docketed in Greene County, and to restrain sale under execution on the judgment.

A temporary restraining order was issued in the cause and continued to the hearing. An appeal was immediately taken and is reported in 224 N. C., 547.

Thereafter, upon call of the case for trial, it was made to appear that motion was then pending in the cause in Durham County to correct the record, and that "the plaintiffs in this case have set up their rights before the court in this motion." Whereupon, the defendants moved for a continuance until the motion could be heard in Durham Superior Court.

The case proceeded without the intervention of a jury, and from the facts found, the trial court concluded that the purported judgment in Durham County was void, and that plaintiff was entitled to have the transcript thereof in Greene County removed as cloud upon title.

Defendant appeals, assigning errors.

J. Faison Thomson and K. A. Pittman for plaintiff, appellee.

Bennett & McDonald for defendant, appellant.

STACY, C. J. This is the same matter that was before us at the Fall Term, 1944, reported in 224 N. C., 547, with full statement of the facts, to which reference may be had to avoid repetition.

The only question presented on the former appeal was the protection of the *res* until the facts could be fully developed. The force and effect of the transcript in Greene County necessarily depends on the validity of the judgment in Durham County. When it was made to appear that motion had been lodged in Durham County to correct the record in the case, and that the plaintiff herein had set up his rights before the court in the proceeding there, it would seem that defendant was entitled to have the plaintiff pursue his legal remedies before asking further aid from a court of equity.

True it is, that under the law as it now exists, a sale under execution may be restrained if the deed of the officer who sells will not pass title, and will only throw a cloud upon the title of the plaintiff, *Harris v. Distributing Co.,* 172 N. C., 14, 89 S. E., 789; *Mizell v. Bazemore,* 194 N. C., 324, 139 S. E., 453, but the invalidity of the judgment upon which the execution was issued may not be collaterally attacked unless it be void or unenforceable, as, for example, where the lien of the judgment is barred by the lapse of time. *Exum v. R. R.,* 222 N. C., 222, 22 S. E. (2d), 424.

Here, the apparent irregularity of the judgment may be corrected on motion in the cause in Durham County, *Ragan v. Ragan,* 212 N. C., 753, 194 S. E., 458; *S. v. Brown,* 203 N. C., 513, 166 S. E., 396, or the execution may there be recalled. *Finance Co. v. Trust Co.,* 213 N. C., 369, 196 S. E., 340; *Crowder v. Stiers,* 215 N. C., 123, 1 S. E. (2d), 353. For the present, at least, the remedies available in Durham County seem adequate. So, we need not now decide to what extent the Superior Court of Greene County may look into the records of the Superior Court of Durham County to determine the validity of the judgment and the effectiveness of the transcript to another county. *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311; *Clark v. Homes,* 189 N. C., 703, 128 S. E., 20; *Hargrove v. Wilson,* 148 N. C., 439, 62 S. E., 520; *Dowdle v. Corpening,* 32 N. C., 58; *S. v. King,* 27 N. C., 203.

Error.

STATE v. MARY BAILEY McNEILL.

(Filed 31 October, 1945.)

Intoxicating Liquors §§ 4d, 6a—

A person, charged with the possession of illicit, nontax-paid liquor for the purpose of sale, G. S., 18-50, cannot be convicted under G. S., 18-48. These two statutes define misdemeanors and are on an equal footing. Neither prescribes or includes a lesser offense or one of lesser degree.

APPEAL by defendant from *Burney, J.*, at May Term, 1945, of HARNETT. Reversed.

The defendant was charged with possession of nontax-paid intoxicating liquor for the purpose of sale. From judgment pronounced on verdict of guilty, the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Neill McK. Salmon for defendant.

DEVIN, J. The only question presented by this appeal is the sufficiency of State's evidence to carry the case to the jury. The State offered the testimony of two officers to the effect that on the occasion alleged they found in defendant's bedroom in her home three pints of untax-paid whiskey in a jar. However, one of these witnesses testified that the defendant, the mother of three children, was present, and that she said she had the whiskey there for a sick child. This testimony which came from the witness offered by the State, was the only evidence on this point, and was uncontradicted. The defendant offered no evidence.

There was no evidence that the liquor here in question was being kept for the purpose of being sold. The State's evidence, by incorporating and offering as worthy of belief the defendant's declaration, negatived possession for the purpose of sale. But it was contended that the *prima facie* effect given possession of intoxicating liquor by G. S., 18-11, was sufficient to carry the case to the jury. With this we cannot agree.

While section 33 of the Alcoholic Beverage Control Act of 1937, now G. S., 18-48, makes possession of any alcoholic beverage upon which the taxes imposed by the laws of the Congress of the United States or of this State have not been paid unlawful, no other or different offense is there defined. By G. S., 18-50, "possession for sale . . . of illicit liquors" is prohibited, constituting a specific offense. In *S. v. Lockey*, 214 N. C., 525, 199 S. E., 715, in construing this last section it was observed that the rule that possession of intoxicating liquor as *prima*

facie evidence of possession for the purpose of sale was not incorporated in the Alcoholic Beverage Control Act of 1937. The Court said: "In the instant case the offense charged was the violation of a specific statute and in such a case this Court is powerless to uphold an erroneous conviction under that statute by substituting another statute requiring proof less strong."

Here the charge contained in the warrant under which the defendant was held to answer was possession of illicit liquor for the purpose of sale. There was no other count or other charge in the warrant. Manifestly the defendant was charged with violation of G. S., 18-50. She could not be convicted under 18-48. These two statutes define misdemeanors and are on equal footing. Neither prescribes or includes a lesser offense or one of lesser degree. G. S., 18-48, may not be regarded as constituting a lesser or different offense embraced in G. S., 18-50.

As there was no evidence of possession of illicit liquor for the purpose of sale, and as the statutory presumption does not arise under the charge contained in the warrant, we think the defendant was entitled to have her motion for judgment of nonsuit allowed. It was incumbent upon the State to prove the charge as laid.

Attention is called to the recent cases of *S. v. Suddreth,* 223 N. C., 610, 27 S. E. (2d), 623, and *S. v. Graham,* 224 N. C., 347, where the present statutes relating to intoxicating liquors are discussed.

For the reasons stated the ruling of the court below in denying defendant's motion for judgment as of nonsuit must be

Reversed.

MOST WORSHIPFUL GRAND LODGE OF FREE AND ACCEPTED ANCIENT MASONS, JURISDICTION OF N. C.; DR. JAMES E. SHEPARD, MOST WORSHIPFUL GRAND MASTER; REV. C. W. LAWRENCE, GRAND SECRETARY; AND WESTERN STAR LODGE #9 OF FREE AND ACCEPTED ANCIENT MASONS, OF SALISBURY, N. C.; ROBERT EVANS, WORSHIPFUL MASTER; J. A. THOMPSON, SECRETARY, FOR AND ON BEHALF OF ALL MEMBERS AND SUBORDINATE LODGES OF FREE AND ACCEPTED ANCIENT MASONS IN THE JURISDICTION OF NORTH CAROLINA (ORIGINAL PARTIES PLAINTIFF)—AND DR. JAMES E. SHEPARD; C. W. LAWRENCE, GEO. A. MOORE, L. W. WERTZ, M. D. LLOYD, GEO. D. CARNES, G. F. HALL, J. H. ALEXANDER, ZACK ALEXANDER, J. McNEWKIRK, ISAAC GARRIS, H. A. DAY, E. F. DAVIS, J. S. DANIELS, ROBERT EVANS, H. M. HARGRAVE AND E. H. JENKINS, ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF THE MOST WORSHIPFUL GRAND LODGE OF FREE AND ACCEPTED ANCIENT MASONS, JURISDICTION OF NORTH CAROLINA, AND ITS SUBORDINATE LODGES (ADDITIONAL PARTIES PLAINTIFF), v. THE MOST WORSHIPFUL NA-

TIONAL GRAND LODGE OF FREE AND ACCEPTED SCOTTISH RITE MASONS OF THE WORLD; DR. W. H. BENDERSON, NATIONAL GRAND MASTER; ERNEST JOHNSTON, NATIONAL GRAND COR. SECRETARY; ALBERT REED, NATIONAL GRAND C. SECRETARY; PROF. W. J. FITZPATRICK, N.G.S.; EUREKA LODGE #1; KING SOLOMON LODGE #2; ROSE OF SHARON CHAPTER O.E.S.; BETHLEHEM COURT OF ISIS; ALL OF THE MOST WORSHIPFUL NATIONAL GRAND LODGE OF FREE AND ACCEPTED ANCIENT SCOTTISH RITE MASONS OF THE WORLD; R. E. DAVIS, WORSHIPFUL MASTER; A. Z. McCOMBS, SECRETARY, AND ALL OTHERS AFFILIATED WITH OR PARTICIPATING IN AND UNDER THE SAID MOST WORSHIPFUL NATIONAL GRAND LODGE OF FREE AND ACCEPTED ANCIENT SCOTTISH RITE MASONS OF THE WORLD IN NORTH CAROLINA.

(Filed 31 October, 1945.)

Appeal and Error § 30b—

Appeal from an order, allowing plaintiffs to amend their complaint and to make additional parties plaintiff, is premature and will be dismissed.

APPEAL by defendants from *Gwyn, J.*, at May Term, 1945, of ROWAN.

This is an action to restrain the defendants from doing business in North Carolina.

Defendants made a special appearance, through their counsel, and moved to dismiss the action for want of jurisdiction, for that it "appears upon the face of plaintiffs' complaint, that the plaintiffs, Most Worshipful Grand Lodge of Free and Accepted Ancient Masons, Jurisdiction of North Carolina, and Western Star Lodge #9 of the Free and Accepted Ancient Masons of Salisbury, N. C.," have not the legal capacity to maintain this action. This motion has not been heard. However, since the motion challenging the jurisdiction of the court was lodged, the plaintiffs moved to amend their complaint and to make new parties. Motion allowed. From the order granting this motion, the defendants except and appeal to the Supreme Court.

D. E. Henderson, Walter H. Woodson, and Leon P. Harris for plaintiffs.

Stahle Linn and R. Lee Wright for defendants.

PER CURIAM. The question of jurisdiction is not presented for our consideration. The appeal is from the order allowing the plaintiffs to amend their complaint and to make additional parties plaintiff. The appeal is premature, and will be dismissed. *Johnson v. Ins. Co.*, 215 N. C., 120, 1 S. E. (2d), 381; *Wilmington v. Board of Education*, 210 N. C., 197, 185 S. E., 767.

Appeal dismissed.

PERCY C. CLAYTON, AND ALL OTHER INTERESTED TAXPAYERS, v. LIGGETT & MYERS TOBACCO COMPANY, A CORPORATION.

(Filed 7 November, 1945.)

1. Municipal Corporations §§ 2, 5—

Municipal corporations are creatures of the Legislature and possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation. Ordinarily such powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the Legislature.

2. Municipal Corporations § 29—

The control of streets is primarily a State duty, and the legislative control, in the absence of constitutional restriction, is paramount, subject to property rights and easements of abutting owners.

3. Same—

The Legislature may delegate the power of control over its streets to the municipal corporations of the State or to the governing body of a city, town, or to a particular municipal board, or other agency.

4. Same—

Within constitutional limitations and provided public use is not unreasonably interfered with, the Legislature, or a municipal corporation by legislative authorization, may grant a private use of streets, and may permit structures in the streets for business convenience, which, in the absence of such authority, would be considered obstructions or nuisances.

APPEAL by plaintiff from *Carr, J.*, at Chambers, 24 August, 1945, at Burlington, N. C. From DURHAM.

Civil action to restrain defendant from erecting an arcade across Morgan Street connecting two of its buildings in the city of Durham, North Carolina.

These pertinent uncontroverted facts appear from the pleadings:

I. Morgan Street, in the city of Durham, North Carolina, is a paved street, a link in the system of streets connecting with highways leading into and out of the city, and an important thoroughfare serving the industrial and commercial area of the city.

II. Defendant has erected what is known as the O'Brien Building on the south side of, and abutting on Morgan Street, and a two-story building known as the Cooper Shop on the north side of, and abutting on said street.

III. The General Assembly of North Carolina, at its session of 1945, by an act entitled "An act to allow the city of Durham to release any interest it and the public may have in certain lands for the purpose of

permitting Liggett & Myers Tobacco Company to cross a part of Morgan Street for private purposes" authorized and empowered the governing body of the city of Durham "to permit by resolution, ordinance or other proceeding deemed advisable, or such papers as may be necessary to release the interest of the city of Durham and the public generally in and to that portion of Morgan Street situated, lying and being between the O'Brien Building of Liggett & Myers Tobacco Company on the south and said Tobacco Company's Cooper Shop Building on the north, for the purpose of permitting said Liggett & Myers Tobacco Company to extend said O'Brien Building from the south over and across Morgan Street to the aforesaid Cooper Shop building on the north, with a clearance of not less than 17 feet at any point above Morgan Street, said building to be constructed and used and said Morgan Street to be crossed for the benefit of said Tobacco Company and its business, and generally for its private purposes."

IV. Thereafter the City Council of the city of Durham passed a resolution, in which it is recited: (1) That the director of planning and the City Manager have investigated the request of Liggett & Myers Tobacco Company to be permitted to construct "a building or overpass over Morgan Street between their O'Brien Building on the south and their Cooper Shop building on the north so that the said two buildings will be connected" with "a clearance over Morgan Street of not less than 17 feet above the surface of Morgan Street at any time," and have submitted recommendation with respect to the same; (2) that the council has carefully considered such request and has examined the plans and specifications for said proposed building; (3) that subject to the recommendations made by the planning department, the council is of opinion that the said request could be granted without being detrimental to the public interest, safety or welfare, and that the same will not impede or congest pedestrian or vehicular traffic passing along Morgan Street; and (4) that the Legislature of North Carolina at its session of 1945 has specifically granted authority to the City Council to grant such permission. And thereupon the City Council resolved "that permission to construct the said building across Morgan Street between the O'Brien Building and the Cooper Shop building of Liggett & Myers Tobacco Company is hereby granted, subject to" specified terms and conditions, for safeguarding the interests of the city, and of the public requirements for use of the street, among others: "That there be an unobstructed clearance of not less than 17 feet at all points above the surface of Morgan Street" and provisions be made to admit of widening said street.

V. Pursuant to the permission granted in the said resolution of the City Council, defendant Liggett & Myers Tobacco Company begun the

construction of a building over and across Morgan Street connecting their O'Brien Building with their Cooper Shop building.

VI. Thereupon, the plaintiff, acting for himself and for any and all interested taxpayers of the city, county and State who desire to intervene, instituted this action for the purpose of restraining defendant from completing the construction of such building (1) upon the ground: (a) That it will create a hazard between said buildings and increase the existent traffic congestion now caused by the extensive use of the street by both vehicles and pedestrians at certain times of day; (b) that an overhead building as above stated would prevent the free and extensive use of the street by plaintiff and other users of said street for travel and transportation; (c) that it will prevent the governing body of the city of Durham from improving and widening said street which is now about thirty feet wide and will interfere with city planning; and (2) for that the General Assembly does not have the right to grant or delegate the right to the governing body of the city of Durham to pass a resolution permitting defendant to construct a building over and across Morgan Street as it has done, and, hence, the said resolution is void.

VII. A temporary restraining order having been granted, returnable before Carr, Resident Judge of the Tenth Judicial District of North Carolina, at Chambers, in Burlington, and being heard, upon motion of defendant for dissolution of the order, the court, being of opinion that the pleadings raise no issue of fact for a jury, finds the following facts:

"1. There is no allegation in the complaint that the right of the plaintiff or any other person to the use of light and air will be impaired or in any way affected by the completion of the proposed structure by the defendant.

"2. The structure which the defendant proposes to build when completed will not unreasonably interfere with the public easement of travel and transportation." Thereupon, the court entered an order dissolving the temporary restraining order.

Plaintiff excepts to the rendition and signing of the order and appeals to Supreme Court and assigns error.

W. C. Purcell for plaintiff, appellant.

Fuller, Reade, Umstead & Fuller for defendant, appellee.

WINBORNE, J. This is the question for decision: Where legislative authority is given therefor, may the governing body of a city grant permission to the owner of buildings abutting on opposite sides of a street to construct an arcade over the street connecting the buildings for private purposes when such completed arcade (1) will not impair the

rights of others to the use of light and air, and (2) "will not unreasonably interfere with the public easement of travel and transportation"?

The court below, in dismissing the temporary restraining order, held in effect that, under such circumstances, the city had such right and with this ruling, we are in agreement.

While the subject, in the form presented here, does not appear to have been considered by this Court, there are decisions to the effect that without express legislative authority therefor, a municipality may not permit encroachments upon public streets for private purposes. Ordinarily the question has arisen where property rights are involved. See *Butler v. Tobacco Co.*, 152 N. C., 416, 68 S. E., 12; *Guano Co. v. Lumber Co.*, 168 N. C., 337, 84 S. E., 346.

The consequential inference from these decisions is that, with express legislative authority therefor, a municipality may permit encroachments upon public streets for private purposes, provided the property rights of others are not invaded, and the public use of the street is not unreasonably obstructed, as was found below by the judge in this case.

Such is the principle as expressed by text writers, for example: In 44 C. J., 983, Municipal Corporations, sec. 3782 (10), it is stated: "Within constitutional limitations, and provided public use is not unreasonably interfered with, the legislature may authorize a private use of streets, and may permit structures in the street for business conveniences that, in the absence of such authority, would be considered obstructions or nuisances. Where acting under constitutional or delegated legislative authorization, a municipality may grant a private use of its streets, unless such private use would unreasonably interfere with public use. But in the absence of constitutional, charter, or statutory provisions so permitting, a municipality has no power to authorize the use of its streets for a private purpose."

Moreover, it is a general principle of law that municipal corporations are creatures of the Legislature of the State, and that they possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation. 37 Am. Jur., 722, Municipal Corporations, section 112. Ordinarily such powers may be enlarged, abridged, or entirely withdrawn by the Legislature at its pleasure. Furthermore, the control of streets is primarily a State duty, and the legislative control, in the absence of constitutional restriction, is paramount, subject to the property rights and easements of the abutting owner. However, the Legislature may delegate the power of control over its streets to the municipal corporations of the State or to the governing body in a city, town or village, or to a particular municipal board, or other agencies.

And where such power has been delegated the power of the municipality is measured by the statute or charter provisions delegating such authority. McQuillin on Municipal Corporations, 2nd Ed., Revised Vol. 4, section 1414 (1310), and 29 C. J., 646, Highways, section 409. See also *Yale University v. New Haven,* 104 Conn., 610, 134 Atl., 268, 47 A. L. R., 667.

The judgment below is

Affirmed.

FIRST SECURITY TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF THE LATE JOSEPH DUCKWORTH ELLIOTT, v. MRS. HAZEL E. HENDERSON, MRS. KATE E. HESTER, MILES O. SHERRILL, FIRST SECURITY TRUST COMPANY, GUARDIAN FOR WALTER MOSES, MINOR; FIRST SECURITY TRUST COMPANY, GUARDIAN FOR JAMES VERNON SHERRILL, MINOR, AND JOSEPH ELLIOTT SHERRILL, JR., MINOR, JOSEPH E. ADNEY, ELIZABETH A. HOLE, MOODY A. BARGER; AND C. M. JANES AND IRENE M. JANES, ASSIGNEES OF MILES O. SHERRILL; L. K. HIGGENBOTHAM, ASSIGNEE OF MILES O. SHERRILL, AND FRED H. MELLOR, ASSIGNEE OF MILES O. SHERRILL.

(Filed 7 November, 1945.)

1. Wills § 34—

Where a will leaving property in the hands of an executor or trustee provides that, five years after the death of testator's wife, the entire estate should be equally divided between testator's four daughters, after the payment of a certain sum to one of the daughters, and that, if any one or more of testator's four daughters should die before the distribution provided for in the will, the legacy or bequest of such deceased daughter or daughters should be paid to their then living children, share and share alike, the intention of the testator is that the share of any one of his daughters, so dying before the date set for the final distribution, must be paid only to her children living at the date for distribution, and not to the issue of her children deceased before the date set for distribution by the will.

2. Same—

Where property is left by will to children or children living at the time fixed for payment or division, when there are persons that answer the description, grandchildren and great grandchildren will not be included in the distribution of such property.

APPEAL by defendants, Walter S. Moses, James Vernon Sherrill and Joseph Elliott Sherrill, Jr., from *Gwyn, J.,* at September Term, 1945, of CATAWBA.

The First Security Trust Company, Executor of the last will and testament of the late Joseph Duckworth Elliott, brings this action under the provisions of the Uniform Declaratory Judgment Act, for the purpose of obtaining a construction of the will of the late Joseph Duckworth Elliott.

The testator died on 4 May, 1930, leaving a last will and testament dated 30 December, 1920. Surviving the testator were his wife, Mary Elizabeth Elliott, and three daughters, Mrs. Hazel E. Henderson, Mrs. Kate E. Hester, Mrs. Pearl Elliott (Sherrill) Salassa and three grandchildren, Joseph E. Adney, Elizabeth O. Hall and Moody A. Barger, who are the children of a daughter, Mrs. Mamie Adney, who predeceased the testator. Mrs. Pearl Elliott Salassa died 15 May, 1935, survived by a daughter, Nancy S. Moses, a son, Miles O. Sherrill, and two grandchildren, Joseph Elliott, Jr., born 15 January, 1926, and James Vernon Sherrill, born 17 August, 1927, children of Joseph E. Sherrill, a son of Pearl Elliott Salassa, who predeceased his mother. Nancy S. Moses died 7 January, 1936, leaving a son, Walter S. Moses, born 2 April, 1932. Mary Elizabeth Elliott, widow of Joseph Duckworth Elliott, died 21 January, 1940.

The 5th paragraph of the will of Joseph Duckworth Elliott reads as follows: "Subject to the other provisions and limitations made in this instrument, it is my will and desire that, at the end of five years after the death of my said wife, Mary Elizabeth Elliott, my entire estate be equally divided between my four daughters, Mamie Hood Adney, Pearl Sherrill Salassa, Hazel Elliott Henderson and Kate Elliott Hester; Provided, however, that my executor before making such distribution, shall pay to my daughter, Mamie Hood Adney, a sum of money equal to, or property of, the value of the estate received by each of my other daughters, Pearl Sherrill Salassa, Hazel Elliott Henderson and Kate Elliott Hester, from their mother, Mary Elizabeth Elliott. It is my further will that, if any one or more of my four daughters mentioned in this paragraph should die before the distribution provided for herein, the legacy or bequest of such deceased daughter or daughters be paid to their then living children, share and share alike."

At the hearing below, all parties waived a trial by jury and agreed that his Honor might find the facts and pass upon the question of law presented as to whether, under Item Five of the will of Joseph Duckworth Elliott, Joseph E. Sherrill, Jr., and James Vernon Sherrill, minor children of Joseph E. Sherrill, deceased, and Walter S. Moses, minor child of Nancy S. Moses, deceased, as grandchildren of Pearl Elliott Salassa, deceased daughter of the testator, are entitled to share along with Miles O. Sherrill, the only living child of Pearl Elliott Salassa, on 21 January, 1945, in the one-fourth interest in the estate of Joseph

Duckworth Elliott, which the said Pearl Elliott Salassa would have taken had she been living on 21 January, 1945. These grandchildren of Pearl Elliott Salassa, being great grandchildren of the testator.

The court below held that since Miles O. Sherrill was the only living child of Pearl Elliott Salassa on 21 January, 1945, he is entitled to the entire one-fourth interest in the estate of Joseph Duckworth Elliott, which his mother would have taken had she been living at that time, to the exclusion of the children of his brother and sister, both of whom died before said date.

Judgment was entered accordingly, and the minor children of Joseph E. Sherrill and Nancy S. Moses excepted and appealed to the Supreme Court.

No counsel for petitioners.

John W. Aiken for defendant, appellee, Miles O. Sherrill.

Eddy S. Merritt for L. K. Higgenbotham, defendant, appellee.

Bailey Patrick, Guardian ad litem for Walter S. Moses, Joseph Elliott Sherrill, Jr., and James Vernon Sherrill, in propria persona.

DENNY, J. The question presented for our determination is whether the testator intended that if any one of his daughters should die before the date set for the final distribution of his estate, her part should be paid to her children living at the time of her death or to her children living at the date of distribution.

The testator authorized his executor to keep his estate intact as nearly as possible, until the expiration of five years from and after the death of his wife. In the meantime the executor was given authority to sell, exchange, reinvest or dispose of any real estate, stock, bonds, or other securities owned by the testator, as in its judgment might be best for the estate. Under the provisions of the will, during the lifetime of his wife she was to receive the sum of $400.00 per month and the use of the family residence. The four daughters were to receive $100.00 each per month until the death of their mother, at which time or within 90 days thereafter they were to receive $10,000.00 each. Other substantial bequests were made in the will.

The executor was charged with the management and control of this estate from testator's death until the expiration of five years after the death of his wife. Upon the death of the testator, each of the four daughters named in the residuary clause of the will became vested with an interest in the estate, but the right of possession was contingent upon being alive at the time fixed by the testator for the division and distribution of the estate. One daughter, Pearl Elliott Salassa, died before the

time fixed for such division and distribution, leaving surviving her two children, Nancy S. Moses and Miles O. Sherrill, and two grandchildren, the defendants James Vernon Sherrill and Joseph Elliott Sherrill, Jr., children of her son Joseph Elliott Sherrill who predeceased her. Nancy S. Moses likewise died before the time fixed for the division and distribution of the estate, leaving one child, the defendant Walter S. Moses.

It makes no difference whether Nancy S. Moses took a vested or contingent interest in the estate her mother would have taken had she been alive at the time fixed for its division and distribution. *Thompson v. Humphrey,* 179 N. C., 44, 101 S. E., 738; *Bank v. Johnson,* 168 N. C., 304, 84 S. E., 355. She inherited no interest therein from her mother and under the terms of the will, the executor is directed to pay the legacy or bequest of such deceased daughter or daughters to their then living children share and share alike. *Cilley v. Geitner,* 182 N. C., 714, 110 S. E., 61; *Thompson v. Humphrey, supra; Whitesides v. Cooper,* 115 N. C., 570, 20 S. E., 295; *Anderson v. Felton,* 36 N. C., 55. Therefore, the children of a deceased daughter under the provisions contained in Item Five of the testator's will, must take, if they take at all, by purchase from the testator and not as heirs of the mother. *Fulton v. Waddell,* 191 N. C., 688, 132 S. E., 669; *Green v. Green,* 86 N. C., 546; *Hawkins v. Everett,* 58 N. C., 42. Even so, Nancy S. Moses and Joseph Elliott Sherrill, having died prior to the time fixed by the testator to call the roll and distribute the legacy or bequest, to the then living children of Pearl Elliott Salassa, no interest in the estate passed to them or to their heirs.

Hence, the appealing defendants have no interest in this estate unless they are beneficiaries under the will. And the will makes no provision for them. It ends with the children of their grandmother, Pearl Elliott Salassa, who may be living at the time for the division and distribution of the estate. Miles O. Sherrill, being the only child of Pearl Elliott Salassa then living, he takes the entire interest his mother would have taken had she been alive at the time fixed for the division and distribution of the estate. This view is in accord with the general rule that when property is left to children or children living at the time fixed for payment or division, when there are persons that answer the description, grandchildren and great grandchildren will not be included in the distribution of such property. *Taylor v. Taylor,* 174 N. C., 537, 94 S. E., 7; *Lee v. Baird,* 132 N. C., 755, 44 S. E., 605; *Mordecai v. Boylan,* 59 N. C., 365; *Ward v. Sutton,* 40 N. C., 421; *Denny v. Closse,* 39 N. C., 102.

The judgment of the court below is

Affirmed.

ALTON K. PEARCE v. INEZ M. PEARCE.

(Filed 7 November, 1945.)

1. Husband and Wife § 4b: Divorce § 2a—

A separation agreement between husband and wife, providing for her support, is void and unenforceable when not in accordance with G. S., 52-12-13.

2. Divorce § 5—

A wife who seeks to assert a cause of action under G. S., 50-7 (4), must allege with particularity the language and conduct relied upon as constituting such indignities to her person as to render her condition intolerable and her life burdensome; and it is essential that there be an allegation that the same was without adequate provocation, its omission being fatal.

3. Divorce §§ 2a, 8—

In a cause of action couched in the language of G. S., 50-5 (4), plaintiff must prove his case *secundum allegata* by showing that the separation was voluntary in its inception. If the assent of the wife was obtained by fraud or deceit, the separation was not voluntary within the meaning of the act.

4. Divorce § 5—

In a suit for divorce by husband against wife under G. S., 50-5 (4), allegations by the wife, that her husband ordered her to leave home, which she did not do, but instead, bargaining with him for a contract of separation, reached an agreement, without averment of fraud or deceit, are insufficient as a defense.

APPEAL by plaintiff and defendant from *Bone, J.*, at March Term, 1945, of WAKE.

Civil action for divorce on the grounds of two years' separation by mutual agreement.

The complaint contains the usual necessary averments sufficient to state a cause of action for divorce under G. S., 50-5 (4).

The defendant answering, qualifiedly denies the allegation of separation by mutual consent and alleges by way of further defense and cross action:

(1) That plaintiff, on or about 19 August, 1942, ordered her to leave his home and then proposed an agreement for separation to which she assented; that a contract was executed; and that plaintiff now by this action is attempting to breach this contract; and

(2) That some time prior to 19 August, 1942, plaintiff became interested in another woman; that he ordered her to occupy a separate bedroom; that he "repeatedly insulted her by telling her that he did not want her and did not give a damn about her, and continued his cold,

indifferent conduct towards his wife, all of which indignities rendered her condition intolerable and her life burdensome." She then reasserts the agreement for separation and support.

On the first further defense and cross action she prays that the contract for support be incorporated in any decree of divorce which may be entered herein, and on the second she seeks a decree of divorce *a mensa* and alimony.

The agreement of separation is attached to her answer. It bears the signatures of two witnesses, but it was not executed and acknowledged as required by G. S., 52-12-13.

The plaintiff demurred to each further defense and cross action. The court below sustained the demurrer to the first further defense and the defendant excepted and appealed. It overruled the demurrer to the second further defense and plaintiff excepted and appealed.

Douglass & Douglass for plaintiff.

Thos. W. Ruffin for defendant.

BARNHILL, J. It would seem to be apparent that a wife may not assert a separation agreement providing for her support as a defense to an action by the husband for divorce or have the agreement incorporated in the decree as a limitation upon the relief granted. G. S., 50-11. This we need not now decide, for the asserted agreement is void and unenforceable. G. S., 52-12-13; *Smith v. Smith, ante,* 189; *Daughtry v. Daughtry, ante,* 358, and cases cited.

A wife who seeks to assert a cause of action under G. S., 50-7 (4), must allege with particularity the language and conduct relied upon as constituting such indignities to her person as to render her condition intolerable and her life burdensome. *Howell v. Howell,* 223 N. C., 62, 25 S. E. (2d), 169; *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1.

Whether the language and conduct of plaintiff as alleged constitute "indignities to the person" of his wife might be the subject of debate, but conceding *arguendo* that such behavior is within the contemplation of the statute, there is still a material defect in defendant's attempted allegation of a cross action. At no time does she allege that plaintiff's conduct was without adequate provocation on her part. This averment is essential. Its omission is fatal. *Howell v. Howell, supra; Pollard v. Pollard, supra; Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222; *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9; *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 917; *Martin v. Martin,* 130 N. C., 27; *O'Connor v. O'Connor,* 109 N. C., 139; *Jackson v. Jackson,* 105 N. C., 433; *White v. White,* 84 N. C., 340.

Plaintiff's cause of action is couched in the language of G. S., 50-5 (4). He must prove his case *secundum allegata* by showing that the separation was voluntary in its inception. *Taylor v. Taylor, ante,* 80; *Williams v. Williams,* 224 N. C., 91. If the assent of the wife was obtained by fraud or deceit, the separation was not voluntary within the meaning of the law.

But here again the allegations are insufficient to constitute a valid defense. Defendant does allege that plaintiff ordered her to leave his home, but she did not go. Instead she bargained with him for a contract of separation. There is no averment that her agreement was induced by fraud, deceit, or undue influence. Her husband merely "persuaded" her to execute the contract.

The court below erred in overruling the demurrer to the second further defense and cross action.

On plaintiff's appeal, reversed.

On defendant's appeal, affirmed.

H. J. LEE v. C. L. BEDDINGFIELD AND MRS. C. L. BEDDINGFIELD.

(Filed 7 November, 1945.)

1. Evidence § 46—

A witness, expert or other, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged, or upon which he has acted or been charged, as in the case of business correspondence, etc., may give such opinion in evidence when a relevant circumstance.

2. Bills and Notes §§ 2a, 27—

In an action to recover on a note allegedly signed by defendants, where plaintiff's evidence tended to show, by evidence and opinion of persons familiar with the handwriting of defendants, that the note in question was signed by defendants, when considered with other evidence that the said note was part of the assets of a failed bank, had credits endorsed thereon and was acquired by plaintiff by assignment from the receiver of the bank, there is sufficient evidence to go to the jury on the question of its execution and judgment as for nonsuit was error.

APPEAL by plaintiff from *Williams, J.,* at May Term, 1945, of WAKE. Reversed.

Action on a note for $249.07. The defendants denied the execution of the note and set up certain other defenses not material to the questions

here presented. At the close of plaintiff's evidence motion for judgment of nonsuit was allowed, and plaintiff appealed.

J. M. Templeton for plaintiff.
No counsel contra.

DEVIN, J. The case was made to turn below upon the sufficiency of the proof of the execution of the note sued on to entitle plaintiff to go to the jury.

As to defendant C. L. Beddingfield plaintiff offered the testimony of a witness, an employee of the State Treasurer's office, whose duty it was to pass on the genuineness of the signatures on checks and vouchers passing through that office. This witness testified that he had seen the signature of C. L. Beddingfield on vouchers issued to him in connection with the State Labor Department, had seen him write his name, and that in witness' opinion the signature on the note sued on was that of C. L. Beddingfield.

As to the defendant Mrs. C. L. Beddingfield, another witness, an employee of the County Board of Education, testified she knew the *feme* defendant, had seen her signature on a variety of papers passing under her observation, including reports with defendant's name attached, which defendant delivered to witness, saying "These are my reports." These reports purported to bear the personal signature of the defendant. "The name on the note (sued on) and reports are exactly alike in every case."

We think this evidence was sufficient, when considered in connection with the other evidence in the case, to withstand a motion for nonsuit. It appeared that the note sued on, originally in the sum of $335, was given to the Commercial National Bank of Raleigh, had credits endorsed thereon, was among the assets of the Bank when it became insolvent, and passed by assignment of the Receiver of the Bank to the person from whom plaintiff acquired it.

In *Nicholson v. Lumber Co.,* 156 N. C., 59 (66), 72 S. E., 86, it was said: "A witness, expert or other, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged or upon which he has acted or been charged, as in the case of business correspondence, etc., may give such opinion in evidence when a relevant circumstance." This statement of the law was quoted with approval in *Morgan v. Fraternal Association,* 170 N. C., 75 (82), 86 S. E., 975, and cited in *LaRoque v. Kennedy,* 156 N. C., 360, 72 S. E., 454, and *Oil Co. v. Burney,* 174 N. C., 382, 93 S. E., 912. See also *Ratliff v. Ratliff,* 131

N. C., 425, 42 S. E., 887; *Tunstall v. Cobb,* 109 N. C., 316, 14 S. E., 28; 27 A. L. R., 319; 20 Am. Jur., 700, 705.

Considering the evidence in the light most favorable for the plaintiff, as we are required to do on a motion for nonsuit, we think the evidence offered sufficient to carry the case to the jury as to both defendants, and that the learned judge below was in error in entering judgment of nonsuit.

Reversed.

MRS. PEARL M. REA, ADMINISTRATRIX OF THE ESTATE OF JOYCE REA, DECEASED, v. SAMUEL S. SIMOWITZ, J. S. SIMOWITZ, BERNARD SIMOWITZ AND ISRAEL D. SHAPIRO, T/A NATIONAL EXPRESS, AND ROBERT WILLIAMS.

(Filed 21 November, 1945.)

1. Evidence § 37: Death § 8—

Mortuary tables are used as the best evidence obtainable, together with evidence of health, habits and the like, in the establishment of material but necessarily uncertain facts.

2. Evidence § 27—

Our mortuary table, G. S., 8-46, is not founded on any statistical information based on experience concerning children under ten years of age and it does not give or purport to give the probable expectancy of life of such infants. Hence as to them it is irrelevant.

3. Death § 8—

Before G. S., 8-46, may be considered by a jury there must be precedent proof of age, bringing the deceased clearly within the class of selected lives tabulated in the table. In the absence of such proof it is error to direct a jury to consider it.

4. Same: Evidence §§ 27, 37—

In a case involving the expectancy of one, not within the class of selected lives tabulated in G. S., 8-46, the jury may consider evidence as to the constitution, health, vigor, habits and the like of deceased as a basis for determining his probable expectancy; and upon proper identification and authentication other available tables, which list the ages involved, may be used in evidence.

5. Negligence §§ 1a, 19a—

There are no degrees of care so far as fixing responsibility for negligence is concerned. The standard is always that care which a man of ordinary prudence should use under like circumstances. But a prudent man increases his watchfulness as the possibility of danger mounts. Thus the degree—that is the quantity—of care necessary to measure up to the standard is as variable as the attendant circumstances.

6. Negligence § 19a—

The degree of care required, under the particular circumstances, to measure up to the standard is for the jury to decide.

APPEAL by defendants from *Phillips, J.*, at March Term, 1945, of MECKLENBURG. New trial.

Civil action to recover damages for wrongful death resulting from the negligent operation of a truck.

Defendant Williams was an employee of the defendant partnership. On 13 September, 1944, he, in the regular course of his employment, was operating a truck of the tractor-trailer type in the City of Charlotte. The truck was loaded to full capacity—20,000 pounds. It had a 134-inch wheelbase, was 95 inches wide and 318 inches long. He was proceeding west on Palmer Street. He made a right-hand turn into Graham Street. To do so, due to the size and length of the truck and the width of the streets, it was necessary for him first to turn to the left of Palmer Street and then cut to the right. In making the turn the right rear wheel ran across the northeast corner of the intersection. At the time the truck passed deceased and a companion were standing on the sidewalk at or near the curb at the northeastern intersection. Some part of the side of the truck struck deceased and knocked her in the street. The rear wheel ran over her body. She died as a result of the injuries sustained.

Defendant Williams testified he saw the two girls standing still at the corner at or about the time he began his turn into Graham Street. He was not aware of the fact he struck deceased. The deceased was nine years of age at the time of her death.

Issues of (1) negligence and (2) damages were answered in favor of plaintiff. From judgment on the verdict defendants appealed.

G. T. Carswell, John M. Robinson, and Hunter M. Jones for plaintiff, appellee.

Jones & Smathers for defendants, appellants.

BARNHILL, J. Counsel for defendants, exercising the care of diligent attorneys, duly entered motions to dismiss as in case of nonsuit. Having examined the record in the calm which follows the heat of battle, they frankly admit the evidence of negligence was such as to require its submission to a jury and abandon their exceptions to the refusal of the court below to dismiss.

They now rely principally on exceptions to the charge of the court. These exceptions present two questions which require discussion: (1) Is it proper or permissible for the court to instruct the jury to consider

our mortuary table in ascertaining the probable life expectancy of a child who, due to her age at the time of her death, did not come within the class of selected lives tabulated in the table; and (2) in negligence cases what standard of care is required in respect to the safety of children of tender age?

The court instructed the jury in part as follows:

"Now, this expectancy is fixed by the mortuary tables under the statute in North Carolina, but the mortuary tables must be considered in connection with other evidence as to the health, the constitution, habits of the deceased.

"Now the youngest age given in the mortuary tables is ten years, and the life expectancy fixed in the mortuary table for ten years is forty-three and seven-tenths years . . .

"In arriving at her life expectancy you will consider the mortuary tables as the Court has already instructed you."

The defendants except, contending that our mortuary table has no application where the deceased, at the time of her death, was less than ten years of age.

They cite no authority in support of their position. We have found no decision in this jurisdiction which discusses or decides the exact question thus presented. Apparently it is in this respect a case of first impression.

Elsewhere there is a conflict of judicial opinion as to the use of mortality tables as an aid in determining the life expectancy of a young child whose age is not tabulated therein.

The rule excluding the consideration of such tables is based upon the ground that the rate of mortality of children of tender years is known to be greater than it is among children of more advanced age, and that hence a table covering the life expectancy of older children would not be a guide as to the life expectancy of a younger child and it might be misleading. *Rajnowski v. Detroit, B. C. & A. R. Co.,* 41 N. W., 847, 74 Mich., 20; *Decker v. McSorley,* 86 N. W., 554, 111 Wisc., 91; *Morse v. Detroit, G. H. & M. Ry. Co.,* 133 N. W., 935, 168 Mich., 99; *Atlanta St. Rwy. Co. v. Beauchamp,* 93 Ga., 6; *Macon, D. & S. R. R. Co. v. Moore,* 99 Ga., 229.

Our mortuary table, G. S., 8-46, is nothing more nor less than one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof.

These mortality tables, usually prepared primarily for the guidance of insurance companies, as a rule are based upon a record, extending over a period of years, of the deaths among a stated number of people, chosen without reference to their age, health, or occupation, the number of

people included and the period of time covered by the record being sufficient to be fairly representative.

Thus these tables are tables showing the average expectancy of life of normal persons at different ages and consist of summarized statistical information based on experience concerning persons of the ages listed. They are used as the best evidence obtainable, together with evidence of health, habits and the like, in the establishment of a material but necessarily uncertain fact. Uncertain and unsatisfactory as such test, drawn from the general duration of life, must be when applied to an individual case, it is better than the uninstructed guess of a jury.

Infant mortality is a matter of common knowledge. Those at all versed in the science of longevity know that the chance of an infant to reach a remote period of existence is uncertain and grows with increasing age until he has passed the period when certain diseases are most apt to strike.

Our table is not founded on any statistical information based on experience concerning children under ten years of age and it does not give or purport to give the probable expectancy of life of such infants. Hence as to them it is irrelevant.

Before it may be considered by a jury there must be precedent proof of age, bringing the deceased clearly within the class of selected lives tabulated in the table. *Atlanta St. Rwy. Co. v. Beauchamp, supra.* In the absence of such proof it is error to direct the jury to consider it.

This does not leave plaintiff destitute of proof. The jury may consider evidence as to the constitution, health, vigor, habits and the like of the deceased as a basis for determining her probable expectancy of life. 20 Am. Jur., 823. Furthermore, there are other available mortality tables which list ages below ten years. Upon proper identification and authentication such tables may be used in evidence. 20 Am. Jur., 821, 822.

The court in its charge defined ordinary care as being that degree of care which a prudent man would use under like circumstances and when charged with a like duty. It then instructed the jury that the driver of the vehicle "is charged with a greater degree of care" and must "use more than ordinary care . . . exercise more than ordinary care" for the safety of children than for adults. When the use of this language was called to its attention at the conclusion of its charge the court then said to the jury: "The Court wishes to correct that and tell you that under the circumstances of a child or children being at or near the intersection, the driver of a vehicle approaching the intersection, the Court charges you that it would be the duty of the driver to exercise a greater degree of care than he would if they were adults and those who were expected to

look after themselves." The defendants excepted and assigned the same as error.

On this record the uncontradicted evidence of negligence is such as to render the exceptive assignment of error of doubtful merit. Even so, we discuss the assignment for the reason it is evident the court below was misled by the opinion in *Goss v. Williams,* 196 N. C., 213, 145 S. E., 169. There this Court approved a charge of the trial judge defining the duty of a motorist toward a child crossing the road in front of his automobile. In so doing, *Clarkson, J.,* writing for the Court, cited, and in part quoted the language used in, *Deputy v. Kimmell,* 80 S. E. (W. Va.), 919, where it is said: "More than ordinary care is required in such cases."

It must be noted that this Court did not then modify, and it has never extended, the rule of the prudent man prevailing in this State.

There are no degrees of care so far as fixing responsibility for negligence is concerned. The standard is always that care which a prudent man should use under like circumstances. Negligence is the doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, negligence is a want of due care; and due care means commensurate care, under the circumstances, tested by the standard of reasonable prudence and foresight. *Moore v. Iron Works,* 183 N. C., 438, 111 S. E., 776; *Helms v. Power Co.,* 192 N. C., 784, 136 S. E., 9. The legal duty, the breach of which will impose liability (provided it is the proximate cause of injury to the person or damage to the property of another), is the duty to exercise that degree of care which a prudent man would have used under the same or similar circumstances when charged with a like duty. This is the invariable standard of care applicable in all negligence cases.

But a prudent man increases his watchfulness as the possibility of danger mounts. So then the degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not nearly so great.

Thus, the degree—that is the quantity—of care necessary to measure up to the standard is as variable as the attendant circumstances. That degree of care which a man of ordinary prudence would exercise under the circumstances may mean nothing more than care not to willfully or wantonly injure, *Dunn v. Bomberger,* 213 N. C., 172, 195 S. E., 364, or it may mean "the utmost degree of care," *Haynes v. Gas Co.,* 114 N. C., 203, "the highest degree of care," *Turner v. Power Co.,* 154 N. C., 131, 69 S. E., 767, or "the greatest degree of care," *McAllister v. Pryor,* 187 N. C., 832, 123 S. E., 92. Hence the quantity of care required to meet the standard must be determined by the circumstances in which plaintiff and defendant were placed with respect to each other. And whether defendant exercised or failed to exercise ordinary care as understood and

defined in our law of negligence is to be judged by the jury in the light of the attendant facts and circumstances. *Perkins v. Wood & Coal Co.*, 189 N. C., 602, 127 S. E., 677.

In short, the standard of care is a part of the law of the case for the court to explain and apply. The degree of care required, under the particular circumstances, to measure up to the standard is for the jury to decide.

The disposition we have made of this appeal renders it unnecessary for us to discuss other exceptive assignments of error appearing in the record.

For the reasons stated there must be a

New trial.

CHARLES F. FOX, FATHER, AND EVELYN ADKINS FOX, MOTHER OF CHARLES EDWARD FOX, DECEASED, v. CRAMERTON MILLS, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 21 November, 1945.)

1. Master and Servant §§ 52c, 55d—

By both statute and the uniform decisions of this Court the findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the Superior Court and in this Court, when supported by competent evidence.

2. Master and Servant § 55b—

An appeal from the Industrial Commission is permitted only on matters of law.

3. Master and Servant §§ 55b, 55c—

While the Workmen's Compensation Act does not set out with particularity the procedure on appeal, repeatedly it has been held by this Court that, by analogy, that prescribed for appeals from judgments of justices of the peace, when practical, should apply. But this refers only to the mechanics of appeal, as to notice and docketing; for the appeal from the Industrial Commission is only on matter of law and not *de novo*.

4. Master and Servant § 55g: Appeal and Error §§ 6d, 48—

Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the Superior Court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated; but when such judgment on appeal merely decreed that the award be in all respects affirmed, the judge below presumably having considered each of the assignments of error and overruled them, *it was held* that a remand is not required.

5. Appeal and Error §§ 37e, 40a: Master and Servant § 55b—

An exception to the judgment affirming an award by the Industrial Commission is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of such commission.

6. Master and Servant §§ 40e, 40f—

Where the testimony tended to show that deceased, following a custom of his employer of leaving the immediate place of his work to go on the ground floor on the outside of the building, for the purpose of smoking, was killed in attempting, on instruction of a superior, to stop a moving elevator at a designated point in order that such superior might use the elevator as a means of returning to the place of his duties, there is competent evidence to support the findings of fact by the Industrial Commission upon which it was determined that the death of deceased was by accident arising out of and in the course of his employment.

APPEAL by defendants from *Rudisill, Special Judge,* at May Term, 1945, of GASTON. Affirmed.

Claim for compensation under the Workmen's Compensation Act for the death of Charles Edward Fox, employee of defendant Cramerton Mills, Inc. It was claimed that his death was by accident arising out of and in the course of his employment by the defendant Mills.

The material facts as found by the hearing commissioner and approved and affirmed by the full commission on review were these:

Charles Edward Fox was a young man 16 years of age, and at the time of his death had only been working a few weeks at defendant's mill, where he was employed as a doffer. The deceased and other employees in the mill had formed a custom, which was known to the employer, of temporarily leaving their place of employment in the mill while their machines were running and going down to the ground floor in the yard for the purpose of smoking—not being allowed to smoke in the building. This custom and habit had been in vogue for some time. On 30 August, 1943, deceased went to work at 3 p.m. His job was on the third floor. About 7:30 p.m. deceased and a fellow employee named Gibson decided they wished to smoke. So they walked down to the second floor and entered the freight elevator at the same time with the head doffer Goodson, who was over Fox and Gibson. Goodson had a box of waste he was carrying out, and the three went down by the elevator to a ramp between the sub-basement and first floor, where Goodson got off on to the ramp, outside the building, for the purpose of carrying the waste to the waste house, leaving Fox and Gibson on the elevator. "At that time when Goodson, the head doffer over Gibson and Fox, was leaving the elevator he told deceased and Gibson to bring the elevator back to that landing and pick him up and take him back upstairs." Fox and

Gibson proceeded to take the elevator on to the ground floor where they got off to go into the yard and smoke, according to the custom and habit of the employees, but just as they reached the ground Fox realized the elevator was going back up, and that, unless controlled, it would not stop to pick up Goodson, as Goodson had directed them to do. As the freight elevator was slow moving, Fox ran up an iron ladder on the outside of the building to the ramp where the head doffer had gotten off to go to the waste house, and as the elevator passed this door, Fox attempted to stop the elevator so as to make it available for Goodson to return to the upper part of the building, as Goodson had directed, and in doing so Fox was caught in the shaft between the side door of the elevator and the wall, and was killed.

The commission found that the injury described, resulting in the death of the deceased, arose out of and in the course of his employment; that the injury occurred on the premises while the deceased was then employed and in the course of his employment; that it arose out of the employment because deceased was following a custom of the mill of leaving the immediate place of work to go on the ground floor on the outside of the mill building for the purpose of smoking; and that deceased was following the instructions of a superior in attempting to stop the elevator at the designated point in order that Goodson, the head doffer, might use the elevator as a means of returning to the third floor, for the performance of his duties.

Award to the next of kin of deceased for compensation and funeral expenses was directed to issue. Defendant Cramerton Mills and its insurance carrier, Liberty Mutual Insurance Co., appealed to the Superior Court, and in doing so filed exceptions to the findings of fact, conclusions of law, and award of Industrial Commission, for that (a) the findings of fact were not supported by competent evidence, (b) the conclusions of law were not supported by evidence, and (c) not supported by proper and sufficient findings of fact.

In the Superior Court the judge presiding, "after due consideration of the entire record" and argument of counsel, adjudged that "the award of the North Carolina Industrial Commission be in all respects affirmed" and entered judgment for an award in the amount as fixed by the Commission.

The record further recites, "The defendants object to the foregoing judgment, except to same, and appeal to the Supreme Court."

J. Burke Gray and J. L. Hamme for plaintiffs, appellees.

Jones & Smathers for defendants, appellants.

DEVIN, J. Both by statute and the uniform decisions of this Court it is declared that the findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the Superior Court and in this Court, when supported by competent evidence. *Carlton v. Bernhardt-Seagle Co.*, 210 N. C., 655, 188 S. E., 777; *Archie v. Lumber Co.*, 222 N. C., 477, 23 S. E. (2d), 834. An appeal from the Industrial Commission is permitted only on matters of law. While the Act does not set out with particularity the procedure on appeal, repeatedly it has been held by this Court that by analogy that prescribed for appeals from judgments of justices of the peace, when practical, should apply. *Higdon v. Light Co.*, 207 N. C., 39, 175 S. E., 710; *Summerell v. Sales Corp.*, 218 N. C., 451, 11 S. E. (2d), 304. But this refers only to the mechanics of appeal, as to notice and docketing; for the appeal from the Industrial Commission is only on matter of law and not *de novo*. It was said in *Winslow v. Carolina Conference*, 211 N. C., 571 (581), 191 S. E., 403: "Statutory provisions with respect to appeals from judgments of justices of the peace to the Superior Court, where the trial must be *de novo*, are not controlling with respect to appeals from awards of the Industrial Commission to the Superior Court, where only errors of law appearing in the record may be considered." It would seem therefore in case of appeals from the Industrial Commission to the Superior Court that the procedure should conform substantially to that in appeals from subordinate courts where by statute appeals are restricted to questions of law, *Smith v. Texas Co.*, 200 N. C., 39, 156 S. E., 160; or to the consideration of exceptions to the report of a referee. *Anderson v. McRae*, 211 N. C., 197, 189 S. E., 639; *Gurganus v. McLawhorn*, 212 N. C., 397 (411), 193 S. E., 844. It follows that where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the Superior Court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated. We think this practice conducive to more orderly and accurate presentation of appeals brought forward under the Act. The appeal from the Industrial Commission in this case pointed out the particulars in which errors of law were assigned, and the judgment in the Superior Court merely decreed that the award be in all respects affirmed. Presumably the judge below considered each of the assignments of error and overruled them. In this view we do not hold that a remand is required in this case.

We note that the defendants in their appeal from the Superior Court to this Court only "object to the foregoing judgment (and) except to the same." The effect of an exception to the judgment is only to challenge the correctness of the judgment, and presents the single question

whether the facts found are sufficient to support the judgment, as was pointed out in *Rader v. Coach Co., ante,* 537. In that case *Justice Barnhill* states the grounds upon which this principle of appellate procedure is based, with citation of numerous authorities.

In conformity with the view expressed in the *Rader case, supra,* it must be held here that an exception to the judgment affirming an award by the Industrial Commission is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of the Industrial Commission. *Rader v. Coach Co., supra; Vestal v. Vending Machine Co.,* 219 N. C., 468, 14 S. E. (2d), 427; *Crissman v. Palmer, ante,* 472; *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139.

However, in view of the questions debated orally and by brief on this appeal, we have examined the record and find that there is competent evidence to support the findings of fact made by the Industrial Commission upon which it was determined that the death of the deceased was by accident arising out of and in course of his employment by defendant Cramerton Mills, and that the award of compensation by the Industrial Commission was properly upheld by the court below. *Bellamy v. Mfg. Co.,* 200 N. C., 676, 158 S. E., 246; *Parrish v. Armour & Co.,* 200 N. C., 654, 158 S. E., 188; *Gordon v. Chair Co.,* 205 N. C., 739, 172 S. E., 485; *Pickard v. Plaid Mills,* 213 N. C., 28, 195 S. E., 28; *Archie v. Lumber Co.,* 222 N. C., 477, 23 S. E. (2d), 834.

Upon the record the judgment of the Superior Court is

Affirmed.

CLAY L. BRUTON v. J. R. SMITH, RUBY B. SMITH, CLEO SMITH, MRS. S. J. SMITH AND SIBLEY MANUFACTURING COMPANY, INC.

(Filed 21 November, 1945.)

1. Contracts § 26: Criminal Law § 2—

Malicious motive makes a bad act worse, but it cannot make that wrong which in its own essence is lawful.

2. Contracts § 26—

An action cannot, in general, be maintained for inducing a third person to break his contract with plaintiff; the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it.

3. Same—

In an action by plaintiff to recover damages of the appealing defendant, the complaint alleging a contract between plaintiff and the other defend-

ants for the purchase by plaintiff of certain lands and the timber thereon, which contract the appealing defendant maliciously and wrongfully prevented the other defendants from complying with, by offering the other defendants a price greatly in excess of that in the plaintiff's contract and the appealing defendant thereafter acquiring a deed to the said lands and timber, the resulting loss to plaintiff is *damnum absque injuria* and there was error by the court below in overruling a demurrer to the complaint.

BARNHILL, J., concurring.

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

APPEAL by defendant Sibley Manufacturing Company, Inc., from *Gwyn, J.*, at April Term, 1945, of MONTGOMERY.

This was an action, *inter alia,* to recover damages for the alleged wrongful and unlawful interference by the defendant Sibley Manufacturing Company, Inc., and for the joint conspiracy entered into by and between all of the defendants to deprive the plaintiff of his rights under the terms and provisions of a certain receipt or contract of conveyance wherein J. R. Smith and his codefendants agreed to execute and deliver to the plaintiff deed to 130 acres of land and timber located in East Center Township, Stanly County, known as the S. J. Smith land.

It is alleged "That although the defendant, Sibley Manufacturing Company, Inc., through its officers and agents, knew of the existence of said receipt or contract of conveyance, it maliciously and wrongfully offered its codefendants a price greatly in excess of the purchase price enumerated in said receipt or contract of conveyance, of which the corporate defendant had knowledge, and maliciously and wrongfully prevented its codefendants, as well as all of the other tenants in common, from complying with the terms and provisions of said receipt or contract of conveyance for the sole purpose of depriving the plaintiff of title thereto and in consummation of their joint malicious and wrongful conspiracy, as aforesaid, the defendant, Sibley Manufacturing Company, Inc., did acquire a deed to said land and timber as a result of which the defendants, other than the corporate defendant, are now unable to comply with their said receipt or contract of conveyance," and "that such acts and conduct on the part of the defendant, Sibley Manufacturing Company, Inc., participated in by its co-defendants, which acts and conduct on the part of the defendants was jointly entered into and consummated maliciously and wrongfully, constituted such interference with said contract rights of the plaintiff as to cause the plaintiff to be damaged on account thereof."

The defendant, Sibley Manufacturing Company, Inc., demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action against it. The court overruled the

demurrer and the defendant, Sibley Manufacturing Company, Inc., in apt time objected, excepted and appealed to the Supreme Court, assigning error.

No counsel for Bruton, plaintiff, appellee.

R. L. Smith & Son for Sibley Manufacturing Company, Inc., defendant, appellant.

SCHENCK, J. The gravamen of what the appealing defendant is alleged to have done was to procure the individual defendants to sell the land and timber involved to it, at a price greatly in excess of that named in said receipt or contract of conveyance, and thereby prevent them from carrying out the contract with the plaintiff, to the damage of the plaintiff. If this was unlawful and wrongful, then the plaintiff made out a cause of action; but if it was not unlawful nor wrongful, however malicious it may have been the plaintiff failed to make out a cause of action. *Elvington v. Shingle Co.,* 191 N. C., 515, 132 S. E., 274. "'Malicious motive makes a bad act worse, but it cannot make that wrong which in its own essence is lawful. . . . As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart.' *Biggers v. Matthews,* 147 N. C., 299." *Holder v. Bank,* 208 N. C., 38, 178 S. E., 861.

In the complaint there is no allegation that the appealing defendant made any false or fraudulent representation to the plaintiff, and no allegation that the appealing defendant breached any contract with the plaintiff by the purchase of the land. Therefore it would seem that any loss that the plaintiff suffered by reason of the appealing defendant's acts in the premises was the result of lawful competition, and the law does not protect one against competition. Disturbance or loss resulting therefrom is *damnum absque injuria. Swain v. Johnson,* 151 N. C., 93, 65 S. E., 619.

"'An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it.' Cooley on Torts, 4th Ed., Vol. 2, p. 602, sec. 360. See, also, *Biggers v. Matthews, supra; Swain v. Johnson, supra; Elvington v. Shingle Co., supra.*" *Holder v. Bank, supra.* See, also, *Coleman v. Whisnant, ante,* 494.

It would seem, also, that the failure of the plaintiff to have his contract duly recorded in the public registry left the appealing defendant free to purchase without incurring any liability to plaintiff.

There was error in overruling the defendant's demurrer and for this reason the judgment below must be reversed. It is so ordered.

Reversed.

BARNHILL, J., concurring: I concur in the majority conclusion, but I cannot agree that a party may not become liable in damages for inducing, or conspiring with, another to breach a contract. The books are full of cases to the contrary. Anno. 84 A. L. R., 43, *et seq.*

The weight of authority supports the rule that an action will lie against a person who, otherwise than in a legitimate exercise of his own rights, procures the breach of a contract. Moreover, interference with contract relations includes not merely the procurement of the breach of contract, but all invasions of contract relations, including any act injuring or destroying persons or property which retards, makes more difficult, or prevents performance, or makes performance of less value to the promisee. 52 Am. Jur., 387.

The theory of the doctrine is that the right to perform a contract and to reap the profits resulting from such performance, and also the right to performance by the other party, are property rights which entitle each party to protection and to seek compensation by action in tort for an injury to such contract. 30 Am. Jur., 71-2; Anno. 84 A. L. R., 43, *et seq.; Angle v. Chicago St. P. M. & O. R. Co.,* 151 U. S., 55, 38 L. Ed., 1.

This rule has been approved and enforced in this State. *Haskins v. Royster,* 70 N. C., 601; *Jones v. Stanly,* 76 N. C., 355; *Morgan v. Smith,* 77 N. C., 37; *Holder v. Mfg. Co.,* 135 N. C., 392; *Williams v. Parsons,* 167 N. C., 529, 83 S. E., 914; *Elvington v. Shingle Co.,* 191 N. C., 515, 132 S. E., 274.

Even so I agree that the complaint fails to state a cause of action against the appealing defendant. In so doing I base my concurrence squarely on our registration law, and the legal effect thereof. Notice, however full, of contracts concerning, or affecting the title to, real property does not take the place of registration. Until the contract or conveyance is recorded third parties may deal with the property as if no contract existed. G. S., 47-18; *Glass v. Shoe Co.,* 212 N. C., 70, 192 S. E., 899; *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636; *Collins v. Davis,* 132 N. C., 106; *Case v. Arnold,* 215 N. C., 593, 2 S. E. (2d), 694; *Grimes v. Guion,* 220 N. C., 676, 18 S. E. (2d), 170; *Turner v. Glenn,* 220 N. C., 620, 18 S. E. (2d), 197; *Lanier v. Lumber Co.,* 177 N. C., 200, 98 S. E., 593; *McClure v. Crow,* 196 N. C., 657, 146 S. E., 713; *Smith v. Turnage-Winslow Co.,* 212 N. C., 310, 193 S. E., 685; *Patterson v. Bryant,* 216 N. C., 550, 5 S. E. (2d), 849.

The exercise of a legal right in a lawful manner cannot give rise to a cause of action.

"An act which is lawful in itself and which violates no right cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful."

Guethler v. Altman, 84 A. S. R., 313. "If an act be lawful—one that the party has a legal right to do—the fact that he may be actuated by an improper motive does not render it unlawful." *Bohn Man. Co. v. Hollis,* 40 A. S. R., 319; *Bell v. Danzer,* 187 N. C., 224, 121 S. E., 448; *Biggers v. Matthews,* 147 N. C., 299; *Swain v. Johnson,* 151 N. C., 93, 65 S. E., 619; *Elvington v. Shingle Co., supra; Holder v. Bank,* 208 N. C., 38, 178 S. E., 861.

The plaintiff was privileged to have his contract recorded in the public registry and thus protect his rights. Until he did so the appealing defendant was free to deal with the property as if there were no contract. In exercising this right, whatever the motive, he incurred no liability for wrongfully interfering with the contract of plaintiff, which as to him, in law, did not exist.

Having failed to file his contract for registration, the plaintiff must suffer the consequences.

It is true the excerpt from 2 Cooley on Torts (4th Ed.), 602, sec. 360, quoted in the majority opinion as a rule of general application is cited in a number of opinions of this Court. In each case, however, the Court was discussing contracts relating to real estate. It has never been adopted here as the general rule controlling all cases of alleged interference with the contract of another.

The law discussed in those opinions must be interpreted in each instance in the light of the framework of the facts of the particular case. *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10; *S. v. Crandall, ante,* 148; *S. v. Utley,* 223 N. C., 39, 25 S. E. (2d), 195; *S. v. Boyd,* 223 N. C., 79, 25 S. E. (2d), 456; *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466. When so interpreted it appears that the rule denying recovery for wrongfully inducing the breach of a contract concerning land is an exception to the general rule heretofore stated. The exception is bottomed upon the force and effect of our registration law.

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

SERVICE FIRE INSURANCE COMPANY OF NEW YORK v. HORTON MOTOR LINES, INC., AND ASSOCIATED TRANSPORT, INCORPORATED.

(Filed 21 November, 1945.)

1. Parties § 10—

As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full

and final determination and adjudication of all matters involved in the controversy. G. S., 1-73.

2. Same: Appeal and Error § 37b—

Ordinarily orders by the trial court making, in its discretion, new parties necessary to a conclusion of the controversy, are not reviewable on appeal.

3. Insurance §§ 50, 51—

When insured property is damaged or destroyed by the negligent act of another, the right of action accruing to the injured party is for an indivisible wrong and gives rise to a single indivisible cause of action, in which the whole claim must be adjudicated.

4. Same —

The cause of action for damages or destruction of insured property abides in the insured through whom the insurer, upon payment, must work out his rights. If, however, the insured no longer has an unsatisfied claim, over and above the amount of insurance received, then the claim of the insurer represents the entire unsettled claim and it, being subrogated to the rights of the insured, may maintain an action without the joinder of the owner.

5. Limitation of Actions §§ 1a, 15: Pleadings § 13½—

The plea of the statute of limitations is a plea in bar—a defense that may not be presented by demurrer. The lapse of time does not discharge a liability. It merely bars recovery.

APPEAL by defendants from *Johnson, Special Judge,* at May Term, 1945, of MECKLENBURG. Affirmed.

Civil action by insurer to recover damages suffered by its insured as a result of an automobile-truck collision.

There was a collision between the automobile of one R. B. Medlin and a truck of defendant Horton Motor Lines, which has since been absorbed by defendant Associated Transport, Inc. The damage to the automobile was $463.50. The plaintiff, having issued its collision insurance policy on the automobile of Medlin, paid him $413.50. It now seeks to recover the said amount under the doctrine of subrogation. Negligence on the part of defendants is duly alleged.

Defendants demurred to the complaint for that "the plaintiff, not having paid the entire loss, is subrogated only to the extent of the payment made by it. That the right of action for damages to said property is indivisible and the only right of action is in the owner of said property and that plaintiff has no right of action against these defendants."

When the cause came on for hearing on the demurrer the plaintiff, during argument thereon, moved the court for an order making Medlin, the insured owner of the automobile, a party to the action "in order that there may be a full and final determination and adjudication of all

matters involved in this controversy." The motion was allowed and an order was entered making said Medlin a party to the action and directing that summons issue. The court then overruled the demurrer and defendants excepted and appealed.

Helms & Mulliss for plaintiff, appellee.
Jones & Smathers for defendants, appellants.

BARNHILL, J. As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. G. S., 1-73, 163; *Insurance Co. v. Locker,* 214 N. C., 1, 197 S. E., 555, and cases cited; *Morgan v. Turnage Co., Inc.,* 213 N. C., 425, 196 S. E., 307; *Wilmington v. Board of Education,* 210 N. C., 197, 185 S. E., 767; *Goins v. Sargent,* 196 N. C., 478, 146 S. E., 131.

Ordinarily such orders are not reviewable upon appeal. *Wilmington v. Board of Education, supra; Rental Co. v. Justice,* 212 N. C., 523, 193 S. E., 817; *Morgan v. Turnage Co., Inc., supra; Bernard v. Shemwell,* 139 N. C., 446.

That the plaintiff alone, without the joinder of the owner, is not entitled to maintain the action does not alter the rule or limit the discretionary power of the judge.

In *Ins. Co. v. R. R.,* 179 N. C., 255, 102 S. E., 417, each of five insurance companies had paid a proportionate part of the loss. Each entered an action against the alleged tort-feasor without the joinder of the insured, the legal holder of the claim, to recover. The defendant demurred and the demurrer was sustained. Thereupon the plaintiffs moved to consolidate the actions and to make the insured owner a party plaintiff. The motion was allowed. The court affirmed, holding that the latter order, in effect, reversed the ruling on the demurrer. That case is controlling here. See also *Rental Co. v. Justice, supra,* and *Insurance Co. v. Locker, supra.*

When property upon which there is insurance is damaged or destroyed by the negligent action of another, the right of action accruing to the injured party is for an indivisible wrong—and a single wrong gives rise to a single indivisible cause of action. *Powell v. Water Co.,* 171 N. C., 290, 88 S. E., 426; 1 Am. Jur., 493. The whole claim must be adjudicated in one action. 1 Am. Jur., 481. (See note 19 for numerous citations.)

The cause of action abides in the insured through whom the insurer, upon payment of the insurance, must work out his rights. *Powell v. Water Co., supra.*

If, however, the insured no longer has an unsatisfied claim, over and above the amount of insurance received, then the claim of the insurer represents the entire unsettled claim and it, being subrogated to the rights of the insured, may maintain an action without the joinder of the owner. *Powell v. Water Co., supra; Cunningham v. R. R.,* 139 N. C., 427; *Ins. Co. v. R. R.,* 132 N. C., 75.

The complaint alleges that the value of the automobile before the collision was $600 and that immediately thereafter it was reasonably worth $136.50. This is tantamount to an allegation that Medlin sustained damages in the sum of $463.50. Plaintiff paid the owner $413.50. Does the complaint thus disclose affirmatively that the cause of action has been split and for that reason is not maintainable? We cannot so hold.

Did Medlin accept the payment from plaintiff in full settlement of his claim? If not, is his claim for the balance still outstanding and unsatisfied? The complaint gives no affirmative answer. Hence it is not subject to successful attack by demurrer. The alleged defects in the statement of the cause of action must be presented by answer.

More than three years have elapsed since the date of the injury. Even so the plea of the statute of limitations is a plea in bar—a defense that may not be presented by demurrer. *Motor Co. v. Credit Co.,* 219 N. C., 199, 13 S. E. (2d), 230; *Fochtman v. Greer,* 194 N. C., 674, 140 S. E., 442; *Smith v. Allen,* 181 N. C., 56, 106 S. E., 143; *Bryant v. Bryant,* 178 N. C., 77, 100 S. E., 178; *Logan v. Griffith,* 205 N. C., 580, 172 S. E., 348; *Pierce v. Faison,* 183 N. C., 177, 110 S. E., 857; *Mining Co. v. Lumber Co.,* 170 N. C., 273, 87 S. E., 40. Furthermore the lapse of time does not discharge the liability. It merely bars recovery.

Defendants resist the order making Medlin a party for fear that it will give life to plaintiff's action even though Medlin's claim is barred. Thus they are anticipating a question which has not yet arisen.

What the respective rights of the parties may be in the event it is made to appear at the hearing that Medlin's claim for damages, in part, is still outstanding and unsatisfied, but his right of action is barred by the statute of limitations, so that plaintiff is now the only party having an enforceable claim, must be reserved for decision at the trial below. The facts there developed will control the ruling of the court.

Neither do we decide the effect of the joinder of Medlin as a defendant rather than as a co-plaintiff.

The exception to the order making new parties is without merit. The order overruling the demurrer is

Affirmed.

IN THE MATTER OF: THE WILL OF MAGGIE NIPSON LOMAX, DECEASED.

(Filed 21 November, 1945.)

1. Wills § 23b: Evidence § 46—

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. Hence the nonexpert witness must state the facts gained from personal observation as a predicate for the expression of his opinion on such capacity. Failure to observe this rule is prejudicial error.

2. Evidence § 6—

The "greater weight of the evidence" relates to the credibility of evidence offered, and not to the quantity.

3. Same: Wills § 25—

In an action on the issue of *devisavit vel non*, where the court charged the jury that the rule, as to the greater weight of the evidence required of the propounders, means that they must offer more evidence, however slight it may be, than the caveators have offered, there is reversible error.

APPEAL by propounders from *Rousseau, J.*, at May Term, 1945, of BUNCOMBE.

Civil action, an issue of *devisavit vel non*.

When this case was called in the Superior Court for the third trial ordered on the last and second appeal, *ante*, 31, 33 S. E. (2d), 63, and to which this appeal relates, the caveators admitted that Maggie Nipson Lomax, the deceased, signed the instrument propounded for probate, and that same was properly witnessed and had been theretofore admitted to probate in common form before the clerk of the Superior Court of Buncombe County; but they attack the instrument for her mental incapacity and by reason of fraud and undue influence. The caveators thereupon assumed the burden to prove the grounds of attack, and in accordance therewith went forward with the introduction of testimony.

In the course of taking testimony, caveators asked each of numerous witnesses offered by them, a question, bearing upon the issue of mental capacity of Maggie Lomax to make a will on the date of the instrument probated in common form, substantially as follows:

"From your observation and conversation with Maggie Nipson Lomax, do you have an opinion satisfactory to yourself as to whether or not on January 8, 1941, she had sufficient mental capacity to know the nature and extent of her property, to know who were the natural objects of her bounty, and to realize the full force and effect of the disposition of her property by will?" This question being answered in the affirmative, the

witness was asked, "What is your opinion?" This question was generally the subject of objection and exception by propounders, and to some of the answers propounders objected and moved to strike same, upon denial of which exception was taken and is now assigned as error. For example, the witness Grace McLendon, a niece, answered: "I am of the opinion that Aunt Maggie did not have it to make a will in 1941, because she was not able to leave the house." Exception No. 5.

In other instances propounders objected and excepted to the question as to "What is your opinion?" and moved to strike the answer expressing opinion that "she did not have sufficient mental capacity to make a will," but do not bring forward as an assignment of error exception taken to the denial of the motions. In other instances objection was taken to the question only, and no motion was made to strike the answer expressing opinion that "she did not have sufficient mental capacity to make a will."

And when the witness Whit New was testifying, he gave as his opinion that she was "too weak to do anything." Whereupon, the court asked this question: "Did she have mentality sufficient to make a will?" Exception No. 19. The witness answered: "No, sir, she didn't have that mind."

These issues were submitted to the jury:

1. Was the paper writing offered for probate as the last will and testament of Maggie Nipson Lomax, deceased, signed and executed according to law?

2. If so, did Maggie Nipson Lomax on January 8, 1941, have sufficient mental capacity to make a will?

3. If so, was the execution of said paper writing procured by fraud or undue influence?

4. Is the paper writing and every part thereof, the last will and testament of Maggie Nipson Lomax?

And the court in charging the jury on these, after reading the first issue, and instructing the jury, upon admissions of caveators, to answer it "Yes," proceeded to charge in relation to the second and third issues. In the course of so doing, and after defining what is "greater weight of the evidence," the court continued with these instructions to which exceptions are taken and assigned for error: (1) "Where the burden is on the caveators to satisfy you by the greater weight of the evidence—that means they must offer more evidence, however slight it may be, than the propounders have offered.

(2) "The same rule applies to the propounder Quick and others where the court puts the burden on them by the greater weight of the evidence, and they would have to satisfy you by the greater weight of the evidence."

Thereupon the court instructed the jury as to the answer to be given to the fourth issue depending upon the answers made to the second and third issues; and further charged that if the jury answered the second issue "No," the third and fourth issues need not be answered.

The jury for verdict answered "Yes" to the first issue, as directed by the court, and "No" to the second issue. Thereupon, the court entered judgment that the paper writing offered for probate as the last will and testament of Maggie Nipson Lomax is not such will, that the same is null, void and of no effect, and is set aside and declared void, etc.

Propounders appeal therefrom to Supreme Court and assign error.

Carl W. Greene and Smathers & Meekins for propounder, appellant.

Geo. F. Meadows, W. W. Candler, and Cecil C. Jackson for caveators, appellees.

WINBORNE, J. The main points assigned as error by propounders on this appeal are substantially these:

1. In permitting lay witnesses to express opinion that Maggie Nipson Lomax did not have sufficient mental capacity to make a will.

2. In charging the jury as indicated in foregoing statement of the facts.

As to the first, this question was the question for decision, and decided on the first appeal in this case—224 N. C., 459, 31 S. E. (2d), 369, and for which the first new trial was then ordered. It is there said, in part, that "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. . . . Hence the witness must state the facts gained from personal observation as a predicate for the expression of his opinion. . . . 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 nonexpert witnesses were permitted to say that 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."

In the present case the errors are (1) in refusing to strike the answer of the lay witness expressing the opinion that Maggie Nipson Lomax did not have sufficient mental capacity to make a will, which was not responsive to the question asked, and (2) in overruling objection to the question asked by the court: "Did she have mentality sufficient to make a will?" by which a negative answer was elicited.

Now as to the charge: While the court had theretofore told the jury that "greater weight of the evidence" relates to the credibility of evidence offered, and not to the quantity of it, the portions to which excep-

tion is taken may tend to confusion in that, the explanation of what is meant by the clause "where the burden is on the caveators to satisfy you by the greater weight of evidence," requires that they offer "more evidence, however slight it may be, than the propounders have offered." To this caveators alone, upon adverse verdict, might have complained. But the court went further and instructed the jury that "the same rule applies to the propounder Quick and others, where the court puts the burden on them, etc." However, upon the admissions of caveators, and the fact that the answer to the fourth issue follows as a matter of law the answers to the second, or to the second and third issues, as the case may be, burden of proof of which was on caveators, there was no burden of proof on propounders. Therefore, the second portion of the instruction tended to and may have confused the jury.

In conclusion let it be noted that much of the argument in this Court by propounders is devoted to the probative value of testimony offered on the trial in Superior Court. This is a matter only for the jury. And though it becomes necessary on this appeal to order a new, and fourth trial, we may not, and do not express or even intimate an opinion on the facts. However, as there are rules by which the trial of such cases is to be governed, the losers, whoever they may be finally, must lose only when the record of the trial shows that, in all material aspects, it was conducted in accordance with the rules. Hence, for prejudicial error in calling the plays, so to speak, and for this reason alone, there must be a

New trial.

MRS. BEATRICE JOHNSON v. FUTRELL BROTHERS LUMBER COMPANY AND B. S. FUTRELL AND J. B. DUNLAP.

(Filed 21 November, 1945.)

1. Deeds § 24: Trespass §§ 1c, 2: Judgments § 22b—

Where plaintiff's complaint alleges that defendants were wrongfully attempting to cut timber on her land beyond the time limited in a consent decree in the proceeding under which defendants purchased, and that defendants wrongfully had caused injury to plaintiff's cultivated lands, and asking for a restraining order and damages based thereon, plaintiff's action may not be regarded as a collateral attack on the judgment in the special proceeding for sale of timber, but rather it is an action maintainable in the Superior Court, founded on the allegations of the complaint: and a demurrer to the complaint was properly overruled.

2. Judgments § 2—

The court has no power to change the terms of an original consent decree for the sale of lands in a special proceeding, without the consent of all parties.

3. Partition §§ 4c, 4d: Judgments § 29—

Commissioners, appointed by decree in a special proceeding to sell lands, can convey only in accordance with the terms of the order; and purchasers are chargeable with notice of the proceeding under which they purchase and are bound by the limitations upon their rights appearing on the face of the record.

APPEAL by plaintiff and defendants from *Dixon, Special Judge,* at February Term, 1945, of LEE.

Action to restrain cutting timber and for damages. Plaintiff alleged that she and her brother and sisters were tenants in common in certain land in Lee County, and that by actual partition she has been allotted therefrom a tract of 71 acres; that before the actual partition the tenants in common, by petition and answer, instituted proceeding to sell for division the timber on all the lands, including that subsequently allotted plaintiff, and that by consent 15 March, 1943, an order was entered by the clerk appointing commissioners to sell the timber at private sale for the best price obtainable, with "not over nine months within which to cut and remove same"; that on 9 June, 1943, the commissioners reported bid of $3,300 for the timber "allowing twelve months within which to cut and remove same," with usual rights of way, and on 21 June, 1943, an order was entered to that effect by the clerk, and on the same day deed was executed by the commissioners to defendants for the timber, allowing 12 months from 21 June, 1943, to cut and remove same. Plaintiff alleges she and the other tenants in common never agreed to the change of the time to cut the timber from 9 to 12 months, and that the attempt to do so was without their knowledge and consent; that the cutting of timber by defendant since 21 March, 1944, on her land was wrongful, and should be restrained, and that she is entitled to the timber cut but not removed since that date. Plaintiff further alleged damages for wrongful injury to her cultivated lands caused by defendants' operations.

Defendants in answer alleged that defendants offered $3,300 for the timber with 12 months time, and that this offer was accepted by the commissioners and confirmed by the clerk, allowing 12 months within which to cut and remove the timber; that the defendants relied upon the acceptance of their offer and the order of the clerk, and in good faith paid $3,300 for the timber conveyed in the commissioners' deed.

Defendants further allege that one of the commissioners had been attorney for plaintiff, and that with knowledge of all the facts she accepted her share of the proceeds of sale and ratified and affirmed the sale, and is now estopped to assert that the clerk or commissioners were without authority to make the sale on the terms offered, or to deny defendants' right to cut, or their title to the timber. Defendants set up a

counterclaim for damages for interference by plaintiff with their operations, and for a further defense defendants say if they be held to nine months time, having in good faith paid $3,300 for 12 months time, they should be entitled to recover a proportionate part of the purchase price.

On the hearing the defendants demurred *ore tenus* on the ground that the complaint did not state sufficient facts to constitute a cause of action. After the jury had been impaneled the court ruled that plaintiff's only remedy was by motion in the original special proceeding for sale of the timber, and, treating the complaint as a motion in the cause, remanded the cause to the clerk. The demurrer was overruled.

Both plaintiff and defendants appealed.

K. R. Hoyle for plaintiff.

Gavin, Jackson & Gavin and D. E. McIver for defendants.

PLAINTIFF'S APPEAL.

DEVIN, J. The plaintiff appealed from the order of the court below remanding the cause to the clerk and holding that her only remedy was by motion in a special proceeding heretofore determined. She contends that having instituted in the Superior Court an action cognizable in that court, the trial judge was in error in remandng the cause to the clerk, and in that view we concur.

The plaintiff alleged that in a special proceeding to which she was a party there was a consent decree entered that the timber on the land be sold for division, with provision in the order that the timber be cut and removed within nine months, and that this period expired 21 March, 1944. She alleged that defendants, the purchasers, were attemptng to cut timber on her land after that date. She sought to restrain them from so doing, and to establish her right to timber cut and not removed within defendants' term, and also to recover damages for injury to her cultivated land caused by defendants' operations. Upon this the defendants joined issue denying the decree was by consent, and alleging offer, acceptance and sale to them of the timber on twelve months time for $3,300, confirmed by the clerk. They allege estoppel *in pais,* set up counterclaim, and plea for recovery of a portion of purchase price.

Plaintiff having alleged that the defendants wrongfully were attempting to cut timber on her land beyond the time limited in the consent decree in the proceeding under which the defendants purchased, and that defendants wrongfully had caused injury to plaintiff's cultivated lands, plaintiff's action for restraining order and for damages based on these allegations would be maintainable in the Superior Court. Her action may not be regarded as a collateral attack on the judgment in the special

proceeding, but rather an action founded upon the consent decree therein for relief against defendants for wrongfully cutting her timber after defendants' rights had expired. *Hargrove v. Wilson,* 148 N. C., 439, 62 S. E., 520, cited by defendants, is not in point. That was an action in term time to set aside a decree and sale in partition on the ground that plaintiffs had not been made parties. Since it appeared on the face of the record that they had been made parties, it was held that a motion in the cause in that case, rather than an independent action was the proper remedy.

If the original order of sale was a consent decree, as alleged, the court had no power to change its terms without consent of all parties, except on the ground of fraud or mistake. *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209; *Jones v. Griggs,* 223 N. C., 279, 25 S. E. (2d), 862. And the commissioners could convey only in accord with the terms of the order. *Morehead v. Bennett,* 219 N. C., 747, 14 S. E. (2d), 785; *Trust Co. v. Refining Co.,* 208 N. C., 501, 181 S. E., 633; 31 Am. Jur., 433. The purchasers were chargeable with notice of the proceeding under which they purchased and were bound by the limitations upon their rights appearing on the face of the record. *Butler v. Winston,* 223 N. C., 421, 27 S. E. (2d), 124; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873; *Bladen County v. Breece,* 214 N. C., 544, 200 S. E., 13; *Whitted v. Fuquay,* 127 N. C., 68, 37 S. E., 141.

Upon the facts alleged by the plaintiff in her pleadings, we think there was error in remanding the cause to the clerk.

DEFENDANTS' APPEAL.

The defendants appealed from so much of the judgment below as overruled their demurrer *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Giving to the plaintiff's allegations that liberal construction enjoined by the statute and by the decisions of this Court (*Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874), we do not think the complaint can be overthrown by demurrer as insufficient to state a cause of action. The demurrer was properly overruled and the judgment in that respect is affirmed.

On plaintiff's appeal: Error and remanded.

On defendants' appeal: Affirmed.

RANTON H. JACKSON AND WIFE, MARY LOU JACKSON, v. W. A. POWELL AND WIFE, HATTIE JANE POWELL.

(Filed 21 November, 1945.)

1. Deeds § 13a—

When real estate is conveyed to any person, the conveyance shall be construed to be in fee simple unless such conveyance in plain words shows the grantor intended to convey an estate of less dignity. G. S., 39-1.

2. Deeds § 11: Wills § 31—

Where language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect.

3. Deeds § 13a: Wills § 33a—

When the words "bodily heirs" or "heirs of the body" are used in a deed or will, and are not so qualified as to indicate that they are used merely as a *descriptio personarum*, they are equivalent to the words "heirs general."

4. Deeds § 13b: Wills § 33b—

In a deed in form a fee simple, except that immediately after the description there appears the following—"The grantors hereof make this conveyance to the grantees named above during their natural lifetime then to their bodily heirs to the third generation," the phrase "to the third generation" is void, being within the rule against perpetuities, hence the grantees take a fee simple title to the property conveyed, under the rule in *Shelley's case.*

APPEAL by defendants from *Grady, Emergency Judge,* at September Term, 1945, of WAKE.

This is an action for specific performance.

The plaintiffs agreed to sell and the defendants agreed to buy a certain tract of land in Swift Creek Township, Wake County, N. C., containing eighty acres, more or less. Plaintiffs obligated themselves to deliver to the defendants a good and sufficient deed with full covenants and warranty, to the premises, upon the payment of $2,500.00 on or before 13 November, 1945. Thereafter defendants notified the plaintiffs that the title to the property is defective and that they would not accept their deed.

Plaintiffs hold title to said property as tenants by the entirety, under a deed from Dr. A. C. West and wife, Olive Pate West, dated 2 October, 1941, which instrument has been duly recorded in the office of the Register of Deeds for Wake County, N. C., and is in the usual form for a fee simple deed with full covenants and warranty, except that immediately following the description of the property there appears the following: "The grantors hereof make this conveyance to the grantees

named above during their natural lifetime then to their bodily heirs to the third generation."

Upon the foregoing facts the court held the rule in *Shelley's case* applies and that plaintiffs are the owners of a fee simple title to said lands and further that the attempted limitation to the bodily heirs of the grantees to the third generation violates the rule against perpetuities. Judgment was entered accordingly; defendants appeal and assign error.

Albert Doub for plaintiffs.
Wilson & Bickett for defendants.

DENNY, J. The operative provisions of the deed under consideration purport to convey to the plaintiffs a fee simple title to the premises described therein. When real estate is conveyed to any person, the conveyance shall be construed to be in fee simple unless such conveyance in plain words shows the grantor intended to convey an estate of less dignity. G. S., 39-1; *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79. Moreover, as stated in *Campbell v. Cronly,* 150 N. C., 457, 64 S. E., 213: "When language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect." Therefore, the provision inserted in plaintiffs' deed, to wit, "The grantors hereof make this conveyance to the grantees named above during their natural lifetime then to their bodily heirs to the third generation," is not repugnant to the general provisions of the deed. *Bagwell v. Hines,* 187 N. C., 690, 122 S. E., 659. We are not confronted with irreconcilable provisions and the necessity of deciding which is controlling, as was the case in *Wilkins v. Norman,* 139 N. C., 40, 51 S. E., 797; *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121, and in many other similar cases. When the words "bodily heirs" or "heirs of the body" are used in a deed or will, and are not so qualified as to indicate that they were used merely as a *descriptio personarum,* they are equivalent to the words "heirs general," *Cohoon v. Upton,* 174 N. C., 88, 93 S. E., 446, and *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503. The phrase, "to the third generation," which appears in the special provision, is void, being within the rule against perpetuities. Hence the legal meaning and effect of the above provision, under the rule in *Shelley's case,* gave the plaintiffs a fee simple title to the property referred to herein. *Bank v. Snow,* 221 N. C., 14, 18 S. E. (2d), 711; *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906; *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60; *Harrington v. Grimes,* 163 N. C., 76, 79 S. E., 301.

The judgment of the court below is

Affirmed.

LOWELL C. PERRY, JR., BY HIS NEXT FRIEND, MAE H. PERRY, v. L. L. HERRIN AND C. W. HERRIN, TRADING AND DOING BUSINESS AS HERRIN BROTHERS COAL & ICE CO.

(Filed 21 November, 1945.)

1. Negligence §§ 5, 19a—

In an action by plaintiff, a minor 17 years of age, through his next friend, to recover damages for injuries, alleged to be the result of negligence by defendants, where all of plaintiff's evidence tended to show that the ice-scoring machine, involved as the cause of the injuries, was of standard make and kind used by ice companies at the time of the accident, was properly installed in the usual and customary way, and had all the guards and safety devices usual and customary and in general use on standard machines of the kind at that time, the machine being in good order and, while operated by a boy only 15 years old, there was no evidence that he was an incompetent operator or that the manner of operating the machine was the proximate cause of the injuries, and the only evidence as to the accident being that plaintiff fell, without knowing how or why, into the machine and injured his arm, there was no error in sustaining a judgment as of nonsuit, G. S., 1-183, at the close of all plaintiff's evidence.

2. Negligence § 3—

There is no duty resting on defendant to warn the plaintiff of a dangerous condition, provided the dangerous condition is obvious.

BARNHILL and WINBORNE, JJ., concur in result.

APPEAL by plaintiff from *Phillips, J.*, at June Term, 1945, of MECKLENBURG.

The action is by a 17-year-old plaintiff, by his next friend, to recover damages for personal injuries proximately caused by the alleged negligence of the defendants in improperly locating an ice-scoring machine on a comparatively narrow platform, and failing to isolate said machine or to protect it in such a way as to properly guard the safety of persons using said platform, failing to enclose or safeguard or shield the saws in said machine, failing to keep and maintain the floor of said platform in a reasonably safe condition by allowing said floor to become and remain in wet, slick and slippery condition, and although this condition was known to defendants, allowing it to so remain in close access to children notwithstanding the dangerous condition thereof, leaving the operation of said machine to a young and inexperienced boy, and failing to equip said scoring machine with appliances which were in known, approved and general use. There was denial of liability by the defendants, and when plaintiff had introduced his evidence and rested his case the defendants moved for a judgment as in case of nonsuit (G. S., 1-183),

which motion was allowed, and from judgment predicated on such ruling the plaintiff appealed, assigning errors.

Ralph V. Kidd, John M. Robinson, and Hunter M. Jones for plaintiff, appellant.

Helms & Mulliss for defendants, appellees.

SCHENCK, J. On a careful consideration of the evidence we are of the opinion that no liability has been established against the defendants and that their motion for judgment as in case of nonsuit was properly allowed.

Since we are of the opinion that there is no evidence of negligence on the part of the defendants, we find it unnecessary to discuss the question suggested in the briefs as to whether the plaintiff was an invitee or a mere licensee, since in either event there was placed on the plaintiff the burden of showing at least some negligence on the part of the defendants.

According to the evidence, all of which was introduced by the plaintiff, the ice-scoring machine involved was of standard make and the kind customarily used by ice companies at the time of the alleged accident, 9 July, 1944, and was properly installed in the usual and customary way, and had the guards which were customarily manufactured and sold on such machines, and had all the guards and safety devices as were usual and customary; the guards over the saws, over the chains, and over the gears were all the guards and safety features that were in general use on standard machines on the date of the accident, and such machines were customarily operated on platforms, and this machine was in good working order. The only evidence as to how the accident actually occurred is the testimony of the plaintiff himself, who testified: "I must have lost my balance and fell. That's the only way I can figure it out. I don't know how I fell or anything. . . . Well I fell into the machine. My left arm got into the machine." While there is evidence that Marshall Herrin, who was operating the machine, was a boy about 15 or 16 years of age, there is no evidence that he was an incompetent operator or that the manner in which he operated the machine was not proper or was the proximate cause of the plaintiff's injury.

If any dangerous conditions existed in connection with the platform, or the ice-scoring machine, such conditions were obvious, and not latent, and the plaintiff was thoroughly familiar with the situation, and the defendants were not charged with the duty of warning the plaintiff thereof.

"Where a condition of premises is obvious to any ordinarily intelligent person, generally there is no duty on the part of the owner of the premises to warn of that condition. *Sterns v. Highland Hotel Co.*, 307 Mass.,

90, 29 N. E. (2d), 721. There is no duty resting on the defendant to warn the plaintiff of a dangerous condition provided the dangerous condition is obvious. *Mulkern v. Eastern S. S. Lines,* 307 Mass., 609, 29 N. E. (2d), 919." *Benton v. United Bank Building Company,* 223 N. C., 809, 28 S. E. (2d), 491.

The judgment of nonsuit is correct.

Affirmed.

BARNHILL and WINBORNE, JJ., concur in result.

STATE v. GEORGE HORNE.

(Filed 21 November, 1945.)

1. Homicide §§ 17, 27a—

In a criminal prosecution for murder, on defendant's exception to the overruling of his objection to State's witness being permitted to tell what he saw happen on the occasion of the homicide, "unless he fixes the date," and to the court's remark in so ruling, "he hasn't got to fix any specific date," since time is not of the essence of the offense and both the indictment and testimony of other witnesses fixed the date on which defendant struck the blow causing deceased's death, the exception is without merit, and the remark of the judge may not be regarded as harmful.

2. Homicide §§ 27d, 27e—

Where the court charged the jury, in a prosecution for murder based on evidence that defendant struck deceased causing death:—that, if the State satisfies you by the evidence and you find beyond a reasonable doubt that defendant struck deceased on his head with a blackjack and that the blow or blows thus inflicted proximately caused his death and the fatal blow was struck with malice, defendant would be guilty of murder in the second degree; and that, if you so find that defendant so struck deceased and such blow or blows proximately caused his death, and that defendant did not strike with malice but did so willfully and unlawfully, he would be guilty of manslaughter; and where the court further charged that if the jury did not find, beyond a reasonable doubt, that defendant so struck the deceased, or if they found that defendant did so strike deceased, but were not satisfied beyond a reasonable doubt that the blow proximately caused his death, then, in either case, they should acquit the defendant—there is no error, and proximate cause was correctly defined.

3. Homicide § 27a—

On objections to the court's charge, the State asking for a verdict of either murder in the second degree or manslaughter, as the evidence may warrant, where the court charged fully as to the law applicable to murder in the second degree and as to manslaughter, and then stated at length the

contentions of the State and the contentions of the accused, we find no error, considering the charge contextually, as it is not perceived wherein prejudice or unfairness properly could be attributed to the language of the judge.

APPEAL by defendant from *Phillips, J.,* at April Term, 1945, of GASTON. No error.

Indictment for murder. The solicitor announced that the State would only ask for verdict of guilty of murder in second degree or manslaughter as the evidence might warrant. The State offered evidence tending to show that on 9 March, 1945, deceased was in defendant's cafe, and that in consequence of some apparently inoffensive words which passed between them the defendant became enraged, ordered deceased out of the cafe, and struck him on the head twice with a blackjack, and kicked him as he staggered out and fell in the yard. Deceased was unarmed and had made no hostile demonstration toward defendant or anyone else. Deceased died shortly thereafter, and *post mortem* examination revealed that death was due to fractured skull and ruptured artery inside the skull. Defendant denied that he had struck deceased with a blackjack, or that he had ever seen him. There was verdict of guilty of murder in second degree, and from judgment imposing sentence defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

O. A. Warren and Ernest R. Warrant for defendant.

DEVIN, J. The defendant in his appeal from the judgment below brings forward three assignments of error which will be considered in order.

1. The defendant excepted to the overruling of his objection to a State's witness being permitted to tell what he saw happen on the occasion of the alleged homicide, "unless he fixes the date," and to the court's remark in so ruling, "he hasn't got to fix any specific date." Since time was not of the essence of the offense charged, and both the indictment and the testimony of other witnesses fixed 9 March, 1945, as the only date on which the deceased was struck by the defendant, the exception is without merit. *S. v. Moore,* 222 N. C., 356, 23 S. E. (2d), 31; *S. v. Baxley,* 223 N. C., 210, 25 S. E. (2d), 621. The remark of the judge in response to defendant's objection may not be regarded as harmful. *S. v. Cash,* 219 N. C., 818, 15 S. E. (2d), 277.

2. The defendant noted exception to the use of the following language by the court in charging the jury: "If you fail to find from the evidence and beyond a reasonable doubt that the defendant struck the

deceased at all, then he would not be guilty of any offense." The words quoted immediately followed instructions to the jury that if the State had satisfied them from the evidence beyond a reasonable doubt that the defendant struck the deceased on his head with a blackjack and that the blow or blows thus inflicted proximately caused his death, and the fatal blow was struck with malice, the defendant would be guilty of murder in the second degree; and that if the jury found beyond a reasonable doubt that defendant struck the deceased on his head with a blackjack, and such blow or blows proximately caused his death, but that defendant did not strike with malice but did so willfully and unlawfully, defendant would be guilty of manslaughter. Then followed the instruction in effect that if the jury did not find beyond a reasonable doubt that the defendant struck the deceased, he would not be guilty of any offense. The court was also careful to instruct the jury in substance if they found defendant did strike the deceased with a blackjack, but were not satisfied beyond a reasonable doubt that the blow proximately caused his death, they should acquit the defendant. Proximate cause was correctly defined.

The charge of the court in the matter to which exception was noted seems to have been free from error, and no harmful result to the defendant can be predicated thereon. The language here is different from that referred to in *S. v. Floyd,* 220 N. C., 530, 17 S. E. (2d), 658, and *S. v. Patterson,* 212 N. C., 659, 194 S. E., 283.

3. The defendant complained of the following statement by the judge in his charge to the jury: "Now, gentlemen of the jury, this is an important case for the State and an important case for the defendant. A man is dead and the State is saying and insisting that the defendant killed him unlawfully, the State asking at your hands a verdict of murder in the second degree and insisting that you should so find in this case." The record shows that immediately following the quoted words, the court stated that the State contended if the jury failed to find the defendant guilty of murder in the second degree, their verdict should be guilty of manslaughter; and the defendant's contention in the same connection was given as follows: "The defendant, on the other hand, insists and contends that you should fail to find from the evidence and beyond a reasonable doubt that he is guilty of murder in the second degree, and that likewise you should fail to find him guilty of manslaughter, but that you should fail to find from the evidence and beyond a reasonable doubt that he is guilty of either offense, murder in the second degree or manslaughter, and that your verdict should be that of not guilty."

These instructions were given at the close of the court's charge and after he had previously charged fully as to the law applicable to murder in the second degree and manslaughter and had stated at length the

contentions of the State and the defendant. Considering the charge contextually, we are unable to perceive wherein prejudice or unfairness properly could be attributed to the language used. *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469.

Assignments of error relating to the denial of defendant's motion for judgment of nonsuit have been abandoned. The only other assignments of error are formal.

After a careful examination of the record as to the rulings complained of, we conclude that in the trial below there was

No error.

AGNES CURRENCE FOX v. W. J. YARBOROUGH

and

ROSENA McKNIGHT, BY HER NEXT FRIEND, E. S. McKNIGHT, v. W. J. YARBOROUGH

and

ROSEDIA REID v. W. J. YARBOROUGH.

(Filed 21 November, 1945.)

1. Pleadings § 27½—

After complaint is filed and before answer is filed, the provisions of the statutes, G. S., 1-569, and G. S., 1-570, are available to defendant for adverse examination of plaintiff to procure information to file answer.

2. Bill of Discovery §§ 1, 2: Pleadings § 27½—

The procedure, under G. S., 1-569, and G. S., 1-570, may be permitted to the plaintiff to procure information to frame complaint, or after answer is filed plaintiff may cause the defendant to be examined to procure evidence. And by parity the defendant may have the plaintiff examined to procure information to file answer, or after the answer is filed to procure evidence for the trial.

3. Bill of Discovery § 3—

When a proper order is made for examination of the adverse party under G. S., 1-569, and G. S., 1-570, appeal therefrom is premature and, ordinarily, will be dismissed.

APPEAL by plaintiffs from *Sink, J.,* 10 September, 1945. From MECKLENBURG.

Three civil actions for recovery of damages resulting from alleged actionable negligence of defendant—it being stipulated that all relate to the same collision between two automobiles, and that the ruling in either on this appeal shall affect all.

After the plaintiffs, respectively, had filed their complaints, and defendant had obtained time to file answers, defendant filed a motion in each case before the clerk of Superior Court for an order for adverse examination of plaintiffs. The motion was supported by affidavit in pertinent part as follows: "That a summons has been issued and a complaint has been filed in this court in the above entitled action; that the defendant is without knowledge concerning certain of the facts alleged in the complaint and which it is necessary for the defendant to have in order properly to draft and file his answer herein; that such information is not otherwise available to the defendant; that the said information is material and necessary and this application is made in good faith and that an examinaton of the plaintiff in this action as provided by the statute is necessary in order that the defendant may file his answer and present his defense herein."

Thereupon, orders for adverse examination of plaintiffs, respectively, in "manner provided by the General Statutes of North Carolina" were entered on 18 June, 1945—notice of which was issued to and served upon plaintiffs, respectively, and their attorneys.

Whereupon plaintiffs, respectively, through their attorneys, demurred to, and moved to strike out said orders for adverse examination for that, "the plaintiffs have filed their complaints in the above entitled actions, and have fully set forth therein the facts which constitute said causes of action, and that the defendant has not filed answer in either of the above named cases, and therefore, as a matter of law, has no right to adversely examine either of the above named plaintiffs before filing answer."

When on 10 September, 1945, the cases came on for hearing upon demurrers to and motions to strike out the orders for adverse examination, and after hearing arguments of counsel for plaintiffs and for defendant, the court entered order overruling the demurrer and denying motions to strike.

Plaintiffs, respectively, appeal therefrom to the Supreme Court and assign error.

Henry L. Strickland and John G. Carpenter for plaintiffs, appellants.
McDougle & Ervin for defendant, appellee.

WINBORNE, J. Taking note of the fact that plaintiffs do not challenge the sufficiency of the showing made by defendant in support of his motions upon which the orders in question are based, decision on this appeal is restricted to this question: After complaint is filed, and before answer is filed, are the provisions of the statute, G. S., 1-569, and G. S.,

1-570, available to defendant for adverse examination of plaintiffs to procure information to file answer?

The question is answered by the statute, and in interpretative decisions of this Court.

The statute provides that a party to an action may be examined as a witness by the adverse party. The decisions declaring the right of a plaintiff to adversely examine a defendant for the purpose of obtaining information upon which to file complaint are numerous. And this Court speaking to the subject has said that the statute gives the right alike to plaintiff and defendant. *Jones v. Guano Co.,* 180 N. C., 319, 104 S. E., 653, and *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 403.

While in *Jones v. Guano Co., supra,* the right was denied to defendant upon other grounds, *Clark, C. J.,* speaking to the subject, declares: "This proceeding may be permitted to the plaintiff to procure information to frame complaint, *Holt v. Finishing Co.,* 116 N. C., 480, or after answer is filed the plaintiff may cause the defendant to be examined to procure evidence. *Helms v. Green,* 105 N. C., 251; *Vann v. Lawrence,* 111 N. C., 32. And by parity the defendant may have the plaintiff examined to procure information to file answer, or after the answer is filed to procure evidence for the trial." To like effect are expressions by *Stacy, C. J.,* in *Chesson v. Bank, supra.*

Hence in the present case the motion was properly made and allowed.

However, when a proper order for such examination has been made, appeal therefrom is premature and ordinarily will be dismissed *Ward v. Martin,* 175 N. C., 287, 95 S. E., 621; *Monroe v. Holder,* 182 N. C., 79, 108 S. E., 359; *Abbitt v. Gregory,* 196 N. C., 9, 144 S. E., 297; *Johnson v. Mills Co.,* 196 N. C., 93, 144 S. E., 534.

Nonetheless, we have in our discretion elected to consider the appeal on its merit, *Ward v. Martin, supra.*

Affirmed.

STATE v. C. E. SPENCER.

(Filed 21 November, 1945.)

Trial § 32—

The statute, G. S., 1-181, requires counsel, praying for instructions to the jury, to "put their requests in writing entitled of the cause, and to sign them; otherwise the judge may disregard them." It is within the sound discretion of the trial judge to give or to refuse prayer for instruction that is not in writing and signed as required by the statute.

APPEAL by defendant from *Phillips, J.,* at April Term, 1945, of GASTON.

STATE *v.* SPENCER.

Criminal prosecution upon a warrant issued out of the Municipal Court of the city of Gastonia, North Carolina, charging that on or about 27 October, 1944, at and in the county of Gaston, North Carolina, defendant, C. E. Spencer, "did willfully, maliciously and unlawfully abandon his wife, Mrs. C. E. Spencer, without providing adequate support for such wife, against the statute in such cases made and provided, . . ." etc., tried before judge and jury in Superior Court on appeal thereto by defendant from judgment on verdict of guilty entered in said municipal court.

The State offered evidence tending to prove the offense charged. A recitation of it will serve no useful purpose. Defendant offered no evidence. There was no motion to nonsuit.

Verdict: Guilty as charged in warrant.

Judgment: Imprisonment for designated term—suspended upon express conditions.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Wade H. Sanders for defendant, appellant.

WINBORNE, J. When on the trial in Superior Court the judge presiding had concluded, or was about to conclude his charge to the jury, counsel for defendant orally requested certain special instructions:

First. "Would your Honor elaborate a little more upon the fact that if a man is incapacitated for work, what his duty would be in that respect—about how much he can do? A man is not guilty of failing to provide his wife with support if it is impossible for him to support her."

To this the court stated: "I told the jury very plainly that he was only required to furnish that support that he was able to from his estate and from his earning capacity, and I tell you that again. In other words, if he can't provide support, if he is physically unable or has no estate from which he can provide support, the law says that he would not be guilty of failure to support."

Second. "Would your Honor tell the jury to take into consideration that she (the prosecutrix) has the bulk of defendant's earning property?"

To this the court replied: "That is a question for the jury."

Defendant assigns the foregoing responses to the oral requests as error for that he contends that, as to the first, the court failed to state the law and evidence on that phase of the case, and, as to the second, the court failed to charge as requested.

The exceptions are without merit for these reasons: The pertinent statute, G. S., 1-181, formerly Revisal, 538, and C. S., 565, requires

counsel praying of the judge instructions to the jury to "put their requests in writing entitled of the cause, and to sign them; otherwise, the judge may disregard them." Moreover, it is within the sound discretion of the trial judge to give or to refuse a prayer for instruction that is not in writing and signed by the attorney tendering it as required by the statute. G. S., 1-181. See *Bank v. Smith,* 186 N. C., 635, 120 S. E., 215; also *Pritchett v. R. R.,* 157 N. C., 88, 72 S. E., 828; and *Posey v. Patton,* 109 N. C., 455, 14 S. E., 64.

Furthermore, the response to the first request appears to be in compliance with it. And the response to the second is not an incorrect statement of the law.

Careful consideration of the record in relation to other assignments of error fails to show that they are well founded.

Hence, in the judgment below we find

No error.

STATE v. JAMES H. VANDERLIP.

(Filed 21 November, 1945.)

Bastards § 3—

Willfulness of the neglect or refusal to provide adequate means of support of an illegitimate child, G. S., 49-2, is one of the essential elements of the offense, and must be charged in the warrant; and a motion in arrest of judgment should be allowed on failure of the warrant to so charge.

APPEAL by defendant from *Dixon, Special Judge,* at Special March Term, 1945, of MECKLENBURG.

It was evidently intended to charge the defendant with the violation of G. S., 49-2 (ch. 228, Public Laws 1933, as amended), relating to the support of illegitimate children. The warrant upon which the defendant was tried charged that he "did willfully, maliciously, unlawfully and feloniously become the father of an illegitimate child by the name of James H. Forbes, who was born on the 11th day of August, 1943, and has failed and refused to provide adequate means of support for the said child." The verdict upon the issues submitted was against the defendant and judgment of imprisonment predicated thereon was pronounced, and defendant moved in arrest of judgment, which motion was denied and exception noted. The defendant appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Henry L. Strickland for defendant.

PER CURIAM. The statute under which the defendant was tried provides that "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided." Willfulness of the neglect or refusal to provide adequate means of support of the illegitimate child is one of the essential elements of the offense, and must be charged in the warrant. *S. v. Cook,* 207 N. C., 261, 176 S. E., 757; *S. v. McLamb,* 214 N. C., 322, 199 S. E., 81.

The motion in arrest of judgment should have been allowed, *S. v. McLamb, supra; S. v. Tarlton,* 208 N. C., 734, 182 S. E., 81; *S. v. Clarke,* 220 N. C., 392, 17 S. E. (2d), 468, and therefore the judgment below is

Reversed.

CHARLES A. CANNON, TRUSTEE, ET AL., v. EUGENE T. CANNON ET AL.

(Filed 28 November, 1945.)

1. Wills §§ 34, 46: Trusts § 8h—

Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will.

2. Wills § 31—

The intention of a testator is his will. This intention is to be gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent. In interpreting the different provisions of a will, the courts are not confined to the literal meaning of a single phrase. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention.

3. Same—

In ascertaining testator's intention, the will in its entirety must be brought into focus, and it is competent to consider the conditions surrounding the testator, how he was circumstanced, his relationship to the objects of his bounty, so as nearly as possible to get his viewpoint at the time the will was executed.

4. Same—

Where the intention of the maker of a will is clearly and consistently expressed, there is no occasion for any interpretation. The will is to be given effect according to its obvious intent. Construction belongs only to the domain of ambiguity, or where different impressions are reasonably made on different minds.

5. Wills §§ 33e, 34—

Where a testatrix, owning at the time large properties in her own name and also a considerable estate held by a trust company under a revocable trust agreement, executed a codicil to her will leaving her residuary estate, largely of valuable securities, to trustees, who were required to divide the same into five shares of equal value and pay from each share an annuity of 4½ per cent, making up the 4½ per cent from the principal of each share when income should prove insufficient, to each of her five children who should survive her, and, should any child not survive testatrix, the share of such deceased child, and upon the death of any other child such child or children's shares, to be again divided, with similar annuities to the children of the deceased child or children, and providing also that the said percentage is to be 4½ per cent on the principal of each share, computed at the market value thereof on the date of the setting aside of such shares, the testatrix at the same time making a similar dispositive change in the trust agreement referred to above, she clearly intended that each of the first annuities should be paid from and after the date of her death and that the principal amount of each share of the first beneficiaries should be set aside and valued as of the same date.

6. Wills § 31—

It is a cardinal principle in the interpretation of wills that the predominant and controlling purpose of the testator must prevail, when ascertained from the general provisions of the will, over particular and apparently inconsistent expressions to which, unexplained, a technical force is given.

7. Same—

The object of all construction is to arrive at the intent and purpose as expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose without excessive regard for minor inaccuracies and inconsistencies. These latter variations are to be reconciled, if reasonably accomplishable within the limits which the law prescribes, otherwise they must yield to the general purpose as expressed in the writing.

8. Wills § 33d—

In a suit to construe a will, which committed to trustees the duty to divide the principal of the residuary estate into five equal shares and to value each share, in the absence of an allegation of a refusal to act, abuse of discretion, or bad faith on the part of such trustees, the court is without power to make such division or to value the resulting shares. Equity will instruct the trustees to proceed.

SEAWELL, J., dissenting.

BARNHILL, J., concurs in dissenting opinion.

DEVIN, J., is of opinion that the language of Section G requires computing marketing value of shares at date they are set apart.

APPEALS by plaintiffs and defendants from *Bobbitt, J.*, at August Term, 1944, and *Gwyn, J.*, at April Term, 1945, of CABARRUS.

CANNON *v.* CANNON.

Civil action by Trustees under the will of Mary Ella Cannon, deceased, for construction of will and for advice in the administration of testamentary trust.

The testatrix died 4 May, 1938. Her will consists of the original and two codicils. It has been duly probated in Cabarrus County. After a number of specific bequests, the residue of the estate is left in trust, with instructions for its management as contained in the second codicil. An alleged ambiguity in these instructions has given rise to the present proceeding.

The testatrix named her son, Charles A. Cannon, her son-in-law, David H. Blair, and the Central Hanover Bank & Trust Company trustees of her residuary estate. On the advice of counsel, the corporate trustee decided not to qualify. The individual trustees duly qualified on 16 September, 1941, and received from themselves as executors the residuary trust estate.

The second codicil to the will was executed and published on 21 May, 1937. On this same day Mrs. Cannon amended a "New York Trust Agreement," under which certain properties were held by a trust company in New York, and so far as the dispositive provisions of the two instruments are concerned, *i.e.*, the New York Trust Agreement and the Will, they are exactly alike and the beneficiaries are the same.

On 14 March, 1939, the trustees under the "New York Trust Agreement" instituted an action in New York to have certain matters judicially determined. It was thought that such determination might be binding here; hence, the plea of *res judicata* and the first appeal, reported in 223 N. C., 664, 28 S. E. (2d), 240.

The pertinent provisions of the second codicil follow:

"Fifth: All the rest, residue and remainder of my property and estate of whatsoever kind and wheresoever situate, I give, devise and bequeath to my Trustees, hereinafter named, In Trust, Nevertheless, to hold, manage, control, invest and reinvest the same and to divide the principal thereof into five (5) equal shares and to dispose of each such equal share as follows:

"(A) My Trustees shall set apart one (1) such equal share and, in case my son, Eugene T. Cannon, shall survive me, shall pay over to the said Eugene T. Cannon from the said equal share an annuity of four and one-half per centum (4½%) per annum in each and every year during his life. Said annuity shall be paid out of the income of the said share of the trust estate to the extent that the income shall suffice therefor and in case there shall be any deficiency in income in any year said deficiency shall be made up out of the principal. In case in any year there shall be a surplus of income over and above said annuity, such income shall be added to the principal of the said share. It is my inten-

tion that said annuity shall be payable without reference to the existence or absence of income.

"Upon the death of my said son, Eugene T. Cannon, or in case he shall die before me then upon my death, the said equal share shall be divided into four (4) equal parts and each such equal part shall be disposed of as follows:

"(i) My trustees shall set apart one (1) such equal part and shall pay over to William C. Cannon, my grandchild and a son of my son, Charles A. Cannon, from the said equal part an annuity of four and one-half per centum (4½%) per annum in each and every year during the life of said William C. Cannon. Said annuity shall be paid out of the income of the said part of the trust estate to the extent that the income shall suffice therefor. In case there shall be any deficiency in income in any year, said deficiency shall be made up out of the principal. In case in any year there shall be a surplus of income over and above said annuity, such income shall be added to the principal of the said part. It is my intention that said annuity shall be payable without reference to the existence or absence of income."

Similar provisions are made in respect of the remaining four equal shares, to be held in trust, one each for the daughters of the testatrix: (B) Adelaide Cannon Blair; (C) Margaret Cannon Howell; (D) Mary Cannon Lucke; (E) Laura Cannon Mattes. The last named daughter has no children, except adopted children who are excluded by the will. Her interest, therefore, will cease at her death, and the share of which she is the first beneficiary will go to the issue of her brother and sisters.

In all, nineteen individuals are mentioned in this item: five first beneficiaries, children of the testatrix, and fourteen second beneficiaries, grandchildren of the testatrix, who, if they all live, will be entitled to receive an annuity of 4½% of the value of a share or part under the terms of the will.

Then comes paragraph (G) in this item which has resulted in variant contentions:

"(G) Whenever an annuity of four and one-half per centum (4½%) of a share or part of the trust estate is granted under the terms and provisions of this my Will, the said percentage shall be that percentage (*i.e.* 4½%) of the principal of the share or part set aside in trust, computed at the market value thereof at the date of the setting aside of said share or part."

At the August Term, 1944, Bobbitt, J., presiding, it was adjudged:

"1. That the annuities to the first annuitants (children of Mary Ella Cannon) provided for in the fifth item of the second codicil to Mary Ella Cannon's Will accrued, and are payable, as of the death of Mary Ella Cannon, to wit: May 4, 1938.

"2. That, for the purpose of ascertaining the amount of each of said annuities, the market value of the principal of each of the trust shares set apart by the Trustees shall be determined as of the date of the setting apart of said shares by the said Trustees, to wit: September 16, 1941."

For the purpose of ascertaining the market value of each of the first five shares "as of September 16, 1941," over objection of all parties, the matter was referred to Hon. S. J. Ervin, Jr., to find the facts and report the same, together with his conclusions of law, to the court.

The plaintiffs and the defendants, other than Laura Cannon Mattes, noted an exception to this judgment.

As the estate consists largely of corporate stocks, principally stock in the Cannon Mills Company, the Referee applied the "Blockage Rule" in arriving at the market value of the Cannon Mills stock. Under this rule, the stock of the Cannon Mills Company was valued at $33⅝ per share, whereas it was then actually selling on the market at $36⅛. The reason given by the Referee and adopted by the court below was that the "prices at which small blocks of stock in the Cannon Mills Company were sold on the New York Stock Exchange on or about September 16, 1941, did not accurately reflect the market values of the large blocks of such stock held by the trust and allocated to the five trust shares on September 16, 1941."

With some slight modifications the referee's report was approved at the April Term, 1945, Gwyn, J., presiding.

Exceptions to this judgment were noted by the plaintiffs and by the following defendants: E. T. Cannon, Adelaide Cannon Blair, Jay B. Douglass, Adelaide Douglass Whitley, David J. Blair, Jr., William C. Cannon, Mariam Cannon Hayes, Charles A. Cannon, Jr., Mary Ruth Cannon, Margaret Cannon Howell, Mary Cannon Hill, Charles G. Hill, Susan Hill Walker, Jane Hill Simpson, Ernest R. Alexander, guardian *ad litem* for the minor defendants, Norma Louise Cannon *et al.*, and J. Carlyle Rutledge, guardian *ad litem* for the unborn issue of Adelaide Cannon Blair *et al.*, and Laura Cannon Mattes.

Several appeals are here prosecuted from both judgments, the plaintiffs and the named defendants duly preserving their respective exceptions and assignments of error.

W. H. Beckerdite for Charles A. Cannon, Trustee, and Adelaide Cannon Blair, Successor Trustee, appellants-appellees.

E. T. Bost, Jr., for E. T. Cannon, William C. Cannon, Mariam Cannon Hayes, Charles A. Cannon, Jr., and Mary Ruth Cannon, appellants-appellees.

Ratcliffe, Vaughn, Hudson & Ferrell for Margaret Cannon Howell, Mary Cannon Hill, Charles G. Hill, Susan Hill Walker, and Jane Hill Simpson, appellants-appellees.

J. G. Korner, Jr., for Adelaide Cannon Blair, Jay B. Douglass, Adelaide Douglass Whitley, and David H. Blair, Jr., appellants-appellees.

E. R. Alexander, Guardian ad litem for the minor defendants, Norma Louise Cannon, et al., appellants-appellees.

J. Carlyle Rutledge, Guardian ad litem for the unborn issue of Adelaide Cannon Blair, et al., appellants-appellees.

John M. Robinson and Hunter M. Jones for Laura Cannon Mattes, appellant, appellee.

STACY, C. J. This is the same case that was before us at the Fall Term, 1943, on demurrers to pleas of estoppel or *res judicata,* reported in 223 N. C., 664, 28 S. E. (2d), 240, to which reference may be had for further statement of the facts.

The will is now presented for construction in a number of particulars.

I. THE JUDGMENT AT AUGUST TERM, 1944.

Two questions were specifically decided at the August Term, 1944, Cabarrus Superior Court: first, that the annuities to the first annuitants vested or accrued at the date of the death of the testatrix, and became payable from and after that date; and, second, that the market value of the principal of each of the first trust shares is to be determined as of the date of its setting aside by the Trustees, to wit, 16 September, 1941.

It is conceded on all sides that the trial court correctly decided the accrual date of the first annuities to be the date of the death of the testatrix, and that they became payable from and after that date. Indeed, such accords with the general current of authority on the subject. Anno. 70 A. L. R., 636. The following appears in the Restatement of the Law of Trusts, page 692:

"Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will. The rule here stated is applicable to trusts created by a specific devise or legacy, by a general pecuniary legacy, and by a residuary devise or bequest; and it is immaterial whether the same person is designated as executor and trustee."

The case of *Trust Co. v. Jones,* 210 N. C., 339, 186 S. E., 335, is in support of this statement. The accrual date of the first annuities, then, may be taken as "fixed and determined" so far as the present action is concerned. See *Kinney v. Uglow,* 163 Ore., 539, 98 P. (2d), 1006.

In respect of the correctness of the second question decided at the August Term, 1944, *i.e.,* that the market value of the principal of each of the first trust shares should be determined as of 16 September, 1941, the parties are in sharp disagreement. It is therefore brought up for review. The answer involves the construction of several provisions of the will.

It is to the financial interest of the children of four of the first annuitants to have the market value of the principal of their trust shares determined at the accrual date, to wit, the date of the death of the testatrix. The children of Laura Cannon Mattes, however, being adopted children, are excluded by the will, and it is to her pecuniary interest to have the market value of the principal of her trust share determined as of 16 September, 1941. It is agreed that the market value of the principal of the first trust shares should be determined at one or the other of these dates.

The solution of the problem is to be found in the expressed purpose of the testatrix. The intention of the testatrix is her will. This intention is to be gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent. In interpreting the different provisions of a will, the courts are not confined to the literal meaning of a single phrase. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention. *Bank v. Corl, ante,* 96; *Trust Co. v. Miller,* 223 N. C., 1, 25 S. E. (2d), 177; *Williams v. Rand,* 223 N. C., 734, 28 S. E. (2d), 247. In ascertaining such intention, the will in its entirety must be brought into focus, and it is competent to consider the conditions surrounding the testatrix, how she was circumstanced, her relationship to the objects of her bounty, so as nearly as possible to get her viewpoint at the time the will was executed. *HeHyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Herring v. Williams,* 153 N. C., 231, 69 S. E., 140.

It follows, of course, that where the intention of the maker of the will is clearly and consistently expressed, there is no occasion for any interpretation. *McCallum v. McCallum,* 167 N. C., 310, 83 S. E., 250. The will is to be given effect according to its obvious intent. *Brock v. Porter,* 220 N. C., 28, 16 S. E. (2d), 410. Construction belongs only to the domain of ambiguity, or where different impressions are reasonably made on different minds. *Walton v. Melton,* 184 Va., 111, 34 S. E. (2d), 129. The writing would not be doubtful if it had the same meaning to everyone. *Krites v. Plott,* 222 N. C., 679, 24 S. E. (2d), 531.

It is the function of construction to ascertain the will of the testatrix. This accomplished, then follows the mandate: "Thy will be done." *McCallum v. McCallum, supra.*

At the time of the execution of the second codicil, the testatrix had large properties in her own name, and she also had a considerable estate held by a trust company in New York under a revocable trust agreement. She amended this trust agreement and executed the second codicil to her will at the same time, making similar dispositive changes in both. The New York court held that under the amendment to this trust agreement the first trust shares vested, both in interest and in title, at the date of the death of the donor and that the principal amount of each of the respective shares should be valued as of that date, 4 May, 1938. See *Cannon v. Cannon, supra.*

The controlling provisions in the Fifth Item of the second codicil are these:

"All the rest . . . of my property . . . I give . . . to my Trustees . . . in trust . . . to hold, manage, control, invest and reinvest the same and to divide the principal thereof into five equal shares and to dispose of each such equal share as follows:

"(A) My Trustees shall set apart one (1) such equal share and, in case my son Eugene T. Cannon shall survive me, shall pay over . . . from the said equal share, an annuity of four and one-half per centum, etc.

"Upon the death of my said son, Eugene T. Cannon, or in case he shall die before me then upon my death, the said equal share shall be divided into four (4) equal parts," etc.

Exactly similar expressions are repeated in clauses "(B)," "(C)" and "(D)," the only differences being in the names of the beneficiaries and the number of second divisions.

Then comes the instruction in paragraph "(G)," to the effect that "whenever" an annuity of four and one-half per centum of a share or part of the trust estate "is granted" under the terms of the will, the said percentage shall be that percentage of the principal of the share or part "set aside in trust, computed at the market value thereof at the date of the setting aside of said share or part."

It will be noted that the time at which the testatrix "granted" the annuities to each of the first five annuitants was at the date of her death. She says in respect of each of these that in case he or she "shall survive me," my trustees shall pay over to him or her "from the said equal share" an annuity for life of four and one-half *per centum.* Hence it was contemplated that the principal of the share should be "set aside in trust" upon the vesting in right of the annuity, for it is provided that the "said annuity shall be paid," not out of the general residuary estate, but "out of the income of the said share of the trust estate to the extent that the income shall suffice therefor, and in case there shall be any deficiency in

income in any year, said deficiency shall be made up out of the principal."

Similar provisions are made in respect of the second beneficiaries. The testatrix says that "upon the death" of my said son or daughter as the case may be, or in case he or she shall die before me, "then upon my death," the said equal share shall be divided into equal parts, and a lifetime annuity is given to each of her named second beneficiaries, to be paid, not out of the general residuary estate, but "out of the income of the said part of the trust estate to the extent that the income shall suffice therefor. In case there shall be any deficiency in income in any year, said deficiency shall be made up out of the principal."

It is a cardinal principle in the interpretation of wills, that "the predominant and controlling purpose of the testator must prevail, when ascertained from the general provisions of the will, over particular and apparently inconsistent expressions to which, unexplained, a technical force is given." *Raines v. Osborne,* 184 N. C., 599, 114 S. E., 849. The central consideration is the general purpose of the will. *Holland v. Smith,* 224 N. C., 255, 29 S. E. (2d), 888. The object of all construction is to arrive at the intent and purpose as expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose without excessive regard for minor inaccuracies or inconsistencies. *Krites v. Plott, supra.* These latter variations are to be reconciled, if reasonably accomplishable within the limits which the law prescribes, otherwise they must yield to the general purpose as expressed in the writing. *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892.

If we look at the second codicil from the viewpoint of the testatrix at the time of its execution, as we are enjoined to do, the above construction harmonizes all of its provisions, and leaves no possible clashes or contradictions which might thereafter arise. Such a result is supposed to have been in the mind of the testatrix when the codicil was published. Her dominant purpose, as repeatedly expressed in the will, also lends support to the construction. *Raines v. Osborne, supra.* We think the testatrix intended that the first annuities granted under the provisions of her will should vest in right as of the date of her death, and that the principal of each first equal share should be "set aside in trust" and valued as of the same date.

In support of the 16 September, 1941, date for the determination of the first trust shares, it is suggested that the division is to be made by the Trustees in their capacity as such, and that this could not be done prior to the time the residuary estate came into their hands. To meet this position, it is pointed out that the Trustees were also instructed to pay an annuity of four and one-half *per centum* to each of the first five

annuitants, "from the said equal share," paying it first out of the income from said share, and in case of any deficiency in income, then out of the principal of the share, it being the intention of the testatrix that the annuity should be paid "without reference to the existence or absence of income" arising from the individual share. The testatrix clearly intended that each of these annuities should be paid from and after the date of her death, as the only condition annexed thereto was that the annuitant "shall survive me." By the same token that the Trustees were instructed to make payments beginning with a date prior to the time the residuary estate came into their hands, they were likewise directed to compute the value of the trust shares as of the same date, *i.e.,* when the shares were to be "set aside in trust" under the terms of the will and the annuities paid therefrom, which, as stated above, was the date of the death of the testatrix. The dominant purpose of the will and the rule of harmonization are in conformity with this conclusion. *Allen v. Cameron,* 181 N. C., 120, 106 S. E., 484; *Ralston v. Telfair,* 17 N. C., 255.

II. THE VALUATION OF THE TRUST SHARES BY THE COURT:

Prior to the order of reference, for ascertainment of the value of the first trust shares, two of the initial beneficiaries, Margaret Cannon Howell and Adelaide Cannon Blair, and their children who are second beneficiaries, demurred to the pleadings in the cause on the ground that no facts are stated therein which would authorize the court to fix the value of the trust shares for the purpose of computing the annuities payable to the first beneficiaries. The demurrers were overruled, and exceptions were duly entered.

It is the contention of the demurrants that the division of the principal of the residuary estate into five equal shares, as well as the valuation of such shares, is committed in the first instance to the Trustees, and that in the absence of an allegation of a refusal to act, abuse of discretion, or bad faith, the court is without authority in the premises. This position would seem to be sound. *Carter v. Young,* 193 N. C., 678, 137 S. E., 875. It is true the Trustees have asked the court to fix the value of the trust shares, as well as the time for their valuation, and some of the beneficiaries have joined in this request. But the testatrix has reposed this confidence in her Trustees. She knew their respective interests in the matter and deliberately selected them for the purpose. Equity will instruct the Trustees how to proceed, but there is no occasion for the court to administer the trust. *Finley v. Finley,* 201 N. C., 1, 158 S. E., 549; *Reid v. Alexander,* 170 N. C., 303, 87 S. E., 125. The demurrers were well interposed.

III. THE JUDGMENT AT THE APRIL TERM, 1945:

The disposition heretofore made of the exceptions addressed to the judgment entered at the August Term, 1944, renders it unnecessary to consider the exceptions addressed to the judgment entered at the April Term, 1945, further than to say this judgment will be vacated, the referee's report stricken out, and the cause remanded for further proceedings and directions to the Trustees as may be appropriate in the light of the determinations here made.

Error and remanded.

SEAWELL, J., dissenting: First, as to the form of the main opinion. I do not see that there is any appeal before us from the judgment rendered by Bobbitt, J., at August Term, 1944, or that, as a matter of law, there could be. At that term an unappealable interlocutory order referring the finding of the market value of the shares under the judgment of the court was made by Judge Bobbitt, to which the parties made exception, thus preserving the right of review upon the determination of the cause. This review is properly had under the appeal from Judge Gwyn now under consideration, and not upon any appeal from any judgment of Judge Bobbitt. The exceptions made do not preserve the right of review in so far as that judgment as appealable, and in this respect no appeal was made. See pp. 70 to 73 of the record, and the entries on p. 73.

I disagree with the majority opinion in its holding that the securities or other property upon which the annuities set up in Mrs. Cannon's will are to be computed should be valued as of the date of her death. I may assign three reasons for my dissent: First, because Mrs. Cannon, in plain and direct language (paragraph G), says that they are to be appraised at the market value obtainable at the time of their setting apart by the trustees, which setting apart could not take place and was not expected to take place until the termination of the prior administration in which the title to the property, as well as its possession, was in the hands of the executors; and second, because the attempted rationalization by which the will is held to mean otherwise is uninvited by any ambiguity or contradiction in its terms and is inconsistent with facts and conditions known to Mrs. Cannon, and in contemplation of which she is presumed to have acted; and third, because it is physically impossible to apply the rule adopted by the Court to all of the annuities set up under the will; and uniformity in that regard is an essential test of the rule.

I think we may concede without citation of supporting cases, of which there must be many thousands, that the purpose of construing a will (where construction is necessary) is to find the intent of the testator.

We are perfectly agreed that this must be found from the whole will—from its "four corners." The cliches and formulas by which this never-doubted principle is expressed are so numerous and so frequently cited that no lawyer now grasps a will by its four corners without facing north.

But these general expressions are only peripherically concerned, if at all, with the point at issue here. After conceding them to be impeccable, we inquire: What from then on?

1. We come to what Mrs. Cannon really said about the market value which she chose to be set upon the shares on which the annuities are to be computed. Clause G:

"Whenever an annuity of four and one-half per centum (4½%) of a share or part of the trust estate is granted under the terms and provisions of this my Will, the said percentage shall be that percentage (*i.e.*, 4½%) of the principal of the share or part set aside in trust, computed at the market value thereof at the date of the setting aside of said share or part."

And not "as of" any other date that would either raise or lower the level of income she chose to provide for the objects of her bounty. And this is all that she said anywhere in the will about the date of the market value to be followed in fixing the value of the shares.

Also, there is no other specific provision of the will, and I think no general intent within its four corners, that contradicts or casts any doubt upon this clearly expressed intention. Against this expression of intent, the Court should not be astute to find conjectural ambiguities or a speculation or merely any plausible intent against an express declaration to the contrary. *Freeman v. Freeman,* 141 N. C., 97, 53 S. E., 620; *Faison v. Middleton,* 171 N. C., 170, 88 S. E., 141; *Baker v. Edge,* 174 N. C., 100, 93 S. E., 462; *Dicks v. Young,* 181 N. C., 448, 107 S. E., 220.

The "setting aside" was not the act of the law nor by virtue of any self-executing or automatic provision of the will. It must occur, if at all, by the intelligent agency set up under the will—the trustees appointed under it. Mrs. Cannon knew that these trustees could not perform that duty and were not expected to do so until the prior administration had ended and the quantity and character of the property upon which the annuities are computed were ascertained and the property turned over to the trustees. By the same reasoning, no computation of any sort could be made until that time—a period which under the law was supposed to extend for two years at least, unless under special circumstances, and which actually lasted nearly three years. This was an active administration in which not only the possession, but the title of the property was in the hands of the executors, and out of it had to be paid debts, taxes, and costs of administration, as well as special legacies and bequests, before it could be ascertained what property, either in kind or amount,

was left to be delivered to the trustees and by them set up into shares for the annuitants.

2. The theory of valuation as of the date of testatrix' death advanced in the main opinion is variously based on the following arguments: That it is conceded by the parties and found in the judgment that the accrual of the annuities took place at the death of the testatrix, and valuation as of that date must necessarily follow; that the language used in the will is identical to that used in the New York Trust, which figured in the case upon our former appeal, and the judgment of the New York Court and the language employed in the New York Trust afford some argument in favor of the position taken in the main opinion; that the proper construction of paragraph "G" carries us back to the date of death of the testatrix for valuation of the shares.

My views regarding the New York case and the trust involved in that suit are fully stated in *Cannon v. Cannon,* 223 N. C., 664, 28 S. E. (2d), 240—the former appeal—and I must be content with what is said there. I need only say now that the circumstances surrounding the donor there and the testatrix here are so radically different as to make any worthwhile comparison impossible.

There is no important significance to be attached to the fact that the accrual of the annuities occurs at the death of the testatrix. Whether that be a matter of common consent amongst the parties or derived from application of correct principles of law makes no difference. There is no necessity in fact and no compulsion of law that the valuation of the shares should be as of that date. Mrs. Cannon knew that the setting apart of the shares which she had in mind could not take place at that time, but must take place, if at all, after the property was turned over to the trustees. She thought that an appropriate time at which to fix the current market value, and her choice was reasonable. At any rate, the property was hers, and her right to fix such a time cannot be questioned. She had as much right to see that the shares were enhanced by adding the *ad interim* increment of value in favor of the first objects of her bounty as she had to add to the principal of each share the surplus earning over the 4½% in behalf of later annuitants. The suggestion of a general fund set up at death out of which the annuities were created and paid is contrary to the will. Taking the first annuitants as typical, these annuitants each did not have an undivided one-fifth interest in the income of a general trust fund provided for their benefit on death. There was no such fund. The annuity was paid out of earnings of a specific share allotted to each, presumably in kind, to be supplemented when necessary from the principal of that share to keep up the annuity income level.

The companion theory that the law effects a division or constructively regards a division as taking place upon the death of the testatrix is

purely conceptional, inadequate to administrative necessities, and not likely to have any bearing on the intent of the testatrix, who wished to have her property handled by intelligent agents and purposed to give them specific directives in its management. The "setting apart" contemplated in the will was an actual division into shares, requiring the exercise of business judgment. I do not understand it to be denied by any party that such a division did not and could not take place until the property was in the hands of the trustees. I think it is enough for us to know that the testatrix had in mind an actual division into shares and a "setting apart" by the trustees, and of her own will and purpose required the market price current at that time to be applied in valuing them.

3. The annuity scheme set up in the will is proliferating, extending to grandchildren who contingently take by subdivision of the shares of ancestors or other annuitants; and in terms paragraph "G" applies to this situation also. The process of succession may take many years to run its course before this subdivision takes place. By that time the respective shares may have greatly diminished in value by consumption of the principal in supplementing the first annuitant's income, or vastly increased by addition of the surplus earning above the four and one-half per cent. Changes either way may have occurred through exercise of the power of investment and reinvestment given the trustees under the will, and in that way the form, nature, character of the component property changes, with complete destruction of identity. The rule adopted by the majority—freezing the application of market values "as of" the date of testatrix' death—will then have no significance. Upon the test of its universality, the rule fails—and yet paragraph "G" purports to set up a rule, and the only rule, applicable to all the annuities set up in the will, wherever *any* annuity is granted under its terms. Frankly, Mrs. Cannon's outlook seems to be broader in its horizon than that we are about to take.

In this will Mrs. Cannon showed every intention to meet the circumstances surrounding her at the time the will was made, and in so doing to fix a level of income for her children, the first annuitants and first objects of her bounty, which she thought reasonable. In doing so, she made necessary the application of a current market value for the properties constituting the respective shares, which happens to be higher than that contended for by certain of the appellants. That level ought to stand. The same rule should apply had it been lower.

I concur in so much of the opinion that holds that the actual determination of the market value on 16 September, 1941, could not be made by the Court or its referee. The testatrix reposed that duty in men of large experience and unquestioned probity, and the power is nondelegable.

I also concur in the holding that the blockage rule should not be applied in valuing the securities composing the trust. The will does not require their sale in any such way, and it would be avoided by prudent business men.

With the modifications here suggested, the judgment should be affirmed.

BARNHILL, J., concurs in this dissent.

DEVIN, J., is of opinion that the language of Section G requires computing market value of shares at date they are set apart.

V. E. CUMMINS v. SOUTHERN FRUIT COMPANY, INCORPORATED, AND E. H. BARBER.

(Filed 28 November, 1945.)

1. Negligence §§ 11, 19b—

The task of the reviewing court, on defendant's motion for judgment as of nonsuit on the ground of plaintiff's contributory negligence, is not merely to determine from the weight of the evidence, however convincing, whether plaintiff was negligent—that would be for the jury; but to say whether his contributory negligence is so clearly apparent that no person with a reasonable mind could draw any other inference.

2. Automobiles § 8—

The duties of those using the highways are correlative. While the rule of the ordinarily prudent man is not changed as a standard of conduct, certainly the ordinarily prudent man must be permitted to put some reliance on compliance with the most common and ordinary laws or rules established for his protection.

3. Automobiles §§ 18c, 18g—

In an action by plaintiff to recover from defendants for injuries allegedly caused by defendants' negligence, where all of the evidence tended to show that defendants' mud-spattered truck was parked, headed north, about 6 a.m. on a dark, foggy morning, with all four wheels on the pavement in the right-hand lane of a two-way highway, without lights, flares, or any other mode of signal, G. S., 20-161, and had been so parked for some time, apparently unattended, and that plaintiff, driving a truck north at about 30 to 35 miles per hour, was compelled to dim his lights, when about 20 feet south of defendants' truck, in response to the dimmed lights of an oncoming car in order to pass same, G. S., 20-181, the lights of this car partly blinding plaintiff, who collided with the rear of defendants' truck, causing the alleged injuries, motion for nonsuit at the close of all the evidence, on the ground of contributory negligence, was properly refused.

4. Automobiles §§ 11, 14—

The operator of a motor vehicle is not required to anticipate that an unlighted, unguarded vehicle is standing in his path on the highway at night; nor can he be held for contributory negligence because he did not stop, when momentarily blinded by the lights of an oncoming vehicle, nor because the rays of his lights, dimmed in response to those of a passing car, did not pick up the body of the unlighted vehicle so parked on the highway.

BARNHILL, WINBORNE, and DENNY, JJ., concur in result.

APPEAL by defendants from *Hamilton, Special Judge,* at April Extra Civil Term, of MECKLENBURG.

This is an action to recover damages for personal injury sustained in a collision on the Concord-Charlotte Highway between a truck driven by plaintiff and one owned by the corporate defendant and being operated by its servant. The plaintiff recovered in the court below, and defendants appealed. The only question presented on the appeal is whether nonsuit should have been granted in the court below on the ground of plaintiff's alleged contributory negligence, which it is contended is shown in his own evidence.

Pertinent to this contention, the facts, as stated in plaintiff's evidence, are as follows:

R. V. McCombs testified for plaintiff that witness worked in Burlington and drove back and forth to his work. On this occasion he was driving south and the bakery truck driven by plaintiff was going north. Witness saw the fruit truck parked on the highway headed toward Concord, all four wheels; no sign of light. It was dark, foggy, rainy; it was between 6:00 and 6:15 o'clock in the morning. The car in which witness was riding and plaintiff's truck were meeting.

"The car I was riding in at the time of the collision I would say was 15 feet from the parked truck when the collision occurred, south of the parked truck I'd say a car length. My judgment is that Mr. Cummins' truck was running thirty miles an hour. There were no lights of any kind, buoys, or anything on the road to give warning to the public that this truck was there. We didn't see the truck ourselves until we was just right on it. I couldn't say whether anybody was in the truck. As we stopped our car I would say within one hundred and fifty or two hundred feet we stopped and walked back to the scene of the accident, and I imagine it taken us two or three minutes to get back and this colored fellow that was driving, he was just getting out of the truck. Of course we went running back and he was rubbing his eyes and said 'Someone ran into me.' We seen a sack of potatoes and it was so dark we thought it was a person laying there. It was laying in the highway. The

colored man was coming to the back of the truck. He was along beside the parked truck. He said 'Someone ran into me.' I says 'No wonder.' He didn't tell me what his name was. I didn't ask the name. I said 'Why don't you get that thing off the highway.' He said he didn't get off because he was afraid he'd stick up. I could see the shoulder of the road to the right of where the truck was parked clearly after we stopped. He had sufficient room to get the truck off of the highway onto the shoulder, though it was very muddy. It had been raining for about a day and night at that time. He had sufficient room. I told him I'd rather pull it out in the field. When I saw him he was walking back towards the bakery truck that ran into him. He was just rubbing his eyes. He didn't appear to be one bit hurt. I had never seen Mr. Cummins before. Today is the first time I ever spoke to him. I thought he was a dead man at the time I saw him. We tried to get him from the wrecked truck and we couldn't get the doors open, and then we went from the back of the bakery truck and unloaded his pies and everything he had in it and prized the seat loose from behind."

On cross-examination:

"It was very dark and foggy and misting. It was very difficult to see any distance in front of you. I would say we were traveling thirty to thirty-five, somewhere along there. It was almost impossible to go any faster, the condition of the weather. I couldn't give you a definite feet how far in front of you that you could see that morning, but you couldn't see too far. You can imagine yourself what you can see on a foggy morning. It was very foggy; that would just be hard to make an estimation of that. It was a kind of a fog and mist together there. The trucks was not together. I would say they were 20 feet apart at the time. I don't know whether the fruit truck moved up or whether the pie truck bounced back off of it. . . . The darky didn't say when the lights went out. I asked him why he didn't put some flares out. He said he didn't have any. He made no statement. The road there was wet. It was not only a heavy fog, but there was a mist with it. I made no examination of the marks or anything of that kind. I don't know whether there were any skid marks on the road or not. My attention was first attracted to the pie truck as we were going south, we saw the truck and we made the statement, said 'someone's going to hit that truck, there sits a truck with no lights,' and we saw this approaching car, or truck rather, of course we didn't know what it was, otherwise, we saw the lights of the truck. That was the pie truck. When we first saw that, I would say we was 50 or 75 feet from this parked truck, and just as we got even with it I said 'There's the first one hits it,' that's the statement I made, I said 'There's the first one hits it,' and it just crashed at the time. I couldn't tell whether the pie truck slowed up. It was very poor vision there, but I couldn't say

whether it slowed up or not. The crash is all I heard. . . . The pie truck passed us about fifteen feet south of the truck that was standing on the road. That's when I got the impression as to its speed, approaching it would be hard to say what it was, just my estimation. I would say he was going approximately 30 miles an hour. That is when the pie truck was within fifteen feet of the rear of the truck my opinion is he was making 30 miles an hour. I can't tell how fast he was running down the road because I couldn't see except the lights. To my estimation he was going at a very moderate speed. It was 'most impossible to go fast on a morning like that. I would say as he passed he was going in my opinion about 30 miles an hour. I'd say it would be approximately 30."

Clay Long testified for plaintiff:

"I was driving the car coming south to go to the Rubber Plant on this particular night. Mr. McCombs was in the front seat with me. Out here about seven miles from town. I saw the truck that was standing still on the highway. All four wheels of that truck was on the road. No lights on it at all. There were not any signals or buoys in front or back of it to warn people that it was there. I'll say the parked truck was 50 or 75, probably a 100 feet back when I first saw it. At that time I saw this approaching car driven by Mr. Cummins. We were meeting each other. My car at the time that Mr. Cummins' car hit the truck was about the length of the car past the parked truck. I stopped. The lights on Mr. Cummins car looked like they were good. When I first saw the darky he was coming from the parked truck back towards the wreck. I never did speak to him at all. Mr. McCombs talked to him. I saw Mr. Cummins, I didn't know him prior to that time. I saw the darky rubbing his eyes. I noticed to the right of his parked truck the shoulder of the road. There was room enough for him to get the truck off and park it on the side of the road. There were no other lights, street lights or anything like that. It was in the country. . . . As we approached this parked truck, although its headlights were not burning, the lens of its headlights were facing us; that's the first thing I could see of the parked truck, my lights reflecting on the lens of the headlights of the parked truck. That's the first I seen of the truck, then I seen the bulk of the truck as I approached. I couldn't state the speed of Mr. Cummins' truck, but he was running I think within the law, around 30 miles an hour. I don't know Mr. Cummins. . . . I will say I was within about 75 or 100 feet probably of this parked truck when my lights were reflected on the lens of its headlights. I was maybe forty feet away. I couldn't say exactly, before I could tell exactly what it was parked on the road. I was about the length of the car that I was driving past the truck when the collision occurred. When the collision occurred, I was about the length of my car past the truck; so that the crash came

when I was a few feet from the back of the truck. I did not have my bright lights on. I dimmed my lights for Mr. Cummins and he dimmed his lights. As I approached, Mr. Cummins evidently saw me because he dimmed his lights, and I dimmed my lights as we approached. We both dimmed our lights. . . . The weather was misty, foggy and drizzling rain. It was real dark. The pie truck and the fruit truck when I got out and went back were approximately 20 feet apart. The fruit truck was approximately twenty feet farther north than the pie truck. I don't know which one moved, whether the pie truck went backwards or the fruit truck forward."

Mr. N. G. McGuirt testified for plaintiff:

"On this morning I had occasion to go out on the Concord Road, going to Concord. It was between five-thirty and quarter of six. I saw this truck of the defendant Fruit Company. It was sitting on the highway, headed towards Concord, north. There was no car coming meeting me at that time. I almost hit the truck myself; there wasn't any lights. It didn't have any lights on it. Didn't have any lights about it. I said something to the colored man in the truck but he didn't hear me, I don't imagine. He was in the truck. All of the truck was on the hard surface. At that particular point that just a two-lane highway."

V. E. Cummins, the plaintiff, testified:

"On the morning of September 29, 1944, I left Charlotte between ten and fifteen minutes to six. I was driving a Dodge half-ton truck. Nobody was with me. Had my truck loaded with pies—a one-half ton panel truck. I was going to Concord to deliver bakery goods, pies. The weather was rainy and foggy. I was proceeding on Highway 29-A when the collision occurred. I was going north on Highway 29-A, alternate. At the point of collision I would say the pavement is about 20 feet wide. The hard surface. The shoulder was about 12 feet wide."

Plaintiff testified that he was going about 35 miles an hour. The truck was in the right-hand lane, entirely on the hard surface, without lights, and there were no flares, or other sign to indicate its presence. He saw the truck when he was about 25 feet from it. The truck was a sort of grayish color, with mud and road film on it to such an extent as to make it hard to distinguish. The body of the truck was about 3½ feet above the surface of the highway and plaintiff's lights shined under it and didn't show the body up. Plaintiff immediately cut to the right and tried to apply the brakes, and the collision occurred. Plaintiff was pinned in the truck beneath the steering wheel and became unconscious.

On cross-examination plaintiff testified that it was rainy and dark and foggy. Possibly his lights might show an object some one hundred feet away. He did not see the truck until just before the collision. His lights were good.

The plaintiff testified that as he was a short distance south of the parked truck, his vision was momentarily obscured by the headlights of an approaching car which "sorta blinded" him, "kinda blinded" him and cut off vision of the truck, and that he may have proceeded in this way a few feet, twenty or twenty-five; and responded to a question addressed to him on cross-examination that at that moment, if he had hit the truck, he "wouldn't have seen it." He "went for the brakes" and cut to the right as soon as he saw it.

"The other truck was a large truck, I imagine about a ton and a half. It looked like it was a sort of grayish color with mud or road scum thrown up from the tires. Nobody ever showed me the case of *Williams v. Fredrickson Motor Express.* That was on level ground. I was approaching that truck on an absolute level. I dimmed my lights right about the same time the other car dimmed theirs. When I did that, I couldn't very well tell how far I was from the approaching car on account of the fog and rain. I knew some distance before I passed the approaching car that there was a car approaching me. I knew that I was running with dim lights or slanting, passing lights. I didn't cut off my main lights altogether. They are not the dim lights, they are the passing lights, it's a slanting ray that you use when you pass a car. When I dimmed my lights and the other car dimmed its lights, I knew that I was running through the fog handicapped as far as seeing in front of me. The pavement was wet. My brakes were good. I have no idea within what distance I could stop the car out there that night. After I had dimmed my lights, I could see an object on the road possibly 100 to 150 feet; that is, after slanting or dipping my lights. . . . I drive, try to drive, in the middle of the lane, and it was immediately in front of me. I judge I was within about 25 feet of it when the Long car passed. . . . I did not see anybody in the highway before getting to this truck." Plaintiff then presented evidence of his injuries and their extent.

The defendant put on evidence mainly relating to the question of negligence and the injury of plaintiff. At the end of plaintiff's evidence, and again at the conclusion of all the evidence, defendant demurred to the evidence and moved for judgment of nonsuit, which was declined.

There was a verdict in favor of plaintiff, and judgment thereupon, and defendants appealed, assigning as error the refusal to grant their motion of nonsuit on the ground of the alleged contributory negligence of the plaintiff.

Jones & Smathers for defendants, appellants.

G. T. Carswell, John M. Robinson, and Hunter M. Jones for plaintiff, appellee.

SEAWELL, J. The appellants base their contention that plaintiff was contributorily negligent very narrowly on the fact that he did not stop or cut down his rate of travel, which was not unlawful, when meeting and passing another car, about 25 feet from the defendants' truck, which was parked without lights or flares in the center of the right-hand lane over which plaintiff had the right of way. At that point, defendants contend, the plaintiff was momentarily blinded by an approaching car; and his negligence in not stopping is therefore a contributing approximate cause of his injury. A much broader view of the occurrence and its component and related factors is necessary to determine whether the plaintiff failed to exercise ordinary prudence under the circumstances and conditions which prevailed at the time of the collision. In this respect, the task of the reviewing court on the question of contributory negligence is not merely to determine from the weight of the evidence, however convincing, whether plaintiff was negligent—that would be for the jury; but to say whether his contributory negligence is so clearly apparent that no person with a reasonable mind could draw any other inference. *Neal v. R. R.*, 126 N. C., 634, 36 S. E., 117; *Hayes v. Western Union Telegraph Co.*, 211 N. C., 192, 193, 189 S. E., 499; *Godwin v. R. R.*, 220 N. C., 281, 17 S. E. (2d), 137; *McCrowell v. R. R.*, 221 N. C., 366, 374, 20 S. E. (2d), 352.

The development of the laws of the road since the advent of the motor vehicle has proceeded on one theory: that the duties of those who use the highway are correlative. The law has never put on the traveller the impossible task of protecting himself solely by his own circumspection against every danger that may beset him on the highway through its use or abuse by others, thus making him an insurer of his own safety. Reasonable provisions in the laws for the protection of travel on the highways enter into and become a part of the measure of prudent conduct on the part of those who are compelled to use them in common with others. While the rule of the ordinarily prudent man is not changed as a standard of conduct, certainly the ordinarily prudent man must be permitted to put some reliance on compliance with the most common and ordinary laws or rules established for his protection, or be driven from the road; and unless this correlative principle is recognized in its bearing upon the rule of prudence, those for whose protection the laws were made must proceed with as high a degree of care as if they never existed—a thing impossible under modern conditions, and nowhere observed.

There are two applications of this principle appropriate to this case:

1. The plaintiff was not required to anticipate that the defendants' truck would be parked with all four wheels on the pavement in the right-hand lane of travel without lights, flares, or any other mode of signal or warning. G. S., 20-161. That it was so parked, and had been so parked

for a considerable time is clear from plaintiff's evidence, notwithstanding partial contradiction from the corporate defendant's driver. A witness saw it in that condition a considerable time before the collision, called to the colored man in the truck, and got no response. Moreover, as one of the factors tending to the plaintiff's undoing, the truck showed up merely as a mud-spattered, film-covered, gray shape, so merged in the gray background of road and mist as to be unnoticeable except at close quarters.

2. The plaintiff proceeded a few feet within the blinding glare of an approaching car. Both cars dimmed or slanted the headlights in passing as they are required to do. G. S., 20-181. It is contended that plaintiff was contributorily negligent in not reducing his speed or stopping altogether at this point. He was then almost at the crisis of the affair, and whether he could have diminished the force of the collision or have avoided it altogether is a matter of speculation, or at least of fact about which reasonable minds might differ. *Leonard v. Transfer Co.,* 218 N. C., 667, 12 S. E. (2d), 729; *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637; *Williams v. Express Lines,* 198 N. C., 193, 151 S. E., 197; *Clarke v. Martin,* 215 N. C., 405, 2 S. E. (2d), 10; *In Buohl v. Brewing Co.,* 349 Pa., 377, 37 A. (2d), 524, the rule is laid down:

"The operator of a motor vehicle is not bound to foresee that another will permit his vehicle to stand on the highway at night without lights. *Nelson v. Damus Bros. Co., Inc.,* 340 Pa., 49, 51, 16 A. (2d), 18. We have consistently held that a fixed rule cannot be laid down which will determine in every instance the person legally responsible for a rear-end collision on a highway at night between a parked vehicle and one that is moving. *Nelson v. Damus Bros. Co., supra; Harkins v. Somerset Bus Co.,* 308 Pa., 109, 162 A., 163 (and other cases). Temporary blinding caused by bright lights on an oncoming or parked vehicle has been recognized as a legally sufficient excuse for failing to stop within the assured clear distance ahead. (Citing cases.) Under the decisions of this Court the trial judge properly submitted to the jury the question of appellee's contributory negligence."

In *Boor v. Schreiber* (Pa.), 33 A. (2d), 648, it is said:

"It is now settled by *Farley v. Ventresco,* 307 Pa., 441, 161 A., 534, that a driver is not bound to stop merely because he is 'blinded' by the headlights of another vehicle. . . . We are not prepared to say, as a matter of law, plaintiff should have anticipated defendants' 'blacked-out' truck lurking behind the curtain." But this much must be clear as a matter of law: he was not required even under those circumstances to anticipate that an unlighted and unguarded truck was in his path, or, in other words, to anticipate the gross negligence of the truck driver in this respect. *Hobbs v. Coach Co., ante,* 323, 34 S. E. (2d), 211. Nor can he be held for contributory negligence as a matter of law because he did not

stop when momentarily blinded, nor because the slanting or passing rays of his lights did not pick up the body of the truck, which stood some 3½ feet above the road. *Williams v. Express Lines, supra.*

The meeting of cars on a much used thoroughfare is a constant occurrence. That this should happen at a point involving other dangers is a coincidence frequently occurring, and the multiple consequences of the violation of this law, enacted for the safety of life and limb, may well be considered within its contemplation and its prevention within its purpose. The driver is not required to proceed as if he were apt at any moment to encounter an unlighted truck in his way. "A motorist may assume that no vehicle will be left standing on the main highway at night without a warning light." Blashfield, p. 341, sec. 1203. It should be understood that we are speaking on the question of ordinary care as applied to the facts of this case. Under the existing circumstances, the plaintiff could have sustained no injury save from the negligent parking of the truck—a negligence which he was not required to anticipate, but only to exercise ordinary care in its discovery and such means of avoidance as prudence might dictate when he became aware of it.

In factual features, the case is not unlike *Cole v. Koonce, supra,* and *Williams v. Express Lines, supra,* in which we held, and we repeat, that generally speaking on the question of the contributory negligence of the plaintiff, the matter must be decided upon the facts of the particular case; and in the case at bar we are unable to separate any item so unaffected by its attendant circumstances that we are able to declare with the positiveness required by the rule that there are no inferences favorable to the plaintiff on the question of contributory negligence. Under the circumstances, the conduct of the plaintiff on that issue was a matter for the jury, and they have spoken.

We find

No error.

BARNHILL, WINBORNE, and DENNY, JJ., concur in result.

ELIZABETH MOODY BURNEY AND HUSBAND, R. T. BURNEY, AND W. F. MOODY, JR., v. R. W. HOLLOWAY AND WIFE, MAUDE LOUISE HOLLOWAY.

(Filed 28 November, 1945.)

1. Wills § 24: Trial § 25—

Since a proceeding to probate a will in common form is *in rem,* it has been held—as far as we know without exception in this jurisdiction—that,

when the issue of *devisavit vel non* has been raised, the proceeding is not subject to nonsuit at the instance of the propounders or other parties concerned.

2. Estoppel § 4: Wills §§ 24, 39—

In suit by the seller to require specific performance of the buyer, title being claimed under a will in the probate of which the issue of *devisavit vel non* was raised and a motion of nonsuit made and allowed, the parties at whose instance the nonsuit was allowed being before the court, they will be bound by its judgment on the principle of estoppel.

3. Mortgages §§ 28, 29, 32a—

On the foreclosure of a deed of trust, the trustee therein having erroneously canceled the same of record, but after correcting such cancellation of the record, the trustee conveyed to the purchaser under the deed of trust, such correction is sufficient to give the purchaser a good title.

4. Wills §§ 31, 34—

The devise of all the income and profits from property, nothing else appearing, carries with it the *corpus.*

5. Same—

The settled policy of the law, founded upon strong reason, does not favor a devise, or even a bequest, by implication, permitting it only when it cogently appears to be the intention of the will. Probability must be so strong that a contrary intention cannot reasonably be supposed to exist in testator's mind, and cannot be indulged merely to avoid intestacy.

6. Wills § 34—

Where testator's will confided the administration of his property, consisting of realty and capital stock in certain companies, to his son, making him collector of the income for the benefit of himself and his sister, after payment of upkeep, taxes and commissions, without any words limiting the devise to a life estate, and also provided that his stocks should not be sold without the consent of his associates and should be voted as such associates voted their stock, and then, if he should have no grandchildren at the death of his children, "my holding" to become the property of an orphanage—(1) The will is sufficient to convey to the son and daughter a fee in the realty; and (2) the words "my holding" are intended to apply only to the shares of capital stock.

APPEAL by defendants from *Williams, J.,* at May Civil Term, 1945, of WAKE.

The controversy here is over a contract of purchase and sale made between the plaintiffs and the defendants and the validity of the title which the plaintiffs have offered the defendants by tender of a deed which defendants decline to accept. Plaintiffs claim that the title is good and that they are holders in fee under the will of W. F. Moody, Sr., and conveyance of the lands to the testator through sale under a deed of trust. The defendants raised a question as to the title under each instrument.

The record shows that upon the "exhibition" of the Moody will before the clerk of the Superior Court of Wake County, the present plaintiffs filed a caveat. This resulted in a proceeding to probate the will in solemn form, and a negative response to the issue of *devisavit vel non* upon the trial. At the same term of court the Thompson Orphanage made a motion to set aside the verdict and judgment on the grounds of mistake and excusable neglect, which was declined. Still at the same term, the presiding judge set the judgment and verdict aside, *ex mero motu,* in the exercise of his discretion, for other reasons. Subsequently, in a compromise at another term of court, the Thompson Orphanage released its claim for a consideration of $900 "in favor of the estate," asked to be permitted to withdraw its motion to set aside the judgment invalidating the will, and a motion for nonsuit of the proceeding was made and allowed, and the will was subsequently probated in common form.

The plaintiffs, deeming themselves to have a title in fee under the will, entered into a contract with defendants in which plaintiffs agreed to sell, and defendants to buy, the real estate described in the will at the purchase price of $3,000. The plaintiffs tendered a deed to the defendants, which is admittedly sufficient in form to convey the title, but defendants declined to accept the deed and pay for the land as agreed, basing the refusal on the grounds (1) that the testator himself did not have a clear title because he had bought at a sale under a deed of trust which appeared on the record as having been satisfied and canceled; admitting, however, that the substitute trustee had corrected this entry as error, and conveyed to Moody under the terms of the deed of trust; (2) and because, as contended, the plaintiffs did not have a clear title under the provisions of the will.

Plaintiffs brought suit, appropriate pleadings were filed, and the cause came on to be heard by Judge Clawson L. Williams, by consent, without a jury, upon allegations and admissions in the pleadings, and stipulations by the parties. From the judgment requiring them to accept the deed and pay for the land as agreed, the defendants appealed.

The will is as follows:

"Jan. 18, 1940.

"It is my will that my property, after my death, be administered by my son W. F. Moody, Jr., and the income therefrom, after upkeep of the property, taxes and a reasonable commission to the administrator for services, be equally divided between him and his sister Peggy. My stock in the Mitchell Funeral Home and the Commercial Investment Company is not to be sold, without consent of Messrs. A. H. Mooneyham and H. W. Mims and also voted at any time as they vote theirs' and can be sold only as they sell theirs. If I have no grandchildren at the death of my chil-

dren, my holding to become the property of the Thompson Orphanage at Charlotte, N. C."

W. F. Moody, Jr., is a single person, and Peggy Moody Burney is the mother of three children, now living.

T. Lacy Williams for plaintiffs, appellees.
Wilson & Bickett for defendants, appellants.

SEAWELL, J. Since a proceeding to probate a will in common form is *in rem,* it has been held—as far as we know without exception in this jurisdiction—that when the issue of *devisavit vel non* has been raised, the proceeding is not subject to nonsuit at the instance of the propounders or other parties concerned. *In re Will of Evans,* 223 N. C., 206, 25 S. E. (2d), 556; *In re Westfeldt,* 188 N. C., 702, 705, 125 S. E., 531; *Collins v. Collins,* 125 N. C., 98, 34 S. E., 195. Whether the disregard of this rule results in a void, or merely irregular, judgment we need not inquire, since in either case the proceeding would not be irrevocably retired from the docket against a party or privy whose right to move was still subsisting. And the Court would not be justified in taking jurisdiction of the rights of parties under a will the validity and testamentary character of which was being tested in another jurisdiction.

However, the parties at whose instance the nonsuit was allowed are before the court, and will be bound by its judgment, on the principle of estoppel, if none other; and other persons who might claim as beneficiaries are not prejudiced by accepting the contest over the will in the former proceeding as concluded.

1. We do not regard the objection relating to the erroneous cancellation of the deed of trust under authority of which the testator held as meritorious. It was an evident error, based upon the sale and the adequacy of the proceeds, and its correction on the record is sufficient.

2. Under one view of construction which has been presented to us, the will is regarded as silent in several places where express disposition or limitation might be expected, and we are called upon in dealing with the will at these vital points to apply rules of construction which have their inherent limitations and cannot be pressed too far lest the result of our labors should be the making, rather than the construction, of the will. These aids would indeed be necessary if we assume, *imprimis,* that the Thompson Orphanage is intended as the ultimate taker of all the property of the testator—an assumption which might be too hastily made. An overall view of the will, keeping in mind the order of the distribution, and paying close attention to the terms used in designating the property referred to at each step of the devises or bequests, will, we think, resolve most of our difficulties.

We know from the record that the testator had two kinds of property at least—the real estate concerned in this controversy and shares of stock in the Mitchell Funeral Home and Commercial Investment Company. He confided the administration of his estate to W. F. Moody, Jr., making him the collector of the income from it for the benefit of himself and his sister Peggy, with provision that the brother should be compensated for his services, and the income be divided equally between them. Nothing else appearing, this would be sufficient to convey to them the fee in the real estate, not only by the language *per se,* but under a long line of decisions, clear in their import, if, at times, difficult to apply, holding that the devise of all the income and profits from the property, nothing else appearing, carries with it the *corpus. Burcham v. Burcham,* 219 N. C., 357, 359, 13 S. E. (2d), 615; *Schwren v. Falls,* 170 N. C., 251, 87 S. E., 49. Nothing else does appear except in the statement of the contingency on the happening of which the Thompson Orphanage should take whatever the will intended to reserve to it: "If I have no grandchildren living at the death of my children."

It is suggested that this contingency has a double aspect; that because the limitation to the Thompson Orphanage is defeated by the existence of grandchildren at the death of the children, the grandchildren living at that time take absolutely by implication.

The settled policy of the law, however, founded upon strong reason, does not favor a devise, or even a bequest, by implication, permitting it only when it cogently appears to be the intention of the will. *Kerr v. Girdwood,* 138 N. C., 473, 50 S. E., 852, 107 Am. St. Rep., 551; *Ferrand v. Jones,* 37 N. C., 633; *McCoury's Exrs. v. Leak,* 14 N. J. Equity, 70; 69 C. J., Wills, sec. 1123. Probability must be so strong that a contrary intention "cannot reasonably be supposed to exist in testator's mind," and cannot be indulged merely to avoid intestacy. *Id.* But even if we adopt that principle here, as a last resort in the absence of dispositive expression, it does not follow that the grandchildren were intended to take any interest in the property generally, or especially the real estate of the testator.

After turning over his property, generally, including, of course, his realty, to the son for handling, and providing that the income should be *equally divided* between him and his sister Peggy, and without any words limiting the devise to a life estate, he proceeds to deal with another sort of property—his holding of stock in the Mitchell Funeral Home and the Commercial Investment Company, in which he had been associated with A. H. Mooneyham and H. W. Mims. He not only forbids the sale of this stock without consent of these associates, but provides that it shall be voted as they vote theirs and sold only as they sold theirs, then provides: "If I have no grandchildren at the death of my children, *my*

holding to become the property of the Thompson Orphanage." Is this term *holding* intended to designate *all* his estate or only his stock in the Funeral Home and Investment Company?

The term *holding* is not one usually applied to property in general, but is uniformly and in common usage applied especially to stocks or shares in incorporated companies. Its use otherwise is indeed so rare as to make it strongly improbable that Moody intended by it to refer to anything other than the shares in the Funeral Home and Investment Company of which he had been speaking—the expression to be construed with its immediate context. The probability was, under the restrictions he had placed upon this stock, that it might be intact at the death of his children, and this prompted the form of the bequest.

In Black's Dictionary, a holding is defined: "A piece of land held under a lease or similar tenancy for agricultural, pastoral, or similar purposes."

In Century Dictionary, it is defined: "—specif. land, or a piece of land, held, esp. of a superior; in general, property owned, esp. stocks and bonds (often in plural)."

More discriminately, Webster defines the plural of this word (to which the definition is confined), as: "Property in general, especially stocks and bonds."

From this it appears that the technical use of the word must be ruled out altogether, and we find little, if any, authority for the use of the word in popular speech to justify us in concluding that by it the testator intended to cover anything except the holding of the testator of shares of stock in the concerns specifically mentioned, to which alone the expression is appropriate.

Moody knew how to refer to what he owned and intended to dispose of as property, and did so when he wanted it cared for and equally divided between his two children. He used the term "holding" after the topic shifted to stocks in the Funeral Home and Investment Company, applied to which the term was both appropriate and in common use.

In view of the construction we are constrained to put upon the term used in designating the property made subject to the contingency, it is unnecessary to invoke the presumption of intestacy or the doctrine of implied devise, at least as to the property in controversy, as the terms of the will are sufficient to constitute a devise thereof, in fee, to the plaintiffs.

The judgment of the court below is without error and is

Affirmed.

L. HERBERT KING v. S. A. KING, ADMINISTRATOR OF MRS. SUSAN D. KING.

(Filed 28 November, 1945.)

1. Judgments § 1—

It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and that such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and then in order to vacate such a judgment an independent action must be instituted.

2. Judgments § 2—

The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.

3. Judgments § 4—

When a party to an action denies that he gave his consent to the judgment as entered; the proper procedure to vacate such judgment is by motion in the cause, upon which the court will determine whether or not such party did consent thereto, and a trial by jury will not be allowed as a matter of right. The fact that such party may have inadvertently overlooked the legal effect of the judgment does not entitle him to relief.

APPEAL by plaintiff from *Williams, J.*, at June Term, 1945, of WAKE.

This action was instituted by the plaintiff to recover from his mother's estate the sum of $3,000.00, for alleged services rendered to her during the period from November, 1922, until her death, 19 November, 1944. Plaintiff alleges his mother promised as compensation for his services, to devise and bequeath to him her entire estate. The plaintiff and the defendant, administrator, are the sole heirs of Mrs. Susan D. King.

During the trial of this action a compromise settlement was agreed upon, which obligated the defendant, administrator, to pay to the plaintiff the sum of $1,200.00, in full settlement of his claim for services. Judgment was drawn in favor of the plaintiff and against the defendant for the agreed sum and the attorneys for the respective parties consented thereto and presented it to the court for its sanction. The court signed the judgment as presented. The legal effect of this judgment gave the plaintiff only $600.00, to be paid out of his brother's part of the estate, the other half to be paid from his own share of the estate, he having inherited one-half of his mother's estate. Someone called plaintiff's attention to the fact that he was paying one-half of his own claim, whereupon his attorney agreed that the judgment had been improperly drawn and the next day after it was signed, and after notice to defendant's attorneys, plaintiff moved to set aside the judgment.

According to the affidavits filed at the hearing, upon the above motion, the plaintiff and his attorney had discussed the question of the payment of the judgment, and plaintiff's attorney had advised his client that no part thereof would be paid from his share of the estate. It appears from the affidavits filed on behalf of the defendant that the judgment sets forth all the terms of the compromise which were discussed and consented to by the defendant and his attorneys. Whereupon, the court found as a fact that after the judgment had been prepared in the presence of the parties "the same was read over to the plaintiff, who consented thereto; thereupon it was signed in his behalf by his counsel appearing in this case and by the other parties whose names appear thereon; that the plaintiff consented to the terms of the judgment as set out therein and it was duly signed for him and in his behalf by his counsel authorized to appear in this case; that no fraud or deceit was practiced in securing the consent of plaintiff to this judgment and the same was not executed by mistake, surprise or excusable neglect," and denied the motion.

Plaintiff appeals and assigns error.

John W. Hinsdale for plaintiff.

R. O. Everett and Harvey Harward for defendant.

DENNY, J. The question here is whether or not the plaintiff consented to the judgment entered pursuant to the compromise agreement reached during the trial of the action in the court below.

The appellant now contends the court below was without jurisdiction to hear and pass upon his motion to set aside the judgment, for the reason that a consent judgment can be attacked only in an independent action.

Justice Winborne, in speaking for the Court, in *Keen v. Parker,* 217 N. C., 378, 3 S. E. (2d), 209, said: "It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and that such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and that in order to vacate such judgment an independent action must be instituted," citing numerous authorities. See also *State ex rel. Jones v. Griggs,* 223 N. C., 279, 25 S. E. (2d), 862.

While it is a settled principle of law in this jurisdiction that a consent judgment cannot be modified or set aside without the consent of the parties thereto, except for fraud or mutual mistake, and the proper procedure to vacate such judgment is by an independent action; it is equally well settled that when a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the

cause. *Williamson v. Williamson,* 224 N. C., 474, 31 S. E. (2d), 367; *Rodriguez v. Rodriguez,* 224 N. C., 275, 29 S. E. (2d), 901; *Gibson v. Gordon,* 213 N. C., 666, 197 S. E., 135; *Morgan v. Hood, Comr. of Banks,* 211 N. C., 91, 198 S. E., 115; *Cason v. Shute,* 211 N. C., 195, 189 S. E., 115; *Deitz v. Bolch,* 209 N. C., 202, 183 S. E., 384; *Bank v. Penland,* 206 N. C., 323, 173 S. E., 345; *Bizzell v. Equipment Co.,* 182 N. C., 98, 108 S. E., 439; *Chemical Co. v. Bass,* 175 N. C., 426, 95 S. E., 766; *Chavis v. Brown,* 174 N. C., 122, 93 S. E., 471; *Cox v. Boyden,* 167 N. C., 320, 83 S. E., 246.

The appellant on the one hand argues that the judgment having been entered by consent, is subject to attack only by an independent action; but does not contend that his consent was obtained by fraud or mutual mistake. While on the other hand, he bases his right to relief squarely on the ground that there was no meeting of the minds of the parties, and therefore that he in reality did not consent to the provisions of the judgment as entered.

The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment. *Williamson v. Williamson, supra; Rodriguez v. Rodriguez, supra.* But when the question is raised as to whether or not a party to an action consented to a judgment, the court, upon motion, will determine whether or not such party did consent thereto and a jury trial will not be allowed as a matter of right. *Deitz v. Bolch, supra; Chavis v. Brown, supra.* And the fact that the plaintiff may have inadvertently overlooked the legal effect of the judgment does not entitle him to the relief he now seeks. Moreover, there is nothing in the pleadings to show that any judgment was sought or anticipated other than one against the administrator of the estate of Mrs. Susan D. King. There is no other party defendant. Therefore, in the absence of express provision in the judgment, directing otherwise, the judgment entered herein must necessarily be paid out of the assets of the estate at the equal expense of the heirs at law of Mrs. King.

The facts found by his Honor as to the plaintiff's consent, are supported by the evidence, and the judgment below is

Affirmed.

FLORENCE SAYER v. ROBERT B. HENDERSON AND MAMIE B. HENDERSON.

(Filed 28 November, 1945.)

1. Limitation of Actions § 1a—

The power of the Legislature of each State to enact statutes of limitations and rules of prescription is well recognized and is unquestioned.

2. Same—

A statute of limitations, strictly so called, operates generally on the remedy directly, and does not extinguish the right.

3. Same: Courts § 11—

It is a fundamental principle of law that remedies are to be governed by the laws of the jurisdiction where the suit is brought. The *lex fori* determines the time within which a cause of action shall be enforced.

APPEAL by defendant Mamie B. Henderson from *Dixon, Special Judge,* at Extra May Term, 1945, of MECKLENBURG.

This is a civil action brought in the Superior Court of Mecklenburg County, State of North Carolina, by Florence Sayer against Robert B. Henderson and Mamie B. Henderson. Robert B. Henderson died since the institution of this action but before process was served on him, and neither he nor his personal representative was ever made a party to this action. The action was for the recovery of an amount alleged to be due the plaintiff on a certain note executed under seal by the named defendants on 25 August, 1926.

When the case came on for trial the parties entered into a stipulation that the court might pass upon the facts as well as the law, and agreed upon the facts. Whereupon the court found the facts to be as agreed upon by the parties, and, upon these facts, concluded as a matter of law, that the plaintiff is entitled to recover of the defendant, Mamie B. Henderson, the sum of $2,440.00 with interest from 1 October, 1933, the court finding, *inter alia,* as a matter of law, that the statutes of limitation of the State of North Carolina were applicable to the plaintiff's alleged cause of action rather than the statutes of limitation of the State of New York as contended by the appealing defendant, and that under the provisions of the applicable statute of limitation of the State of North Carolina, plaintiff's cause of action is not barred, and thereupon adjudged that the plaintiff have and recover of the defendant Mamie B. Henderson the sum of $2,440.00, together with interest from 1 October, 1933, and costs. From such judgment the defendant Mamie B. Henderson appealed, assigning errors.

W. T. Shore and F. A. McCleneghan for plaintiff, appellee.
Wilson H. Price, Sr., for defendant Mamie B. Henderson, appellant.

SCHENCK, J. The question posed, and upon which the case on this appeal is made to turn in the briefs filed, was: Are the statutes of limitation of the State of North Carolina or the statutes of limitation of the State of New York applicable in this action?

The only allegations made by the appealing defendant in her answer which can be construed as a plea of the statutes of limitation, were as follows: "1. That if the plaintiff has or had any cause of action, which is denied, that more than three years have elapsed since plaintiff's cause or causes of action accrued, and that the defendants plead this lapse of time in bar of any recovery by the plaintiff in this action;" and "2. That if the plaintiff has or had any cause of action, which is denied, that more than ten years have elapsed since plaintiff's cause or causes of action accrued, and that the defendants plead this lapse of time in bar of any recovery by the plaintiff in this action."

The statutes of limitation have been uniformly held by this Court, and so far as we know by other courts, to be governed by the law of the forum. The most recent case with us in point is *Webb v. Webb,* 222 N. C., 551, 23 S. E. (2d), 897. The plea of the statutes of limitation is a plea to the remedy and consequently the *lex fori* must prevail. *Arrington v. Arrington,* 127 N. C., 190, 37 S. E., 212; *Clodfelter v. Wells,* 212 N. C., 823, 195 S. E., 11. "'A statute of limitations, strictly so called, . . . operates generally on the remedy directly, and does not extinguish the right. The power of the Legislature of each State to enact statutes of limitation and rules of prescription is well recognized and unquestioned. It is a fundamental principle of law that remedies are to be governed by the laws of the jurisdiction where the suit is brought. The *lex fori* determines the time within which a cause of action shall be enforced.' 17 R. C. L., Art. Lim. of Actions." *Vanderbilt v. R. R.,* 188 N. C., 568 (580), 125 S. E., 387.

There are only two statutes pleaded, the three years statute, G. S., 1-52, and the ten years statute, G. S., 1-47. It is unnecessary to discuss the three years statute, since it is agreed that the instrument sued on was under seal.

As to the ten years statute, it is agreed and found by the Court that this action was instituted on 10 February, 1943, by the plaintiff Florence Sayer on a note executed by defendant Mamie B. Henderson as balance purchase money of property located in the State of New York, and secured by mortgage upon said real estate, that the last payment made upon the note involved was $30.00 on 1 October, 1933, at which time the principal balance upon said note was $2,440.00, hence the institution of

the action was within the ten years allowed after the said last payment, as the statute commenced again to run from the day when the last payment was made. *Green v. Greensboro College,* 83 N. C., 449 (454). The court was therefore correct in concluding that the plaintiff's cause of action was not barred by the North Carolina ten years statute of limitations, or any other statutes of limitation pleaded.

For the reasons stated and upon authorities cited, we are of the opinion that the judgment should be affirmed, and it is so ordered.

Affirmed.

HENRY A. SMITH v. JIM STEEN AND CARRY STEEN.

(Filed 28 November, 1945.)

Appeal and Error § 37a—

The burden is on the appellant, not only to show error, but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby.

APPEAL by plaintiff from *Olive, Special Judge,* at May Term, 1945, of RICHMOND. No error.

Action for damages for wrongful eviction from leased premises. Plaintiff alleged that on account of threats of physical violence by defendant Jim Steen, and his wrongfully cutting the electric wires, plaintiff was forced to vacate a dwelling house which he had leased from the defendants; that due to the wrongful conduct of defendants he was badly frightened and suffered injury to his electrical appliances. Plaintiff alleged substantial damage, both compensatory and punitive.

Defendants, answering, denied making the threats complained of, and alleged that the cutting of the electric wires was caused by plaintiff's improper use of electricity in violation of contract.

The following issue was submitted to the jury: "Did the defendant Jim Steen wrongfully evict the plaintiff from the house he had rented?" The jury answered the issue "No." Other issues were not answered.

From judgment for defendants on the verdict, plaintiff appealed.

A. A. Reaves and George S. Steele, Jr., for plaintiff.

Z. V. Morgan for defendants.

DEVIN, J. The determinative issue of fact raised by the pleadings, and upon which the contest was waged, has been by the jury decided in

favor of the defendants. The only assignments of error brought forward by the plaintiff in his appeal relate to the court's instructions to the jury. An examination of the charge as a whole in the light of the criticism noted, however, leads us to the conclusion that no prejudicial error is shown, which should require upsetting the verdict and judgment and awarding a new trial. "The burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby." *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863; *Wilson v. Lumber Co.,* 186 N. C., 56, 118 S. E., 797.

The case at bar involved controverted questions of fact which seem to have been fairly presented. The triers of the facts have accepted the defendants' version. The result will not be disturbed.

No error.

CHARLES W. COCHRAN, JR., AND WIFE, LOUISE K. COCHRAN, v. JAMES B. ROWE.

(Filed 28 November, 1945.)

Appeal and Error §§ 4, 30c—

As a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist, and the only matter to be decided is the disposition of the costs. While there are well recognized exceptions to this rule, where the subject of the litigation—the right of plaintiffs to the immediate possession of certain premises—has been disposed of by the surrender of same by defendant to plaintiffs, there is no exception.

APPEAL by defendant from *Phillips, J.,* at April Term, 1945, of MECKLENBURG. Appeal dismissed.

McDougle & Ervin for plaintiffs, appellees.

Tillett & Campbell and Idrienne E. Levy for defendant, appellant.

PER CURIAM. Plaintiffs move in this Court to dismiss the defendant's appeal on the ground that the subject matter of the litigation has been disposed of and that nothing remains but a moot question and an adjudication of the costs.

It appears that this was a summary ejectment proceeding under G. S., 42-26, *et seq.,* and that judgment was rendered below, based upon the verdict of the jury, decreeing that the plaintiffs were entitled to the

immediate possession of the described premises. No question of damages or arrears of rent was presented.

It is admitted that since the judgment below was entered the defendant has surrendered possession of the premises to the plaintiffs and the plaintiffs are now in complete possession thereof.

As a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist, and the only matter to be decided is the disposition of the costs. While there are well recognized exceptions to this rule, they have no application here. *VanDyke v. Ins. Co.,* 174 N. C., 78, 93 S. E., 444; *Herring v. Pugh,* 125 N. C., 437, 34 S. E., 538; *Elliott v. Tyson,* 117 N. C., 114, 23 S. E., 102; *Elliott v. Tyson,* 116 N. C., 184, 21 S. E., 106; *Russell v. Campbell,* 112 N. C., 404, 17 S. E., 149; McIntosh, Practice & Procedure, 775. Here the subject of the litigation—the right of plaintiffs to the immediate possession of the premises—has been disposed of by the surrender of the premises by the defendant to the plaintiffs. No other question was raised in the trial below, and the judgment appealed from merely awarded possession to the plaintiffs.

We think the plaintiffs' motion to dismiss the appeal should be allowed, and it is so ordered.

Appeal dismissed.

IN THE MATTER OF WILLIAM N. BURNETT, BY AND THROUGH HIS GUARDIAN AND MOTHER, MRS. L. F. FINBURG.

(Filed 28 November, 1945.)

Appeal and Error §§ 4, 30e—

In *habeas corpus*, petitioner asking for release from arrest upon telephonic revocation of his parole, where it appears that on the hearing below that petitioner's parole had then been revoked in due form, G. S., 134-85, the legality of his arrest and detention is presently academic, hence motion of the Attorney-General to dismiss must be allowed.

HABEAS CORPUS proceedings, heard by *Burney, J.,* in Chambers at Wilmington, N. C., 16 July, 1945. Here on petition for a writ of *certiorari.*

Petitioner was duly committed to the Jackson Training School. On 19 February, 1945, he was released on parole. On 12 July, 1945, acting on a telephonic revocation of the parole, the probation officer of New Hanover County ordered his arrest. Writ of *habeas corpus,* after hearing, was denied and petitioner was recommitted. Thereupon, on his petition, writ of *certiorari* issued from this Court.

W. L. Farmer and Rodgers & Rodgers for petitioner.

Attorney-General McMullan and Assistant Attorney-General Tucker for respondent.

PER CURIAM. On 16 July, 1945, the date of the hearing below, petitioner's parole was revoked in due form. G. S., 134-85. He is now lawfully detained. The legality of his original arrest and detention is presently academic. Hence the motion of the Attorney-General to dismiss must be allowed. *Cochran v. Rowe, ante,* 645; *Martin v. Sloan,* 69 N. C., 128; *S. v. R. R.,* 74 N. C., 287; *Waters v. Boyd,* 179 N. C., 180, 102 S. E., 196; *Trade Association v. Doughton,* 192 N. C., 384, 135 S. E., 131; *Board of Education v. Comrs. of Johnston,* 198 N. C., 430, 152 S. E., 156; *Efird v. Comrs. of Forsyth,* 217 N. C., 691, 9 S. E. (2d), 466.

Petition dismissed.

STATE v. FRANK STUTTS.

(Filed 28 November, 1945.)

1. Intoxicating Liquor § 9d—

In criminal prosecution for unlawful possession of illicit liquor, where the evidence tended to show that defendant on his arrest said that the whiskey belonged to him, it having been found in his room, the door of which he unlocked for the arresting officers to enter, an issue of fact is presented, notwithstanding a radical shift of position by defendant on the trial and denial of any knowledge of the liquor, hence motion to dismiss under G. S., 15-173, was properly overruled.

2. Criminal Law § 62½—

On conviction of unlawful possession of illicit liquor and finding by the court that same was a breach of the condition on which a former sentence was imposed, the sentence ordered for the breach of condition being for a term less than imposed for the present offense, both running concurrently, there is no prejudicial error.

APPEAL by defendant from *Sink, J.,* at May Term, 1945, of MOORE.

Criminal prosecution on charge of unlawful possession of illicit liquor.

The jury returned a verdict of guilty. Thereupon the court adjudged that the condition on which a sentence imposed at the January Term, 1941, was suspended had been breached and ordered commitment. Defendant excepted.

Judgment was pronounced and defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody and Tucker for the State.

W. Clement Barrett and H. F. Seawell, Jr., for defendant, appellant.

PER CURIAM. When arrested the defendant said the whiskey belonged to him. It was found in a room in a shack occupied by him when on a fishing trip. He changed clothes in that room on the afternoon of his arrest and he unlocked the door thereto for the officers.

At the trial he made a radical shift of position and denied any knowledge of the liquor or its ownership. This presented an issue of fact for the jury. Hence the motion to dismiss under G. S., 15-173, was properly overruled.

A careful examination of the other exceptive assignments of error fails to disclose any cause for disturbing the verdict.

The sentence ordered in effect for breach of condition was for a term less than the sentence here imposed and is to run concurrently. Therefore, any error therein does not prejudice the defendant.

No error.

STATE v. ELLIS MARSH.

(Filed 12 December, 1945.)

1. Criminal Law § 63—

Upon conviction and sentence in a criminal action and suspension of execution on condition that defendant be of good behavior and not violate any criminal laws of the State for a certain period, where subsequent evidence, offered before the judge of the Superior Court, supports his findings of fact that defendant had breached the condition, upon which the sentence was suspended, the same is sufficient to support a judgment that the execution of the suspended sentence be placed in immediate effect and the former judgment complied with.

2. Appeal and Error §§ 37b, 37e—

Where findings of fact and judgment entered upon them were matters to be determined in the sound discretion of the court, the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here.

APPEAL by defendant from *Williams, J.*, at August Term, 1945, of COLUMBUS.

Criminal prosecution upon warrant issued out of Recorder's Court of Columbus County on 14 May, 1945, charging defendant with two crim-

inal offenses: (1) Trespass upon the lands of E. M. Walters after being forbidden to do so, G. S., 14-134, and (2) assault upon E. M. Walters.

On trial in said court defendant was convicted, and by judgment was given prison sentence. He appealed to Superior Court, and on trial therein, at June Term, 1945, defendant pleaded guilty to each count.

Thereupon, the court entered judgment that defendant be imprisoned for thirty days on each count and be assigned to work the public highways under direction and supervision of the State Highway and Public Works Commission—the sentences to run consecutively—the latter to begin upon the expiration of the first. But that execution of these sentences are suspended upon the following terms and conditions:

"1. That defendant be of good behavior and not violate any criminal laws of the State of North Carolina and the United States of America for a period of two years.

"2. That the defendant not be seen in the presence of or speak to Mrs. E. M. Walters for a period of one year from this date.

"3. That the defendant pay to the Clerk of the Superior Court of Columbus County on or before the first day of the next term the sum of three thousand dollars to be paid by the said clerk to E. M. Walters in full settlement of any and all claims growing out of the alleged assault or alienation of his wife's affections and that the said E. M. Walters shall execute and deliver to the Clerk of Superior Court before receiving said money a release in full, releasing the said Ellis Marsh from any further liability growing out of any of the matters set out in the complaint in the civil action filed by E. M. Walters against said defendant.

"4. That the defendant pay the cost of this action to be taxed by the Clerk."

Thereafter at August Term, 1945, of said Superior Court, upon motion of the solicitor for issuance of capias and commitment upon the sentences imposed at the June Term, 1945, and suspended upon conditions above quoted, and after hearing evidence, the court found these facts:

(1) That since the imposition of said sentences, defendant has violated the first condition, that is, "that he violated the criminal laws of North Carolina, and has knowingly permitted to be operated, used, kept in the premises occupied by him as a place of business in the city of Whiteville, in said Columbus County, illegal punch-boards as defined by the statutes of this State," "that he has permitted the illegal punch-boards, so kept as aforesaid, to be played or used in said place of business," that he has engaged in selling beer to intoxicated persons and to minors in said place of business, and that he purchased and kept and had in his possession what is referred to in the testimony as "baseball numbers" which were used as gambling devices, and one hundred twenty

illegal punch-boards which did not yield the same return each time used by a customer.

(2) That as to the third condition "no part of said three thousand dollars has been paid to or received by the clerk of the court from said defendant—the defendant contending that the requirement that the payment of aforesaid sum as a condition of the suspension of this judgment and sentence is unconstitutional."

(3) That defendant has not violated the second condition and has complied with fourth condition.

Whereupon the court adjudged and ordered that the conditions upon which execution of said sentence was suspended having been breached and violated by defendant, the execution of said suspended sentence be placed in immediate effect and that capias and commitment issue to the end that the judgment of the court at the June Term, 1945, be complied with as therein written.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Wm. F. Jones for defendant, appellant.

WINBORNE, J. The conclusion reached on the basic question involved is sufficient to sustain the judgment below. This is the question: Does the evidence offered before the judge of the Superior Court, bearing thereon, support his finding of fact that defendant has breached the first condition upon which the sentence of June Term, 1945, was suspended, by violating the criminal laws pertaining to punch-boards, G. S., 14-302?

We are of opinion that it does.

This statute, G. S., 14-302, provides that "It shall be unlawful for any person . . . to operate or keep in his possession, or the possession of any other person, firm, or corporation, for the purpose of being operated, any punch-board . . . that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another—by paying money or anything of value for the privilege of operating, playing or patronizing the same, whether through himself or another, the same return in market value, each and every time such punch-board . . . is operated, played or patronized by paying of money or other thing of value for the privilege thereof . . ."; and G. S., 14-303, provides that a violation of the provisions of G. S., 14-302, shall be a misdemeanor punishable by fine or imprisonment, or, in the discretion of the court, by both.

Defendant offered evidence on the hearing before the judge tending to show that he has not committed any criminal offense under the above statute, or any other, since the date of the suspended sentence, and that the punch-boards of the character condemned by the statute found in his place of business were those on hand, and which were stored under the counter when he quit operating them prior to the date of the suspended sentence.

On the other hand, there is evidence for the State tending to show that since the date of the suspended sentence not only has defendant had such punch-boards in his possession in his place of business, but that persons therein have been seen operating the boards, and, on one occasion, when the defendant was present. There is also evidence tending to show that on other occasions "the punched out tickets" had been seen on the floor of the defendant's place of business.

In the light of this evidence—sufficient at least for the inference drawn by the judge, we are unable to say that the finding of the judge is an abuse of the discretion vested in him in such matters. See *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Pelley,* 221 N. C., 487, 20 S. E. (2d), 850, and many others of like import.

In the *Pelley case, supra, Denny, J.,* speaking to the subject for the Court, recently said: "These findings of fact and the judgment entered upon them were matters to be determined in the sound discretion of the court and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here."

Hence, it is unnecessary to consider any other finding of fact pertaining to a violation of the criminal law.

Moreover, as the record fails to show that the court passed upon the constitutional question raised by defendant with respect to the third condition upon which the sentence was suspended, that question will not be, and is not considered on this appeal.

The judgment below is

Affirmed.

MARGIE P. DARK, ADMX., v. H. W. JOHNSON ET AL.

(Filed 12 December, 1945.)

Negligence §§ 4b, 19a—

In a civil action to recover for the wrongful death of plaintiff's intestate, allegedly caused by negligence of defendant, where all of the evidence tended to show that plaintiff's intestate, who had previously been em-

ployed by defendant as a driver and at the time of the accident was employed by defendant to install certain electrical equipment on one of defendant's trucks, which was being driven by another on a round trip for a load of gasoline, asked to go on the trip and was allowed by the driver to do so, plaintiff's intestate driving part of the way and receiving injuries, from which he died three days thereafter, on the return trip by the negligence of the driver when the truck overturned, and that defendant called deceased's wife and told her of her husband's injury and said he was sure he could do something for her husband, there is sufficient evidence for the jury as to whether deceased was on the truck with defendant's prior authority or subsequent ratification, and judgment as of nonsuit was error.

APPEAL by plaintiff from *Grady, Emergency Judge,* at April Term, 1945, of WAKE.

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 defendants.

The defendant, H. W. Johnson, who lives at Fuquay Springs, Wake County, operates a number of motor trucks, and is engaged in the business of hauling and distributing gasoline, lubricating oils, and other petroleum products.

It is alleged that on 4 March, 1943, plaintiff's intestate was employed by the defendant to install certain electrical equipment on one of his trucks and as a part of his duty was riding on the truck belonging to the defendant and driven by Nelson Meadows, when the driver negligently, carelessly and in a wanton manner ran the truck off the road and injured plaintiff's intestate to such an extent that he died three days thereafter. It is further alleged that plaintiff's intestate was riding on the truck, at the time and place in question, with the knowledge, consent and acquiescence of the owner of the truck.

The evidence discloses that the defendant's truck left Fuquay Springs on the afternoon of 4 March, 1943, for Greensboro to get a load of gasoline. The driver, Nelson Meadows, started alone. He saw A. Garland Dark near the Bank of Fuquay. Dark asked him if he was going to Greensboro and back. Meadows said, "yes." Dark replied, "I will go with you," and Meadows said, "all right." Dark drove part of the way to Greensboro. They both went into the Terminal to the loading rack. Meadows says, "I don't know whether it was me or him that signed for the gas. . . . Either one of us could have signed for it."

The accident occurred on the return trip near Mills Service Station in Wake County. It was admitted that plaintiff's intestate's death "was caused by the overturning of this truck which belonged to the defendant Johnson." There is ample evidence of the negligence of the driver. (Judgment of nonsuit was entered as to the defendants, W. A. Hinton

and wife, without objection or exception. It is alleged that their car negligently cut across the path of the on-coming truck and forced the defendant's driver off the road.)

On the following morning, the defendant Johnson called Mrs. Dark and informed her "that Garland and Nelson went to Greensboro after a load of gas for him that night and on the way back Nelson wrecked the truck and Garland was in the hospital not seriously injured then, . . . that he had never lost one of his men yet and not to worry about it." Mrs. Dark further testified: "Mr. Johnson at the garage gave me some personal belongings of my husband and said he was sure he could do something for him, but he never did."

The deceased had previously been employed by the defendant as a driver, but was not so employed at the time of the accident.

Upon consideration of all the evidence, judgment of nonsuit was entered as to the defendant, H. W. Johnson, from which the plaintiff appeals, assigning errors.

William B. Oliver, N. F. Ransdell, and Wilson & Bickett for plaintiff, appellant.

Bailey, Holding, Lassiter & Wyatt for defendant, appellee.

STACY, C. J. It may be conceded that plaintiff has failed to show, with exactness, for what purpose or in what capacity her intestate was on the defendant's truck at the time of his injury. This, however, need not defeat her action, even though the complaint contains specific allegations in respect of the matter. *Williams v. McLean,* 221 N. C., 228, 19 S. E. (2d), 867. The gravamen of the cause of action is the alleged breach of duty which the defendant owed plaintiff's intestate in the circumstances disclosed by the record. *Russell v. Cutshall,* 223 N. C., 353, 26 S. E. (2d), 866; *White v. McCabe,* 208 N. C., 301, 180 S. E., 704; 5 Am. Jur., 729.

Whether the deceased was on the truck with the defendant's prior authorization, or subsequent ratification, as passenger, invitee, or licensee, would seem to be for the jury. 42 C. J., 1101. The conversation which the defendant had with the plaintiff on the morning following the wreck, taken in connection with the other circumstances in the case, affords some evidence for the consideration of the twelve. *Henderson v. Powell,* 221 N. C., 239, 19 S. E. (2d), 876; 4 Blashfield Cyc. Auto. L. & P., ch. 63, pp. 78, *et seq.*

It is not alleged that plaintiff's intestate was a fellow servant of the driver, *Pleasants v. Barnes,* 221 N. C., 173, 19 S. E. (2d), 627; *Shorter v. Cotton Mills,* 198 N. C., 27, 150 S. E., 499; *Michaux v. Lassiter,* 188

N. C., 132, 123 S. E., 310, or that the parties were subject to the provisions of the Workmen's Compensation Act. G. S., ch. 97. See especially G. S., 97-14.

Inferences may also be drawn from the evidence either for or against the status of the deceased as employee, guest, or trespasser, in relation to the owner of the truck. *Russell v. Cutshall, supra.* All the various permissible inferences of fact, arising on the record, should be submitted to the jury for determination in accordance with the usual practice in such cases. 35 Am. Jur., 1015, *et seq.* We refrain from a discussion of the evidence in advance of the verdict of the jury.

The judgment of nonsuit will be set aside.

Reversed.

WILLIAM T. STEWART v. YELLOW CAB COMPANY, A CORPORATION.

(Filed 12 December, 1945.)

Automobiles § 18h—

In a civil action for alleged damages to plaintiff and his automobile, resulting from a collision between the motor vehicles of plaintiff and defendant at an intersection of two city streets, where the city maintained traffic signals, G. S., 20-169, the evidence being sharply contradictory as to whether plaintiff or defendant violated the traffic signal by entering the intersection on a red light, the court erred, in its charge to the jury, by a failure to state in a plain and concise manner the evidence offered as to the right of way between the parties in support of their respective contentions and to declare and explain the law applicable thereto. G. S., 1-180.

APPEAL by defendant from *Olive, Special Judge,* at March Term, 1945, of MECKLENBURG.

This is an action for personal injuries and property damages allegedly sustained by the plaintiff, in a collision between an automobile owned by him and in which he was a passenger, and one of defendant's cabs, at the intersection of Fifth and Tryon Streets, in Charlotte, N. C., on 27 June, 1944. The plaintiff's car was proceeding in a southerly direction on Tryon Street and the cab was proceeding in a westerly direction on Fifth Street, crossing Tryon Street. Tryon Street is approximately sixty feet wide and Fifth Street is approximately twenty-five feet wide at the intersection. The collision between the two vehicles occurred on the west side of Tryon Street, after the cab had crossed the center of Tryon Street.

The plaintiff alleged the defendant violated an ordinance of the City of Charlotte, by entering the intersection under a red light. The defendant, on the other hand, alleged that plaintiff's car failed to stop before entering the intersection, in violation of the traffic signal light and the ordinance of the City of Charlotte, and the laws of North Carolina applicable thereto, the City of Charlotte having installed traffic signal lights at the intersection of North Tryon and Fifth Streets in said city, and that said lights were in operation at the time of the collision between the cars of the plaintiff and defendant.

The plaintiff offered evidence tending to prove the driver of the cab entered the intersection at an excessive rate of speed, and on a red light, after plaintiff's car had entered the intersection. Likewise, defendant offered evidence tending to prove that plaintiff's car entered the intersection at an excessive rate of speed and on a red light after the cab of the defendant had entered the intersection. The evidence is sharply contradictory as to the speed of the respective cars.

The jury returned a verdict in favor of plaintiff. From the judgment predicated on the verdict, the defendant appealed, assigning error.

Henry L. Strickland for plaintiff.

Helms & Mulliss for defendant.

DENNY, J. The ordinance of the City of Charlotte authorizing the erection and maintenance of the traffic signals at the intersection of North Tryon and Fifth Streets in said city, as authorized by G. S., 20-169, not having been introduced in evidence, in the trial below, the court instructed the jury not to consider the evidence as to the traffic lights except as to whether or not, under the definition of negligence, a reasonably prudent person, in the exercise of due care, would drive under a red light at the intersection of North Tryon and Fifth Streets. And the court further instructed the jury that in so far as this case was concerned, it was not negligence *per se* to enter the intersection on a red light, and that it was not a violation of any law to enter this intersection on a red light.

The court having withdrawn from the jury any consideration of the traffic signals as having any legal bearing on the rights of the plaintiff and defendant as they entered the intersection of the streets where the collision occurred, the defendant duly excepted to the failure of the court, in charging the jury, to state in a plain and concise manner the evidence given in the case as to the right of way as between the parties at the intersection of the streets in which the collision occurred, and to declare and explain the law arising thereunder, as provided by G. S.,

1-180. We think the exception well taken, and must be sustained. The court inadvertently failed to state the evidence offered by the parties in support of their respective contentions, as to which motor vehicle first entered the intersection, and to declare and explain the law applicable thereto. The right of way rule is stated in the recent case of *Cab Co. v. Sanders,* 223 N. C., 626, 27 S. E. (2d), 631, and in the cases cited therein, and need not be restated here.

In view of the conclusion reached, it becomes unnecessary to discuss the remaining exceptions.

The defendant is entitled to a new trial, and it is so ordered.

New trial.

J. L. HILGREEN v. SHERMAN'S CLEANERS & TAILORS, INC.

(Filed 12 December, 1945.)

1. Statutes § 5a—

All statutes must be construed in the light of their purpose. A literal reading of them, which would lead to absurd results, is to be avoided, when they can be given a reasonable application, consistent with their words and with the legislative purpose.

2. Same—

Unless the section of the Emergency Price Control Act of 1942, dealing with penalties, commands in unequivocal language, that each individual purchase shall carry a penalty of $50, the conscience of the Court forbids that most harsh interpretation. The section contains no such language.

3. Penalties § 2—

In a civil action by plaintiff to recover certain penalties, plus reasonable attorney's fees, under the Emergency Price Control Act of 1942, where there was a separate overcharge on each of five items, totaling eighty-five cents, all items left at one time to be cleaned by defendant, who filed but one schedule of maximum prices with the local O.P.A., as required by the said Act, the five acts complained of constitute but a single violation within the meaning of the statute, and plaintiff is entitled to recover the sum of $50, plus reasonable attorney's fees and costs.

4. Superior Courts § 1a: Penalties § 2—

The Superior Court has jurisdiction in actions to enforce the Emergency Price Control Act of 1942, regardless of the amount of the penalty or penalties demanded in good faith, if in addition thereto the plaintiff seeks to recover reasonable attorney's fees, since such fees are mandatory upon recovery by plaintiff.

HILGREEN *v.* CLEANERS & TAILORS, INC.

APPEAL by defendant from *Clement, J.*, at April Term, 1945, of GUILFORD.

This is a civil action instituted 3 June, 1944, to recover certain penalties, plus reasonable attorney's fees, allegedly arising under the Act of Congress entitled Emergency Price Control Act of 1942, Title 50, U. S. C. A., sec. 925 (e).

The plaintiff took five separate garments to the place of business of the defendant, on 28 March, 1944; namely, two suits, a plain dress, and two blouses, for the purpose of having all the garments cleaned and pressed.

The defendant has two methods of dry-cleaning, one method is designated as "Regular" or "Machine Work," the other method is "DeLuxe" or "Hand Work." The plaintiff testified that he instructed an agent of the defendant at the time he delivered the garments to him to use the DeLuxe method on the two suits and the Regular method on the other garments. The DeLuxe method was used on all the garments, according to the testimony of the defendant, and charges made accordingly.

The schedule of maximum prices charged by the defendant prior to 1 March, 1944, and on file with the local office of O.P.A., as required by the Emergency Price Control Act, was introduced in evidence. The prices charged by the defendant for cleaning and pressing each of the two blouses was 50 cents, the schedule for DeLuxe work rather than 35 cents the schedule for Regular work. The charge for cleaning and pressing the plain dress was $1.00, which was the price for DeLuxe work rather than 60 cents for Regular work. The evidence tends to show that the overcharge for one of the suits, in excess of the maximum price schedule for DeLuxe work, was 5 cents and the other was 10 cents.

The jury found that there was an excess charge of 15 cents each on the two blouses, 40 cents overcharge for cleaning and pressing the plain dress, 10 cents overcharge on one of the suits and 5 cents on the other, making a total overcharge of 85 cents on the five garments.

The court held that the transaction constituted five separate violations of the Emergency Price Control Act, and entered judgment in favor of the plaintiff for $250.00, and ordered the defendant to pay into the office of the clerk of the Superior Court of Guilford County the sum of $25.00, as attorney's fees for the use and benefit of the plaintiff's attorney. Defendant appeals, assigning error.

E. M. Stanley and John R. Hughes for plaintiff.

R. R. King, Jr., for defendant.

DENNY, J. This appeal presents for our determination the following questions: (1) Did the court commit error in overruling defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence and renewed at the close of all the evidence? (2) If not, did the acts complained of constitute a single violation of the defendant's price schedule, within the meaning of the statute, or did they constitute five separate violations of the schedule, giving the plaintiff the right to collect a multiple of fifty dollar penalties? (3) If the plaintiff is entitled to collect but a single penalty of $50.00 and reasonable attorney's fees, did the Superior Court have jurisdiction of this action?

The plaintiff offered ample evidence to carry this case to the jury, and the first question must be answered in the negative.

The second question is more difficult. The decisions in various jurisdictions differ widely in construing the statute which gives the plaintiff the right to maintain this action.

The pertinent part of the Emergency Price Control Act of 1942, Title 50, U. S. C. A., sec. 925 (e), reads as follows: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50.00 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. . . . Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid."

The appellee insists that the judgment below should be affirmed and is relying upon the case of *Thierry v. Gilbert,* 147 Fed. (2d), 603, in which case the First Circuit Court of Appeals held that where a landlord leased to a tenant the premises in question, including a mechanical refrigerator as part of the equipment, for a term of seventeen months, beginning 1 April, 1943, at a rental of $55.00 a month and under the Rent Regulation the maximum rent was fixed at $50.00 a month, each payment of $55.00 as stipulated in the lease constituted a separate violation of the Rent Regulation. The Court said: "The result is no doubt harsh in this case, where the landlord acted innocently in making the overcharges. But as originally enacted, and as applicable here, the Act gave the tenant the right to recover the same penalty whether the violation was willful or not. The rigors of sec. 205 (e) have been mitigated, but only prospectively, by sec. 108 (b) of the Stabilization Extension Act of 1944, 50 U. S. C. A. Appendix, sec. 925 (e), the legislative history of which clearly indicates that Congress, by such amendment, intended

among other things to obviate for the future the hardship in the very type of situation here presented." There are many decisions in accord with the above opinion, and among them we cite: *Lamur v. Yates,* 148 F. (2d), 137; *Lapinski v. Copacino,* 131 Conn., 119, 38 A. (2d), 592; *Beasley v. Gottlieb,* 131 N. J. Law, 117, 35 A. (2d), 49; *Thompson v. Taylor,* 60 Fed. Supp., 395.

Under the facts presented on this record, however, the appellant contends that if the plaintiff is entitled to recover anything as a penalty, he is only entitled to recover treble the amount by which the consideration exceeded the prices listed in the defendant's schedule, or $50.00, whichever is greater. The plaintiff delivered the five garments, at the same time, to the defendant to be cleaned and pressed. The aggregate overcharge is only 85 cents, and the defendant insists that one penalty, and not five, is all the plaintiff is entitled to recover.

In the case of *Peters v. Felber* (Cal.), 152 P. (2d), 42, in which the plaintiff demanded, and had obtained judgment in the trial court for six penalties of $50.00 each, for excess payments of rent in the sum of $6.00 per month for six months, the appellate court held the plaintiff was entitled to recover treble the total overcharge of $36.00, or $108.00, and attorney's fees. In the opinion of the Court, it is said:

"The general principle to be followed in the construction of section 205 (e), 50 U. S. C. A. Appendix, sec. 925 (e), is succinctly expressed by the then *Mr. Justice Stone* in *Haggar Company v. Helvering,* 1940, 308 U. S., 389, 394, 60 S. Ct., 337, 84 L. Ed., 340, 344: 'All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.' In *Bowles v. American Stores, Inc.,* 1943, 78 U. S. App. D. C., 238, 139 Fed. (2d), 377, the United States Court of Appeals, District of Columbia, in reviewing a judgment where the award was five dollars instead of the amount authorized by section 205 (e), 50 U. S. C. A. Appendix, sec. 925 (e), took occasion to say this about the purpose of the legislation (p. 379 of 139 F., 2d): 'Congress foresaw that the task of enforcing the Act against retailers would be too vast for the Administrator to accomplish without the help of consumers. The plain purpose of the $50 clause is to enlist the help of consumers in discouraging violations. . . . The filing and prosecution of a small suit may or may not cost the plaintiff a substantial amount of money, but any suit takes time and effort. Congress made $50 a floor and not a ceiling in order to give overcharged consumers the necessary incentive to sue.' See also *Miller v. Superior Court,* 1943, 22 Cal. (2d), 818, 838, 142 P. (2d), 309.

"To interpret the section as authorizing the recovery in one action of as many times fifty dollars as there are overcharges pleaded, would lead to results so absurd that the interpretation should be avoided unless required by the language of the section. This is not a fanciful speculation. We have one appeal pending before us where a multiple of fifty dollar penalties is sought because of a succession of weekly rents which exceeded the ceiling price by twenty-five cents each. In another action now on appeal the plaintiff pleads twenty-two purchases in which he was overcharged a total of thirty-four cents, and prays for twenty-two fifty dollar penalties, a total of $1,100. To interpret the section so as to hold out so great rewards for so minor overcharges would serve to foster in buyers a desire to promote price violations rather than to put a stop to them, with the result that the section would operate to defeat rather than further its purpose. Such an interpretation, obviously, is not to be adopted if it may be avoided without doing violence to the provisions of the section."

The opinions in the following cases are in accord with the construction given the statute in the above case: *Brooks, et ux., v. Kalisiewicz, et ux* (Pa.), 58 F. Supp., 648; *Everly v. Zepp, et als.* (Pa.), 57 F. Supp., 303; *Link, et als., v. Kallaos, et als.* (Mo.), 56 F. Supp., 304; *McCowen v. Dumont, et als.* (Mo.), 54 F. Supp., 749; *Hayes v. Osborn* (Okla.), 160 P. (2d), 956; *Aronwald v. Sperber,* 49 N. Y. S. (2d), 257. In the last cited case, in which two cases were consolidated, the defendant, operator of a retail meat market, had filed a price schedule covering meats and one covering poultry. One of the plaintiffs purchased from the defendant fifteen items of meat on six occasions and one of poultry on another. The other plaintiff purchased an item of meat and one of poultry on different occasions. The plaintiffs alleged 18 separate violations of the maximum prices contained in the defendant's price schedules and sought to recover 18 penalties of $50.00 each. The Court said:

"The language of Section 205 (e) is clear and hardly leaves room for far-fetched speculation. It calls for a penalty for the violation of a 'regulation, order, or price schedule prescribing a maximum price or maximum prices.' Those who used this language in enacting the law were aware of the fact that a schedule contains numerous items, yet but a single penalty is prescribed for any violation of such a schedule. To twist this language to mean that each item of the schedule is to be treated as a single schedule, would certainly be doing violence to language itself.

"This Court is reluctant to read words into a penal provision, so as to mulct one of greater damages than the very provisions called for. Had Congress intended to exact a $50 penalty for each sale beyond the pre-

scribed price, it could have said so in no uncertain vocables. The law deals with reasonable concepts and the statute must be so construed.

"The Emergency Price Control Act of 1942 is a salutary war measure. Its purpose is obvious enough; to prevent avarice and cupidity on the part of sellers of commodities from getting out of hand and thus prevent an increase of the consumers' hardships. The rising tide of prices had to be checked by legislative enactment. However, no intent can be read into that wise and prudent enactment to establish thereby a sort of gestapo, with each individual consumer an informer, leading to inordinate and unconscionable fines and penalties. Unless the section dealing with penalties commands in unequivocal language, that each individual purchase shall carry a penalty of $50, the conscience of the Court forbids that most harsh interpretation. Since the section does not contain such language, the construction irresistibly leads to the conclusion herein reached.

"The attorney for the O.P.A. lays goodly stress on the thought that the statute referred to is remedial and not penal, and, therefore, calls for a liberal interpretation in favor of plaintiff. With this the Court cannot agree. Liberal is not synonymous with violent. A liberal interpretation is not tantamount to being liberal with the defendant's funds. There should not be such a wide margin of demarcation between law and good morals as the contrary holding would produce. . . . It is the opinion of the Court that, since the defendant violated but two price schedules, each plaintiff herein is entitled to recover a penalty of $50 for each of such violations, or a total of $100 for each plaintiff."

In the instant case, the defendant had but one price schedule, and we think the acts complained of by the plaintiff constitute but a single violation within the meaning of the statute and that the plaintiff is entitled to recover the sum of $50.00, plus reasonable attorney's fees and costs.

In view of the conclusion reached herein, we come to the question of jurisdiction. Under the provisions of the Emergency Price Control Act of 1942, the aggrieved party may bring his action in any court of competent jurisdiction. In *Hopkins v. Barnhardt,* 223 N. C., 617, 27 S. E. (2d), 644, we held that a justice of the peace in this State did not have jurisdiction in an action for a penalty plus reasonable attorney's fees to be fixed and awarded by the court. The Superior Court, however, does have jurisdiction in actions to enforce the Emergency Price Control Act of 1942, regardless of the amount of the penalty or penalties demanded in good faith, if in addition thereto the plaintiff seeks to recover reasonable attorney's fees. Jurisdiction is determined by the amount demanded in good faith, *Tillery v. Benefit Society,* 165 N. C., 262, 80 S. E., 1068, or by the character of the relief

sought, *Drainage Commissioners v. Sparks,* 179 N. C., 581, 103 S. E., 112, and *Canal Co. v. Whitley,* 172 N. C., 100, 90 S. E., 1. The statute authorizes the court to award reasonable attorney's fees and the Superior Court, being a court of general jurisdiction, has the power to award such fees. *Hopkins v. Barnhardt, supra; In re Will of Howell,* 204 N. C., 437, 168 S. E., 671. In a recent decision of the Supreme Court of New York, the Court held the awarding of reasonable attorney's fees is mandatory under the provisions of section 205 (e) of the Emergency Price Control Act of 1942, if the plaintiff is successful in the litigation. *Aronwald v. Sperber,* 53 N. Y. Supp. (2d), 352.

Except as herein modified, the judgment of the court below is affirmed.

Let the cost be equally divided between the parties.

Modified and affirmed.

STATE v. ERNEST BROOKS, JR.

(Filed 12 December, 1945.)

1. Appeal and Error §§ 37b, 37e: Evidence § 27: Criminal Law § 48c—

The admissibility of evidence, when challenged, is, *imprimis,* a question for the trial court. Where its admission primarily depends upon a determination of fact, the court of review is ordinarily bound by the finding of the trial judge when it is supported by evidence, and will not disturb that finding or ruling admitting the evidence unless there appears some error of law or legal inference.

2. Criminal Law § 33—

The competency of an alleged confession is a preliminary question for the trial court, to be determined, after hearing evidence of the circumstances under which the confession was given, both for the State and for the defendant.

3. Criminal Law §§ 53a, 81c—

In a criminal prosecution in a capital case, where the trial judge calls back the jury especially to correct an error in his original charge; and thereupon gives the jury supplemental instructions, calling their attention to the mistake, and correctly giving them the rule on the point involved, such supplemental instructions have all the more weight and there is no reversible error.

APPEAL by defendant from *Frizzelle, J.,* at March Criminal Term, 1945, of NEW HANOVER.

The defendant, a young Negro fourteen or fifteen years of age, was convicted under a bill of indictment charging him, in two counts, of rape

upon the person of Mrs. G. V. Parker and of burglary in breaking and entering the dwelling house then occupied by her, in the nighttime, with the intent to commit this felony.

Many of the details are unprintable, but the evidence necessary to an understanding of the decision upon the appeal may be summarized as follows:

The Parkers, husband and wife, and a daughter seven years old, lived as the sole occupants of a five room house in Wilmington. The house had a living room, two bedrooms, a dining room, kitchen and bath. The husband was away on the night of the occurrence, working at the shipyard, and Mrs. Parker and young child were alone in the house. She had been sewing, and a little after midnight cut off the radio and went to bed. She was eight months gone in pregnancy, was lying in bed in some discomfort and unable to sleep, and alert to noises. She heard a key turn in the lock of the front door, which she had locked before retiring. Thinking it was her husband who had returned because of sickness, or some other reason, she did not get up, but lay listening. She heard the sound of the French doors between the living room and dining room being opened, and called "Who is that?" and someone said, "It is me." Mrs. Parker said, "Who is me?" and got the reply, "Jake," and the person, whom she later identified as this defendant, pushed the bedroom door open, and with violence and threats to kill Mrs. Parker and her little girl who was in the room, overcame her resistance and accomplished the act as far as necessary to complete the crime. However, he became frightened at the cries of the little girl and left without fully completing the sexual act.

Mrs. Parker immediately called her neighbors from her window, called up her husband, who was working at the shipyard, and when he came, the police were called. Mrs. Parker detailed the circumstances to the policeman, Murray, minutely describing the defendant. Murray testified in corroboration of the witness, stating that she had described the clothing of her assailant, the physical appearance of his face and eyes and other characteristics, and said she was satisfied that she could recognize his eyes. She gave a detailed statement of what occurred that night; said that the boy was dressed in a pair of dark trousers, a dirty jacket, similar to a soldier's jacket, and had on a toboggan, giving other details corresponding with her testimony on the trial.

The occurrence was after midnight, and on that same morning Murray took Mrs. Parker through the colored section of the city to see whether the assailant could be found and identified. Finally, the defendant was seen walking along the sidewalk, and Mrs. Parker screamed, "There he is," becoming much agitated and hysterical. On account of Mrs. Par-

ker's condition, Murray did not want to bring Mrs. Parker nearer to the boy, but called other officers who followed and took him in charge, and he was carried to the office of Superintendent Fales for examination. He there confessed to the crime, going over in detail all the circumstances, and stating that he was frightened away by the crying of the little girl.

Upon trial of the case the voluntariness of this confession was challenged, and before admitting it in evidence, the jury was sent out and the question of its voluntariness was taken up by the court and evidence heard. On this inquiry the evidence was substantially as follows:

The witness Murray testified that prior to the confession neither he nor any person in his presence made any threat on or offered defendant any reward or leniency in the event he would make a statement, and that there was nothing done, of any nature, to force him to make it. That while Mr. Fales was beginning the questioning witness was outside, but was inside when the confession was made.

H. E. Fales, Superintendent of New Hanover County Bureau of Investigation, in whose office the confession was made, testified that "he did not offer the defendant any reward or hope of reward, or promise him any leniency for telling the truth about the matter; and that no one in his presence forced the defendant to make any statement." He further testified:

"I talked with the defendant about the crime. I told him he didn't have to say anything. I asked him how old he was, what school he went to, did he go to Sunday School, and if he had done the crime. He didn't know anything about it at first, and then I showed him the key. I searched him and found the key. I found the key in his watch pocket. It was a regular house key. After I found the key, I talked on a little bit and I said, 'Did you unlock the door with this key?' and he said, 'No, it was not locked,' and then he told me this story. He did admit he turned off the light, and I told him there were fingerprints, but I did not tell him they were his fingerprints. I told him this for the psychological effect. He did not come through with anything until I found the key. I asked him if he would go out with us and point out the alleged scene of the crime, and he said he would. He directed us to the proper street and up to this house, and when we got to the corner I said, 'Where is the house?' and he said, 'Right over there,' and he went to the house and I said, 'Just what did you do?' and he showed us, and he went up to the front porch and said the door was not locked, and how he went through the French doors, and then he went in the bedroom and showed us where the woman and the girl were lying on the bed. Frankly, I don't remember whether the statement was signed before we went or after we came back."

The defendant testified substantially as follows:

"There were no officers at the exact time I came in there, but later Mr. Fales and Mr. Wolfe and Mr. Murray came in and two more policemen, and those other policemen were sitting there talking to me, and he told me he had my fingerprints and if I would come on and tell the truth it would be easier."

He testified that he had a key on him which Mr. Fales found and that Mr. Fales asked him about it; that he told Mr. Fales that his father kept tools and things on a shelf, and he got it from there. Mr. Fales suggested that he go down there and give a demonstration—said "did I want to go down there and show them the way to the house and everything"; that he was not told he didn't have to go; that after Mr. Fales told him he had his fingerprints, he thought he had to confess the crime.

"Q. Did he say anything about making it easier on you if you went through it?

"A. When I first came to the police station they said they had my fingerprints, and if I would tell the truth it would be a whole lot easier on me."

Upon the conclusion of this inquiry, the court found that the alleged confession was "given or obtained without any inducement of hope or fear, and that the same was the free and voluntary confession, admissible in evidence"; and the jury having been returned to the court room and the trial resumed, admitted the evidence of the confession over defendant's objection and exception.

The witness Murray, recalled, testified that the defendant said to him that he did go into the white lady's house and have sexual relations with her, but did not complete his desire because the little girl, who was there on the bed, started crying and he got afraid, picked up his trousers and went out. That defendant said he was around the Recreation Center at Tenth and Castle Streets and decided to go up into the white section and have sexual relations with a white woman. "I said, 'You mean you had that in mind before you left?' and he said, 'Yes.'" He then, according to this testimony, detailed the circumstances as they had been testified to by Mrs. Parker, who at that time had made no statement in his presence. That defendant voluntarily went with the officer and pointed out the house he had entered. That having done so, he asked the officer if he wished him to sit there on the wall and pull off his shoes as he did that night, and was told that it was not necessary. That he then went on in front of the officer, entered the house, pushed open the French doors and said, "This is the bedroom to the right." That he then pointed out the various things in the bedroom as they were on that night, showing where he had placed his hands upon the bed. That the defendant told

the officers he was wearing the same toboggan on the night of the occurrence that he wore when brought to the police office; and, asked if he had a brown jacket, he said he did and that it was at the laundry. That the policeman found the jacket there, and defendant stated that he had carried it to the cleaners next day. In this clothing they found a key.

N. J. Wolfe, a member of the police force, corroborated this statement.

The defendant's mother testified: "He is fifteen; he became fifteen on December 31, 1945."

After charging the jury, and after they had retired to the room to consider their verdict, the judge called them back and supplemented his charge as follows:

"Gentlemen of the Jury: At the conclusion of the charge I had a suspicion and a feeling that I had committed error with respect to the instruction relating to the second count, and I asked Mr. McEwen to read back to me that portion of the charge, which he did, which confirmed the impression which I had.

"I instructed you that under the second count you could render only one of two verdicts, to wit, guilty of burglary in the first degree, or not guilty, though later in the charge stating to you that by reason of the provision in the statute enacted by the Legislature of 1941, amending the law as it had theretofore existed, you were vested with an election notwithstanding the fact you found the facts constituted burglary in the first degree to render a verdict of guilty of burglary in the second degree.

"The defendant, by reason of the law as the Court has instructed you, had removed from him the right upon the evidence in this case, and the law applicable thereto, to insist upon a verdict of guilty of burglary in the second degree under the facts of the case, and I was afraid it had caused some confusion and misunderstanding in your minds, and for that reason I am calling you back to try to eliminate any confusion that may have been created, and to make it perfectly clear to you, and I now charge you, that under this second count of burglary you may render one of three verdicts, to wit, guilty of burglary in the first degree; guilty of burglary in the second degree, or, not guilty, and that you can render a verdict of guilty of burglary in the second degree in the exercise of your sound discretion and the election given you under the amendment even though you may be satisfied beyond a reasonable doubt from the evidence in this case, and may find facts from that evidence upon which, but for that proviso or amendment, you would find a verdict of guilty of burglary in the first degree."

The case was submitted to the jury and resulted in conviction of the defendant on both counts. Counsel for the defendant moved to set aside the verdict because of errors committed during the course of the trial,

which motion was refused, and the defendant excepted. Judgment imposing the death penalty was pronounced, to which the defendant objected, excepted, and appealed, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

C. G. Gates for defendant, appellant.

SEAWELL, J. 1. The admissibility of evidence, when challenged, is, *imprimis,* a question for the trial court. Where its admission preliminarily depends upon a determination of fact, the court of review is ordinarily bound by the finding of the trial judge when it is supported by evidence, and will not disturb that finding or ruling admitting the evidence unless there appears some error of law or legal inference.

Pertinent to confessions, it is observed in *S. v. Grass,* 223 N. C., 31, 33, 25 S. E. (2d), 193:

"The competency of an alleged confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, and the court's ruling thereon is not reviewable on appeal, unless accompanied by some imputed error of law or legal inference. *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821." See, also, *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Rogers,* 216 N. C., 731, 6 S. E. (2d), 499.

The trial judge was careful to preserve the rights of the youthful prisoner, and the record discloses no reason why the Court here should disturb his findings and conclusion, or his ruling admitting the evidence of the confession and the acts of the defendant upon visiting the scene of the alleged crime—if included in the objection and challenge of the defendant's counsel above noted. The ruling admitting the evidence must be sustained.

2. The defendant did not cause the whole charge to be sent up, nor indeed the specific language used in that portion of the charge to which he desires to direct our attention as erroneous. The exception might therefore, for sound reasons, be dismissed as ineffectual. We entertain it only because of the gravity of the crime of which defendant was convicted. But, supposing the supplemental instruction given by the judge by way of correction sufficiently reflects the charge as it theretofore stood, we cannot see how the defendant was prejudiced thereby. In fact, as the jury were called back especially for this correction, the rule last given, and correctly given, had all the more weight. *S. v. Rogers, supra,* p. 732; *S. v. Baldwin,* 178 N. C., 693, 100 S. E., 345.

We have not only given consideration to the two assignments of error brought forward in the argument and brief, but we have carefully examined the whole record and find nothing which would justify us in disturbing the result of the trial. We find

No error.

A. T. MORGAN, ADMINISTRATOR OF LOUISE MORGAN, DECEASED, v. THE CAROLINA COACH COMPANY, A CORPORATION, AND G. E. GIBBS.

(Filed 12 December, 1945.)

1. Death §§ 3, 6: Negligence § 17a—

In an action to recover damages for wrongful death, G. S., 28-172, 28-173, the plaintiff must allege and prove (1) that the defendant was negligent, (2) that such negligence, acting in continuous and unbroken sequence, and without which the injury would not have occurred, resulted in the injury producing death, and (3) that, under the circumstances, a man of ordinary prudence could and would have foreseen that such result was probable.

2. Negligence §§ 5, 17a: Automobiles § 9c—

The decisions of this Court are to the effect that the violation of an ordinance or statute enacted for the safety of the public is negligence *per se*, but such violation must be the proximate cause or one of the proximate causes of the injury to warrant recovery.

3. Automobiles §§ 9c, 13, 14, 16—

The stopping of a passenger bus upon the paved portion of a highway outside of business or residential districts, for the purpose of permitting a passenger to alight, is not parking or leaving a vehicle standing, within the meaning of G. S., 20-161, and is not violative thereof. And by analogy the same principle would apply when stopping for the purpose of receiving a passenger.

4. Automobiles §§ 9c, 13, 14, 16, 18a, 18d—

Where the complaint, in an action to recover damages for wrongful death, alleges that the passenger bus of one of defendants, following on the highway a school bus, plainly marked as such by visible signs required by statute, which after proper signal had stopped and was engaged in discharging school children, passed the school bus without stopping and then stopped immediately ahead of the school bus for the sole purpose of taking on a passenger, G. S., 20-217, thus concealing the view ahead and forcing plaintiff's intestate to go behind the bus to cross the highway, and as deceased was attempting to cross, before the stop signal of the school bus was withdrawn, defendant's bus speeded up its motor, the sound of which prevented deceased from hearing the approach of other vehicles, and put the passenger bus in motion, and, when deceased reached about the center of the highway, she was violently struck and killed by an automobile

coming from ahead at a high rate of speed, a cause of action against the defendant, owner of the passenger bus, is stated and demurrer was properly overruled.

APPEAL by defendant, the Carolina Coach Company, a corporation, from *Sink, J.*, at May Term, 1945, of MOORE.

Civil action to recover for alleged wrongful death, G. S., 28-172, and G. S., 28-173, heard upon demurrer to complaint.

It appears from the allegations of the complaint that Louise Morgan, about 13 years of age, intestate of plaintiff, came to her death on 1 January, 1945, when stricken by an automobile operated by defendant G. E. Gibbs as she was crossing a public highway after alighting from a school bus on which she was a passenger. The school bus and the passenger bus of defendant, the Carolina Coach Company, were moving west on the highway from Carthage towards Biscoe, and the automobile of defendant G. E. Gibbs was moving east in opposite direction on said highway. And in the light of these facts, these are the pertinent allegations of negligence in so far as same relate to defendant, the Carolina Coach Company:

"7. That when the school bus . . . reached a point about six miles west of Carthage, the driver of said school bus gave a visible and proper signal which indicated his intention to bring school bus to a stop, and a clearly visible printed stop signal extended from the left side of said school bus and said bus was turned to the right and was stopped on said highway a short distance from the paved portion thereof.

"8. That while said school bus was standing on said highway the said Louise Morgan and other children alighted therefrom, and before the stop signal of said school bus had been withdrawn and before said school bus had moved on, the defendant, Carolina Coach Company, negligently, carelessly, wrongfully and in violation of the Motor Vehicle Law of North Carolina failed to bring said passenger bus to a full stop before passing said school bus, notwithstanding the fact that said school bus bore a plainly visible sign containing the words "school bus" in large letters on the side and rear thereof, and the aforementioned stop signal was in plain view and had not been withdrawn.

"9. That while said school bus was discharging passengers, including the said Louise Morgan, the bus of the defendant, Carolina Coach Company, passed said school bus without stopping and then for the sole purpose of receiving a passenger brought said long and high passenger bus to a full stop at a point on said highway immediately west of said school bus and the said Louise Morgan was forced to walk to the rear of the defendant's passenger bus in order to reach the opposite side of said highway and said passenger bus was stopped in such position that the

view of the said Louise Morgan of any oncoming traffic from the west was obstructed and prevented.

". . .

"11. That under the circumstances and conditions herein described, the said Louise Morgan, in the usual and ordinary way, alighted from said school bus, went around to the rear of the passenger bus of the defendant, Carolina Coach Company, which had wrongfully and unlawfully passed the rear of the said school bus and had wrongfully come to a stop in the proper pathway of the said Louise Morgan, and she started across said highway to the opposite and proper side for her to travel, and when she reached a point about the center of the paved portion of said highway she was suddenly, unexpectedly and without any notice or warning violently struck by a Ford automobile that was being driven at a high, negligent and dangerous rate of speed by the defendant, G. E. Gibbs, and she was knocked down, run over and dragged by said Ford automobile; her body was horribly mangled and she died as a proximate result of the combined negligence of the defendants, Carolina Coach Company and G. E. Gibbs. . . .

"14. That the said Louise Morgan was injured and killed as a direct and proximate result of the combined and concurring negligence of the defendants, in that, the defendant, Carolina Coach Company, failed to bring its said bus to a full stop before passing said school bus that was engaged in discharging its infant passengers as it was its duty to have done; and after passing said school bus it negligently, carelessly and wrongfully brought said passenger bus to a stop for the purpose of receiving a passenger, and at such place and under such conditions as to block the passageway and view of the said Louise Morgan who had properly alighted from said school bus, and while the said Louise Morgan was passing immediately to the rear of said bus of the defendant, Carolina Coach Company, as she was under the circumstances compelled to do in order to reach the opposite side of said highway, the defendant, Carolina Coach Company speeded up the motor of said bus, the sound of which would and did prevent the said Louise Morgan from hearing the approach of any other vehicle on said highway, and it put said passenger bus in motion before the school bus' stop signal had been withdrawn and before the school bus had been put in motion which indicated that it was safe for the said Louise Morgan to proceed; and under the circumstances and conditions herein described, the defendant, G. E. Gibbs, negligently, . . . approached said place . . ."

The defendant, the Carolina Coach Company, demurred to the complaint for that upon its face it shows that plaintiff has failed to allege a cause of action against this defendant in that "no subsisting facts are

alleged which show or tend to show actionable negligence on the part of said defendant."

When the case came on for hearing, and having been heard, the presiding judge entered order overruling the demurrer. Defendant, the Carolina Coach Company, appeals therefrom to the Supreme Court and assigns error.

Douglass & Douglass and Seawell & Seawell for plaintiff, appellee.
Jones & Smathers for defendant, appellant.

WINBORNE, J. Accepting as true the allegations of fact contained in the complaint, and relevant inferences of fact, necessarily deducible therefrom, as we must do in testing by demurrer thereto the sufficiency of the allegations of the complaint to state a cause of action, *Merrell v. Stuart,* 220 N. C., 326, 17 S. E. (2d), 458, and cases cited, the facts alleged in the complaint in the present case present this factual situation at the scene of alleged wrongful death:

The school bus, marked as such by proper sign, traveling west on the highway described above gave signal, indicating intention to stop, by extending stop signal from its left side, and "turned to the right and was stopped on said highway a short distance from the paved portion thereof," for the purpose of discharging passengers, who were school children. And while the school bus was so standing, and while school children were alighting therefrom, and before the stop signal had been withdrawn and before the school bus had moved on, the passenger bus of defendant Carolina Coach Company, also traveling west, approached on the same highway, and instead of coming to a full stop before passing the school bus, passed it and stopped to take on a passenger "at a point on said highway immediately west of said school bus," thereby forcing intestate of plaintiff to walk to the rear of the passenger bus in order to reach the opposite side of the highway, and obstructing her view, and by the noise of its motor preventing her hearing of any traffic from the west. And as intestate of plaintiff started across the highway "to the opposite and proper side for her to travel" and had reached a point about the center of the paved portion of the highway, she was suddenly, unexpectedly and without notice or warning violently struck "by the automobile of defendant Gibbs"—which was being driven "at a high, negligent and dangerous rate of speed."

In the light of these circumstances, are the facts sufficient to state a cause of action against defendant Carolina Coach Company?

The court below was of opinion that they are, and with that view we are not in disagreement.

In an action to recover damages for wrongful death the plaintiff must allege and prove (1) that the defendant was negligent, (2) that such negligence, acting in continuous and unbroken sequence, and without which the injury would not have occurred, resulted in the injury producing death, and (3) that under the circumstances a man of ordinary prudence could and would have foreseen that such result was probable. *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843; *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239; *Mitchell v. Melts,* 220 N. C., 793, 18 S. E. (2d), 406, and cases therein cited.

Moreover, the statute, G. S., 20-217, requiring motor vehicles to stop for school buses in certain cases, in so far as applicable to roads and highways outside of incorporated towns and cities, provides that: "Every person using, operating, or driving a motor vehicle upon or over the roads and highways of the State of North Carolina . . . upon approaching from any direction on the same highway any school bus transporting school children to and from home, while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads and highways of the State . . . shall bring such motor vehicle to a full stop before passing or attempting to pass such bus and shall remain stopped until said passengers are received or discharged at that place and until the 'stop signal' of such bus has been withdrawn or until such bus has moved on." This statute further provides that the above provisions are applicable only in the event the school bus bears upon the front and rear thereof a plainly visible sign containing the words "school bus" in letters not less than five inches in height. It is further provided that any person violating the provisions of the statute shall be guilty of a misdemeanor, etc.

The decisions of this Court are to the effect that the violation of an ordinance or statute enacted for the safety of the public is negligence *per se,* but such violation must be the proximate cause or one of the proximate causes of injury to warrant recovery on that ground. See *White v. R. R.,* 216 N. C., 79, 3 S. E. (2d), 310, and numerous other cases.

Furthermore, the decisions of this Court hold that the stopping of a passenger bus upon the paved portion of a highway outside of business or residential districts for the purpose of permitting a passenger to alight, is not parking or leaving the vehicle standing, within the meaning of section 123, chapter 407, Public Laws 1937, now G. S., 20-161, and is not violative thereof. *Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; *Leary v. Bus Corp.,* 220 N. C., 745, 18 S. E. (2d), 426. See also *White v. Chappell, supra.* And by analogy the same principle would apply when stopping for the purpose of receiving a passenger.

In the *White case, supra,* where a child who had alighted from bus, which stopped on the highway and on which he and his mother had been riding as passengers, ran to the rear of the bus and there attempted to cross the highway and was stricken by another motor vehicle traveling in opposite direction from that in which the bus was traveling, the opinion of this Court was that in the light of all the evidence there was no causal relation between the stopping of the bus on the pavement, to the right of the center of the highway, and the injury and death of the intestate. And in *Peoples v. Fulk, supra,* and *Leary v. Bus Corp., supra,* the motor vehicles in question were not held to have violated any statute by stopping on the highway.

The present case, however, presents somewhat different factual situation. If the passenger bus of the Carolina Coach Company approached the school bus on the same highway while the school bus which was transporting school children was stopped and engaged in discharging passengers therefrom upon the highway—the school bus bearing the visible sign as required by the statute, the passenger bus should have been brought to a full stop before passing or attempting to pass the school bus and should have remained stopped until the passengers on the school bus were discharged at that place, and until the stop signal of the bus had been withdrawn, or until such bus had moved on. A violation of this statutory duty would be negligence *per se.* But such violation must be a proximate cause contributing to the injury and death of intestate to warrant recovery on that ground. Here, however, whether the stopping of the bus at the place and under the circumstances alleged created a hazard which was a proximate cause contributing to the injury and death of intestate would seem to be for the jury.

The judgment is

Affirmed.

LUCIELLE TEAL TICE v. ALBERT WINCHESTER ET UX.

(Filed 12 December, 1945.)

1. Boundaries §§ 1, 3a, 4: Deeds § 12—

All the descriptive matter set out in a deed, where pertinent, is to be considered in the attempt to identify the land to be conveyed, both in its content and extent; but we must observe other more specific rules, respecting the comparative weight and value of the descriptive elements in the conveyance—natural objects, artificial monuments, fixed corners, course, distance, quantity.

2. Boundaries § 3a: Deeds § 12—

When the beginning point, in the description of land in a conveyance, has been established, it cannot be shifted backwards and forwards in the line by any call for course or distance; but the actual distance between it and the next corner shall be taken, regardless of whether the distance called for is over or short of that point.

3. Boundaries §§ 3a, 4—

An artificial monument, such as a stake, usually is not considered as of so much dignity and certainty as a reference to natural objects or to objects more or less permanent in their nature, such as permanent structures on land.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1945, of UNION.

This appeal is from a judgment rendered in a special proceeding under G. S., 38-1, *et seq.*, to determine a disputed boundary between the properties of the parties.

The respective lots of the parties are adjoining portions of a lot formerly owned by H. B. Allen, the defendants having acquired title to their lot first in order. In the deed to defendants, Allen described the beginning corner as follows:

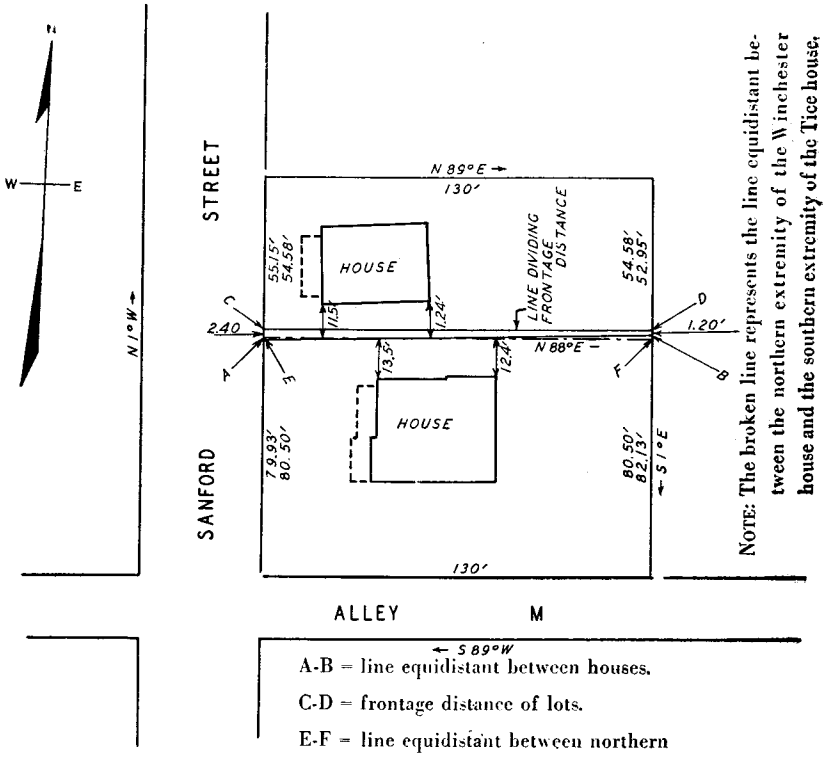
"Beginning at an iron stake in the East edge of the East sidewalk on Sanford Street, a new corner, said point being equidistant between the dwelling located on the lot here being described and the dwelling located on the next adjoining the same," and the closing line as follows: "thence a new division line being equidistant between the dwelling located on the lot being described and the dwelling located nearest the same on H. B. Allen's adjoining lot S. 86 W. 130 feet to the beginning point."

In plaintiff's deed the beginning corner is described as follows: "Beginning at an iron stake in the East edge of the East sidewalk on Sanford Street, said point being the northwest corner of Albert Winchester's lot purchased from H. B. Allen by deed dated June 23, 1943, and recorded in Book 97, at page 99, Union County Registry, and running thence with said Winchester's lot line N. 86 E. 130 feet to an iron stake, said point being Albert Winchester's new corner in the old line." (R., pp. 2 and 3.)

The defendants' deed calls for a distance along the east sidewalk of Sanford Street 83⅓ feet to a point in the edge of the sidewalk and in the north edge of Alley "M."

Under order of the clerk, a survey was made by the county surveyor, who filed his report, accompanied by a plat of the survey, both of which form a part of the record in this case.

The plat is here reproduced.



A-B = line equidistant between houses.

C-D = frontage distance of lots.

E-F = line equidistant between northern and southern extremity of houses.

MAP OF PROPERTY
owned by
LUCIELLE TEAL TICE, Petitioner
and ALBERT WINCHESTER and Wife, Defendants
Monroe, Union County, N. C.
Surveyed April 3, 1945. Scale: 1" = 30 ft.
by RALPH W. ELLIOTT, C. S.

The surveyor's report is as follows:

"To HONORABLE J. E. GRIFFIN, CLERK
OF SUPERIOR COURT OF UNION COUNTY:

"The undersigned, appointed in an Order in this cause dated 20th day of March, 1945, has made a survey of the lots belonging to the plaintiff

and the defendants herein and attaches hereto a plat thereof. The line, A to B, has been run equidistant between the houses of the plaintiff and the defendants as called for in the deeds; the red line shown on the plat (C to D) represents the line dividing the properties according to frontage distance and is according to the contention of the defendants as I understand it.

"Respectfully submitted this the 11th day of April, 1945.

RALPH W. ELLIOTT,
County Surveyor."

Upon the hearing before the clerk, judgment was rendered finding the line E to F on the accompanying plat to be the true dividing line between the respective lots of plaintiff and defendants.

Both plaintiff and the defendants appealed to the Superior Court, where it was heard before Judge Hoyle Sink, by consent of parties, without a jury. After considering the pleadings, deeds, and plat of Surveyor Elliott, the court found and held the line represented as C to D on the plat to be the correct dividing line between the parties. From this judgment plaintiff appealed.

Milliken & Richardson for plaintiff, appellant.
Coble Funderburk for defendants, appellees.

SEAWELL, J. In determining the line C to D to be a correct dividing line between the lots of the plaintiff and the defendants, Judge Sink made no formal findings of fact. This was hardly necessary since the conclusion was based upon descriptions in the deeds and the plat in evidence, together with the explanatory report of the surveyor relating to the manner in which the survey was made. The only thing we might consider outside of these data is whether the iron stake mentioned in connection with the beginning corner is still there, or ever was there. No such monument appears on the court map in evidence; and we may, therefore, assume that it was not there, whatever inference might otherwise have been drawn from its presence if it had been. With the evidence before us upon which he acted, it becomes clear that Judge Sink undertook to find the proper location of the beginning corner of defendants' deed and of the disputed line by the application of legal principles to the evidence before him, none of which we find disputed. The matter is determinable, therefore, on review of the legal questions involved.

The gist of the controversy is the establishment of the beginning corner of defendants' deed (which is also the beginning corner of plaintiff's deed) described as "equidistant between the dwelling located on the lot here being described and the dwelling located on the lot next adjoining

the same." The call from that point is "running thence with the east line of said sidewalk S. 4 E. 83⅓ feet to a point in the east edge of said sidewalk, and in the north edge of Alley 'M.'" The second call is "North with the edge of Alley 'M' N. 86 E. 130 feet to an iron stake in the north edge of Alley 'M,' Mrs. Josephine Aldridge's corner." The third call is "with the line of said Aldridge and Mrs. McGill N. 4 W. 83⅓ feet to an iron stake, a new corner"; and the fourth call "thence a new division line, being equidistant between the dwelling located on the lot being described and the dwelling located nearest the same on H. B. Allen's adjoining lot, S. 86 W. 130 feet to the beginning point." The location of the two corners on Alley "M" is not questioned.

The appellees contend that the location of the beginning point in the deeds is not physically ascertainable from the reference data given by grantor, as "equidistant" between the houses mentioned, because of the difference in construction, their relative location on the lots, and the want of parallelism between them. They contend, therefore, that the description is ambiguous, both as to the beginning corner and the dividing line which might be determined by its location. In this situation, they contend that the proper way to determine the beginning corner is to take the first definitely described corner—that is, the intersection of the east edge of Sanford Street sidewalk with the north edge of Alley "M"—and survey backwards 83⅓ feet—reversing the call and being governed by its stated distance.

Appellant contends that the beginning corner is fixed as a mathematical point and can be ascertained as such in accordance with the intention of the grantor by application of ordinary principles of surveying by reference to the buildings mentioned; and that when so ascertained, it is controlling over descriptions of less certainty and dignity, and specifically over the distance called for between this fixed point and the intersection of the west line with the north line of Alley "M."

As suggested by appellees, it is true that all the descriptive matter set out in a deed, where pertinent, is to be considered in the attempt to identify the land intended to be conveyed, both in its content and extent; *Buckner v. Anderson,* 111 N. C., 572, 16 S. E., 424; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 547; *Penny v. Battle,* 191 N. C., 220, 131 S. E., 627; *Bissette v. Strickland,* 191 N. C., 260, 131 S. E., 655. But to avoid a mere impressionistic conclusion, we must observe other more particular and specific rules recognized in law respecting the comparative weight and value and controlling influence of the descriptive elements ordinarily found in conveyances of land—natural objects, artificial monuments, fixed corners, course, distance, quantity.

In the order here given these elements of description in a deed are usually considered as controlling over those which experience has shown

to afford less certainty: calls for a natural object or a point in itself unambiguous, course, distance, quantity. *Miller v. Cherry,* 56 N. C., 24. In the case at bar, the propriety of reversing the call to the intersection of the sidewalk along Sanford Street and the north edge of Alley "M" and measuring backward the full distance of the call to find the beginning corner depends upon whether or not the beginning can be otherwise fixed in accordance with the intention of the grantor as "equidistant" between the houses mentioned in the deeds, so as to run a dividing line of that character between them. When such beginning point has been established, it cannot be shifted backward or forward in the line by any call for course or distance; but the actual distance between it and the next corner shall be taken regardless of whether the distance called for is over or short of that point. *Cowles v. Reavis,* 109 N. C., 417, 422, 13 S. E., 930; *Lee v. Barefoot, supra.* We are not prepared to concede that such a point is not ascertainable by the application of the ordinary rules of surveying, and by reference to the permanent objects—the two houses between which the grantor desired the dividing line to run equidistantly, and which he gave as reference. It is true that neither of them is in the direct line with the "beginning" point and the next corner, and one of them is located nearer Sanford Street than the other, and the houses present different ground plans, and are not strictly parallel; and yet it is possible to run a line satisfying the mathematical conditions between the two houses at the point of their nearest approach, having regard to the course of the line and its projection either way, and this seems to be the method adopted by the surveyor, as is seen by reference to the plat and to his report.

An artificial monument, such as a stake, usually is not considered as of as much dignity and certainty as a reference to natural objects or to objects of more or less permanence in their nature, such as permanent structures upon the land. At any rate, as we have said, there is no evidence here that any iron stake is now present in the line, and the only evidence that it ever was present is the recital in the deed; and if we wish to determine its original location, the reference to the more permanent monuments referred to in the deed would, under the authorities mentioned, control over course and distance. 8 Am. Jur., "Boundaries," ss. 61, 62.

The finding of fact and judgment of the court below were not supported by the evidence, and the cause is remanded for further proceedings in accordance with this opinion.

Error and remanded.

NEW HANOVER COUNTY AND C. R. MORSE, CITY-COUNTY TAX COLLECTOR, v. KIRBY C. SIDBURY.

(Filed 12 December, 1945.)

1. Parties §§ 1, 2: Attorney and Client § 1—

A party may appear either in person or by counsel. G. S., 1-11. The statutory provision is in the alternative. It means that a litigant may not appear both *in propria persona* and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later through counsel.

2. Appearance §§ 1, 2a: Pleadings § 13½—

A purported special appearance, raising questions as to the merits involved in the action, does not challenge the jurisdiction of the court. Nor may it be treated as a demurrer. It is not a valid plea.

3. Same—

Having overruled an invalid special appearance, without finding that it was irrelevant and frivolous and made in bad faith for the purpose of delay, G. S., 1-126, leave to answer should be granted, G. S., 1-125.

4. Taxation § 34: Mortgages § 37—

In an action by a county to recover money received by defendant for its use, the complaint alleging that defendant, as mortgagee, foreclosed a mortgage and failed, out of the proceeds of sale, first to pay plaintiff's claim or lien for taxes as provided by G. S., 105-408, a cause of action is stated, and demurrer *ore tenus* for lack thereof, interposed in this Court, cannot be sustained.

5. Same: Taxation § 40b—

An alternative remedy is created by G. S., 105-408, in behalf of the taxing agency. On foreclosure of a deed of trust or mortgage it may look to the trustee or mortgagee for the payment of taxes required by the statute, or it may waive that remedy and resort to a foreclosure of the tax lien.

APPEAL by defendant from *Williams, J.*, at August Term, 1945, of NEW HANOVER.

Civil action to recover money received by defendant to use of plaintiff.

On or about 1 May, 1928, defendant mortgagee foreclosed mortgage on the lands of Southern Realty and Development Company. He did not, out of the proceeds of sale, first pay plaintiff's claim or lien for taxes as provided by G. S., 105-408. On 16 September, 1944, plaintiff instituted this action to recover taxes levied against said property and unpaid at the time of sale. After complaint was filed, defendant, *in propria persona,* filed special appearance and motion to dismiss.

At the August Term, 1945, while the motion to dismiss was pending, plaintiff in open court moved for judgment by default final. W. L. Farmer, Esq., a practicing attorney of the New Hanover Bar, then counsel for defendant, attempted to speak for and represent defendant in opposing the motion. The court thereupon found the facts, including the following:

"And it further appearing and the Court finding that the defendant attempted to and did file what he termed a special appearance, in person, in which he raised question as to merits involved in the action, which the Court holds was in fact no special appearance, nor could it be construed as such, and that no answer having been filed by the defendant, nor was the defendant present in Court when the case was called for trial; that an attorney attempted to appear for the defendant, who, upon objection being raised by the plaintiff, the Court held that the defendant could not appear in person and by attorney, and that said attorney would not be permitted to represent the defendant . . ."

It then entered judgment by default final. Thereafter defendant served notice of appeal.

G. C. McIntire for plaintiffs, appellees.

Clayton C. Holmes for defendant, appellant.

BARNHILL, J. The defendant excepts to (1) the refusal of the court below to permit his counsel to appear for him at the hearing on the motion for judgment by default final and (2) the signing of judgment without granting defendant an opportunity to file answer. The exceptions must be sustained.

A party may appear either in person or by counsel. G. S., 1-11. The statutory provision is in the alternative. It simply means that a litigant may not appear both *in propria persona* and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later through counsel. *Abernethy v. Burns,* 206 N. C., 370, 173 S. E., 899; *McClamroch v. Ice Co.,* 217 N. C., 106, 6 S. E. (2d), 850.

Oftentimes, particularly in inferior courts, a litigant undertakes to conduct his case without benefit of expert advice. He soon finds himself enmeshed in the intricacies of the law and realizes he cannot proceed intelligently and effectively without the aid of counsel. He employs an attorney who thereafter makes the necessary appearances in his behalf. In such cases both the original appearance in person and the subsequent appearances by counsel are permissible and entirely proper under our system. Having elected to employ counsel at any stage of the proceedings

he may not be deprived of his services for the reason he has theretofore appeared in person. It is error for the court to undertake so to do.

The purported special appearance does not challenge the jurisdiction of the court. Nor may it be treated as a demurrer. Hence the court properly concluded it was not a valid plea. Having overruled it, however, without finding that it was irrelevant and frivolous and made in bad faith for the purpose of delay, G. S., 1-126, leave to answer should have been granted. G. S., 1-125; *Boone v. Hardie,* 83 N. C., 471; *Bank v. Derby,* 215 N. C., 669, 2 S. E. (2d), 875.

The demurrer *ore tenus* for that the complaint does not state a cause of action, interposed in this Court, cannot be sustained.

G. S., 105-408, provides that "whenever any real estate shall be sold by any person under any power of sale conferred upon him by any . . . mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of sale all taxes then assessed upon such real estate. . . . The failure to comply with this section and pay such taxes or assessments shall not vacate or affect the lien of such taxes or assessments, but such lien shall be discharged only to the extent payment is actually made." Thus it creates an alternative remedy in behalf of the taxing agency. It may look to the trustee or mortgagee for the payment required by the statute or it may waive that remedy and resort to a foreclosure of the tax lien.

While it was suggested here in the argument that the plaintiff has already elected to foreclose this lien, and the motion filed by defendant so indicates, it does not so appear on the face of the complaint. That defense, as well as the bar of the statute of limitations, if relied on by the defendant, must be asserted by way of answer.

The judgment entered is vacated and the cause is remanded for further proceedings in accord with this opinion.

Error and remanded.

WILLIE W. JENKINS v. WILLIAM M. JENKINS.

(Filed 12 December, 1945.)

1. Judgments § 30: Divorce §§ 2a, 17—

In an action by a husband against his wife, for divorce on the ground of two years separation, in which the wife set up in her answer a separation agreement by which her husband contracted to pay her a certain sum monthly for her support and asked for judgment that she recover according to the terms of such agreement, this plea of the wife being ignored by the court and no judgment rendered therein, though the court

rendered a decree of absolute divorce for the husband, such decree is not *res judicata* in a subsequent action by the wife against the husband based on the agreement.

2. Divorce §§ 11, 12—

Alimony in actions for divorce *a vinculo* is not permitted in this jurisdiction, save *pendente lite* or where alimony is prayed in a successful cross action for divorce *a mensa*.

3. Divorce § 5: Pleadings § 10—

In an action for absolute divorce a counterclaim or cross action for debt under a separation agreement between the parties is not cognizable by the court.

4. Judgments § 30—

The general rule is that a judgment in a civil action constitutes an estoppel upon the parties, in a subsequent action for the same cause, as to all issuable matters contained in the pleadings; but the judgment is conclusive only on the points raised by the pleadings or which might justly be predicated on them, and the rule does not embrace matters not properly introduced and not cognizable in the former action and as to which no judgment was rendered.

APPEAL by defendant from *Alley, J.*, at August Term, 1945, of GUILFORD. Affirmed.

Plaintiff instituted this action to recover sums alleged to be due under a separation agreement between her and the defendant, her former husband.

Plaintiff alleged that while she and defendant were about to separate they entered into a contract wherein it was agreed that plaintiff should have the care and custody of the two children, and that defendant should pay her $60 per month and $10 per month for each child while with her; that after two years had elapsed defendant obtained an absolute divorce on the ground of two years' separation, and thereafter failed and refused to make any payments to her; that one of the children is now in the U. S. Army and defendant is making the required payments for the other. She prayed judgment for past due monthly installments at $60 per month amounting to $540.

Defendant, admitting the material allegations of the complaint, set up the plea of *res judicata* as a defense to the action, and based his plea on the following grounds: That in the divorce action this plaintiff (the defendant there) answered and set up the separation agreement now sued on and asked for judgment that she recover $70 per month according to the terms of the agreement. Upon the verdict in the divorce action on the three issues of (1) marriage, (2) two years' separation and (3) residence, judgment was rendered by Judge Sink granting divorce, and

awarding the custody of the children to the plaintiff herein. Finding that one of the children was in the U. S. Army and that the defendant herein was responsible for the maintenance of the other child until his twentieth birthday "by reason of the deed of separation set forth in the further answer," it was ordered that defendant herein pay $10 per month for maintenance of the second child.

On the hearing of the present action it was stipulated that jury trial be waived and that, as all the facts appeared in the pleadings and record in this case and in the divorce action, the trial judge should therefrom decide the question of law now raised and determine the rights of the parties.

Under this stipulation, the court held that the facts thus presented were insufficient to support the plea of *res judicata,* and adjudged that plaintiff recover of defendant the amounts due under the contract. Defendant excepted and appealed.

Z. H. Howerton for plaintiff.

Harry R. Stanley and E. Kermit Hightower for defendant.

DEVIN, J. The only question presented by the appeal is the correctness of the ruling below that plaintiff was not estopped to maintain her action on the contract between herself and the defendant set out in the complaint. The question of the validity of the contract is not presented, and it seems to have been conceded by the defendant that under the decisions of this Court in *Archbell v. Archbell,* 158 N. C., 408, 74 S. E., 327, and *Lentz v. Lentz,* 193 N. C., 742, 138 S. E., 12, the binding effect of the contract between the parties, if otherwise valid, is not affected by the subsequent divorce decree. The single assignment of error brought forward poses the question whether the plaintiff's answer in the divorce action and the judgment thereon render the subject of her present action *res judicata.*

It is contended that plaintiff's claim for monthly payments under the contract having been set up in the answer and ignored in the judgment in an action between the same parties, this constituted a judicial denial of plaintiff's claim, which now estops her from asserting the same claim in this action.

Since alimony in actions for divorce *a vinculo* is not permitted in this jurisdiction, save *pendente lite,* or where alimony is prayed in a successful cross action for divorce *a mensa,* the answer in the divorce action now relied on by the defendant did not raise an issue. *Silver v. Silver,* 220 N. C., 191, 16 S. E. (2d), 834; *Hobbs v. Hobbs,* 218 N. C., 468, 11 S. E. (2d), 311; *Adams v. Adams,* 212 N. C., 373, 193 S. E., 274; *Dawson v.*

Dawson, 211 N. C., 453, 190 S. E., 749. Nor in an action for absolute divorce was a counterclaim or cross action for debt as set up in the answer cognizable by the court, and the plaintiff in that action (defendant here) by his failure to reply seems to have so regarded it. No judgment was rendered thereon either in affirmance or disallowance of her claim. Whether considered as a claim for alimony or an action for debt no issue was presented which the court could or did adjudicate.

The general rule that a judgment in a civil action constitutes an estoppel upon the parties, in a subsequent action for the same cause, as to all issuable matters contained in the pleadings, has been uniformly upheld by the courts. *Tyler v. Capehart,* 125 N. C., 64, 34 S. E., 108; *Shakespeare v. Land Co.,* 144 N. C., 516, 57 S. E., 213; *Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535; *Garrett v. Kendrick,* 201 N. C., 388, 160 S. E., 349; *Jefferson v. Sales Corp.,* 220 N. C., 76, 16 S. E. (2d), 462. The reason is that a party should be required to present his whole cause of action at one time in the forum in which the litigation has been duly constituted. *Jefferson v. Sales Corp., supra.* But the judgment is conclusive only on the points raised by the pleadings or which might justly be predicated on them, and the rule does not embrace matters not properly introduced and not cognizable in the former action and as to which no judgment was rendered. *Stancil v. Wilder,* 222 N. C., 706, 24 S. E. (2d), 527.

The ruling of the court below holding the plea of *res judicata* insufficient to bar plaintiff's action for admittedly past due monthly payments under the contract must be

Affirmed.

LINWOOD GRIFFIN, JR., v. UNITED SERVICES LIFE INSURANCE COMPANY, INC.

(Filed 12 December, 1945.)

1. Fraud §§ 8, 9—

In an action against a life insurance company to recover on a policy issued by it, a plea of fraud by the defendant is an affirmative defense. The burden is on the defendant to show both false representations and *scienter.* Hence, the exception to the refusal of the court to dismiss, as in case of nonsuit, is without merit.

2. Trial § 37—

Ordinarily, the form and number of the issues, in the trial of a civil action, are left to the sound discretion of the trial judge and a party cannot complain because a particular issue was not submitted to the jury in the form tendered by him.

3. Trial § 38—

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings.

4. Same—

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. The rule applies to new matter alleged in the answer.

5. Trial § 38—

In an action to recover on a policy of life insurance, where there were issues squarely raised by the pleadings, supported by evidence, as to the valid delivery of the policy and as to the payment of the first premium, and the court declined to submit the issues thereon tendered by defendant, or to submit others of similar import, which would be determinative of the questions presented, there was error.

APPEAL by defendant from *Nimocks, J.*, at February Term, 1945, of CUMBERLAND. New trial.

Civil action to recover on policy of life insurance.

On or about 1 April, 1941, plaintiff applied to the defendant for a policy of life insurance in the sum of $2,000 on the life of his wife, Frances Parrott Griffin. The application was in the name of the insured and contained certain representations "in lieu of medical examination." Plaintiff was named as beneficiary. The policy was delivered in accord with the application.

The insured died 15 July, 1941. Plaintiff filed proof of death. The defendant denied liability. Thereupon plaintiff instituted this action to recover the face amount of the policy.

The defendant in its answer pleads (1) fraud in the procurement of the policy and (2) no valid and binding delivery.

The issues submitted to the jury were answered in favor of the plaintiff. From judgment thereon the defendant appealed.

W. C. Downing and James R. Nance for plaintiff, appellee.

Neil Burkinshaw and Robert H. Dye for defendant, appellant.

BARNHILL, J. The plea of fraud was an affirmative defense. The burden was on the defendant to show both false representation and *scienter*. Hence the exception to the refusal of the court to dismiss as in case of nonsuit is without merit.

The application contains the provision "the insurance hereby applied for shall not take effect until a policy shall have been actually delivered to and accepted by me, while I am in good health and the first premium

shall have been paid or allotted to be paid during my continued good health. If, however, at the time of signing the application, the full first premium is paid, then the insurance will take effect from the date of this application (subject to the provisions of the policy applied for) . . ."

The defendant pleads this provision by way of further defense and alleges that the insured was not in good health at the time the policy was delivered to and accepted by her; that the first full premium was not paid at the time of signing the application and has not been "paid or allotted to be paid during her continued good health," and that, therefore, there has never been a valid delivery of said policy.

There was evidence tending to show that the insured was afflicted with chronic myelogenous leukemia and that she had not been in good health for a period of at least five years. She was treated at the Highsmith Hospital in Fayetteville in 1940 and again in July, 1941. Shortly after the application she left for California to consult a doctor. She had likewise been treated at the Mayo Clinic and several Army hospitals.

The testimony discloses that the first full premium was not paid at the time of the application. It does not appear that it was allotted to be paid.

So then there was an issue squarely raised by the pleading, supported by evidence, as to the valid delivery of the policy. It was material to the affirmative defense relied on. On this state of the record the court declined to submit the issues tendered by defendant or to submit others of similar import which would be determinative of the questions presented. In this there was error.

Ordinarily the form and number of the issues in the trial of a civil action are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to the jury in the form tendered by him. But G. S., 1-200, is mandatory. It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. *Holler v. Tel. Co.*, 149 N. C., 336; *Falkner v. Pilcher*, 137 N. C., 449; *Brown v. Ruffin*, 189 N. C., 262, 126 S. E., 613; *Gaskins v. Mitchell*, 194 N. C., 275, 139 S. E., 435; *Home Building, Inc., v. Nash*, 200 N. C., 430, 157 S. E., 134; *Colt Co. v. Barber*, 205 N. C., 170, 170 S. E., 663.

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. *Tucker v. Satterthwaite*, 120 N. C., 118; *Burton v. Mfg. Co.*, 132 N. C., 17; *Falkner v. Pilcher, supra; Colt Co. v. Barber, supra.*

The rule applies to new matter alleged in the answer. *Shaw v. McNeill*, 95 N. C., 535; *Main v. Field*, 144 N. C., 307; *Brown v. Ruffin, supra.*

In the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify directly or by clear implication, the judgment rendered, this Court will remand for a new trial. *Holler v. Tel. Co., supra; Hatcher v. Dabbs,* 133 N. C., 239; *Brown v. Ruffin, supra; Owens v. Phelps,* 95 N. C., 286; *Colt Co. v. Barber, supra.*

In view of the disposition we have made of this appeal we do not deem it necessary to discuss other exceptive assignments of error appearing in the record.

For the reason stated there must be a

New trial.

C. LEE CLARK v. LUCY WHITE CLARK.

(Filed 12 December, 1945.)

Appeal and Error § 12—

The requirements of the statute, G. S., 1-288, relating to appeals to this Court from judgments of the Superior Court in a civil action, without making the deposit or giving the security required by law for such appeals, are mandatory and jurisdictional, and unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket.

APPEAL by plaintiff from *Clement, J.,* at April Term, 1945, of Greensboro Division of GUILFORD.

Civil action for absolute divorce on ground of two years separation, instituted in the municipal court of the City of High Point, and heard in Superior Court upon appeal thereto by plaintiff from order of judge of said municipal court, setting aside judgment rendered therein in favor of plaintiff. The presiding judge of Superior Court, by judgment entered, affirmed the findings of fact and order of the judge of the municipal court. Plaintiff gave notice of appeal therefrom to Supreme Court, and in due time filed affidavit, as required by the statute, G. S., 1-288, to be allowed to appeal without making the deposit or giving the security required by law for such appeal. Thereupon, the presiding judge of the Superior Court, "upon the foregoing affidavit" entered order allowing plaintiff to appeal as prayed, and on 6 November, 1945, the record and case on appeal were filed in the office of the Clerk of the Supreme Court in due time for appeals from the 12th Judicial District at Fall Term, 1945.

Thereafter, on 27 November, 1945, when the Court resumed its sitting for hearing of appeals from the 12th Judicial District, defendant appellee, through her counsel moved to dismiss the appeal in this action for

failure of appellant "to file with his affidavit for permission to appeal *in forma pauperis,* a written statement from a practicing attorney that he has examined the affiant's case and that he is of the opinion that the decision of the Superior Court in said action is contrary to law as required by G. S., 1-288," and filed in support thereof certificate of the assistant clerk of the Superior Court of Guilford County to the effect "that all papers relating to the application of the plaintiff to appeal *in forma pauperis* in the above entitled case were delivered to counsel for the plaintiff at the time the record on appeal herein was certified and signed, and that there is not now on file in the office of the clerk of the Superior Court of Guilford County either the original or any copy of any written statement from a practicing attorney that he has examined the case of appellant and that he is of the opinion that the decision in the Superior Court in said action is contrary to law."

Thereupon, on 28 November, 1945, before the case was reached for hearing of argument, the attorney for appellant filed in this Court a paper designated as "certificate of counsel," which reads: "This is to certify that I have examined appellant's case on appeal and am of the opinion that the decision of the Superior Court, in the above entitled action, is contrary to law. This the 28th day of November, 1945," and signed in the name of, and as "attorney for appellant."

Walser & Wright for plaintiff, appellant.
Moseley & Holt for defendant, appellee.

WINBORNE, J. The motion to dismiss the appeal must be allowed. The requirements of the statute relating to appeals to Supreme Court from judgment of Superior Court, in a civil action, G. S., 1-288, formerly C. S., 649, without making the deposit or giving the security required by law for such appeal are mandatory and jurisdictional, and "unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket." *Honeycutt v. Watkins,* 151 N. C., 652, 65 S. E., 762. See, also, among others, these cases: *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Hanna v. Timberlake, ibid.,* 556, 166 S. E., 733; *McIntire v. McIntire, ibid.,* 631, 166 S. E., 731; *Powell v. Moore,* 204 N. C., 654, 169 S. E., 281; *Noble v. Pritchett, ibid.,* 804, 169 S. E., 618; *Brown v. Kress & Co.,* 207 N. C., 722, 178 S. E., 248; *Lupton v. Hawkins,* 210 N. C., 658, 188 S. E., 110; *Berwer v. Ins. Co.,* 210 N. C., 814, 188 S. E., 618; *Gilmore v. Ins. Co.,* 214 N. C., 674, 200 S. E., 407; *Franklin v. Gentry,* 222 N. C., 41, 21 S. E. (2d), 828.

In *Powell v. Moore, supra* (1933), where there is full discussion of the provisions of the statute as it then appeared in section 649 of Consoli-

dated Statutes of 1919, it is said: "It is not the policy of our law to deny to any litigant his right of appeal, but inasmuch as only questions of law are to be determined in the Supreme Court, when the party cast in a civil action is unable to make the deposit or give the security required by law for his appeal, he is reasonably required (1) to make affidavit, within five days, that he is unable by reason of his poverty to give the security required by law, and (2) that he is advised by counsel learned in the law there is error in matter of law in the decision of the Superior Court—which affidavit (3) must be accompanied by a written statement from a practicing attorney of said Superior Court that he has examined the affiant's case, and is of opinion that the decision of the Superior Court in said action is contrary to law, and (4) the appeal, when passed upon and granted by the clerk, shall be within ten days from the expiration by law of said term of court."

Thereafter, the General Assembly of 1937 (Public Laws 1937, chapter 89) amended the statute, C. S., 649, so as to permit correction of "an error or omission . . . made in the affidavit or certificate of counsel," by filing "an amended affidavit or certificate" . . . But the amendment does not go so far as to permit the filing of an affidavit of the party appealing or certificate of counsel when no such affidavit or no such certificate was made and filed within the time prescribed by statute.

Hence, as no certificate of counsel appears to have been made and filed in the present case as required by the statute, the motion to dismiss is appropriate, and same is allowed.

Appeal dismissed.

STATE OF NORTH CAROLINA, EX REL. H. EDMUND RODGERS, ADMR. C. T. A. OF ESTATE OF R. L. FOX, v. O. E. TODD AND B. F. BRITTAIN, JR., EXECUTORS OF ESTATE OF R. L. FOX, DECEASED, AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

(Filed 12 December, 1945.)

1. Appeal and Error § 30b—

An appeal which is both premature and fragmentary will be dismissed.

2. Same—

No appeal lies from the denial of motion for judgment on the pleadings.

APPEAL by defendants from *Williams, J.*, at October Term, 1945, of NEW HANOVER. Appeal dismissed.

Poisson & Campbell for plaintiff.
Stevens & Burgwyn for defendants.

PER CURIAM. This was an action by the administrator *c. t. a.* of the estate of R. L. Fox against former executors of the estate and the surety on their bond to recover for losses alleged to have been sustained by the estate due to failure to account for certain funds collected and for negligent failure to collect others. The defendants, among other defenses, pleaded several statutes of limitation, and moved the court for judgment declaring plaintiff's action barred, and for judgment on the pleadings.

The court below held that neither of the statutes of limitation pleaded constituted a bar, and denied the motion. Defendants excepted and appealed.

It is apparent that defendants' appeal is both premature and fragmentary. No final judgment has been rendered, and no substantial rights of the defendants have been affected by the ruling which cannot be protected by an exception and appeal from the final judgment, if adverse. Only part of the case has been brought up, leaving other parts unsettled. *Johnson v. Ins. Co.*, 215 N. C., 120, 1 S. E. (2d), 381; *Cole v. Trust Co.*, 221 N. C., 249, 20 S. E. (2d), 348; *Utilities Com. v. R. R.*, 223 N. C., 840, 28 S. E. (2d), 490; McIntosh Prac. & Proc., 776. No appeal lies from the denial of motion for judgment on the pleadings.

Appeal dismissed.

LENA HARRINGTON v. LEE WALTER TAYLOR.

(Filed 12 December, 1945.)

Contracts § 5—

There is no consideration for a promise to reimburse plaintiff for injuries suffered by her, when plaintiff saved defendant from serious injury or death by interposing herself between defendant and his assailant in a fight.

APPEAL by plaintiff from *Olive, Special Judge,* at May, 1945, Civil Term, of RICHMOND.

George S. Steele, Jr., for plaintiff, appellant.

No counsel contra.

PER CURIAM. The plaintiff in this case sought to recover of the defendant upon a promise made by him under the following peculiar circumstances:

The defendant had assaulted his wife, who took refuge in plaintiff's house. The next day the defendant gained access to the house and began

another assault upon his wife. The defendant's wife knocked him down with an axe, and was on the point of cutting his head open or decapitating him while he was laying on the floor, and the plaintiff intervened, caught the axe as it was descending, and the blow intended for defendant fell upon her hand, mutilating it badly, but saving defendant's life.

Subsequently, defendant orally promised to pay the plaintiff her damages; but, after paying a small sum, failed to pay anything more. So, substantially, states the complaint.

The defendant demurred to the complaint as not stating a cause of action, and the demurrer was sustained. Plaintiff appealed.

The question presented is whether there was a consideration recognized by our law as sufficient to support the promise. The Court is of the opinion that however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law.

The judgment sustaining the demurrer is

Affirmed.

J. C. BRUMLEY, IN BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS IN THE CITY OF CHARLOTTE, v. H. H. BAXTER, LILLIAN R. HOFFMAN, CURTIS B. JOHNSON, ELMER HILKER, T. E. HEMBY, LOUIS G. RATCLIFFE, ERNEST B. HUNTER, CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, AND CHARLOTTE VETERANS' RECREATION CENTER.

(Filed 17 December, 1945.)

1. Constitutional Law §§ 4a, 4c: Municipal Corporations § 5—

There seems to be no constitutional limitation upon the power of the General Assembly to create a corporation for a public purpose. N. C. Const., Art. VIII, sec. 1.

2. Same—

The legislative power, both as to the State and to political and administrative subdivisions thereof, is restrained only by the limitations imposed by the State Constitution or that of the United States.

3. Constitutional Law § 12: Municipal Corporations § 5—

The State cannot authorize a city to donate its property, or to grant privileges to one class of citizens not to be enjoyed by all, except in consideration of public services. N. C. Const., Art. I, secs. 2, 7.

4. Constitutional Law § 12—

Services rendered by citizens called out to defend their country in time of war are regarded as "public services" within the meaning of the N. C. Const., Art. I, sec. 7.

5. Same—

The Act of the Legislature, authorizing the creation of the Charlotte Veterans' Recreation Center, Public Laws 1945, ch. 460, is valid, as the act is for a public purpose and in the public interest.

6. Constitutional Law § 3a—

To justify declaring void an act of the General Assembly, its unconstitutionality must clearly appear. Reasonable doubts are to be resolved in favor of its constitutionality.

7. Municipal Corporations § 5—

A city has no power, even with legislative sanction, to make an absolute grant of its valuable realty not presently required for other purposes, without a monetary consideration, for a public purpose which is not a necessary purpose, with a provision in the conveyance that, in the event the grantee determines that the public purpose has failed, or that the facilities are not sufficiently used, the grantee may dispose of the property in its discretion and apply the proceeds to such charity as it may elect.

APPEAL by plaintiff from *Olive, Special Judge,* at October Term, 1945, of MECKLENBURG.

This was an action to restrain the City of Charlotte from executing deed without monetary consideration conveying certain real property, owned by the city, to the Charlotte Veterans' Recreation Center, under authority of ch. 460, Public Laws 1945 (herein referred to as Senate Bill No. 154).

On the hearing below it was agreed that the plaintiff is a citizen, resident and taxpayer of the City of Charlotte; that the City of Charlotte has a population of more than one hundred thousand inhabitants according to the last Federal census, and that defendant H. H. Baxter is the mayor, and Lillian R. Hoffman the clerk of the city.

"4. That the defendants, Curtis B. Johnson, Elmer Hilker, T. E. Hemby, Louis G. Ratcliffe, and Ernest B. Hunter are acting as commissioners of Charlotte Veterans' Recreation Center, pursuant to an Act of the 1945 Session of the General Assembly of North Carolina, known as Senate Bill No. 154 of the said session, having been appointed as provided in said Act and having obtained a certificate of incorporation from the Secretary of State, a copy of which is attached to the complaint, marked Exhibit A and made a part hereof, and that all the necessary formalities for the organization of said corporation are in accordance with the provisions of said Act of the General Assembly. Copy of the resolution of the City Council of the City of Charlotte relative to

the creation of said Veterans' Recreation Authority is hereto attached marked Exhibit C.

"5. That on the 18th day of October, 1945, the City Council of the City of Charlotte, undertaking to act under the authority of Sec. 14 of the Act of the General Assembly hereinbefore referred to, passed a resolution authorizing the execution of a deed by the City of Charlotte to Charlotte Veterans' Recreation Center without monetary consideration. A copy of said resolution, including copy of the said deed, is attached to the complaint, marked Exhibit B, and made a part hereof.

"6. That the Charlotte Veterans' Recreation Center, through its Commissioners hereinbefore named, has already made definite plans to exchange the property to be deeded to it by the City of Charlotte for other property in accordance with the provision in the proposed deed from the City of Charlotte permitting such exchange.

"7. That, unless restrained by the court in this action, the defendant, H. H. Baxter, as Mayor, and the defendant, Lillian R. Hoffman, as Clerk, of the City of Charlotte, will execute and deliver to Charlotte Veterans' Recreation Center deed as authorized in the resolution of the City Council hereinbefore referred to and that, thereupon, the said Charlotte Veterans' Recreation Center, and its commissioners, will undertake to effect an exchange of said property received from the City of Charlotte for other property, as provided in the proposed deed from the City of Charlotte.

"8. That the defendant, City of Charlotte, for many years, owned the northwest corner of East Fifth and North College Streets, the same having located thereon for many years a City Auditorium, which auditorium has been removed from said lot and for approximately 10 years same has been leased by the City of Charlotte, and the lessee thereon has used the same for a filling station and parking lot; that the City of Charlotte, in 1945, as provided by law, sold said property for $51,000.

"9. That for many years the City of Charlotte owned the piece of property located at the northeasterly corner of North Graham Street and West Fifth Street in the City of Charlotte, same having located thereon a water tank used in connection with the water system of the City of Charlotte; that the same has ceased to be used for said purposes and the City of Charlotte duly sold and conveyed this property in the year 1945, for $18,000.

"10. That as a result of the sale of said City properties referred to in paragraphs 8 and 9 above, the City obtained a total sum of $69,000.

"11. That in the year 1945, the City of Charlotte purchased from the then owners of the property that property located on North Poplar Street in the City of Charlotte, described in Exhibit B, hereto attached,

for $52,500 which funds were taken from the $69,000 received from the sale of the property referred to in paragraphs 8 and 9 above.

"12. That the United States of America since 1941, has been and still is at war with the German Reich, the Kingdom of Italy, the Japanese Empire and other satelite countries, or what is known as the Axis powers; that the State of North Carolina and the City of Charlotte are a part of the United States of America and that approximately 19,000 of the citizens of Charlotte and the adjacent territory under the jurisdiction of the Charlotte Veterans' Recreation Center entered the armed forces of the United States, and that approximately 2,000 veterans of World War II have returned to the City of Charlotte and the territory within the jurisdiction of the Charlotte Veterans' Recreation Center.

"13. That the Charlotte Veterans' Recreation Center has a commitment from a citizen of Charlotte for a gift of $40,000 for building purposes conditioned upon the property referred to in the resolution of the City Council being conveyed upon substantially the terms set out in the deed incorporated in the resolution of the City Council, marked Exhibit B and attached to the complaint.

"14. That at the present time the City of Charlotte is the only City in North Carolina having a population of over 100,000 according to the last Federal census."

The Act under authority of which the City of Charlotte proposes to execute the deed contains the following pertinent provisions: It declares that it is in the public interest that adequate recreational facilities be provided in cities of more than 100,000 population for persons who have served or are serving in the armed forces of the United States in the present war, and if the governing bodies of such cities find there is lack of adequate recreational facilities, power is given for the appointment of five commissioners to act as Authority. The commissioners so appointed are directed to apply for a charter, setting out their appointment and the proposed name of the corporation, and to secure from the Secretary of State a certificate of incorporation. The boundaries of the Authority are declared to be the city limits and the area within ten miles from such limits. The commissioners are required to provide separate recreational facilities for white and colored. Provision is made for filling vacancies in membership of commission, and for reports. In the construction of the facilities, zoning and building laws are to be observed, but the property shall be exempt from taxation, and also exempt from the operation of Local Government Act or County Fiscal Control Act. Section 14 of the Act authorizes the city, in order to provide construction, repair or management of any Veterans' recreation project, to sell and convey without consideration or for a nominal consideration to an Authority within

such city any real property, and bind itself to the performance and observance of the agreements and conditions attached thereto.

The conditions annexed to the deed which the City of Charlotte proposes to execute, are that the Charlotte Veterans' Recreation Center shall have the right to convey in fee simple the property thus conveyed in exchange for other real property, the property so conveyed or that for which it may be exchanged to be operated and maintained under control of the Commissioners of the Veterans' Recreation Center in accordance with the provisions of the Act. It is provided in the proposed deed that if the Charlotte Veterans' Recreation Center shall cease to exist or fail to maintain veterans' recreational facilities on the property, or if the commissioners determine at any time that the property is no longer needed for the purposes set forth in the Act, or that the number of veterans who wish to use the facilities offered is not sufficient to justify continuance of the project, then the property shall be sold by the commissioners and the net proceeds used to establish a home for the aged in Charlotte or for an increase in the charity wards of Charlotte Memorial Hospital.

By a vote of 7 to 2 the City Council of Charlotte adopted resolution directing the Mayor and City Clerk to execute deed for the Poplar Street property under authority of the Act for maintaining and operating a Veterans' Recreation Center in Charlotte, incorporating in the deed the terms and conditions above set out. The minority vote in the City Council was in opposition to the terms of the deed rather than the purpose of the conveyance.

Judgment was rendered that the Act of the General Assembly was valid and the Charlotte Veterans' Recreation Center a public corporation validly created; that thereunder the City of Charlotte had full power to execute the proposed deed without consideration upon the terms and conditions set out; and that section 14 of the Act was constitutional and valid. The plaintiff's prayer for restraining order was denied. The plaintiff excepted and appealed.

Robinson & Jones for plaintiff.
John D. Shaw for defendants.

DEVIN, J. The taxpayers' suit to restrain the proposed donation by the City of Charlotte of valuable real property for the purpose of providing recreational facilities for persons who are now serving in the armed forces of the United States, or who have served in the war recently ended, presents questions of (1) the power of the General Assembly to authorize the gift, and (2) the power of the city to execute the deed, (3) in the form proposed.

At the outset it may be said that there seems to be no constitutional limitation upon the power of the General Assembly to create a corporation for a public purpose. Art. VIII, sec. 1; *Dickson v. Brewer,* 180 N. C., 403, 104 S. E., 887; *Webb v. Port Commission,* 205 N. C., 663, 172 S. E., 377; *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693. The legislative power both as to the State and to political and administrative subdivisions thereof is restrained only by the limitations imposed by the State Constitution or that of the United States.

For the protection of the rights of individuals and to preserve the interest of the public from encroachment it is provided by Art. I, sec. 7, of the North Carolina Constitution 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 in Art. I, sec. 2, it is declared that "all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." And this is supplemented by the provision of Art. VII, sec. 7, which prohibits a city or other municipal corporation from contracting debts or levying taxes, except for the necessary expenses thereof, "unless by a vote of the majority of the qualified voters therein."

Manifestly, the State cannot authorize the City of Charlotte to donate its property, or to grant privileges to one class of citizens not to be enjoyed by all, except in consideration of public services. In *Brown v. Commissioners,* 223 N. C., 744, 28 S. E. (2d), 104, it was said the Legislature may not "lawfully authorize a municipal corporation to pay gifts or gratuities out of public funds."

Are the services rendered by citizens called out to defend their country in time of war to be regarded as "public services" within the meaning of Art. I, sec. 7, of the Constitution? It was so held in *Hinton v. State Treasurer,* 193 N. C., 496, 137 S. E., 669. See also *People v. Westchester Co. National Bank,* 231 N. Y., 465. While the services which have been rendered and are now being rendered by those for whom the facilities of the Veterans' Recreation Center are to be provided were primarily rendered to the United States, they were also rendered to an extent to each community constituting a component part of a common country. Local units, members of the National Guard and National Guard Reserve were incorporated into the armed forces of the United States, together with those called under the selective draft. *Arver v. U. S.,* 245 U. S., 366. "The service was public, the consideration is implied." *Hinton v. State Treasurer, supra.* In that case it was said, "Since the dawn of civilization the nations of the earth have always recognized an obligation to those of its citizens who bore arms in their defense. This obligation has been fulfilled in many ways. Appropriate recognition of it has always served to encourage patriotism and the pro-

motion of the public welfare." "Services rendered in such a cause must necessarily be a public service." *State v. Clausen,* 113 Wash., 570. The weight of authority in other states where the question of the validity of donations to service men following World War I was considered supports this view. See cases cited in the *Hinton case, supra,* and in *People v. Westchester Co. Bank, supra.* In the last cited case the Court construed a clause in the New York Constitution similar to ours, but which does not include the words "but in consideration of public services," as prohibiting an issue of bonds by the state to provide a bonus for veterans of World War I, *Judges Cardoza* and *Pound* dissenting. See also *R. R. v. Forbes,* 188 N. C., 151, 124 S. E., 132.

The General Assembly has declared that it is in the public interest that adequate recreational facilities be provided in populous cities for those now serving in or who have recently been discharged from the armed forces of our country, and the City of Charlotte has found the lack of such facilities there and that in the public interest they are needed in that city. While not controlling, these findings and declarations are persuasive. *Martin v. Raleigh,* 208 N. C., 369, 180 S. E., 786. It may be noted that from the area embraced in the Charlotte Center alone 19,000 persons have been called or have entered into the service of their country in this war, and that 2,000 have returned. The presence of a rapidly increasing number of soldiers and veterans who come to this territory, whether temporarily or for permanent residence, presents a problem in public service which it is thought may be solved in part by the creation of the facilities proposed.

In *Hinton v. State Treasurer, supra,* it was held that a statute setting aside a fund and creating an administrative agency to make loans for the purpose of enabling veterans of World War I to purchase homes was within the legislative power, unrestrained by Art. I, sec. 7. In *Bridges v. Charlotte,* 221 N. C., 472, 20 S. E. (2d), 825, it was declared that payments from the retirement fund to teachers after they had ceased to serve were not offensive to Art. I, sec. 7, of the Constitution, in that they were regarded as in the nature of delayed compensation for public services rendered, or delayed payments of salary. In *Martin v. Raleigh,* 208 N. C., 369, 180 S. E., 786, an appropriation by the City of Raleigh for the hospitalization of the indigent sick and afflicted of the city was upheld; and the creation of a Port Commission as a State agency was held to be for a public purpose and the Act declared not offensive to the Constitution. *Webb v. Port Commission,* 205 N. C., 663, 172 S. E., 377. So also the creation of a Housing Commission was held to be for a public purpose and the use of municipal property in connection therewith approved, the purpose of the Act being to promote health, sanitation and good order. *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693.

The power of a city to make appropriation for a public purpose was expressed by *Chief Justice Stacy* in *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597, in these words: "The primary role of municipal government is that of a protector of rights and not a giver of gifts, but if the end in view be a public municipal one, it is the general holding that a city may aid by donation in proper instances, as well as by other means of assistance."

The power of cities to dedicate real property for use as recreation centers and for other recreational purposes is expressly conferred by G. S., 160-156, and the exercise of this power was held by this Court to be in the public interest and for a public purpose. *Atkins v. Durham,* 210 N. C., 295, 186 S. E., 330; *White v. Charlotte,* 209 N. C., 573 (575), 183 S. E., 730. In the *Atkins case, supra,* the issuance of bonds for the acquisition of land for public parks and playgrounds in the City of Durham was upheld as a necessary expense.

The constitutional limitation contained in Art. I, sec. 7, has been frequently invoked by this Court to strike down legislation conferring special privileges not in consideration of public service. *Simonton v. Lanier,* 71 N. C., 498; *Ketchie v. Hedrick,* 186 N. C., 392, 119 S. E., 767; *Power Co. v. Elizabeth City,* 188 N. C., 278, 124 S. E., 611; *S. v. Fowler,* 193 N. C., 290, 136 S. E., 709; *Plott v. Ferguson,* 202 N. C., 446, 163 S. E., 688; *Little v. Miles,* 204 N. C., 646, 169 S. E., 220; *Edgerton v. Hood, Comr. of Banks,* 205 N. C., 816, 172 S. E., 481; *Cowan v. Trust Co.,* 211 N. C., 18, 188 S. E., 812; *S. v. Warren,* 211 N. C., 75, 189 S. E., 108; *Realty Co. v. Boren,* 211 N. C., 446, 190 S. E., 733; *S. v. Dixon,* 215 N. C., 161, 1 S. E. (2d), 520; *S. v. Harris,* 216 N. C., 746, 28 S. E. (2d), 104. But where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege legislation has been upheld. *Hudson v. Greensboro,* 185 N. C., 502, 117 S. E., 629; *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597; *S. v. Sasseen,* 206 N. C., 644, 175 S. E., 142; *Newman v. Comrs. of Vance County,* 208 N. C., 675, 182 S. E., 453; *Loan Corp. v. Trust Co.,* 210 N. C., 29, 185 S. E., 482; *Allen v. Carr,* 210 N. C., 513, 187 S. E., 809; *S. v. Lawrence,* 213 N. C., 674, 197 S. E., 586; *Lilly & Co. v. Saunders,* 216 N. C., 163, 4 S. E. (2d), 528.

We conclude that the objection to the validity of the Act authorizing the creation of the Charlotte Veterans' Recreational Center cannot be sustained. To justify declaring void an Act of the General Assembly, its unconstitutionality must clearly appear. Reasonable doubts are to be resolved in favor of its validity. *S. v. Brockwell,* 209 N. C., 209, 183 S. E., 378.

2. Has the city power even with legislative authority to convey valuable real property without monetary consideration for a public purpose

which is at the same time not a necessary purpose? It is admitted here that the property proposed to be conveyed was derived from the sale of other property which had been owned by the city for many years, and that it is not now used or presently needed for municipal purposes, and that this property may be regarded as equivalent to surplus funds in the treasury. Under the principle announced in *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611, and *Goswick v. Durham,* 211 N. C., 687, 191 S. E., 728, and *Turner v. Reidsville,* 224 N. C., 42, the city would have power to appropriate surplus funds for a public purpose though it be not one which may be classified as a necessary purpose or expense. *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624; *Nash v. Monroe,* 198 N. C., 306, 151 S. E., 634; *Mewborn v. Kinston,* 199 N. C., 72, 154 S. E., 76; *Burleson v. Board of Aldermen of Spruce Pine,* 200 N. C., 30, 156 S. E., 241. A limitation upon this principle, however, was pointed out in *Sing v. Charlotte,* 213 N. C., 60, 195 S. E., 271. In that case it was held that funds in the city treasury derived from taxation, though labeled "contingent fund," could not be used for a public purpose which was not a necessary expense, without a vote of the people. The distinction between the *Sing case, supra,* and the *Adams case, supra,* was that in the latter no question of taxation or credit was involved. The purchase of property from surplus funds was within the power of the city (*Goswick v. Durham,* 211 N. C., 687, 191 S. E., 728), and the power to sell real property owned by the city in order to use the proceeds for the acquisition of other property for public use was upheld in *Harris v. Durham,* 185 N. C., 572, 117 S. E., 801.

3. However, we think the city should be restrained from executing deed for the city's property upon the terms proposed.

While the making of provision for veterans' recreational facilities, where the need therefor has been declared by the City Council, in accord with the enabling Act of the General Assembly, may, under the circumstances here disclosed, come within the category of a public purpose and in the public interest, this should not be understood as affording the sole criterion for the disposition of the city's property upon the terms proposed. The public purpose so declared may constitute authority for the dedication of real property not presently required for other municipal purposes to be used in carrying out the purposes for which the Veterans' Recreational Authority was created, so long as the need continues, under the control of the city, with provision for reversion of the property or its equivalent in the event the purpose of the grant should cease and the property be no longer required or used therefor. But the Act under which the Veterans' Recreational Center was created may not be held to authorize the city to make an absolute grant of its property upon such terms that in the event the grantee determines the public purpose has

failed, or the recreational facilities placed thereon for veterans are not being sufficiently used, the grantee may dispose of the property in its discretion and apply the proceeds to such charity as it may elect. Under the charter of the city (Public-Local Laws 1939, ch. 366), as well as general law (G. S., 160-229, 160-282), the powers of the city within respect to hospitals and provisions for indigent sick are to be exercised by the City Council. Discretionary exercise of these powers may not be delegated. *Murphy v. Greensboro,* 190 N. C., 268 (277), 129 S. E., 614; *Bowles v. Graded School,* 211 N. C., 36, 188 S. E., 615. The purpose contemplated by the Act and the Resolution of the City Council to provide recreational facilities for veterans is necessarily of limited duration, and the ultimate disposition of the property would be placed beyond the control of the city. It is a sound principle of municipal law that a city may exercise only such powers as are expressly granted, necessarily implied or essential to its purposes. *Asheville v. Herbert,* 190 N. C., 732, 130 S. E., 861; *Madry v. Scotland Neck,* 214 N. C., 461, 199 S. E., 618.

It must be held that the execution of the deed upon the terms proposed is beyond the power of the city and in excess of authority conferred by the Act, and that the motion for restraining order should have been allowed.

The provisions in the statute expressly authorizing conveyance of the property by deed would seem to supersede, for the public purpose therein declared, the city's charter provision that sale of city property be at auction. The statute declares that in so far as its provisions are inconsistent with any other law the provisions of the Act shall be controlling. *R. R. v. Gaston County,* 200 N. C., 780, 158 S. E., 481; *Kirkman v. Stoker,* 201 N. C., 11, 158 S. E., 551; *Asheville v. Herbert,* 190 N. C., 732, 130 S. E., 861.

There was error in denying plaintiff's motion for a restraining order as prayed.

Error.

W. A. MELTON v. M. M. RICKMAN.

(Filed 17 December, 1945.)

1. False Imprisonment § 1—

A cause of action for false arrest or false imprisonment is based upon the deprivation of one's liberty without legal process. It may arise when the arrest or detention is without warrant, or the warrant charges no criminal offense, or the warrant is void, or the person arrested is not the person named in the warrant. All that must be shown is the deprivation of one's liberty without legal process.

2. Malicious Prosecution § 1—

To sustain an action for malicious prosecution the plaintiff must show malice, want of probable cause, and the favorable termination of the former proceeding.

3. Process § 15—

One who uses legal process to compel a person to do some collateral act not within the scope of the process, or for the purpose of oppression or annoyance, is liable in damages in a common law action for abuse of process. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. Evil purpose alone is not sufficient. The bad intent must finally culminate in the abuse.

4. Process § 16—

In an action *ex delicto* for damages for malicious abuse of process, where the complaint alleges that defendant had a check of plaintiff, who had no funds in the bank and the check was dishonored, whereupon defendant caused a warrant to issue and plaintiff to be arrested, charged with a violation of the bad check law, the issuance of the warrant being in furtherance of defendant's plan to collect his debt by criminal process, and at the trial plaintiff pleaded guilty or was found guilty, and pending judgment plaintiff paid the check and costs, defendant surrendered the check and notified the magistrate that same was paid and judgment was entered discharging plaintiff on payment of costs, no cause of action is stated and demurrer *ore tenus* here sustained.

SEAWELL, J., dissenting.

DEVIN, J., concurs in dissent.

APPEAL by defendant from *Gwyn, J.*, at May Term, 1945, of ROWAN.

Civil action *ex delicto* for damages resulting from the abuse of criminal process, heard on motion to strike certain allegations in the complaint.

The motion first came on for hearing before the clerk who allowed the motion to strike certain paragraphs and denied it as to others. When the appeal came on to be heard in the court below "the plaintiff, through counsel, states in open Court that he elects to sue upon malicious abuse of process only." Thereupon the judge overruled the clerk and denied the motion to strike *in toto*. The defendant excepted and appealed.

The plaintiff alleges in substance:

On 31 March, 1944, he borrowed from defendant $25 to be paid in two weeks plus 10 per cent. At the same time he executed and delivered to defendant a check for $25 to be held as evidence of the loan. Defendant knew plaintiff had no funds in or credit with the bank on which the check was drawn but used the check as evidence of the loan for the purpose of falsely representing the loan as a cash transaction so as to enable him to force collection thereof by criminal process if necessary.

Thereafter plaintiff negotiated additional small loans on the same terms and conditions, but by reason of payments made and the credits to which he is entitled for penalties for usurious charges the plaintiff, on 3 January, 1945, was not indebted to defendant in any amount. On said date, notwithstanding the plaintiff owed him nothing, defendant, for the sole purpose of collecting the loan of 31 March, 1944, maliciously, etc., caused plaintiff to be arrested charged with a violation of the bad check law on a warrant issued on the complaint of defendant; that the issuance of said warrant was in furtherance of the aforesaid plan and device of defendant to collect his alleged debt by criminal process.

It being made to appear that plaintiff at the time he gave the check had no funds in or credit with the bank on which it was drawn and that upon presentation payment thereof was refused the justice of the peace found plaintiff guilty of the violation of G. S., 14-106.

The judgment was held open for one week. Plaintiff was unable to pay counsel and give bond in any amount so as to appeal from the judgment that might be pronounced and "although this plaintiff was not indebted to the defendant in any amount, as his only alternative to remaining in custody and in jail until the February Term, 1945," of the Superior Court, he, before the expiration of the week, paid defendant the sum of $25 plus $6.40 accrued costs; that upon receipt thereof defendant surrendered the check and notified the magistrate his claim and costs had been paid; that thereupon the magistrate entered judgment as follows:

"After hearing the evidence in this case, it is adjudged that the defendant W. A. Melton tenders submission. It is further ordered and adjudged that the defendant W. A. Melton be discharged upon payment of costs, as check has now been paid."

Plaintiff did not submit. Instead he pleaded not guilty and gave evidence of the true nature of the transaction and was found guilty by the magistrate.

The purpose of said arrest was to collect the alleged debt and humiliate and embarrass the plaintiff to such an extent that he would be forced and coerced to pay same; that said arrest was used to accomplish a purpose not contemplated by law and constitutes an unlawful, etc., abuse of process which in fact accomplished its unlawful purpose.

He then alleges damages and prays the recovery of both compensatory and punitive damages.

D. A. Rendleman for plaintiff, appellee.

R. Lee Wright for defendant, appellant.

BARNHILL, J. Upon the call of the case in this Court the defendant demurred *ore tenus* for that the complaint fails to state a cause of action for abuse of process. Decision thereon is determinative of this appeal.

At common law there were a number of related causes of action devised to afford a remedy against the wrongful invasion of the liberty of an individual through the processes of the courts.

A cause of action for false arrest or false imprisonment is based upon the deprivation of one's liberty without legal process. It may arise when the arrest or detention is without warrant, *Allen v. Greenlee,* 13 N. C., 370; *S. v. DeHerrodora,* 192 N. C., 749, 136 S. E., 6; *Cook v. Hospital,* 168 N. C., 250, 84 S. E., 352; *Hoffman v. Hospital,* 213 N. C., 669, 197 S. E., 161, or the warrant charges no criminal offense, *Rhodes v. Collins,* 198 N. C., 23, 150 S. E., 492, or the warrant is void, or the person arrested is not the person named in the warrant. 4 Am. Jur., 81, sec. 132. All that must be shown is the deprivation of one's liberty without legal process.

To sustain an action for malicious prosecution the plaintiff must show malice, want of probable cause, and the favorable termination of the former proceeding. *Miller v. Greenwood,* 218 N. C., 146, 10 S. E. (2d), 708; *Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577; *Stancill v. Underwood,* 188 N. C., 475, 124 S. E., 845; *Wingate v. Causey,* 196 N. C., 71, 144 S. E., 530; *Mooney v. Mull,* 216 N. C., 410, 5 S. E. (2d), 122, 125 A. L. R., 893; *Rawls v. Bennett,* 221 N. C., 127, 19 S. E. (2d), 126.

One who uses legal process to compel a person to do some collateral act not within the scope of the process or for the purpose of oppression or annoyance is liable in damages in a common law action for abuse of process. 1 Am. Jur., 176; *R. R. v. Hardware Co.,* 143 N. C., 54; *Ludwick v. Penny,* 158 N. C., 104, 73 S. E., 228; *Wright v. Harris,* 160 N. C., 542, 76 S. E., 489; *Griffin v. Baker,* 192 N. C., 297, 134 S. E., 651; *Klander v. West,* 205 N. C., 524, 171 S. E., 782.

So then, while false imprisonment is the arrest and imprisonment without legal process and malicious prosecution is the prosecution with malice and without probable cause, abuse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attempted to be secured. 1 Am. Jur., 176; *Stanford v. Grocery Co.,* 143 N. C., 419; *R. R. v. Hardware Co.,* 138 N. C., 175; *Griffin v. Baker, supra; Abernethy v. Burns,* 210 N. C., 636, 188 S. E., 97; *Klander v. West, supra; Martin v. Motor Co.,* 201

N. C., 641, 161 S. E., 77; *Ellis v. Wellons,* 224 N. C., 269; *Rock v. Abrashin,* 65 A. L. R., 1280; Anno. 86 Am. St. Rep., 397.

Evil purpose alone is not sufficient. The bad intent must finally culminate in the abuse, for it is only the latter which is the gist of the action. *Carpenter v. Hanes, supra.* Nor can a cause of action arise out of the issuance of the process alone. *Abernethy v. Burns, supra.* There is no writ until it is issued. Hence there can be no abuse of a writ before its issuance. That which does not exist cannot be abused.

"Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process." 1 Cooley, Torts (3rd), 354; *Wright v. Harris, supra; Ludwick v. Penny, supra; R. R. v. Hardware Co.,* 143 N. C., 54; *Jerome v. Shaw,* 172 N. C., 862, 90 S. E., 764; *Italian Star Line v. U. S. Shipping Bd. E. F. Corp.,* 53 F. (2d), 359, 80 A. L. R., 576, Anno. p. 580; Anno. 86 Am. St. Rep., 397.

When the allegations of the complaint are considered in the light of these principles of law, it becomes apparent that no cause of action for malicious abuse of process is stated.

The alleged conduct of the defendant in his business relations with plaintiff, if true, is not commendable. Even so, his conduct prior to the issuance of the warrant does not give rise to a cause of action.

Defendant had in his possession a check of the plaintiff. Plaintiff had no funds in bank and the check was dishonored. Defendant caused a warrant to be issued and plaintiff to be arrested, charged with a violation of the bad check law. The issuance of said warrant was in furtherance of defendant's plan to collect his debt by criminal process. At the trial the plaintiff pleaded guilty (as shown by the judgment) or the magistrate found him guilty (as alleged by plaintiff). The pronouncement of judgment was held open for a week. In the interim plaintiff paid the check and costs. Defendant surrendered the check and notified the magistrate his claim had been paid. The magistrate thereafter entered judgment discharging plaintiff on condition he pay the costs.

Where then is the allegation of any act on the part of the defendant which constitutes the misuse of the process of the court? The magistrate did not pronounce judgment immediately, but this was not at the instance or on the request of the defendant. Was it to give plaintiff an opportunity to raise the money due the defendant? It is not so alleged.

Defendant did not demand his money under threat of prosecution. He did not seek a judgment requiring plaintiff to pay. His one and only act after the issuance of the warrant, as alleged by plaintiff, was to accept his money together with the cost as tendered by plaintiff, surrender the check, and notify the magistrate that he had been paid. In this there was no perversion of the writ.

"Defendant's suit may have been unlawful, and the allegations upon which it was based may have been false in fact, but he pursued the regular and usual procedure of the law." *Wright v. Harris, supra.*

Jackson v. Telegraph Co., 139 N. C., 347, is factually distinguishable. See *Wright v. Harris, supra.*

As the complaint fails to state a cause of action for abuse of process, the questions presented by the appeal need not be discussed.

Demurrer sustained.

SEAWELL, J., dissenting: In dissenting, I should like to suggest a correction of an inadvertence in the statement. I think it will be found that there was only one judgment by Fesperman, J. P., and this was made after defendant had been given a week to get up the money. The defendant carried this money, together with $6.40 costs, to Fesperman, and the judgment followed. This, of itself, is evidence to go to the jury of his control and abuse of the process under any label we might apply to the proceeding.

The necessary elements in an action for malicious prosecution, as tersely stated in *Jaffe v. Stone,* 114 Pac. (2d), 335, are (1) a judicial proceeding favorably terminated; (2) lack of probable cause; and (3) malice. Contrasted with an action for abuse of process, our own Court observed: "In an action for malicious prosecution there must be shown (1) malice and (2) want of probable cause and (3) that the former proceeding has terminated. *R. R. v. Hardware Co.,* 138 N. C., 175. In an action for abuse of process it is not necessary to show either of these three things." *R. R. v. Hardware Co.,* 143 N. C., 54, 55, 55 S. E., 422.

With these handicaps removed, the complaint states a cause of action for abuse of process.

Imprimis, we must understand that oppression under color of legal process, as a cause of action, does not necessarily fall either on one side or the other of a strict dividing line or become legally nonexistent. Not infrequently the same series of transactions may develop both infractions of duty with corresponding legal liability. Thus while it is usually, and correctly, stated that a cause of action for abuse of process arises when a writ is regularly issued and is used for an ulterior purpose not authorized by law, it is not meant that the proceedings leading up to its issue are impeccable or *bona fide,* or free from condemnation of law. Process maliciously sued out, and without probable cause, may be the subject of abuse of process as well as process the issue of which is lawfully procured.

"The facts of a case may at once justify an action either for malicious prosecution or for the abuse of process. In other words, an abuse of

process may occur in the course of a prosecution which has been malicious and wrongful throughout." 80 A. L. R., 581. *Consouland v. Rosomano,* 176 Fed., 481; *McGann v. Allen,* 105 Conn., 177, 14 Atl., 810; *Brantley v. Rhodes-Haverty Furniture Co.,* 131 Ga., 276, 62 S. E., 222; *Wright v. Harris,* 160 N. C., 542, 76 S. E., 489.

This brings us to the question whether the motive and conduct of defendant in suing out and prosecuting the writ may be considered as within the constituent elements of abuse of process, and to what extent the factual situation throughout the transaction may determine whether the wrong inflicted on the plaintiff is properly abuse of process rather than malicious prosecution. *Jackson v. Telegraph Co.,* 139 N. C., 347, 51 S. E., 1015.

Abuse of process is variously defined in the texts and decisions as follows: "Abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted in 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." 1 Am. Jur., Abuse of Process, sec. 2. "If a process, either civil or criminal, is wilfully made use of for a purpose not justified by the law, this is an abuse for which action will lie." 1 Cooley on Torts, 3d Ed., p. 354. "An abuse of process is some unlawful use of the process for the accomplishment of some end foreign to the purpose for which it may be issued." *Carpenter v. Hanes,* 167 N. C., 551, 554, 83 S. E., 577.

A more cautious approach to definition is made by the Court in *Carpenter v. Hanes, supra:* "The illegality or maliciousness of the proceeding leading up to it [the issue of the writ] does not determine its abuse in law as much as the unlawful or oppressive use of it after it is issued for the purpose of coercing or harassing the defendant in some way."

Definitions of abuse of process ordinarily recapitulate case history rather than the inherent or substantial characteristics of the condemned practice. The individuation is therefore likely to neglect exceptions which have long been recognized as giving rise to actionable abuse of process, because of the peculiar facts involved, their outstanding oppression, as offensive to public policy as it is injurious to the individual, although an action for malicious prosecution might lie. These exceptions do not base the abuse of process with technical strictness on conduct of the defendant subsequent to the issue of the writ. Instances are not wanting where the Court has found that the antecedent acts or the set purpose of the defendant, coupled with the unlawful issuing of the process for a manifestly ulterior purpose and its subsequent prosecution, all in close and continuous sequence, have been held to constitute abuse of process.

Jackson v. Telegraph Co., supra, cannot be disposed of on the theory that it is distinguished by factual differences from the present case, or that it is so distinguished in the *Harris case, supra. Wright v. Harris, supra,* distinguished it, as *abuse of process,* from the case then being considered, *malicious prosecution,* and reiterated its authority. *In neither* the *Jackson case, supra,* nor *Grainger v. Hall,* 4 Bing. N. C., 212 (33 Eng. Com. Law, 328), the principle of which it adopts, did the defendant do any act whatever with regard to the process *after it was issued*—they simply let nature take its course.

In *Jackson v. Telegraph Co., supra,* McManus, the agent of the defendant company, was forbidden to go upon the premises of Jackson, the owner, to erect poles and wires. In order to secure the absence of Jackson while the poles could be erected and the wires strung, McManus swore out a warrant and caused his arrest. It is true that after the warrant was issued, McManus told the sheriff to arrest Jackson, but that was no more than the writ commanded. Stressing the declaration of McManus immediately before the writ was issued that he would put Jackson "out of the way," and that such was the purpose of the warrant, this Court held that Jackson had a good cause of action for abuse of process; and in a subsequent case, *Wright v. Harris, supra,* the Court declared the principle in the *Jackson case, supra,* to be analogous to that in *Grainger v. Hall, supra.* The facts in the *Grainger case, supra,* as stated in *Wright v. Harris, supra,* were these:

"Plaintiff was on the eve of sailing from port in his smack, of which he was the master, and, as the declaration runs, upon plaintiff refusing to comply with an unjust demand for goods not embraced in the mortgage given by plaintiff to secure his debt to defendants, on pain of being refused the proper registry or clearance for sailing, or to submit to any unlawful exaction by them, the latter thereupon, 'wrongfully and unjustly contriving and intending, as aforesaid, to imprison, harass, oppress, injure, and impoverish the plaintiff, and to cause and procure him to be arrested and imprisoned, and to prevent his making and prosecuting any voyages in his smack or vessel, and wholly to ruin the plaintiff thereby, they, well knowing that plaintiff was entirely unprepared and unprovided with bail,' falsely and maliciously caused the arrest of plaintiff, under a writ of capias, which they had caused 'to be sued and prosecuted out of the Court of our Lord the King of the Bench at Westminster,' for the purpose of using it, not to collect an honest debt in a legal way, but to wrong and oppress the plaintiff. This case is much like that of *Jackson v. Telegraph Co., supra,* which was decided by this Court, and has several times been cited by us as authority upon the subjects of the 'abuse of process.'"

It is indeed difficult to see why the bringing into existence of a false criminal warrant, with the immediate purpose of its abuse in the collection of a debt, and the further prosecution of the case until this ulterior purpose is accomplished, could be classed otherwise than abuse of process, carrying with it *ab initio* the legal incidents and remedial procedure peculiar to that form of action. In the case at bar, just as in the *Grainger case, supra,* and the *Jackson case, supra,* the wrongful suing out of the process and its prosecution brought about in continuous sequence the expected conditions of duress of which the defendant was the beneficiary, under conditions which are hardly consistent with his innocence.

In the case at bar, taking the complaint to be true, we note a practice on the part of the defendant which is perhaps not unprecedented or inexperienced by the seeker after small loans or small credits. The defendant required the plaintiff, who sought to borrow $25, to sign a check for that amount, prepared by defendant and drawn indifferently on a bank in which, as both of them knew, plaintiff had no money. In this way it might be made to appear that it was a cash transaction; and plaintiff might be prosecuted for crime in case the loan was not paid. With that purpose in view, defendant finally presented the check at the bank and carried out his scheme of collection by causing plaintiff's arrest. He followed the prosecution; and during the interim of a week given the plaintiff to get up the money, he not only received payment for the debt, which he ordinarily had the right to do, but also collected $6.40 costs, and reported that fact to the justice of the peace, upon which his zeal for the public welfare rapidly cooled. The justice, in frank recognition of the character of the proceeding, ended the case "as the check had been paid."

As between the parties who both knew that at the time of drawing the check the drawer had no money in the bank, the check was no more than an acknowledgment of debt; and its use in the manner alleged is simply to make the liberty of the citizen the security for the debt, if the creditor can succeed in prostituting the process of the court to that ulterior purpose.

I am not so much interested, in this case, in breaking up the vicious small loan practices as I am in removing the State of North Carolina from its shadow, and breaking up the abuse of process which constitutes the security for the loan and renders a nefarious business prosperous.

I think the pleading states a cause of action, and the demurrer should be overruled.

DEVIN, J., concurs in dissent.

BESSIE KELLY AND ANNIE L. KELLY v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH, J. R. BREWER AND WIFE, ETHEL M. BREWER, R. S. WESTBROOK, C. B. PARMELE, H. F. SHAFFNER, AND HOME REAL ESTATE LOAN AND INSURANCE CO.

ROBERT J. PLUMMER AND WIFE, MARGARET J. PLUMMER, v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH AND RICHARD S. WESTBROOK.

FRED H. RAYNOR AND LILLIE FLORENCE RAYNOR v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH AND RICHARD S. WESTBROOK.

CARRIE R. PLUMMER v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH, AND RICHARD G. WESTBROOK.

O. C. CONNELLY AND WIFE, HATTIE CONNELLY, v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH, AND RICHARD G. WESTBROOK.

W. E. SPOONER AND WIFE, BETTIE C. SPOONER, v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH, RICHARD WESTBROOK, HOME REAL ESTATE, LOAN AND INSURANCE COMPANY, W. F. SHAFFNER AND C. B. PARMELE.

W. F. COX v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH, AND RICHARD G. WESTBROOK.

IDA C. COX v. H. ELIZABETH KING, TRUSTEE, THE TOWN OF CAROLINA BEACH, AND RICHARD WESTBROOK.

(Filed 17 December, 1945.)

1. Boundaries §§ 1, 4: Waters and Watercourses § 1—

While the general rule is that a description of land as bordering on a non-navigable stream carries to the thread of the stream, this is rebutted by words which clearly restrict the grant to the edge or shore of the stream; and where the call is to a point on the margin of a swamp and thence along the swamp, the common law rule which carries the riparian owner's title to the thread of the stream does not apply.

2. Same—

The description "to the high water mark" of a non-navigable arm of the sea, a broad shallow sound, most of which is dry at low water and the deepest part of which (a ten-foot channel) does not exceed 3 feet at high water and is not over 10 inches at low water, restricts or limits the conveyance to the correctly located line of mean high water as indicated on the ground. Particularly is this so where the title to the marsh lands, lands covered by water, was at the time the lots in question were laid off held by the State, subject to disposition by the State Board of Education, since title to swamp lands is presumed to be in that Board or its assigns until a valid title to same is shown otherwise. G. S., 146-90.

3. Same—

There is no presumption that grantors, in a deed describing lands as running to the high water mark of a shallow sound most of which being dry at low water, intended to convey lands beneath the waters of the sound.

4. Boundaries § 3a: Damages § 1a—

Where the deeds, under which plaintiffs claim, describe their lots as fronting on a certain avenue and extending back to the high water mark of a shallow sound, their rights are limited by the express words of their deeds, and the boundaries of their lots may not be extended beyond the high water mark of the sound as it existed at the time their titles were acquired; and their titles and right of possession may not be extended to embrace lands which were then covered by the waters of the sound, nor include the use of such waters for practical or esthetic purposes. And upon the filling in of the sound by defendants and others, within the limits of the previous high water mark, the loss of access to the waters or deprivation of view suffered by plaintiffs is *damnum absque injuria*.

5. Boundaries § 1—

What are the boundaries of a deed is a question of law for the court. Where they are is a question of fact for the jury.

6. Boundaries § 3d—

Where lots are sold by reference to a recorded plat, the effect of reference to the plat is to incorporate it in the deed as part of the description of the land conveyed. And if the deed contains two descriptions, one by metes and bounds and the other by lot and block according to a certain plat or map, the controlling description is the lot according to the plat, rather than the one by metes and bounds.

7. Boundaries § 3a—

Ancient grants offered, without sufficient evidence to show their location so as to cover the *locus in quo*, are not admissible in evidence.

APPEAL by plaintiffs from *Frizzelle, J.*, at April Term, 1945, of NEW HANOVER. Affirmed.

These were actions to determine plaintiffs' title to certain lots in the Town of Carolina Beach, based upon allegations that by the acts of the defendants the plaintiffs have been deprived of rights therein with respect to Myrtle Grove Sound. The eight cases entitled as above were consolidated for trial, the causes alleged and the relief sought being substantially the same in each.

The substance of the several complaints was that the plaintiffs named therein had bought lots in a subdivision originally laid out, platted, and mapped by the New Hanover Transit Company, from which by *mesne* conveyances plaintiffs' titles were derived, and that these lots fronted on Carolina Beach Avenue North and extended back therefrom westwardly to Myrtle Grove Sound. It was alleged in each case that the plaintiffs

therein were owners in fee and in possession of the described lots, and that the defendants had wrongfully invaded plaintiffs' rights therein by filling in the western end of said lots and constructing a road thereon, thereby cutting off the plaintiffs from the waters of the sound.

In the case of plaintiffs Kelly the lot was described as Lot 2 in Block 2, according to the map of the northern section of Carolina Beach and as extending about 175 feet westwardly from Carolina Beach Avenue North "to the high water mark of Myrtle Grove Sound."

In the Robert Plummer case the lot was described as Lot 4 in Block 12, according to map recorded in Book 73, pages 32 and 33, New Hanover Registry and extending westwardly from Carolina Beach Avenue North "to the high water mark of the eastern side of Myrtle Grove Sound; thence southwardly along said high water mark or line of the eastern side of Myrtle Grove Sound."

In the Carrie Plummer case the lot is described as Lot 5 in Block 2, according to map of J. L. Becton, C.E., and extending westwardly from Carolina Beach Avenue North "to the high water mark of Myrtle Grove Sound; thence northwardly along the high water mark of Myrtle Grove Sound."

In the Connelly case the lots were described as Lots 2 and 3 in Block 10, according to original plat of northern extension of Carolina Beach, and extending westwardly from Carolina Beach Avenue North about 150 feet "to the high water mark of Myrtle Grove Sound." This lot has since been conveyed to G. C. Bordeaux, who by order has been made party plaintiff.

In the Spooner case the lot was described in the complaint as bounded on the east by Carolina Beach Avenue North, and on west by the run of Myrtle Grove Sound, but in the deed to plaintiffs in this case, offered in evidence, the lot is described as "Lot No. 9 in Block 8, as shown by the official map and plan of Carolina Beach as surveyed, platted and mapped by J. L. Becton, C.E., and duly recorded in Book 73 in office of Register of Deeds of New Hanover County, reference to which map is hereby had for a more particular description of the land and premises conveyed."

In the W. F. Cox case the lot was described as Lot 6 in Block 4, according to maps and plans of Carolina Beach by J. L. Becton, C.E., and extending westwardly from Carolina Beach Avenue North 125 feet "to high water mark of Myrtle Grove Sound."

In the Ida C. Cox case the lot is described as Lot 4 in Block 14, according to official map or plan of a part of Carolina Beach prepared by Becton and Humphrey, C.E., "reference being had to said map or plan for a complete description of the lot herein conveyed."

In the Raynor case the lot was described as Lot No. 1 in Block 6, "according to the original map of Carolina Beach Northern Extension,"

and as extending westwardly from Carolina Beach Avenue North 125 feet "to the low water mark of Myrtle Grove Sound."

It was alleged in each complaint that the back or western end of the lots described extended to Myrtle Grove Sound, and that if the sound was navigable water the plaintiffs were entitled to have the same open, and if non-navigable the lot extended to the thread of the stream; that the use of the water for boating and other purposes was a valuable appurtenance to the lots. In the Kelly case damages were asked "on account of the foregoing conduct of the defendants" in the sum of $1,000.

Each suit purports to have been brought under the Uniform Declaratory Judgment Act to ascertain and declare plaintiffs' rights and title, to the end that plaintiffs be adjudged to be the owners of described lots running back to the present waters of the sound.

The defendants filed answer to each complaint in which they denied the plaintiffs' claims and in one or more of the answers alleged that under a deed from the State Board of Education they own the land west of the western boundary of plaintiffs' lots, and deny invasion of any right or title of plaintiffs. It was admitted that a street over and along a portion of the land covered by defendants' deed and later reclaimed had been laid out and dedicated to public use.

At February Term, 1942, the court ordered a compulsory reference, finding that a complicated question of boundary was involved, requiring personal view of the premises, and named Hon. D. H. Bland of the Goldsboro Bar as referee. Plaintiffs excepted to the order of reference and reserved right to jury trial. After hearing all the evidence, the referee made full findings of fact and submitted his conclusions of law thereon, wherein he recommended that upon all the evidence judgment of nonsuit should be entered as to all defendants in each case; that in any event nonsuit should be entered as to defendants Westbrook, and J. R. Beaver and wife; that if nonsuit be not proper upon all the evidence that judgment should be entered that plaintiffs are owners of their respective lots up to the boundaries as determined, and that plaintiffs have sustained no damage from the work of reclaiming defendants' land, and are not entitled to recover further herein.

The plaintiffs excepted to each and all of the material findings of fact and conclusions of law in the referee's report, and demanded jury trial upon issues presented in each case. Upon the hearing in the Superior Court the plaintiffs offered a portion of the evidence which had been taken and reported by the referee, and rested their cases. The defendants moved for judgment of nonsuit in each case, and the several motions were allowed.

From judgment dismissing the actions, the plaintiffs appealed.

Poisson & Campbell and Isaac C. Wright for plaintiffs.
Emmett H. Bellamy for the defendant Town of Carolina Beach.
Bellamy & Bellamy and Kellum & Humphrey for other defendants.

DEVIN, J. The several plaintiffs named in the caption instituted their actions against the defendants for substantially the same causes, and for convenience these were consolidated for trial. For the same reason, since the rights of the parties involved in the several appeals are to be determined according to the same legal principles, the questions presented, except as noted, will be considered as applicable to all.

These actions were brought for the purpose of having plaintiffs' rights in and to described lots in the Town of Carolina Beach determined with respect to access to and use of the waters of Myrtle Grove Sound, from which plaintiffs allege they have been deprived by the filling in by the defendants of a portion of the sound.

Their contention is that as their deeds designate Myrtle Grove Sound as the western boundary of their lots, they may not lawfully be cut off from the waters of the sound by the interposition of reclaimed land which now separates them from the sound; and that while some of the deeds describe the lots as extending to the high water mark of the sound, if the sound be regarded as navigable water defendants have wrongfully deprived them as riparian owners of access to the waters of the sound; and that if, as found by the referee and approved by the court, the sound be regarded as non-navigable, the plaintiffs' western lines would extend to the thread or channel of the stream.

An examination of the evidence reported by the referee which was offered by the plaintiffs, including the various detailed maps, leads to the conclusion that Myrtle Grove Sound where it bordered plaintiffs' lots could not be classed as a navigable stream. This sound at its head at Carolina Beach, on its eastern side, was a wide shallow salt marsh which at high tide was covered with water, varying in depth from 18 inches to zero. On the western side was a channel which at high tide at deepest point did not exceed 3 feet in depth, and at low tide the water was confined to a channel some 10 feet wide and 8 or 10 inches deep. These were facts found by the referee with no substantial contradiction in the evidence offered by the plaintiffs. *Ins. Co. v. Parmele,* 214 N. C., 63, 197 S. E., 714.

The litigation with which we are here concerned grew out of the fact that the land lying within the limits of Myrtle Grove Sound, which extended north from its southern head a distance of several miles and covered in all more than two thousand acres, was regarded by the State Board of Education as coming within the terms of the statute, G. S., 146-4, and the board conveyed to the defendants the land included in the

sound at its head where it adjoined plaintiffs' lots. The defendants thereafter undertook to dredge a channel along the western side of the sound and to cast the soil thereby excavated upon the eastern portion so as to reclaim land up to the line of the eastern edge or high water mark of the sound. Upon this reclaimed land was laid out a street or road, and upon a portion of it was erected the Town Hall of Carolina Beach.

The plaintiffs, however, maintain that under their deeds the western boundaries of their lots extend to the center of the channel, and hence that the filled in land and street were placed upon their property. The determinative question for decision is whether plaintiffs have any rights in the land west of the high water mark of the sound.

While the general rule is that a description of land as bordering on a non-navigable stream carries to the thread of the stream, *Rose v. Franklin,* 216 N. C., 289, 4 S. E. (2d), 876; *Wall v. Wall,* 142 N. C., 387, 55 S. E., 283, this is rebutted by words which clearly restrict the grant to the edge or shore of the stream. 8 A. J., 762, 11 C. J. S., 577. It was held in *Rowe v. Lumber Co.,* 128 N. C., 301, 38 S. E., 896, and reaffirmed with modification in *Rowe v. Lumber Co.,* 133 N. C., 433, 45 S. E., 830, that where the call is to a point on the margin of a swamp and thence along the swamp, the common law rule which carries the riparian owner's title to the thread of the stream does not apply. This principle was the basis of the decision in *Oemler v. Green,* 134 Ga., 198, and in *Welder v. State* (Tex. Civ. App.), 196 S. W., 868. Numerous other cases are collected in the annotation in 74 A. L. R., 620, 623. We think the description "to the high water mark" of a non-navigable arm of the sea, a broad shallow sound, such as is here disclosed by the evidence, restricts or limits the conveyance to the correctly located line of mean high water as indicated on the ground. 8 A. J., 757, 11 C. J. S., 576. Particularly is this so where the title to the marsh lands, lands covered by water, was at the time these lots were laid off held by the State subject to disposition by the State Board of Education, since the title to swamp lands is presumed to be in that board or its assignees until a valid title to such land is shown otherwise. G. S., 146-90. Nor is it to be presumed that plaintiffs' grantors intended to convey land beneath the waters of the sound. *Guano Co. v. Lumber Co.,* 146 N. C., 187, 59 S. E., 538; *Niles v. Cedar Point Club,* 175 U. S., 300.

Since the deeds under which the plaintiffs claim describe their lots, with exceptions hereinafter noted, as fronting east on Carolina Beach Avenue North and extending back westwardly to the high water mark of Myrtle Grove Sound, it follows that plaintiffs' rights thereunder are limited by the express words of their deeds, and the boundaries of their lots may not be extended beyond the high water mark of the sound as it existed at the time their titles were acquired. Plaintiffs' titles and right of possession

may not be extended to embrace land that was then covered by the waters of the sound, nor include the use of the waters for practical or esthetic purposes. If the defendants or others filled in the eastern portion of the sound within the limits of the previous high water mark, under the circumstances here disclosed, the loss of access to the waters or deprivation of view must be regarded as *damnum absque injuria.*

For the purposes of these actions, the titles of plaintiffs to the lots described in their deeds as fronting on Carolina Beach Avenue North and extending back or westwardly to the high water mark of Myrtle Grove Sound may be regarded as uncontroverted. While the defendants formally denied the plaintiffs' allegations of title, in the Kelly case the defendants allege title in themselves in the tracts of land conveyed to them in the deed from the State Board of Education, and admit that the eastern boundary of their land, which is wholly within the limits of Myrtle Grove Sound, constitutes a common boundary between the lands belonging to defendants and the plaintiffs. And the referee reports the contention of the defendants as being that the western boundary of the lots claimed by plaintiffs is the mean high water mark of the sound which has been correctly located, and that plaintiffs own nothing beyond so far as the marsh land of the sound is concerned, title to which was vested by law in the State Board of Education and by said board conveyed to defendants. To this statement of their position defendants did not except.

What are the boundaries of a deed is a question of law for the court. Where they are is a question of fact for the jury. *Scull v. Pruden,* 92 N. C., 168; *Rose v. Franklin,* 216 N. C., 289, 4 S. E. (2d), 876. Upon the evidence offered we reach the conclusion that it has been correctly determined that by the express language of the conveyances under which plaintiffs claim, the western boundaries of their lots are confined to the high water mark on the eastern side of the sound.

It will be noted, however, that the deeds in two of the cases do not specifically call for the high water mark of the sound as the western boundary. In the Raynor case the western boundary was referred to in the deed as "the low water mark of Myrtle Grove Sound," but the lot is further described in the deed as being designated and known as Lot No. 1 in Block 6, according to a map of Carolina Beach prepared by J. L. Becton, C.E., and duly recorded. By reference to this map, which was offered in evidence, it appears that this, like all the other lots, had a frontage of 50 feet and that the western boundary of this lot was the high water mark of the sound. Furthermore, according to a survey and recorded map made by M. H. Lander, C.E., before the sound was filled in, the distance at this point from the avenue to high water mark of the sound was 125 feet on northern side and 137 feet on south side of said

lot, while the dimensions of this lot extending westward was shown on the map of Becton and Humphrey, on the south side, as 100 feet, and hence did not extend beyond the high water mark. In the Spooner case the lot was described in the complaint as bounded on the west by the run of Myrtle Grove Sound, but the deed offered in evidence described the lot only as "lot No. 9 in Block 8, as shown by the official map and plan of Carolina Beach as surveyed, platted and mapped by J. L. Becton, C.E., and duly registered in Book 73 in the office of the Register of Deeds of New Hanover County, reference to which said maps is hereby had for a more particular description of the lands and premises hereby conveyed." The map referred to, which was in evidence, shows the western boundary of Lot 9 as the high water mark of the sound. The western line of this lot (as well as that of the other lots) is shown as practically straight.

It seems to have been established by numerous decisions of this Court that where lots are sold by reference to a recorded plat, the effect of reference to the plat is to incorporate it in the deed as a part of the description of the land conveyed. *Elizabeth City v. Commander,* 176 N. C., 26, 96 S. E., 736. As was said in *Collins v. Land Co.,* 128 N. C., 563, 39 S. E., 21, "a map or plat referred to in a deed becomes a part of the deed as if it were written therein." *Ins. Co. v. Carolina Beach,* 216 N. C., 778, 3 S. E. (2d), 21; *Pearson v. Allen,* 151 Mass., 79. "Where a deed contains two descriptions, one by metes and bounds and the other by lot and block according to a certain plat or map, the controlling description is the lot according to the plan, rather than the one by metes and bounds. *Nash v. R. R.,* 67 N. C., 413." *Hayden v. Hayden,* 178 N. C., 259, 100 S. E., 515; 130 A. L. R., 643, note. Applying these principles to the evidence in this case, it follows that the high water mark of the sound must be regarded as the western boundary of all of the lots of the plaintiffs.

The defendants in their answer in the Kelly case claim title to the swamp and marsh land originally covered by the waters of Myrtle Grove Sound and west of the eastern high water mark of the sound, under a deed from the State Board of Education. This area they have partially filled in and reclaimed. In order to attack the validity of defendants' deed, the plaintiffs sought to show that this land was covered by ancient grants previously issued by the State. But the referee found and the court apparently approved that plaintiffs had failed to offer sufficient evidence to show the location of either of the grants offered so as to cover the *locus.* The only surveyor offered had attempted to plat the grants but no actual survey had been made. Plaintiffs made no effort to connect their titles with any of the grants referred to. We concur in the ruling of the referee in holding these grants insufficiently located to be admissible in evidence. But in any event the extension of plaintiffs' lots

to the west must be held limited by the high water mark of the sound at the time the reclamation was undertaken and title beyond that line has not been shown. If plaintiffs' actions be considered as laying the foundation for claims for damages for wrongful invasion by defendants of plaintiffs' rights in respect to the described lots, they would seem to be without support in the evidence. Nor does the record disclose any evidence that the value of plaintiffs' lots has been thereby impaired.

Plaintiffs cite *Cornelison v. Hammond, ante,* 535, as authority against a nonsuit, considering the question involved as being one of boundary only, but that case was a processioning proceeding under G. S., 38-1, instituted for the purpose of determining where the line in controversy between adjoining landowners should be located; that is, which of two claimed lines was the true one. Here the question is (1) what is the western boundary line of plaintiffs' lots, and (2) whether plaintiffs have any rights beyond that line which have been invaded by the defendants.

Upon all the evidence and after plenary hearings the referee recommended in his carefully prepared and comprehensive report that judgment of nonsuit should be entered by the court. This view was adopted by the learned judge who heard the case below, and after a careful consideration of the record and evidence offered we are constrained to concur in this ruling.

We think the plaintiffs have failed to offer sufficient evidence to entitle them to present their several causes to the jury, and that the judgment of nonsuit should be

Affirmed.

VIRGIE M. TYSINGER, EXECUTRIX OF GEORGE E. TYSINGER, v. COBLE DAIRY PRODUCTS, A COPARTNERSHIP COMPOSED OF GEORGE S. COBLE, MAE C. COBLE AND FRANK BUCK, TRUSTEE.

(Filed 17 December, 1945.)

1. Negligence § 17a—

Negligence is not to be presumed from the mere fact of injury or that testator was killed.

2. Negligence § 5—

In an action to recover damages for wrongful death allegedly resulting from actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff's testator under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury which produced the death—a cause that produced the result in continuous

sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed.

3. Negligence § 19a: Trial § 22a—

There must be legal evidence of every material fact necessary to support a verdict. If the evidence fails to establish any one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law.

4. Automobiles § 18a: Negligence § 5—

Where the violation of a statute relative to the operation of a motor vehicle upon the highway is negligence *per se*, such violation must be a proximate cause of injury to become actionable.

5. Automobiles § 18c: Negligence § 17a—

The operator of a motor vehicle on a public highway may assume and act upon the assumption that a pedestrian will use reasonable care and caution commensurate with visible conditions, and that he will observe and obey the rules of the road.

6. Automobiles §§ 18c, 18g—

In an action by plaintiff to recover damages for the wrongful death of plaintiff's testator as a result of alleged negligence, where plaintiff's evidence tended to show that plaintiff's testator was struck and killed by defendant's truck, in crossing a highway from a neighbor's to his own home, at a point other than a marked cross-walk and not within an unmarked cross-walk at an intersection, there being at the point of crossing an unobstructed view of the road from three hundred yards to a quarter of a mile in the direction deceased was facing and from which the truck was approaching, without evidence of anything to give notice to the operator of the truck that deceased was unaware of its approach and would not obey the law of the road and without evidence as to how close the truck was to him when he started across—except that deceased was hit by the side of the truck near the center of the highway, there is no evidence that the driver of the truck failed to exercise due care to avoid colliding with deceased or from which to infer that a failure to give warning by sounding the horn was a proximate cause of the collision, and there is evidence of contributory negligence in deceased's failure to yield the right of way, and judgment of nonsuit was proper.

APPEAL by plaintiff from *Olive, Special Judge,* at February Term, 1945, of DAVIDSON.

Civil action to recover for alleged wrongful death, G. S., 28-172, *et seq.*

Plaintiff in her complaint alleges actionable negligence. Defendant answering denies material allegations of complaint, and pleads contributory negligence of plaintiff's intestate.

From the pleadings it appears that these facts are uncontroverted: (1) About 3:30 o'clock p.m. on 21 March, 1944, George E. Tysinger, who resided on the north side of U. S. Highway No. 29, about three miles south of Thomasville in Davidson County, North Carolina, was killed when stricken by a loaded truck of defendants, operated by Richard Draughan as their agent and employee on their business, as he, the said Tysinger, was in the act of crossing the said highway from the south side thereof to, and in front of his home on the north side. (2) Said highway curves to "the left just beyond and northeast of the said Tysinger home." (3) On said date the highway was "smooth and dry." And (4) plaintiff, Virgie M. Tysinger, is the duly qualified executrix of George E. Tysinger, deceased.

And on the trial below the evidence offered by plaintiff tends to show these facts: The highway from Lexington toward Thomasville at the point in question is 22 feet wide with shoulders on each side estimated by one witness to be 6 to 8 feet in width, and by another from 9 to 14 feet. The defendant's truck was traveling from the direction of Lexington toward Thomasville. To one so traveling, the Tysinger home is on the left of the highway. On the opposite or right side of the highway is the R. W. Everhart home, which is nearer to Thomasville than is the Tysinger home. The edge of the porch of the Everhart home is about 9 feet from the right edge of the hard surface of the highway. In going from the Everhart home to the front of Tysinger home, "to cross straight," one would have to walk up the highway a little toward Lexington and then cross. From the Everhart home, according to testimony of Mr. Everhart, "You can see a quarter of a mile down towards Lexington. There is no obstruction." According to another, "The driver driving the Coble truck . . . could see a man on the highway in front of or near the Tysinger home a distance of approximately 300 yards." And in the judgment of another, "As you approach the Tysinger home toward Thomasville the driver of the truck can see about 300 yards."

Mr. Everhart, who was the only eyewitness, testified: "I lived sort of right in front of George Strange's (referring to deceased) house . . . I saw deceased standing in my yard talking. It was just a little before it happened. I started to my porch when it happened. I looked around and saw Mr. Strange (referring to deceased) going across the road, and the side of the truck hit him . . . He was walking pretty rapid. I didn't hear any sound or signal from the truck. I didn't hear any brakes applied . . . When I first saw the truck it was cutting over kind of left toward Thomasville. It knocked it up the road just a piece—about thirty feet. The body was lying just above my house—right in the center of the road . . . the truck was making pretty rapid speed." And on cross-examination, this witness continued: "I was talking to George

Strange (again referring to deceased) in my front yard on the left side next to Lexington . . . I was standing right at edge of my porch when I was talking to Strange . . . When I stopped talking to Strange I turned toward Thomasville, going around the side of the house. When I got to the corner I turned and looked. The contact was to the side of the truck. Q. When you looked you saw Mr. Strange starting across the highway? A. Yes, sir. Q. And you saw him continue across the highway into the side of the truck? A. When I got the glance of it he was right in the center of the road. Q. You saw him starting across the road when you first looked? A. Yes, sir. Q. He kept going right into the side of the truck? He walked right into the side of the truck, didn't he? A. The side of the truck hit him. Q. The contact was on that side of the truck? A. Yes, sir."

The witness R. L. Lopp testified: "I have a saw mill there on the right hand side of the highway as you go toward Thomasville. It is about 100 yards from the highway. From the saw mill you cannot see the highway right in front of George's home, but just a little beyond you can see it. I was at the saw mill under the planer shed . . . when George Tysinger was killed. This planer shed is an open shed . . . I heard the truck coming and it hit something; it made a thud like, and I looked up and saw the truck swerving across the road and it was on the shoulder. I saw the truck on left side of the highway . . . going toward Thomasville . . . After hearing it approach, and after hearing a thud, I looked around and saw the truck. In my opinion the truck was running 45 miles per hour. Then I walked on up the road. At the time I heard the truck, I don't recall hearing any sound (of a horn or brakes) at all, only some old cans or something made a powerful racket in the truck. When I looked around and saw it, the truck was moving at a high rate of speed and turning crossways and it was twisting about and it was going off the highway. When I saw the truck it was on a fill from the highway . . ."

Then on cross-examination, the witness continued: "The shoulders were muddy and soft and the hard surface dry . . . The mill is lower than the highway. You have to go down a hill from the highway to get to the mill. The Everhart home is between the saw mill and the highway . . . The first thing I observed was a thud—a noise as if something was struck. It attracted my attention. Up to that time I was cleaning up in the shed . . . I did not look up till I heard the thud. I couldn't say what happened before then. I don't know where Mr. Tysinger was before the thud."

Plaintiff further offered evidence tending to show blood stains and glass on the pavement near the center line of the highway "approxi-

mately in the middle of the road"; that marks on the highway "started about the center of the right hand side, the center between the center line and the edge of the paving and . . . cut across the center mark in the direction of the truck"; and that the truck came to rest with its rear wheels on the left shoulder and one front wheel on the pavement. And with respect to the marks: The witness N. R. Kinney, who says that he is a civil engineer, and that he came upon the scene while the Coble truck was there on the left hand side of the road toward Thomasville, testified: "I saw black marks on the highway which led in the direction of the truck a distance of about 100 feet . . . Deep ruts were cut in the dirt on the soft shoulder of the highway behind the truck. The best I remember about 6 inches deep, the deepest part. These furrows ran toward the truck or behind it from 10 to 12 feet . . . There was a fill where the truck was standing . . . I made some notes of what I saw. There was a mail box there 9 steps from where Coble's truck was standing. It was 27 steps from the mail box to where the marks begun on the highway."

And the witness Everhart testified: "I saw the marks of the truck wheels . . . on the highway. These marks cut over to the left of the hard surface, over kind of to the left of the road toward my mail box. The truck made the marks. From first to last, the marks went about 30 feet."

Also, the witness Lopp, testifying thereto, said: "The rear of the truck was right on the edge of the fill, but the front part was turned a little toward the highway. The dirt shoulder was soft. I would call it muddy. On the left shoulder I saw ruts about 6 inches deep leading 20 or more feet up to the truck. There were marks that started from the right side of the highway and going diagonally across the highway toward the left side and finally went plumb across the road on the shoulder . . . right up to Coble's truck. Where I first saw the marks it was, I reckon, 150 feet to Coble's truck . . ."

There is also evidence tending to show the body of the truck was wider than the cab.

Plaintiff having introduced evidence and rested, defendant moved for judgment as in case of nonsuit. The court, being of opinion that the motion ought to be allowed, entered judgment in accordance therewith, and dismissed the action.

Plaintiff appeals therefrom to the Supreme Court and assigns error.

W. H. Steed and Phillips & Bower for plaintiff, appellant.

McCrary & DeLapp for defendant, appellee.

WINBORNE, J. Plaintiff's challenge to the correctness of the judgment as of nonsuit from which this appeal is taken raises for decision two questions:

1. Taking the evidence shown in the record in the light most favorable to plaintiff, as we must do in considering judgments as in case of nonsuit, is there sufficient evidence of actionable negligence on the part of defendant to require the submission to the jury of an issue with respect thereto?

2. If so, upon all the evidence, was the plaintiff's testator guilty of contributory negligence as a matter of law?

We are of opinion and hold that the evidence fails to show actionable negligence against the defendant. But if it be conceded that it does make such a case, we are of opinion and hold, as a matter of law, that upon all the evidence shown in the record, the plaintiff's testator was negligent, and that such negligence was a proximate or contributing cause of his injury and death.

Negligence is not to be presumed from the mere fact of injury or that testator was killed. *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661, and cases cited. See also *Pack v. Auman,* 220 N. C., 704, 18 S. E. (2d), 247; *Mitchell v. Melts,* 220 N. C., 793, 18 S. E. (2d), 406.

In an action for recovery of damages for wrongful death allegedly resulting from actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed plaintiff's testator under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury which produced the death—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed.

There must be legal evidence of every material fact necessary to support a verdict, and the verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C. J., 51. *Mitchell v. Melts, supra,* and cases there cited. If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law. *Mitchell v. Melts, supra.*

It is appropriate, therefore, to consider the evidence in the light of the various acts of negligence alleged in the complaint and charged against defendant as having proximately caused the injury and death of plaintiff's testator.

First. It is alleged that defendant failed in its duty to equip the truck with adequate brakes and to keep in "good working order" such brakes

in violation of provisions of G. S., 20-124 (a). This statute requires that every motor vehicle when operated upon a highway to be equipped with brakes adequate to control the movement of and to stop such vehicle, and that such brakes shall be maintained in good working order. A violation of this statute is negligence *per se,* but such violation must be a proximate cause of injury to become actionable. However, there is no evidence pertaining directly to the brakes on the truck in the present case. And in the absence of evidence as to nearness of the truck to plaintiff's testator when he entered the highway, no reasonable inference may be drawn from the attendant circumstances as to condition of the brakes on the truck.

Second. It is alleged defendant violated the provisions of G. S., 20-141 (b) 3, and of G. S., 20-141 (c), pertaining to speed restrictions, in that it operated the loaded truck at time and place at a speed of more than thirty-five miles per hour, and in that driver failed to decrease speed in going around a curve, when special hazard existed with respect to pedestrians so as to avoid striking the testator. The statutes referred to provide: That where no special hazard exists a speed of thirty-five miles per hour for motor vehicles designed, equipped for, or engaged in transporting property shall be lawful, but any speed of such motor vehicles in excess of thirty-five miles per hour shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful; and the fact that the speed of a vehicle is lower than the foregoing *prima facie* limit shall not relieve the driver from the duty to decrease speed when going around a curve, or when special hazard exists with respect to pedestrians, and that speed shall be decreased as may be necessary to avoid colliding with any person on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

In this connection, the evidence fails to show that the truck was traversing a curve as it approaches the scene of the collision with testator. Moreover, the only evidence as to the rate of speed at which the truck was traveling related to the speed of the truck after the collision.

In the light of admitted facts as to length of marks on the shoulder of the highway and the point at which the truck came to rest, the suggestion of a speed of forty-five miles per hour as the truck was leaving the highway and going on the shoulder, is contrary to human experience. *Ingram v. Smoky Mountain Stages, Inc., ante,* 444, 35 S. E. (2d), 337. The physical facts "speak louder than words." *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88.

Also, in this connection, the statute pertaining to the rights and duties of pedestrians in crossing roadways at other than cross walks, section 135 of chapter 407, Public Laws 1937, now G. S., 20-174, provides that: (a) Every pedestrian crossing a roadway at any point other than within

a marked cross walk or within an unmarked cross walk at an intersection shall yield the right of way to all vehicles upon the roadway; and that (d) it shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand side thereof, and such pedestrian shall yield the right of way to approaching traffic. On the other hand, in subsection (e) of G. S., 20-174, it is provided that "notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

And there is another principle of law applicable to the situation here in hand, that is, that "one is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption that others will exercise care for their own safety," 45 C. J., 705. Indeed, the operator of a motor vehicle on a public highway may assume and act upon the assumption that a pedestrian will use reasonable care and caution commensurate with visible conditions, and that he will observe and obey the rules of the road. See *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239, and authorities there cited. See also *Hobbs v. Coach Co., ante,* 323.

In the light of these principles it was the duty of plaintiff's testator, in crossing the highway at a point other than within a marked cross walk or within an unmarked cross walk at an intersection, to yield the right of way to defendant's truck approaching upon the roadway, and the operator of the truck, in the absence of anything which gave or should have given notice to the contrary, was entitled to assume and to act upon the assumption that plaintiff's testator would use reasonable care and caution commensurate with visible conditions, and that he would observe and obey the rules of the road. Applying this principle: There is evidence that the highway toward Lexington from which direction the truck was traveling, was visible from three hundred yards to a quarter of mile. And the evidence indicates that in going from the Everhart home to testator's home, testator would be facing the direction from which the truck was approaching. And there is no evidence of anything that gave or should have given notice to the operator of defendant's truck that plaintiff's testator was unaware of the approach of the truck, and would not obey the rule of the road, until the time the testator started across the highway, nor is there evidence as to how close the truck was to him when he started across—except the fact that he was stricken by the side of the truck near the center of the highway. Under such circumstances, to infer that the operator of the truck failed to

exercise due care to avoid colliding with the testator upon the roadway, or to infer that a failure to give warning by sounding the horn was a proximate cause of the collision between the truck and testator, or to infer that the driver of the truck failed to exercise proper precaution upon observing testator upon the roadway in confused state, would be mere speculation. Verdicts may not be predicated upon speculation. *Mitchell v. Melts, supra.*

Third. The next act of negligence alleged is that defendant violated the provisions of G. S., 20-146, as to duty to drive on right half of the highway, and of G. S., 20-150 (d), forbidding the driving on left side of center line of highway. The latter statute, however, relates to driving on the left side of the center line of highway upon the crest of a grade or upon a curve in the highway, which are conditions the evidence fails to show here. The former statute provides that "upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway . . . unless it is impracticable to travel on such side of the highway . . ." A violation of this statute would be negligence *per se,* but to be actionable, such negligence must be a proximate cause of the injury. However, the evidence here discloses marks on the highway indicating that before reaching the scene of the collision the truck was traveling on the right half of the highway. The course of the marks, and the testimony of the eyewitness Everhart make it apparent that the turn of the truck to left and across the center line was in an effort to avert the collision. As was said by *Barnhill, J.,* in *Ingram v. Smoky Mountain Stages, Inc., supra,* speaking to a similar situation, "It is a human instinct when a collision is impending between two vehicles to turn or cut away from the other vehicle. The evidence here discloses that it was done in an effort to avoid the collision. There is no circumstance tending to show that it was other than what a man of reasonable prudence would have done."

Fourth. The last act of negligence alleged is that defendant violated the provisions of G. S., 20-140, pertaining to reckless driving, in that the truck of defendant was operated carelessly and heedlessly in willful and wanton disregard of the rights and safety of others, at a speed and in a manner to endanger or be likely to endanger person and property and by operating same to the left, when by the exercise of proper care, he could have turned to the right where there was ample space to safely pass without striking plaintiff's testator.

In this respect, and in the light of the rights of parties respectively, and of the duties imposed by law upon each, as hereinabove discussed, the evidence is too speculative and uncertain to support this allegation.

Now, then, as to the alleged contributory negligence of plaintiff's testator, it is sufficient to say that in crossing the highway at a point other

than a marked cross walk or within an unmarked cross walk at an intersection it was his duty to yield the right of way to all vehicles upon the highway. G. S., 20-174 (a). The highway was visible, according to all the evidence, for at least three hundred yards in the direction from which the truck of defendant was approaching. And in leaving the point where he was talking to witness Everhart to go toward his home, he necessarily faced in the direction of the oncoming truck. He must have seen the truck, and taken the chance of crossing, or, have been inattentive to the duty imposed upon him by law, and started across without looking for vehicles on the highway. In either event, a reading of the evidence leads to the conclusion, as a matter of law, that his own conduct contributed to his injury and death, unfortunate and regrettable as it may be.

The judgment below is

Affirmed.

MRS. M. E. STEELE v. T. C. COXE, TRADING AND DOING BUSINESS AS COXE LUMBER COMPANY.

(Filed 17 December, 1945.)

1. Evidence § 42d—

It is well settled that admissions of an agent, when made in the course of his employment, are competent as evidence against the principal. And where plaintiff's agent is a witness on the stand, a letter of such agent to the defendant, containing a statement of an admission of defendant's agent, may be introduced to corroborate the witness, who testified to same effect without objection.

2. Evidence § 46—

Opinion evidence of a non-expert witness as to stumps and laps, in a controversy over the cutting of timber, is admissible, the witness testifying that "he had been in timber all his life" and had been a timber cruiser for 20 or 30 years.

3. Evidence § 15—

It is proper for a witness to refresh his memory from a paper writing, even when the witness has not asked to be allowed to do so. Indeed, a witness may be compelled to so refresh his memory.

4. Trial §§ 37, 38—

Where the issues submitted to the jury arise upon the pleadings, present all essential or determinative facts in controversy, and afford the parties opportunity to introduce all pertinent evidence and apply it fairly, objections thereto are groundless.

5. Trial §§ 37, 39—

The court is not required to submit the tendered issues in the language of the party who tenders them. The issues submitted are largely in the discretion of the court, and, if not prejudicial or affecting substantial rights, will not ordinarily be held for error.

6. Trial § 33—

An assignment of error to a statement of the court, in its charge to the jury, as to the contentions of the parties about a controversy over the evidence, will not be sustained where no objection was made in time to afford the court an opportunity to correct any error therein.

7. Trial § 29b—

Objection to the charge, for not complying with G. S., 1-180, must state specifically how the charge failed to measure up to the requirements of the statute.

APPEAL by defendant from *Olive, Special Judge,* at May Special Term, 1945, of RICHMOND.

An action to recover the value of timber cut by defendant from a tract of land in Richmond County, owned by the plaintiff and known as the Lovin Tract, containing about 284 acres. It is alleged in the complaint that the plaintiff sold to the defendant on 9 April, 1940, all merchantable timber on a tract of land owned by her, known as the Morman Place, containing about 1,100 acres, but did not sell to the defendant any of the timber growing on the Lovin Tract; that thereafter, while defendant was cutting timber from the adjoining tract known as the Morman Place, his employees commenced cutting timber from the Lovin Tract, and the agent of the plaintiff told the employees of the defendant to stop cutting said timber, and thereafter the defendant represented to agent of the plaintiff that the cutting of the timber from the Lovin Place was a mistake, but that defendant would like permission to finish cutting the timber on the Lovin Place, and that he, defendant, would pay plaintiff whatever the timber was worth, whereupon the plaintiff's agent gave the defendant permission to finish cutting the timber on Lovin Place; that the defendant cut from the Lovin Tract 129,500 feet of timber, worth $12.00 per thousand feet, mostly during the months of March and April, 1943, and that defendant had finished cutting timber on the Lovin Tract before the middle of April, 1943; that the defendant is indebted to the plaintiff for said timber in the sum of $1,554.00 with interest from 1 May, 1943, wherefore, the plaintiff prays that she recover of the defendant said indebtedness, together with interest and costs.

The defendant in answer to the complaint avers that prior to 9 April, 1940, he, defendant, sent his agent to look over the timber of the plaintiff and to learn the boundaries of the land upon which it was located; that

the agent of the plaintiff rode around in an automobile with the agent of defendant and pointed out the boundaries of said land in a general way, and plaintiff's agent then sent a colored man with defendant's agent to point out specifically the boundaries of said land; that the defendant's trade and agreement with plaintiff's agent was "to buy all merchantable timber on the land embraced within the boundaries thus pointed out to the defendant's agent first in a general way and subsequently specifically and in detail, the dimensions of the timber to be the same as was described in the deed of 9 April, 1940; that the defendant, through his employees, cut and removed timber within the boundaries specifically designated and pointed out to defendant's agent, and no other land, and the defendant paid the plaintiff, or the plaintiff's mortgage creditors, the entire purchase price of said timber in accord with the agreement entered into by defendant with plaintiff's agent; that during the negotiation between the plaintiff's agent and the defendant the agent of the plaintiff did not mention that plaintiff owned and held the land under two separate deeds, or that there were two separate tracts of land, one known as the Morman Place and the other known as the Lovin Place, and if the description in the timber deed of 9 April, 1940, omitted any of the lands theretofore pointed out to the defendant or to his agent, the omission of such land from the description in the aforesaid timber deed was due to mutual mistake of the parties thereto, or to the mistake of the draftsman of said deed, or to the fraud of said agent of the plaintiff in pointing out or having pointed out to defendant's agent land other than that which is described in the said timber deed and to the mistake of the defendant; and that if the land pointed out to the defendant's agent as being the land upon which the timber was growing and which the defendant was to purchase from the plaintiff, contained two tracts, one known as the Morman Tract and one known as the Lovin Tract, and only the Morman Tract is described on said timber deed, the defendant is entitled to a reformation of the timber deed by the inclusion therein of said Lovin Tract in order to make the deed conform to the agreement between plaintiff and defendant, and defendant is entitled to a judgment ordering reformation of the timber deed accordingly; whereupon the defendant prays that the plaintiff recover nothing of the defendant and that her alleged cause of action be dismissed; that if it be determined that the defendant or his agents cut and removed timber from lands not embraced in the description contained in the timber deed of 9 April, 1940, but within the boundaries pointed out to the defendant's agent as the timber being sold to the defendant by the plaintiff, then that said deed be ordered reformed so as to include and embrace any land omitted from said deed which was pointed out to the defendant by the plaintiff's agent.

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

"1. Was the Lovin Tract of land omitted from the timber deed, from the plaintiff to defendant, executed on April 9, 1940, by mutual mistake of the parties and their agents, as alleged in the answer? Answer: No.

"2. Did the defendant agree with Mr. J. M. Ledbetter, as agent of the plaintiff, to pay for the timber cut from the Lovin Tract after a controversy had arisen about it? Answer: Yes.

"3. What amount, if any, is the plaintiff entitled to recover of the defendant for timber cut and removed from the Lovin Tract? Answer: $1,027.00, plus interest from May 1, 1943, until paid."

From judgment that plaintiff recover of the defendant the sum of $1,027.00, with interest from May 1, 1943, until paid, together with costs as prescribed in the verdict, the defendant appealed, assigning errors.

George S. Steele, Jr., for plaintiff, appellee.
Fred J. Coxe and J. C. Sedberry for defendant, appellant.

SCHENCK, J. The first assignment of error set out in appellant's brief is exception No. 1, to the court's allowing the plaintiff, over objection by defendant, to introduce in evidence two paragraphs of a letter from J. M. Ledbetter (agent of plaintiff) to T. C. Coxe (defendant), dated 30 June, 1943. The matter objected to in the letter is the statement that Mr. Hildreath, agent of defendant, made to J. M. Ledbetter that they would have to count the stumps to tell how much timber had been cut from the Lovin Tract and sawed along with timber cut from the Morman Place. Aside from the fact that this tends to corroborate Ledbetter, then a witness on the stand, it is admissible, *inter alia,* for the reason that the statement attributed to Mr. Hildreath in the letter was made in the capacity of agent of Mr. Coxe, the defendant, in the settlement of the timber dispute. It is well settled that admissions of an agent, when made in the course of his employment, are admissible in evidence. *Calvert v. Alvey,* 152 N. C., 610, 68 S. E., 153; *Salmon v. Pearce,* 223 N. C., 587, 27 S. E. (2d), 647. Mr. Ledbetter testified substantially to the same effect without objection. The admission of similar evidence without objection waives the first objection. *Owens v. Lumber Co.,* 212 N. C., 133, 193 S. E., 219, and cases there cited. This assignment of error cannot be sustained.

The next assignments of error set out and discussed in appellant's brief are Nos. 2, 3, 4 and 5 which are considered together, since they relate to having witness Irby testify to his opinion, and also to having him refresh his recollection from letters handed him when he as a witness had not indicated a desire to see such letters. These exceptions seem to be based upon two reasons, first, the lack of qualification of the witness

to express an opinion, and second, upon allowing witness to refresh his recollection from the letters shown him, when there was no request made by witness to see such paper writings for the purpose of refreshing his recollection. On the first contention; that is, that the witness was not qualified to express an opinion, the witness testified that "he had been in timber" all his life and had been a timber cruiser for 20 or 30 years, and that he had cruised timber for a number of people in a number of localities. While the witness Irby was never found by the court to be an expert, "it has also been found necessary to admit a class of evidence from non-expert witnesses, which is usually spoken of as 'opinion evidence,' where the facts as they appeared to the witness cannot clearly and adequately be reproduced, described and detailed to the jury." 20 Am. Jur., 640, Evidence, sec. 769. "The practical test for receiving or rejecting opinions of lay witnesses is that where the jury can be put into a position of equal vantage with the witness for drawing them, the witness may not as a rule give an opinion or estimate." 20 Am. Jur., 642, Evidence, sec. 769. Applying the tests indicated to the witness Irby's testimony, the distances from stumps to laps, the diameter of stumps and laps, and the number of stumps could not have been given in evidence, and, therefore, of necessity the opinion of the witness was properly received. The second reason urged as to why the witness Irby's opinions and estimates should have been excluded was that the witness was handed a letter to refresh his recollection. It is well settled that it is proper for a witness to refresh his memory by the use of a proper writing. 20 Am. Jur., 798, Evidence, sec. 946. Not only may a witness be allowed to refresh his memory, but he may be compelled to do so. *State ex rel. Davenport v. McKee,* 94 N. C., 325; N. C. Handbook of Evidence, Lockhart, sec. 43. These assignments of error cannot be sustained.

The next assignments of error set out in appellant's brief relate to exceptions 8 and 17, which are to the refusal of the court to submit issues tendered by the defendant and to the submission of the issues which were submitted to and answered by the jury. The issues tendered by the defendant were: "1. Was it the intention of the parties that the timber on both the Morman and the Lovin or O'Brien tracts was to be included in the timber deed of April 9, 1940? Answer: ..... 2. If not, what was the value of the standing timber cut from the Lovin or O'Brien tract? Answer: ....." The issues submitted to and answered by the jury were: "1. Was the Lovin tract of land omitted from the timber deed, from the plaintiff to the defendant, executed on April 9, 1940, by mutual mistake of the parties and their agents, as alleged in the answer? Answer: ..... 2. Did the defendant agree with Mr. J. M. Ledbetter, as agent of the plaintiff, to pay for the timber cut from the Lovin tract

after a controversy has arisen about it? Answer: ..... 3. In what amount, if any, is the plaintiff entitled to recover of the defendant for timber cut and removed from the Lovin tract? Answer: ....."

These assignments of error pose two questions: First, did the issues submitted to and answered by the jury arise upon the pleadings and present to the jury all essential or determinative facts in controversy, and were not prejudicial and did not affect any substantial rights? We are of the opinion that the answer is in the affirmative. The determinative facts in controversy were, first, was the timber on the Lovin tract of land omitted by mistake from the timber deed from plaintiff to defendant dated April 9, 1940, and the case rested primarily upon the answer thereto, and an answer given in favor of the defendant would have been fatal to plaintiff's case; and other determinative questions arising on the pleadings and presented to the jury were, did the defendant agree with plaintiff's agent to pay for the timber cut from the Lovin tract, and what amount was plaintiff entitled to recover of defendant for timber cut and removed from Lovin tract? We think the issues as submitted arise on the pleadings and present to the jury inquiries as to all essential matters or determinative facts in dispute. "The test of the sufficiency of issues is, 'did the issues afford the parties opportunity to introduce all pertinent evidence and apply it fairly?' *Tuttle v. Tuttle,* 146 N. C., 484; *DeLoache v. DeLoache,* 189 N. C., 394, 400; *Elliott v. Power Co., ante,* (190 N. C.), 62. When issues meet the test they satisfy all the requirements of *Rudasill v. Falls,* 92 N. C., 222, and *Gordon v. Collett,* 104 N. C., 381. *Erskine v. Motor Co.,* 187 N. C., 826 (831-2)." *Grier v. Weldon,* 205 N. C., 575, 172 S. E., 200. In this case the issues seem to meet the test indicated.

Another question left for answer, since the issues submitted are deemed sufficient: Was there any requirement for the submission of the issues tendered? We think not. "The issues submitted were sufficient to embrace every question in dispute between the parties, and for the parties to present every material phase of the case, and this being the case, an objection to it is groundless. *Patterson v. Mills,* 121 N. C., 258; *Warehouse Co. v. Ozment,* 132 N. C., 848; *Hatcher v. Dabbs,* 133 N. C., 239; *Pretzfelder v. Ins. Co.,* 123 N. C., 164." *Hall v. Giessell,* 179 N. C., 657, 103 S. E., 392.

Since the issues submitted were sufficient, the Court is not required to submit the tendered issues in the language of the party who tenders them. In truth, the form of the issues submitted are largely in the discretion of the court, and if not prejudicial or affecting substantial rights will not ordinarily be held for error. *Gasque v. Asheville,* 207 N. C., 821 (828), 178 S. E., 848; *Grier v. Weldon,* 205 N. C., 575 (578), 172 S. E.,

200. The issues submitted were entirely sufficient to cover the whole controversy, and, therefore, the exceptions to them are untenable.

The next assignment of error set out in the appellant's brief was based upon exception No. 11. This assignment cannot be sustained for the reason principally, that the portion of the charge assailed was given in a statement of the contention of the parties, to which no objection was made at the time given, in order to afford the court an opportunity to correct himself if the contention given was erroneous. The contention given related to what was said to plaintiff's agent by the defendant's agent in regard to paying for the timber on the Lovin tract provided defendant was permitted to cut it. There was a controversy as to what was said; the plaintiff contending the defendant said he would pay for the timber on the Lovin tract if he was permitted to cut it, and defendant contending he said he would pay for the timber cut on the Lovin tract if he was permitted to cut it, and the court found that he had contracted to pay for it. The portion of the charge assailed related to the court's stating the contentions of the parties as to what was said by the defendant as to paying for the timber on the Lovin land if he was allowed to cut it. It has been repeatedly and universally held by this Court that the error assigned to statements in the charge upon the contentions of the parties and not at the time called to the court's attention, are untenable. *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Hobbs,* 216 N. C., 14, 3 S. E. (2d), 431.

The next assignment of error set out in appellant's brief relates to exception No. 12, in which the appellant contends that the portion of the charge assailed was error for that it relates to the second issue submitted, which should not have been submitted. The correctness of the second issue has already been discussed and held to be a valid one under the pleadings and evidence. Hence this exception is untenable.

The next assignment of error set out in the appellant's brief is that based on exception 12, which is to a portion of his Honor's charge to the effect that the plaintiff contends that the third issue, provided the issue is reached, should be answered, in effect, that the plaintiff is entitled to recover "the sum of $1,295.00, or a substantial sum approaching that amount," when the court did not instruct the jury that the defendant contended that the issue should be answered in a sum less than $1,925.00. If error was here committed it was in the statement of contentions, which was not called to the attention of the court at the time, and, therefore, was untenable. *S. v. Wagstaff* and *S. v. Hobbs, supra.*

The next assignment of error set out in appellant's brief is to the portion of the charge assailed by exception No. 14. This assignment is untenable for the same reasons as the preceding assignment mentioned, No. 13.

The next assignment of error set out in appellant's brief relates to exception No. 15, which likewise assails the charge of the court in stating the contentions of the plaintiff, and which, for the reasons given in discussing exceptions Nos. 12, 13, and 14, are untenable.

While the appellant's brief in closing states that it appears from the record that the court did not instruct the jury in accord with G. S., 1-180, it nowhere states specifically how the charge failed to measure up to the requirements of the statute. This is requisite.

After a careful scrutiny of the record, and due consideration of the rulings of the court, we have found no reason to disturb the verdict and judgment.

Affirmed.

CENTRAL MOTOR LINES, INCORPORATED, v. BROOKS TRANSPORTATION COMPANY, INCORPORATED.

(Filed 17 December, 1945.)

1. Process §§ 6b, 6d—

In an action to recover damages for a tort occurring in New Jersey by a domestic corporation against a foreign corporation, formerly domesticated here with a local process agent, but which had withdrawn all personnel and property from this State, except an intrastate franchise for the transportation of freight, service of process on the lessee of defendant's franchise is invalid, as is also service on the Secretary of State under G. S., 55-38.

2. Same—

An intrastate franchise for the transportation of freight in this State, owned by a foreign corporation, is "property" within the meaning of G. S., 55-38.

3. Same—

Every state has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. But this power, to designate by statute the officer upon whom service in suits against foreign corporations may be made, relates to business and transactions within the jurisdiction of the state enacting the law.

APPEAL by plaintiff from *Clement, J.*, at 9 April, 1945, Civil Term, of GUILFORD.

The plaintiff is a corporation under the laws of the State of North Carolina, having its principal office at Kannapolis in said State, engaged in the transportation of freight and property in North Carolina and

other states, including the State of New Jersey. The defendant is a corporation under the laws of Virginia, domesticated in North Carolina by compliance with G. S., 55-118, engaged in transporting freight in Virginia and other states, including also New Jersey.

The action is for recovery of damages for an alleged negligent injury to plaintiff's motor vehicle through a collision with defendant's truck, occurring in the State of New Jersey.

Formerly the defendant had a process agent in this State—W. B. Witt—who was also manager of its Greensboro Terminal, but he was withdrawn from the State with other personnel.

The defendant owned an intrastate franchise for the transportation of freight between Greensboro and Reidsville in North Carolina, which on 11 April, 1941, it leased to J. M. Goldston, who later abandoned the lease and paid no rent thereon after April, 1942.

In the month of February, 1943, defendant closed its freight terminal in Greensboro, removed all its property and personnel from the State (unless the intrastate franchise referred to should be considered property within the State), and since then has not been engaged in any business or operations in the State except an occasional trip into North Carolina, principally with leased equipment. J. M. Goldston had no relation to the defendant corporation other than that described.

In connection with its activities in North Carolina during the years 1940, 1941 and 1942, defendant domesticated under G. S., 55-118, and filed franchise tax returns and paid franchise taxes from 21 September, 1940, up to and including February, 1943, but since that date has filed no returns and has paid no taxes, having physically withdrawn from its operations here.

Upon the original summons issued in this action, the return of the sheriff shows that W. B. Witt, the process agent above referred to and whose address was given as Wendover Avenue, Greensboro, N. C., could not be found within the county.

The plaintiff procured service of process to be made upon J. M. Goldston as agent and process agent of the defendant in this State by virtue of the fact that he was lessee of the defendant's franchise. Thereupon, the defendant, specially appearing for the purpose, moved to dismiss the action on the ground that the service was invalid and of no effect.

The plaintiff then procured an order for the issue of an alias summons and caused process so designated to be served upon Thad Eure, North Carolina Secretary of State, under the provisions of G. S., 55-38. The defendant again made a special appearance and moved to dismiss the action on the ground that this service was invalid and insufficient to bring it into court.

The matter came on to be heard before Clement, J., who took evidence, heard argument of counsel, made his findings of fact and conclusions of law, adjudging that in both instances the attempted service was invalid; and allowed the motion to dismiss the action.

From this judgment plaintiff appealed, assigning errors.

Armistead W. Sapp for plaintiff, appellant.
Smith, Wharton & Jordan for defendant, appellee.

SEAWELL, J. We are asked to determine whether, upon the facts of this case, the service of process upon J. M. Goldston, one time lessee of defendant's intrastate franchise, or the subsequent service upon the Secretary of State, was effectual to bring into the jurisdiction of a court of this State the defendant, a foreign corporation, in an action brought by a resident corporation on a transitory cause of action arising in another state.

We are of the opinion that the relation of lessee of defendant's franchise did not constitute J. M. Goldston in any respect agent of the defendant upon whom process might be served in this case. The fact that he was process agent of his own corporation did not make him process agent of the defendant—and he is not a "local agent" within the meaning of G. S., 1-97, under any definition of which the Court is aware. Moreover, he had abandoned the lease long before service was made upon him. There was no attempt to call the defendant into court for anything arising out of the lease or exercise of the franchise. The service upon Goldston was invalid and ineffectual.

We proceed to consider the service made upon the Secretary of State.

The service of process on that officer depends for its validity, primarily, on the applicability of G. S., 55-38, to the facts as they existed at the time of service—upon the presence of the conditions named in the statute as necessary to that form of service, and, perhaps, more importantly upon the extent to which we may indulge the presumption of implied consent to be sued in a case of this kind. For convenience we quote:

"55-38. RESIDENT PROCESS AGENT.—Every corporation having property or doing business in this state, whether incorporated under its laws or not, shall have an officer or agent in the state upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this state. In the latter event, process in an action or proceeding against the corporation may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this state,

service could be made. For this service to be performed by the secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service was made."

Summarizing the pertinent facts in order to present a clear view of the picture: (a) the defendant is a foreign corporation domesticated here; (b) the originally appointed process agent had withdrawn from the State with other "personnel" and was not available for service of process when the action was instituted; (c) the defendant later (on 8 July, 1944) appointed a new resident process agent in order to preserve its intrastate franchise granted by the North Carolina Utilities Commission, and its right to do business thereunder; (d) that franchise still subsists as a property right of value; (e) the defendant had discontinued operation under its franchises in North Carolina, was not doing business within the State, and had at the time of service of plaintiff's process no property other than the franchise mentioned.

In this situation it would seem that our attention might be directed, primarily at least, to the question whether the franchise above mentioned as still subsisting constitutes "property . . . in this state" within the meaning of the statute.

We doubt whether any fruitful inquiry could be made as to what the draftsman had in mind by making the presence of "property" in this State a condition which would subject the corporation to service of process. Many reasons could be given, but none, we feel, which would, on principle, exclude from its coverage the franchise which the defendant has so carefully protected and which is subject to sale and lease only under the control and by the approval of the State authorities.

It may be conceded, therefore, that the plaintiff has complied with the provisions of the statute in the presence of conditions therein named, without, however, deciding that the mere holding of property here, particularly of the kind described, would justify the alternate service provided in the Act.

This, however, only brings us to the larger question whether the statute so observed and invoked is effective to bring a foreign corporation into the jurisdiction of the State court upon a cause of action arising in another state, and not in any manner connected with its activities in this State. *Old Wayne Mutual Life Association v. McDonough,* 204 U. S., 8, 51 L. Ed., 345, and *Simon v. Southern Ry.,* 236 U. S., 116, 59 L. Ed., 492, followed in *King v. Motor Lines,* 219 N. C., 223, 13 S. E. (2d), 233, and *Hamilton v. Greyhound Corp.,* 220 N. C., 815, 18 S. E. (2d), 367, are authorities to the contrary. (*Steele v. Telegraph Co.,* 206 N. C., 220, 173 S. E., 583, cited in plaintiff's brief, is distinguished in *King v. Motor Lines, supra,* and is unavailable as authority in support of the validity of the questioned service.) Certainly, service on the Secretary

of State, a mere alternative, would be of no greater avail than service on a process agent appointed by the corporation itself, in compliance with the statute.

In *Hamilton v. Atlantic Greyhound Corp., supra,* as in *King v. Motor Lines, supra,* the suit was brought by a nonresident against a nonresident corporation upon a transitory cause of action arising beyond the intended jurisdiction; but in *Wayne Mutual Life Association v. McDonough, supra*—the case followed in *King v. Motor Lines, supra*—the process, service of which was criticized and held invalid, was sued out by a resident to bring a corporation into the court of his own state, Pennsylvania, and served under a statute comparable to ours.

And in *Simon v. Southern Ry. Co., supra,* the other authority cited and followed in *King v. Motor Lines, supra,* the questioned service was made in a transitory action brought by a resident of Louisiana in a court of that State against a Virginia corporation for a cause of action arising in the State of Mississippi. The service statute is almost identical with ours. The *ratio decidendi* in these cases must be found elsewhere. Speaking for the Court in the *Simon case, supra, Justice Lamar* observes:

"Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Fund Life Asso. v. Phelps,* 190 U. S., 147, 47 L. Ed., 987, 23 Sup. Ct. Rep., 707; *Connecticut Mut. L. Ins. Co. v. Spratley,* 172 U. S., 603, 43 L. Ed., 569, 19 Sup. Ct. Rep., 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Mut. Life Asso. v. McDonough,* 204 U. S., 22, 51 L. Ed., 351, 27 Sup. Ct. Rep., 236, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

This reasoning, we think, also disposes of any argument in aid of the validity of the service arising out of the fact that the defendant corpo-

ration domesticated here under the 1899 statute, now G. S., 55-118. That statute must be read in connection with G. S., 55-38, now being construed, and the implication of consent with respect to the foreign corporation rendering itself liable to process here is no stronger in the one than in the other. In *Sou. Ry. Co. v. Allison,* 190 U. S., 326, 47 L. Ed., 1078 (reversing the decision of this Court in *Allison v. Sou. Ry. Co.,* 129 N. C., 336, 40 S. E., 91, and incidentally overruling *Debnam v. Telegraph Co.,* 126 N. C., 831, 36 S. E., 269, and *Beach v. Sou. Ry. Co.,* 131 N. C., 399, 42 S. E., 856), the United States Supreme Court interpreted our domestication law as a licensing statute rather than one creating a new corporation; and that distinction is sufficient for our purpose here. Under either statute, or both taken together, the controlling distinction lies in the extent to which the presumption of implied consent may be indulged in without infraction of the federal right.

It is true that the form in which the prohibition is expressed in the *Simon case, supra,* is a construction of a state statute; nevertheless, behind it lies a federal question, and the obvious purpose of the Court was to save so much of the statute as did not impinge upon the federal right.

Many opinions may be found in which the adopted authorities—*Old Wayne Mutual Life Association v. McDonough, supra,* and *Simon v. Sou. Ry. Co., supra*—are distinguished from those being at the time under consideration because of factual differences. See annotations 145 A. L. R., 630-667, where the subject is treated with fine analysis and detail and, of course, much more comprehensively than we can afford here.

In *Pa. Fire Ins. Co. v. Gold Issue Min. and M. Co.,* 243 U. S., 93, 61 L. Ed., 610, the subject is treated in its bearing upon due process of law (see notes), and while the Court upheld the service in that case, the decision rested upon the fact that the foreign corporation had filed an express consent to be thus sued by such service; whereas in the *Wayne case, supra,* the corporation was doing business in certain states without compliance with the statute and the implication of extraterritorial consent did not arise.

In *International Shoe Co. v. State of Washington, et al.,* U. S. Supreme Court, 3 December, 1945, after stating what would constitute presence in the state sufficient to justify suit in that jurisdiction, *Chief Justice Stone,* in delivering the opinion of the Court, says:

" 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *St. Clair v. Cox,* 106 U. S., 350, 355; *Mutual*

Life Ins. Co. v. Spratley, 172 U. S., 602, 610-611; *Penna. Lumbermen's Ins. Co. v. Meyer,* 197 U. S., 407, 414-415; *Commercial Mutual Accident Co. v. Davis,* 213 U. S., 245, 255-256; *International Harvester v. Kentucky, supra; cf. St. Louis S. W. Ry. v. Alexander,* 227 U. S., 218. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. *St. Clair v. Cox, supra,* 359, 360; *Old Wayne Life Ass'n v. McDonough,* 204 U. S., 8, 21; *Frene v. Louisville Cement Co., supra,* 515, and cases cited. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."

And further: "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. *Cf. Pennoyer v. Neff, supra; Minnesota Ass'n v. Benn,* 261 U. S., 140.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Compare *International Harvester v. Kentucky, supra,* with *Green v. Chicago, Burlington & Quincy Ry., supra,* and *People's Tobacco Co. v. American Tobacco Co., supra.* Compare *Mutual Life Ins. Co. v. Spratley, supra,* 619, 620, and *Commercial Mutual Accident Co. v. Davis, supra,* with *Old Wayne Life Ass'n v. McDonough, supra.* See 29 Columbia Law Review, 187-195."

We have not found the authority of the *Wayne case, supra,* and the *Simon case, supra,* successfully distinguished, or disputed, upon the factual situations which they present and which are, in so far as any principle of law may be deduced, comparable to the facts of the present case.

However this may be, these cases have been definitely followed in this State in *King v. Motor Lines* and *Hamilton v. Greyhound Corp.,* both *supra,* and the principle of decision in those cases has become our own. We are, therefore, of opinion, and so hold, that the attempted service of

process upon the Secretary of State under the facts of this case was invalid and ineffectual to bring the corporation within the jurisdiction of the court.

The judgment of the trial court dismissing the action for want of valid service of process is

Affirmed.

MARY R. HINSON v. Z. V. MORGAN, RALPH BARRINGTON, J. P. GIBBONS, SR., AND THE TOWN OF HAMLET, A MUNICIPAL CORPORATION,

and

MARY R. HINSON v. DORIS BAUMRIND, HAMLET GIN & SUPPLY COMPANY, A CORPORATION, THE TOWN OF HAMLET, A MUNICIPAL CORPORATION, Z. V. MORGAN, AND THURMAN STEEN.

(Filed 17 December, 1945.)

1. Evidence § 41—

In a suit attacking two deeds for want of consideration, evidence of the husband of grantee in one of the deeds attacked, that he knew all about his wife's business and knew that she did not pay anything for the deed to her, and that she did not receive anything in consideration for the other deed in which she was grantor, and that he never heard his wife say that she received or paid any money for such deeds, was properly excluded as hearsay.

2. Taxation § 40c: Judicial Sales § 6—

A commissioner, appointed in a judicial proceeding to sell land, may not purchase at his own sale, even though he acts fairly. If he does, the sale is voidable, and may be set aside as of course upon proper and reasonable application of the parties interested.

3. Deeds § 4—

The consideration named in a deed is presumed to be correct. And while it may be inquired into by parol evidence, such evidence must be sufficient to contradict the recital in the deed.

4. Taxation §§ 40c, 42—

In an action to recover lands of plaintiff, sold in tax foreclosure proceedings, from defendants, who acquired their title from the grantee of the commissioner appointed in such proceedings, where plaintiff's evidence tended to show that the husband of grantee in the commissioner's deed knew of no consideration paid by or to his wife for the deeds to and from her, and that he and his wife conveyed to said commissioner three of the five tracts conveyed to her by the commissioner in less than a month after the date of the deed to her, both of these deeds being put on record on the same day, fifteen minutes apart, and that the costs of the proceeding and the taxes on the property involved were not paid until several months thereafter, the tax scrolls failing to indicate that the taxes on the lands

were paid in full, the judgment roll appearing regular and in compliance with the statute, G. S., 105-391, and the deed of the commissioner being in conformity with the judgment, there is insufficient evidence for the jury and judgment as in case of nonsuit was proper.

APPEAL by plaintiff from *Olive, Special Judge,* at May Civil Term, 1945, of RICHMOND.

Two civil actions instituted 17 May, 1944, to recover possession of land, and for an accounting as to, and for recovery of rents and profits of said lands.

The complaints in the two actions, while relating to separate tracts of land, are of substantially the same import. The claim of right to recover the lands is based on the same attack upon certain phases of a tax foreclosure proceeding instituted by the Town of Hamlet against Mary R. Hinson, *et al.,* Civil Issue No. 7787, under which the defendant J. P. Gibbons, Sr., claims to own in fee simple the land which is the subject of the first of these actions, and under which the defendants Doris Baumrind, Hamlet Gin & Supply Company, a corporation, and Thurman Steen claim to own in fee simple the lands which are the subject of the second of these actions. The regularity of the tax foreclosure proceeding down to and including the report of sale is not challenged by plaintiff. The proceeding relates to delinquent taxes for the years 1931 to 1934, both inclusive, and certain paving lien on the lands in question, as well as other lands listed for taxation in the name of Mary R. Hinson. It is alleged, however, in paragraph 10 of the complaint therein that the defendant therein, J. W. Lassiter, holds a deed dated 1 October, 1922, and duly recorded, from Mary R. Hinson for two tracts of land (one of which is involved in the second of present actions), and for that reason he was made a party to the proceeding. Certain lien holders were made parties to the proceeding.

Judgment of the clerk of Superior Court, in the tax foreclosure proceeding, taken *pro confesso,* found as a fact, and adjudged as lien upon lands involved the amount of taxes due the Town of Hamlet for the years covered in the complaint therein, as well as the amount and lien of paving assessment due the town, and ordered sale and appointed Z. V. Morgan commissioner to sell the lands, etc.

The report of sale by Z. V. Morgan, commissioner, appointed for the purpose in the foreclosure proceeding as shown in the record discloses that sale was made on 18 November, 1935, to H. B. Long of the lands which are the subjects of the present actions at the prices of $610 and $800, respectively, and of two other tracts at total price of $160. As to these sales plaintiff alleges that H. B. Long did not bid individually, but, being an officer of the Town of Hamlet, bid for and on behalf of the

town. Defendants, in their answers, deny this. And there is no evidence in the record to support the allegations.

The record of the tax foreclosure suit further shows that H. B. Long by written instrument dated and acknowledged 1 March, 1937, "for and in consideration of the sum of One Dollar, and other good and valuable considerations to him paid by said Willie Mae Lassiter," assigned to her his bid and all rights in connection therewith on the property of Mary R. Hinson, sold in said proceeding. Plaintiff alleges on information and belief that Willie Mae Lassiter paid no consideration for said assignment. Plaintiff further avers, also on information and belief, that Willie Mae Lassiter knew nothing whatever of said assignment, and that the assignment to her was a device and a contrivance on the part of the commissioner aforesaid, individually, to come into possession of said land. While defendants admit the assignment, they deny the further averments tending to attack it. In this connection the assignment itself is the only evidence offered by plaintiff.

The record of the foreclosure proceeding further shows that on 1 March, 1937, the clerk of Superior Court, taking cognizance of and recognizing the assignment from H. B. Long to Willie Mae Lassiter, as hereinabove stated, which had been filed and made part of the record in the cause, and finding "that the said sale was in all respects duly and properly conducted and made, and that the price offered, as aforesaid, was and is the just and reasonable and fair value of the said land," entered judgment "that the said sale be and it is hereby in all respects confirmed," and authorized and directed the commissioner (1) "upon payment of the purchase money and every part thereof" to execute and deliver to the said purchasers a deed in fee simple for said lands; (2) upon receipt of the said purchase money to pay (a) cost of action, and cost and expense of sale, (b) judgment for taxes on property described therein, if sufficient—to pay the town and county taxes on said property, but if not "then and in that event the said commissioner shall execute a deed to the purchasers, subject to the remaining taxes unpaid by the proceeds of this sale," and (c) if there be any surplus after the taxes are paid on the property, together with the other expenses above set forth, then and in that event, the same shall be paid into the office of the clerk of the Superior Court to be distributed according to law.

Thereafter, Z. V. Morgan, commissioner, purporting to act under and pursuant to the authority of the order of confirmation, as aforesaid, executed a deed, dated and acknowledged 17 May, 1937, to "Willie Mae Lassiter, her heirs and assigns" conveying all the several tracts of land to which the assignment of H. B. Long related as above stated. This deed was filed and recorded on 15 June, 1937, at 2:45 p.m.

On 14 June, 1937, Willie Mae Lassiter and her husband, J. W. Lassiter, for the recited consideration of "$1.00 and other valuable considerations" executed "a regular warranty deed" to Z. V. Morgan, individually, sufficient in form to convey a fee simple title to the part of the lands described in the commissioner's deed to Willie Mae Lassiter as above stated, which are the subject of these actions, that is, three of the five tracts. This deed was recorded on 15 June, 1937, at 3:00 p.m., in Book 231, at page 616.

Plaintiff alleges upon information and belief (1) that while the bids H. B. Long assigned to Willie Mae Lassiter totaled $1,560, Willie Mae Lassiter in fact paid to the commissioner "no sum or other consideration whatever in consideration of the execution and delivery of the deed"; (2) that while the deed from Willie Mae Lassiter and husband, J. W. Lassiter, to Z. V. Morgan "recited consideration of $1.00 and other valuable consideration," the said Z. V. Morgan "paid neither to Willie Lassiter nor to her husband any sum or other consideration whatsoever for the execution of said deed and the delivery thereof."

Defendants answering admit that Z. V. Morgan, commissioner, executed and delivered the deed to Willie Mae Lassiter, dated 17 May, 1937, and which appears of record, and that Willie Lassiter and husband, J. W. Lassiter, conveyed the same property to Z. V. Morgan, and assert the validity of both deeds, and deny all allegations in attack upon them.

The defendants plead in bar of these actions, among other things, (1) the judgment in the tax foreclosure proceeding as *res judicata;* and (2) the provision of G. S., 105-393, limiting to one year's time for contesting validity of tax foreclosure title.

Plaintiff on the trial below also offered evidence in pertinent part as follows: Plaintiff testified in chief that she at one time owned all the property described in the complaints in these suits, and detailed how she acquired title, and stated that she had "never conveyed any of that property," and is the widow of the late R. E. Hinson.

J. W. Lassiter testified in substance: That Willie Mae Lassiter and Willie Lassiter, named in the deed from the commissioner to her and from her and her husband to Z. V. Morgan, are one and the same person; that she was his wife, and she is now dead; that Mr. Morgan did not pay her anything for the execution of that deed "in my presence. I was there when the deed was signed. She did not pay him anything for the execution of the deed in my presence"; that his wife did not do anything except housework around their home; that he knows that she never inherited any money; that he never gave her any large sum of money; and that he saw her every day. Then, upon objection by defendants, testimony of the witness was excluded as follows: That he knew all about his wife's business; that he knows that she did not pay anything for the

deed the commissioner executed to her; that he knows that Z. V. Morgan did not pay her anything for the execution of her deed to him in 1937; that he never heard her say that she paid Mr. Morgan any money; and that he never heard her say that Mr. Morgan paid her any money. Exception by plaintiff. Then on cross-examination the witness testified that he is brother of plaintiff and that he is grantee in a deed from Mary R. Hinson, dated and recorded 1 October, 1932, and that the lands described therein are lands described in the deed from Willie Lassiter, his wife, to Z. V. Morgan, dated 14 June, 1937, and recorded in Book 231, at page 616, etc.

Plaintiff, after having same identified, offered in evidence the scrolls of the Town of Hamlet showing the list for taxes of Mrs. R. E. Hinson for the years 1931 to 1937, both inclusive, showing payments and dates of payments on the taxes of each year.

Plaintiff also introduced all the summonses in these actions.

At the close of plaintiff's evidence, the defendants moved for judgment as in case of nonsuit. Motions were allowed, and judgment signed. Plaintiff excepted and appeals to Supreme Court and assigns error.

George S. Steele, Jr., for plaintiff, appellant.
Fred W. Bynum for appellee, J. P. Gibbons.
Pittman, McLeod & Webb for appellee, Town of Hamlet, et al.
Jones & Jones for appellee, Doris Baumrind, et al.

WINBORNE, J. The assignments of error brought up for consideration fail to show error in the judgment below.

First: It is contended by appellant that there is error in the exclusion of the testimony of the witness J. W. Lassiter to the effect that he knew all about his wife's business and knew that she did not pay anything for the deed from the commissioner, and that Z. V. Morgan did not pay anything to her for the deed to him, and that he had never heard her say that she paid Morgan any money or that he paid her any money. It is clear that all of this evidence comes within the ban of the hearsay evidence rule. The witness was permitted to testify as to what occurred in his presence with respect to the consideration passing between the parties. Any other knowledge he had is necessarily predicated upon hearsay, and is incompetent. This disposition of the exception renders it unnecessary to consider the competency of the evidence with respect to the provisions of G. S., 8-51, relating to examination of a witness in his own behalf when other party is dead.

Second: Appellant contends in the main that there is sufficient evidence in the record to take the case to the jury on the question as to

whether the commissioner purchased at his own sale. It is a well settled principle of law that a commissioner appointed in a judicial proceeding to sell land may not purchase at his own sale, even though he acts fairly. If he does, the sale is voidable, and may be set aside as of course upon proper and reasonable application of the parties interested. Am. Jur., 31-474, Judicial Sales, section 141. *Davis v. Doggett,* 212 N. C., 589, 194 S. E., 288.

In this connection for purposes of consideration of the question raised, we may pass other questions (1) as to whether plaintiff, in her attack upon the proceeding, may maintain an independent action, or (2) whether she must proceed by motion in the cause, and (3) as to the timeliness with which she has proceeded in relation to provisions of G. S., 105-393, and consider the challenge to the presumption arising upon the regularity of the tax foreclosure proceeding.

The judgment roll in the tax foreclosure proceeding offered in evidence by plaintiff, shows upon its face that the proceeding is regular and in compliance with the statutory requirements in actions to foreclose tax liens. G. S., 105-391. And the deed from the commissioner to the purchaser upon its face purports to be in compliance with and in conformity to the provisions of the judgment in the tax foreclosure proceeding by which the sale to purchaser was confirmed.

The consideration named in a deed is presumed to be correct. *Faust v. Faust,* 144 N. C., 383, 57 S. E., 22. *Ex Parte Barefoot,* 201 N. C., 393, 160 S. E., 365. And while the consideration may be inquired into by parol evidence, we find no sufficient evidence to contradict the recital. However, plaintiff points to these circumstances to raise a reasonable inference that Willie Mae Lassiter, the assignee of the purchaser at the commissioner's sale, did not pay to the commissioner the $1,560.00, the total amount of the bids for the several tracts of land sold and assigned to her: 1st: The testimony of the husband of Willie Mae Lassiter bearing upon her ability to pay, as he understood it. 2nd: The fact that Willie Mae Lassiter and husband conveyed to Z. V. Morgan three of the five tracts conveyed to her by Z. V. Morgan, commissioner, in less than a month after the date of the deed to her, both of which deeds were filed for registration on the same day, fifteen minutes apart. 3rd: The costs were not paid until 20 September, 1937, and none of the taxes involved were paid until 31 August, 1937. And 4th: The tax scrolls offered in evidence by plaintiff fail to indicate that the full amount of the taxes were paid. All these combined amount to no more than a suspicion, if they rise to that dignity. They rest in speculation. Court proceedings, and deed pursuant thereto, may not be upset on evidence of such character.

Other questions debated in briefs filed need not be considered.
The judgment below is
Affirmed.

STATE v. A. C. WISE.

(Filed 17 December, 1945.)

1. Criminal Law § 33—

Exception to the admission of testimony of the officers, as to confessions made by prisoner in a prosecution for murder, cannot be sustained, where the record does not disclose that defendant requested further inquiry or findings by the court, or offered evidence to controvert the statement of the officers, who testified that, upon arresting defendant, they warned him of his rights and advised him that any statement he made would be used against him. There is nothing to rebut the presumption that the confessions were voluntarily made.

2. Homicide § 4c—

The definition of a killing, with deliberation and premeditation, does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.

3. Homicide §§ 27c, 27e—

The court's instructions to the jury on manslaughter in a trial and conviction for murder, there being no evidence which would tend to mitigate or reduce the grade of the offense to manslaughter, may not be held for error entitling defendant to a new trial.

4. Criminal Law §§ 54b, 54c—

The jury having returned a verdict of guilty of murder in the first degree "with mercy," there being no request by the jury for permission to make this recommendation or intimation by the judge that such a recommendation would be considered, the court properly treated the recommendation of mercy as surplusage and imposed the sentence fixed by statute.

APPEAL by defendant from *Olive, Special Judge,* at September Term, 1945, of GUILFORD. No error.

The defendant was indicted for the murder of his paramour. The evidence offered by the State, based largely on admissions made by the defendant to the officers, tended to show that adulterous relations between defendant and deceased, the wife of Quinnie Williams, had been engaged

in for some months; that on 11 August, 1945, as they had done on previous occasions, these two went to a place in the woods, a pine thicket several miles west of Greensboro; that they were driven in an automobile by one Warren to a point on a side road where they got out and walked to this thicket; that following some argument the disagreement was made up and sexual relations were had; that thereafter defendant announced that their relations must cease as they would be found out and trouble ensue; that deceased opposed the suggestion and in the discussion that followed she struck him with her hand one time in the chest, to which he responded by striking her with his fist knocking her down; and then as she lay on the ground he took her chin in his left hand, drew his pocketknife and cut her throat; that as she did not die immediately, and still showed signs of life, he went into the woods near-by, secured a stick or club and beat her over the head and neck; that he took her pocketbook, watch and glasses and returned to the car and told Warren he had killed her. The evidence disclosed that the body had been dragged a short distance from where she was killed, and several days elapsed before it was discovered. Decomposition had set in. *Post-mortem* examination revealed that death was due to a broken vertebra in the neck. The deceased's watch and glasses were found in defendant's home, as well as the knife with which defendant admitted to the officers he had cut her. A stick or club was found near where the body had lain, and this the defendant told the officers was the one which he had used.

The defendant offered no evidence.

There was verdict of guilty of murder in the first degree, with recommendation of mercy, and from judgment imposing sentence of death defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

F. L. Paschal for defendant.

DEVIN, J. The defendant assigns error in the ruling of the court below admitting in evidence over objection the testimony of the officers as to confessions made to them by the defendant. The record does not disclose that the defendant requested further inquiry or findings by the court, or offered any testimony to controvert the statements of the officers. He presents the question only by his exception to the evidence. The officers having testified that upon arresting the defendant they warned him of his rights and advised him he did not have to make a statement unless he wished, and that his statements would be used against him, there was nothing to rebut the presumption that the confessions were voluntarily given. The admissions of the defendant were supported by

the finding of the watch and glasses of deceased in defendant's home, and the weapon with which she was beaten to death at the place where he admitted it was used.

Exception to the introduction of evidence of defendant's confession cannot be sustained. *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193. With the testimony of these admissions properly in evidence, the defendant's exception to the denial of his motion for judgment of nonsuit becomes untenable.

The defendant assigns error in the charge of the court to the jury in that the court's definition of "deliberation" was incomplete. The language of the court excepted to was this: "Deliberation, gentlemen of the jury, means to think about, to revolve over in one's mind; while premeditation means to think beforehand, to form a prior determination to do the act." Then followed definition of murder in the second degree, malice and manslaughter, to which no exception was noted. Later the court gave this instruction: "Now, gentlemen of the jury, the court instructs you as a matter of law that the law does not lay down any rule as to the time that must elapse between the moment when a person premeditates or reaches a determination in his own mind to kill, and the moment when he does the killing, as a test. It is not a question of time. If the determination is formed deliberately and upon due reflection it makes no difference how soon afterwards the fatal resolve is carried into execution. So, where one forms a purpose to take the life of another and weighs this purpose in his mind long enough to form a fixed design or determination to kill at a subsequent time, no matter how soon or how late, and pursuant thereto kills, this would be a killing with premeditation and deliberation and would be murder in the first degree."

The court further charged the jury if they found from the evidence beyond a reasonable doubt that defendant killed the deceased with either knife or stick, weapons which they found beyond a reasonable doubt were capable of producing death in the hands of defendant under the circumstances, and that the defendant intended at the time to kill her, and if they so found beyond a reasonable doubt that such intent to kill had been formed and determined in his mind, that he had thought it over and revolved it over in his mind and decided to kill her, then that was premeditation and deliberation, and if he killed her with premeditation and deliberation and with malice, and they so found beyond a reasonable doubt each and every one of these elements it would be their duty to return verdict of guilty of murder in the first degree. No exception was noted to this instruction. These instructions as to the elements necessary to constitute murder in the first degree under the statute seem to be in substantial accord with the decisions of this Court. *S. v. Roberson,* 150 N. C., 837, 64 S. E., 182; *S. v. McClure,* 166 N. C., 321, 81 S. E., 458;

S. v. Benson, 183 N. C., 795, 111 S. E., 869; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Buffkin,* 209 N. C., 117, 183 S. E., 543. In defining and illustrating the meaning of deliberation the present Chief Justice in *S. v. Benson, supra,* used this language: "It does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. *S. v. Coffey,* 174 N. C., 814. When we say the killing must be accompanied by premeditation and deliberation, it is meant that there must be a fixed purpose to kill, which precedes the act of killing, for some time, however short, although the manner and length of time in which the purpose is formed is not very material. *S. v. Walker,* 173 N. C., 780." The court, without using this exact language, instructed the jury in substance if they found beyond a reasonable doubt the defendant killed the deceased with a deadly weapon, and that it was done in the heat of passion, without revolving it over in his mind or thinking it over, or forming a fixed design to kill, they could not convict him of murder in the first degree. The court here, as in the *Benson case, supra,* was contrasting a killing done with deliberation with one done in hot blood, in heat of passion.

To the court's instructions as to second degree murder no exception was noted.

The defendant assigned error in the court's instructions to the jury on manslaughter, but as we do not think there was evidence which would tend to mitigate or reduce the grade of the offense to manslaughter, the instructions criticised may not be held for error entitling the defendant to a new trial. *S. v. Wallace,* 203 N. C., 284, 165 S. E., 716; *S. v. Cureton,* 215 N. C., 778, 3 S. E. (2d), 343; *S. v. Grainger,* 223 N. C., 716, 28 S. E. (2d), 228.

After careful examination of the entire record we conclude that the exceptions brought forward in defendant's assignments of error, and debated orally and in his brief, cannot be sustained, and that defendant has no just cause of complaint as to the fairness of his trial.

We note that the jury returned verdict of guilty of murder in first degree, "with mercy." As there was no request by the jury for permission to make this recommendation or intimation by the judge that such a recommendation would be considered, *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743; *S. v. Day,* 215 N. C., 566, 2 S. E. (2d), 569; *S. v. Howard,* 222 N. C., 291, 22 S. E. (2d), 917, the court properly treated

the jury's recommendation of mercy as surplusage, *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260, and imposed the sentence fixed by the statute.

In the trial we find

No error.

N. J. McGUINN AND WIFE, MARY P. McGUINN, v. J. A. McLAIN.

(Filed 17 December, 1945.)

1. Ejectment § 1—

The fact that a landlord may obtain permission from the Rent Control Office of the O.P.A. to institute an action under the local law for the possession of his property, does not release the property from the provisions of the Emergency Price Control Act of 1942, Title 50, U.S.C.A. App., sec. 901, *et seq.*

2. Ejectment § 7—

The rental value of the premises in controversy in this action was fixed by the Rent Control Office, and local statutes, S. L. 1945, ch. 796, amending G. S., 42-32, authorizing the collection of double rents or other damages for withholding the premises after notice to quit, cannot exceed the maximum rent fixed by the Office of Price Administration under the Emergency Price Control Act of 1942.

3. Same—

Ordinarily when a tenant holds over after the expiration of his lease or a tenant from month to month refuses to quit after notice, the landlord is entitled to recover, as damages for the wrongful withholding of the premises, the fair rental value of the property. The measure of damages is the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved. Rental value is what the premises would rent for, or it may be determined by other evidence.

4. Same—

As long as the Rent Control Act is effective in a particular locality, a landlord who owns rental property therein and subject to the provisions of the Act, cannot assert under the local law any right in conflict with the Act.

5. Same—

Any difficulty encountered by defendant, in an ejectment proceeding, in obtaining other suitable living quarters is not sufficient under the Rent Control Act to defeat the right of plaintiffs to recover possession of their property for their own use and occupancy.

APPEAL by plaintiffs and defendant from *Phillips, J.,* at June Term, 1945, of MECKLENBURG.

This is a proceeding in summary ejectment under the Landlord and Tenant Act, begun before a justice of the peace and heard on appeal in the Superior Court. The pertinent parts of the agreed statement of facts are as follows:

"The defendant rented the property at 932 Henley Place, in Charlotte, North Carolina, on July 8, 1942, from month to month, at the rate of $65.00 per month, payable in advance, on or before the 10th day of each month.

"The plaintiffs purchased the property occupied by the defendant on 1 February, 1945; that the plaintiffs petitioned the O.P.A. Rent Control Office for possession of the property, and were given permission to bring suit for the same on or after 15 May, 1945, of which petition the defendant had due notice.

"That on 7 April, 1945, the plaintiffs, through their attorney, gave due and proper notice to the defendant to vacate the premises on 6 May, 1945, which notice was duly received by the defendant.

"The defendant did not vacate on 6 May, 1945, and on 16 May, 1945, the plaintiffs commenced their action.

"That the proceedings before the Rent Control Office and the notice to the defendant were in due and proper form."

Plaintiffs tendered the following issues, and those submitted to the jury were answered as set forth below:

"1. Are the plaintiffs entitled to immediate possession of the property known as 932 Henley Place, Charlotte, N. C.? Answer: Yes.

"2. What sum are the plaintiffs entitled to recover for rent for the said premises? Answer: $93.16.

"3. Was the detention of said premises by the defendant wrongful and was their appeal without merit and taken for the purpose of delay?

"4. What sum, if any, are the plaintiffs entitled to recover as damages for the wrongful detention of the said premises? Answer: $258.92."

The court declined to submit the third issue, and the plaintiffs excepted. On the question of damages on the fourth issue, for the wrongful detention of the premises, the court permitted N. J. McGuinn, one of the plaintiffs, to testify, over the objection of the defendant, as to certain expenses incurred by him, from 9 May, 1945, the date he was required to vacate the house formerly occupied by him and his family, until the date of the trial. He testified as to the cost of room and board at the Selwyn Hotel, the cost of crating, hauling and storing his furniture, the expense of keeping a cat and dog at a kennel, and testified that his living expenses would have been only $4.00 per day if he had been permitted to occupy his own home, thereby showing a loss or damages of $258.92.

Judgment predicated on the verdict was entered, and the plaintiffs and defendant appealed, assigning error.

John James for plaintiffs.
Wm. H. Abernathy for defendant.

DENNY, J. On the plaintiffs' appeal we must determine whether or not the court committed error in refusing to submit the third issue. While on the defendant's appeal we must determine whether or not there was error in submitting the fourth issue on the question of damages.

It is admitted that the plaintiffs, after purchasing the property occupied by the defendant and his family, proceeded in accordance with the Rules and Regulations issued pursuant to the Rent Control provisions of the Emergency Price Control Act of 1942, and the amendments thereto. Title 50, U.S.C.A. App., sec. 901, *et seq.* It further appears that the plaintiffs are, in good faith, seeking to gain possession of the property for their own personal use and occupancy. The defendant offered no defense to this action other than his inability to find a suitable house in which to move.

PLAINTIFFS' APPEAL.

The plaintiffs insist that the third issue should have been submitted in view of the provisions of chapter 796, Session Laws of 1945, amending G. S., 42-32, as follows: "On appeal to the superior court, the jury trying issues joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued, to the time of trial in the superior court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal."

The property sought to be recovered is in the City of Charlotte, within a Rent Control Area, and is subject to the provisions of the Emergency Price Control Act and the Rules and Regulations issued pursuant thereto. The purpose of rent control is to make certain that landlords will collect only fair and reasonable rents for properties within the controlled area, which are occupied by tenants as living quarters. And the fact that a landlord may obtain permission from the Rent Control Office of the O.P.A. to institute an action under the local law for the possession of his property, does not release the property from the provisions of the Emergency Price Control Act. The rental value of the premises in controversy in this action was fixed by the Rent Control Office at $65.00 per month, and local statutes authorizing the collection of double rents or other damages for withholding the premises after notice to quit, cannot

exceed the maximum rent fixed by the Office of Price Administration. *Matskowsky, et al., v. Katz,* 53 N. Y. S., 2nd, 430, 184 Misc., 60. The States of New Jersey and Florida, having similar statutes, have restricted the application of these statutes in rent enforcement cases. *Ricci v. Claire* (N. J.), O.P.A. Opinions and Decisions, Vol. 1, p. 1989; *Collins v. Ford* (Fla.), O.P.A. Opinions and Decisions, Vol. II, p. 5053. See also *Myers v. H. L. Rust Co.,* 134 Fed., 2nd, 417; *Cannon v. Gordon,* 48 N. Y. S., 2nd, 124. Ordinarily when a tenant holds over after the expiration of his lease or a tenant from month to month refuses to quit after notice, the landlord is entitled to recover as damages for the wrongful withholding of the premises, the fair rental value of the property. This Court said in *Sloan v. Hart,* 150 N. C., 269, 63 S. E., 1037: "The measure of damages appears settled by practically all the authorities to be the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved. . . . By rental value is meant . . . what the premises would rent for, or by evidence of other facts from which the rental value may be determined." *Martin v. Clegg,* 163 N. C., 528, 79 S. E., 1105; *Credle v. Ayers,* 126 N. C., 11, 35 S. E., 128. But, so long as the Rent Control Act is effective in a particular locality, a landlord who owns rental property therein and subject to the provisions of the Act, cannot assert under the local law any right in conflict with said Act. *Concord Estates v. Burke,* 50 N. Y. S., 2nd, 635; *Schwartz v. Trajer Realty Corp.,* 56 F. Supp., 930; *Cannon v. Gordon, supra; Myers v. H. L. Rust Co., supra.* Hence, the measure of plaintiffs' damages is the rental value of the premises as fixed by the Office of Price Administration. These plaintiffs are entitled to the immediate possession of their property, but the court properly refused to submit the third issue set out herein.

DEFENDANT'S APPEAL.

In view of the disposition made of the plaintiffs' appeal, and for the reasons stated therein, the exceptions noted to the plaintiffs' evidence on the question of damages submitted on the fourth issue, must be sustained.

The defendant asserted no legal defense to this action. The difficulty he may encounter in obtaining suitable living quarters is not sufficient to defeat the right of the plaintiffs to recover possession of their property for their own use and occupancy. *Bauer v. Neuzil,* 152 P., 2nd, 47; *Jones v. Shields,* 146 P., 2nd, 735; *Gould v. Butler,* 31 A., 2nd, 867; *New York Housing Authority v. Awant,* 54 N. Y. S., 2nd, 571; *New York Housing Authority v. Curington,* 50 N. Y. S., 2nd, 445. The plaintiffs, however, are only entitled to recover the rent as determined under the second issue and the immediate possession of the property as

set forth in the first issue. Except as modified herein, the defendant's appeal is affirmed.

Plaintiffs' appeal, affirmed.

Defendant's appeal, modified and affirmed.

A. B. McMILLAN v. J. A. ROBESON.

(Filed 17 December, 1945.)

Trial ss 52, 53—

In an action by a husband to recover from his deceased wife's brother a large amount of miscellaneous personalty, consisting of household furniture, silver, jewelry, etc., mostly given to plaintiff and/or his wife upon their marriage, there being no children of the marriage and the defendant claiming the property as administrator of deceased and setting up the statute of limitations, where the court, acting by consent without a jury, gave judgment for the plaintiff, upon evidence partly inconclusive as to ownership, without findings on the various items, there is error and the cause is remanded for further hearing, as it is the function of the court, however tedious the process, to make findings in accordance with the evidence and to pass upon the applicability of the statute of limitations.

APPEAL by defendant from *Nimocks, J.*, in Chambers, 24 March, 1945, as of March Term, 1945, of CUMBERLAND.

Cook & Cook and James R. Nance for defendant, appellant.

Robert H. Dye for plaintiff, appellee.

SEAWELL, J. The plaintiff brought this action for the recovery of personal property, and at the same time invoked the ancillary proceeding of claim and delivery to obtain possession *pendente lite*. Under the claim and delivery a large quantity of miscellaneous property was taken, as appears from the returns of the sheriff.

The plaintiff attached a schedule to his complaint, in which the property claimed is listed, and which also contains such descriptive matter as he desired to furnish. A similar inventory and description is found in the affidavit in the claim and delivery proceeding.

The defendant denied plaintiff's title and right to the possession of the property, alleged that he was in rightful possession thereof as administrator of Eliza Hill Robeson (a sister of defendant and of the plaintiff's deceased wife, Mary Fuller Robeson McMillan), who, up to her death, held the property, as her own, under the will of Mrs. McMillan. Defendant further pleaded the three-year statute of limitation, alleging that Miss

Robeson had held the property as her own for more than six years, and the administrator for an additional three months, before the institution of action for its recovery.

The property in dispute consists largely of miscellaneous items of house furniture and furnishings claimed by plaintiff to have been bought and paid for by him upon his marriage and at various times during their married life, for the common use of himself and wife, and of valuable wedding presents presented to either or both of them upon the marriage. The inventory includes such items as beds, tables, chairs, rugs, vases, radio, stoves; silver tableware, pitchers, cups, silver and gold bowls, platters, glassware, diamond rings, and other items of an extensive inventory.

The matter was heard by Nimocks, J., by consent of parties without a jury, and resulted in a finding of facts, conclusions of law and judgment for plaintiff for the property, substantially as claimed, an inventory of which is set out in the judgment.

The defendant objected, excepted and appealed from the judgment, assigning errors.

The evidence taken before the judge discloses that Mary Fuller Robeson and plaintiff were married in 1924. Mrs. McMillan died in 1936, leaving a purported will, in which she gave all her property to her sister, Miss Robeson. The will is a holograph, without witnesses to its execution, and, according to the record, admitted to probate on the oath of only two witnesses as to the handwriting and other facts of proof required by G. S., 31-18.2. The plaintiff objected to the introduction of the purported will, and the objection was overruled. Since plaintiff finally prevailed, he did not appeal. Whether he thus waived his objection to the will, we do not find it within the scope of our decision to determine. During their married life they lived at 323 Person Street, in Fayetteville. Miss Eliza Hill Robeson lived with them, and after the death of Mrs. McMillan, both Miss Robeson and plaintiff continued to live there for three or four years, when plaintiff married again and moved away. Miss Robeson died in October, 1943, and her brother, the defendant, administered on her estate.

The plaintiff, for identification of the property he claims, depended largely upon its location at a particular time—the period during which he lived in the house at 323 Person Street, and, in part, its location there at the time the claim and delivery was issued. However, upon the trial, he gave descriptions, tallying, for the most part, with the property taken under the claim and delivery proceeding, although leaving ambiguity as to other items.

The defendant in his brief bases his objection to the findings of fact and conclusions of law made by Judge Nimocks upon the following

specifications: First, that the action is barred by the three-year statute of limitations, and the judge should have so held; second, that there is no estate by entirety in personal property in North Carolina, and the evidence disclosed a joint tenancy in much of the property claimed by plaintiff; third, that the action instituted was not a proper action to obtain possession of property so held; fourth, that the property was not sufficiently described in the pleadings and the evidence to justify a taking thereof; and contends that there is no evidence to support the findings of fact or conclusions of law.

Coming to the question of ownership and title, there are a number of items constituting a substantial part of the property as to which the plaintiff himself testified that either he or others had given to Mrs. McMillan, or that they had been given to them jointly, and in many instances the evidence of the plaintiff with regard to such ownership was the only evidence before the court.

It appears from the evidence that there were no children born to the McMillan marriage, and that there is no person, other than those before the court, now directly interested in the property, unless the widow of a deceased brother, Audrey Robeson, now a resident of Virginia, is so interested. Except for a consideration of the will, the evidence with regard to the acquisition of the property and the testimony of the plaintiff containing inferences of ownership of a part thereof, or interest therein, by Mrs. Mary Fuller McMillan, might be of no advantage to the defendant in view of the rights of the husband under G. S., 28-149.9. The will, however, was obviously under consideration of the court in making its findings, and it cannot be ignored here.

We have, then, this situation presented on the appeal: An examination of the evidence discloses that as to a number of items in the inventory exhibited by plaintiff and listed by the court in the judgment, the objection based on indefiniteness of description may indeed be well founded; and as to others, the objection may not be so well based. It further appears from the testimony of the plaintiff that some of the articles now claimed were given by him to his former wife, with little or no inference anywhere to the contrary; and the evidence is contradictory as to a number of other items as to which, of course, the judge hearing the matter had the right to find in accordance with the weight of the evidence as it impressed him. Plaintiff is entitled to recover in this case, at most, only those items as to which he has shown exclusive title.

However, the evidence, taken as a whole, is of such a nature and so interconnected that the Court does not feel that it could, with propriety, single out and classify these items or the items in the extensive inventory here presented which were improperly dealt with on the trial and those as to which the finding of the court was supported by evidence, and make

an award here or there upon such classification without intruding on the offices of the jury. *Imprimis,* that was the function of the court below, which acted both as judge and jury; and however tedious the process, it should be performed in the orderly procedure of the trial.

At present, the Court does not feel that it is in position to determine the applicability of the statute of limitations to plaintiff's action, and must leave that to the court below to decide upon the evidence as it may then appear.

There was error in the trial in the respects pointed out, of such character as to warrant a trial *de novo.* It is so ordered.

Error and remanded.

STATE v. GRADY GORDON.

(Filed 17 December, 1945.)

1. Criminal Law § 52b—

In passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State, and when so considered the court must determine whether or not there is any competent evidence to support the allegations in the warrant or bill of indictment.

2. Same—

In a criminal prosecution the evidence must show more than an opportunity to commit the offense, and should raise more than a suspicion or mere conjecture as to the existence of the fact to be proved.

3. Fornication and Adultery § 3—

Where the evidence for the State, in a prosecution for fornication and adultery, tended to show that defendant and his wife lived in a one-room house, about fourteen by twenty-six feet, and the other woman in the case, whose husband was in the Navy, came with her five children to live with them because she had no other place to stay, and that defendant and this woman were seen together constantly, sometimes accompanied by defendant's wife, and that late at night the officers went to defendant's house and heard defendant say, "you believe I hugged that woman," and the answer "yes," and the officers saw defendant in a crouching position over the bed where the woman was and on entering the room found defendant on a pallet and his wife and the other woman in different beds with several children in the beds and on the pallet, there is insufficient evidence for the jury and motion for judgment as of nonsuit should have been allowed.

APPEAL by defendant from *Alley, J.,* at August Term, 1945, of DAVIDSON.

STATE *v.* GORDON.

The defendant was convicted in the recorder's court of Denton, on a warrant charging him with fornication and adultery with one Eunice Jordan, and with occupying a building for the purpose of prostitution. The defendant appealed to the Superior Court and was tried *de novo*.

The evidence offered by the State is substantially as follows: The defendant and his wife lived in a one-room house, about fourteen feet wide and twenty-six feet long. Eunice Jordan and her five children lived in a house about 150 yards from the home of the defendant. The husband of Eunice Jordan is in the Navy. A short time before the defendant was arrested, Eunice Jordan and her five children moved into the home of the defendant. The defendant stated to the officers that the reason Eunice Jordan and her children were living with him, "his wife went and got her and moved her in the house . . . she didn't have any other place to stay." The defendant and Eunice Jordan were seen together a number of times in a cafe in Thomasville and in other public places as well as in private homes. None of the State's witnesses testified to any improper conduct on the part of the defendant and Eunice Jordan on any of these occasions. Sometimes they were accompanied by the defendant's wife.

About 12:30 a.m., on 26 June, 1945, the officers went to the home of the defendant. Some of them testified the room was dark and they could not see anything, but heard the defendant say "You believe I hugged that woman?" The answer was "Yes." One officer testified he went around to the east window of the room and saw the defendant in a crouching position over the bed where they found Eunice Jordan, and it "looked like he might have been on his knees," and that he heard the statement quoted above. When the officers knocked on the door the defendant let them in, and then laid down on a pallet. They found the defendant's wife in one bed, Eunice Jordan and two of her children in another, and defendant and three of the Jordan children on pallets, all in the same room.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit on both counts in the warrant. Motion was allowed on the second count, which charged the defendant with occupying a building for the purpose of prostitution. The defendant offered no evidence.

Verdict: Guilty. Judgment: Imprisonment in the common jail of Davidson County for nine months, to be assigned to do labor under the supervision of the State Highway and Public Works Commission. The defendant appeals, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Phillips & Bower for defendant.

DENNY, J. The question for determination on this appeal is whether the defendant's motion for judgment as of nonsuit should have been sustained as to both counts in the warrant.

It is well settled with us that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State, and when so considered the Court must determine whether or not there is any competent evidence to support the allegations in the warrant or bill of indictment. *S. v. Herndon,* 223 N. C., 208, 25 S. E. (2d), 611; *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606; *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47; *S. v. Woodard,* 218 N. C., 572, 11 S. E. (2d), 882; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321; *S. v. Hammonds,* 216 N. C., 67, 3 S. E. (2d), 439; *S. v. Landin,* 209 N. C., 20, 182 S. E., 389; *S. v. Marion,* 200 N. C., 715, 158 S. E., 406.

We think the evidence adduced in the trial below is insufficient to support the verdict. The defendant may be guilty of the crime charged, but the evidence shows no more than an opportunity to commit the offense. The circumstances disclosed may be sufficient to raise a suspicion, but the evidence should raise more than a suspicion or mere conjecture as to the existence of the fact to be proved. *S. v. Prince,* 182 N. C., 788, 108 S. E., 330. The facts here are substantially different from those in *S. v. Davenport, ante,* 13, 33 S. E. (2d), 136, and similar cases cited by the State. Davenport and his paramour were constantly together day and night, on the streets or in one of his several homes, and when arrested late at night in one of these homes, no other persons were occupying the house and they came out of the same bed-room. There was but one room in Grady Gordon's house and it was occupied by eight people, including his wife.

The defendant's motion for judgment as of nonsuit should have been allowed. *Barker v. Dowdy,* 224 N. C., 742, 32 S. E. (2d), 265; *S. v. Todd, supra; 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; *S. v. Prince, supra; Hopkins v. Hopkins,* 132 N. C., 25, 43 S. E., 506.

The judgment of the court below is

Reversed.

O. J. WHITE v. J. R. PLEASANTS.

(Filed 17 December, 1945.)

1. Contracts § 6: Brokers and Factors § 3: Fraud, Statutes of, § 9—

Oral contracts between real estate brokers and their principals for the sale of land of the principal are enforceable as such.

2. Brokers and Factors § 8: Contracts § 16—

A simple contract of agency for the sale of land for an indefinite and unstated time is generally revocable, in good faith, at any time before the broker makes the sale, or produces a purchaser who is ready, willing and able to buy on the terms set forth by the principal.

3. Contracts § 16: Brokers and Factors §§ 10, 12—

Where a broker has made a sale of land, or has produced a purchaser who is ready, willing and able to buy on the terms set forth by the principal, the principal, although having the power, has no legal right, without incurring liability for the wrongful termination, to revoke the broker's agency to sell.

4. Brokers and Factors §§ 10, 12—

When under an existing contract of agency to sell land in which no stipulation is made for compensation, the broker has made a sale, or produced a purchaser who is ready, willing and able to buy the land, the rule seems to be that the broker is entitled to the reasonable value of his services.

APPEAL by plaintiff from *Stevens, J.*, at September Term, 1945, of DURHAM.

Civil action commenced before justice of peace of Durham County, North Carolina, for recovery of $50.00 on implied contract for commissions in sale of real estate, tried in Superior Court *de novo* on appeal thereto from judgment of said justice of peace court.

Upon the trial in Superior Court plaintiff testified in pertinent part as follows: "On or about March 2nd of this year, and for the past three years, I have had license to engage in real estate business in Durham . . . As a licensed real estate dealer, I sell real estate on commission for other people . . . About the middle of February, 1945, I went to the defendant's office to ask him about some property which he was interested in and he . . . advised me that he had a lot in Forest Hills which he would like for me to sell for him . . . At this time . . . defendant took the map or drawing or blue print . . . of lot . . . and showed it to me. I asked what his price on the lot was and he told me $1000. I said: 'Mr. Pleasants, I will sell that lot.' Mr. Pleasants said: 'I wish you would. I want my money out of it . . .' He gave me the dimensions of

the lot as 120 by 230. I made a notation or memorandum of the dimensions of the lot . . . following . . . 120 x 230, $1000—J. R. Pleasants. . . . Pursuant to this agreement with defendant, I ran an ad in Durham papers advertising the said lot for sale . . . in the Durham Sun on March 2nd, 1945, as follows: 'Lots for sale. Here are some lots you will like. Forest Hills—120 x 230—$1000,' etc. Signed 'O. J. White.' . . . I also ran this ad in Morning Herald of March 3, 1945 (same as above). Immediately after on the same day while I was running these ads in papers, I met the defendant on the street . . . and told him I had advertised his lot for sale in the Durham papers and the defendant then said, 'Well, I'm glad you have. That's a good buy; one of the best bargains in Durham' . . . he said, 'All right, go ahead and sell it. It's one of the best buys in Durham.' This conversation occurred on Saturday, March 3rd . . . I carried Mrs. Campbell in my car to see the lot . . . Later she . . . said she did not wish to purchase the lot. I also carried in my car Mr. W. O. Wilkins and showed him the same lot that I showed Mrs. Campbell. I quoted him a price of $1000 cash, which was the price the defendant told me to sell it for. I sold the lot to W. O. Wilkins for $1000 cash and at the time I made the sale Mr. W. O. Wilkins gave me his check in the sum of $100 as a deposit on said lot. The balance was $900 as stated on face of check." (Check offered—reading: "Durham, N. C., 3/9/1945. Home Savings Bank. Pay to the order of O. J. White, Agent, $100.00—One Hundred and no/100 Dollars. Dep. on lot 120 x 230—Bal. $900.00," signed "W. O. Wilkins.") "When I received this check, I carried it to the defendant's office on the same day and told him I had sold the lot. Prior to taking the check to defendant, I saw him and advised him that I had sold this lot and the defendant advised me that one of his friends was interested in purchasing the lot but said that his friend had not purchased the lot and the one who brought the check to him first would get the lot. I later returned with the check for the defendant, at which time the defendant advised me that he had not sold his lot to anyone and no one had paid him any money on it. I then advised the defendant that here was a check for $100 deposit on the lot, and put the check on the defendant's desk. The defendant said he would not accept the check, but I left it on his desk. I advised the defendant the first time I saw him on March 9th that I had sold his lot and wanted a deed, and I advised him the same thing when I gave him the check. The defendant refused to execute a deed for the lot, I asked him to pay me for my services or commission, which he refused to do. After he refused . . . I brought this suit . . . W. O. Wilkins advised me and I so advised the defendant, that he was ready, willing and able to pay $1000 cash for this lot upon the execution of the deed by the defendant . . . The usual commission in a sale of this kind is 5%, or $50."

Then, on cross-examination, plaintiff continued: "When I first saw him (defendant) on March 9th I did not have any check. I told him I had a sale for the lot and wanted the deed for it. I did not offer him any money at that time . . ."

W. O. Wilkins, as witness for plaintiff, testified in pertinent part as follows: ". . . On or about March 1945 the plaintiff took me out to Forest Hills and showed me a lot. The lot was about 120 by 230 feet . . . It was my information that the lot was owned by Mr. Pleasants, the defendant. The plaintiff . . . advised me that he could sell me the lot for $1000. I purchased this lot for $1000. I gave him a check for $100 as a deposit on the lot. (Identifies check.) I was ready, willing and able on March 9th to pay $1000 for that lot in Forest Hills as soon as I could get a good deed . . . and have been ready, willing and able to pay this price for the said lot since this time." Then, on cross-examination, the witness continued: "I gave Mr. White the check the same day it is dated between 2:00 and 3:00 o'clock. I agreed to pay $1000 for the lot."

At close of evidence for plaintiff, the court allowed motion of defendant for judgment as in case of nonsuit, and entered judgment accordingly. Plaintiff appeals therefrom and assigns error.

J. Grover Lee for plaintiff, appellant.
W. H. Hofler for defendant, appellee.

WINBORNE, J. Taking the evidence in the light most favorable to plaintiff, we are of opinion that exception to the ruling of the court below in granting motion for judgment as in case of nonsuit is well taken. The evidence offered by plaintiff appears to be sufficient to take the case to the jury upon appropriate issues.

Appellee concedes at the outset that oral contracts between real estate brokers and their principals for the sale of land of the principal are enforceable as such. *Abbott v. Hunt,* 129 N. C., 403, 40 S. E., 119; *Lamb v. Baxter,* 130 N. C., 67, 40 S. E., 850; *Smith v. Browne,* 132 N. C., 365, 43 S. E., 915; *Palmer v. Lowder,* 167 N. C., 331, 83 S. E., 464.

And it is not debated on this appeal that plaintiff has introduced evidence tending to show that defendant requested plaintiff to sell a certain lot of land for him at the price of $1000—without fixing any time limit within which plaintiff was authorized to sell the lot, and without specifying compensation to plaintiff for selling it.

It is a settled principle of law that a simple contract of agency for the sale of land for an indefinite and unstated time is generally revocable, in good faith, at any time before the broker makes the sale of the land, or produces a purchaser who is ready, willing and able to buy on the

terms set forth by the principal. But where the broker has made a sale of the land, or has produced a purchaser who is ready, willing and able to buy on the terms set forth by the principal, the principal, although having the power, has no legal right, without incurring liability for the wrongful termination, to revoke the broker's agency to sell. 12 C. J. S., 46, Brokers, section 16; 8 Am. J., 1007, Brokers, section 39. See also *Abbott v. Hunt, supra; Clark v. Lumber Co.,* 158 N. C., 139, 73 S. E., 793; *Crowell v. Parker,* 171 N. C., 392, 88 S. E., 497; *Real Estate Co. v. Sasser,* 179 N. C., 497, 103 S. E., 73; *Hagood v. Holland,* 181 N. C., 64, 106 S. E., 154; *House v. Abell,* 182 N. C., 619, 109 S. E., 877; *Olive v. Kearsley,* 183 N. C., 195, 111 S. E., 171; *Gossett v. McCracken,* 189 N. C., 115, 126 S. E., 117; *Johnson v. Ins. Co.,* 221 N. C., 441, 20 S. E. (2d), 327; *Lindsey v. Speight,* 224 N. C., 453, 31 S. E. (2d), 371; *Ins. Co. v. Disher, ante,* 345.

Moreover, when under an existing contract of agency to sell land in which no stipulation is made for compensation the broker has made a sale, or produced a purchaser who is ready, willing and able to buy the land, the rule seems to be that the broker is entitled to recover the reasonable value of his services. See *Lindsey v. Speight, supra,* where the authorities are assembled. See also *Thomas v. Realty Co.,* 195 N. C., 591, 143 S. E., 144.

In the light of these principles of law applied to the evidence offered by plaintiff, the judgment below is

Reversed.

A. C. JORDAN ET UX V. J. H. HARRIS ET AL.

(Filed 17 December, 1945.)

1. Intoxicating Liquors § 3: Public Officers §§ 1, 2—

By G. S., 18-45, authority is vested in the A.B.C. Boards of the respective counties to appoint one or more law enforcement officers with "the same powers and authorities in their respective counties as other peace officers." Subsection O.

2. Public Officers §§ 4, 8: Principal and Surety § 5a—

Peace officers are required to give bond for the faithful discharge of their duties. G. S., 128-9. The law provides that such officers, and the sureties on their official bonds, shall be liable to the persons injured for torts committed *colore officii.*

3. Public Officers § 8—

The naming of the Durham A.B.C. Board as obligee in a bond of its law enforcement officers, rather than the State, works no limitation of its

character as an official bond and affords no escape from its obligation as such.

APPEAL by defendants, George T. Featherstone and American Bonding Company, from *Jeff D. Johnson, Jr., Special Judge,* at June Term, 1945, of DURHAM.

Civil action to recover of Durham County Alcoholic Beverage Control Board; George T. Featherstone, its chief enforcement officer, and surety on his bond, damages for negligently allowing fire at a captured still to spread over plaintiffs' timber lands.

On the night of 12 December, 1943, a distillery which was being operated on plaintiffs' land, without his knowledge or consent, was raided by the Durham County A.B.C. Board enforcement squad, led by George T. Featherstone, the chief enforcement officer. After making an unsuccessful attempt to arrest the operators, who made good their escape, the officers undertook to destroy the still. The boxes and barrels used in connection with the still and about 35 gallons of whiskey were thrown on the fire, which added to its intensity. It is alleged that through the negligence of the defendants, the fire was allowed to spread to plaintiffs' woods, and they bring this action to recover for the destruction of their timber.

When George T. Featherstone was appointed Chief Enforcement Officer, he gave bond in the sum of $1,000 to the Durham County Alcoholic Beverage Control Board, with the American Bonding Company as surety and conditioned as follows:

"The Condition of the Aforegoing Obligation Is Such, That Whereas, the Principal was elected or appointed Chief Enforcement Officer: Now, Therefore, if the Principal shall during the term of one year beginning on the 15th day of December, 1942, well and faithfully perform all and singly the duties incumbent upon him by reason of his election or appointment as aforesaid, and honestly account for all moneys coming into his hands as such officer, according to law, except as hereinafter limited, during said term, then this obligation shall be null and void, otherwise of full force and virtue."

At the close of the evidence, judgments of nonsuit were entered in favor of the defendants, with the exception of George T. Featherstone and his bondsman.

The jury returned the following verdict:

"1. Was the plaintiffs' land burned over and damaged by the negligence of the defendant, George T. Featherstone, acting by virtue or under color of his office as Chief Enforcement Officer of the Durham County Alcoholic Beverage Control Board? Answer: Yes.

"2. What damages, if any, are the plaintiffs entitled to recover? Answer: $512.00."

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

R. M. Gantt for plaintiffs, appellees.
Fuller, Reade, Umstead & Fuller for defendants, appellants.

STACY, C. J. By the terms of G. S., 18-45, authority is vested in the A.B.C. Boards of the respective counties to appoint one or more law enforcement officers with "the same powers and authorities within their respective counties as other peace officers." Subsection (O). Peace officers are required to give bond for the faithful discharge of their duties. G. S., 128-9; *S. v. Swanson,* 223 N. C., 442, 27 S. E. (2d), 122. The law provides that such officers, and the sureties on their official bonds, shall be liable to the persons injured for torts committed *colore officii. Dunn v. Swanson,* 217 N. C., 279, 7 S. E. (2d), 563; *Price v. Honeycutt,* 216 N. C., 270, 4 S. E. (2d), 611; *Warren v. Boyd,* 120 N. C., 56, 26 S. E., 700; *Kivett v. Young,* 106 N. C., 567, 10 S. E., 1019; G. S., 109-1; 109-34.

The case was tried under the principles announced in *Dunn v. Swanson, supra,* and *Price v. Honeycutt, supra.* In this, there was no error. The decisions in *Davis v. Moore,* 215 N. C., 449, 2 S. E. (2d), 366, and *Midgett v. Nelson,* 214 N. C., 396, 199 S. E., 393, are inapposite to the facts of the present record.

The naming of the Durham County A.B.C. Board as obligee in the bond, rather than the State, works no limitation of its character as an official bond and affords no escape from its obligations as such. G. S., 109-1. See *Hunter v. Retirement System,* 224 N. C., 359, 30 S. E. (2d), 384.

The verdict and judgment will be upheld.

No error.

STATE v. ANDREW PARSONS.

(Filed 28 March, 1945.)

APPEAL by defendant from *Armstrong, J.,* at August Term, 1944, of CALDWELL.

Criminal prosecution upon indictment charging defendant with carnal knowledge of a virtuous female child, over twelve and under sixteen years of age. G. S., 14-26.

Verdict: Guilty of carnal knowledge as charged in the bill of indictment.

Judgment: Confinement in Central Prison at Raleigh for not less than three nor more than five years.

Defendant appeals to Supreme Court and assigns error.

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

W. H. Strickland for defendant, appellant.

PER CURIAM. The several assignments of error presented by defendant on this appeal have been carefully considered and are found to be without merit. The trial appears to have been conducted in full accordance with settled rules of evidence and well established principles of law. And the evidence taken in the light most favorable to the State is sufficient to take the case to the jury, and to support the verdict. Hence, in the judgment below we find

No error.

MRS. JESSIE P. BULLARD, ADMINISTRATRIX OF THE ESTATE OF E. A. BULLARD, DECEASED, v. HOTEL HOLDING COMPANY, A CORPORATION.

MRS. DALE F. NOBLE, ADMINISTRATRIX OF THE ESTATE OF WALTER B. NOBLE, DECEASED, v. HOTEL HOLDING COMPANY, A CORPORATION.

(Filed 28 March, 1945.)

APPEAL by plaintiffs from *Bone, J.*, at October Term, 1944, of WAYNE.

Two civil actions to recover damages for alleged wrongful deaths of intestates of plaintiffs as result of injuries sustained in fire in hotel of defendant in which they were lodging, consolidated for the purpose of trial, and tried together.

From judgment as in case of nonsuit, entered at close of their evidence, plaintiffs appeal to Supreme Court and assign error.

Taliaferro & Clarkson, Tillett & Campbell, Wilkinson & King, and W. A. Dees for plaintiffs, appellants.

Langston, Allen & Taylor and Jones & Smathers for defendant, appellee.

PER CURIAM. One member of the Court, *Barnhill, J.*, not sitting, and the remaining six being evenly divided in opinion as to whether on the

record on this appeal there is any sufficient evidence of negligence on the part of defendant as alleged by plaintiffs, the judgment of Superior Court is affirmed, according to usual practice of the Court in such cases, and stands as the decision in this case—without becoming a precedent. *Howard v. Coach Co.,* 216 N. C., 799, 4 S. E. (2d), 449; *Pafford v. Construction Co.,* 218 N. C., 782, 11 S. E. (2d), 548; *Smith v. Furniture Co.,* 221 N. C., 536, 19 S. E. (2d), 17; *Whichard v. Lipe,* 223 N. C., 856, 25 S. E. (2d), 593.

Affirmed.

STATE v. RASTER BRADY.

(Filed 11 April, 1945.)

APPEAL by defendant from *Bobbitt, J.,* at December Term, 1944, of RANDOLPH.

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

J. G. Prevette for defendant, appellant.

PER CURIAM. The defendant was tried at December Term, 1944, Randolph Superior Court, upon an indictment charging him with carnal knowledge and abuse of his daughter, "a female child over twelve years and under sixteen years of age." G. S., 14-26.

Upon his conviction, he was sentenced for a term of ten years in the State's Prison. From this he appealed. His only exception is to the overruling of his demurrer to the evidence. The evidence was sufficient to sustain conviction, and the appeal is without merit.

In the proceedings of the lower court we find

No error.

STATE v. ORLIE KING.

(Filed 11 April, 1945.)

APPEAL by defendant from *Bobbitt, J.,* at September Term, 1944, of RANDOLPH.

Defendant was tried on a bill of indictment charging an assault on one Clyde M. Stafford. There was a verdict of guilty. The court pronounced judgment upon the verdict and the defendant appealed.

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

J. G. Prevette and P. T. Stiers for defendant, appellant.

PER CURIAM. The only exceptive assignment of error is directed to the alleged error of the court below in overruling the motion of the defendant to dismiss under G. S., 15-173. A careful examination of the record leads us to the conclusion that there was sufficient evidence to be submitted to the jury. The motion was properly overruled.

In the trial below we find

No error.

STATE v. LACY ALEXANDER McDANIEL.

(Filed 23 May, 1945.)

APPEAL by defendant from *Sink, J.*, at 25 September Criminal Term, 1944, of Greensboro Division of GUILFORD.

Criminal prosecution upon bill of indictment charging defendant with crime of rape of a named female person.

At 11 September Criminal Term, 1944, of Superior Court of Guilford, in apt time, before Dixon, S. J., defendant entered challenge to the array and moved to quash the bill of indictment on ground that there were irregularities in preparation of jury list from which names of jurors, including those selected as grand jury, were drawn. The court, after hearing evidence in that respect, found as a fact that the provisions of the statute have been complied with, that the jury list was legally prepared in good faith and without corruption, and that the drawing of names for jury for the term, as well as the drawing of grand jury, was done by a child under the age of ten years, as required. Thereupon, the challenge to the array, and motion to quash the bill of indictment were denied, and defendant excepted.

At the trial term the State offered evidence tending to show that defendant raped the prosecutrix.

And defendant, as a witness for himself, admitted that he assaulted the prosecutrix with the intent to rape her, and narrated details in substantial conformity with evidence offered by the State, except with respect to consummation of rape.

The jury returned verdict of guilty of rape as charged in the bill of indictment.

Judgment of death by asphyxiation, as provided by law, was pronounced by the court.

Defendant appeals to Supreme Court and assigns error.

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

D. Newton Farrell, Jr., for defendant, appellant.

PER CURIAM. Careful consideration of each of the several exceptions and assignments of error, which counsel for defendant, with commendable diligence and zeal, has urged, in brief and on oral argument, fails to show cause for disturbing the judgment from which appeal is taken. No new questions of law are presented, and the rulings of the court to which exceptions relate are in accord with precedents. The evidence presents a case for the jury. The record proper appears to be in form.

No error.

STATE v. NATHAN CURLING.

(Filed 19 September, 1945.)

APPEAL by defendant from *Burney, J.*, at July Term, 1945, of WASHINGTON.

The defendant was tried and convicted upon a bill of indictment charging him with an assault with intent to commit rape, and from judgment of imprisonment, predicated on the verdict, appealed to the Supreme Court, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

W. L. Whitley for the defendant.

PER CURIAM. The exceptions most stressfully argued on this appeal by the appellant, both orally and by brief, are the ones which relate to the court's refusal to grant the defendant's motion to dismiss the action or for judgment of nonsuit duly lodged when the State had produced its evidence and rested its case and renewed after all the evidence was concluded, G. S., 15-173.

The defendant's appeal is virtually from the finding of the jury. We have carefully examined the record and are of the opinion that there is sufficient competent evidence to sustain the allegations of the indictment.

We have also considered all the exceptions set out in the appellant's brief and are of the opinion that no error prejudicial to the defendant was committed either in the ruling of the court upon the admission or exclusion of evidence, or in the charge to the jury.

Since no new questions are presented on this appeal, it is not deemed necessary or expedient to discuss the exceptions set out in detail.

In the trial before the Superior Court we find

No error.

STATE v. SALLIE CANNADAY.

(Filed 10 October, 1945.)

APPEAL by defendant from *Burney, J.*, at May Term, 1945, of HARNETT. No error.

The defendant was charged with the possession of intoxicating liquor for the purpose of sale. From judgment pronounced on verdict of guilty the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Neill McK. Salmon for defendant.

PER CURIAM. The only assignment of error brought forward in the case on appeal is the denial by the court below of defendant's motion for judgment of nonsuit. An examination of the record leads us to the conclusion that the evidence offered by the State was sufficient to carry the case to the jury, and that the defendant's motion was properly denied. The evidence supports the verdict and judgment. In the trial we find

No error.

STATE v. JOE TALTON.

(Filed 10 October, 1945.)

APPEAL by defendant from *Thompson, J.*, at March Criminal Term, 1945, of JOHNSTON.

Criminal prosecution upon indictment charging defendant with the murder of one Dewey Daniels.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for a term of not less than five years, nor more than seven years.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Wellons & Canaday for defendant, appellant.

PER CURIAM. All exceptions assigned as error on this appeal have been carefully considered. They present no new questions of law, and are without merit.

Hence, in the judgment below there is

No error.

STATE v. BEN DOVER.

(Filed 17 October, 1945.)

APPEAL by defendant from *Bobbitt, J.*, at March, 1945, Term, of CLEVELAND.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Horace Kennedy for defendant, appellant.

PER CURIAM. The appellant, Dover, was convicted at March Term, 1945, of Cleveland Superior Court on an indictment charging the felonious receiving of certain automobile tires, knowing them to be stolen. The exceptions taken upon the trial and to the judgment do not show merit, and the result will not be disturbed. The judgment is

Affirmed.

STATE v. NATHANIEL STEVENSON.

(Filed 28 November, 1945.)

APPEAL by defendant from *Burney, J.*, at June Term, 1945, of COLUMBUS.

Criminal prosecution upon bill of indictment charging in separate counts that defendant and others did unlawfully (1) transport, (2) possess, and (3) possess for the purpose of sale, respectively, intoxicating liquors, upon which the State and Federal taxes had not been paid, contrary to the form of the statute, etc.

Verdict: Guilty thereof in manner and form as charged in the bill of indictment.

Judgment: Pronounced—and defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Detlaw Sanderson and Wm. F. Jones for defendant, appellant.

PER CURIAM. The assignments of error brought up for consideration on this appeal in the main relate (1) to trial court's overruling of motion of defendant for a continuance, (2) to alleged expressions of opinion by the court, (3) to refusal of motion for judgment as of nonsuit, and (4) to portions of the charge.

Careful consideration of each of them, in the light of the factual situation and of the evidence offered considered in the light most favorable to the State, reveals no new questions of law and only a case for the jury. Moreover, defendant fails to show prejudicial error. Hence, in the judgment below we find

No error.

STATE v. GILBERT BARFIELD.

(Filed 28 November, 1945.)

APPEAL by defendant from *Sink, J.*, at March Term, 1945, of SCOTLAND.

Criminal prosecution tried upon indictment charging defendant with an assault with a deadly weapon, with intent to kill one James Haywood.

Verdict: Guilty of assault with a deadly weapon. Judgment: To be confined in the common jail of Scotland County and assigned to work for a period of two years, as provided by law.

The defendant appeals, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

Z. V. Morgan for defendant.

PER CURIAM. We have carefully considered the exceptions presented, and do not find any of sufficient merit to justify interference with the verdict below.

No error.

STATE v. TIM COX.

(Filed 12 December, 1945.)

APPEAL by defendant from *Burgwyn, Special Judge,* at April Term, 1945, of ROBESON.

Criminal prosecution on a warrant charging the unlawful operation of a motor vehicle upon the public highways while under the influence of intoxicating liquor.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Rhodes, Moody, and Tucker for the State.

L. J. Britt and F. D. Hackett for defendant, appellant.

PER CURIAM. The only exceptive assignment of error is directed to alleged error in the charge. The defendant insists the court, in reviewing the contentions of the State, used language which tended to discredit witnesses for the defendant and, in effect, constituted an expression of opinion.

We are not persuaded the contention as stated by the court is not reasonably supported by the facts and circumstances appearing on this record. In any event it did not constitute an intimation of the opinion of the court or otherwise impinge upon the provisions of G. S., 1-180. Hence the assignment of error is without substantial merit.

No error.

DISPOSITION OF APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES.

S. v. Williams, 224 N. C., 183. Affirmed 21 May, 1945.

WORD AND PHRASE INDEX.

Abatement—Plea in, overruled where actions not same and result sought dissimilar, *Taylor v. Schaub*, 134.

Abortion—Aiding and abetting evidence sufficient, *S. v. Manning*, 41.

Abuse of Process—Defined, *Melton v. Rickman*, 700.

Accounting — Compulsory reference, *Troitino v. Goodman*, 406; for property purchased for joint account and concealed, *Hatcher v. Williams*, 112; judgment in suit for, not *res judicata* in action for restraining order, *Taylor v. Schaub*, 134.

Acknowledgment—By notary on deed showed commission had expired effect, *Crissman v. Palmer*, 472.

Actions—Defined, as used in *lis pendens* statute, *Whitehurst v. Abbott*, 1; and defined generally, *ibid.;* predicated on statute must be within its terms, *Padgett v. Long*, 392; in foreign state to avoid our exemption laws, *ibid.*

Admissions—And Declarations, competent to prove undue influence, *In re Will of Ball*, 91; of killing in murder case, *S. v. Matheson*, 109; of agent as evidence against principal, *Steele v. Coxe*, 726.

Adverse Possession—Acts of, by predecessors in title only unavailing, *Perry v. Alford*, 146; listing and paying taxes alone not evidence of, *ibid.;* defined, *ibid.;* insufficient evidence of, *ibid.*

Agency—See Principal and Agent, Brokers and Factors; Master and Servant, Attorney and Client.

Aider and Abettor—Defined, *S. v. Williams*, 182.

Alienation of Affections—Proof required, position of relatives, *Ridenhour v. Miller*, 543.

Alimony—Subsistence in discretion of trial court, *Oldham v. Oldham*, 476; no defense limits power except adultery, *ibid.*

Ancient Grants—Not shown to cover *locus in quo* inadmissible, *Kelly v. King*, 709.

Anti-Trust Laws—Federal anti-trust laws have no application to contracts and transactions as to patents, wholly within the State, *Coleman v. Whisnant*, 494.

Appeal and Error—*Certiorari* not available to extend time for making and serving case on appeal, *Bell v. Nivens*, 35; statement of case on appeal not served in time a nullity, *ibid.;* failure to have case on appeal settled does not require dismissal, appellant may present case on record proper, *ibid.;* party who asserts no right in subject of action, divests himself of right to appeal, *In re Morris*, 48; on appeal from injunction, findings not conclusive but presumed supported by evidence, *Mullen v. Louisburg*, 53; case tried on misapplication of principles remanded for another hearing, *Coley v. Dalrymple*, 67; exception not brought forward in brief, abandoned, *S. v. Hill*, 74; *S. v. Sutton*, 332; *Troitino v. Goodman*, 406; *Beam v. Gilkey*, 520; law in opinion confined to particular case, *S. v. Crandall*, 148; judgment in excess of statutory penalty stricken and remanded for proper judgment, *S. v. Murphy*, 115; opinion on former appeal in same case conclusive, *Cheshire v. Church*, 165; motion to dismiss as frivolous and for delay, before appeal docketed, dismissed, *Indemnity Co. v. Hood, Comr.*, 187; sentence suspended on condition without appeal in criminal case, want of due process waived, *S. v. Miller*, 213; no jurisdiction in court below, none on appeal, *ibid.;* duty of court below to pronounce judgment as directed by appellate court, but not necessarily at next term, *S. v. Graham*, 217; to warrant new trial ruling complained of must have been material and prejudicial, *S. v. King*, 236; evidence material in former trial not offered, so exception not tenable, *S. v. Friddle*,

240; theory of trial binding, *Hobbs v. Coach Co.*, 323; failure to file case in time, appellant may apply for *certiorari*, *S. v. Jones*, 363; agreement, unsupported by exception ineffective as exception without argument or authority, *S. v. Britt*, 364; exception for failure to charge as required by G. S., 1-180, must be taken and error pointed out specifically, otherwise broadside, ibid.; findings approved and supported by evidence binding, *Troitino v. Goodman*, 406; erroneous judgment reviewed by appeal, *Crissman v. Palmer*, 472; motion for new trial for newly discovered evidence made, when, *ibid.;* court below without jurisdiction, none on appeal, *Ridenhour v. Ridenhour*, 508; Supreme Court may render final judgment in what cases, *Goodson v. Lehmon*, 514; original *lis pendens* sufficient after dismissal, reversal or nonsuit on appeal, for causes other than on merits, *ibid.;* appeal from judgment, approving findings and award of Industrial Commission presents only whether facts sufficient to support same, *Rader v. Coach Co.*, 537; court judicially knows only what in record, *S. v. Morgan*, 549; parol evidence of estate by entireties, without objection, cannot be corrected on appeal, *Pugh v. Pugh*, 555; appeal from order allowing amendment and additional parties premature, *Order of Masons v. Order of Masons*, 561; findings of Industrial Commission conclusive on appeal, *Fox v. Mills, Inc.*, 580; exception to award insufficient to bring up findings and evidence, *ibid.;* ordinarily discretionary power to make new parties not reviewable, *Ins. Co. v. Motor Lines, Inc.*, 588; on proper order for examination of adverse party, appeal premature and ordinarily dismissed, *Fox v. Yarborough*, 606; burden on appellant to show error and that he was prejudiced thereby, *Smith v. Steen*, 644; generally court will not hear appeal, when matter has been settled or has ceased to exist, costs being only controversy, *Cochran v. Rowe*, 645; in *habeas corpus* parol improperly revoked, which impropriety corrected, appeal dismissed, *In re Burnett*, 646; findings and judgment discretionary, no review in absence of gross abuse, *S. v. Marsh*, 648; admissibility of evidence for court and when dependent upon fact, findings of judge based on evidence not reviewable, except for error of law, *S. v. Brooks*, 662; statutory requirements for pauper appeals mandatory and jurisdictional, *Clark v. Clark*, 687; appeal both premature and fragmentary, dismissed, *S. v. Todd*, 689; no appeal from denial of motion for judgment on pleadings, *ibid.*

Appearance—General, and obtaining time to plead subjects party to jurisdiction and waives irregularities in service, *Wilson v. Thaggard*, 348; by attorney or in person, *New Hanover County v. Sidbury*, 679.

Arson—Evidence competent, *S. v. Smith*, 78.

Assault and Battery—With deadly weapon and intent to kill, *S. v. Cody*, 38; charge of crime and less degrees, *ibid.;* with deadly weapon, two years imprisonment not cruel and unusual, *S. v. Crandall*, 148; indictment for felonious and secret assault with deadly weapon and intent to kill, *S. v. Murdock*, 224; with deadly weapon, to wit, a hoe, charge not sufficient without description of hoe to show deadly character, *S. v. Harrison*, 234; right to defense of one's home is substantive, as is also right to evict trespasser from home, *S. v. Spruill*, 356; shooting with pistol sufficient evidence of, *S. v. Miller*, 478; only evidence of assault with deadly weapon, charge guilty or not guilty, *ibid.;* no consideration for promise to pay for injuries to plaintiff in protecting defendant from murderous assault, *Harrington v. Taylor*, 690.

Assumpsit—Contracts between husband and wife based on, *Ritchie v. White*, 450; not applicable where parties may not effectually agree, *ibid.*

Attachment—In foreign state to avoid our exemption law, *Padgett v. Long*, 392.

Attorney and Client—Reasonable fees paid attorney by guardian allowable, *Casualty Co. v. Lawing*, 103; suit for fee resisted under Soldiers' and Sailors' Civil Relief Act, *Bell v. Niven*, 395; client may not appear in person and by attorney at same time, *New Hanover County v. Sidbury*, 679.

Authentication of Records—Statutes on, implement constitutional requirements of full faith and credit, but are not exclusive, *Kearney v. Thomas*, 156; as to record of marriage, *ibid.*

Automobiles—Plaintiff's agent, driving plaintiff's automobile, contributing negligently to plaintiff's injury, would bar recovery from another, *Evans v. Johnson*, 238; S. C. law on recovery for negligence by guest passenger, *Harper v. Harper*, 260; recovery of wife based on negligence of husband driving her car, whether husband her agent for jury, *ibid.;* owner has right to control operation of, and when present negligence of driver, nothing else appearing, imputable to owner, *ibid.;* collision, theory of trial *respondeat superior*, *Hobbs v. Coach Co.*, 323; ample evidence of negligence in head-on collision and motion for nonsuit properly denied, *ibid.;* reasonable care in operation of, *Henson v. Wilson*, 417; small child on road, injured by, *ibid.;* duties of users of highway, correlative, *Cummins v. Fruit Co.*, 625; driver not required to anticipate unlighted, unguarded vehicle on highway at night, *ibid.;* evidence sufficient for jury as to presence of injured worker on truck of employer with consent or ratification, *Dark v. Johnson*, 651; collision between two, at intersection, instructions should state evidence as to right of way, *Stewart v. Cab Co.*, 654; stopping on paved highway to permit passengers to alight or board, not parking within statute, and no violation thereof, *Morgan v. Coach Co.*, 668; violation of statute relative to operation of, on highway, negligence *per se*, *Tysinger v. Dairy Products*, 717.

Bad Check—Use of process to collect, as malicious, *Melton v. Rickman*, 700.

Bailment—Distinguished from principal and agent, *Sink v. Sechrest*, 232.

Bankruptcy—Exempted property excepted from Federal Act, *Sample v. Jackson*, 380; trustee must set exempted property apart to bankrupt, or court in absence of trustee, *ibid.;* does not affect judgment against guardian for breach of trust, *Trust Co. v. Parker*, 480; defalcation in, includes failure of fiduciary to account, *ibid.*

Banks and Banking—Venue as to receivers of banks, *Indemnity Co. v. Hood, Comr.*, 361.

Bastards—Neither paternity nor failure to support, sufficient to convict father of, without willfulness, *S. v. White*, 351; no demand by mother for, and acceptance of $20 in lieu of support not sufficient evidence against father of, *ibid.;* willfulness of neglect or refusal to support, essential element and must be charged and proved, *S. v. Vanderlip*, 610.

Beneficiary—Estopped to attack administration of trust by successive trustees, *Cheshire v. Church*, 165.

Bequeath—Usually applies aptly to personalty, but may include realty, *Ferguson v. Ferguson*, 375.

Betterments—Where defendant tendered and plaintiff accepted property in litigation, on condition of payment for improvements, only issue is amount expended therefor and value, *Featherstone v. Glenn*, 404.

Bill of Discovery—Statutory provisions and procedure, *Fox v. Yarborough*, 606; proper order for, appeal premature, *ibid.*

Bills and Notes—Evidence of executing and validity of note by maker sufficient to go to jury, *Lee v. Beddingfield*, 573.

"Bodily Heirs"—See *Jackson v. Powell*, 599.

Bonds and Notes—Of county issued only under statutory authority and approval thereof by Local Government Commission, not approval of their validity, *Ins. Co. v. Guilford County*, 293; of U. S. governed by Federal law, *Ervin v. Conn*, 267; restrictions on transfer and succession of U. S. bonds irrespective of State laws, *ibid.*

Book of Account—Produced in execution proceedings, *Cotton Co., Inc., v. Reaves*, 436.

Boundaries—*Bona fide* dispute between adjoining landowners as to boundary may not be nonsuited, *Cornelison v. Hammond*, 535; only one issue in dispute as to true boundary between adjoining owners, *ibid.;* all descriptive matter in conveyance considered to identify land, but weight different, *Tice v. Winchester*, 673; non-navigable waters as, to thread of stream and otherwise, *Kelly v. King*, 709; recorded map is controlling over metes and bounds, *ibid.*

Brokers and Factors—Commissions recovered only where, finds during agency buyer or lessee within terms specified by owner, *Ins. Co. v. Disher*, 345; unsuccessful efforts insufficient, *ibid.;* terms not met on facts, *ibid.;* oral contracts between, and principals for sale of lands, enforceable, *White v. Pleasants*, 760; no stated compensation, entitled to reasonable value of services rendered, *ibid.*

Burden of Proof—On one claiming to be innocent purchaser for value without notice, *Whitehurst v. Abbott*, 1; failure of passenger to move seat on request of driver of common carrier does not shift, on warrant for violating separate seating of races, *S. v. Brown*, 22; on pleader particularizing character of separation in divorce, *Taylor v. Taylor*, 80; on one setting up abandonment and recrimination, *ibid.;* on lessee to show contract by landlord for repairs, *Harrill v. Refining Co.*, 421; on pleader of fraud, *Griffin v. Ins. Co.*, 684.

Burial Association—See Mutual Burial Association.

Carriers—Requirements as to seating white and colored by, *S. v. Brown*, 22; common, right to intervene where liquor, in interstate commerce, seized and confiscated, *S. v. Gordon*, 241.

Caveat—Innocent purchaser for value, prior to, acquires good title, *Whitehurst v. Abbott*, 1; *lis pendens* essential in, *ibid.;* defined, *ibid.;* successful, makes void certified copy recorded in another county, *ibid.*

Caveat Emptor—Applies to sales of land without express warranty in absence of fraud or mistake, *Turpin v. Jackson County*, 389; applied to tort action by lessee against lessor, *Harrill v. Refining Co.*, 421.

Certiorari—Writ of, in Supreme Court not available to extend time for making and serving case on appeal, *Bell v. Nivens*, 35; will preserve right of appeal, *ibid.; S. v. Jones*, 363; where court imposes suspended criminal sentence for condition broken, no appeal and remedy by, *S. v. Miller*, 213.

Children—Reasonable care in relation to, by operator of automobile, *Henson v. Wilson*, 417; willfulness of neglect or refusal to support illegitimate child, essential element and must be charged and proved, *S. v. Vanderlip*, 610; *S. v. White*, 351.

Clerks of Superior Court—As juvenile court shall give each infant such oversight as is to its best interest, *In re Morris*, 48; may not delegate authority to render judgment in tax foreclosures, *Eborn v. Ellis*, 386; facsimile rubber stamp signatures

of, authorized for summons, pleadings, notices, judgments in tax foreclosures, *ibid.; de jure* and *de facto* character of claimant and incumbent, where clerk on leave in military service and commissioners appoint successor, *English v. Brigman*, 402; issuance of summons by, ministerial act without personal interest, *ibid.*

Commerce Clause—Intoxicating liquor within protection of, *S. v. Gordon*, 241.

Confessions—Competent when voluntary, *S. v. Mays*, 486; competency of question for court after hearing evidence of circumstances, *S. v. Brooks*, 662; presumption that voluntary, *S. v. Wise*, 746.

Confiscation—Of liquor in interstate commerce, *S. v. Gordon*, 241; statutes for, of liquor clearly contemplate hearing, *ibid.*

Congress—Power to authorize bonds issued with restrictions on transfer and succession contrary to State law, *Ervin v. Conn*, 267.

Colored Persons—Required to move seat on common carrier, *S. v. Brown*, 22.

Consideration—In deeds, effect, etc., *Westmoreland v. Lowe*, 553.

Constitutional Law — Judgment on *habeas corpus* by court of another state not entitled to, when, *In re Morris*, 48; cruel and unusual punishment, *S. v. Crandall*, 148; full faith and credit clause not exclusive as to authentication of documents, *Kearney v. Thomas*, 156; statutes of authentication implement of Constitution, *ibid.;* charters and rules of Burial Association subject to change by Legislature, when, *Spearman v. Burial Assn.*, 185; obligations of contract, *ibid.;* liquor protected by commerce clause, *S. v. Gordon*, 241; U. S. power to borrow money and regulate contracts therefor as to succession by survivorship, irrespective of State laws, *Ervin v. Conn*, 267; power of Congress to authorize Secretary of Treasury and President to issue bonds with restrictions on transfer, *ibid.;* validity of municipal ordinance, cannot be tested by *mandamus*, *Jarrell v. Snow*, 430; injunction not proper remedy to determine constitutionality of act or ordinance, *ibid.;* no limitation on power of Legislature to create corporations for public purpose, *Brumley v. Baxter*, 691.

Contempt of Court—Court should not withhold punitive measures to enforce appropriate decree, *In re Morris*, 48.

Contracts—Between municipality and utility to purchase electricity for redistribution, *Mullen v. Louisburg*, 53; under G. S., 143-129, construction and purpose, *ibid.;* oral to devise realty void, *Coley v. Dalrymple*, 67; covered by writing or writings without ambiguity or dispute, construction for court, *Atkinson v. Atkinson*, 120; not usually enforced by equity, *ibid.;* necessity for further agreement avoids, *ibid.;* unilateral, *ibid.;* in action on, for services and defense of failure of performance and damages and evidence *pro* and *con*, matter for jury and defendant entitled to damages proximately resulting from breach, *Caldwell v. McCorkle*, 171; certificates of incorporations and rules subject to change by act of Legislature, when, *Spearman v. Burial Assn.*, 185; laws in force at time become part of contract, *ibid.;* in action on, plea of tort as counterclaim, *Smith v. Smith*, 189; Federal, such as bonds, governed by law of U. S., *Ervin v. Conn*, 267; provisions in deed from individual to county, by which the county undertook to assume and agreed to pay a mortgage indebtedness on the property, is not enforceable as an express contract, *Ins. Co. v. Guilford County*, 293; fraud in inducement vitiates, *Laundry Machinery Co. v. Skinner*, 285; with a county, *Ins. Co. v. Guilford County*, 293; trust agreement has status of a, and cannot be amended by a court,

Trust Co. v. Steele's Mills, 302; conditional delivery of deed not a contradiction of written instrument, *Lerner Shops v. Rosenthal*, 316; quitclaim deed sufficient consideration to support, *Turpin v. Jackson County*, 389; *caveat emptor* applies in, for sale of land, in absence of fraud or mistake, *ibid.;* damages recoverable on breach of, *Troitino v. Goodman*, 406; special damages and foreseeable, *ibid.;* damages under, ordinary such only as cannot by reasonable effort be avoided, *ibid.;* of marriage and rights, privileges and obligations incident to, *Ritchie v. White*, 450; suit on, as to patents and rights thereunder, *Coleman v. Whisnant*, 494; fraud, coercion to avoid, *ibid.;* separation agreement between husband and wife must be according to statutory requirement or void, *Pearce v. Pearce*, 571; malicious motive cannot make lawful act wrong, *Burton v. Smith*, 584; action cannot be maintained for inducing third person to break contract with plaintiff, *ibid.;* no consideration for promise to pay for injuries to plaintiff in protecting defendant from murderous assault, *Harrington v. Taylor*, 690; oral, between owners and brokers for sale of land, enforceable, *White v. Pleasants*, 760.

Corporations—Suit against foreign and individual to prevent transfer of its stock, which impounded, *Holladay v. General Motors Corp.*, 230; may transfer funds to trust for purpose of giving financial aid to its needy employees and their dependents in cases of accident or sickness, *Trust Co. v. Steele's Mills*, 302; suit against, to have its stock transferred, necessary and proper parties, *Griffin & Vose, Inc., v. Minerals Corp.*, 434.

Counterclaim—Pleading tort action as, in action under contract, *Smith v. Smith*, 189; for debt under separation agreement not cognizable in divorce action, *Jenkins v. Jenkins*, 681.

Counties—Provisions in deed from individual to county, by which the county undertook to assume and agreed to pay a mortgage indebtedness on the property, is not enforceable as an express trust, *Ins. Co. v. Guilford County*, 293; approval of bonds or notes of, by Local Government Commission is not an approval of their legality, *ibid.*

Courts—Liability for tort determined by *lex loci*, *Buckner v. Wheeldon*, 62; jurisdiction derivative, where Superior has none, Supreme Court has none on appeal, *S. v. Miller*, 213; negligence determined by *lex loci*, *Harper v. Harper*, 260; conflict of law, Federal and State, State must yield to Federal, *Ervin v. Conn*, 267; bonds of U. S. governed by Federal laws, *ibid.;* State and Federal, jurisdiction over patents, *Coleman v. Whisnant*, 494; Federal anti-trust laws not applicable to litigation as to ownership and use of patent wholly within State, *ibid.;* judge assigned to district has jurisdiction of all "in chambers" matters, *Ridenhour v. Ridenhour*, 508; Supreme Court may render final judgment, when, *Goodson v. Lehmon*, 514; power to correct minutes to speak truth, *S. v. Morgan*, 549; *lex fori* governs remedy, *Sayer v. Henderson*, 642; Superior Court has jurisdiction to enforce, regardless of amount of penalties, if attorney's fees claimed, *Hilgreen v. Cleaners & Tailors, Inc.*, 656.

Criminal Law—Where no shifting of burden of proof, State must prove every element beyond reasonable doubt, *S. v. Brown*, 22; State may not appeal on judgment of guilty on purported special verdict on conclusion of unconstitutionality, *S. v. Mitchell*, 42; evidence considered on motion for nonsuit, *S. v. Scoggins*, 71; impeaching State's witness, evidence of previous similar statements, *ibid.;* failure to charge as to good character of defendants, in absence of request, *ibid.;* admission of declaration by prosecuting

witness, "I am going to die," *S. v. Hill*, 74; failure to move for nonsuit at close of State's evidence, benefit lost, *ibid.;* evidence, arson, *S. v. Smith*, 78; errors in court's statement of contentions, *ibid.;* declaration of killing by defendant, as he commandeered taxi, gun in hand, competent, *S. v. Matheson*, 109; exception waived when like evidence admitted without objection, *ibid.;* premeditation and deliberation, where killing intentional without provocation, *ibid.;* nonsuit properly denied, murder in first degree, *ibid.;* deliberation not capable of actual proof, *ibid.;* evidence as to highway robbery not sufficient, *S. v. Murphy*, 115; general verdict where two offenses charged sentence may be imposed on each count if verdict proper and evidence sufficient, *ibid.;* judgment in excess of statutory penalty stricken and remanded for proper judgment, *ibid.;* retroaction of plea of guiltq on appeal from recorder's court, *S. v. Crandall*, 148; plea of guilty is formal confession, *ibid.;* general plea of guilty covers all offenses charged, *ibid.;* verdict must be accepted unless incomplete, *ibid.;* verdict of acquittal in term must be accepted, *ibid.;* two persons present, encouraging each other homicide, both principals, *S. v. Williams*, 182; aider and abettor defined, *ibid.;* judgment suspended, *S. v. Miller*, 213; court may suspend judgment *in toto* to another term, *S. v. Graham*, 217; evidence considered how, on nonsuit, *S. v. Heglar*, 220; *S. v. Murdock*, 224; *S. v. Murphy*, 115; *S. v. Gordon*, 757; no new trial in criminal cases for newly discovered evidence, *S. v. King*, 236; charge construed contextually, *S. v. French*, 276; premeditation and deliberation, *ibid.;* charge in criminal prosecution for murder on material contention, unsupported by evidence and in direct conflict with undisputed State's evidence, is harmful error, although not called to court's attention, *S. v. Isaac*, 310; identification of prisoner and corroboration by prosecutrix, *S. v. Sutton*, 332; evidence competent for one purpose, in absence of request to restrict, competent generally, *ibid.;* sufficient evidence to support verdict and judgment, in capital case, exceptions to refusal to set aside verdict and judgment, untenable, as discretionary, *ibid.;* recapitulation of all evidence not demanded, and sufficient to present principal features relied on, *ibid.;* voluntary confession, without warning by officers, competent, *S. v. Lord*, 354; impeaching witness (defendant's wife) by showing statement contrary to testimony on stand, *S. v. Britt*, 364; exceptions based on G. S., 1-180, must be made and error pointed out specifically, otherwise broadside, *ibid.;* generally presumed that sentences imposed in same jurisdiction to be served in same place, run concurrently and no presumption that cumulative, *In re Parker*, 369; intention of sentence should prevail where clear but meaningless sentence cannot be explained *aliunde* or *dehors*, *ibid.;* on appeal in capital case on record, which show no arraignment on plea, *certiorari* showing both, and record regular otherwise, no error, *S. v. Williams*, 475; evidence of physician as expert as to death caused by suffocation, *S. v. Mays*, 486; confession competent when voluntary, *ibid.;* photographs of wounds competent, *ibid.;* State's evidence on charge, conviction of less degree of offense valid, *S. v. Morgan*, 549; presiding judge may appoint member of bar to prosecute in absence of solicitor and objection after adverse verdict too late, *ibid.;* malicious motive cannot make lawful act wrong, *Bruton v. Smith*, 584; motion in arrest of judgment, where essential element of crime not charged, *S. v. Vanderlip*, 610; on conviction of unlawful possession of liquor and finding breach of

condition of former sentence and concurrent sentences, first greater than second, no error, *S. v. Stutts*, 647; findings supported by evidence that condition broken, sufficient to support judgment on suspended sentence, *S. v. Marsh*, 648; competency of confession for court, after hearing evidence of its circumstances, *S. v. Brooks*, 662; supplemental instructions to jury correcting error in original charge in capital case, proper, *ibid.;* confessions and evidence of officers before whom made, no evidence to contradict, *S. v. Wise*, 746; voluntary recommendation by jury for mercy, surplusage, *ibid.*

Cruel and Unusual Punishment—*S. v. Crandall*, 148.

Customer—Store owes what duty as to dangerous condition, *Ross v. Drug Store*, 226.

Damages—Special, defined, *Penner v. Elliott*, 33; in action for defamation not actionable *per se*, special damages must be pleaded and proven, *ibid.;* humiliation and mental anguish not special, *ibid.;* in action on contract and defense of failure to perform and damages, and evidence *pro* and *con*, matter for jury and defendant entitled to damages proximately resulting from breach, *Caldwell v. McCorkle*, 171; recoverable on breach of contract, *Troitino v. Goodman*, 406; special foreseeable, *ibid.;* on breach of contract ordinarily only such as cannot, with reasonable effort be avoided, *ibid.;* to surface soil and superstructures in mining feldspar and kaolin, *English v. Clay Co.*, 467; *damnum absque injuria*, *Bruton v. Smith*, 584; to riparian owners, *Kelly v. King*, 709; measure of, in ejectment, *McGuinn v. McLain*, 750.

Damnum Absque Injuria—See *Bruton v. Smith*, 584; *Kelly v. King*, 709.

Deadly Weapon—Hoe used as, *S. v. Crandall*, 148; hoe not deadly *per se*, *S. v. Harrison*, 234.

Death—Will speaks as of date of, *Ferguson v. Ferguson*, 375; mortuary tables as evidence, *Rea v. Simowitz*, 575; must be precedent proof of age, *ibid.;* action to recover damages for wrongful death, what necessary to allege and prove, *Morgan v. Coach Co.*, 668; *Tysinger v. Dairy Products*, 717.

Declarations—When competent as proof of undue influence and when corroborative, *In re Will of Ball*, 91; of killing competent, *S. v. Matheson*, 109.

Declaratory Judgment Act—Issues of fact to be determined by jury, *Ins. Co. v. Wells*, 547.

Deed—Burden on one claiming to be innocent purchaser, *Whitehurst v. Abbott*, 1; absolute on face with option to repurchase, *Ricks v. Batchelor*, 8; one purchasing record title, without notice protected, *ibid.;* of separation between husband and wife, requisites for validity, *Smith v. Smith*, 189; statutory requirements, *ibid.;* parol agreement of conditional delivery of, valid, *Lerner Shops v. Rosenthal*, 316; conditional delivery of, may be from grantor to grantee, *ibid.;* legal delivery not necessarily manual or physical transfer, *ibid.;* intention to deliver is necessary to transfer title, *ibid.;* of gift void unless registered in two years, *Ferguson v. Ferguson*, 375; quitclaim, where only grantor's interest conveyed, *Turpin v. Jackson County*, 389; no implied covenants in, *ibid.; caveat emptor* in, *ibid.;* delivery essential to vest title, *McMichael v. Pegram*, 400; conveying fee cannot create trust in favor of grantor, *Carlisle v. Carlisle*, 462; *Loftin v. Kornegay*, 490; notary's acknowledgment on, showed commission had expired, effect, *Crissman v. Palmer*, 472; registration on certificate by notary whose commission had expired, invalid, *ibid.;* incompetency to make, and undue influence joined in one action, *Goodson v. Lehmon*, 514; restraint on alienation void, *Beam v. Gilkey*, 520; burden on plaintiffs in action to annul deed, *In re Will*

of Atkinson, 526; affecting standing timber must be required for realty, *Westmoreland v. Lowe*, 553; made by authority of judgment, *Johnson v. Lumber Co.*, 595; every conveyance deemed in fee unless contrary appears, *Jackson v. Powell*, 599; rule in *Shelley's case*, *ibid.;* descriptive matter in, considered but weight different, *Tice v. Winchester*, 673; beginning point established, it cannot be shifted by call for course and distance, *ibid.;* description by recorded maps as to lot and block is controlling over metes and bounds, *Kelly v. King*, 709; consideration in, presumed correct, but may be attacked, *Hinson v. Morgan*, 740.

Defalcation—In criminal statutes implies moral dereliction, but is broader in Bankruptcy Act, including failure of fiduciary to account, *Trust Co. v. Parker*, 480.

Demurrer—To new matter in answer, *Smith v. Smith*, 189; admits facts and not law, *Newton v. Chason*, 204; *Padgett v. Long*, 392; *Smith v. Smith*, 189; *ore tenus* granted on request for injunction when remedy at law, *ibid.;* allegation that plaintiff's agent, driving plaintiff's car, negligently contributed to plaintiff's injury not demurrable, *Evans v. Johnson*, 238; to allegations of coercion, *Coleman v. Whisnant*, 494; demurrer sustained for want of necessary party, motion allowed to join such party is reversal of demurrer, *Ins. Co. v. Motor Lines, Inc.*, 588.

Devisavit Vel Non—On issue of, no evidence of undue influence, *In re Will of Ball*, 91.

Devise—Usually signifies realty, but may include personalty, *Ferguson v. Ferguson*, 375.

Discovery—See Bill of Discovery.

Divorce—Evidence of separation and of abandonment and recrimination for defendant case for jury, *Taylor v. Taylor*, 80; separation under statute unrestricted, but must be voluntary, *ibid.;* not necessary to plead cause of separation, *ibid.;* plaintiff not bound to anticipate defenses, *ibid.;* material facts in every complaint for, deemed denied and must be found by jury, *ibid.; Moody v. Moody*, 89; burden on defendant as to abandonment and recrimination, *ibid.;* for two years' separation, parties living in same room but no intercourse, nonsuit proper, *Dudley v. Dudley*, 83; no evidence of separation, nonsuit, *Moody v. Moody*, 89; affidavit required by G. S., 50-8, jurisdictional, *Young v. Young*, 340; complaint with false affidavit insufficient to support decree, *ibid.;* separation not sufficient where parties held themselves out as husband and wife, *ibid.;* separation agreements, *Ritchie v. White*, 450; *Pearce v. Pearce*, 571; alimony without divorce and subsistence and counsel fees *pendente lite*, *Oldham v. Oldham*, 476; amount not reviewable, but may be modified on motion, *ibid.;* suit by wife against former husband to have them declared tenants in common of estate by entireties, *Pugh v. Pugh*, 555; judgment of, not *res judicata* in action under separation agreement, pleaded and ignored in divorce action, *Jenkins v. Jenkins*, 681; counterclaim for debt under separation agreement not cognizable in action for, *ibid.*

"Doing Business"—Question of fact and not definition, *Highway Com. v. Transportation Co.*, 198; foreign corporations vessel regular carrier of freight to this State, *ibid.*

Dower—As affected by separation agreement, *Smith v. Smith*, 189.

Drainage Districts—Assessments collected like taxes, *Newton v. Chason*, 204; a *quasi*-municipal corporation which cannot be collaterally attacked, *ibid.*

Due Process of Law—Where sentence in criminal case suspended on condition without appeal, defendant waives right to complain of want of, *S. v. Miller*, 213; absence of no-

tice or hearing violates, *S. v. Gordon*, 241.

Easement—Set out in writing by original owner of realty development and all owners of lots in certain block, for service and benefit of all such owners and their successors in title, and such block developed and built upon in accordance with such writing, now lost and not recorded, is valid and binding on parties and their privies, *Neamand v. Skinkle*, 383.

Ejectment—Right to evict trespasser from home, *S. v. Spruill*, 356; both parties to, claiming from common source, prior ownership fixed in that action, *Ferguson v. Ferguson*, 375: purported judgment with rubber stamp signature subject to collateral attack in action of, *Eborn v. Ellis*, 386; permission from O.P.A. to institute suit in, does not release property from Emergency Price Control Act, *McGuinn v. McLain*, 750.

Ejusdem Generis—Not generally applicable to residuary clause or what amounts to one, *Ferguson v. Ferguson*, 375.

Electricity—Sale of generating plant by municipality and distribution of, purchased wholesale is not sale of electric plant, *Mullen v. Louisburg*, 53.

Emergency Price Control Act—Absurd result of penalties thereunder avoided, *Hilgreen v. Cleaners & Tailors, Inc.*, 656; permission to sue for possession, does not release property from, *McGuinn v. McLain*, 750.

Equitable Interest—*Barbee v. Lamb*, 211.

Equitable Lien—No lien for purchase money in N. C., *Rudasill v. Cabaniss*, 87.

Equity—Will not relieve where remedy at law, *In re Estate of Daniel*, 18; *Ins. Co. v. Guilford County*, 293; protects property rights to restore *status quo ante injuriam*, *Atkinson v. Atkinson*, 120; character of fraud for relief by, *ibid.;* instruction referred to fraud rather than parol trust, *ibid.;* acts *in personam* rather than *in rem*, *ibid.;* contractual promise not usually enforced by, *ibid.;* none in unilateral contract, *ibid.;* will not interfere, ordinarily with enforcement of municipal ordinance, *Jarrell v. Snow*, 430; will instruct trustees to proceed to act in dividing and valuing estate under will, where they refuse to act, *Cannon v. Cannon*, 611.

Estates—By entireties, husband paying for and deed to him and wife, *Rudasill v. Cabaniss*, 87; rights of husband in, *Atkinson v. Atkinson*, 120; option on, terminated on change of ownership by survivorship, *ibid.;* suit by wife against former husband to have them declared tenants in common, after divorce, *Pugh v. Pugh*, 555; vested remainder in children of life tenant, subject to open for those after-born and subject to be divested, *Beam v. Gilkey*, 520; motion in 1945 to vacate sale and confirmation in 1922, refusal proper, *ibid.*

Estoppel—Against beneficiary attacking administration of trust by successive trustees, *Cheshire v. Church*, 165; in suit for specific performance, title claimed under will, probate of which nonsuited, party moving for such nonsuit being before court, is bound by judgment, *Burney v. Holloway*, 633.

Evidence—Whether deed and option is mortgage, *Ricks v. Batchelor*, 8; direct, in fornication and adultery not essential, *S. v. Davenport*, 13; *res gestæ*, *S. v. Hill*, 74; *S. v. Smith*, 78; exception to, untenable when like evidence admitted without objection, *S. v. Matheson*, 109; *Hobbs v. Coach Co.*, 323; Federal statutes for authentication implement full faith and credit clause, not exclusive, *Kearney v. Thomas*, 156; of parol trust, *McCorkle v. Beatty*, 178; where court subsequently admits evidence erroneously excluded, not harmful, *S. v. King*, 236; no new trial in criminal cases for newly discovered evidence, *ibid.;*

declaration of party need not be part of *res gestæ* and admissible when, *Hobbs v. Coach Co.*, 323; declarations and admissions by one of several defendants admissible against him but not against his co-defendants, *ibid.;* incompetent, admitted, subsequent charge to jury not to consider it cures error, *ibid.;* identification of prisoner by prosecutrix, *S. v. Sutton*, 332; exclusion of testimony of prosecutrix on cross-examination as to her former evidence of her knowledge of penalty for rape, harmless, *ibid.;* court should instruct jury that corroboratory evidence competent only for that purpose, *ibid.;* to corroborate prisoner, in criminal case before he goes upon stand incompetent, *ibid.;* impeaching witness (defendant's wife) by showing statements contrary to testimony on the stand, *S. v. Britt*, 364; impeaching witness, admitted generally without objection or request for restriction, becomes substantive, *ibid.;* of rents collected by defendant's intestate on plaintiff's property, personal transaction and inadmissible, *McMichael v. Pegram*, 400; books of execution debtor produced, *Cotton Co., Inc., v. Reaves*, 436; production of, in possession of adverse party, *ibid.;* of declaration incompetent, where title in suit acquired after declarations made, *Lane v. Becton*, 457; degree of proof to establish parol trust, *Carlisle v. Carlisle*, 462; expert of physician that death caused by suffocation, *S. v. Mays*, 486; failure to object waives lack of responsiveness, *ibid.;* of default in debt secured by mortgage competent, plaintiff claiming title thereunder, *Ins. Co. v. Boogher*, 493; of equal weight sufficient to rebut a presumption, *In re Will of Atkinson*, 526; defendant in homicide case not required to give, *S. v. Peterson*, 540; expert must qualify how and ruling of trial court conclusive, *ibid.;* a witness, expert or other, who has an opinion of person's handwriting from seeing him write, or seen his business writings acknowledged or on which he was duly charged in course of business, may give such opinion, *Lee v. Beddingfield*, 573; mortuary tables as, *Rea v. Simowitz*, 575; expectance of infants under ten years of age, and there must be precedent proof of age, *ibid.;* opinion, as to testamentary capacity, *In re Will of Lomax*, 592; admissibility of, for court and when dependent on fact, findings of judge based on evidence not reviewable except for error of law, *S. v. Brooks*, 662; admissions of agent in course of employment against principal, and letter as corroborative, *Steele v. Coxe*, 726; hearsay, opinion of husband as to business of wife, *Hinson v. Morgan*, 740.

Excusable Neglect—Must be found as well as meritorious defense to set aside judgment, *Johnson v. Sidbury*, 208.

Execution—On examination under, books of debtor produced, *Cotton Co., Inc., v. Reaves*, 436; accounting of partnership affairs in supplemental proceeding, *ibid.;* sale under, restrained if deed by officer will not pass title, *Holden v. Totten*, 558.

Executors and Administrators—Executor not innocent purchaser from devisees, *Whitehurst v. Abbott*, 1; given full power to sell land for assets by statutes, heirs necessary parties and adverse claimants may be brought in, *In re Estate of Daniel*, 18; oral contract to devise realty in consideration of services void, *Coley v. Dalrymple*, 67; in suit against, for services on special contract, may recover on *quantum meruit, ibid.;* services to mother-in-law not presumed gratuitous, *ibid.;* services by husband and wife, recoverable separately, *ibid;* venue, *Indemnity Co. v. Hood, Comr.*, 361; widow may not recover for domestic service and support of husband under promise by him to devise

home to her, *Ritchie v. White*, 450; implied promise by parent to pay for voluntary services rendered by adult child, not living in parent's home, *Basinger v. Pharr*, 531; loan of money by adult child to parent, payable on death, nonsuit proper, *ibid.*

Exemptions—See Homestead and Personal Property Exemptions.

Ex Proprio Vigore—In equity and fraud, *Atkinson v. Atkinson*, 120.

Facsimile Signatures—Authorized by statute in tax foreclosures, *Eborn v. Ellis*, 386.

False Imprisonment—Defined, *Melton v. Rickman*, 700.

Federal Anti-Trust Laws—Have no application to contracts and transactions as to patents wholly within the State, *Coleman v. Whisnant*, 494.

Federal Courts—See Courts; have jurisdiction of patent rights to what extent, *Coleman v. Whisnant*, 494.

Federal Employers' Liability Act—Does not define "employer" or "employee," hence considered in ordinary sense, *Bourne v. R. R.*, 43; action for wrongful death under, *ibid.;* remedial and liberally construed, but applies only to master and servant, *ibid.;* locomotive engineer of defendant, under permit to study road for future assignment, only licensee, *ibid.*

Federal Government—Power of, under Constitution beyond reach of states, *Ervin v. Conn*, 267.

Feldspar—See *English v. Clay Co.*, 467.

Feme Covert—See *Ritchie v. White*, 450.

Fiduciaries—Under obligation of fair play and good faith, *Hatcher v. Williams*, 112; no liability on trustee for loss on loans, where no evidence of inadequacy of securities when taken, no evidence of bad faith or lack of due diligence, *Cheshire v. Church*, 165; personal residence of, controls venue and citizenship, *Indemnity Co. v. Hood, Comr.*, 361; defalcation in Bankruptcy Act includes failure of fiduciary to account, *Trust Co. v. Parker*, 480; fiduciary character of debt not changed by reducing it to judgment, *ibid.;* certain fiduciary relations raise presumption of fraud as matter of law on dealings between the parties, *In re Will of Atkinson*, 526.

Forfeiture—Judgment of, as to intoxicants, *S. v. Jones*, 363.

Foreign Corporation—Suit against to prevent transfer of its stock, *Holladay v. General Motors Corp.*, 230; service of process on, *Motor Lines v. Transportation Co.*, 733; *Highway Comm. v. Transportation Corp.*, 198.

Fornication and Adultery—Direct evidence not essential, *S. v. Davenport*, 13; sufficiency of evidence, *ibid.;* evidence insufficient, *S. v. Gordon*, 757.

Franchises—To public utility in discretion of municipality, unless prohibited. *Mullen v. Louisburg*, 53.

Fraud—Growing out of concealing property purchased for joint account, *Hatcher v. Williams*, 112; constructive trust, *ex maleficio*, remedial device to prevent, *Atkinson v. Atkinson*, 120; character of, for equitable relief, *ibid.;* presumption of, from conveyance by mortgagor to mortgagee, but prior agreement may validate, *ibid.;* is false representation of subsisting fact but no all-embracing definition, *Laundry Machinery Co. v. Skinner*, 285; in absence of *caveat emptor* applies in sale of real estate, *Turpin v. Jackson County*, 389; fraud and coercion to avoid contract must be pleaded and proven, *Coleman v. Whisnant*, 494; certain fiduciary relations raise legal presumption of fraud on dealings between parties, *In re Will of Atkinson*, 526; an affirmative defense, burden on pleader, *Griffin v. Ins. Co.*, 684; pleaded in defense action not subject to nonsuit, *ibid.*

Fraud, Statute of—Oral contract to devise realty void, *Coley v. Dalrym-*

ple, 67; parol lease over three years void under, *Barbee v. Lamb*, 211; under, no notice to purchaser except by recorded writing, *ibid.;* contracts and deeds as to standing timber governed by rules applicable to realty, *Westmoreland v. Lowe*, 553.

Fraudulent Conveyance—Judgment in suit to set aside, from husband to wife, judgment as reconveyance, void, *Lane v. Becton*, 457.

Franchise—Intrastate, for transportation of freight as property under G. S., 55-38, *Motor Lines v. Transportation Co.*, 733.

Full Faith and Credit Clause—Implemented by statutes on authentication, which are not exclusive, *Kearney v. Thomas*, 156.

Gambling—Injunction closing business, seizure and sale of property for, prostitution and sale of whiskey only, *S. v. Alverson*, 29.

Garnishment—In foreign state to avoid our exemption laws, *Padgett v. Long*, 392.

Gifts—Presumed deed of, void unless registered in two years, *Ferguson v. Ferguson*, 375; presumed, purchaser taking title in name of wife, *Carlisle v. Carlisle*, 462; *Rudasill v. Cabaniss*, 87.

Guardian and Ward—Decree of court having jurisdiction conclusive as to infant's estate, *Casualty Co. v. Lawing*, 103; parent liable for child's support, but when unable, should have allowance from his child's estate, *ibid.;* disbursements by parent guardian prior to appointment allowed when, *ibid.;* reasonable counsel fees proper expense, *ibid.;* bankruptcy does not affect judgment against guardian for breach of trust, *Trust Co. v. Parker*, 480; duty of guardian, as to custody, accounts and investing, *ibid.*

Guest—May recover for negligence in S. C., when, *Harper v. Harper*, 260; wife as guest in own car driven by husband when injury occurred, *ibid.*

Habeas Corpus—Judgment of, in another state as to custody of child subject to jurisdiction here and carried away without court's consent, not entitled to full faith and credit here, *In re Morris*, 48; custody of infant awarded exclusively to one, court justified in seeing that its confidence not abused, *ibid.;* between husband and wife for custody of children, award as *res judicata* on changed circumstances, *Ridenhour v. Ridenhour*, 508.

Handwriting—Proven how, *Lee v. Beddingfield*, 573; handwriting on note proven by expert or law witness, *ibid.*

Heirs—Necessary parties to sale of lands for assets, *In re Estate of Daniel*, 18.

Hoe—Not deadly weapon *per se*, *S. v. Harrison*, 234; used as deadly weapon, *S. v. Crandall*, 148.

Home—Right to defend is substantive, as is right to evict trespasser from, *S. v. Spruill*, 356.

Homestead and Personal Property Exemptions—Excepted from Federal Bankruptcy Act, *Sample v. Jackson*, 380; trustee must set apart, where no trustee court may, *ibid.;* homestead not estate in land but mere exemption from sale, *ibid.;* judgment lien on homestead, *ibid.;* attachment or garnishment in foreign state to avoid, *Padgett v. Long*, 392; action to recover damages for avoiding, allegations necessary, *ibid.*

Homicide—A charge that an intentional killing with deadly weapon, whether rightfully or wrongfully done would be second degree murder, is erroneous, *S. v. Clark*, 52; a killing must be unlawful to constitute either murder in second degree or manslaughter, *ibid.;* involuntary manslaughter, evidence of, *S. v. Scoggins*, 71; use of word "killing" as to degrees of, not harmful, *ibid.;* self-defense available only to one without fault, *S. v. Davis*, 117; aggressor must withdraw when, *ibid.;* two persons present, encouraging and aiding each other in, both principals, *S. v. Williams*, 182;

evidence ample to convict two persons of, *ibid.;* ample evidence of murder, *S. v. French*, 276; evidence of mortician, who examined deceased, that veinous system has broken down, insufficient to take case from jury, *ibid.;* proof that, committed in perpetration or attempt to rape, makes first degree, *S. v. Mays*, 486; sufficient sanity to commit rape, responsible for resulting homicide, *ibid.;* circumstantial evidence sufficient for jury, deceased killed on ride in prisoner's car, *S. v. Peterson*, 540; defendant not required to go upon stand and may rely on weakness of State's case, instructions to contrary, error, *ibid.;* witness of, may tell what he saw without fixing date, *S. v. Horne*, 603; no error in charge as to murder in second degree and manslaughter, *ibid.;* premeditation and deliberation, intent defined, *S. v. Wise*, 746; verdict of murder, with recommendation of mercy entirely voluntary by jury, "mercy" surplusage, *ibid.*

Husband and Wife—Services by husband and by wife to deceased, recoverable by each separately, *Coley v. Dalrymple*, 62; earnings of married woman being her separate property, does not deprive her of sharing in family duties, *ibid.;* married woman still a *feme covert*, *ibid.;* marriage not private affair, *Dudley v. Dudley*, 83; separation, cohabitation, discontinuance of sexual relations relative to divorce, *ibid.;* husband purchases land, taking title by entireties, wife not liable on his note for purchase price, *Rudasill v. Cabaniss*, 87; conveyance of interest to wife, husband paying therefor, presumption of gift, *ibid.; Carlisle v. Carlisle*, 462; rights of husband in estate by entireties, *Atkinson v. Atkinson*, 120; deeds of separation between, requisites necessary to validity, *Smith v. Smith*, 189; *Pearce v. Pearce*, 571; contract between, which fixes sum wife is to receive for support of herself and children must be executed as required by G. S., 52-12, *Daughtry v. Daughtry*, 358; widow not entitled to recover from husband's estate for domestic services and his support, *Ritchie v. White*, 450; devise by husband to wife of her own property not estoppel and does not put her to her election, *Lane v. Becton*, 457; alienation of wife's affections, plaintiff must show what, *Ridenhour v. Miller*, 543; parents and relatives must act in good faith, but occupy different position from stranger in dealing with, *ibid.;* suit between to have them declared tenants in common of estate by entireties, after divorce, *Pugh v. Pugh*, 555; opinion of husband about wife's affairs, hearsay, *Hinson v. Morgan*, 740.

Improvements—See Betterments.

Indictment—Amendment to warrant, *S. v. Brown*, 22; verdict on, containing two or more counts, sentence on each, if valid verdict and proper evidence, *S. v. Murphy*, 115; caption no part of and omission no ground for arrest of judgment, *S. v. Davis*, 117; recital of wrong county, harmless, *ibid.;* plea of guilty generally covers all offenses charged, *S. v. Crandall*, 148; for felonious secret assault with deadly weapon and intent to kill, verdict of secret assault with deadly weapon valid, *S. v. Perry*, 174; sufficient for murder in first degree, no variance proof in perpetration of felony, *S. v. Mays*, 480.

Industrial Commission—See Master and Servant.

Infants—Custody of, awarded to uncle and aunt and modified by award to mother, who asks for writ of assistance, *habeas corpus* judgment in another state, not entitled to full faith and credit, *In re Morris*, 48; custodian's first duty to court of appointment, and court justified in proceeding to that end, *ibid.;* decree of court having jurisdiction conclusive as to infant's estate, *Casualty Co. v. Lawing*, 103.

Injunctions—On appeal from, findings not conclusive, but presumed supported by evidence, *Mullen v. Louisburg*, 53; not granted when adequate remedy at law, *Newton v. Chason*, 204; none to restrain tax lien sales, *ibid.;* attempt by injunction to restrain *mandamus* is collateral attack on judgment, *ibid.;* to protect easement, written agreement lost, *Neamand v. Skinkle*, 383; not proper remedy to determine constitutionality of act or ordinance, *Jarrell v. Snow*, 430.

Insanity—Separation caused by, relative to divorce, *Taylor v. Taylor*, 80.

Instructions—Erroneous, on question of testamentary capacity, is reversible, even though patent and *lapsus linguæ*, *In re Will of Lomax*, 31; in fornication and adultery, *S. v. Davenport*, 13; in assault with deadly weapon and intent to kill, etc., *S. v. Cody*, 38; that intentional killing with deadly weapon, whether rightfully of wrongfully done, is murder in second degree, is error, *S. v. Clark*, 52; errors in statement of contentions, must be called to court's attention, *S. v. Smith*, 78; must be construed contextually, *S. v. Davis*, 117; *S. v. French*, 276; no prayer for, appellate court cannot speculate on form of, *Kearney v. Thomas*, 156; as to duty of proprietor of store to warn customer of hidden danger, *Ross v. Drug Store*, 226; that hoe is deadly weapon *per se* error, *S. v. Harrison*, 234; charge on material contention of a party in murder trial, unsupported by evidence and directly in conflict with undisputed State's evidence, error, though not called to court's attention, *S. v. Isaac*, 310; subsequent charge not to consider incompetent evidence cures error of its admission, *Hobbs v. Coach Co.*, 323: as to impeaching evidence, admitted generally, *S. v. Britt*, 364; failure to object to court's statement of contentions, waiver, *ibid.;* requests for, must be made before argument, *S. v. Morgan*, 549; prayers for, must be in writing, signed, *S. v. Spencer*, 608; should give charge as to right of way, in action result of collision between two motor vehicles, *Stewart v. Cab Co.*, 654; supplemental, after calling jury back, to correct error, proper, even in capital case, *S. v. Brooks*, 662.

Insurance—Evidence on payment of premiums *pro* and *con*, case for jury, *Creech v. Assurance Co.*, 479; issue as to whether automobile in liability policy was being used as public conveyance, for jury, *Ins. Co. v. Wells*, 547; insurer paying loss and suing joint tort-feasor, insured necessary party, *Ins. Co. v. Motor Lines, Inc.*, 588; suit on policy of, defense fraud, action not subject to nonsuit, *Griffin v. Ins. Co.*, 684.

Intent—Proof of mutual, not necessary to conviction of one of parties to fornication and adultery, *S. v. Davenport*, 13; controls as to whether deed and option is a mortgage, *Ricks v. Batchelor*, 8; evidence to establish, *ibid.;* criminal, proven beyond reasonable doubt, *S. v. Brown*, 22; failure of passenger on common carrier to move when requested *prima facie* of intent to violate law for separation of races, *S. v. Brown*, 22; willfulness not necessary, *ibid.;* proven, *S. v. Murdock*, 224; in homicide, *S. v. Wise*, 746.

Interstate Commerce — Intoxicating liquor in, *S. v. Gordon*, 241; protected by law but its semblance not to circumvent State law, *ibid.*

Intervener—Common carrier where liquor in interstate commerce seized and confiscated, *S. v. Gordon*, 241.

Intoxicating Liquor—Moving in interstate commerce and agent in charge convicted of unlawful possession and transportation, carrier entitled to be heard on question of confiscation, *S. v. Gordon*, 241: judgment for forfeiture of illegally possessed,

S. v. Jones, 363; license to sell, issued by county commissioners and surrender requested and refused, remedy, *Jarrell v. Snow*, 430; one charged with possession of non-tax paid, for sale, cannot be convicted of possession only, *S. v. McNeill*, 560; admission of possession to officers and denial on trial, for jury, *S. v. Stutts*, 647; A.B.C. Boards empowered to appoint enforcement officers, *Jordan v. Harris*, 763.

Issues—Relating to matters of law or not pointed out by exceptions and not raised by pleadings do not entitle party to jury trial in compulsory reference, *Cheshire v. Church*, 165; in discretion of trial court, *Griffin v. Ins. Co.*, 684; must be sufficient to settle controversy and cover matters raised by pleadings, *ibid.;* which present all essentials of controversy, affording opportunity to all pertinent evidence, sufficient, *Steele v. Coxe*, 726.

Joint Tort-Feasor—Right to bring in, to settle controversy statutory, *Evans v. Johnson*, 238.

Judges—Assigned to district has jurisdiction of all "in chambers" matters, *Ridenhour v. Ridenhour*, 508.

Judgments—In excess of statutory penalty stricken on appeal and remanded for proper, *S. v. Murphy*, 115; omission of caption from indictment or recital of wrong county, no ground for arrest of, *S. v. Davis*, 117; for an accounting not *res judicata* in suit for restraining order, *Taylor v. Schaub*, 134; on pleadings confined to confession of cause of action and insufficient avoidance, *Smith v. Smith*, 189; action to restrain proceeding under *mandamus* is collateral attack on judgment, *Newton v. Chason*, 204; establishing drainage district may not be attacked in independent suit, *ibid.;* neglect must be excusable to warrant settling aside, *Johnson v. Sidbury*, 208; finding of meritorious defense as well as excusable neglect necessary to set aside, *ibid.;* suspended, *S. v. Miller*, 213; suspended without appeal, defendant may not complain of want of due process, *ibid.;* judge may suspend, *in toto* to another term, *S. v. Graham*, 217; on pleadings against intervening common carrier claiming liquor seized and confiscated, *In re S. v. Gordon*, 241; construing trust instrument may not go beyond terms of trust, *Trust Co. v. Steele's Mills*, 302; in divorce action based on insufficient affidavit, G. S., 50-8, invalid and relief by motion, *Young v. Young*, 340; judgment by default and inquiry cannot be set aside except for fatal irregularity or excusable neglect, etc., *Wilson v. Thaggard*, 349; obtained against bankrupt in four months not void against all world but only against trustee, *Sample v. Jackson*, 380; clerks of Superior Court may not delegate authority to render in tax foreclosure, *Eborn v. Ellis*, 386; purported judgment signed with facsimile rubber stamp signature is subject to collateral attack, *ibid.;* set aside when, under Soldiers' and Sailors' Civil Relief Act, *Bell v. Niven*, 395; on verdict, no evidence of last clear chance and issue of contributory negligence for defendant, *Ingram v. Smoky Mountain Stages, Inc.*, 444; not necessarily considered integrally, may be good in part and void otherwise, *Lane v. Becton*, 457; in fraudulent conveyance suit that acts as reconveyance void, *ibid.;* erroneous reviewed by appeal only, *Crissman v. Palmer*, 472; fiduciary character of debt not changed by reducing it to, *Trust Co. v. Parker*, 480; award, on *habeas corpus* between parents for custody of children, as *res judicata*, *Ridenhour v. Ridenhour*, 508; Supreme Court may render final, when, *Goodson v. Lehmon*, 514; new action in one year, after every final judgment of nonsuit, and new action a continuation of old, *ibid.;* against surety assigned to trustee to preserve lien, *Stewart v. Parker*, 551; paid by surety without assign-

ment to trustee, lien satisfied, *ibid.;* in action to remove cloud on title by transcript of, from another county, motion pending in original county, restraining order continued, *Holden v. Totten*, 558; action to prevent cutting timber in violation of, under which timber purchased not collateral attack on, *Johnson v. Lumber Co.*, 595; commissioners to sell under, and purchasers bound by decree and limitations on face of record, *ibid.;* motion in arrest of, where necessary element of crime not charged, *S. v. Vanderlip*, 610; consent, contract of parties with approval of court, and cannot be set aside but by consent, except for fraud or mistake, *King v. King*, 639; of divorce not *res judicata*, in action under separation agreement, pleaded and ignored in divorce action, *Jenkins v. Jenkins*, 681.

Judicial Sales—On confirmation, bidder's rights, *Wood v. Fauth*, 398; may require commissions to be paid in cash, *ibid.;* commissioner to conduct may not be purchaser, *Hinson v. Morgan*, 740.

Jurisdiction—Derivative, *S. v. Miller*, 213; nothing justifies assumption of jurisdiction not possessed, *ibid.*

Jury—Competency for court, *S. v. Hill*, 74; newsmen in jury room by mistake, *ibid.;* no defect or error as to, where Negroes called and not excluded except on challenge for cause, *S. v. Lord*, 354; challenge of juror for expression of opinion and accepted on statement that he could give fair trial, no error, *ibid.*

Kaolin—See *English v. Clay Co.*, 467.

Landlord and Tenant—Entering into possession under void lease, for indefinite term, makes one a tenant at will, *Barbee v. Lamb*, 211; tenancy at will, how terminated, *ibid.;* without agreement or warranty, landlord not ordinarily liable for repairs or defects, *Harrill v. Refining Co.*, 421; burden on lessee to show contract for repairs, *ibid.;* breach of covenant by landlord for repairs, does not ordinarily give rise to tort action for personal injuries to lessee, *ibid.;* landlord not deemed in power of tenant as to raise presumption of fraud, *In re Will of Atkinson*, 526; rights of, in ejectment, and under Emergency Price Control Act, *McGuinn v. McLain*, 750.

Lapsus Linguæ—Patent error, in charge on testamentary capacity, reversible though simply, *In re Will of Lomax*, 31.

Last Clear Chance—Where plaintiff guilty of contributory negligence, *Ingram v. Smoky Mountain Stages, Inc.*, 444; no evidence of, *ibid.*

Lease—Parol, for over three years void under statute of frauds, *Barbee v. Lamb*, 211.

Legislature—Creation of public corporations by legislative powers, *Brumley v. Baxter*, 691.

Lessor and Lessee—See Landlord and Tenant.

Lex Fori—Governs remedy, *Sayer v. Henderson*, 642.

Lex Loci—Governs a physician's conduct in action for malpractice, *Buckner v. Wheeldon*, 62; negligence determined by, *Harper v. Harper*, 260.

Libel and Slander — Distinguished, actionable *per se* and *per quod*, *Penner v. Elliott*, 33; unless actionable *per se* special damages must be pleaded or demurrable, *ibid.;* special damages defined, *ibid.*

Lien—None for purchase money, *Rudasill v. Cabaniss*, 87.

Limitation of Actions—None against sovereign unless expressly named, *Fertilizer Co. v. Gill, Comr.*, 426; plea of, is plea in bar and cannot be presented by demurrer, *Ins. Co. v. Motor Lines, Inc.*, 588; legislative power over, *Sayer v. Henderson*, 642; *lex fori* governs remedy, *ibid.*

Lis Pendens—When notice to all the world, *Whitehurst v. Abbott*, 1; when land in another county, what necessary, *ibid.;* effect of same as registration, *ibid.;* "action" defined as used in statute, *ibid.;* essential in caveat, *ibid.;* not exclusive nor

designed for intermeddlers, *ibid.;* active or constructive notice, *ibid.;* original notice sufficient, after dismissal, reveral of nonsuit on appeal, otherwise than on merits, where identity of causes, *Goodson v. Lehmon*, 514.

Loan—By adult child to parent payable on death of parent, nonsuit of action against executor, error, *Basinger v. Pharr*, 531.

Local Government Commission—Approval by, of notes or bonds of counties, not approval of validity of such notes or bonds, *Ins. Co. v. Guilford County*, 293.

Malicious Prosecution—To sustain action for, plaintiff must show what, *Melton v. Rickman*, 700.

Malpractice—Liability for, governed by *lex loci*, *Buckner v. Wheeldon*, 62; physician's and surgeon's liability for, *ibid.*

Mandamus—Attempt to restrain, is collateral attack on judgment, *Newton v. Chason*, 204; denied to test constitutionality of municipal ordinance, *Jarrell v. Snow*, 430; lies only for one who has a right and no other legal remedy, *ibid.*

Marriage—Not a private affair, *Dudley v. Dudley*, 83; society has interest in, *ibid.;* proof of, from records of another state, *Kearney v. Thomas*, 156; second or subsequent, presumed legal, *ibid.;* property rights dependent on, *ibid.;* parties to, *Ritchie v. White*, 450; State's interest in, *ibid.;* right, privileges and obligations incident to, *ibid.*

Master and Servant—Wrongful death, under Federal Employers' Liability Act, plaintiff must be employee of defendant and engaged in interstate commerce, *Bourne v. R. R.*, 43; Federal Employers' Liability Act applies only to, *ibid.;* liability of employer for negligence, dependent solely on negligence of its servant where that was the theory of trial, *Hobbs v. Coach Co.*, 323; findings of Industrial Commission approved by judge presumed correct and binding on appeal in absence of proper exceptions and assignments, *Rader v. Coach Co.*, 537; findings of fact by Industrial Commission conclusive on appeal, *Fox v. Mills, Inc.*, 580.

Mental Anguish and Humiliation—Not special damages in action for defamation, *Penner v. Elliott*, 33.

Meritorious Defense—Must be found as well as excusable neglect to set aside judgment, *Johnson v. Sidbury*, 208.

Mines and Minerals—Subjacent support, right of in owner, when, *English v. Clay Co.*, 467; of feldspar and kaolin, *ibid.*

Moot Question—Appellate Court will not hear, *In re Morris*, 48.

Mortgage—Paid off by defendant at request of plaintiff, who conveyed to defendant with option to repurchase not a mortgage, *Ricks v. Batchelor*, 8; presumption of fraud on conveyance by mortgagor to mortgagee, *Atkinson v. Atkinson*, 120; agreement as to acquisition and cancellation of, may be valid, *ibid.;* title claimed by deed from trustee in deed of trust, evidence of default therein competent, *Ins. Co. v. Boogher*, 493; on foreclosure, trustee having erroneously canceled same, but after correcting such cancellation, trustee conveyed to purchaser, correction sufficient to give good title, *Burney v. Holloway*, 633; mortgagee on foreclosure liable for taxes, *New Hanover County v. Sidbury*, 679.

Mortuary Tables — See Evidence, Death.

Municipal Corporations—Not liable generally for torts committed when exercising powers conferred for public good, *Beach v. Tarboro*, 26; mission of employee out of which injury arose determines liability, *Ibid.;* contract between and utility for purchase of electricity for redistribution, *Mullen v. Louisburg*, 53; purpose and construction of G. S., 143-129, *ibid.;* franchise by, to utility company in discretion of governing body unless prohibited,

ibid.; officers of, in making contracts, exercise judicial and discretionary powers not subject to court except for fraud, *ibid.;* sale of generating machinery by, not sale of electric plant, when, *ibid.;* ordinances of, cannot be tested by *mandamus, Jarrell v. Snow,* 430; equity will not ordinarily interfere with ordinances of, *ibid.;* creatures of Legislature with granted powers only, *Clayton v. Tobacco Co.,* 563; may grant private use of streets and authorize structures therein for business purposes, when, *ibid.;* power of Legislature over, *Brumley v. Baxter,* 691; may not donate property except for public services, which must be necessary purpose also, *ibid.*

Murder—Ample evidence of, and nonsuit properly denied, *S. v. French,* 276; premeditation and deliberation defined, *ibid.*

Mutual Burial Associations—Members bound by changes of rules made by Legislature, *Spearman v. Burial Assn.,* 185; spouse or next of kin of one in armed forces who dies overseas, may elect as to certain benefits, *ibid.*

Negligence—Unfavorable result alone of treatment by physician or surgeon not, *Buckner v. Wheeldon,* 62; proprietor of store not insurer, *Ross v. Drug Store,* 226; *respondeat superior,* ordinarily, not applicable to bailor and bailee, *Sink v. Sechrest,* 232; right to bring in joint tort-feasor in actions for, *Evans v. Johnson,* 238; plaintiff's agent contributing negligently to plaintiff's injury would bar recovery for, *ibid.;* determined by *lex loci, Harper v. Harper,* 260; guest passenger may recover for, when, *ibid.;* of driver imputable to owner, *ibid.;* contributory, does not bar recovery when, *Ingram v. Smoky Mountain Stages, Inc.,* 444; last clear chance and contributory, *ibid.;* no degree of care to fix responsibility for, *Rea v. Simowitz,* 575; fixed by rule of prudent man, which is for jury, *ibid.;* no duty on defendant to warn plaintiff of obviously dangerous condition, *Perry v. Herrin,* 601; nonsuit for plaintiff's contributory negligence allowed only when such negligence is so clear that reasonable minds could draw no other inference, *Cummins v. Fruit Co.,* 625; evidence sufficient for jury as to whether electrical repair worker, injured by overturning of truck was riding thereon with consent or ratification of employer, *Dark v. Johnson,* 651; in action for wrongful death what necessary to allege and prove, *Morgan v. Coach Co.,* 668; stopping bus on paved highway to permit passenger to alight or board bus, not parking within statute, *ibid.;* not presumed from injury, *Tysinger v. Dairy Products,* 717.

Nonsuit—In fornication and adultery properly denied, *S. v. Davenport,* 13; colored passenger on bus for failure to change seat, denied, *S. v. Brown,* 22; collision of taxi and town truck, erroneously denied, *Beach v. Tarboro,* 26; assault with deadly weapon, etc., properly denied, *S. v. Cody,* 38; power to grant wholly statutory and did not exist until 1897, *Avent v. Millard,* 40; failure to make motion at close of plaintiff's evidence is waiver of right, *ibid.;* in prosecution for aiding in an abortion, refusal proper, *S. v. Manning,* 41; on motion for, defendant's evidence considered, when and how, *Buckner v. Wheeldon,* 62; evidence of malpractice by surgeon sufficient, nonsuit error, *ibid.;* in criminal evidence considered how, *S. v. Scoggins,* 71; failure to make at close of State's evidence benefit lost, *S. v. Hill,* 74; error to grant where evidence for both sides on vital issues, *Taylor v. Taylor,* 80; divorce action where parties lived in same house and room but discontinued sexual relations, nonsuit proper, *Dudley v. Dudley,* 83; no evidence of separation in divorce action, nonsuit proper, *Moody v.*

Moody, 89; in criminal case evidence considered how, *S. v. Murphy*, 115; *S. v. Murdock*, 224; *S. v. Gordon*, 757; evidence not sufficient as to highway robbery, *ibid.;* in adverse possession under color, *Perry v. Alford*, 146; must be more than suspicion, *S. v. Heglar*, 220; *S. v. Murphy*, 115; evidence insufficient in lottery case, *ibid.;* prosecution for felonious assault with intent to kill, properly denied, *S. v. Murdock*, 224; defendant permitted, by consent and for convenience of expert, to examine one of its witnesses, not necessary to decide whether defendant's motion under G. S., 1-183, at close of plaintiff's evidence aptly made, *Hobbs v. Coach Co.*, 323; judgment of, and right to bring new action in one year, *Goodson v. Lehmon*, 514; for plaintiff's contributory negligence allowed only when such negligence so clear that reasonable minds could draw no other inference, *Cummins v. Fruit Co.*, 625; probate of will in common form is *in rem* and on *devisavit vel non*, not subject to, *Burney v. Holloway*, 633; proper in action to set aside tax foreclosure sales, *Hinson v. Morgan*, 740.

Notary Public—Acknowledged by, on deed showed commission had expired, effect, *Crissman v. Palmer*, 472.

Notice—Actual or constructive notice to on buying *pendente lite* sufficient, *Whitehurst v. Abbott*, 1; purchaser of record title without notice protected, *Ricks v. Batchelor*, 8; none under statute of frauds except in writing and recorded, *Barbee v. Lamb*, 211; absence of, and hearing violated due process rule, *S. v. Gordon*, 241.

Nuisance—Maintenance of public, indictable, *S. v. Alverson*, 29; must be peculiar injury to person or property to enable plaintiff to maintain civil action for public, *ibid.;* injunction closing business and seizure and sale of property only for prostitution, gambling and sale of whiskey, *ibid.;* obstructions in streets allowed for private business, when, *Clayton v. Tobacco Co.*, 563.

Option—To repurchase from one paying mortgage and taking conveyance, *Ricks v. Batchelor*, 8; whether option or mortgage depends on intent, *ibid.;* invalid when further agreement necessary, *Atkinson v. Atkinson*, 120; terminates on change of ownership, *ibid.;* subject to law of conditional delivery, *Lerner Shops v. Rosenthal*, 316.

Ordinance—Violation of safety, negligence *per se* but must be proximate cause of injury to warrant recovery, *Morgan v. Coach Co.*, 668.

Parent and Child—Parent primarily liable for child's support, but when unable, should have allowance from child's estate, *Casualty Co. v. Lawing*, 103; disbursements by parent guardian prior to appointment allowed, when, *ibid.*

Parol Evidence—Admissible to vary or contradict written instrument only in case of fraud, *Laundry Machinery Co. v. Skinner*, 285.

Parol Trust—Imposed on legal title, *Atkinson v. Atkinson*, 120; *McCorkle v. Beatty*, 178; evidence of, must be clear, strong and convincing, *ibid.;* error in charge on, as to weight of evidence, *ibid.*

Parol Warranty—Which contradicts written instrument, *Laundry Machinery Co. v. Skinner*, 285.

Parties—Heirs necessary, to sell land for assets and adverse claimants may be, *In re Estate of Daniel*, 18: third party must have direct and substantial interest before becoming a party to action, *Mullen v. Louisburg*, 53; necessary and proper, in suit to compel corporation to transfer its stock, where dispute as to ownership, *Griffin & Vose, Inc., v. Mineral Corp.*, 434; new parties must have legal interest which will be affected, *ibid.;* court's discretionary power to make when necessary, but ordinarily reviewable, *Ins. Co. v. Motor Lines, Inc.*, 588; ap-

peal in person or by attorney, *New Hanover County v. Sidbury*, 679.

Partition—Transfer to civil issue docket is before judge, *Wood v. Fauth*, 398; confirmation of sale confers right, *ibid.;* set off by bidder against shares denied, *ibid.;* commissioners appointed by judgment in, can convey only within terms of decree, *Johnson v. Lumber Co.*, 595.

Partnership—Accounting of affairs of, in proceedings supplemental to execution, *Cotton Co., Inc., v. Reaves*, 436; between husband and wife valid to what extent, *Carlisle v. Carlisle*, 462.

Passenger—Prosecution of colored, as to seating, *S. v. Brown*, 22.

Patents—Federal Courts have what jurisdiction of, *Coleman v. Whisnant*, 494; State courts' jurisdiction, *ibid.;* joint owners of, and contracts among, *ibid.*

Penalties—Under Emergency Price Control Act—must be construed to avoid absurd results, *Hilgreen v. Cleaners & Tailors, Inc.*, 656.

Pendente Lite — Purchaser of property, not innocent, when, *Whitehurst v. Abbott*, 1.

Photographs—Of wounds competent, *S. v. Mays*, 486.

Physicians and Surgeons—Liability of, governed by *lex fori*, *Buckner v. Wheeldon*, 62; practice by, implies such learning, skill and ability as others in like case possess, *ibid.;* unfavorable result alone not negligence, which must be from want of skill, *ibid.;* foreign substances left in body as result of operation, *ibid.*

Pleadings—Recovery on theory of complaint, *Coley v. Dalrymple*, 67; *Atkinson v. Atkinson*, 120; plaintiff not bound to anticipate defenses, *Taylor v. Taylor*, 80; burden on pleader who particularizes character of separation in divorce, *ibid.;* material facts in every complaint for, deemed denied, *ibid.;* amendments in discretion of court, *Hatcher v. Williams*, 112; in suit for accounting for joint enterprise, fraud in concealing joint property may be alleged in amendment as arising out of same transaction, *ibid.;* action for accounting not same as suit for restraining order, *Taylor v. Schaub*, 134; no amendment *ex mero motu*, *ibid.;* should show burden of proof, *Kearney v. Thomas*, 156; demurrer to new matter in answer, *Smith v. Smith*, 189; counterclaim for slander may not be pleaded in action to recover monetary consideration under contract, *ibid.;* allowance of motion for judgment on pleadings confined to confession of cause of action and insufficient avoidance, *ibid.;* demurrer admits facts and not law, *Newton v. Chason*, 204; *Smith v. Smith*, 189; complaint for divorce, with false affidavit, insufficient to support decree, *Young v. Young*, 340; complaint for divorce must be sworn to and allegations and proof must correspond, *ibid.;* duty of defendant to plead, though no copy of complaint served, where default judgment set aside on motion and time to plead granted, *Wilson v. Thaggard*, 348; incompetency to make a deed and undue influence on a weak mind may be joined in one action, *Goodson v. Lehmon*, 514; admission of divorce in answer of husband on suit by former wife, *Pugh v. Pugh*, 555; demurrer sustained for want of necessary party, motion allowed to join such party is reversal of demurrer, *Ins. Co. v. Motor Lines*, 588; examination of adverse party for information to file, *Fox v. Yarborough*, 606; invalid special appearance not a valid plea, *New Hanover County v. Sidbury*, 679; demurrer *ore tenus* disallowed in tax suit, *ibid.;* counterclaim for debt under separation agreement not cognizable in action for divorce, *Jenkins v. Jenkins*, 681; suit on insurance policy, fraud pleaded as defense, burden on defendant and action not subject to nonsuit, *Griffin v. Ins. Co.*, 684; no

appeal from denial of motion for judgment on, *S. v. Todd*, 689.

Premeditation and Deliberation—Sufficient evidence of, where killing intentional, without provocation, no excuse offered, *S. v. Matheson*, 109; not capable of actual proof, *ibid.;* defined, *S. v. French*, 276; *S. v. Wise*, 746.

Presumption—No presumption of malice if killing lawfully done, *S. v. Clark*, 52; on appeal from injunction, that findings supported by evidence, *Mullen v. Louisburg*, 53; that services of member of family gratuitous, *Coley v. Dalrymple*, 67; of gift from husband to wife, *Rudasill v. Cabaniss*, 87; *Carlisle v. Carlisle*, 462; of fraud on conveyance by mortgagor to mortgagee, *Atkinson v. Atkinson*, 120; second or subsequent marriage presumed legal, *Kearney v. Thomas*, 156; no presumption based on presumption, *ibid.;* none as to continuance of particular life, *ibid.;* sentences presumed concurrent and not cumulative, *In re Parker*, 369; that testator of sound mind, does not intend partial intestacy, *Ferguson v. Ferguson*, 375; denial of motion to set aside, no findings stated, presumed on facts alleged, *Crissman v. Palmer*, 472; certain fiduciary relations raise legal presumption of fraud on dealings between the parties, *In re Will of Atkinson*, 526; rebutted by evidence of equal weight, *ibid.;* none that adult child with separate home renders services to parent gratuitously, *Basinger v. Pharr*, 531; as boundaries at high water mark, or to thread of stream, *Kelly v. King*, 709; negligence not presumed from injury, *Tysinger v. Dairy Products*, 717; as to consideration named in deed, *Hinson v. Morgan*, 740; that confession was voluntary, *S. v. Wise*, 746.

Principal and Agent—One acting for another assumes obligation of fiduciary, *Hatcher v. Williams*, 112; distinguished from bailor and bailee, *Sink v. Sechrest*, 232; agent of plaintiff negligently contributing to plaintiff's injury would bar recovery from another, *Evans v. Johnson*, 238; agent in charge of liquor in interstate commerce convicted of unlawful possession, *In re S. v. Gordon*, 241; wife as guest passenger in own car driven by husband, when injured, existence of relationship of, for jury, *Harper v. Harper*, 260; commissions recovered only when agency performed within terms of contract, *Ins. Co. v. Disher*, 345; agency, except where revoked in good faith at any time before performance, *ibid.;* admissions of agent as evidence against principal, *Steele v. Coxe*, 726.

Principal and Surety — Judgment against surety assigned to trustee to preserve lien, *Stewart v. Parker*, 551; judgment paid by surety without assignment to trustee, satisfied and surety may sue only as simple contract creditor, *ibid.;* peace officers required to give bond, *Jordan v. Harris*, 763; liability for torts *colore officii*, *ibid.*

Process—No definition of "doing business" a question of fact, *Highway Comm. v. Transportation Corp.*, 198; special appearance to test service of, finding of fact by court below binding, *ibid.;* sole purpose to bring party into court, *Ryan v. Batdorf*, 228; *alias* and *pluries* improperly issued, good as to original, when, *ibid.;* general appearance and obtaining time to plead, waive irregularities in service of, *Wilson v. Thaggard*, 348; issuance of summons by clerk of Superior Court ministerial act, *English v. Brigman*, 402; in suit by domestic corporation against foreign corporation formerly doing business here, *Motor Lines v. Transportation Co.*, 733; rights of states to provide for service of, as to business therein, *ibid.*

Propounder—Also executor, purchasing from other devisees, *Whitehurst v. Abbott*, 1.

Proprietor—Of store, owes customers what care as to safety of premises, *Ross v. Drug Store*, 226.

Prostitution—Injunction closing business, seizure and sale of property for, and gambling and sale of whiskey only, *S. v. Alverson*, 29.

Proximate Cause—Violation of safety statute or ordinance negligence *per se*, but must be, to warrant recovery, *Morgan v. Coach Co.*, 668; negligence *per se* must be of injury, *Tysinger v. Dairy Products*, 717.

Public Officers—*De jure* and *de facto* of incumbent clerk of Superior Court, on voluntary nonsuit by claimant, *English v. Brigman*, 402; enforcement officers appointed by A.B.C. Board are, *Jordan v. Harris*, 763; liability of bond and sureties for torts committed *colore officii*, *ibid.*

Public Service—Services of those in Armed Forces are, *Brumley v. Baxter*, 691.

Public Utility—G. S., 143-129, has no application to contracts where there can be no competition, rates being fixed, *Mullen v. Louisburg*, 53; municipal franchises to, unless prohibited, in discretion of local government, *ibid.*

Punishment—Two years' imprisonment not cruel and unusual for assault with deadly weapon, *S. v. Crandall*, 148.

Purchaser—Executor not innocent, when buying from other devisees, *Whitehurst v. Abbott*, 1; innocent, for value, prior to caveat, acquires good title, *ibid.*; burden on one claiming to be innocent, *ibid.*; innocent, of record title without notice, *Ricks v. Batchelor*, 8; *lis pendens* good in second action after reversal on appeal of denial of nonsuit, *Goodson v. Lehmon*, 514.

Quo Warranto—Action for damages for arrest and imprisonment of officer cannot be converted into, *English v. Brigman*, 402.

Rape—Evidence of prosecutrix as to what became of part of her apparel competent to show why articles not produced, *S. v. Sutton*, 332; ample evidence for jury and nonsuit properly denied, *ibid.*; sufficient sanity to commit, responsible for resulting homicide, *S. v. Mays*, 486; in assault with intent to commit, burden on defendant to show he was under 18 years of age, *S. v. Morgan*, 549.

Realty—Standing trees are, *Westmoreland v. Lowe*, 553.

Reasonable Care—In operation of motor vehicle, *Henson v. Wilson*, 417.

Receivers—Venue, *Indemnity Co. v. Hood, Comr.*, 361.

Recordari—Where court imposes suspended criminal sentence for condition broken, no appeal and remedy by, *S. v. Miller*, 213.

Recorder's Court—See Courts; plea of guilty in and appeal, brings up only question of law, *S. v. Crandall*, 148.

Reference — Procedure to preserve jury trial on compulsory, *Cheshire v. Church*, 165; where accounting necessary, objection to compulsory, without merit, *Troitino v. Goodman*, 406.

Registration—Does not make executor innocent purchaser from devisees, *Whitehurst v. Abbott*, 1; effect of, same as *lis pendens*, *ibid.*; deed of gift void unless recorded in two years, *Ferguson v. Ferguson*, 375; of deed on certificate of notary whose commission had expired, invalid, *Crissman v. Palmer*, 472; apparent and latent defects in, *ibid.*

Remainders—See Estates, Wills.

Repairs—Landlord not ordinarily liable for, *Harrill v. Refining Co.*, 421.

Res Gestæ—Declaration of "I am going to die," *S. v. Hill*, 74; as to who set house afire, *S. v. Smith*, 78; admissions by party need not be part of, *Hobbs v. Coach Co.*, 323.

Res Judicata—Judgment in action for accounting, not *res judicata* in suit for restraining order growing out of same transaction, *Taylor v. Schaub*, 134; *habeas corpus* between husband and wife for custody of children, award as *res judicata* on changed circumstances, *Ridenhour v. Riden-*

hour, 508; judgment of divorce not *res judicata* in action yunder separation agreement, pleaded and ignored in divorce action, *Jenkins v. Jenkins*, 681.

Respondeat Superior—Ordinarily inapplicable to relationship of bailor and bailee, *Sink v. Sechrest*, 232; negligence from automobile collision, *Hobbs v. Coach Co.*, 323.

Restitution—Attempt to invoke where remedy at law, *Ins. Co. v. Guilford County*, 293.

Retroaction—Of plea of guilty on appeal from recorder's court, *S. v. Crandall*, 148.

Riparian Owner's Rights—See *Kelly v. King*, 709.

Road Machinery—Breach of contract of sale, damages, *Troitino v. Goodman*, 406.

Robbery—Highway robbery, evidence of, not sufficient, *S. v. Murphy*, 115.

Rule in Shelley's Case—Grant or devise to one and his bodily heirs to third generation within rule against perpetuities and conveys fee simple under, *Jackson v. Powell*, 599.

Sales—Of patents, interests therein and restraint, *Coleman v. Whisnant*, 494.

Sanity—Sufficient to commit rape, responsible for resulting homicide, *S. v. Mays*, 486.

School Bus—See Automobiles.

Search Warrant—Invalid, on forfeiture of illegally possessed liquor, *S. v. Jones*, 363.

Self-Defense—Available only to one without fault, *S. v. Davis*, 117; aggressor must withdraw, *ibid.*

Sentence—In criminal case, suspended, *S. v. Miller*, 213; case remanded for lawful sentence, *S. v. Graham*, 217; generally presumed that, imposed in same jurisdiction, though at different times to be served in Same place, run concurrently, *In re Parker*, 369.

Separation Agreements — Between husband and wife, *Smith v. Smith*, 189; *Ritchie v. White*, 450; breach which will exonerate from performance, *Smith v. Smith*, 189; judgment of divorce not *res judicata* in action under, pleaded and ignored in divorce action, *Jenkins v. Jenkins*, 681; counterclaim for debt under, not cognizable in divorce action, *ibid.*

Service—Mailing case on appeal not sufficient, *Bell v. Nivens*, 35.

Slander—Actionable *per se* or only *per quod*, *Penner v. Elliott*, 33.

Soldiers' and Sailors' Civil Relief Act —Prejudice by reason of service necessary to invoke, *Bell v. Niven*, 395; judgment set aside under, *ibid.*; attorney's fee resisted under, *Bell v. Niven*, 395; services in Armed Forces are "public services" within Constitutional provision, *Brumley v. Baxter*, 691.

Special Appearance—To test validity of service on Secretary of State in action against foreign corporation, *Highway Comm. v. Transportation Corp.*, 198; findings by court on, to test service of process, binding when based on competent evidence, *ibid.*

Special Verdict—Purported, and judgment not guilty, State may not appeal, *S. v. Mitchell*, 42.

Specific Performance—In suit for, title claimed under will, probate of which nonsuited, party moving for such nonsuit being before court is bound by judgment, *Burney v. Holloway*, 633.

Status Quo Ante Injuriam—*Atkinson v. Atkinson*, 120.

Statutes—Legislative intent in construction of, *Mullen v. Louisburg*, 53; action predicated on statute must be within its terms, *Padgett v. Long*, 392; construed in light of purpose, absurd results avoided, *Hilgreen v. Cleaners & Tailors, Inc.*, 656; Emergency Price Control Act and penalties thereunder, *ibid.*; safety, violation of, negligence *per se*, but violation must be proximate cause of injury to warrant recovery, *Morgan v. Coach Co.*, 668.

Statute of Frauds—With us does not forbid parol trust in lands, *Carlisle v. Carlisle*, 462.

Stock—Suit against foreign corporation as to transfer of its stock, *Holladay v. General Motors Corp.*, 230.
Streets—Control of streets primarily a State duty and legislative control is ordinarily paramount, subject to property rights, *Clayton v. Tobacco Co.*, 563.
Subrogation—On damage or destruction of property, insured being paid in full, insurer is subrogated to right of action against tort-feasor, *Ins. Co. v. Motor Lines, Inc.*, 588.
Suspended Sentence—Findings that condition broken on, when supported by evidence sufficient, *S. v. Marsh*, 648.
Summons—See Process.
Superior Courts—See Courts; may allow amendment to warrant, when and how, *S. v. Brown*, 22; liability for tort determined by *lex loci*, *Buckner v. Wheeldon*, 62; appeal to, after plea of guilty, *S. v. Crandall*, 148; jurisdiction derivative, where Superior has none, Supreme Court has none on appeal, *S. v. Miller*, 213; negligence determined by *lex loci*, *Harper v. Harper*, 141; State and Federal, jurisdiction over patents, *Coleman v. Whisnant*, 494; judge assigned to district has jurisdiction of all "in chambers" matters, *Ridenhour v. Ridenhour*, 508; power to correct minutes to speak truth, *S. v. Morgan*, 549; *lex fori* governs remedy, *Sayer v. Henderson*, 642; Superior Court has jurisdiction to enforce, regardless of amount of penalties, if attorney's fees claimed, *Hilgreen v. Cleaners & Tailors, Inc.*, 656.
Surety—See Principal and Surety.
Taxation—Listing and paying, alone not evidence of adverse possession, *Perry v. Alford*, 146; remedy on illegal levy, *Newton v. Chason*, 204; drainage assessments collected as taxes, *ibid.*; no sale of tax lien delayed by injunction, *ibid.*; courts determine whether a project is a necessary expense of a county, but the commissioners determine whether the project is necessary, *Ins. Co. v. Guilford County*, 293; statutes of limitations as applied to sales and use taxes, in deficiencies and assessments, *Fertilizer Co. v. Gill, Comr.*, 426; mortgagee, on foreclosure, liable for failure to pay, *New Hanover County v. Sidbury*, 679; commissioner to conduct tax sale may not be purchaser, *Hinson v. Morgan*, 740.
Tax Foreclosures—Clerk may not delegate authority to sign judgment in, *Eborn v. Ellis*, 386; facsimile rubber stamp signatures of clerks of Superior Court in, *ibid.*
Tenant at Will—Defined, *Barbee v. Lamb*, 211; terminated how, *ibid.*
Torts—Municipalities not generally liable for, when exercising powers conferred for public good, *Beach v. Tarboro*, 26; mission out of which injury arose determines liability, *ibid.*; governed by *lex loci*, *Buckner v. Wheeldon*, 62; pleading, as counterclaim in action on contract, *Smith v. Smith*, 189; right to bring in joint tort-feasor to settle controversy given by statute, *Evans v. Johnson*, 238; *caveat emptor* applicable ordinarily in action for, by lessee against lessor, *Harrill v. Refining Co.*, 421; patent, latent and concealed defects, *ibid.*
Trespass—Right to evict trespasser from home is substantive, *S. v. Spruill*, 356.
Trial—Motion for nonsuit defendant's evidence considered, how, *Buckner v. Wheeldon*, 62; not *de novo*, on appeal from recorder's court after plea of guilty, *S. v. Crandall*, 148; procedure to preserve jury trial on compulsory reference, *Cheshire v. Church*, 165; verdict must be accepted, *S. v. Perry*, 174; verdict incomplete, insensible, repugnant, not responsive may be refused, *ibid.*; verdict of acquittal in effect must be recorded, *ibid.*; rule requiring objection at time to erroneous statement in charge of contentions, not applicable to first degree murder, *S. v. Isaac*, 310; allegations and proof in

divorce action must correspond, *Young v. Young*, 340; where defendant tendered and plaintiff accepted property in litigation, on condition of payment for improvements, the only issue is amount expended for improvements and value, *Featherstone v. Glenn*, 404; power of court to order production of pertinent evidence in possession of adverse party, *Cotton Co., Inc., v. Reaves*, 436; motion for new, on ground of newly discovered evidence made, when, *Crissman v. Palmer*, 472; error in consolidation, injury must be shown, *In re Will of Atkinson*, 526; action to set aside deed and *devisavit vel non* consolidated, *ibid.;* request for instructions must be made before argument, *S. v. Morgan*, 549; of action by woman against her former husband alleging divorce, husband cannot attack divorce after its admission in his answer, *Pugh v. Pugh*, 555; prayers for instructions in writing and signed and entitled, otherwise may be disregarded, *S. v. Spencer*, 608; issues ordinarily in discretion of trial court, provided sufficient to settle controversy arising on pleadings, *Griffin v. Ins. Co.*, 684; issues should cover new matters alleged in answer, *ibid.;* must be evidence of every material fact to support verdict, *Tysinger v. Dairy Products*, 717; issues, sufficiency of and discretion of trial court as to, *Steele v. Coxe*, 726; by consent without jury of suit between husband and administrator of deceased wife, proper findings in accordance with evidence must be made and applicability of statute of limitations passed on, however tedious, *McMillan v. Robeson*, 754.

Trusts—Constructive, *ex maleficio*, remedial device to prevent fraud, not referred to intent of parties, *Atkinson v. Atkinson*, 120; estoppel against beneficiary attacking administration of, *Cheshire v. Church*, 165; no liability on trustee for losses on loans where no evidence of inadequacy of securities when taken or of lack of good faith and due diligence, *ibid.;* parol trusts, evidence required and weight of, *McCorkle v. Beatty*, 178; not created by agreement that tenant should occupy premises so long as he lived thereon rent free, *Barbee v. Lamb*, 211; corporation may create, to give financial aid to its needy employees and their dependents in case of accident and sickness, *Trust Co. v. Steele's Mills*, 302; trust agreement has status of contract, which cannot be amended by court, *ibid.;* parol, in favor of grantor in deed for fee simple, void, *Carlisle v. Carlisle*, 462; parol, in lands valid under express agreement, *ibid.; Loftin v. Kornegay*, 490; income from, by will, beneficiary entitled to income from death of testator, *Cannon v. Cannon*, 611; equity will instruct trustees to act where they refuse to carry out terms of will, *ibid.*

Undue Influence—None on issue of *devisavit vel non*, *In re Will of Ball*, 91; mental or physical condition, alone, no evidence of, *ibid.;* declarations competent to prove, *ibid.;* importunity by wife after will made, *ibid.;* husband devising his property to his wife no evidence of, *ibid.*

Vendor and Purchaser—No lien by vendor except by recorded instrument, *Rudasill v. Cabaniss*, 87; contract on option void between, *Atkinson v. Atkinson*, 120; deed may be delivered conditionally by parol agreement and such delivery may be from grantor to grantee, *Lerner Shops v. Rosenthal*, 316; option subject to condition, *ibid.*

Venue—Personal residence of fiduciary controls as to him, *Indemnity Co. v. Hood, Comr.*, 361; discretion of court as to, not reviewable, *ibid.*

Verdict—Where two or more counts, sentence on each if valid verdict and proper evidence, *S. v. Murphy*, 115; judgment in excess of statutory penalty stricken and remand-

ed, *ibid.;* no directed, where evidence for jury, *Kearney v. Thomas*, 156; must be accepted by court, *S. v. Perry*, 174; incomplete, insensible, repugnant, not responsive may be refused and reconsideration ordered, *ibid.;* not bad for informality, minor errors, *ibid.;* of acquittal in effect must be recorded, *ibid.;* with voluntary recommendation for mercy, surplusage, *S. v. Wise*, 746.

Veterans' Recreation Center—Charlotte, for public purpose, *Brumley v. Baxter*, 691.

Warrant—Superior Court may allow amendment to warrant, how and when, *S. v. Brown*, 22.

Warranty—Does not change a quitclaim deed, *Turpin v. Jackson County*, 389; no implied covenants of, in deed, *ibid.*

Water and Water Courses—Non-navigable as boundary, to thread of stream and otherwise, *Kelly v. King*, 709.

Whiskey—See Intoxicating Liquor.

Wills — Executor purchasing from other devisees, not innocent purchaser, *Whitehurst v. Abbott*, 1; certified copy of, recorded in another county void on successful caveat to original, *ibid.; lapsus linguæ*, on charge as to testamentary capacity, reversible error, *In re Will of Lomax*, 31; oral contract to devise realty void, *Coley v. Dalrymple*, 67; that testator was chronically ill, used narcotics, was mentally weak, had poor memory, no evidence of undue influence, *In re Will of Ball*, 91; how undue influence proven, *ibid.;* importunity by wife after will made, *ibid.;* husband devising his property to his wife, no evidence of undue influence, *ibid.;* every part considered in construction of, *Bank v. Corl*, 96; inconsistencies reconciled, *ibid.;* intention of testator in his will, *ibid.;* one provision repugnant to another only when irreconcilable, *ibid.;* reconciliation of payments provided under, *ibid.;* presumption that testator of sound mind does not intend partial intestacy, *Ferguson v. Ferguson*, 375; promise of husband to devise home to wife for domestic services and support, invalid, *Ritchie v. White*, 450; devise by husband to wife of her own property not estoppel and does not put her to her election, *Lane v. Becton*, 457; vested remainder in children of life tenant, subject to open for those after-born and subject to be divested, *Beam v. Gilkey*, 520; burden on caveators on issue of *devisavit vel non*, *In re Will of Atkinson*, 526; creating trust for five years, when divided between testator's daughters, and on death of any daughter, before distribution period of will, to living children of such deceased daughter, intent was that distribution only to grandchildren living at end of five-year period and great grandchildren, issue of deceased grandchild, not included, *Trust Co. v. Henderson*, 567; capacity to make, not simple fact, *In re Will of Lomax*, 592; language in, given its legal meaning, *Jackson v. Powell*, 599; trust by, giving income, beneficiary entitled to income from death of testator, *Cannon v. Cannon*, 611.

Witness—Expert, how qualified, *S. v. Peterson*, 540; may refresh memory from paper writing and may be compelled to do so, *Steele v. Coxe*, 726.

Workmen's Compensation Act—See Master and Servant.

Writ of Assistance—Court should not withhold punitive measures to enforce appropriate decree, *In re Morris*, 48.

Wrongful Death—Action for, *Tysinger v. Dairy Products*, 717.

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 9. Identity of Actions.

Where a judgment in a pending action would not support a plea of *res judicata* in a second action, and the two actions are not the same and the results sought are dissimilar, a plea in abatement in the second action, on the ground that another action between the parties was then pending, is properly overruled. *Taylor v. Schaub*, 134.

ABORTION.

§ 8. Weight and Sufficiency of Evidence.

Where, in a criminal prosecution for aiding and abetting in an abortion, G. S., 14-45, the State's evidence tended to show that defendant, and another who pleaded guilty, took a pregnant woman, in the car of defendant who was driving, to several near-by towns, in the last of which an abortion was performed on the woman, and defendant was heard to say that he might have to pay out of this case, there is sufficient evidence to sustain a conviction. *S. v. Manning*, 41.

ACTIONS.

§ 4. Civil Action.

The word "action," when unqualified, is an inclusive term and connotes all judicial proceedings of a civil nature maintained and prosecuted for the purpose of asserting a right of redressing a wrong. *Whitehurst v. Abbott*, 1.

ADVERSE POSSESSION.

§ 1. Nature and Requisites of Title: In General.

The listing and payment of taxes on land may be a relevant fact in connection with other circumstances tending to show claim of title, but not sufficient alone to show adverse possession. *Perry v. Alford*, 146.

Adverse possession must have been actual, open, continuous, and denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible. *Ibid.*

§ 6. Continuity of Possession.

Where plaintiff alleges title by adverse possession under color but produces no evidence of acts of asserted dominion and possession, whatever acts of possession, previously exercised by his predecessors in title, were discontinued and cannot avail him. *Perry v. Alford*, 146.

§ 19. Sufficiency of Evidence, Nonsuit and Directed Verdict.

In an action for trespass, title being involved and plaintiff alleging adverse possession under color, where plaintiff's evidence tended to show that he lived ten or more miles from the land and saw it about once a year, that he never cultivated it, never sold or cut timber or wood, never built on it, or fenced it, but just recorded his deed and paid the taxes, there is no evidence of adverse possession and motion for judgment as of nonsuit was properly allowed. *Perry v. Alford*, 146.

APPEAL AND ERROR.

I. Nature and Grounds of Appellant Jurisdiction of Supreme Court.
1. In General. S. v. Miller, 213.
3a. Parties Who May Appeal. In re Morris, 48.
4. Academic Questions and Advisory Opinions. In re Morris, 48; Cochran v. Rowe, 645; In re Burnett, 646.

II. Presentation and Preservation in Lower Court of Grounds of Review.
6d. Exceptions to Findings of Fact or Judgments on Findings. Fox v. Mills, Inc., 580.
6e. Objections and Exceptions to Evidence. Pugh v. Pugh, 555.
6g. Parties Entitled to Complain and Take Exceptions. In re Morris, 48.
8. Theory of Trial. Hobbs v. Coach Co., 323; Young v. Young, 340.

III. Requisites and Proceedings for Appeal.
10a. Duty to Make Out and Serve Case on Appeal. Bell v. Nivens, 35.
10b. Time for Service of Case on Appeal and Motions to Strike Out for Failure to File in Time. Ibid.
10e. Settlement of Case on Appeal. Ibid.
12. Pauper Appeals. Clark v. Clark, 687.

V. Docketing Appeal.
18a. Certiorari: In General. Bell v. Nivens, 35; S. v. Jones, 363.

VI. The Record Proper.
22. Conclusiveness and Effect of Record. S. v. Morgan, 549.

VII. Assignments of Error.
23. Form and Requisites of Assignments of Error. S. v. Britt, 364; Rader v. Coach Co., 537.
24. Necessity of Exceptions to Support Assignments of Error. S. v. Britt, 364.

VIII. Briefs.
29. Abandonment of Exceptions by Failure to Discuss Same in Brief. Bell v. Nivens, 35; S. v. Britt, 364; S. v. Hill, 74; S. v. Sutton, Triotino v. Goodman, 406; Beam v. Gilkey, 520.

IX. Dismissal and Reinstatement of Appeals.
30b. Jurisdiction and Hearings of Motions to Dismiss in Supreme Court. S. v. Miller, 213; Ridenhour v. Ridenhour, 508; Order of Masons v. Order of Masons, 562; S. v. Todd, 689.
31b. Failure to Make Out and Serve Statement of Case on Appeal. Bell v. Nivens, 35.
31c. Failure to Docket Appeal on Time. Indemnity Co. v. Hood, Comr., 187; S. v. Jones, 363.
31e. For That Question Presented Has Become Moot or Academic. Cochran v. Rowe, 645; In re Burnett, 646.

XI. Review.
37a. Matters Reviewable: In General. Crissman v. Palmer, 472; Goodson v. Lehmon, 514; Smith v. Steen, 644.
37b. Matters in Discretion of Lower Court. Ins. Co. v. Motor Lines, 588; S. v. Marsh, 648; S. v. Brooks, 662.
37e. Findings of Fact. Mullen v. Louisburg, 53; Troitino v. Goodman, 406; Rader v. Coach Co., 537; Fox v. Mills, Inc., 580; S. v. Marsh, 648; S. v. Brooks, 662.
39a. Prejudicial and Harmless Error: In General. S. v. King, 236.
39e. In Instructions. S. v. Friddle, 240.
40a. Review of Exceptions to Judgment or Signing of Judgment or to Findings. S. v. Jones, 363; Rader v. Coach Co., 537; Fox v. Mills, Inc., 580.

XIII. Determination and Disposition of Cause.
47a. New Trial: For Newly Discovered Evidence. S. v. King, 236; Crissman v. Palmer, 472.
48. Remand. Coley v. Dalrymple, 67; Troitino v. Goodman, 406; S. v. Graham, 217; Fox v. Mills, Inc., 580.
49a. Law of Case. Cheshire v. Church, 165; Goodson v. Lehmon, 514.
49b. Stare Decisis. S. v. Crandall, 148.

§ 1. Nature and Grounds of Appellant Jurisdiction of Supreme Court: In General.

This Court's jurisdiction is derivative and where the Superior Court was without jurisdiction to entertain an appeal from a county criminal court, this Court has none. No circumstance or condition is sufficient justification for the assumption of jurisdiction not possessed. *S. v. Miller*, 213.

§ 3a. Parties Who May Appeal.

A party litigant, who has or asserts no right or interest in the subject matter of the action, divests himself of the right to appeal. *In re Morris*, 48.

APPEAL AND ERROR—*Continued.*

§ 4. Academic Questions and Advisory Opinions.

An appellate court will not hear and decide a moot question, or one which has become such. G. S., 1-277. This does not mean, however, that the trial court should withhold available punitive measures for willful failure to comply with its appropriate decrees. *In re Morris*, 48.

As a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist, and the only matter to be decided is the disposition of the costs. While there are well recognized exceptions to this rule, where the subject of the litigation—the right of plaintiffs to the immediate possession of certain premises—has been disposed of by the surrender of same by defendant to plaintiffs, there is no exception. *Cochran v. Rowe*, 645.

In *habeas corpus*, petitioner asking for release from arrest upon telephonic revocation of his parole, where it appears that on the hearing below that petitioner's parole had then been revoked in due form, G. S., 134-85, the legality of his arrest and detention is presently academic, hence motion of the Attorney-General to dismiss must be allowed. *In re Burnett*, 646.

§ 6d. Exceptions to Findings of Fact or Judgments on Findings.

Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the Superior Court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated; but when such judgment on appeal merely decreed that the award be in all respects affirmed, the judge below presumably having considered each of the assignments of error and overruled them, we do not hold that a remand is required. *Fox v. Mills, Inc.*, 580.

§ 6e. Objections and Exceptions to Evidence.

In an action to have tenants by the entireties declared tenants in common, after an absolute divorce between them, where parol evidence was introduced, without objection, to the effect that the lands were held by the entireties, there is nothing this Court can do on appeal to aid the husband. *Pugh v. Pugh*, 555.

§ 6g. Parties Entitled to Complain and Take Exceptions.

A party litigant, who has or asserts no right or interest in the subject matter of the action, divests himself of the right to appeal. *In re Morris*, 48.

§ 8. Theory of Trial.

In an action to recover damages for alleged injuries resulting from an automobile collision, while there are other allegations of negligence in the complaint, the trial below was had on the alleged theory that, at the time of the collision, the bus of the corporate defendants was being driven by the individual defendant, an employee and agent of corporate defendants, at a reckless and high rate of speed and out of control, and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the bus to move from its right-hand side to its left-hand side of the public highway and immediately in front of plaintiff's automobile. Hence, the liability of the corporate defendants is grounded solely, and is wholly dependent upon the negligence, if any, of the individual defendant, under the doctrine of *respondeat superior*. *Hobbs v. Coach Co.*, 323.

Where a suit for divorce is tried on the theory of separation by mutual consent, to establish his cause of action, the plaintiff must not only show that he

APPEAL AND ERROR—*Continued.*

and the defendant have lived separate and 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 parties. *Young v. Young*, 340.

§ 10a. Duty to Make Out and Serve Case on Appeal.

A writ of *certiorari* from this Court is not available to extend the time for preparation and service of statement of case on appeal, which is a matter for the parties and the court below, subject to the limitation that extension may not carry the appeal beyond the time it is due here. *Bell v. Nivens*, 35.

The mailing by appellant of his statement of case on appeal is not sufficient service in the absence of an understanding to that effect. *Ibid.*

§ 10b. Time for Service of Case on Appeal and Motions to Strike Out for Failure to File in Time.

A statement of case on appeal not served in time may be disregarded or treated as a nullity. Of course, where a party is disadvantaged by some error or act of the court or its officers, and not by any fault or neglect of his own or his agent, a different situation is presented. *Ibid.*

§ 10e. Settlement of Case on Appeal.

The failure to have the "case on appeal" legally settled does not *ipso facto* require a dismissal of the appeal. The appellants are still entitled to present the case on the record proper. *Ibid.*

§ 12. Pauper Appeals.

The requirements of the statute, G. S., 1-288, relating to appeals to this Court from judgments of the Superior Court in a civil action, without making the deposit or giving the security required by law for such appeals, are mandatory and jurisdictional, and unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket. *Clark v. Clark*, 687.

§ 18a. Certiorari: In General.

It is not permissible to retrieve by *certiorari* the right to bring up "the case on appeal" which has been lost by laches. Its true use is to preserve the right before it is lost in order to prevent its loss. *Bell v. Nivens*, 35.

Where appellant fails to file his case on appeal fourteen days before the call of the district to which it belongs, he may apply for *certiorari* to preserve his right of appeal and appellees' motion filed thereafter to docket and dismiss under Rule 17 will be denied. *S. v. Jones*, 363.

§ 22. Conclusiveness and Effect of Record.

This Court can judicially know only that which appears in the record. *S. v. Morgan*, 549.

§ 23. Form and Requisites of Assignments of Error.

An exception, for failure to charge the jury as required by G. S., 1-180, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. *S. v. Britt*, 364.

APPEAL AND ERROR—*Continued.*

Where there is a single assignment of error to several rulings of the trial court and one of them is correct, the assignment must fail. *Rader v. Coach Co.*, 537.

§ 24. Necessity of Exceptions to Support Assignments of Error.

An argument unsupported by exception is as ineffective as an exception without argument or citation of authority. *S. v. Britt*, 364.

An exception, for failure to charge the jury as required by G. S., 1-180, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. *Ibid.*

§ 29. Abandonment of Exceptions by Failure to Discuss Same in Brief.

Failure to file brief works an abandonment of the exceptions and assignments of error, except those appearing on the face of the record which are cognizable *sua sponte*. *Bell v. Nivens*, 35.

An argument unsupported by exception is as ineffective as an exception without argument or citation of authority. *S. v. Britt*, 364.

Exceptions in the record, not set out in appellant's brief or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. *S. v. Hill*, 74; *S. v. Sutton*, 332; *Troitino v. Goodman*, 406; *Beam v. Gilkey*, 520.

§ 30b. Jurisdiction and Hearings of Motions to Dismiss in Supreme Court.

This Court's jurisdiction is derivative and where the Superior Court was without jurisdiction to entertain an appeal from a county criminal court, this Court has none. No circumstance or condition is sufficient justification for the assumption of jurisdiction not possessed. *S. v. Miller*, 213.

Where it appears on the face of the record that the court below had no jurisdiction, this Court will so declare *ex mero motu*. *Ridenhour v. Ridenhour*, 508.

Appeal from an order, allowing plaintiffs to amend their complaint and to make additional parties plaintiff, is premature and will be dismissed. *Order of Masons v. Order of Masons*, 562.

An appeal which is both premature and fragmentary will be dismissed. *S. v. Todd*, 689.

No appeal lies from the denial of motion for judgment on the pleadings. *Ibid.*

§ 31b. Failure to Make Out and Serve Statement of Case on Appeal.

The failure to have the "case on appeal" legally settled does not *ipso facto* require a dismissal of the appeal. The appellants are still entitled to present the case on the record proper. *Bell v. Nivens*, 35.

§ 31c. Failure to Docket Appeal on Time.

Where appellant is not required to docket his appeal, from an order granting a motion for a change of venue, until the Fall Term of this Court, and appellee files at the Spring Term, a motion to docket and dismiss on the ground that the appeal on the face of the record is frivolous and only for delay, which appellant controverts, motion of appellee denied without expressing any opinion on the merits of the appeal. *Indemnity Co. v. Hood, Comr.*, 187.

APPEAL AND ERROR—*Continued.*

Where appellant fails to file his case on appeal fourteen days before the call of the district to which it belongs, he may apply for *certiorari* to preserve his right of appeal and appellees' motion filed thereafter to docket and dismiss under Rule 17 will be denied. *S. v. Jones*, 363.

§ 31e. For That Question Presented Has Become Moot or Academic.

As a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist, and the only matter to be decided is the disposition of the costs. While there are well recognized exceptions to this rule, where the subject of the litigation—the right of plaintiffs to the immediate possession of certain premises—has been disposed of by the surrender of same by defendant to plaintiffs, there is no exception. *Cochran v. Rowe*, 645.

In *habeas corpus*, petitioner asking for release from arrest upon telephonic revocation of his parole, where it appears that on the hearing below that petitioner's parole had then been revoked in due form, G. S., 134-85, the legality of his arrest and detention is presently academic, hence motion of the Attorney-General to dismiss must be allowed. *In re Burnett*, 646.

§ 37a. Matters Reviewable: In General.

The proper way to review an erroneous judgment is by appeal. *Crissman v. Palmer*, 472.

This Court may render final judgment here in proper cases, and occasionally does so; but it is not the practice to render judgment here unless it may be necessary to protect some right of the litigant parties in danger of *ad interim* defeat, or where it is demanded by the public convenience or welfare. Ordinarily, the opinion is certified down and, while binding on the court of original jurisdiction, the cause is not terminated until the authority of that court has been exercised by judgment in accordance with such opinion. *Goodson v. Lehmon*, 514.

The burden is on the appellant, not only to show error, but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby. *Smith v. Steen*, 644.

§ 37b. Matters in Discretion of Lower Court.

Ordinarily orders by the trial court making, in its discretion, new parties necessary to a conclusion of the controversy, are not reviewable on appeal. *Insurance Co. v. Motor Lines, Inc.*, 588.

Where findings of fact and judgment entered upon them were matters to be determined in the sound discretion of the court, the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here. *S. v. Marsh*, 648.

The admissibility of evidence, when challenged, is, *imprimis*, a question for the trial court. Where its admission primarily depends upon a determination of fact, the court of review is ordinarily bound by the finding of the trial judge when it is supported by evidence, and will not disturb that finding or ruling admitting the evidence unless there appears some error of law or legal inference. *S. v. Brooks*, 662.

§ 37e. Findings of Fact.

While in appeals from orders granting or denying injunctive relief, the findings of fact made by the court below are not conclusive, such findings are presumed, in the absence of exceptions, to be supported by evidence, and it

does not behoove this Court to seek for cause to upset or reverse the same. *Mullen v. Louisburg*, 53.

Findings of fact, made by a referee and approved by the trial court, when supported by competent evidence, are not subject to review on appeal, except where some question of law is involved. *Troitino v. Goodman*, 406.

Where there are no findings to support a referee's conclusions, exceptions thereto must be sustained and the cause remanded for additional findings. *Ibid.*

An exception to a judgment, which approved and confirmed the findings of fact, conclusions of law and award of the N. C. Industrial Commission, presents the single question, whether the facts found and admitted are sufficient to support the judgment. It is insufficient to bring up for review the findings of fact or evidence upon which they are based. *Rader v. Coach Co.*, 537.

When the only assignment of error is based on appellant's exception to the judgment and the judgment is supported by the findings of fact, the judgment will be affirmed. *Ibid.*

Findings of fact by the Industrial Commission, affirmed and approved by the judge, are binding on us when supported by evidence. It is presumed that they are correct and in accordance with the testimony and, when it is claimed that such findings are not supported by evidence, the exceptions and assignments of error entered in the court below must so specify. *Ibid.*

An exception to the judgment affirming an award by the Industrial Commission is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of such commission. *Fox v. Mills, Inc.*, 580.

Where findings of fact and judgment entered upon them were matters to be determined in the sound discretion of the court, the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here. *S. v. Marsh*, 648.

The admissibility of evidence, when challenged, is, *imprimis*, a question for the trial court. Where its admission primarily depends upon a determination of fact, the court of review is ordinarily bound by the finding of the trial judge when it is supported by evidence, and will not disturb that finding or ruling admitting the evidence unless there appears some error of law or legal inference. *S. v. Brooks*, 662.

§ 39a. Prejudicial and Harmless Error: In General.

To warrant a new trial it should be made to appear that the ruling complained of was material and prejudicial to defendant's rights, and that a different result would have likely ensued. *S. v. King*, 236.

§ 39e. In Instructions.

Evidence material to the decision on a former trial was not offered: hence exception to the charge on this point was untenable. *S. v. Friddle*, 240.

§ 40a. Review of Exceptions to Judgment or Signing of Judgment or to Findings.

Upon the trial of three defendants for unlawful possession and transportation of intoxicating liquor, seized at the home of the first defendant, who with the second defendant was found guilty on both counts, while the third defendant was found to be the owner of the liquor but not guilty, an order of forfeiture being entered by the court in all three cases, upon hearing on appeal by third defendant from order of forfeiture, preserved by *certiorari*, the only

APPEAL AND ERROR—*Continued.*

exception being to the judgment of forfeiture and refusal to sign judgment of restoration, no errors appearing on the face of the record, the judgment of forfeiture is affirmed. *S. v. Jones*, 363.

When the only assignment of error is based on appellant's exception to the judgment and the judgment is supported by the findings of fact, the judgment will be affirmed. *Rader v. Coach Co.*, 537.

An exception to the judgment affirming an award by the Industrial Commission is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of such commission. *Fox v. Mills, Inc.*, 580.

§ 47a. New Trial: For Newly Discovered Evidence.

It is the established rule in this jurisdiction that new trials will not be awarded by the Supreme Court for newly discovered evidence in criminal cases. *S.* v. *King*, 236.

Motion, for a new trial on the ground of newly discovered evidence, must be made at trial term, or upon appeal in this Court. *Crissman v. Palmer*, 472.

§ 48. Remand.

Where a case is tried under a misapprehension of the law, or correct principles are erroneously applied, the appellate practice with us is to order another hearing. *Coley v. Dalrymple*, 67; *Troitino v. Goodman*, 406.

Where defendant, in a criminal prosecution for violation of various provisions of the prohibition law, was convicted by a general verdict of guilty as charged and judgment entered on the count of manufacturing and prayer continued on the other counts, and upon appeal this Court held the evidence insufficient to support a verdict on any count except that of possession for sale and remanded the case for a lawful sentence, on the cause coming on for hearing, it was the duty of the court below to pronounce judgment as directed by this Court. *S. v. Graham*, 217.

Where a defendant, in a criminal prosecution based on several counts, was convicted by a general verdict and judgment of imprisonment rendered on a count as to which there was insufficient evidence, and on appeal the case was remanded for a lawful sentence, an objection, that no judgment was rendered by the court below at the first term after the decision of this Court was certified down, is without merit. *Ibid.*

Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the Superior Court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated; but when such judgment on appeal merely decreed that the award be in all respects affirmed, the judge below presumably having considered each of the assignments of error and overruled them, we do not hold that a remand is required. *Fox v. Mills, Inc.*, 580.

§ 49a. Law of Case.

In a compulsory reference, objected to and jury trial demanded, on the coming in of the referee's report, issues tendered by the objecting party, which have already been answered as matters of law by this Court on a former appeal in the same case, are not appropriate issues, the opinion on the former appeal being conclusive. *Cheshire v. First Presbyterian Church*, 165.

A ruling of the court below in accordance with a decision of this Court on a previous appeal in the same case, based upon the same facts, must be upheld, as such decision is the law of the case. *Ibid.*

APPEAL AND ERROR—*Continued.*

This Court may render final judgment here in proper cases, and occasionally does so; but it is not the practice to render judgment here unless it may be necessary to protect some right of the litigant parties in danger of *ad interim* defeat, or where it is demanded by the public convenience or welfare. Ordinarily, the opinion is certified down and, while binding on the court of original jurisdiction, the cause is not terminated until the authority of that court has been exercised by judgment in accordance with such opinion. *Goodson v. Lehmon*, 514.

§ 49b. Stare Decisis.

The law discussed in any opinion is set within the framework of that particular case. *S. v. Crandall*, 148.

APPEARANCE.

§ 1. Special Appearance.

Upon motion by special appearance to dismiss for want of service of process on defendant, this Court is bound by the findings of fact made by the court below, when there is sufficient evidence to support them. *Highway Com. v. Transportation Corp.*, 198.

A purported special appearance, raising questions as to the merits involved in the action, does not challenge the jurisdiction of the court. Nor may it be treated as a demurrer. It is not a valid plea. *New Hanover County v. Sidbury*, 679.

Having overruled an invalid special appearance, without finding that it was irrelevant and frivolous and made in bad faith for the purpose of delay, G. S., 1-126, leave to answer should be granted, G. S., 1-125. *Ibid.*

§ 2a. Acts Constituting General Appearance.

A defendant who makes a general appearance thereby waives irregularities in the service of summons and subjects himself to the jurisdiction of the court, G. S., 1-103. The same result follows when defendant obtains time within which to answer. *Wilson v. Thaggard* and *Stone v. Thaggard*, 348.

§ 2b. Effect of General Appearance.

A defendant, having made a general appearance, by motion to set aside a default judgment, which was allowed and time granted defendant in which to plead, it is his duty to answer or demur, even though a copy of the complaint filed has not been delivered to defendant, G. S., 1-121, and, upon his failure to do either, the court has authority to enter judgment by default and inquiry, without notice. And the court is without discretion to vacate the same, except upon a finding of fatal irregularity or excusable neglect and meritorious defense. G. S., 1-220. *Wilson v. Thaggard* and *Stone v. Thaggard*, 348.

ASSAULT AND BATTERY.

§ 7c. Assault With a Deadly Weapon With Intent to Kill, Resulting in Injury.

In a criminal prosecution for assault with a deadly weapon with intent to kill, resulting in injury, G. S., 14-32, where the State's evidence tended to show that prosecutor was in the act of taking money from his cash register, after closing his store for the night, when the defendant, who was definitely identified by both prosecutor and his clerk, shot a gun through the store window, the load lodging near prosecutor, who ran out of the store and shot a pistol in the

direction defendant had gone and was wounded by gunshot in reply from the darkness, threats by defendant against prosecutor being also shown, there is ample evidence to sustain conviction and motion to dismiss under G. S., 15-173, was properly denied. *S. v. Cody*, 38.

In a prosecution for an assault with a deadly weapon with intent to kill, resulting in injury, where the court charged that one of three verdicts might be returned: (1) guilty of assault with a deadly weapon with intent to kill, inflicting serious injury, not resulting in death, or (2) guilty of assault with a deadly weapon, or (3) not guilty, there being slight, if any, evidence of serious injury, there is no harmful error in the court's submitting the felony charge to the jury, defendant having been acquitted on that count. *Ibid.*

§ 7d. Assault With Deadly Weapon.

In a criminal prosecution for assault with a deadly weapon, a charge by the court that a commonly used implement, such as a hoe or ice pick, is *per se* a deadly weapon, with no evidence to disclose its weight, size, length, or other description, is reversible error. *S. v. Harrison*, 234.

Where a deadly weapon is referred to in an indictment, its use being a necessary element of the offense charged, it might be an act of proper precaution to procure another bill containing a description of the implement allegedly used, such as its weight, size and material out of which made. *Ibid.*

In a prosecution for assault with a deadly weapon, where the fact that defendant shot the State's witness with a pistol is not controverted, the only plea being self-defense, there is sufficient evidence for the jury. *S. v. Miller*, 478.

When there was evidence of an assault with a deadly weapon and none of simple assault, the court properly charged the jury that they could return one of two verdicts, either guilty of assault with a deadly weapon or not guilty. *Ibid.*

§ 7g. Assault on Female.

In a criminal prosecution for an assault on a female, with intent to commit rape, the burden of showing that defendant was under 18 years of age is on the defendant. G. S., 14-33. *S. v. Morgan*, 549.

§ 11. Sufficiency of Evidence.

In a criminal prosecution for assault with a deadly weapon with intent to kill, resulting in injury, G. S., 14-32, where the State's evidence tended to show that prosecutor was in the act of taking money from his cash register, after closing his store for the night, when the defendant, who was definitely identified by both prosecutor and his clerk, shot a gun through the store window, the load lodging near prosecutor, who ran out of the store and shot a pistol in the direction defendant had gone and was wounded by gunshot in reply from the darkness, threats by defendant against prosecutor being also shown, there is ample evidence to sustain conviction and motion to dismiss under G. S., 15-173, was properly denied. *S. v. Cody*, 38.

In a criminal prosecution for a felonious assault with intent to kill, where the State's evidence tended to show that defendant, while the prosecuting witness was having a row in her place of business with one of her servants, left the room and returned almost immediately with a shotgun and shot the prosecuting witness at close range, inflicting serious injury, there was sufficient evidence for the jury, and motion for judgment as of nonsuit was properly denied. *S. v. Murdock*, 224.

ASSAULT AND BATTERY—*Continued.*

In a prosecution for assault with a deadly weapon, where the fact that defendant shot the State's witness with a pistol is not controverted, the only plea being self-defense, there is sufficient evidence for the jury. *S. v. Miller*, 478.

§ 12b. Defense of Home.

The right of a person to defend his home from attack is a substantive right, as is the right to evict a trespasser from his home. *S. v. Spruill*, 356.

When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, G. S., 1-180, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. *Ibid.*

§ 13. Instructions.

In a prosecution for an assault with a deadly weapon with intent to kill, resulting in injury, where the court charged that one of three verdicts might be returned: (1) guilty of assault with a deadly weapon with intent to kill, inflicting serious injury, not resulting in death, or (2) guilty of assault with a deadly weapon, or (3) not guilty, there being slight, if any, evidence of serious injury, there is no harmful error in the court's submitting the felony charge to the jury, defendant having been acquitted on that count. *S. v. Cody*, 38.

When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, G. S., 1-180, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. *S. v. Spruill*, 356.

When there was evidence of an assault with a deadly weapon and none of simple assault, the court properly charged the jury that they could return one of two verdicts, either guilty of assault with a deadly weapon or not guilty. *S. v. Miller*, 478.

§ 14. Verdict and Judgment.

In case of an assault with a deadly weapon, the person convicted (or one who pleads guilty) shall be punished by fine or imprisonment, or both, at the discretion of the court. G. S., 14-33. And, when no time is fixed by the statute, imprisonment for two years will not be held to be cruel or unusual and violative of Art. I, sec. 14, of the Constitution of North Carolina. *S. v. Crandall*, 148.

ASSISTANCE, WRIT OF.

§ 4. Issuance and Execution.

An appellate court will not hear and decide a moot question, or one which has become such. G. S., 1-277. This does not mean, however, that the trial court should withhold available punitive measures for willful failure to comply with its appropriate decrees. *In re Morris*, 48.

ATTORNEY AND CLIENT.

§ 1. Office of Attorney: In General.

A party may appear either in person or by counsel. G. S., 1-11. The statutory provision is in the alternative. It means that a litigant may not appeal both *in propria persona* and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later through counsel. *New Hanover County v. Sidbury*, 679.

AUTOMOBILES.

III. Operation and Law of the Road.

8. Due Care in Operation in General. Hobbs v. Coach Co., 323; Henson v. Wilson, 417; Cummins v. Fruit Co., 625.

9a. Attention to Road and Proper Lookout. Henson v. Wilson, 417.

9c. Safety Statutes and Ordinances. Morgan v. Coach Co., 668.

11. Passing Vehicles on Highways. Cummins v. Fruit Co., 625.

12a. Speed: In General. Hobbs v. Coach Co., 323.

13, 14, 16. Starting and Turning: Stopping, Parking and Parking Lights: Loading and Number of Passengers. Cummins v. Fruit Co., 625; Morgan v. Coach Co., 668.

18a. Negligence and Proximate Cause. Harper v. Harper, 260; Hobbs v. Coach Co., 323; Morgan v. Coach Co., 668; Tysinger v. Dairy Products, 717.

18c. Contributory Negligence. Cummins v. Fruit Co., 625; Tysinger v. Dairy Products, 717.

18d. Concurring and Intervening Negligence. Morgan v. Coach Co., 668.

18g. Sufficiency of Evidence and Nonsuit. Hobbs v. Coach Co., 323; Henson v. Wilson, 417; Cummins v. Fruit Co., 625; Tysinger v. Dairy Products, 717.

18h. Instructions. Stewart v. Cab Co., 654.

IV. Guests and Passengers.

19. Right of Action for Injuries in General. Harper v. Harper, 260.

20b. Imputed Negligence. Ibid.

V. Liability of Owner for Driver's Negligence.

23. In General. Hobbs v. Coach Co., 323.

24a. Agents and Employees: In General. Harper v. Harper, 260.

24c. Competency and Sufficiency of Evidence. Hobbs v. Coach Co., 323.

24d. Instructions. Harper v. Harper, 260.

§ 8. Due Care in Operation in General.

The operator of a motor vehicle on a public highway may assume that other operators of motor vehicles will use reasonable care and caution commensurate with visible conditions, and that they will approach with their vehicles under reasonable control and will observe and obey the rules of the road. As between operators their duties are mutual and each may assume that others will comply with their obligations. *Hobbs v. Coach Co.*, 323.

It is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent man would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator to keep the vehicle under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty requires the operator to be reasonably vigilant, to anticipate and expect the presence of others, and to see what he ought to have seen. *Henson v. Wilson*, 417.

The duties of those using the highways are correlative. While the rule of the ordinarily prudent man is not changed as a standard of conduct, certainly the ordinarily prudent man must be permitted to put some reliance on compliance with the most common and ordinary laws or rules established for his protection. *Cummins v. Fruit Co.*, 625.

§ 9a. Attention to Road and Proper Lookout.

It is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent

man would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator to keep the vehicle under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty requires the operator to be reasonably vigilant, to anticipate and expect the presence of others, and to see what he ought to have seen. *Henson v. Wilson*, 417.

§ 9c. Safety Statutes and Ordinances.

The decisions of this Court are to the effect that the violation of an ordinance or statute enacted for the safety of the public is negligence *per se*, but such violation must be the proximate cause or one of the proximate causes of the injury to warrant recovery. *Morgan v. Coach Co.*, 668.

The stopping of a passenger bus upon the paved portion of a highway outside of business or residential districts, for the purpose of permitting a passenger to alight, is not parking or leaving a vehicle standing, within the meaning of G. S., 20-161, and is not violative thereof. And by analogy the same principle would apply when stopping for the purpose of receiving a passenger. *Ibid.*

Where the complaint, in an action to recover damages for wrongful death, alleges that the passenger bus of one of defendants, following on the highway a school bus, plainly marked as such by visible signs required by statute, which after proper signal had stopped and was engaged in discharging school children, passed the school bus without stopping and then stopped immediately ahead of the school bus for the sole purpose of taking on a passenger, G. S., 20-217, thus concealing the view ahead and forcing plaintiff's intestate to go behind the bus to cross the highway, and as deceased was attempting to cross, before the stop signal of the school bus was withdrawn, defendant's bus speeded up its motor, the sound of which prevented deceased from hearing the approach of other vehicles, and put the passenger bus in motion, and, when deceased reached about the center of the highway, she was violently struck and killed by an automobile coming from ahead at a high rate of speed, a cause of action against the defendant, owner of the passenger bus, is stated and demurrer was properly overruled. *Ibid.*

§ 11. Passing Vehicles on Highways.

The operator of a motor vehicle is not required to anticipate that an unlighted, unguarded vehicle is standing in his path on the highway at night; nor can he be held for contributory negligence because he did not stop, when momentarily blinded by the lights of an oncoming vehicle, nor because the rays of his lights, dimmed in response to those of a passing car, did not pick up the body of the unlighted vehicle so parked on the highway. *Cummins v. Fruit Co.*, 625.

§ 12a. Speed: In General.

Allegations, in a complaint for alleged personal injuries to plaintiff by an automobile collision, and evidence supporting same, as to the presence of soldier-passengers in plaintiff's car and the fact that one of them was killed and others injured by the collision, were proper and competent solely to be considered by the jury with respect to the momentum of the vehicle at the time of the crash (which was admitted), the attendant destruction and death bearing on the question of negligence and proximate cause of the injury. *Hobbs v. Coach Co.*, 323.

AUTOMOBILES—*Continued.*

§§ 13, 14, 16. Starting and Turning: Stopping, Parking and Parking Lights: Loading and Number of Passengers.

The operator of a motor vehicle is not required to anticipate that an unlighted, unguarded vehicle is standing in his path on the highway at night; nor can he be held for contributory negligence because he did not stop, when momentarily blinded by the lights of an oncoming vehicle, nor because the rays of his lights, dimmed in response to those of a passing car, did not pick up the body of the unlighted vehicle so parked on the highway. *Cummins v. Fruit Co.*, 625.

The stopping of a passenger bus upon the paved portion of a highway outside of business or residential districts, for the purpose of permitting a passenger to alight, is not parking or leaving a vehicle standing, within the meaning of G. S., 20-161, and is not violative thereof. And by analogy the same principle would apply when stopping for the purpose of receiving a passenger. *Morgan v. Coach Co.*, 668.

Where the complaint, in an action to recover damages for wrongful death, alleges that the passenger bus of one of defendants, following on the highway a school bus, plainly marked as such by visible signs required by statute, which after proper signal had stopped and was engaged in discharging school children, passed the school bus without stopping and then stopped immediately ahead of the school bus for the sole purpose of taking on a passenger, G. S., 20-217, thus concealing the view ahead and forcing plaintiff's intestate to go behind the bus to cross the highway, and as deceased was attempting to cross, before the stop signal of the school bus was withdrawn, defendant's bus speeded up its motor, the sound of which prevented deceased from hearing the approach of other vehicles, and put the passenger bus in motion, and, when deceased reached about the center of the highway, she was violently struck and killed by an automobile coming from ahead at a high rate of speed, a cause of action against the defendant, owner of the passenger bus, is stated and demurrer was properly overruled. *Ibid.*

§ 18a. Negligence and Proximate Cause.

In an action to recover for injuries to plaintiffs as the result of an automobile wreck, where plaintiffs' evidence tended to show that defendant, the driver of the car in which both plaintiffs and defendant were riding, became drowsy, knew he was drowsy, lost consciousness, and failed to keep a proper lookout and to attend to what he was doing and thereby, or intentionally, disregarding the screams of one plaintiff, swerved the car to the left, ran off the road, causing the injuries, there is sufficient evidence for the jury and motion for judgment as of nonsuit was properly denied. *Harper v. Harper* and *Wickham v. Harper*, 260.

Allegations, in a complaint for alleged personal injuries to plaintiff by an automobile collision, and evidence supporting same, as to the presence of soldier-passengers in plaintiff's car and the fact that one of them was killed and others injured by the collision, were proper and competent solely to be considered by the jury with respect to the momentum of the vehicle at the time of the crash (which was admitted), the attendant destruction and death bearing on the question of negligence and proximate cause of the injury. *Hobbs v. Coach Co.*, 323.

Where the complaint, in an action to recover damages for wrongful death, alleges that the passenger bus of one of defendants, following on the highway a school bus, plainly marked as such by visible signs required by statute,

which after proper signal had stopped and was engaged in discharging school children, passed the school bus without stopping and then stopped immediately ahead of the school bus for the sole purpose of taking on a passenger, G. S., 20-217, thus concealing the view ahead and forcing plaintiff's intestate to go behind the bus to cross the highway, and as deceased was attempting to cross, before the stop signal of the school bus was withdrawn, defendant's bus speeded up its motor, the sound of which prevented deceased from hearing the approach of other vehicles, and put the passenger bus in motion, and, when deceased reached about the center of the highway, she was violently struck and killed by an automobile coming from ahead at a high rate of speed, a cause of action against the defendant, owner of the passenger bus, is stated and demurrer was properly overruled. *Morgan v. Coach Co.*, 668.

Where the violation of a statute relative to the operation of a motor vehicle upon the highway is negligence *per se*, such violation must be a proximate cause of injury to become actionable. *Tysinger v. Dairy Products*, 717.

§ 18c. Contributory Negligence.

In an action by plaintiff to recover from defendants for injuries allegedly caused by defendants' negligence, where all of the evidence tended to show that defendants' mud-spattered truck was parked, headed north, about 6 a.m. on a dark, foggy morning, with all four wheels on the pavement in the right-hand lane of a two-way highway, without lights, flares, or any other mode of signal, G. S., 20-161, and had been so parked for some time, apparently unattended, and that plaintiff, driving a truck north at about 30 to 35 miles per hour, was compelled to dim his lights, when about 20 feet south of defendants' truck, in response to the dimmed lights of an oncoming car in order to pass same, G. S., 20-181, the lights of this car partly blinding plaintiff, who collided with the rear of defendants' truck, causing the alleged injuries, motion for nonsuit at the close of all the evidence, on the ground of contributory negligence, was properly refused. *Cummins v. Fruit Co.*, 625.

The operator of a motor vehicle on a public highway may assume and act upon the assumption that a pedestrian will use reasonable car and caution commensurate with visible conditions, and that he will observe and obey the rules of the road. *Tysinger v. Dairy Products*, 717.

In an action by plaintiff to recover damages for the wrongful death of plaintiff's intestate as a result of alleged negligence, where plaintiff's evidence tended to show that plaintiff's intestate was struck and killed by defendant's truck, in crossing a highway from a neighbor's to his own home, at a point other than a marked cross-walk and not within an unmarked cross-walk at an intersection, there being at the point of crossing an unobstructed view of the road from three hundred yards to a quarter of a mile in the direction deceased was facing and from which the truck was approaching, without evidence of anything to give notice to the operator of the truck that deceased was unaware of its approach and would not obey the law of the road and without evidence as to how close the truck was to him when he started across—except that deceased was hit by the side of the truck near the center of the highway, there is no evidence that the driver of the truck failed to exercise due care to avoid colliding with deceased or from which to infer that a failure to give warning by sounding the horn was a proximate cause of the collision, and there is evidence of contributory negligence in deceased's failure to yield the right of way, and judgment of nonsuit was proper. *Ibid.*

AUTOMOBILES—*Continued.*

§ 18d. Concurring and Intervening Negligence.

Where the complaint, in an action to recover damages for wrongful death, alleges that the passenger bus of one of defendants, following on the highway a school bus, plainly marked as such by visible signs required by statute, which after proper signal had stopped and was engaged in discharging school children, passed the school bus without stopping and then stopped immediately ahead of the school bus for the sole purpose of taking on a passenger, G. S., 20-217, thus concealing the view ahead and forcing plaintiff's intestate to go behind the bus to cross the highway, and as deceased was attempting to cross, before the stop signal of the school bus was withdrawn, defendant's bus speeded up its motor, the sound of which prevented deceased from hearing the approach of other vehicles, and put the passenger bus in motion, and, when deceased reached about the center of the highway, she was violently struck and killed by an automobile coming from ahead at a high rate of speed, a cause of action against the defendant, owner of the passenger bus, is stated and demurrer was properly overruled. *Morgan v. Coach Co.*, 668.

§ 18g. Sufficiency of Evidence and Nonsuit.

In an action to recover damages for alleged injuries to plaintiff resulting from an admitted automobile collision, where plaintiff's evidence tended to show that, at the time of the accident, the bus of the corporate defendants was being driven on the public highway, by the individual defendant, employee and agent of corporate defendants, at a reckless and high rate of speed (in excess of 45 miles per hour, no special hazard existing, G. S., 20-141) and out of control and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the bus to move over from its right-hand side to its left-hand side of the highway, in violation of G. S., 20-148, and immediately in front of plaintiff's automobile, a head-on collision resulting, and while plaintiff was offering his evidence, as an accommodation to the witness, a medical expert was allowed to testify for defendants, and then plaintiff completed his evidence and rested, defendant introducing no other evidence and also resting, upon motion by defendants for judgment as of nonsuit, G. S., 1-183, the motion was properly denied, there being ample evidence for the jury, and there being no sufficient evidence of contributory negligence; and it is not necessary to decide whether or not defendants' motion under G. S., 1-183, was aptly made. *Hobbs v. Coach Co.*, 323.

In a civil action to recover damages for the alleged wrongful death (G. S., 28-173, 174) of a child less than eight years of age, where plaintiff's evidence tended to show that plaintiff's intestate was on the side of the left side embankment of a narrow road cut, as the loaded truck operated by one of defendants approached him uphill and at a speed of not over five miles per hour, that if he was there the operator of the truck saw him, or by the exercise of ordinary care could and should have seen him, that the operator of the truck had knowledge of the narrowness of the road and of the uneven surface of the road and its effect in making the loaded truck lean to the left, so that collision with, and injury to a child on the left embankment was likely to ensue, while defendants' evidence contradicted that of plaintiff, issues of fact are raised which the jury alone may decide, and there was error in the court's allowing a motion for judgment as of nonsuit, when renewed at the close of all the evidence. *Henson v. Wilson*, 417.

In an action by plaintiff to recover from defendants for injuries allegedly caused by defendants' negligence, where all of the evidence tended to show that defendants' mud-spattered truck was parked, headed north, about 6 a.m.

on a dark, foggy morning, with all four wheels on the pavement in the right-hand lane of a two-way highway, without lights, flares, or any other mode of signal, G. S., 20-161, and had been so parked for some time, apparently unattended, and that plaintiff, driving a truck north at about 30 to 35 miles per hour, was compelled to dim his lights, when about 20 feet south of defendants' truck, in response to the dimmed lights of an oncoming car in order to pass same, G. S., 20-181, the lights of this car partly blinding plaintiff, who collided with the rear of defendants' truck, causing the alleged injuries, motion for nonsuit at the close of all the evidence, on the ground of contributory negligence, was properly refused. *Cummins v. Fruit Co.*, 625.

In an action by plaintiff to recover damages for the wrongful death of plaintiff's intestate as a result of alleged negligence, where plaintiff's evidence tended to show that plaintiff's intestate was struck and killed by defendant's truck, in crossing a highway from a neighbor's to his own home, at a point other than a marked cross-walk and not within an unmarked cross-walk at an intersection, there being at the point of crossing an unobstructed view of the road from three hundred yards to a quarter of a mile in the direction deceased was facing and from which the truck was approaching, without evidence of anything to give notice to the operator of the truck that deceased was unaware of its approach and would not obey the law of the road and without evidence as to how close the truck was to him when he started across —except that deceased was hit by the side of the truck near the center of the highway, there is no evidence that the driver of the truck failed to exercise due care to avoid colliding with deceased or from which to infer that a failure to give warning by sounding the horn was a proximate cause of the collision, and there is evidence of contributory negligence in deceased's failure to yield the right of way, and judgment of nonsuit was proper. *Tysinger v. Dairy Products*, 717.

§ 18h. Instructions.

In a civil action for alleged damages to plaintiff and his automobile, resulting from a collision between the motor vehicles of plaintiff and defendant at an intersection of two city streets, where the city maintained traffic signals, G. S., 20-169, the evidence being sharply contradictory as to whether plaintiff or defendant violated the traffic signal by entering the intersection on a red light, the court erred, in its charge to the jury, by a failure to state in a plain and concise manner the evidence offered as to the right of way between the parties in support of their respective contentions and to declare and explain the law applicable thereto. G. S., 1-180. *Stewart v. Cab Co.*, 654.

§ 19. Right of Action for Injuries in General.

The South Carolina guest statute, S. C. Code, sec. 5908 (1), as interpreted by the Supreme Court of that State, comes to this: If the negligent failure to exercise due care was the result of mere inadvertence or casual inattention, it is simply negligence and a guest passenger may not recover. On the other hand, if there was a conscious failure to be careful for the safety of others or to observe the rules of the road, then an inference of recklessness is permissible. And, when there is testimony tending to show that defendant failed to keep a proper lookout or to observe the positive commands of the traffic statute, it is for the jury to say, under all circumstances, whether such conduct evidences a heedless and reckless disregard of the rights of others. *Harper v. Harper* and *Wickham v. Harper*, 260.

AUTOMOBILES—*Continued.*

§ 20b. Imputed Negligence.

Where plaintiff predicates her cause of action, for damages from injuries in an automobile accident, on allegations and her own evidence that she was a guest passenger in her automobile, which she had lent to her husband for the purpose of a business trip, with the intent at the time that he should have exclusive control while so used, and which was being operated by her husband for that purpose at the time of the accident, there was error in the court's charge to the jury that they should answer "No" to the issue, "Was defendant at the time of the alleged injury acting as agent and under the control and supervision of plaintiff?" *Harper v. Harper* and *Wickham v. Harper*, 260.

§ 23. Liability of Owner for Driver's Negligence: In General.

In an action to recover damages for alleged injuries resulting from an automobile collision, while there are other allegations of negligence in the complaint, the trial below was had on the alleged theory that, at the time of the collision, the bus of the corporate defendants was being driven by the individual defendant, an employee and agent of corporate defendants, at a reckless and high rate of speed and out of control, and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the bus to move from its right-hand side to its left-hand side of the public highway and immediately in front of plaintiff's automobile. Hence, the liability of the corporate defendants is grounded solely, and is wholly dependent upon the negligence, if any, of the individual defendant, under the doctrine of *respondeat superior*. *Hobbs v. Coach Co.*, 323.

§ 24a. Agents and Employees: In General.

The owner of an automobile has the right to control and direct its operation. So when the owner is an occupant of an automobile, being operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner. *Harper v. Harper* and *Wickham v. Harper*, 260.

§ 24c. Competency and Sufficiency of Evidence.

In an action to recover damages for alleged injuries to plaintiff resulting from an admitted automobile collision, where plaintiff's evidence tended to show that, at the time of the accident, the bus of the corporate defendants was being driven on the public highway, by the individual defendant, employee and agent of corporate defendants, at a reckless and high rate of speed (in excess of 45 miles per hour, no special hazard existing, G. S., 20-141) and out of control and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the bus to move over from its right-hand side to its left-hand side of the highway, in violation of G. S., 20-148, and immediately in front of plaintiff's automobile, a head-on collision resulting, and while plaintiff was offering his evidence, as an accommodation to the witness, a medical expert was allowed to testify for defendants, and then plaintiff completed his evidence and rested, defendant introducing no other evidence and also resting, upon motion by defendants for judgment as of nonsuit, G. S., 1-183, the motion was properly denied, there being ample evidence for the jury, and there being no sufficient evidence of contributory negligence; and it is not necessary to decide whether or not defendants' motion under G. S., 1-183, was aptly made. *Hobbs v. Coach Co.*, 323.

AUTOMOBILES—*Continued.*

§ 24d. Instructions.

Where plaintiff predicates her cause of action, for damages from injuries in an automobile accident, on allegations and her own evidence that she was a guest passenger in her automobile, which she had lent to her husband for the purpose of a business trip, with the intent at the time that he should have exclusive control while so used, and which was being operated by her husband for that purpose at the time of the accident, there was error in the court's charge to the jury that they should answer "No" to the issue, "Was defendant at the time of the alleged injury acting as agent and under the control and supervision of plaintiff?" *Harper v. Harper* and *Wickham v. Harper*, 260.

BAILMENT.

§ 1. Nature, Requisites and Validity.

Where a son leaves his automobile in the custody of his parents, with instructions that the parents use the car to keep the battery from running down, driving it enough for that purpose, the relationship of the parties is that of bailor and bailee, rather than principal and agent. *Sink v. Sechrest*, 232.

§ 6. Actions for Conversion or Failure to Surrender Property.

Generally a third party may not recover of the bailor for the negligent use by the bailee of the bailed chattel, in the absence of some control exercised by the bailor at the time, or of negligence on his part which proximately contributed to the injury. The doctrine of *respondeat superior* ordinarily is inapplicable to the relationship of bailor and bailee, unless made so by statute. *Sink v. Sechrest*, 232.

BANKRUPTCY.

§ 4. Title and Rights of Trustee.

It is generally held that the provision of the Bankruptcy Act, making void a judgment obtained against bankrupt within four months of adjudication, does not avoid liens as against all the world, but only as against the trustee, and those claiming under him. The lien is not avoided for the benefit of the bankrupt save as to his exempt property. *Sample v. Jackson*, 380.

§ 7. Claims and Priorities.

Where a bankruptcy court adjudges no assets available for unsecured creditors, declines to administer the property as too burdensome, assigning all realty to bankrupt as his homestead, creditors abandon any claim thereto, title to the land, subject to the homestead exemption and existing liens, reverts to the bankrupt, and the lien of a judgment within four months is not discharged. *Sample v. Jackson*, 380.

§ 7½. Exemptions.

Exempt property is expressly excepted from the operation of the Federal Bankruptcy Act, and the trustee must set apart and allot to the bankrupt such exemptions as are allowed by the State law. When there is no trustee this may be done by the court itself. *Sample v. Jackson*, 380.

It is generally held that the provision of the Bankruptcy Act, making void a judgment obtained against bankrupt within four months of adjudication, does not avoid liens as against all the world, but only as against the trustee,

BANKRUPTCY—*Continued.*

and those claiming under him. The lien is not avoided for the benefit of the bankrupt save as to his exempt property. *Ibid.*

A bankrupt may assert the invalidity of a lien created within four months of bankruptcy by attachment or like process, the enforcement of which would defeat the exemption. *Ibid.*

Where a bankruptcy court adjudges no assets available for unsecured creditors, declines to administer the property as too burdensome, assigning all realty to bankrupt as his homestead, creditors abandon any claim thereto, title to the land, subject to the homestead exemption and existing liens, reverts to the bankrupt, and the lien of a judgment within four months is not discharged. *Ibid.*

§ 9. Debts Discharged.

Where a guardian lends to himself a large part of his ward's estate, keeps no accounts, commingles the assets of the guardianship with his personal funds, and fails to account for the estate, a judgment against him, for the funds so unaccounted for, is not affected by the guardian's subsequent discharge in bankruptcy. Bankruptcy Act, sec. 17, 11 U. S. C. A., 35. *Trust Co. v. Parker*, 480.

"Defalcation" as used in criminal statutes implies some moral dereliction, but in sec. 17 of the Bankruptcy Act, 11 U. S. C. A. 35, it is a broader term and includes any failure of a guardian or other person acting in a fiduciary capacity to account for trust funds. Examples cited. *Ibid.*

BANKS AND BANKING.

§ 13. Office and Duties of Statutory Receiver in General.

In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks, G. S., 53-20, G. S., 53-22. *Indemnity Co. v. Hood, Comr.*, 361.

BASTARDS.

§ 2. Nature and Elements of Offense of Willful Failure to Support.

Neither paternity nor failure to support, nor both, without willfulness, is sufficient to convict a father for failure to support his illegitimate child. *S. v. White*, 351.

§ 3. Warrant and Indictment.

Willfulness of the neglect or refusal to provide adequate means of support of an illegitimate child, G. S., 49-2, is one of the essential elements of the offense, and must be charged in the warrant; and a motion in arrest of judgment should be allowed on failure of the warrant to so charge. *S. v. Vanderlip*, 610.

§ 5. Evidence and Nonsuit.

Where defendant was tried on a warrant charging the willful refusal, failure and neglect to support defendant's illegitimate child, and the evidence for the State tended to show that not only had the mother made no demand on defendant for support of the child, but that she had said to him if he paid $20 (which he did), there would be no more of it, and that she thought she could care for the child as it ought to be cared for, there is not sufficient evidence to support the verdict and judgment. *S. v. White*, 351.

BETTERMENTS.

§ 7. Assessment of Value of Improvements.

In a civil action to cancel a deed, remove cloud from plaintiff's title and to require defendant to reconvey house and lot to plaintiff, based on allegations of fraud, undue influence and coercion, where on the trial defendant in open court tendered the property in question to plaintiff, on the condition that plaintiff pay defendant the amount expended by her for improvements, which tender was accepted, there was error by the court below in submitting to the jury an issue, as to whether defendant made permanent improvements, under title believed by her to be good, the only matter left open by the agreement of the parties being the amount expended for improvements or their reasonable value. *Featherstone v. Glenn*, 404.

BILL OF DISCOVERY.

§§ 1, 2, 3. Nature and Scope of Remedy in General: Parties Who May Be Examined: Affidavit and Proceedings to Secure.

The procedure, under G. S., 1-569, and G. S., 1-570, may be permitted to the plaintiff to procure information to frame complaint, or after answer is filed plaintiff may cause the defendant to be examined to procure evidence. And by parity the defendant may have the plaintiff examined to procure information to file answer, or after the answer is filed to procure evidence for the trial. *Fox v. Yarborough*, 606; *McKnight v. Yarborough*, 606; *Reid v. Yarborough*, 606.

BILLS AND NOTES.

§§ 2a, 27. Sufficiency of Execution: Sufficiency of Evidence, Nonsuit and Directed Verdict.

In an action to recover on a note allegedly signed by defendants, where plaintiff's evidence tended to show, by evidence and opinion of persons familiar with the handwriting of defendants, that the note in question was signed by defendants, when considered with other evidence that the said note was part of the assets of a failed bank, had credits endorsed thereon and was acquired by plaintiff by assignment from the receiver of the bank, there is sufficient evidence to go to the jury on the question of its execution and judgment as for nonsuit was error. *Lee v. Beddingfield*, 573.

BOUNDARIES.

§ 1. General Rules.

All the descriptive matter set out in a deed, where pertinent, is to be considered in the attempt to identify the land to be conveyed, both in its content and extent; but we must observe other more specific rules, respecting the comparative weight and value of the descriptive elements in the conveyance—natural objects, artificial monuments, fixed corners, course, distance, quantity. *Tice v. Winchester*, 673.

While the general rule is that a description of land as bordering on a non-navigable stream carries to the thread of the stream, this is rebutted by words which clearly restrict the grant to the edge or shore of the stream; and where the call is to a point on the margin of a swamp and thence along the swamp, the common law rule which carries the riparian owner's title to the thread of the stream does not apply. *Kelly v. King*, 709.

The description "to a high water mark" of a non-navigable arm of the sea, a broad shallow sound, most of which is dry at low water and the deepest

part of which (a ten-foot channel) does not exceed 3 feet at high water and is not over 10 inches at low water, restricts or limits the conveyance to the correctly located line of mean high water as indicated on the ground. Particularly is this so where the title to the marsh lands, lands covered by water, was at the time the lots in question were laid off held by the State, subject to disposition by the State Board of Education, since title to swamp lands is presumed to be in that Board or its assigns until a valid title to same is shown otherwise. G. S., 146-90. *Ibid.*

There is no presumption that grantors, in a deed describing lands as running to the high water mark of a shallow sound most of which being dry at low water, intended to convey lands beneath the waters of the sound. *Ibid.*

What are the boundaries of a deed is a question of law for the court. Where they are is a question of fact for the jury. *Ibid.*

§ 3a. In General.

All the descriptive matter set out in a deed, where pertinent, is to be considered in the attempt to identify the land to be conveyed, both in its content and extent; but we must observe other more specific rules, respecting the comparative weight and value of the descriptive elements in the conveyance—natural objects, artificial monuments, fixed corners, course, distance, quantity. *Tice v. Winchester*, 673.

When the beginning point, in the description of land in a conveyance, has been established, it cannot be shifted backwards and forwards in the line by any call for course or distance; but the actual distance between it and the next corner shall be taken, regardless of whether the distance called for is over or short of that point. *Ibid.*

An artificial monument, such as a stake, usually is not considered as of so much dignity and certainty as a reference to natural objects or to objects more or less permanent in their nature, such as permanent structures on land. *Ibid.*

Where the deeds, under which plaintiffs claim, describe their lots as fronting on a certain avenue and extending back to the high water mark of a shallow sound, their rights are limited by the express words of their deeds, and the boundaries of their lots may not be extended beyond the high water mark of the sound as it existed at the time their titles were acquired; and their titles and right of possession may not be extended to embrace lands which were then covered by the waters of the sound, nor include the use of such waters for practical or esthetic purposes. And upon the filling in of the sound by defendants and others, within the limits of the previous high water mark, the loss of access to the waters or deprivation of view suffered by plaintiffs is *damnum absque injuria*. *Kelly v. King*, 709.

Ancient grants offered, without sufficient evidence to show their location so as to cover the *locus in quo*, are not admissible in evidence. *Ibid.*

§ 3d. Maps.

Where lots are sold by reference to a recorded plat, the effect of reference to the plat is to incorporate it in the deed as part of the description of the land conveyed. And if the deed contains two descriptions, one by metes and bounds and the other by lot and block according to a certain plat or map, the controlling description is the lot according to the plat, rather than the one by metes and bounds. *Kelly v. King*, 709.

§ 4. Calls to Natural Objects.

All the descriptive matter set out in a deed, where pertinent, is to be considered in the attempt to identify the land to be conveyed, both in its content and extent; but we must observe other more specific rules, respecting the comparative weight and value of the descriptive elements in the conveyance—natural objects, artificial monuments, fixed corners, course, distance, quantity. *Tice v. Winchester*, 673.

An artificial monument, such as a stake, usually is not considered as of so much dignity and certainty as a reference to natural objects or to objects more or less permanent in their nature, such as permanent structures on land. *Ibid.*

While the general rule is that a description of land as bordering on a non-navigable stream carries to the thread of the stream, this is rebutted by words which clearly restrict the grant to the edge or shore of the stream; and where the call is to a point on the margin of a swamp and thence along the swamp, the common law rule which carries the riparian owner's title to the thread of the stream does not apply. *Kelly v. King*, 709.

The description "to a high water mark" of a non-navigable arm of the sea, a broad shallow sound, most of which is dry at low water and the deepest part of which (a ten-foot channel) does not exceed 3 feet at high water and is not over 10 inches at low water, restricts or limits the conveyance to the correctly located line of mean high water as indicated on the ground. Particularly is this so where the title to the marsh lands, lands covered by water, was at the time the lots in question were laid off held by the State, subject to disposition by the State Board of Education, since title to swamp lands is presumed to be in that Board or its assigns until a valid title to same is shown otherwise. G. S., 146-90. *Ibid.*

There is no presumption that grantors, in a deed describing lands as running to the high water mark of a shallow sound most of which being dry at low water, intended to convey lands beneath the waters of the sound. *Ibid.*

§ 7. Parties and Procedure.

In a processioning proceeding under G. S., 38-1, *et seq.*, when it is made to appear that there is a *bona fide* dispute between landowners as to the true location of the boundary line between adjoining tracts of land, the cause may not be dismissed as in case of nonsuit. *Cornelison v. Hammond*, 535.

The statute, G. S., 38-1, *et seq.*, is expressly designed to provide a means of settlement by an orderly proceeding in court and plaintiff, as a matter of right, is entitled to have the issue answered by a jury so that the controversy may be brought to an end by judicial decree. *Ibid.*

The cause may be dismissed when it is made to appear that (1) there are fatal irregularities or defects on the face of the record, or (2) no *bona fide* dispute exists, or (3) plaintiff and defendant are not the owners of adjoining tracts. *Ibid.*

§ 10. Issues and Burden of Proof.

When a cause to determine the true boundary line between adjoining landowners is heard on appeal from the clerk, unless the pleadings are complicated by other allegations, there is only one issue—where is the true location of the dividing line between the lands of plaintiff and defendant? *Cornelison v. Hammond*, 535.

BROKERS AND FACTORS.

§ 3. Creation, Existence and Termination.

Oral contracts between real estate brokers and their principals for the sale of land of the principal are enforceable as such. *White v. Pleasants*, 760.

§ 8. Sale of Property.

A simple contract of agency for the sale of land for an indefinite and unstated time is generally revocable, in good faith, at any time before the broker makes the sale, or produces a purchaser who is ready, willing and able to buy on the terms set forth by the principal. *White v. Pleasants*, 760.

§ 10. Where Sale Is Completed.

A prime requisite, for the recovery of commission from his principal by a rental broker, is that the broker must find, while his contract of agency is still in effect, a prospect ready, able and willing to lease the premises on the terms specified by the owner in his contract with the broker. *Insurance Co. v. Disher*, 345.

Where a broker has made a sale of land, or has produced a purchaser who is ready, willing and able to buy on the terms set forth by the principal, the principal, although having the power, has no legal right, without incurring liability for the wrongful termination, to revoke the broker's agency to sell. *White v. Pleasants*, 760.

When under an existing contract of agency to sell land in which no stipulation is made for compensation, the broker has made a sale, or produced a purchaser who is ready, willing and able to buy the land, the rule seems to be that the broker is entitled to the reasonable value of his services. *Ibid.*

§ 11. Where Sale Is Not Completed.

It is not enough that a broker has devoted his time, labor, or money to advance the interest of his employer. Unsuccessful efforts, however meritorious, afford no ground for action. Where his acts bring about no agreement or contract between his employer and a purchaser, by reason of his failure, the loss must be all his own. *Insurance Co. v. Disher*, 345.

§ 12. Actions for Commissions.

In an action by a broker against his principal for commissions, where all the evidence showed that the plaintiff had a right to lease the defendant's property for $385 per month, less 5% commissions, and that the best offer plaintiff was able to get, before the agency was revoked, was $350 per month, a motion for judgment as in case of nonsuit, made at the close of plaintiff's evidence, and renewed at the close of all the evidence, G. S., 1-183, should have been allowed. *Insurance Co. v. Disher*, 345.

BURIAL ASSOCIATIONS.

(See Mutual Burial Associations.)

CARRIERS.

§ 3. Matters and Transactions Subject to Federal Regulation.

Interstate commerce is protected by Federal law, but the semblance of it is not to be used to circumvent the State law. *In re S. v. Gordon*, 241.

CARRIERS—*Continued.*

§ 18b. Separation of White and Colored.

In a prosecution against a colored passenger for a violation of G. S., 60-136, where the State's evidence tended to show that such passenger, when called upon by the driver of a common carrier bus, refused to move from a seat in the front to an unoccupied seat in the rear of the bus, to make room for white passengers, compelling the said driver to call upon officers of the law to remove her, there is sufficient evidence for the jury, and motion for nonsuit was properly denied. *S. v. Brown*, 22.

The refusal of a passenger on a street car, or other passenger vehicle, to move to another seat when requested to do so by the driver, when necessary to carry out the purpose of providing separate seats for white and colored passengers, constitutes *prima facie* evidence of an intent to violate the statute, but does not shift the burden of proof. While it is no longer necessary to show willfulness, under G. S., 60-136, the State must show beyond a reasonable doubt that the defendant intentionally violated the statute. *Ibid.*

CLERKS OF THE SUPERIOR COURT.

§ 3. Jurisdiction and Powers as a Court: In General.

Clerks of the Superior Courts, under provisions of G. S., 105-394, relating to the use and the authorization of the use of facsimile signatures in signing summons, complaints, verifications of pleadings, notices, judgments or other papers in tax foreclosure proceedings, may not delegate to another the authority to render judgments in such proceedings. *Eborn v. Ellis*, 386.

Issuance of summons is itself a ministerial act as to which the Clerk of the Superior Court is not disqualified by his personal interest. *English v. Brigman*, 402.

§ 7. As Judge of Juvenile Court.

The duty shall be constant upon the court to give each child, subject to its jurisdiction, such oversight and control as will conduce to the welfare of the child and to the best interests of the State. G. S., 110-21. *In re Morris*, 48.

CONSTITUTIONAL LAW.

§ 3a. General Rules of Construction.

To justify declaring void an act of the General Assembly, its unconstitutionality must clearly appear. Reasonable doubts are to be resolved in favor of its constitutionality. *Brumley v. Baxter*, 691.

§§ 4a, 4c. Legislative: In General: Delegation of Power.

There seems to be no constitutional limitation upon the power of the General Assembly to create a corporation for a public purpose. N. C. Const., Art. VIII, sec. 1. *Brumley v. Baxter*, 691.

The legislative power, both as to the State and to political and administrative subdivisions thereof, is restrained only by the limitations imposed by the State Constitution or that of the United States. *Ibid.*

§ 6a. Judicial Power in General.

The constitutionality of an Act or ordinance will not be determined in a suit to enjoin its enforcement. Nor will we decide the question of its constitutionality prior to an attempt to enforce it. *Jarrell v. Snow*, 430.

CONSTITUTIONAL LAW—*Continued.*

§ 12. Monopolies and Exclusive Emoluments and Privileges.

The State cannot authorize a city to donate its property, or to grant privileges to one class of citizens not to be enjoyed by all, except in consideration of public services. N. C. Const., Art. I, secs. 2, 7. *Brumley v. Baxter*, 691.

Services rendered by citizens called out to defend their country in time of war are regarded as "public services" within the meaning of the N. C. Const., Art. I, sec. 7. *Ibid.*

The Act of the Legislature, authorizing the creation of the Charlotte Veterans' Recreation Center, Public Laws 1945, ch. 460, is valid, as the act is for a public purpose and in the public interest. *Ibid.*

§ 15a. Due Process: In General.

Absence of notice or opportunity to be heard violates the due process of law provision. *In re S. v. Gordon*, 241.

The basic elements of a fair and full hearing on the facts include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence. *Ibid.*

§ 15d. Waiver.

An order, suspending the imposition or execution of sentence on condition, is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. *S. v. Miller*, 213.

§ 16. What Constitutes Due Process in General.

Whatever may be the effect of ch. 108, Public Laws 1921 (G. S., 31-20, 21), it does not control rights which accrued prior to its enactment. N. C. Const., Art. I, secs. 17, 19. Hence, when an original will probated in 1910 is invalidated by judicial decree, a certified copy thereof recorded in another county becomes void and one who purchases with notice of the caveat cannot convey any title thereunder, either before or after notice of its invalidity has been filed in the county where the certified copy has been recorded. The only purpose of such certified copy was to give notice of the source of title. *Whitehurst v. Abbott*, 1.

§ 20. Nature and Extent of Mandate in General.

Where the certificate of membership in a burial association, as well as the general statute relating to such associations, G. S., 58-226, contains the express provision that the rules and by-laws of such associations may be modified by Act of the General Assembly, members are bound by subsequent legislation, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. *Spearman v. Burial Assn.*, 185.

Laws in force at the time of the execution of a contract become a part of the convention. This embraces those which affect its validity, construction, discharge, and enforcement. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

§ 23. Nature and Scope of Mandate.

The Superior Court, in a proper proceeding, having awarded the custody of a minor to an uncle and aunt and thereafter, because of the changed legal status of the parties, modified its former order and given the custody of the child to the mother, on application of the mother for a writ of assistance and show cause order against the uncle and aunt for failure to surrender the child, a judgment on *habeas corpus* by a court of another state, to which the child had been taken by the uncle and aunt, awarded custody to the father, is not entitled to full faith and credit here, the record disclosing that jurisdictional facts were misrepresented and suppressed in that proceeding. *In re Morris*, 48.

The Federal statute implements the Constitution in requiring that full faith and credit be given in each state to the public acts, records and judicial proceedings of every other state, and requires certified copies of records to be admitted in evidence when authenticated as provided by the statute. It is not intended to supplant, nor does it supplant, other modes of proof recognized as competent in the jurisdiction where the exemplification is to be made. *Kearney v. Thomas*, 156.

§ 25b. Regulation.

Interstate commerce is protected by Federal law, but the semblance of it is not to be used to circumvent the State law. *In re S. v. Gordon*, 241.

§ 32. Cruel and Unusual Punishment.

In case of an assault with a deadly weapon, the person convicted (or one who pleads guilty) shall be punished by fine or imprisonment, or both, at the discretion of the court. G. S., 14-33. And, when no time is fixed by the statute, imprisonment for two years will not be held to be cruel or unusual and violative of Art. I, sec. 14, of the Constitution of North Carolina. *S. v. Crandall*, 148.

§ 34. Legislative.

The Federal Government has authority, under its constitutional grant of power, to borrow money, Art. I, sec. 8, clause 2 and clause 18, to regulate and adjust its contracts within the compass of that power, so that property in them may be subject to succession by survivorship, according to the terms of the contract, irrespective of the succession laws of the state generally applicable to that subject. *Ervin v. Conn* and *Bank v. Frederickson*, 267.

The Congress has power, under the Federal Constitution, to authorize the Secretary of the Treasury, with the approval of the President, to issue bonds of the United States, including therein any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe. *Ibid.*

The Constitution, Art. VI, clause 2, grants to the Federal Government an exclusive authority, in order to achieve results, looking to internal order and external security, beyond the reach of any single state. This exclusiveness is the life of the powers thus granted; and, when a conflict arises between the state and Federal law with regard to the exercise of power within the reasonable scope of such exclusive grants, it seems to us axiomatic that the state law must yield. *Ibid.*

Immunity of interference by local law with instrumentalities created for the Government of the United States is a familiar principle, frequently applied to taxation and many other forms of attempted regulation. *Ibid.*

As Federal contracts, bonds of the United States are governed by Federal rather than state law. *Ibid.*

CONTEMPT OF COURT.

§ 2b. Willful Disobedience to Court Order.

An appellate court will not hear and decide a moot question, or one which has become such. G. S., 1-277. This does not mean, however, that the trial court should withhold available punitive measures for willful failure to comply with its appropriate decrees. *In re Morris*, 48.

CONTRACTS.

§ 1. Nature and Essentials in General.

Laws in force at the time of the execution of a contract become a part of the convention. This embraces those which affect its validity, construction, discharge, and enforcement. *Spearman v. Burial Assn.*, 185.

Liberty to contract carries with it the right to exercise poor judgment as well as good judgment—"as a man consents to bind himself, so shall he be bound." *Troitino v. Goodman*, 406.

The right to make a contract is both a liberty and a property right. *Coleman v. Whisnant*, 494.

§ 3. Offer.

While an offer to sell realty remains unilateral and unaccepted, the person to whom the offer was made has no equity in the premises and a conveyance by the owner involves no breach of legal duty, and where a complete change of ownership meanwhile takes place, for example, through survivorship in an estate by the entireties, the option terminates. *Atkinson v. Atkinson*, 120.

Where an offer to sell necessitates or contemplates a further agreement of the parties in essential matters, the option is invalid. *Ibid.*

§ 4. Acceptance.

While an offer to sell realty remains unilateral and unaccepted, the person to whom the offer was made has no equity in the premises and a conveyance by the owner involves no breach of legal duty, and where a complete change of ownership meanwhile takes place, for example, through survivorship in an estate by the entireties, the option terminates. *Atkinson v. Atkinson*, 120.

§ 5. Consideration.

A quitclaim deed for land, without reference to the character of the title, is, in the absence of fraud or mistake, a sufficient consideration to support a contract; money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance. *Turpin v. Jackson County*, 389.

Consideration is an essential element of a contract, and want of consideration constitutes legal excuse for nonperformance of an executory promise. *Coleman v. Whisnant*, 494.

There is no consideration for a promise to reimburse plaintiff for injuries suffered by her, when plaintiff saved defendant from serious injury or death by interposing herself between defendant and his assailant in a fight. *Harrington v. Taylor*, 690.

§ 6. Form and Requisites of Agreement or Instrument.

Oral contracts between real estate brokers and their principals for the sale of land of the principal are enforceable as such. *White v. Pleasants*, 760.

CONTRACTS—*Continued.*

§ 7f. Relating to Public Officers and Administration.

The provisions of G. S., 143-129, are not applicable to a contract between a municipal corporation and a public utility for the purchase wholesale of electric current for redistribution through the municipality's local plant. *Mullen v. Louisburg*, 53.

The purpose of G. S., 143-129, is to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts by giving notice to the prospective bidders and thus assuring competition, which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money. *Ibid.*

The statute (G. S., 143-129) applies only to contracts in relation to supplies and materials where the bidders have the right to name the price for which they are willing to furnish the same. It has no application whatever to a contract between a municipality and a public utility, where there can be no competition between bidders because the municipality or the State has the power and authority to fix the price of the service to be rendered or the commodity to be furnished. *Ibid.*

It is a general rule that officers of a municipal corporation, in the letting of municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or palpable abuse of discretion, have no power to control their actions. *Ibid.*

Where a municipality decides to abandon the generation of electricity by the use of Diesel engines and substitute therefor electricity purchased wholesale for distribution through its electric plant, and in pursuance of such change of policy, advertises a sale of its Diesel engines, under G. S., 160-59, there is no sale by such municipality of its electric plant requiring approval of a majority of the qualified voters under G. S., 160-2 (6). *Ibid.*

§ 8. General Rules of Construction.

Where the subject of controversy is covered by exchanges in writing between the parties, manifesting no ambiguity which would require resort to extrinsic evidence, or consideration of disputed fact, the construction is for the court. *Atkinson v. Atkinson*, 120.

Laws in force at the time of the execution of a contract become a part of the convention. This embraces those which affect its validity, construction, discharge, and enforcement. *Spearman v. Burial Assn.*, 185.

§ 11b. Conditions Precedent.

An option or offer is just as much subject to the law of conditional delivery as any other instrument; and where the delivery imposes a condition precedent to the effectiveness of the option itself, it cannot be converted into a contract without performing the condition. It takes the act of both parties to consummate contract. *Lerner Shops v. Rosenthal*, 316.

§ 16. Performance or Breach: In General.

In a suit where it appears, from a liberal construction of plaintiff's pleadings, that his allegations as to conspiracy and fraud by defendants in connection with securing plaintiff's patent, the validity of which is not challenged, are incidental and by way of inducement to the gravamen of the complaint, which is that plaintiff's rights under the patent to make use of and vend the patent appliances have been tortiously interfered with by defendants to plaintiff's damage, and that plaintiff is entitled to compensation or royalties upon

the use of the patented devices by defendants as licensees, in accordance with an agreement, the State court is not without jurisdiction and demurrer on that ground cannot be sustained. *Coleman v. Whisnant*, 494.

Unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring the breach of a contract, or in preventing the making of a contract, when done, not in the legitimate exercise of defendant's own rights, but with design to injure the plaintiff, or to gain some advantage at his expense. *Ibid.*

A simple contract of agency for the sale of land for an indefinite and unstated time is generally revocable, in good faith, at any time before the broker makes the sale, or produces a purchaser who is ready, willing and able to buy on the terms set forth by the principal. *White v. Pleasants*, 760.

Where a broker has made a sale of land, or has produced a purchaser who is ready, willing and able to buy on the terms set forth by the principal, the principal, although having the power, has no legal right, without incurring liability for the wrongful termination, to revoke the broker's agency to sell. *Ibid.*

§ 18½. Actions: In General.

A plaintiff may not sue for rescission of a contract and its breach at the same time. The one is in disaffirmance of the contract; the other in its affirmance. *Troitino v. Goodman*, 406.

§ 21. Pleadings.

In a suit where it appears, from a liberal construction of plaintiff's pleadings, that his allegations as to conspiracy and fraud by defendants in connection with securing plaintiff's patent, the validity of which is not challenged, are incidental and by way of inducement to the gravamen of the complaint, which is that plaintiff's rights under the patent to make use of and vend the patent appliances have been tortiously interfered with by defendants to plaintiff's damage, and that plaintiff is entitled to compensation or royalties upon the use of the patented devices by defendants as licensees, in accordance with an agreement, the State court is not without jurisdiction and demurrer on that ground cannot be sustained. *Coleman v. Whisnant*, 494.

In a suit to avoid the effects of a contract, the execution of which is admitted, plaintiff alleging coercion by defendants in procuring his signature, where no facts are alleged by plaintiff upon which coercion may be predicated and there are no allegations of fraud, the assertions of plaintiff are mere conclusions of the pleader, and demurrer to the allegations of coercion was properly sustained. *Ibid.*

In a suit to avoid for want of consideration the sale of an interest in a patent and to recover damages for unlawful interference by defendants with plaintiff's efforts to realize on his invention, where plaintiff alleges that, while defendants own three-quarters of his patent and have paid the patent fees and some expenses and a small amount for another similar patent, plaintiff owns a one-quarter interest in the patent, and that defendants have appropriated his patent to their own use, and for two years have consistently and continuously prevented plaintiff from making contracts for the exercise of his right in relation to his patent, preventing his using the patent himself or licensing its use by others or manufacturing the patented articles for sale, by threats of suits against those with whom plaintiff has attempted to deal, an actionable wrong is set out which is not vulnerable to demurrer. *Ibid.*

CONTRACTS—*Continued.*

§ 24. Instructions.

In an action by plaintiffs against defendant to recover on contract for services performed, where defendant pleads that plaintiffs, subcontractors for defendant under contract to process clothing, bedding, etc., for Army bases, though paid in full, failed to perform the services as agreed, to the damage of defendant, who was compelled himself to retransport the clothing, etc., and do the work over again to comply with his customer's contract, there being evidence offered in support of the contentions of both plaintiffs and defendant, it was error for the court to charge the jury that, should they answer the issue in favor of plaintiffs to any amount, it would constitute a finding that the contract was as plaintiffs contend and defendant would not be entitled to recover anything except what a breach of the contract had cost him, as such charge expressly excludes expenses incurred in correcting the defective work of plaintiff and money received for services plaintiffs failed to render. *Caldwell v. McCorkle*, 171.

§ 25b. Assessment of Damages by Jury.

If the controverted issue of breach of contract is resolved against plaintiffs, in an action for service rendered thereunder against defendant, who has pleaded breach and counterclaim for damages, then defendant is entitled to recover the losses which naturally and proximatly result from the nonperformance and which were reasonably in the minds of the parties at the time of its making. *Caldwell v. McCorkle*, 171.

In actions for breach of contract, the damages recoverable are such as may reasonably be supposed to have been in the contemplation of the parties when the contract was made. The injured party is entitled to full compensation for his loss, and to be placed as near as may be in the condition which he would have occupied had the contract not been breached. But he is not entitled to enrichment. *Troitino v. Goodman*, 406.

Whether special damages, arising from the breach of a contract, may be regarded as within the contemplation of the parties, and therefore recoverable, would depend upon the information communicated, or the knowledge of the parties at the time, and the reasonable foreseeability of such damages. *Ibid.*

Where plaintiff purchased from defendant road machinery, which defendant agreed to put in first-class condition for immediate use and also to secure leases thereon, on commission and at current rentals, for at least three months or until plaintiff should need the machinery, upon defendant's failure both to repair and lease, the proper measure of damages is, not necessarily the difference between the purchase price and the value of the machinery, but the difference between its actual value and what its value would have been had it been put in first-class condition for immediate use, plus a fair rental value for a period of three months less commissions on such value. If the plaintiff paid an extravagant price for the machinery, he is not to recover for this slothfulness, in the absence of an allegation of fraud or overreaching. *Ibid.*

In an action for breach of contract in the sale of machinery, where plaintiff has been allowed as damages the difference between the actual value of the machinery and what its value would have been had it been put in first-class condition for immediate service, plaintiff cannot also recover sums expended by him in an effort to put the machinery in condition for operation and service. He cannot recover the difference in value and also the cost of eliminating this difference. *Ibid.*

CONTRACTS—*Continued.*

While the courts are not disposed to permit one who breaches his contract without any valid excuse to prescribe the rights of the innocent party, nevertheless, one who is injured in his person or property by the wrongful or negligent act of another is required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense; and ordinarily, he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. *Ibid.*

§§ 26, 27. Grounds, Nature and Essentials of Right of Action: Actions.

Unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring the breach of a contract, or in preventing the making of a contract, when done, not in the legitimate exercise of defendant's own rights, but with design to injure the plaintiff, or to gain some advantage at his expense. *Coleman v. Whisnant*, 494.

Malicious motive makes a bad act worse, but it cannot make that wrong which in its own essence is lawful. *Bruton v. Smith*, 584.

An action cannot, in general, be maintained for inducing a third person to break his contract with plaintiff; the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it. *Ibid.*

In an action by plaintiff to recover damages of the appealing defendant, the complaint alleging a contract between plaintiff and the other defendants for the purchase by plaintiff of certain lands and the timber thereon, which contract the appealing defendant maliciously and wrongfully prevented the other defendants from complying with, by offering the other defendants a price greatly in excess of that in the plaintiff's contract and the appealing defendant thereafter acquiring a deed to the said lands and timber, the resulting loss to plaintiff is *damnum absque injuria* and there was error by the court below in overruling a demurrer to the complaint. *Ibid.*

CORPORATIONS.

§ 13b. Transfer and Ownership.

In a suit in this State against an individual and a corporation, both citizens of Delaware, to prevent the transfer of stock in the corporate defendant belonging to plaintiff, where, prior to time for answering, the individual defendant on special appearance moved to dismiss for want of service, and the corporate defendant also moved to dismiss for want of service on the individual and for lack of jurisdiction of the subject matter, an order by the court, impounding the stock and dissolving a temporary restraining order against the individual, was proper and suffices to protect the corporate defendant from any failure to transfer the stock. *Holladay v. General Motors Corp.*, 230.

Where an action, to compel defendant corporation to transfer to the plaintiff upon its books certain shares of stock which had been issued to one M and others, was based upon the allegation that these shares had been endorsed and transferred to plaintiff, which was denied in the answer and by affidavit of M, in support of a motion by the defendant that M and others claiming ownership of the stock be made parties, there was error in the denial of such motion, M and his associates having a right to be heard. *Griffin & Vose, Inc., v. Minerals Corp.*, 434.

CORPORATIONS—*Continued.*

§ 17. Corporate Powers and Liabilities: In General.

For the purpose of promoting loyalty and good will between itself and its employees, by providing financial assistance in emergencies to certain of its employees and their dependents, thereby relieving suffering and helping such employees when they are unable to help themselves, a corporation, employing about 500 operators in an isolated village, may transfer such funds, as may be reasonably necessary to carry out this purpose, to a trust foundation to be administered by a corporate trust company and a committee of employees, and the expenditure of such corporate funds is an ordinary and necessary expense of the corporation. *Trust Co. v. Steele's Mills*, 302.

COUNTIES.

§ 1. Powers and Functions: In General.

Every county is a body politic and corporate and has only such powers as are prescribed by statute, and those necessarily implied by law, and such powers can only be exercised by the board of commissioners, or in pursuance of resolution adopted by the board. G. S., 153-1. Hence, in order to make a valid and binding contract, the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law. *Insurance Co. v. Guilford County*, 293.

Where a board of county commissioners by resolution requested the surrender of a license to sell wine, which request was declined by the licensee, on the assumption that such action by the commissioners was invalid and unconstitutional, such licensee has an adequate remedy at law, should the commissioners undertake to enforce their resolution or to prevent the exercise of the privilege granted by the license. *Jarrell v. Snow*, 430.

§ 5. County Commissioners.

The courts determine whether a given project is a necessary expense of a county, but the board of commissioners for the county determine, in their discretion, whether such project is necessary or needed in the designated locality. *Insurance Co. v. Guilford County*, 293.

Every county is a body politic and corporate and has only such powers as are prescribed by statute, and those necessarily implied by law, and such powers can only be exercised by the board of commissioners, or in pursuance of resolution adopted by the board. G. S., 153-1. Hence, in order to make a valid and binding contract, the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law. *Ibid.*

§§ 9, 10.

Where plaintiff lent money to an individual evidenced by a promissory note, with an understanding between plaintiff, such individual and defendant, a county, that, with the money so furnished, the individual would purchase a certain piece of realty in said county and erect thereon a building to be used by the county for municipal purposes, securing the plaintiff by a deed of trust, the county also contracting with the individual to purchase from him, within a specified time, the said property by deed, reciting that the conveyance was subject to the debt and deed of trust, which the county assumes and agrees to pay, all of which was done, no trust or agency is created, and until or unless there be a reformation of the deed, the note and deed of trust, the legal remedy of foreclosure, under the terms of the deed of trust or by civil action, would seem to be available to plaintiff. On the other hand, the provisions in the deed from the individual to the county, by which the county undertook to

assume and agreed to pay the indebtedness to the plaintiff secured by the deed of trust, is not enforceable as an express contract. Const. of N. C., Art. VII, sec. 7, Art. V, sec. 4. *Insurance Co. v. Guilford County*, 293.

Every county is a body politic and corporate and has only such powers as are prescribed by statute, and those necessarily implied by law, and such powers can only be exercised by the board of commissioners, or in pursuance of resolution adopted by the board. G. S., 153-1. Hence, in order to make a valid and binding contract, the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law. *Ibid.*

The Legislature has prescribed the machinery by which a county may issue lawful and valid obligations for public purposes and necessary expenses, and pledge its faith, G. S., Art. 9, 153-69, *et seq.* And the Legislature has expressly provided that approval by the Local Government Commission of bonds or notes of a county, or other governmental unit, shall not extend to or be regarded as an approval of the legality of the bonds or notes in any respect. G. S., 159-12. *Ibid.*

COURTS.

§ 1a. In General.

This Court's jurisdiction is derivative and where the Superior Court was without jurisdiction to entertain an appeal from a county criminal court, this Court has none. No circumstance or condition is sufficient justification for the assumption of jurisdiction not possessed. *S. v. Miller*, 213.

The Superior Court has jurisdiction in actions to enforce the Emergency Price Control Act of 1942, regardless of the amount of the penalty or penalties demanded in good faith, if in addition thereto the plaintiff seeks to recover reasonable attorney's fees, since such fees are mandatory upon recovery by plaintiff. *Hilgreen v. Cleaners & Tailors, Inc.*, 656.

§ 3. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

Under G. S., 7-74, a judge assigned to a district is the judge thereof for six months, and within the period of such assignment has jurisdiction of all "in Chambers" matters arising in the district. *Ridenhour v. Ridenhour*, 508.

§ 4½. Records.

The power to correct the minutes and records to make them speak the truth is within the discretion of the judge holding the court. *S. v. Morgan*, 549.

§ 11. Administration: In General.

The Federal Government has authority, under its constitutional grant of power, to borrow money, Art. I, sec. 8, clause 2 and clause 18, to regulate and adjust its contracts within the compass of that power, so that property in them may be subject to succession by survivorship, according to the terms of the contract, irrespective of the succession laws of the state generally applicable to that subject. *Ervin v. Conn* and *Bank v. Frederickson*, 267.

The Constitution, Art. VI, clause 2, grants to the Federal Government an exclusive authority, in order to achieve results, looking to internal order and external security, beyond the reach of any single state. This exclusiveness is the life of the powers thus granted; and, when a conflict arises between the state and Federal law with regard to the exercise of power within the reasonable scope of such exclusive grants, it seems to us axiomatic that the state law must yield. *Ibid.*

COURTS—*Continued.*

Immunity of interference by local law with instrumentalities created for the Government of the United States is a familiar principle, frequently applied to taxation and many other forms of attempted regulation. *Ibid.*

As Federal contracts, bonds of the United States are governed by Federal rather than state law. *Ibid.*

All parties, to litigation growing out of a contract relative to the ownership and use of a patent, being citizens and residents of North Carolina, and the execution of the contract and all the transactions thereunder and all acts complained of having taken place in this State, Federal anti-trust laws have no application thereto. *Coleman v. Whisnant*, 494.

It is a fundamental principle of law that remedies are to be governed by the laws of the jurisdiction where the suit is brought. The *lex fori* determines the time within which a cause of action shall be enforced. *Sayer v. Henderson*, 642.

§ 13. Transitory Causes of Action in Tort.

In an action for damages against a physician or surgeon for malpractice, the standard of the defendant's duty in the premises, as affecting his liability for negligence, must be determined by the law of the place where the tort was committed. *Buckner v. Wheeldon*, 62.

The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done. *Harper v. Harper* and *Wickham v. Harper*, 260.

The South Carolina guest statute, S. C. Code, sec. 5908 (1), as interpreted by the Supreme Court of that State, comes to this: If the negligent failure to exercise due care was the result of mere inadvertence or casual inattention, it is simply negligence and a guest passenger may not recover. On the other hand, if there was a conscious failure to be careful for the safety of others or to observe the rules of the road, then an inference of recklessness is permissible. And, when there is testimony tending to show that defendant failed to keep a proper lookout or to observe the positive commands of the traffic statute, it is for the jury to say, under all circumstances, whether such conduct evidences a heedless and reckless disregard of the rights of others. *Ibid.*

CRIMINAL LAW.

I. Nature and Elements of Crimes.

2. Intent, Willfulness. S. v. Murdock, 224; Bruton v. Smith, 584.

III. Parties and Offenses.

8. Principals. S. v. Williams, 182.

IV. Jurisdiction and Venue.

14½. Appeals to Superior Court. S. v. Crandall, 148.

V. Arraignment and Pleas.

17. Plea of Guilty and Nolo Contendere. S. v. Crandall, 148.

VII. Evidence.

28a. Presumptions and Burden of Proof. S. v. Brown, 22.

28c. Proof of Intent. Ibid; S. v. Murdock, 224.

31a. Subjects of Expert and Opinion Evidence in General. S. v. Mays, 486; S. v. Peterson, 540.

31d. Footprints. S. v. Mays, 486.

31f. Identification by Sight or Appearance. S. v. Sutton, 332.

31g. Qualification of Experts. S. v. Peterson, 540.

31h. Examination of Experts. S. v. Mays, 486.

32a. Circumstantial Evidence: In General. S. v. Davenport, 13; S. v. Smith, 78; S. v. Matheson, 109; S. v. Sutton, 332.

33. Confessions. S. v. Matheson, 109; S. v. Crandall, 148; S. v. Lord, 354; S. v. Mays, 486; S. v. Brooks, 662; S. v. Wise, 746.

34b. Flight as Implied Admission of Guilt. S. v. Matheson, 109.

38a. Photographs. S. v. Mays, 486.

40. Character Evidence of Defendant as Substantive Proof. S. v. Scoggins, 71.

41b. Cross-examination of Witness. S. v. Sutton, 332.

CRIMINAL LAW—*Continued.*

41d. Evidence Competent for Purpose of Impeaching Witness. S. v. Britt, 364.

41e. Evidence Competent for Purpose of Corroborating Witness. S. v. Scoggins, 71; S. v. Sutton, 332.

42. Hearsay Evidence. S. v. Hill, 74; S. v. Smith, 78.

VIII. Trial.

44. Time of Trial and Continuance. S. v. Morgan, 549.

48b. Evidence Competent for Restricted Purpose. S. v. Sutton, 332; S. v. Britt, 364.

48c. Admission of Evidence. S. v. Hill, 74; S. v. Brooks, 662.

50c. Appointment of Prosecution in Absence of Solicitor. S. v. Morgan, 549.

52b. Nonsuit. S. v. Scoggins, 71; S. v. Hill, 74; S. v. Murphy, 115; S. v. Heglar, 220; S. v. Murdock, 224; S. v. Gordon, 757.

53a. Form and Sufficiency of Instructions in General. S. v. Davis, 117; S. v. French, 276; S. v. Brooks, 662.

53b. Applicability to Counts and Evidence. S. v. Sutton, 332.

53e. Expression of Opinion as to Weight and Sufficiency of Evidence. S. v. Scoggins, 71.

53f. Requests for Instructions. Ibid; S. v. Morgan, 549.

53g. Contention and Objections and Exceptions to Instructions. S. v. Smith, 78; S. v. Isaac, 310; S. v. Britt, 364.

54b. Form, Sufficiency, and Effect of Verdict. S. v. Murphy, 115; S. v. Perry, 174; S. v. Sutton, 332; S. v. Wise, 746.

54c. Rendition and Acceptance of Verdict and Power of Court to Have Jury Redeliberate. S. v. Perry, 174; S. v. Wise, 746.

54f. Conviction on Less Degree of Crime. S. v. Morgan, 549.

IX. Motions After Verdict.

55. Jurisdiction of Court to Hear and Determine Motions After Verdict. S. v. Graham, 217.

59. Motions to Set Aside Verdict as Being Contrary to Weight of Evidence. S. v. Sutton, 332.

X. Judgment and Sentence.

60. Conformity to Verdict. S. v. Murphy, 115.

61a. Formalities and Requisites: In General. In re Parker, 369.

62. Conditional and Alternative Judgments. S. v. Miller, 213; S. v. Graham, 217.

62½. Concurrent and Cumulative Sentences. In re Parker, 369; S. v. Stutts, 647.

63. Suspended Judgments and Executions. S. v. Miller, 213; S. v. Graham, 217; S. v. Marsh, 648.

XI. Costs.

65. Validity and Attack. S. v. Graham, 217; S. v. Sutton, 332.

XII. Appeal in Criminal Cases.

68a. Right of State to Appeal. S. v. Mitchell, 42.

76. Certiorari. S. v. Miller, 213.

77. The Record. Ibid.

80. Prosecution of Appeals and Dismissal. S. v. Williams, 275.

81c. Prejudicial and Harmless Error. S. v. Matheson, 109; S. v. Brooks, 662.

85. Proceedings in Lower Court After Remand. S. v. Murphy, 115.

§ 2. Intent, Willfulness.

Intent being a mental attitude, it must ordinarily be proven by circumstantial evidence, that is, by proving facts from which the facts sought to be proven may be inferred. *S. v. Murdock*, 224.

Malicious motive makes a bad act worse, but it cannot make that wrong which in its own essence is lawful. *Bruton v. Smith*, 584.

§ 8. Principals.

Where two persons are present, encouraging each other in a common purpose resulting in a homicide, both are principals and equally guilty. *S. v. Williams*, 182.

An aider and abettor is one who advises, counsels, procures or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense. *Ibid.*

§ 14½. Appeals to Superior Court.

Where a defendant pleads guilty in a court inferior to the Superior Court, such as a recorder's court, and that fact appears upon the face of the record as it comes to the Superior Court on his appeal from a judgment of the infe-

rior court, his appeal cannot call into question the facts charged, but brings up for review only matters of law, and the defendant is not entitled to a trial *de novo*. *S. v. Crandall*, 148.

§ 17. Plea of Guilty and Nolo Contendere.

The retraction or withdrawal of a plea of guilty, made by a defendant in a recorder's court, is not a matter of right when the case has been appealed to the Superior Court, and motion to be allowed to so retract is addressed to the sound discretion of the court. *S. v. Crandall*, 148.

Where a defendant pleads guilty in a court inferior to the Superior Court, such as a recorder's court, and that fact appears upon the face of the record as it comes to the Superior Court on his appeal from a judgment of the inferior court, his appeal cannot call into question the facts charged, but brings up for review only matters of law, and the defendant is not entitled to a trial *de novo*. *Ibid.*

A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which defendant is arraigned. *Ibid.*

Where a plea of guilty is general it covers all offenses charged in the warrant or in the indictment. *Ibid.*

§ 28a. Presumptions and Burden of Proof.

Where there was no special plea, in a criminal prosecution, that shifted the burden upon the defendant to show anything to the satisfaction of the jury, the State must prove beyond a reasonable doubt every essential element of the crime charged, including intent; and there is error for the court to instruct the jury to bring in a verdict of not guilty, if it appears to their satisfaction from the evidence that the defendant acted in good faith. *S. v. Brown*, 22.

§ 28c. Proof of Intent.

The refusal of a passenger on a street car, or other passenger vehicle, to move to another seat when requested to do so by the driver, when necessary to carry out the purpose of providing separate seats for white and colored passengers, constitutes *prima facie* evidence of an intent to violate the statute, but does not shift the burden of proof. While it is no longer necessary to show willfulness, under G. S., 60-136, the State must show beyond a reasonable doubt that the defendant intentionally violated the statute. *S. v. Brown*, 22.

Intent being a mental attitude, it must ordinarily be proven by circumstantial evidence, that is, by proving facts from which the facts sought to be proven may be inferred. *S. v. Murdock*, 224.

§ 31a. Subjects of Expert and Opinion Evidence in General.

In a prosecution for murder, where, after a proper foundation was laid for the question, a physician who had examined the body was asked by the State his opinion as to the cause of death and replied, "My opinion is that she died from suffocation from the dress being crammed over her air passages," such expert testimony is proper and competent, and there being no objection to the answer and no motion to strike, the prisoner waived any ground for objection to so much of the answer as may not be responsive to the question. *S. v. Mays*, 486.

Ordinarily opinion evidence of a lay witness is not admissible. It is the province of the jury to decide what inferences and conclusions are warranted

CRIMINAL LAW—*Continued.*

by the testimony. Such evidence is admissible only when a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert information from one who has special learning, skill, or experience in the matter at issue. *S. v. Peterson*, 540.

§ 31d. Footprints.

In a prosecution for murder, an exception for that the court admitted testimony as to the similarity of the footprints of defendant and certain prints found at and about the premises, where the crime was committed, cannot be sustained. The condition of the prints only goes to the weight of the evidence. It is likewise permissible to offer in evidence a cast or moulage of such footprints. *S. v. Mays*, 486.

§ 31f. Identification by Sight or Appearance.

Evidence of prosecutrix, in a trial on an indictment charging rape, that, when confronted with defendant in the sheriff's office the day after alleged crime was committed, she said "that is the man," and that defendant made no denial or reply, was clearly competent for the purpose of corroborating the witness' former testimony that defendant was the man who assaulted her. *S. v. Sutton*, 332.

§ 31g. Qualification of Experts.

Before opinion evidence is admissible a witness must qualify as an expert in that field of knowledge. The preliminary question of competency is for the presiding judge and ordinarily his ruling is conclusive. *S. v. Peterson*, 540.

§ 31h. Examination of Experts.

In a prosecution for murder, where, after a proper foundation was laid for the question, a physician who had examined the body was asked by the State his opinion as to the cause of death and replied, "My opinion is that she died from suffocation from the dress being crammed over her air passages," such expert testimony is proper and competent, and there being no objection to the answer and no motion to strike, the prisoner waived any ground for objection to so much of the answer as may not be responsive to the question. *S. v. Mays*, 486.

§ 32a. Circumstantial Evidence: In General.

The gift of defendants or of a defendant, in a criminal prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony. *S. v. Davenport*, 13.

On a prosecution upon indictment charging fornication and adultery, where the State's evidence tended to show that defendants were constantly together, day and night, on the streets and in several different homes maintaind by the male defendant, and that they were arrested late at night in one of these homes, no other person being in the house at the time, both defendants coming out of the same bedroom, there was sufficient evidence to support a conviction and motion for nonsuit was properly denied. *Ibid.*

Testimony of a witness that, on hearing her daughter screaming, she said to defendant, "E., what in the world is the matter?" and defendant replied that his wife had told a damn lie on him and he had tried to break her damn neck, is competent in a criminal prosecution for arson, defendant being charged

with the burning of his mother-in-law's home where his wife and daughter had taken refuge in consequence of marital trouble. *S. v. Smith*, 78.

In a prosecution for murder the testimony of a taxi driver that prisoner, when fleeing from the scene of the alleged crime, commandeered his taxicab with gun in hand, said he had killed deceased and threatened to kill the witness if he let the cops catch him, is competent. *S. v. Matheson*, 109.

There was no error, on trial for rape, in excluding evidence, sought to be elicited from a witness on cross-examination by defendant's counsel, as to the crowded condition of a certain highway about the time of the alleged crime, it nowhere appearing that there were any people at or near the scene of the alleged crime at the time of its commission and all the evidence for the State tending to show that such crime was committed on a side road, off the said highway. *S. v. Sutton*, 332.

§ 33. Confessions.

In a prosecution for murder the testimony of a taxi driver that prisoner, when fleeing from the scene of the alleged crime, commandeered his taxicab with gun in hand, said he had killed deceased and threatened to kill the witness if he let the cops catch him, is competent.. *S. v. Matheson*, 109.

A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned. *S. v. Crandall*, 148.

A statement in the nature of a confession, made voluntarily to officers after his arrest by a prisoner charged with a capital crime, is competent and admissible as evidence. It is not essential that the officers should have cautioned their prisoner that any statement he might make could be used against him and that he was at liberty to refuse to answer questions or to make any statement and that such refusal or failure to make any statement could not be used against him. *S. v. Lord*, 354.

A confession, *prima facie* voluntary and admissible, is proper and competent as evidence, no fact or circumstance tending to impeach its voluntariness being made to appear. *S. v. Mays*, 486.

The competency of an alleged confession is a preliminary question for the trial court, to be determined, after hearing evidence of the circumstances under which the confession was given, both for the State and for the defendant. *S. v. Brooks*, 662.

Exception to the admission of testimony of the officers, as to confessions made by prisoner in a prosecution for murder, cannot be sustained, where the record does not disclose that defendant requested further inquiry or findings by the court, or offered evidence to controvert the statement of the officers, who testified that, upon arresting defendant, they warned him of his rights and advised him that any statement he made would be used against him. There is nothing to rebut the presumption that the confessions were voluntarily made. *S. v. Wise*, 746.

§ 34b. Flight as Implied Admission of Guilt.

In a prosecution for murder the testimony of a taxi driver that prisoner, when fleeing from the scene of the alleged crime, commandeered his taxicab with gun in hand, said he had killed deceased and threatened to kill the witness if he let the cops catch him, is competent. *S. v. Matheson*, 109.

CRIMINAL LAW—*Continued.*

§ 38a. Photographs.

Photographs to illustrate the testimony of witnesses, in a prosecution for murder, respecting wounds found on the body of deceased were competent; and being admitted, it was not improper to permit the jury to see them. Otherwise they would neither corroborate nor explain. *S. v. Mays*, 486.

§ 40. Character Evidence of Defendant as Substantive Proof.

On trial under an indictment for manslaughter, no prejudicial error may be predicated upon failure of the court to charge the jury that evidence of good character of defendants should be considered as substantive evidence, in the absence of a request so to charge. *S. v. Scoggins*, 71.

§ 41b. Cross-examination of Witness.

An exception by defendant, in a prosecution for rape, to the court's permitting a State's witness, over objection, to testify to a statement made to him by defendant's sister-in-law, in the absence of defendant, as to where defendant worked, is untenable for the reason that the statement assailed was in direct answer to an interrogatory propounded by defendant's counsel. *S. v. Sutton*, 332.

§ 41d. Evidence Competent for Purpose of Impeaching Witness.

On trial upon an indictment for homicide, it is competent for the State to contradict the testimony of defendant's wife, by showing prior inconsistent statements made by her, and a person, to whom the said wife made such contradictory statements, is a competent witness for that purpose. *S. v. Britt*, 364.

In a criminal prosecution, where the State offered evidence of statements made by defendant's wife, as to the circumstances of the killing, inconsistent with her testimony for defendant, and defendant failed to request that same be considered only for the purpose of impeaching or contradicting his wife's testimony, such evidence becomes substantive and a contention of the State based thereon, given in the charge to the jury, without objection at the time, will not be held for error. *Ibid.*

§ 41e. Evidence Competent for Purpose of Corroborating Witness.

Upon an attempt to impeach the credibility of a State's witness, it is competent for the State to show that previously the witness had made statements similar to the testimony of such witness on the stand, the jury being cautioned that such statements may be considered only for the purpose of corroborating the witness and not as substantive evidence. Discrepancies between such previous statements and the testimony of the witness, not material or prejudicial to defendant, do not affect the competency of the corroborative evidence. *S. v. Scoggins*, 71.

Evidence of prosecutrix, in a trial on an indictment charging rape, that when confronted with defendant in the sheriff's office the day after the alleged crime was committed, she said "that is the man," and that defendant made no denial or reply, was clearly competent for the purpose of corroborating the witness' former testimony that defendant was the man who assaulted her. *S. v. Sutton*, 332.

The testimony of a witness, as to her impressions and suggestion by her that the prosecuting witness, in a trial for rape, go to a doctor for examination, was competent when offered for the purpose of corroborating the prosecutrix, where the court fully instructed the jury that it should receive the testimony

only for that purpose and not as substantive evidence, if they found it did in fact so corroborate the evidence of prosecutrix. *Ibid.*

Where the solicitor, in a criminal prosecution, objects to questions asked a witness, for the purpose of corroborating the defendant before the defendant has been upon the stand, it is clearly within the discretion of the court as to whether or not it will admit such evidence, even after assurance that defendant will be examined as a witness. *Ibid.*

§ 42. Hearsay Evidence.

In the trial of defendant on an indictment for assault with a deadly weapon, inflicting serious injury not resulting in death, with intent to kill, the admission of evidence that the prosecutrix, who was present and testified at the trial, said just after she was shot by defendant, "I am going to die," is harmless and it is immaterial whether or not her statement was hearsay or part of the *res gestæ*, there being no controversy about her serious condition or the fact that she was shot by defendant. *S. v. Hill*, 74.

In a prosecution for arson, exclamation of a witness, "E. has set the house on fire," made at the time the fire was discovered on the outside of the house, where the witness had just seen the defendant E., is competent as part of the *res gestæ*. *S. v. Smith*, 78.

§ 44. Time of Trial and Continuance.

In the absence of a motion by a defendant in a criminal prosecution for a continuance, because of the absence of the solicitor and no objection on that ground until after an adverse verdict, any rights which defendant may have had on that account are waived. *S. v. Morgan*, 549.

§ 48b. Evidence Competent for Restricted Purpose.

Evidence competent for one purpose is, in the absence of a request to restrict it to the one purpose, admissible generally; and the court, in the absence of a request to restrict, is not required to do so. *S. v. Sutton*, 332.

In a criminal prosecution, where the State offered evidence of statements made by defendant's wife, as to the circumstances of the killing, inconsistent with her testimony for defendant, and defendant failed to request that same be considered only for the purpose of impeaching or contradicting his wife's testimony, such evidence becomes substantive and a contention of the State based thereon, given in the charge to the jury, without objection at the time, will not be held for error. *S. v. Britt*, 364.

§ 48c. Admission of Evidence.

In the trial of defendant on an indictment for assault with a deadly weapon, inflicting serious injury not resulting in death, with intent to kill, the admission of evidence that the prosecutrix, who was present and testified at the trial, said just after she was shot by defendant, "I am going to die," is harmless and it is immaterial whether or not her statement was hearsay or part of the *res gestæ*, there being no controversy about her serious condition or the fact that she was shot by defendant. *S. v. Hill*, 74.

The admissibility of evidence, when challenged, is, *imprimis*, a question for the trial court. Where its admission primarily depends upon a determination of fact, the court of review is ordinarily bound by the finding of the trial judge when it is supported by evidence, and will not disturb that finding or ruling admitting the evidence unless there appears some error of law or legal inference. *S. v. Brooks*, 662.

CRIMINAL LAW—*Continued.*

§ 50c. Appointment of Prosecution in Absence of Solicitor.

In the absence of the solicitor the judge presiding has authority to appoint members of the local bar to act for the solicitor in prosecuting for the State. *S. v. Morgan*, 549.

§ 52b. Nonsuit.

The established rule, on a motion for judgment of nonsuit in a criminal prosecution, requires that the evidence be considered in the light most favorable for the State, and that, if there be any competent evidence to support the charge contained in the bill of indictment, the case is one for the jury. *S. v. Scoggins*, 71.

A motion for judgment as of nonsuit, in a criminal case under G. S., 15-173, must be made at the close of the State's evidence and, if denied, renewed at the close of all the evidence, otherwise the benefit of the exception to the court's refusal to grant the motion is lost. *S. v. Hill*, 74.

The general rule, on motion for judgment as of nonsuit in a criminal case, is that if there be any evidence to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case is one for the jury; but, where there is merely a suspicion or conjecture in regard to the charge against defendant, the motion should be allowed. G. S., 15-173. *S. v. Murphy*, 115.

In a criminal prosecution for assault and highway robbery, where there was sufficient evidence of assault, but as to robbery the evidence disclosed no more than an opportunity for defendants to take the money, with equal opportunity for others to have stolen it, a verdict on the highway robbery charge is speculative and not supported by the evidence. *Ibid.*

Where the evidence, taken in the light most favorable to the State, on motion by defendants for judgment as of nonsuit in a criminal prosecution, raises no more than a suspicion as to the guilt of defendants, the same is insufficient to support a verdict of guilty and the motion must be allowed. *S. v. Heglar*, 220.

When the court is to rule upon a demurrer to the evidence in a criminal case, G. S., 15-173, it is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment, the evidence being construed in the light most favorable to the State. *S. v. Murdock*, 224.

In passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State, and when so considered the court must determine whether or not there is any competent evidence to support the allegations in the warrant or bill of indictment. *S. v. Gordon*, 757.

In a criminal prosecution the evidence must show more than an opportunity to commit the offense, and should raise more than a suspicion or mere conjecture as to the existence of the fact to be proved. *Ibid.*

§ 53a. Form and Sufficiency of Instructions in General.

A charge by the court to the jury must be construed contextually. *S. v. Davis*, 117; *S. v. French*, 276.

In a criminal prosecution in a capital case, where the trial judge calls back the jury especially to correct an error in his original charge; and thereupon gives the jury supplemental instructions, calling their attention to the mistake, and correctly giving them the rule on the point involved, such supplemental instructions have all the more weight and there is no reversible error. *S. v. Brooks*, 662.

CRIMINAL LAW—*Continued.*

§ 53b. Applicability to Counts and Evidence.

An exception, that the court did not state the law relative to circumstantial evidence, is untenable where the State did not rely primarily on circumstantial evidence, but upon direct evidence of positive identification of defendant and of the fact that defendant committed the crime of rape upon prosecutrix. *S. v. Sutton*, 332.

Recapitulation of all the evidence is not demanded, and the requirements of the statute in this respect are met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. An omission from the charge of an important feature of the evidence should be called to the attention of the court before the verdict is returned. *Ibid.*

§ 53e. Expression of Opinion as to Weight and Sufficiency of Evidence.

In a criminal prosecution for manslaughter, the use by the court of the word "killing," in referring to the degrees of homicide cognizable under the bill of indictment, is not harmful error, where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used. *S. v. Scoggins*, 71.

§ 53f. Requests for Instructions.

On trial under an indictment for manslaughter, no prejudicial error may be predicated upon failure of the court to charge the jury that evidence of good character of defendants should be considered as substantive evidence, in the absence of a request so to charge. *S. v. Scoggins*, 71.

Requests for special instructions must be in before the beginning of the argument. *S. v. Morgan*, 549.

§ 53g. Contention and Objections and Exceptions to Instructions.

Errors in the court's statement of the contentions of the parties must be called to the court's attention in time for the court to have an opportunity to correct them, and a failure to so call them to the court's attention is a waiver of any objection thereto. *S. v. Smith*, 78.

In a criminal prosecution for murder, argument and contention of the State, given in the court's charge to the jury, that prisoner was armed with a shotgun when he inquired for deceased at her home shortly before the homicide, which was not only unsupported by the evidence, but was in direct conflict with the State's undisputed evidence on the very point, constitutes harmful error, even though not called to the attention of the court at the time. *S. v. Isaac*, 310.

The rule, that requires an objection at the time to an erroneous statement in the charge of the contention of the parties, does not apply on the trial of first degree murder, when such statement includes the assumption of sworn evidence against the prisoner, tending to show previous malice and vitally necessary upon the question of premeditation, where this evidence had been excluded or where no such evidence had been given. *Ibid.*

In a criminal prosecution, where the State offered evidence of statements made by defendant's wife, as to the circumstances of the killing, inconsistent with her testimony for defendant, and defendant failed to request that same be considered only for the purpose of impeaching or contradicting his wife's testimony, such evidence becomes substantive and a contention of the State based thereon, given in the charge to the jury, without objection at the time, will not be held for error. *S. v. Britt*, 364.

CRIMINAL LAW—*Continued.*

Ordinarily, the failure to object in apt time to a statement of contention by the court constitutes waiver of the right to object. *Ibid.*

An exception, for failure to charge the jury as required by G. S., 1-180, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. *Ibid.*

§ 54b. Form, Sufficiency, and Effect of Verdict.

In a criminal prosecution for assault and highway robbery, where there was sufficient evidence of assault, but as to robbery the evidence disclosed no more than an opportunity for defendants to take the money, with equal opportunity for others to have stolen it, a verdict on the highway robbery charge is speculative and not supported by the evidence. *S. v. Murphy*, 115.

Where there is a general verdict on a bill of indictment containing two or more counts charging distinct offenses, the court can impose a sentence on each count, if the verdict is free from valid objection and has evidence to support it. *Ibid.*

While a verdict is a substantial right, it is not complete until accepted by the court for record. *S. v. Perry*, 174.

When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or one which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict. *Ibid.*

A verdict is not bad for informality or clerical errors in language, if it is such that it can be clearly seen what is intended, and it must not be voided except from necessity. *Ibid.*

While a verdict must have a definite meaning free from ambiguity and responsive to the issue or issues submitted by the court, additional nonessential words, which are not a part of the legal verdict and do not leave the character of the verdict in doubt, may be treated as mere surplusage. *Ibid.*

Upon the trial of defendant on an indictment, charging a secret and felonious assault with a deadly weapon and with intent to kill, inflicting serious injury, where the jury found and returned that defendant committed an assault with a deadly weapon and in secrecy, G. S., 14-3, but without intent to kill, G. S., 14-33, there is a valid verdict, in effect acquitting the defendant of the felony charged, and the court's refusal to accept the same for record was error. *Ibid.*

Where there is sufficient evidence to support the verdict and judgment, in a capital case, exceptions to the court's refusal to set aside the verdict and to the judgment, are untenable, the granting of the motion to set aside the verdict being in the discretion of the court and the verdict furnishing sufficient predicate for the judgment. *S. v. Sutton*, 332.

The jury having returned a verdict of guilty of murder in the first degree "with mercy," there being no request by the jury for permission to make this recommendation or intimation by the judge that such a recommendation would be considered, the court properly treated the recommendation of mercy as surplusage and imposed the sentence fixed by statute. *S. v. Wise*, 746.

§ 54c. Rendition and Acceptance of Verdict and Power of Court to Have Jury Redeliberate.

While a verdict is a substantial right, it is not complete until accepted by the court for record. *S. v. Perry*, 174.

CRIMINAL LAW—*Continued.*

When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or one which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict. *Ibid.*

Whenever a prisoner, either in terms or effect, is acquitted by the jury, the verdict as returned should be recorded. *Ibid.*

The jury having returned a verdict of guilty of murder in the first degree "with mercy," there being no request by the jury for permission to make this recommendation or intimation by the judge that such a recommendation would be considered, the court properly treated the recommendation of mercy as surplusage and imposed the sentence fixed by statute. *S. v. Wise*, 746.

§ 54f. Conviction on Less Degree of Crime.

The State's evidence being sufficient to carry the case to the jury upon the charge contained in the bill of indictment and the jury returning a verdict of guilty of a less degree of the offense charged, such verdict is valid. G. S., 15-170. *S. v. Morgan*, 549.

§ 55. Jurisdiction of Court to Hear and Determine Motions After Verdict.

In the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had, and courts of general jurisdiction, having stated terms for the trial of criminal actions, have the power to continue the case to a subsequent term for sentence. And if through inadvertence or oversight sentence is not pronounced during the term at which the case was tried, or if the clerk neglects to enter a sentence duly pronounced, the court may impose sentence at a subsequent term. *S. v. Graham*, 217.

§ 59. Motions to Set Aside Verdict as Being Contrary to Weight of Evidence.

Where there is sufficient evidence to support the verdict and judgment, in a capital case, exceptions to the court's refusal to set aside the verdict and to the judgment, are untenable, the granting of the motion to set aside the verdict being in the discretion of the court and the verdict furnishing sufficient predicate for the judgment. *S. v. Sutton*, 332.

§ 60. Conformity to Verdict.

Where there is a general verdict on a bill of indictment containing two or more counts charging distinct offenses, the court can impose a sentence on each count, if the verdict is free from valid objection and has evidence to support it. *S. v. Murphy*, 115.

When an indictment contains several counts as to offenses of different grades and punishments and the evidence applies to one or more counts but not to all, on a general verdict, judgment, in excess of the statutory penalty for the count or counts supported by the evidence, will be stricken out on appeal and the cause remanded for a proper judgment. *Ibid.*

§ 61a. Formalities and Requisites: In General.

Where the judgment in a criminal case, imposing sentence, concludes in part, "this sentence to begin at the expiration of the sentence in case number C. P. 31355," the sentence is not merely vague, it is meaningless; and it cannot be explained, by resort to evidence *aliunde*, that these words refer to the

administrative record in the State Prison of a sentence in another case against defendant. *In re Parker*, 369.

The intention of the court imposing sentence should prevail where clearly expressed, but this does not imply that such intention should be sought through evidence *dehors* the record—at least in a case where the sentence on its face is meaningless. *Ibid.*

§ 62. Conditional and Alternative Judgments.

An order, suspending the imposition or execution of sentence on condition, is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. *S. v. Miller*, 213.

Defendant in a criminal action, after judgment suspended on conditions, is relegated to contest judgment and execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed. *Ibid.*

Where on conviction of defendant in a criminal case and judgment and execution are suspended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is provided by statute from an adverse ruling, so that defendant's remedy is by *certiorari* or *recordari*. *Ibid.*

A judge of the Superior Courts may exercise the power to continue a prayer for judgment from one term to another, and when no conditions are imposed, he may exercise this power with or without the defendant's consent. It is otherwise where conditions are imposed, except perhaps when the judge proceeds under the probation statutes. G. S., Art. 20, ch. 15. *S. v. Graham*, 217.

§ 62½. Concurrent and Cumulative Sentences.

In the absence of a statute to the contrary, and unless it sufficiently appears otherwise in the sentence itself, it is generally presumed that sentences imposed in the same jurisdiction, to be served at the same place or prison, run concurrently, although imposed at different times, and by different courts and upon a person already serving a sentence. No presumption will be indulged in favor of sustaining a sentence as cumulative. *In re Parker*, 369.

Where the judgment in a criminal case, imposing sentence, concludes in part, "this sentence to begin at the expiration of the sentence in case number C. P. 31355," the sentence is not merely vague, it is meaningless; and it cannot be explained, by resort to evidence *aliunde*, that these words refer to the administrative record in the State Prison of a sentence in another case against defendant. *Ibid.*

On conviction of unlawful possession of illicit liquor and finding by the court that same was a breach of the condition on which a former sentence was imposed, the sentence ordered for the breach of condition being for a term less than imposed for the present offense, both running concurrently, there is no prejudicial error. *S. v. Stutts*, 647.

CRIMINAL LAW—*Continued.*

§ 63. Suspended Judgments and Executions.

When prayer for judgment is continued, the judgment is suspended. When judgment is pronounced and sentence is suspended, execution of sentence is stayed. When either judgment or sentence is suspended on condition, the ultimate purpose is the same. *S. v. Miller*, 213.

The inherent power of a court having jurisdiction to suspend judgment, or stay execution of sentence, on conviction in a criminal case, for a determinate period or for a reasonable length of time, has been recognized and upheld in this jurisdiction. Such disposition of the case does not serve to delay or defeat the defendant's right of appeal. *Ibid.*

An order, suspending the imposition or execution of sentence on condition, is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. *Ibid.*

Defendant in a criminal action, after judgment suspended on conditions, is relegated to contest judgment and execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed. *Ibid.*

Where on conviction of defendant in a criminal case and judgment and execution are suspended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is provided by statute from an adverse ruling, so that defendant's remedy is by *certiorari* or *recordari*. *Ibid.*

A judge may suspend judgment over a criminal *in toto* until another term. *S. v. Graham*, 217.

In the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had, and courts of general jurisdiction, having stated terms for the trial of criminal actions, have the power to continue the case to a subsequent term for sentence. And if through inadvertence or oversight sentence is not pronounced during the term at which the case was tried, or if the clerk neglects to enter a sentence duly pronounced, the court may impose sentence at a subsequent term. *Ibid.*

A judge of the Superior Courts may exercise the power to continue a prayer for judgment from one term to another, and when no conditions are imposed, he may exercise this power with or without the defendant's consent. It is otherwise where conditions are imposed, except perhaps when the judge proceeds under the probation statutes. G. S., Art. 20, ch. 15. *Ibid.*

Upon conviction and sentence in a criminal action and suspension of execution on condition that defendant be of good behavior and not violate any criminal laws of the State for a certain period, where subsequent evidence, offered before the judge of the Superior Court, supports his findings of fact that defendant had breached the condition, upon which the sentence was suspended, the same is sufficient to support a judgment that the execution of the suspended sentence be placed in immediate effect and the former judgment complied with. *S. v. Marsh*, 648.

CRIMINAL LAW—*Continued.*

§ 65. Validity and Attack.

Where a defendant, in a criminal prosecution based on several counts, was convicted by a general verdict and judgment of imprisonment rendered on a count as to which there was insufficient evidence, and on appeal the case was remanded for a lawful sentence, an objection, that no judgment was rendered by the court below at the first term after the decision of this Court was certified down, is without merit. *S. v. Graham*, 217.

Where there is sufficient evidence to support the verdict and judgment, in a capital case, exceptions to the court's refusal to set aside the verdict and to the judgment, are untenable, the granting of the motion to set aside the verdict being in the discretion of the court and the verdict furnishing sufficient predicate for the judgment. *S. v. Sutton*, 332.

§ 68a. Right of State to Appeal.

Where the court enters judgment of not guilty, after a purported special verdict, on the conclusion that the statute, on which the criminal prosecution was based, is unconstitutional, the State has no right of appeal under G. S., 15-179. *S. v. Mitchell*, 42.

§§ 76, 77. Certiorari: The Record.

Where on conviction of defendant in a criminal case and judgment and execution are supended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is provided by statute from an adverse ruling, so that defendant's remedy is by *certiorari* or *recordari*. *S. v. Miller*, 213.

§ 80. Prosecution of Appeals and Dismissal.

Where the record on appeal in a capital case only purports to be a transcript of the record proper in the court below, without case on appeal or assignments of error, and prisoner's counsel, in argument and brief, states that appeal as certified fails to show arraignment or plea by his client, and on *certiorari* and return the minutes of the trial court show arraignment and plea of not guilty, and the record in other respects appearing regular and proper, in the absence of error on the face of the record as corrected, we find no error. *S. v. Williams*, 475.

§ 81c. Prejudicial and Harmless Error.

Exceptions by defendant, in a criminal prosecution, to evidence of a State's witness will not be sustained, where the defendant himself testifies without objection to substantially the same facts. *S. v. Matheson*, 109.

In a criminal prosecution in a capital case, where the trial judge calls back the jury especially to correct an error in his original charge; and thereupon gives the jury supplemental instructions, calling their attention to the mistake, and correctly giving them the rule on the point involved, such supplemental instructions have all the more weight and there is no reversible error. *S. v. Brooks*, 662.

§ 85. Proceedings in Lower Court After Remand.

When an indictment contains several counts as to offenses of different grades and punishments and the evidence applies to one or more counts but not to all, on a general verdict, judgment, in excess of the statutory penalty for the

CRIMINAL LAW—*Continued.*

count or counts supported by the evidence, will be stricken out on appeal and the cause remanded for a proper judgment. *S. v. Murphy*, 115.

DAMAGES.

§ 1a. Compensatory Damages.

While the courts are not disposed to permit one who breaches his contract without any valid excuse to prescribe the rights of the innocent party, nevertheless, one who is injured in his person or property by the wrongful or negligent act of another is required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense; and ordinarily, he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. *Troitino v. Goodman*, 406.

Where the deeds, under which plaintiffs claim, describe their lots as fronting on a certain avenue and extending back to the high water mark of a shallow sound, their rights are limited by the express words of their deeds, and the boundaries of their lots may not be extended beyond the high water mark of the sound as it existed at the time their titles were acquired; and their titles and right of possession may not be extended to embrace lands which were then covered by the waters of the sound, nor include the use of such waters for practical or esthetic purposes. And upon the filling in of the sound by defendants and others, within the limits of the previous high water mark, the loss of access to the waters or deprivation of view suffered by plaintiffs is *damnum absque injuria*. *Kelly v. King*, 709.

DEATH.

§§ 3, 6. Grounds and Conditions Precedent.

In an action to recover damages for wrongful death, G. S., 28-172, 28-173, the plaintiff must allege and prove (1) that the defendant was negligent, (2) that such negligence, acting in continuous and unbroken sequence, and without which the injury would not have occurred, resulted in the injury producing death, and (3) that, under the circumstances, a man of ordinary prudence could and would have foreseen that such result was probable. *Morgan v. Coach Co.*, 668.

§ 8. Expectancy of Life and Damages.

Our mortuary table, G. S., 8-46, is nothing more nor less than one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. *Rea v. Simowitz*, 575.

Mortuary tables are used as the best evidence obtainable, together with evidence of health, habits and the like, in the establishment of material but necessarily uncertain facts. *Ibid.*

Before G. S., 8-46, may be considered by a jury there must be precedent proof of age, bringing the deceased clearly within the class of selected lives tabulated in the table. In the absence of such proof it is error to direct a jury to consider it. *Ibid.*

In a case involving the expectancy of one, not within the class of selected lives tabulated in G. S., 8-46, the jury may consider evidence as to the constitution, health, vigor, habits and the like of deceased as a basis for determining his probable expectancy; and upon proper identification and authentication other available tables, which list the ages involved, may be used in evidence. *Ibid.*

DECLARATORY JUDGMENT ACT.

§ 5. Hearings and Trial.

The propriety of invoking the provisions of the Uniform Declaratory Judgment Act, G. S., 1-253, *et seq.*, on plaintiff's policy of liability insurance issued to one of defendants, being without challenge on the record and defendants demanding a jury trial on issues raised by the pleadings, G. S., 1-261, the question, as to whether the automobile covered by the policy was being "used as a public or livery conveyance," within the meaning of the policy at the time of the accident and injuries, is such an issue of fact as should be determined by a jury, under proper instructions, where the pleadings are not so clear in respect to the facts as to render it determinable without the aid of a definite finding. *Insurance Co. v. Wells*, 547.

DEEDS.

§ 1d. Distinction Between Deeds and Mortgages.

Whether any particular transaction amounts to a mortgage or an option to repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction is whether the debt existing prior to the conveyance is still subsisting or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a mortgage. *Ricks v. Batchelor*, 8.

§ 2a. Competency of Grantor.

Mental incompetency to make a deed and that weakness of mind, which often renders the subject especially amenable to undue influence, are not too far apart psychologically or too radically inconsistent as to require their assertion in separate actions. G. S., 1-123. *Goodson v. Lehmon*, 514.

§ 2c. Undue Influence.

Mental incompetency to make a deed and that weakness of mind, which often renders the subject especially amenable to undue influence, are not too far apart psychologically or too radically inconsistent as to require their assertion in separate actions. G. S., 1-123. *Goodson v. Lehmon*, 514.

In certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation, of itself and without more, raises a presumption of fraud or undue influence as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted. *In re Will of Atkinson*, 526.

§ 4. Consideration.

He who claims to be a *bona fide* purchaser for value without notice, so as to avoid the defective character of his deed, asserts an affirmative defense and has the burden of proving that fact. *Whitehurst v. Abbott*, 1.

One who for value purchases the record title without notice, actual or constructive, of any equity or adverse claim therein is protected. *Ricks v. Batchelor*, 8.

While the recital of consideration in a deed is not contractual, and like other receipts is *prima facie* only of payment and may be rebutted by parol, this rule does not extend to authorize the admission of parol evidence to contradict or modify the terms of a deed, or to permit the conveyance or reservation of real property by parol. *Westmoreland v. Lowe*, 553.

DEEDS—*Continued.*

The consideration named in a deed is presumed to be correct. And while it may be inquired into by parol evidence, such evidence must be sufficient to contradict the recital in the deed. *Hinson v. Morgan* and *Hinson v. Baumrind*, 740.

§ 5. Delivery and Acceptance.

A parol agreement of the conditional delivery of a deed conveying lands is valid, and it does not contradict the written instrument, but only postpones its effectiveness until after the condition has been performed or the event has happened. Such conditional delivery may be from grantor to grantee. *Lerner Shops v. Rosenthal*, 316.

Whether a deed has been delivered in the legal sense is not dependent exclusively upon the question of its manual or physical transfer from the grantor to the grantee, but also upon the intent of the parties. Both the delivery of the instrument and the intention to deliver it are necessary to the transmutation of title. *Ibid.*

It is axiomatic that delivery is essential to vest title in the grantee named in a deed. Delivery is the final act of execution. *McMichael v. Pegram*, 400.

§ 6. Deeds of Gift.

A deed of gift is absolutely void, when not registered within two years after its making. G. S., 47-26. *Ferguson v. Ferguson*, 375.

§ 7. Requisites and Sufficiency of Registration.

Registration, based on the certificate of a notary whose commission has expired, is invalid. And where the defect in the probate is apparent on the record, the registration does not affect subsequent purchasers and encumbrances. The rule is otherwise when the incapacity of the officer is latent and does not appear upon the record. *Crissman v. Palmer*, 472.

§ 8. Registration as Notice.

To affect a purchaser with notice, a lease for a term exceeding three years must be in writing and recorded in the proper county. *Barbee v. Lamb*, 211.

A deed of gift is absolutely void, when not registered within two years after its making. G. S., 47-26. *Ferguson v. Ferguson*, 375.

Registration, based on the certificate of a notary whose commission has expired, is invalid. And where the defect in the probate is apparent on the record, the registration does not affect subsequent purchasers and encumbrances. The rule is otherwise when the incapacity of the officer is latent and does not appear upon the record. *Crissman v. Palmer*, 472.

§ 11. General Rules of Construction.

He who claims to be a *bona fide* purchaser for value without notice, so as to avoid the defective character of his deed, asserts an affirmative defense and has the burden of proving that fact. *Whitehurst v. Abbott*, 1.

One who for value purchases the record title without notice, actual or constructive, of any equity or adverse claim therein is protected. *Ricks v. Batchelor*, 8.

A deed, which did not purport to convey the lands described therein, but merely whatever right, title, and interest the grantors had in the lands, is limited by the grant and is in legal effect no more than a quitclaim deed, even though it might have contained a covenant of warranty. *Turpin v. Jackson County*, 389.

DEEDS—*Continued.*

A quitclaim deed for land, without reference to the character of the title, is, in the absence of fraud or mistake, a sufficient consideration to support a contract; money paid for such a conveyance cannot be recovered back, or a plea of failure of consideration maintained to a note given for such a conveyance. *Ibid.*

Where language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect. *Jackson v. Powell,* 599.

§ 12. Property Conveyed.

All the descriptive matter set out in a deed, where pertinent, is to be considered in the attempt to identify the land to be conveyed, both in its content and extent; but we must observe other more specific rules, respecting the comparative weight and value of the descriptive elements in the conveyance—natural objects, artificial monuments, fixed corners, course, distance, quantity. *Tice v. Winchester,* 673.

When the beginning point, in the description of land in a conveyance, has been established, it cannot be shifted backwards and forwards in the line by any call for course or distance; but the actual distance between it and the next corner shall be taken, regardless or whether the distance called for is over or short of that point. *Ibid.*

§ 13a. Estates Created by Construction of the Instrument.

When real estate is conveyed to any person, the conveyance shall be construed to be in fee simple unless such conveyance in plain words shows the grantor intended to convey an estate of less dignity. G. S., 39-1. *Jackson v. Powell,* 599.

When the words "bodily heirs" or "heirs of the body" are used in a deed or will, and are not so qualified as to indicate that they are used merely as a *descriptio personanum,* they are equivalent to the words "heirs general." *Ibid.*

§ 13b. Rule in Shelley's Case.

In a deed in form a fee simple, except that immediately after the description there appears the following—"The grantors hereof make this conveyance to the grantees named above during their natural lifetime then to their bodily heirs to the third generation," the phrase "to the third generation" is void, being within the rule against perpetuities, hence the grantees take a fee simple title to the property conveyed, under the rule in *Shelley's case. Jackson v. Powell,* 599.

§ 14a. *Condition Precedent to Vesting of Title.*

A parol agreement of the conditional delivery of a deed conveying lands is valid, and it does not contradict the written instrument, but only postpones its effectiveness until after the condition has been performed or the event has happened. Such conditional delivery may be from grantor to grantee. *Lerner Shops v. Rosenthal,* 316.

§ 15. Reservations and Exceptions.

While the recital of consideration in a deed is not contractual, and like other receipts is *prima facie* only of payment and may be rebutted by parol, this rule does not extend to authorize the admission of parol evidence to contradict or modify the terms of a deed, or to permit the conveyance or reservation of real property by parol. *Westmoreland v. Lowe,* 553.

DEEDS—*Continued.*

§ 16. Restrictions.

Restraint on alienation, in a devise by will, is void. *Beam v. Gilkey*, 520.

§ 17. Covenants and Warranties.

There are no implied covenants with respect to title, quantity or encumbrance, in the sale of real estate. In the absence of fraud, mistake, or overreaching, the doctrine of *caveat emptor* applies. *Turpin v. Jackson County*, 389.

§ 21. Requisites and Validity of Timber Deeds.

The statute of frauds defeats a parol conveyance or reservation of timber; and, there being no exception or reservation as to timber in plaintiff's deed, parol evidence of a previous oral agreement between plaintiff and defendant to reserve or except timber was properly excluded. *Westmoreland v. Lowe*, 553.

§ 24. Actions.

He who claims to be a *bona fide* purchaser for value without notice, so as to avoid the defective character of his deed, asserts an affirmative defense and has the burden of proving that fact. *Whitehurst v. Abbott*, 1.

In a proceeding to caveat a will, the caveators are required to handle the laboring oar on the issue of undue influence, just as the plaintiffs, in an action to annul a deed on the ground of fraud or undue influence, are required to carry the same burden of proof. *In re Will of Atkinson*, 526.

Where plaintiff's complaint alleges that defendants were wrongfully attempting to cut timber on her land beyond the time limited in a consent decree in the proceeding under which defendants purchased, and that defendants wrongfully had caused injury to plaintiff's cultivated lands, and asking for a restraining order and damages based thereon, plaintiff's action may not be regarded as a collateral attack on the judgment in the special proceeding for sale of timber, but rather it is an action maintainable in the Superior Court, founded on the allegations of the complaint; and a demurrer to the complaint was properly overruled. *Johnson v. Lumber Co.*, 595.

DIVORCE.

§ 2a. Separation.

The separation contemplated by the statute is apparently unrestricted. A separation by the act of the parties, or one of them, or under order of court *a mensa et thoro*, suffices; but not an involuntary living apart, where there had been no previous separation, such as might arise from the incarceration or insanity of one of the parties. *Taylor v. Taylor*, 80.

The word "separation," as applied to the legal status of a husband and wife, means a cessation of cohabitation, and cohabitation includes other marital duties besides marital intercourse. *Dudley v. Dudley*, 83.

The discontinuance of sexual relations is not in itself a living "separate and apart" within the meaning of the statute, and a divorce will be denied where it appears that, during the period relied upon, the parties had lived in the same house. *Ibid.*

Marriage is not a private affair between the parties. Society has an interest in the marital status, and a divorce will not be granted for separation, where the only evidence thereof must "be sought behind the closed doors of the matrimonial domicile." *Ibid.*

DIVORCE—*Continued.*

Where a suit for divorce is tried on the theory of separation by mutual consent, to establish his cause of action, 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. There can be no voluntary separation without the conscious act of both parties. *Young v. Young*, 340.

For the purpose of obtaining a divorce under G. S., 50-5 (4), or G. S., 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such a character as to induce others, who observed them, to regard them as living together in the ordinary acceptation of that descriptive phrase. *Ibid.*

A separation agreement between husband and wife, providing for her support, is void and unenforceable when not in accordance with G. S., 52-12, 13. *Pearce v. Pearce*, 571.

In a cause of action couched in the language of G. S., 50-5 (4), plaintiff must prove his case *secundum allegata* by showing that the separation was voluntary in its inception. If the assent of the wife was obtained by fraud or deceit, the separation was not voluntary within the meaning of the act. *Ibid.*

In an action by a husband against his wife, for divorce on the ground of two years separation, in which the wife set up in her answer a separation agreement by which her husband contracted to pay her a certain sum monthly for her support and asked for judgment that she recover according to the terms of such agreement, this plea of the wife being ignored by the court and no judgment rendered therein, though the court rendered a decree of absolute divorce for the husband, such decree is not *res judicata* in a subsequent action by the wife against the husband based on the agreement. *Jenkins v. Jenkins*, 681.

§§ 3, 4. Jurisdiction and Venue: Affidavit and Conditions Precedent.

In an action for divorce the affidavit, required by the statute in connection with the complaint, is jurisdictional, G. S., 50-8, and a complaint accompanied by a false statutory affidavit, if it be properly so found, would be regarded as insufficient to empower the court to grant a decree of divorce; and the correct procedure for relief against the judgment is by motion in the cause. *Young v. Young*, 340.

§ 5. Pleadings.

It is not necessary to set out in the complaint the cause of the separation, or to allege that it was without fault on the part of the plaintiff, or to aver that it was by mutual agreement of the parties. *Taylor v. Taylor*, 80.

The plaintiff may particularize as to the character of the separation by alleging that it was by mutual consent, abandonment, etc., in which event, if material to the cause of action, the burden would rest with the plaintiff to prove the cause *secundum allegata*. *Ibid.*

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

Where defendant, in an action for divorce on the grounds of two years separation, set up the plaintiff's wrongful conduct and willful abandonment of defendant and also recrimination, either defense, if established, would defeat the plaintiff. The burden, however, rests upon the defendant to establish these

DIVORCE—*Continued.*

defenses, which are affirmative and deemed controverted and not cross causes. *Ibid.*

The statute, G. S., 50-10, requires that the material facts in every complaint for divorce shall be deemed denied, whether the same be actually denied by a pleading or not, and no judgment shall be given in favor of plaintiff until such facts have been found by a jury. *Taylor v. Taylor*, 80; *Moody v. Moody*, 89.

As the allegations in a petition for divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise, the court cannot grant a decree. *Young v. Young*, 340.

A wife who seeks to assert a cause of action under G. S., 50-7 (4), must allege with particularity the language and conduct relied upon as constituting such indignities to her person as to render her condition intolerable and her life burdensome; and it is essential that there be an allegation that the same was without adequate provocation, its omission being fatal. *Pearce v. Pearce*, 571.

In a suit for divorce by husband against wife under G. S., 50-5 (4), allegations by the wife, that her husband ordered her to leave home, which she did not do, but instead, bargaining with him for a contract of separation, reached an agreement, without averment of fraud or deceit, are insufficient as a defense. *Ibid.*

In an action for absolute divorce a counterclaim or cross action for debt under a separation agreement between the parties is not cognizable by the court. *Jenkins v. Jenkins*, 681.

§ 8. Sufficiency of Evidence.

In an action for divorce on the ground of two years separation, where the complaint alleges and there is evidence for plaintiff tending to show that the parties have lived separate and apart for two years next immediately preceding the institution of the action and that plaintiff has resided in the State for a period of six months, G. S., 50-6, and defendant pleaded and offered evidence of wrongful abandonment and recrimination, the case is one for the jury and there is error in allowing a motion for judgment as of nonsuit. *Taylor v. Taylor*, 80.

In an action by a husband against his wife for absolute divorce, under the two years separation statute, G. S., 50-6, where plaintiff's evidence tended to show that, although the parties lived in the same house and for a large part of the time in the same room, they lived separate and apart for more than two years preceding the action because of a total discontinuance of sexual relations between them, judgment as of nonsuit was proper. *Dudley v. Dudley*, 83.

There being no competent evidence offered, in a divorce action based on the grounds of two years separation, G. S., 50-6, of the living separate and apart by plaintiff and defendant, the court properly allowed a motion for judgment as in case of nonsuit at the close of plaintiff's evidence. G. S., 1-183. *Moody v. Moody*, 89.

On motion in the cause by defendant to set aside a judgment of divorce, granted September, 1944, for alleged two years separation by mutual consent, on the ground that the judgment was fraudulently obtained, where affidavits on the part of the wife, the defendant, show that the parties were married, in Atlanta, Ga., where she lived, on 9 June, 1941, and lived together in Atlanta until plaintiff entered the U. S. Navy (to which he still belongs), when defend-

ant remained with her parents, with plaintiff's approval, spending portions of her time with her husband at various places, visiting his parents, living with plaintiff in 1944 in Washington, where their friends thought them a happy married couple, that she received an allotment from his pay and plaintiff paid her expenses on trips, wrote regularly and sent her checks as late as 29 June, 1944, and she heard of this action first on 1 August, 1944; while plaintiff contents himself with the categorical statement that he did not live with defendant as husband and wife after 15 June, 1942, admitting support and referring to the separation by mutual agreement only as agreed to by defendant in April, 1944, without denying any of the instances of association in defendant's affidavits—there is no sufficient evidence of the separation by mutual agreement and the living separate and apart as is contemplated by statutes, G. S., 50-5 (4), and G. S., 50-6, and plaintiff has practiced imposition upon the court. *Young v. Young*, 340.

As the allegations in a petition for divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise, the court cannot grant a decree. *Ibid.*

In a cause of action couched in the language of G. S., 50-5 (4), plaintiff must prove his case *secundum allegata* by showing that the separation was voluntary in its inception. If the assent of the wife was obtained by fraud or deceit, the separation was not voluntary within the meaning of the act. *Pearce v. Pearce*, 571.

§ 10. Verdict and Decree.

On motion in the cause by defendant to set aside a judgment of divorce, granted September, 1944, for alleged two years separation by mutual consent, on the ground that the judgment was fraudulently obtained, where affidavits on the part of the wife, the defendant, show that the parties were married, in Atlanta, Ga., where she lived, on 9 June, 1941, and lived together in Atlanta until plaintiff entered the U. S. Navy (to which he still belongs), when defendant remained with her parents, with plaintiff's approval, spending portions of her time with her husband at various places, visiting his parents, living with plaintiff in 1944 in Washington, where their friends thought them a happy married couple, that she received an allotment from his pay and plaintiff paid her expenses on trips, wrote regularly and sent her checks as late as 29 June, 1944, and she heard of this action first on 1 August, 1944; while plaintiff contents himself with the categorical statement that he did not live with defendant as husband and wife after 15 June, 1942, admitting support and referring to the separation by mutual agreement only as agreed to by defendant in April, 1944, without denying any of the instances of association in defendant's affidavits—there is no sufficient evidence of the separation by mutual agreement and the living separate and apart as is contemplated by statutes, G. S., 50-5 (4), and G. S., 50-6, and plaintiff has practiced imposition upon the court. *Young v. Young*, 340.

§§ 11, 12. Alimony Pendente Lite: Alimony Upon Divorce From Bed and Board.

Alimony in actions for divorce *a vinculo* is not permitted in this jurisdiction, save *pendente lite* or where alimony is prayed in a successful cross action for divorce *a mensa*. *Jenkins v. Jenkins*, 681.

DIVORCE—*Continued.*

§§ 13, 15. Alimony Without Divorce: Review and Change of Award.

Two separate remedies are provided by G. S., 50-16, one for alimony without divorce, and second, for reasonable subsistence and counsel fees *pendente lite*. The amounts allowed are determined by the trial court in his discretion, and are not reviewable; either party, however, may apply for a modification at any time before the trial of the action. This power is constitutionally exercised without the intervention of a jury. *Oldham v. Oldham*, 476.

There is no defense that limits the power of the trial court to award subsistence *pendente lite*, under G. S., 50-16, except the defense of adultery as specified in the statute, so that the reasonableness of a separation agreement need not be determined before the court can award temporary allowances. *Ibid.*

§ 17. Hearings and Decree.

In an action by a husband against his wife, for divorce on the ground of two years separation, in which the wife set up in her answer a separation agreement by which her husband contracted to pay her a certain sum monthly for her support and asked for judgment that she recover according to the terms of such agreement, this plea of the wife being ignored by the court and no judgment rendered therein, though the court rendered a decree of absolute divorce for the husband, such decree is not *res judicata* in a subsequent action by the wife against the husband based on the agreement. *Jenkins v. Jenkins*, 681.

DRAINAGE DISTRICTS

§ 1. Establishment.

A drainage district is a *quasi*-municipal corporation, and neither its existence nor the regularity of its proceedings can be collaterally impeached. *Newton v. Chason*, 204.

§ 10. Attack of Assessments.

Parties to drainage proceedings, and in reference to their lands situated within the drainage district, are estopped, from questioning by independent suit, the judgment establishing the district or the validity and amount of the assessments made in the cause or the burdens and benefits affecting the property. These, and like rulings, must be challenged at the proper time and in the course of the proceeding, and unless objection is successfully maintained, the parties are concluded. *Newton v. Chason*, 204.

Drainage proceedings are never closed, and a party aggrieved therein may, by motion in the cause at any time, raise questions as to his right affected thereby. *Ibid.*

EASEMENT.

§ 2. Creation by Necessity and Implication.

In a civil action for permanent injunction against interference with the use of an easement in an alleyway, where plaintiffs' evidence tends to show that a developer of realty for residential purposes put a map of his property on record, sold some of the lots in a certain block thereof and thereafter, with the approval and consent of the purchasers of the lots sold and for the convenience of all lots in said block, the developer and the purchasers of lots in such block, including predecessors in title of plaintiffs and defendants, by written agreement, which is now lost and which was not put on record, agreed to, and did lay out and establish, locate and grade a common alleyway for

EASEMENT—*Continued.*

ingress, regress and egress for the then owners of plaintiffs' and defendants' lots and other lots in said block, and for the benefit of subsequent owners and the public, and that thereafter owners of lots on said alleyway constructed homes, garages and other improvements thereon with reference to the use of such alley as the only entrance to their property and used the same for many years without question, until recently when defendants wrongfully placed barriers at both entrances to said alleyway and also notices forbidding the use thereof, there is sufficient evidence for the jury and the court below erred in allowing defendants' motion for judgment as of nonsuit. *Neamand v. Skinkle*, 383.

EJECTMENT.

§ 1. Nature and Scope of Remedy in General.

The fact that a landlord may obtain permission from the Rent Control Office of the O.P.A. to institute an action under the local law for the possession of his property, does not release the property from the provisions of the Emergency Price Control Act of 1942, Title 50, U.S.C.A. App., sec. 901, *et seq. McGuinn v. McLain*, 750.

§ 7. Judgment and Relief.

The rental value of the premises in controversy in this action was fixed by the Rent Control Office, and local statutes, S. L. 1945, ch. 796, amending G. S., 42-32, authorizing the collection of double rents or other damages for withholding the premises after notice to quit, cannot exceed the maximum rent fixed by the Office of Price Administration under the Emergency Price Control Act of 1942. *McGuinn v. McLain*, 750.

Ordinarily when a tenant holds over after the expiration of his lease or a tenant from month to month refuses to quit after notice, the landlord is entitled to recover, as damages for the wrongful withholding of the premises, the fair rental value of the property. The measure of damages is the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved. Rental value is what the premises would rent for, or it may be determined by other evidence. *Ibid.*

As long as the Rent Control Act is effective in a particular locality, a landlord who owns rental property therein and subject to the provisions of the Act, cannot assert under the local law any right in conflict with the Act. *Ibid.*

Any difficulty encountered by defendant, in an ejectment proceeding, in obtaining other suitable living quarters is not sufficient under the Rent Control Act to defeat the right of plaintiffs to recover possession of their property for their own use and occupancy. *Ibid.*

§ 9b. Common Source of Title.

Where both parties to an action for recovery of land claim title from a common source, prior ownership of the land may be taken as a "fixed fact" so far as the action is concerned. *Ferguson v. Ferguson*, 375.

§ 15. Sufficiency of Evidence.

A purported judgment, signed with a facsimile rubber stamp signature and relied upon by defendants as muniment of title, is subject to collateral attack in an action to recover land. *Eborn v. Ellis*, 386.

EQUITABLE LIEN.

§ 1. Nature: In General (Expressed or Implied).

There is no lien for purchase money in North Carolina. A vendor cannot reserve a lien unless he take his security in writing and have it registered—in the shape of a mortgage or deed of trust. *Rudasill v. Cabaniss*, 87.

EQUITY.

§ 3. Nature of Equitable Rights and Remedies in General.

A court of equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law. *In re Estate of Daniel*, 18; *Insurance Co. v. Guilford County*, 293.

In seeking equity a plaintiff must find his cause of action in the invasion of property rights, at which point equity takes hold and proceeds as far as it may, within the power and practice of the court, to restore the parties to the *status quo ante injuriam*. *Atkinson v. Atkinson*, 120.

Equity acts *in personam* but it also acts in relation to the *res*. *Ibid.*

A plaintiff may not invoke the aid of a court of equity for application of the principle of restitution, it appearing on the face of the record that plaintiff is not without adequate remedy at law. *Insurance Co. v. Guilford County*, 293.

Ordinarily equity will not interfere with the enforcement of a municipal ordinance, since, if valid, plaintiff cannot complain, and, if not, its validity may be attacked in an action of law. *Jarrell v. Snow*, 430.

Equity will not interfere to test the validity of an alleged unlawful and invalid municipal ordinance enforceable only by indictment. *Ibid.*

ESTATES.

§ 9a. Creation and Termination of Life Estates and Vesting of Remainders.

By a devise to a woman for her natural life, remainder in fee to the children of the devisee, with subsequent provision that, in case devisee should die leaving no child, or children, or child of any such children, the devise should go to another, a life estate passes under the will to such devisee and remainder in fee vests immediately in the children of life tenant who are *in esse*, subject to open and make room for any after-born child or children, with ultimate limitation over in case the life tenant should die leaving no issue. Such remainder vests subject only to a contingency affecting the *quantum* of the children's interest, but not the quality of their estate. *Beam v. Gilkey*, 520.

The vested character of a remainder created by will is unaffected by a direction in the will that the property be equally divided among the remaindermen when they become of age, after the death of the life tenant. *Ibid.*

§ 11. Procedure.

In a suit to sell lands by life tenant against remaindermen, where remaindermen come in by counsel and join in the plaintiff's prayer for relief, this makes it for all practical purposes an *ex parte* proceeding. *Beam v. Gilkey*, 520.

A court of equity is empowered to order a sale of realty, upon application of the life tenant and the remaindermen, life tenant's children *in esse*, who represent the entire class of remaindermen, including children *in posse*, and to conclude all of the same class then before the court. It is likewise in the discretion of such court to determine whether the sale shall be public or private. *Ibid.*

ESTATES—*Continued.*

In a suit, before a court of general equity jurisdiction, brought by the life tenant against the vested remaindermen, to sell the lands, failure to bring in those having a contingent interest, based on the death of the life tenant without issue, is not fatal after the death of the life tenant leaving issue. Such a proceeding is not under C. S., 1744, 1745 (see G. S., 41-11, 41-12). When the purchaser pays his bid into court, he is relieved from any further responsibility. *Ibid.*

The presence of a minor son of a vested remainderman as a party, in a suit for sale of the property brought by a life tenant against all remaindermen, is mere surplusage and harmless. The minor had no interest in the property then and has none now. *Ibid.*

§ 12. Conduct of Sale, Report and Confirmation.

A court of equity is empowered to order a sale of realty, upon application of the life tenant and the remaindermen, life tenant's children *in esse*, who represent the entire class of remaindermen, including children *in posse*, and to conclude all of the same class then before the court. It is likewise in the discretion of such court to determine whether the sale shall be public or private. *Beam v. Gilkey*, 520.

§ 14. Attack and Setting Aside Sale.

In a suit, before a court of general equity jurisdiction, brought by the life tenant against the vested remaindermen, to sell the lands, failure to bring in those having a contingent interest, based on the death of the life tenant without issue, is not fatal after the death of the life tenant leaving issue. Such a proceeding is not under C. S., 1744, 1745 (see G. S., 41-11, 41-12). When the purchaser pays his bid into court, he is relieved from any further responsibility. *Beam v. Gilkey*, 520.

On hearing in 1945 motions in the cause to vacate the order of sale of realty and judgment of confirmation made in 1922, where the court found that defendants appearing of record had been duly served with summons; that they filed answer through counsel and joined in the request for an order of sale; that full value was paid for the property at the time, and that the purchaser has since erected valuable improvements thereon, in the absence of compelling reasons to the contrary there was no error in refusing to vacate the order of sale and judgment of confirmation. *Ibid.*

ESTOPPEL.

§ 3. Nature and Essentials.

Where a husband attempts to devise to his wife lands already belonging to her (1) the wife is not put to her election, especially when she does not offer the will for probate and fails to qualify as executrix thereunder; (2) and the wife's grantees are not estopped by her joinder, with some of the other devisees under her husband's will, in the execution of mortgages on the property, nor by evidence that she claimed only a life estate, against the assertion of a fee title by her said grantees, since their adversaries are not attempting to assert a title acquired after such declarations or in any way affected by them. *Lane v. Becton*, 457.

§ 4. Operation and Effect.

In suit by the seller to require specific performance of the buyer, title being claimed under a will in the probate of which the issue of *devisavit vel non*

ESTOPPEL—*Continued.*

was raised and a motion of nonsuit made and allowed, the parties at whose instance the nonsuit was allowed being before the court, they will be bound by its judgment on the principle of estoppel. *Burney v. Holloway*, 633.

§ 6b. Estoppel by Misrepresentation.

Where a husband attempts to devise to his wife lands already belonging to her (1) the wife is not put to her election, especially when she does not offer the will for probate and fails to qualify as executrix thereunder; (2) and the wife's grantees are not estopped by her joinder, with some of the other devisees under her husband's will, in the execution of mortgages on the property, nor by evidence that she claimed only a life estate, against the assertion of a fee title by her said grantees, since their adversaries are not attempting to assert a title acquired after such declarations or in any way affected by them. *Lane v. Becton*, 457.

§ 6d. Estoppel by Conduct.

In a suit by a successor trustee under a will, after the death of the life beneficiary, against the administrator of the life beneficiary and the ultimate beneficiaries, the said administrator attacking by cross action the authority of the former trustees, the accounts and the general handling of the trust by plaintiff and his predecessor trustees, plaintiff having pleaded estoppel against such administrator as to any claim against the former trustees and there being evidence tending to show that testatrix died in 1919 and her executor settled her estate in 1920 and acted as trustee to his death in 1928 when, in a proceeding for that purpose, the second trustee was appointed and on his death in 1932 the plaintiff was appointed in another proceeding, the life beneficiary being a party to both proceedings, and that regular accounts were filed by the executor and all three trustees and approved, all without any objection or question from the life beneficiary, who was under no disability from 1919 to his death in 1940, such conduct of the life beneficiary constitutes an estoppel against his administrator and the findings of fact and conclusions of law by the court below on the plea of estoppel must be upheld. *Cheshire v. First Presbyterian Church*, 165.

EVIDENCE.

I. Judicial Notice.

2. Of Judicial, Legislative and Executive Acts of Agencies of This State. Rea v. Simowitz, 575.
3. Of Other States. Kearney v. Thomas, 156.

II. Burden of Proof and Presumptions.

6. In General. Kearney v. Thomas, 156; In re Will of Atkinson, 526; In re Will of Lomax, 592.

IV. Credibility of Witnesses, Impeachment and Corroboration.

15. In General. Steele v. Coxe, 726.
18. Evidence Competent to Corroborate Witness. S. v. Sutton, 332.

VII. Competency of Evidence in General.

27. General Rules. Hobbs v. Coach Co., 323; S. v. Sutton, 332; Rea v. Simowitz, 575; S. v. Brooks, 662.
28. Circumstantial Evidence. Hobbs v. Coach Co., 323.
32. Transactions or Communications With Decedent. McMichael v. Pegram, 400.

VIII. Documentary Evidence.

34. Governmental Acts and Documents of Other States. Kearney v. Thomas, 156.

IX. Best and Secondary Evidence.

37. General Rules. Rea v. Simowitz, 575.

X. Parol or Extrinsic Evidence Affecting Writings.

40. Exceptions to General Rules. Laundry Machinery Co. v. Skinner, 285.

XI. Hearsay Evidence.

41. In General. Hinson v. Morgan, 740.

EVIDENCE—*Continued.*

42b. Res Gestae. S. v. Hill, 74; S. v. Smith, 78; In re Will of Ball, 91; Hobbs v. Coach Co., 323.
42c. By Parties or Others Interested in the Event. Hobbs v. Coach Co., 323.
42d. By Agents of Representatives. Steele v. Coxe, 726.
43a. Declarations: In General. In re Will of Ball, 91.
43b. By Decedents Against Interest. Lane v. Becton, 457.

XII. Expert and Opinion Evidence.

45a. In General. S. v. Peterson, 540.
46. Subjects of Opinion Evidence by Non-experts. Lee v. Beddingfield, 573; In re Will of Lomax, 592; Steele v. Coxe, 726.
48. Causes of Death. S. v. Mays, 486.
51. Competency and Qualifications of Experts. S. v. Peterson, 540.

§ 2. Of Judicial, Legislative, and Executive Acts of Agencies of This State.

Our mortuary table, G. S., 8-46, is nothing more nor less than one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. *Rea v. Simowitz*, 575.

§ 3. Of Other States.

The Federal statute implements the Constitution in requiring that full faith and credit be given in each state to the public acts, records and judicial proceedings of every other state, and requires certified copies of records to be admitted in evidence when authenticated as provided by the statute. It is not intended to supplant, nor does it supplant, other modes of proof recognized as competent in the jurisdiction where the exemplification is to be made. *Kearney v. Thomas*, 156.

The purpose of certification is to avoid the necessity of bringing original documents from the places where they are kept, or of presenting witnesses who have compared copies with the original—a method still permissible under the common law. *Ibid.*

Authentication guarantees that the original of the copy genuinely exists, as exemplified, and this is attained by showing: (a) The authority of the person certifying, or that he is the keeper of the record; (b) his present incumbency of the office; and (c) the genuineness of his *signature* or *seal*. *Ibid.*

Where a marriage license and marriage certificate of record in the Hustings Court of the City of Petersburg, Va., attested by the signature of the Clerk of said court, has attached thereto a certificate of the presiding judge of said court, under his hand and the seal of said court, that the said Clerk is the duly qualified and commissioned Clerk of said court and that the attestation on the said license and marriage certificate is in due form as provided by the laws of Virginia and made by the proper officer, and in turn the same seal is used by the Clerk of said court in certifying the official character of the Judge, the admission of these documents and certificates in evidence will not be held for error. *Ibid.*

§ 6. In General.

The laws of evidence do not recognize a presumption on a presumption. The facts upon which a presumption is based must be proved by direct evidence. *Kearney v. Thomas*, 156.

There is no genuine presumption of the continuance of a particular human life, with a uniform application. The pleadings will show whose duty it is to prove that a particular person was living at a certain time, and, upon his showing the mere fact of life at a preceding date, the court will usually leave it to the jury to say whether he has proved his case. *Ibid.*

There is no such thing as a directed verdict while the credibility of the evidence is still a matter for the jury; and it always is for the jury where the

demand is for an affirmative finding in favor of the party having the burden, even though the evidence be uncontradicted. *Ibid.*

It is sufficient to rebut a presumption by evidence of equal weight rather than by a preponderance of the evidence, where the burden of the issue is on the opposite party. *In re Will of Atkinson*, 526.

Strictly speaking, the burden of the issue, as distinguished from the duty to go forward with the evidence, does not shift from one side to the other, for the burden of proof continues to rest upon the party who alleges facts necessary to enable him to prevail in the cause. It is required of him who thus asserts such facts to establish them before he can become entitled to a verdict; and he constantly has the burden of the issue as to these matters, whatever may be the intervening effect of different kinds of evidence or of evidence possessing varying degrees of probative force. *Ibid.*

The "greater weight of the evidence" relates to the credibility of evidence offered, and not to the quantity. *In re Will of Lomax*, 592.

In an action on the issue of *devisavit vel non*, where the court charged the jury that the rule, as to the greater weight of the evidence required of the propounders, means that they must offer more evidence, however slight it may be, than the caveators have offered, there is reversible error. *Ibid.*

§ 15. In General.

It is proper for a witness to refresh his memory from a paper writing, even when the witness has not asked to be allowed to do so. Indeed, a witness may be compelled to so refresh his memory. *Steele v. Coxe*, 726.

§ 18. Evidence Competent to Corroborate Witness.

Evidence of prosecutrix, in a trial on an indictment charging rape, that, when confronted with defendant in the sheriff's office the day after the alleged crime was committed, she said "that is the man," and that defendant made no denial or reply, was clearly competent for the purpose of corroborating the witness' former testimony that defendant was the man who assaulted her. *S. v. Sutton*, 332.

§ 27. General Rules.

Objection to the admission of evidence is rendered harmless by the subsequent admission, without objection, of evidence to the same effect as that objected to and bearing upon the identical matter. *Hobbs v. Coach Co.*, 323.

Where evidence is improperly admitted and, at the conclusion of all the evidence, the court rules that the same is incompetent and instructs the jury not to consider it, the error in the admission of the evidence is cured. *Ibid.*

Evidence competent for one purpose is, in the absence of a request to restrict it to the one purpose, admissible generally; and the court, in the absence of a request to restrict, is not required to do so. *S. v. Sutton*, 332.

Our mortuary table, G. S., 8-46, is not founded on any statistical information based on experience concerning children under ten years of age and it does not give or purport to give the probable expectancy of life of such infants. Hence as to them it is irrelevant. *Rea v. Simowitz*, 575.

In a case involving the expectancy of one, not within the class of selected lives tabulated in G. S., 8-46, the jury may consider evidence as to the constitution, health, vigor, habits and the like of deceased as a basis for determining his probable expectancy; and upon proper identification and authentication other available tables, which list the ages involved, may be used in evidence. *Ibid.*

EVIDENCE—*Continued.*

The admissibility of evidence, when challenged, is, *imprimis*, a question for the trial court. Where its admission primarily depends upon a determination of fact, the court of review is ordinarily bound by the finding of the trial judge when it is supported by evidence, and will not disturb that finding or ruling admitting the evidence unless there appears some error of law or legal inference. *S. v. Brooks*, 662.

§ 28. Circumstantial Evidence.

Allegations, in a complaint for alleged personal injuries to plaintiff by an automobile collision, and evidence supporting same, as to the presence of soldier-passengers in plaintiff's car and the fact that one of them was killed and others injured by the collision, were proper and competent solely to be considered by the jury with respect to the momentum of the vehicle at the time of the crash (which was admitted), the attendant destruction and death bearing on the question of negligence and proximate cause of the injury. *Hobbs v. Coach Co.*, 323.

§ 32. Transactions or Communications With Decedent.

In a civil action by plaintiffs against defendant for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards defendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, is excluded by G. S., 8-51, as personal transactions and communications with defendant's intestate. *McMichael v. Pegram*, 400.

§ 34. Governmental Acts and Documents of Other States.

The purpose of certification is to avoid the necessity of bringing original documents from the places where they are kept, or of presenting witnesses who have compared copies with the original—a method still permissible under the common law. *Kearney v. Thomas*, 156.

Authentication guarantees that the original of the copy genuinely exists, as exemplified, and this is attained by showing: (a) The authority of the person certifying, or that he is the keeper of the record; (b) his present incumbency of the office; and (c) the genuineness of his *signature* or *seal*. *Ibid.*

Where a marriage license and marriage certificate of record in the Hustings Court of the City of Petersburg, Va., attested by the signature of the Clerk of said court, has attached thereto a certificate of the presiding judge of said court, under his hand and the seal of said court, that the said Clerk is the duly qualified and commissioned Clerk of said court and that the attestation on the said license and marriage certificate is in due form as provided by the laws of Virginia and made by the proper officer, and in turn the same seal is used by the Clerk of said court in certifying the official character of the Judge, the admission of these documents and certificates in evidence will not be held for error. *Ibid.*

§ 37. General Rules.

Mortuary tables are used as the best evidence obtainable, together with evidence of health, habits and the like, in the establishment of material but necessarily uncertain facts. *Rea v. Simowitz*, 575.

EVIDENCE—*Continued.*

In a case involving the expectancy of one, not within the class of selected lives tabulated in G. S., 8-46, the jury may consider evidence as to the constitution, health, vigor, habits and the like of deceased as a basis for determining his probable expectancy; and upon proper identification and authentication other available tables, which list the ages involved, may be used in evidence. *Ibid.*

§ 40. Exceptions to General Rules.

It is important to distinguish between the legal effect of fraud in the inducement, which vitiates the contract, and a parol warranty, which would have to be set up by amendment or contradiction of the written instrument. Parol evidence to vary, add to, or contradict a written instrument can be admitted only on the theory that the representations constitute fraud in the inducement and destroy the contract. *Laundry Machinery Co. v. Skinner*, 285.

§ 41. In General.

In a suit attacking two deeds for want of consideration, evidence of the husband of grantee in one of the deeds attacked, that he knew all about his wife's business and knew that she did not pay anything for the deed to her, and that she did not receive anything in consideration for the other deed in which she was grantor, and that he never heard his wife say that she received or paid any money for such deeds, was properly excluded as hearsay. *Hinson v. Morgan* and *Hinson v. Baumrind*, 740.

§ 42b. Res Gestæ.

In the trial of defendant on an indictment for assault with a deadly weapon, inflicting serious injury not resulting in death, with intent to kill, the admission of evidence that the prosecutrix, who was present and testified at the trial, said just after she was shot by defendant, "I am going to die," is harmless and it is immaterial whether or not her statement was hearsay or part of the *res gestæ*, there being no controversy about her serious condition or the fact that she was shot by defendant. *S. v. Hill*, 74.

In a prosecution for arson, exclamation of a witness, "E. has set the house on fire," made at the time the fire was discovered on the outside of the house, where the witness had just seen the defendant E., is competent as part of the *res gestæ*. *S. v. Smith*, 78.

Evidence of declarations of the testator, which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. Other declarations, when relevant, may be admitted as corroborative or supporting evidence, but alone they are not sufficient to establish the fact at issue. *In re Will of Ball*, 91.

It is not necessary to the competency of an admission by a party to the record that it shall have been made as part of the *res gestæ*. Admissions, when offered as those of a party to the record, are competent against him when they are against his interest, material and pertinent or relevant to an issue in the case. Such admissions are original, primary, independent and substantive evidence. *Hobbs v. Coach Co.*, 323.

§ 42c. By Parties or Others Interested in the Event.

It is not necessary to the competency of an admission by a party to the record that it shall have been made as part of the *res gestæ*. Admissions,

EVIDENCE—*Continued.*

when offered as those of a party to the record, are competent against him when they are against his interest, material and pertinent or relevant to an issue in the case. Such admissions are original, primary, independent and substantive evidence. *Hobbs v. Coach Co.*, 323.

While declarations by a party to the record, who is one of several defendants, are competent against him when against his interest, material, pertinent and relevant, their admission is not prejudicial to his codefendants, where the court rules that they are competent only against the defendant making them and instructs the jury not to consider them as against the other defendants. *Ibid.*

§ 42d. By Agents or Representatives.

It is well settled that admissions of an agent, when made in the course of his employment, are competent as evidence against the principal. And where plaintiff's agent is a witness on the stand, a letter of such agent to the defendant, containing a statement of an admission of defendant's agent, may be introduced to corroborate the witness, who testified to same effect without objection. *Steele v. Coxe*, 726.

§ 43a. In General.

Evidence of declarations of the testator, which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. Other declarations, when relevant, may be admitted as corroborative or supporting evidence, but alone they are not sufficient to establish the fact at issue. *In re Will of Ball*, 91.

§ 43b. By Decedents Against Interest.

Where a husband attempts to devise to his wife lands already belonging to her (1) the wife is not put to her election, especially when she does not offer the will for probate and fails to qualify as executrix thereunder; (2) and the wife's grantees are not estopped by her joinder, with some of the other devisees under her husband's will, in the execution of mortgages on the property, nor by evidence that she claimed only a life estate, against the assertion of a fee title by her said grantees, since their adversaries are not attempting to assert a title acquired after such declarations or in any way affected by them. *Lane v. Becton*, 457.

§ 45a. In General.

Ordinarily opinion evidence of a lay witness is not admissible. It is the province of the jury to decide what inferences and conclusions are warranted by the testimony. Such evidence is admissible only when a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert information from one who has special learning, skill, or experience in the matter at issue. *S. v. Peterson*, 540.

§ 46. Subjects of Opinion Evidence by Nonexperts.

A witness, expert or other, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged, or upon which he has acted or been charged, as in the case of business correspondence, etc., may give such opinion in evidence when a relevant circumstance. *Lee v. Beddingfield*, 573.

EVIDENCE—*Continued.*

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. Hence the nonexpert witness must state the facts gained from personal observation as a predicate for the expression of his opinion on such capacity. Failure to observe this rule is prejudicial error. *In re Will of Lomax*, 592.

Opinion evidence of a non-expert witness as to stumps and laps, in a controversy over the cutting of timber, is admissible, the witness testifying that "he had been in timber all his life" and had been a timber cruiser for 20 or 30 years. *Steele v. Coxe*, 726.

§ 48b. Causes of Death.

In a prosecution for murder, where, after a proper foundation was laid for the question, a physician who had examined the body was asked by the State his opinion as to the cause of death and replied, "My opinion is that she died from suffocation from the dress being crammed over her air passages," such expert testimony is proper and competent, and there being no objection to the answer and no motion to strike, the prisoner waived any ground for objection to so much of the answer as may not be responsive to the question. *S. v. Mays*, 486.

§ 51. Competency and Qualification of Experts.

Before opinion evidence is admissible a witness must qualify as an expert in that field of knowledge. The preliminary question of competency is for the presiding judge and ordinarily his ruling is conclusive. *S. v. Peterson*, 540.

EXECUTION.

§ 11. Procedure.

In an action to remove a cloud upon plaintiff's title, based on a transcript of judgment from Durham County docketed in Greene County, where restraining order was continued and appeal taken and thereafter on call of the case for trial, it appeared that motion had been lodged in Durham County to correct the record and that plaintiff had set up his rights in the Durham County proceeding, the defendant was entitled to have plaintiff pursue his legal remedies in Durham before asking for further aid from the equity case in Greene. The apparent irregularity may be corrected by motion in the cause in Durham County, or the execution may be recalled; and for the present the remedies in Durham County seem adequate. *Holden v. Totten*, 558.

§ 16. Time of Sale and Preliminary Proceedings and Conduct of Sale.

A sale under execution may be restrained if the deed of the officer who sells will not pass title and will only throw a cloud upon the title of plaintiff; but the invalidity of the judgment upon which the execution was issued may not be collaterally attacked unless it be void or unenforceable. *Holden v. Totten*, 558.

§§ 23, 24. Funds and Interest Subject to Supplementary Proceedings: Procedure.

Where the examination of the debtor, G. S., 1-352, shows that his books of account contain evidence material to the investigation, he should be required to produce them. *Cotton Co., Inc., v. Reaves*, 436.

In a supplemental proceeding, G. A., 1-352, *et seq.*, all parties being before the court, where it appeared that the issue was the ascertainment of the inter-

est, if any, of partner R, one of the defendants, in the assets of a partnership W & R, which remain after the partnership debts have been paid and the partnership affairs adjusted, the plaintiff, a just creditor of R and assignee of his interest in a judgment in favor of the partnership, is entitled to a full accounting of all of the partnership affairs, so as to determine what may be applicable to plaintiff's debt, and there was error in the refusal of the court below to allow the examination of R and to require the production of the partnership books and records for that purpose. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

§ 13a. Nature and Grounds of Remedy.

An administrator, desiring to subject an interest in lands of his intestate to the payment of debts of the estate, is given full power to that end under G. S., 28-81, *et seq.* Heirs at law are necessary parties, G. S., 28-87; and adverse claimants may be brought in, G. S., 28-88. *In re Estate of Daniel*, 18.

§ 15a. Claims Against and Liabilities of Estate: In General.

Where there is evidence from which the jury may draw the inference that plaintiff, who was then married and residing in Tennessee, agreed to lend, and did lend to his father, the intestate, who then resided in North Carolina, the sum of $2,000.00 to be due and payable at the death of the father, the probative force is for the jury and judgment as of nonsuit at close of plaintiff's evidence was error. *Basinger v. Pharr*, 531.

§ 15d. Claims for Personal Services Rendered Deceased.

An oral contract, to devise specific realty for services rendered deceased, is contrary to the statute of frauds and not enforceable, that issue being raised. *Colcy v. Dalrymple*, 67.

Where a plaintiff alleges a contract by the deceased to pay for services performed, in an action against deceased's personal representative, and upon trial fails to prove a special contract, but does prove the performance of the services and their value, he may not recover on special contract, though he is entitled to recover on implied *assumpsit* or *quantum meruit* without amending the complaint. *Ibid.*

Services rendered to a mother-in-law by plaintiff and his family, while residing in a separate house as tenants on the mother-in-law's farm, are not such as to indulge the presumption of gratuitous attention prompted by natural ties of affection. *Ibid.*

In an action by plaintiff against the personal representative of his deceased mother-in-law for personal services rendered by himself and his family, the services rendered by plaintiff's wife, which were performed outside their home and not within the scope of her household or domestic duties, would properly be recoverable, on implied *assumpsit* or *quantum meruit*, in her own name. *Ibid.*

A widow is not entitled to recover from her husband's estate, on *quasi*-contract or implied *assumpsit*, the value of domestic services to, and support of her husband, under a promise by him to devise her their home place in his will. *Ritchie v. White*, 450.

Even in the absence of an express contract, when an adult child, who has removed from the home of his parent and has married, renders services to the parent which were voluntarily accepted, the law implies a promise on the

EXECUTORS AND ADMINISTRATORS—*Continued.*

part of the parent to pay what the services are reasonably worth and there is no presumption of gratuity. *Basinger v. Pharr*, 531.

Where there is evidence from which the jury may draw the inference that plaintiff, who was then married and residing in Tennessee, agreed to lend, and did lend to his father, the intestate, who then resided in North Carolina, the sum of $2,000.00 to be due and payable at the death of the father, the probative force is for the jury and judgment as of nonsuit at close of plaintiff's evidence was error. *Ibid.*

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

A cause of action for false arrest or false imprisonment is based upon the deprivation of one's liberty without legal process. It may arise when the arrest or detention is without warrant, or the warrant charges no criminal offense, or the warrant is void, or the person arrested is not the person named in the warrant. All that must be shown is the deprivation of one's liberty without legal process. *Melton v. Rickman*, 700.

FIDUCIARIES.

§ 2. Duties and Liabilities.

One who acts for another, or assumes the obligation of a fiduciary, is under the compulsion of fair play and good faith in respect of the interests of his principal or the confiding party. *Hatcher v. Williams*, 112.

In administering a trust fund under a will, which directed that the estate be reduced to cash and the money be invested in interest bearing securities, there is no liability on the part of the trustee for loss on loans, in the absence of evidence tending to show that they were inadequately secured at the time they were made, and there being no evidence that the investments were not made in good faith or that the trustee failed to exercise due diligence in his efforts to collect same. *Cheshire v. First Presbyterian Church*, 165.

"Defalcation" as used in criminal statutes implies some moral dereliction, but in sec. 17 of the Bankruptcy Act, 11 U. S. C. A. 35, it is a broader term and includes any failure of a guardian or other person acting in a fiduciary capacity to account for trust funds. Examples cited. *Trust Co. v. Parker*, 480.

The fiduciary character of a debt does not depend upon its form but the manner of its origin and the acts by which it is incurred, and reducing such debt to judgment does not affect it, for the court will look behind the judgment to discover the original character of the liability. *Ibid.*

In certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation, of itself and without more, raises a presumption of fraud or undue influence as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted. *In re Will of Atkinson*, 526.

FORNICATION AND ADULTERY.

§ 1. Nature and Grounds.

Where the male defendant only appealed from a verdict of guilty, on prosecution in Recorder's Court for fornication and adultery, an exception to the

court's charge, which referred to the male defendant, singly, as the person on trial, is without merit. The prosecution is not one in which both defendants must be convicted of mutual intent to violate the law before conviction of one of them can be sustained. *S. v. Davenport*, 13.

§ 3. Evidence.

The guilt of defendants or of a defendant, in a criminal prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony. *S. v. Davenport*, 13.

On a prosecution upon indictment charging fornication and adultery, where the State's evidence tended to show that defendants were constantly together, day and night, on the streets and in several different homes maintained by the male defendant, and that they were arrested late at night in one of these homes, no other person being in the house at the time, both defendants coming out of the same bedroom, there was sufficient evidence to support a conviction and motion for nonsuit was properly denied. *Ibid.*

Where the evidence for the State, in a prosecution for fornication and adultery, tended to show that defendant and his wife lived in a one-room house, about fourteen by twenty-six feet, and the other woman in the case, whose husband was in the Navy, came with her five children to live with them because she had no other place to stay, and that defendant and this woman were seen together constantly, sometimes accompanied by defendant's wife, and that late at night the officers went to defendant's house and heard defendant say, "you believe I hugged that woman," and the answer "yes," and the officers saw defendant in a crouching position over the bed where the woman was and on entering the room found defendant on a pallet and his wife and the other woman in different beds with several children in the beds and on the pallet, there is insufficient evidence for the jury and motion for judgment as of nonsuit should have been allowed. *S. v. Gordon*, 757.

§ 4. Trial, Charge and Verdict.

Upon trial in the Superior Court, after appeal the male defendant only from a conviction of fornication and adultery in the Recorder's Court, a charge that, if the jury find from the evidence, beyond a reasonable doubt, that this defendant, not being married to the woman, did lewdly and lasciviously bed and cohabit with her and violated the statute, they should bring in a verdict of guilty, and if they should fail to so find, they should bring in a verdict of not guilty, substantially complies with G. S., 1-180, in the absence of request for further instructions. *S. v. Davenport*, 13.

Where the male defendant only appealed from a verdict of guilty, on prosecution in Recorder's Court for fornication and adultery, an exception to the court's charge, which referred to the male defendant, singly, as the person on trial, is without merit. The prosecution is not one in which both defendants must be convicted of mutual intent to violate the law before conviction of one of them can be sustained. *Ibid.*

FRAUD.

§ 1. Deception Constituting Fraud: In General.

There can be no all-embracing definition of fraud. Each case must be considered upon peculiar facts presented. The best definition of actionable fraud requires it to be a false representation of a subsisting fact. *Laundry Machinery Co. v. Skinner*, 285.

FRAUDS—*Continued.*

It is important to distinguish between the legal effect of fraud in the inducement, which vitiates the contract, and a parol warranty, which would have to be set up by amendment or contradiction of the written instrument. Parol evidence to vary, add to, or contradict a written instrument can be admitted only on the theory that the representations constitute fraud in the inducement and destroy the contract. *Ibid.*

§ 3. Past or Subsisting Fact.

Ordinarily, a mere statement of opinion cannot be held for fraud; and, where representations held for fraud are partly or wholly stated in the outward form of opinion, they will be found to relate to some essential character, quality or capacity inherent in the thing sold, absolute in their nature and indistinguishable from factual statements. *Laundry Machinery Co. v. Skinner*, 285.

Promissory representations, looking to the future as to value, use, as well as commendatory expressions or exaggerated statements of prospects, quality or gain, are opinion and do not generally constitute legal fraud. *Ibid.*

§ 8. Pleadings.

In a suit to avoid the effects of a contract, the execution of which is admitted, plaintiff alleging coercion by defendants in procuring his signature, where no facts are alleged by plaintiff upon which coercion may be predicated and there are no allegations of fraud, the assertions of plaintiff are mere conclusions of the pleader, and demurrer to the allegations of coercion was properly sustained. *Coleman v. Whisnant*, 494.

In an action against a life insurance company to recover on a policy issued by it, a plea of fraud by the defendant is an affirmative defense. The burden is on the defendant to show both false representations and *scienter*. Hence, the exception to the refusal of the court to dismiss, as in case of nonsuit, is without merit. *Griffin v. Insurance Co.*, 684.

§ 9. Burden of Proof.

In an action against a life insurance company to recover on a policy issued by it, a plea of fraud by the defendant is an affirmative defense. The burden is on the defendant to show both false representations and *scienter*. Hence, the exception to the refusal of the court to dismiss, as in case of nonsuit, is without merit. *Griffin v. Insurance Co.*, 684.

§ 11. Sufficiency of Evidence.

In certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation, of itself and without more, raises a presumption of fraud or undue influence as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted. *In re Will of Atkinson*, 526.

FRAUDS, STATUTE OF.

§ 9. Application in General.

An oral contract, to devise specific realty for services rendered deceased, is contrary to the statute of frauds and not enforceable, that issue being raised. *Coley v. Dalrymple*, 67.

FRAUDS, STATUTE OF—*Continued.*

Standing trees on land are real property and contracts and conveyances in respect thereto are governed by the same rules applicable to other forms of real property. *Westmoreland v. Lowe*, 553.

Oral contracts between real estate brokers and their principals for the sale of land of the principal are enforceable as such. *White v. Pleasants*, 760.

§ 10. Contract to Convey.

The statute of frauds defeats a parol conveyance or reservation of timber; and, there being no exception or reservation as to timber in plaintiff's deed, parol evidence of a previous oral agreement between plaintiff and defendant to reserve or except timber was properly excluded. *Westmoreland v. Lowe*, 553.

§ 11. Leases.

A parol lease agreement for more than three years is void. G. S., 22-2. *Barbee v. Lamb*, 211.

To affect a purchaser with notice, a lease for a term exceeding three years must be in writing and recorded in the proper county. *Ibid.*

FRAUDULENT CONVEYANCES.

§§ 1, 6. In General: Original Parties.

The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from G. S., 39-15, which has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. *Lane v. Becton*, 457.

§ 8. Creditors.

In an action by a creditor against husband and wife to set aside a conveyance by the husband to his wife as fraudulent and void as to plaintiff, no answer being filed and no consent given by defendants, the judgment can give no greater relief than that demanded in the complaint, C. S., 606; G. S., 1-226; and the court acted in excess of its jurisdiction when it ordered the *feme* defendant to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title. Such provisions of the judgment are void. *Lane v. Becton*, 457.

The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from G. S., 39-15, which has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. *Ibid.*

§ 15. Verdict and Judgment.

In an action by a creditor against husband and wife to set aside a conveyance by the husband to his wife as fraudulent and void as to plaintiff, no answer being filed and no consent given by defendants, the judgment can give no greater relief than that demanded in the complaint, C. S., 606; G. S., 1-226; and the court acted in excess of its jurisdiction when it ordered the *feme* defendant to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title. Such provisions of the judgment are void. *Lane v. Becton*, 457.

GAMING.

§ 5. Sufficiency of Evidence.

In a criminal prosecution under G. S., 14-290, 14-291, and 14-291 (1), relating to lotteries, where the evidence for the State tended to show that defendants, residents of an adjoining county, were seen together at various times in and about the town of Albemarle and passing through in cars, and that they were arrested together, in an automobile parked on a public road near said town, one of them having in his possession two envelopes, containing money and marked with numbers and letters on the outside and also containing slips of paper with numbers and letters and several words, as "short," "shorties," "today," "took" and "still" thereon, and that when arrested one of defendants said, "You haven't got anything on me. I have been expecting this," and the other defendant tried to put the money in his pocket, without evidence of the operation of any variety of lottery, or that defendants were agents for a lottery or engaged in selling numbers or lottery tickets, the court erred in the refusal of defendants' motion of nonsuit. G. S., 15-173. *S. v. Heglar*, 220.

GIFTS.

§ 1. Nature and Essentials.

The conveyance of an interest to the wife, the husband having paid or agreed to pay the purchase money, is presumed to be a gift from the husband to his wife. *Rudasill v. Cabaniss*, 87.

The fact that plaintiff purchased land and caused title to be taken in his wife's name does not create a resulting trust in his favor: on the contrary, the law presumes that the husband intended the property to be a gift to his wife. This presumption is one of fact and is rebuttable. *Carlisle v. Carlisle*, 462.

A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. G. S., 52-2. And to rebut the presumption of a gift to the wife, and to establish a parol trust in his favor, no greater degree of proof is required than is required to establish a parol trust under any other circumstances. *Ibid.*

GUARDIAN AND WARD.

§ 12. Title and Control of Ward's Property.

While it is the primary duty of a parent to support his child, whether the child has an estate or not, this obligation may be qualified by the parent's ability. And when a parent has not means sufficient to provide necessary maintenance, he should have reasonable allowance for lawful disbursements from the child's estate for that purpose. *Casualty Co. v. Lawing*, 103.

Disbursements, made by a parent guardian prior to his appointment, may be allowed by the court on it appearing that such disbursements were made in good faith and would have been authorized if an application had been made in advance. *Ibid.*

§ 13. Investment and Management of Property.

When the court having jurisdiction of the subject matter and the parties in a proper proceeding, after full investigation and upon sufficient evidence, undertakes supervision of infants' estates and thereupon adjudges the transaction to be for the best interests of the infants, the court's decree will be held to be conclusive. *Casualty Co. v. Lawing*, 103.

GUARDIAN AND WARD—*Continued.*

The employment of counsel for legal advice and assistance in connection with the administration of the ward's estate is a proper expense to be charged in the guardian's account, if reasonable in amount and for the benefit of the ward. G. S., 33-42. *Ibid.*

Where a guardian lends to himself a large part of his ward's estate, keeps no accounts, commingles the assets of the guardianship with his personal funds, and fails to account for the estate, a judgment against him, for the funds so unaccounted for, is not affected by the guardian's subsequent discharge in bankruptcy. Bankruptcy Act, sec. 17, 11 U. S. C. A. 35. *Trust Co. v. Parker*, 480.

It is the duty of a guardian to keep his ward's money and property separate from his own; to keep an account thereof; to make authorized investments, not in his own name, but as guardian; to keep those investments separate from his own; and, when called upon to do so, to account for same either in cash or in approved securities. *Ibid.*

If a guardian, in good faith and with due diligence, invests the funds of his ward in loans upon real estate in which he has no interest and loss occurs by reason of the subsequent depreciation in value of the security or other cause over which he has no control, he is protected from liability therefor. And he may discharge himself at the termination of his trust by turning over and accounting for authorized investments, taken in good faith as a result of prudent management, even though such securities are not then worth face value. *Ibid.*

A guardian has no right to mingle guardianship funds with his own and use them as such or to profit by the use thereof, and if he does so commingle such funds and use them in his own business or for his personal advantage, he is guilty of a conversion. *Ibid.*

Embarking the ward's funds in business ventures is such a violation of the trust as to make the guardian and his sureties immediately liable for a conversion of the funds, unless done in accordance with statute. (G. S., 33-23, -24.) *Ibid.*

§ 20. Duty to Account.

It is the duty of a guardian to keep his ward's money and property separate from his own; to keep an account thereof; to make authorized investments, not in his own name, but as guardian; to keep those investments separate from his own; and, when called upon to do so, to account for same either in cash or in approved securities. *Trust Co. v. Parker*, 480.

§ 21. Form and Sufficiency.

When the court having jurisdiction of the subject matter and the parties in a proper proceeding, after full investigation and upon sufficient evidence, undertakes supervision of infants' estates and thereupon adjudges the transaction to be for the best interests of the infants, the court's decree will be held to be conclusive. *Casualty Co. v. Lawing*, 103.

Disbursements, made by a parent guardian prior to his appointment, may be allowed by the court on it appearing that such disbursements were made in good faith and would have been authorized if an application had been made in advance. *Ibid.*

Where a guardian lends to himself a large part of his ward's estate, keeps no accounts, commingles the assets of the guardianship with his personal funds, and fails to account for the estate, a judgment against him, for the

GUARDIAN AND WARD—*Continued.*

funds so unaccounted for, is not affected by the guardian's subsequent discharge in bankruptcy. Bankruptcy Act, sec. 17, 11 U. S. C. A. 35. *Trust Co. v. Parker*, 480.

It is the duty of a guardian to keep his ward's money and property separate from his own; to keep an account thereof; to make authorized investments, not in his own name, but as guardian; to keep those investments separate from his own; and, when called upon to do so, to account for same either in cash or in approved securities. *Ibid.*

While a guardian is held to a high degree of diligence and good faith, he is not ordinarily an insurer of funds which come into his hands. *Ibid.*

If a guardian, in good faith and with due diligence, invests the funds of his ward in loans upon real estate in which he has no interest and loss occurs by reason of the subsequent depreciation in value of the security or other cause over which he has no control, he is protected from liability therefor. And he may discharge himself at the termination of his trust by turning over and accounting for authorized investments, taken in good faith as a result of prudent management, even though such securities are not then worth face value. *Ibid.*

A guardian has no right to mingle guardianship funds with his own and use them as such or to profit by the use thereof, and if he does so commingle such funds and use them in his own business or for his personal advantage, he is guilty of a conversion. *Ibid.*

Embarking the ward's funds in business ventures is such a violation of the trust as to make the guardian and his sureties immediately liable for a conversion of the funds, unless done in accordance with statute. (G. S., 33-23, -24.) *Ibid.*

"Defalcation" as used in criminal statutes implies some moral dereliction, but in sec. 17 of the Bankruptcy Act, 11 U. S. C. A. 35, it is a broader term and includes any failure of a guardian or other person acting in a fiduciary capacity to account for trust funds. Examples cited. *Ibid.*

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Children.

The Superior Court, in a proper proceeding, having awarded the custody of a minor to an uncle and aunt and thereafter, because of the changed legal status of the parties, modified its former order and given the custody of the child to the mother, on application of the mother for a writ of assistance and show cause order against the uncle and aunt for failure to surrender the child, a judgment on *habeas corpus* by a court of another state, to which the child had been taken by the uncle and aunt, awarded custody to the father, is not entitled to full faith and credit here, the record disclosing that jurisdictional facts were misrepresented and suppressed in that proceeding. *In re Morris*, 48.

A custodian's first duty is to the court of his appointment, and the Superior Court, having awarded exclusive custody of a minor to one of the parties litigant, thereby assumes the obligation to see that its confidence is not abused, and the court is justified in proceeding to that end with an inquiry *ex mero motu* or at the instance of an interested party. *Ibid.*

In *habeas corpus* between husband and wife, who are living separate and apart without being divorced, for the custody of their minor children, an order of the Superior Court awarding custody of the children to one of the parties,

HABEAS CORPUS—*Continued.*

or to both parties for specified periods, is not *res judicata*, when the court on a subsequent hearing finds as a fact that there has been a substantial change in the circumstances of the parties since the rendition of the last order in the cause. G. S., 17-39. *Ridenhour v. Ridenhour*, 508.

Considering the welfare of the children "the polar star" by which the judge is to be guided, in a *habeas corpus* proceeding for their custody between parents, living separate and apart without being divorced, failure to give statutory notice of the hearing, when a full hearing has been had, will not be held to invalidate an order with respect to their care and custody. *Ibid.*

The Superior Court is without jurisdiction to make an order for the support and maintenance of minor children, in a *habeas corpus* proceeding for their custody between their parents, living separate and apart without divorce, after appeal to this Court by one of the parties from a former order of the Superior Court awarding custody of the children. *Ibid.*

In a *habeas corpus* proceeding between parents, for the custody of their minor children, where on appeal by the husband, this Court finds error, costs will be awarded against appellant. *Ibid.*

HOMESTEAD AND PERSONAL PROPERTY EXEMPTION.

§ 1. Nature or Rights.

Homestead exemptions are granted by and subject to State law. With us the homestead is not an estate in land. It is a mere exemption from sale under execution or like process, which relates only to the remedy. *Sample v. Jackson*, 380.

A judgment is a lien on the land in which the homestead is allotted but collection by sale under execution or other process is prohibited during the life of the exemption. *Ibid.*

In a suit to recover damages (G. S., 95-75) for violation of the provisions of G. S., 95-73, an allegation, that the forbidden purpose of the statute was accomplished by instituting in the foreign state an action, suit or proceeding for the attachment or garnishment of the debtor's earnings in the hands of his employer, would seem to be an essential element of the cause of action. An allegation, that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same, is not sufficient. *Padgett v. Long*, 392.

The resident creditor is not forbidden (G. S., 95-73) to send his claim out of the State for collection by suit or otherwise, provided no effort is made, in the foreign state by attachment or garnishment, to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State. *Ibid.*

§ 9. Appraisal and Allotment of Homestead.

Exempt property is expressly excepted from the operation of the Federal Bankruptcy Act, and the trustee must set apart and allot to the bankrupt such exemptions as are allowed by the State law. When there is no trustee this may be done by the court itself. *Sample v. Jackson*, 380.

§ 10. Personal Property Exemptions: In General.

In a suit to recover damages (G. S., 95-75) for violation of the provisions of G. S., 95-73, an allegation, that the forbidden purpose of the statute was accomplished by instituting in the foreign state an action, suit or proceeding

for the attachment or garnishment of the debtor's earnings in the hands of his employer, would seem to be an essential element of the cause of action. An allegation, that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same, is not sufficient. *Padgett v. Long*, 392.

The resident creditor is not forbidden (G. S., 95-73) to send his claim out of the State for collection by suit or otherwise, provided no effort is made, in the foreign state by attachment or garnishment, to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State. *Ibid.*

HOMICIDE.

§ 2. Parties and Offenses.

Where two persons are present, encouraging each other in a common purpose resulting in a homicide, both are principals and equally guilty. *S. v. Williams*, 182.

An aider and abettor is one who advises, counsels, procures or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense. *Ibid.*

§ 4c. Premeditation and Deliberation.

Where the defendant, in a prosecution for murder, admitted that he intentionally and without provocation fired the gun which resulted in the death of deceased, a police officer, to prevent deceased from arresting him, and offered no excuse or explanation in mitigation for his act, except that he did not make up his mind and determine to kill deceased, there is evidence of premeditation and deliberation and evidence sufficient to sustain a verdict of murder in the first degree, and motion for nonsuit, G. S., 15-173, was properly overruled. *S. v. Matheson*, 109.

Deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. *Ibid.*

Deliberation means to think about, to revolve in one's mind; and if a person thinks about the performance of an act and determines in his mind to do that act, he has deliberated upon that act. Premeditation means to think beforehand; and where a person forms a purpose to kill another and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon or how late, and pursuant to said fixed design, kills said person, this would be a killing with premeditation and deliberation, and would be murder in the first degree. *S. v. French*, 276.

Proof that a homicide was committed in the perpetration or attempted perpetration of rape makes the crime murder in the first degree and dispenses with the necessity of proof of premeditation and deliberation. G. S., 14-17. *S. v. Mays*, 486.

The definition of a killing, with deliberation and premeditation, does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. *S. v. Wise*, 746.

HOMICIDE—*Continued.*

§ 6b. Malice.

In a criminal prosecution for murder, the plea being self-defense and the solicitor asking for a verdict of murder in the second degree or manslaughter, a charge that, deceased having been admittedly shot by defendant with a deadly weapon, a pistol, if the State satisfies you, by all the evidence beyond a reasonable doubt, that deceased died as a result of said shot and that the killing was intentional, that is, willfully done on purpose, without regard to whether it was done rightfully or wrongfully, malice is presumed, and if nothing else appears murder in the second degree is constituted and it would be your duty to return a verdict of murder in the second degree, there is reversible error. *S. v. Clark*, 52.

If a killing was rightfully done there would be no presumption of malice. A killing could not be unlawfully done and at the same time rightfully done, the terms being contradictory, and in order to constitute either murder in the second degree or manslaughter, the killing must be unlawful. *Ibid.*

§ 10. Mental Capacity and Drunkenness.

If a defendant possesses sufficient sanity to enable him to commit the crime of rape, then he is legally responsible for the homicide that results from his act. *S. v. Mays*, 486.

§ 11. Self-defense.

The right of self-defense is available only to a person who is without fault, and if one voluntarily, that is aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it, and gives notice to his adversary that he has done so. *S. v. Davis*, 117.

§ 14. Requisites and Sufficiency of Indictment.

Where the bill of indictment charges the capital felony of murder in the language of the statute, G. S., 15-144, containing every necessary averment, proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata*. If defendant desired more definite information, he had the right to request a bill of particulars, in the absence of which he has no cause to complain. *S. v. Mays*, 486.

§ 17. Relevancy and Comptency in General.

In a criminal prosecution for murder, on defendant's exception to the overruling of his objection to State's witness being permitted to tell what he saw happen on the occasion of the homicide, "unless he fixes the date," and to the court's remark in so ruling, "he hasn't got to fix any specific date," since time is not of the essence of the offense and both the indictment and testimony of other witnesses fixed the date on which defendant struck the blow causing deceased's death, the exception is without merit, and the remark of the judge may not be regarded as harmful. *S. v. Horne*, 603.

§ 25. Sufficiency of Evidence and Nonsuit.

In a criminal prosecution, defendants having been convicted of manslaughter, where the State offered evidence tending to show that defendants, deceased and two women were in two boats on a pond, that all of them were drinking except one of the women and there was a jar of whiskey in one of the boats, that defendant S., in a boat by himself, tilted the other boat so that all of its occupants except deceased were thrown into water three feet deep, and upon

HOMICIDE—*Continued.*

the refusal of deceased to give S. the remainder of the whiskey, S. struck the deceased three sharp blows on the head with a paddle, knocking him flat in the boat and apparently rendering him unconscious, and then both defendants, standing in the water, took hold of the boat in which deceased was lying and turned it bottom up, throwing deceased into the pond, his inert body floating away, with no attempt to aid or rescue him, and the next morning the dead body was recovered and the death being due to drowning, there is evidence of involuntary manslaughter at least, and motion of nonsuit was properly overruled and the case submitted to the jury. *S. v. Scoggins*, 71.

Where the defendant, in a prosecution for murder, admitted that he intentionally and without provocation fired the gun which resulted in the death of deceased, a police officer, to prevent deceased from arresting him, and offered no excuse or explanation in mitigation for his act, except that he did not make up his mind and determine to kill deceased, there is evidence of premeditation and deliberation and evidence sufficient to sustain a verdict of murder in the first degree, and motion for nonsuit, G. S., 15-173, was properly overruled. *S. v. Matheson*, 109.

In a prosecution of two persons for murder, where the State's evidence tended to show that deceased was standing near another person on a city sidewalk, when the first defendant called upon deceased to stop bothering his cousin and the deceased said he was not bothering anyone, whereupon the first defendant shot a pistol at deceased twice, and then the second defendant took the gun from the first defendant and shot at deceased twice, deceased falling to the ground at the second shot and dying on the way to the hospital, there being only one wound on deceased, a shot through the heart, there is ample evidence for the jury and the first defendants' motion for judgment as of nonsuit, G. S., 15-173, was properly denied. *S. v. Williams*, 182.

In a prosecution for murder, where the State's evidence tended to show that deceased, her husband and others, in the husband's automobile, were driving out of an alley into the highway, the defendant in his own car following, that the first car ran into the highway and stopped and defendant, following and in trying to get around the first car, hit a telephone pole, when the first car drove off and defendant backed from the post and drove home, that shortly thereafter defendant came up to the first car demanding damages and cursing and when deceased and other occupants of the car walked off, defendant followed, still arguing about his damages and cursing and threatening the whole party, none of whom apparently had any weapons, and finally defendant, telling deceased's party to wait until he got back, ran off to his house near-by and coming back in a few minutes with a rifle, stuck the barrel into the car and fired four or five times and when deceased got out of the car, defendant shot her in the back, as she looked away from him, and she fell and defendant ran, deceased being dead a few minutes thereafter, there was ample evidence for the jury and motion for judgment as of nonsuit properly denied. *S. v. French*, 276.

Testimony, in a prosecution for murder, of a mortician, who examined deceased's body shortly after her death, that deceased's veinous system had broken down, is insufficient to prevent the case being submitted to the jury, where the State's evidence tended to show that deceased was alive and active one moment, and immediately after repeated shots from a rifle in the hands of defendant, was found dead with a rifle wound in her chest. *Ibid.*

Where the bill of indictment charges the capital felony of murder in the language of the statute, G. S., 15-144, containing every necessary averment,

HOMICIDE—*Continued.*

proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata*. If defendant desired more definite information, he had the right to request a bill of particulars, in the absence of which he has no cause to complain. *S. v. Mays*, 486.

In a criminal prosecution for murder, where the State's evidence tended to show that the prisoner, deceased and others were out riding at night in prisoner's automobile, and after a dispute prisoner told deceased to get out of the car which deceased did and walked down the road; that prisoner drove past him, got out and came with one of the company back near deceased and they renewed their quarrel, when there was a lick or thud and prisoner ran back to his car and said that a passing car had killed deceased and that all of the party would be held unless they so stated; that deceased was still alive, with his skull crushed by a wound on the head and no other wound on his body and his clothes not torn or disarrayed, and no car had passed, and that prisoner refused to help deceased or take him to a doctor, and deceased, a young man in good health, died almost immediately, the evidence is sufficient to repel a motion to dismiss under G. S., 15-173. *S. v. Peterson*, 540.

§ 27a. Form and Sufficiency in General.

A charge by the court to the jury must be construed contextually. *S. v. French*, 276.

In a prosecution for murder, where the prisoner does not take the stand or offer other testimony, nor plead self-defense, but elects to rely upon the weakness of the State's evidence, there being no admission of the use of a deadly weapon, the evidence in respect thereto being circumstantial, the testimony is not such as to justify a peremptory instruction in the absence of explanation. *S. v. Peterson*, 540.

In a criminal prosecution for murder, on defendant's exception to the overruling of his objection to State's witness being permitted to tell what he saw happen on the occasion of the homicide, "unless he fixes the date," and to the court's remark in so ruling, "he hasn't got to fix any specific date," since time is not of the essence of the offense and both the indictment and testimony of other witnesses fixed the date on which defendant struck the blow causing deceased's death, the exception is without merit, and the remark of the judge may not be regarded as harmful. *S. v. Horne*, 603.

On objection to the court's charge, the State asking for a verdict of either murder in the second degree or manslaughter, as the evidence may warrant, where the court charged fully as to the law applicable to murder in the second degree and as to manslaughter, and then stated at length the contentions of the State and the contentions of the accused, we find no error, considering the charge contextually, as we are unable to perceive wherein prejudice or unfairness properly could be attributed to the language of the judge. *Ibid.*

§ 27b. On Presumptions and Burden of Proof.

While the defendant in a criminal prosecution has a right to go upon the stand and explain or attempt to explain the facts and circumstances about which the State has offered testimony, there is no law which requires him to do so, and he may elect to go forward with testimony or rest on the weakness of the State's case and risk an adverse verdict. Suggestions to the contrary contained in instructions are prejudicial error. *S. v. Peterson*, 540.

HOMICIDE—*Continued.*

§ 27c. On Question of Murder in First Degree.

There being sufficient evidence of murder in the first degree and no element of murder in the second degree or of manslaughter being made to appear, the court properly limited the possible verdicts to guilty of murder in the first degree or not guilty. *S. v. Mays*, 486.

The court's instructions to the jury on manslaughter in a trial and conviction for murder, there being no evidence which would tend to mitigate or reduce the grade of the offense to manslaughter, may not be held for error entitling defendant to a new trial. *S. v. Wise*, 746.

§ 27d. On Question of Murder in Second Degree.

Where the court charged the jury, in a prosecution for murder based on evidence that defendant struck deceased causing death:—that, if the State satisfies you by the evidence and you find beyond a reasonable doubt that defendant struck deceased on his head with a blackjack and that the blow or blows thus inflicted proximately caused his death and the fatal blow was struck with malice, defendant would be guilty of murder in the second degree; and that, if you so find that defendant so struck deceased and such blow or blows proximately caused his death, and that defendant did not strike with malice but did so willfully and unlawfully, he would be guilty of manslaughter; and where the court further charged that if the jury did not find, beyond a reasonable doubt, that defendant so struck the deceased, or if they found that defendant did so strike deceased, but were not satisfied beyond a reasonable doubt that the blow proximately caused his death, then, in either case, they should acquit the defendant—there is no error and proximate cause is correctly stated. *S. v. Horne*, 603.

§ 27e. On Question of Manslaughter.

Where the court charged the jury, in a prosecution for murder based on evidence that defendant struck deceased causing death:—that, if the State satisfies you by the evidence and you find beyond a reasonable doubt that defendant struck deceased on his head with a blackjack and that the blow or blows thus inflicted proximately caused his death and the fatal blow was struck with malice, defendant would be guilty of murder in the second degree; and that, if you so find that defendant so struck deceased and such blow or blows proximately caused his death, and that defendant did not strike with malice but did so willfully and unlawfully, he would be guilty of manslaughter; and where the court further charged that if the jury did not find, beyond a reasonable doubt, that defendant so struck the deceased, or if they found that defendant did so strike deceased, but were not satisfied beyond a reasonable doubt that the blow proximately caused his death, then, in either case, they should acquit the defendant—there is no error and proximate cause is correctly stated. *S. v. Horne*, 603.

The court's instructions to the jury on manslaughter in a trial and conviction for murder, there being no evidence which would tend to mitigate or reduce the grade of the offense to manslaughter, may not be held for error entitling defendant to a new trial. *S. v. Wise*, 746.

HUSBAND AND WIFE.

§ 1. Mutual Rights, Duties and Disabilities of Coverture: In General.

While the statute provides that the earnings of a married woman, by virtue of any contract for her personal services, shall be her sole and separate prop-

erty, G. S., 52-10, still this does not relieve her of her marital obligations, or deny to her the privilege of sharing in the family duties and aiding in such work, as the helpmeet of her husband, when minded so to do. *Coley v. Dalrymple*, 67.

A married woman is still a *feme covert* with the rights, privileges and obligations incident to such status under the law. *Ibid.*

There are three parties to a marriage contract—the husband, the wife and the State; and certain incidents immediately attach to the relation which cannot be abrogated without the consent of the State. It is the husband's duty to support his wife and children and there is no law or public policy which gives any countenance to an attempt by the husband to abdicate this duty which the law casts upon him, and impose it upon his wife through the medium of a contract. Such a contract is unenforceable. *Ritchie v. White*, 450.

The wife is a *feme covert* with all the rights, privileges, and obligations incident to such status under the law. The husband is entitled to such domestic service as she may choose to perform, and to her aid, comfort, society and companionship, which the law regards as the full equivalent of support, like aid, comfort, society and companionship on the part of the husband. *Ibid.*

§ 4a. Contracts and Conveyances: In General.

The conveyance of an interest to the wife, the husband having paid or agreed to pay the purchase money, is presumed to be a gift from the husband to his wife. *Rudasill v. Cabaniss*, 87.

A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for or on behalf of the firm with third parties. But, as between themselves, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, or if the agreement impairs or changes the body or capital of the personal estate of the wife, or accruing income thereof for a longer period than three years next ensuing the agreement, the contract is void unless executed in accordance with G. S., 52-12. *Carlisle v. Carlisle*, 462.

§ 4b. Between Husband and Wife.

A contract between husband and wife, which does not purport to divest the wife of dower or the husband of curtesy, but which does fix the sum of money the wife is to receive from her husband each month thereafter, as long as the agreement remains in effect, for her support and the support of their minor child, is within the class of contracts which, in order to be valid and binding on the parties, must be executed in the manner and form required by G. S., 52-12, and, not being so executed, the same is void as to the wife and also as to the husband. *Daughtry v. Daughtry*, 358.

A widow is not entitled to recover from her husband's estate, on *quasi*-contract or implied *assumpsit*, the value of domestic services to, and support of her husband, under a promise by him to devise her their home place in his will. *Ritchie v. White*, 450.

Married couples are free to contract with each other concerning their property rights in the manner provided by the statutes, G. S., 52-10, *et seq.*, but they are not at liberty, by private agreement, to transfer from one to the other or to absolve either of the obligations which the marital status imposes. *Ibid.*

HUSBAND AND WIFE—*Continued.*

Even in a separation agreement, executed after or in immediate contemplation of separation, the measure of the husband's liability is not necessarily determined by the agreement, but by what the law pronounces a just, fair and reasonable allowance to the wife in the light of the circumstances and condition of the parties. *Ritchie v. White*, 450.

The fact that plaintiff purchased land and caused title to be taken in his wife's name does not create a resulting trust in his favor; on the contrary, the law presumes that the husband intended the property to be a gift to his wife. This presumption is one of fact and is rebuttable. *Carlisle v. Carlisle*, 462.

A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. G. S., 52-2. And to rebut the presumption of a gift to the wife, and to establish a parol trust in his favor, no greater degree of proof is required than is required to establish a parol trust under any other circumstances. *Ibid.*

A separation agreement between husband and wife, providing for her support, is void and unenforceable when not in accordance with G. S., 52-12, 13. *Pearce v. Pearce*, 571.

§ 5. Right to Maintain Action Against Spouse.

The law will not imply *assumpsit* where the parties may not effectually agree; but this is not to say that the wife may not recover of her husband for moneys lent, or for promissory rents due from her separate estate, or for services rendered outside of the home under an agreement with her husband. *Ritchie v. White*, 450.

Even in a separation agreement, executed after or in immediate contemplation of separation, the measure of the husband's liability is not necessarily determined by the agreement, but by what the law pronounces a just, fair and reasonable allowance to the wife in the light of the circumstances and condition of the parties. *Ibid.*

§ 11. Creation.

Where a husband purchases land, in the absence of his wife, and takes a deed to himself and wife as tenants by the entireties, giving the seller his unsecured note for the entire purchase price, the wife is not a maker of the note and cannot be held liable for its payment. *Rudasill v. Cabaniss*, 87.

In an action to have tenants by the entireties declared tenants in common, after an absolute divorce between them, where parol evidence was introduced, without objction, to the effect that the lands were held by the entireties, there is nothing this Court can do on appeal to aid the husband. *Pugh v. Pugh*, 555.

§ 12a. Nature and Incidents.

The husband, for the duration of an estate by the entirety, has both the ownership and the control of the property since in law, for that period, the rents and profits of the land belong to him. *Atkinson v. Atkinson*, 120.

§ 12c. Termination.

While an offer to sell realty remains unilateral and unaccepted, the person to whom the offer was made has no equity in the premises and a conveyance by the owner involves no breach of legal duty, and where a complete change of ownership meanwhile takes place, for example, through survivorship in an estate by the entireties, the option terminates. *Atkinson v. Atkinson*, 120.

HUSBAND AND WIFE—*Continued.*

§ 15. What Constitutes Wife's Separate Estate.

In an action by plaintiff against the personal representative of his deceased mother-in-law for personal services rendered by himself and his family, the services rendered by plaintiff's wife, which were performed outside their home and not within the scope of her household or domestic duties, would properly be recoverable, on implied *assumpsit* or *quantum meruit*, in her own name. *Coley v. Dalrymple*, 67.

§ 19. Requisites and Validity of Deeds of Separation.

The following requisites are generally agreed to be necessary to the validity of deeds of separation between husband and wife: (1) A separation must have already taken place, or is to immediately follow the execution of the deed. (2) The separation agreement must be made for an adequate reason, not for mere mutual volition or caprice, and under circumstances of such character as to render it reasonably necessary to the health or happiness of the parties. (3) The agreement must be reasonable, just, and fair to the wife, having due regard to the condition and circumstances of the parties at the time it was made. And (4) it must conform to statutory requirements, where property rights are involved. G. S., 52-12 and 52-13. *Smith v. Smith*, 189.

§ 20. Construction and Operation of Deeds of Separation.

The breach by the wife of a covenant against molestation of the husband is no defense to an action by the wife to force the husband to make payments for her support based upon release of dower and rights in his property acquired by her marriage to him, in accordance with the terms of a separation agreement entered into by them. *Smith v. Smith*, 189.

The authorities are to the effect (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability on the latter's covenants, the respective covenants must be interdependent rather than independent; and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith. *Ibid.*

§ 21. Attack of Deeds of Separation.

In an action by a wife against her former husband to enforce a separation agreement between them, executed in accordance with G. S., 52-12, and affecting the wife's right of dower, support and all other rights acquired by her marriage in the property of her said husband, the defendant admitting the agreement as written and seeking in a first further defense to reform the instrument on the ground of omissions by mutual mistake of the parties and errors of draftsman, without averring that the matter omitted was considered by the officer taking the wife's acknowledgment, and seeking in a second further defense to set up a supplemental agreement, modifying the original and affecting the wife's property rights, without averring that the supplemental agreement is in writing and executed in accordance with G. S., 52-12, both further defenses and answers are fatally deficient and the court erred in overruling plaintiff's demurrers thereto. *Smith v. Smith*, 189.

Where plaintiff sued her former husband to recover a monetary consideration under a written separation agreement, defendant's counterclaim for slander sounds in tort and is not a cause of action arising out of the contract or

HUSBAND AND WIFE—*Continued.*

transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of actions within the purview of the statute, G. S., 1-137. *Ibid.*

The breach by the wife of a covenant against molestation of the husband is no defense to an action by the wife to force the husband to make payments for her support based upon release of dower and rights in his property acquired by her marriage to him, in accordance with the terms of a separation agreement entered into by them. *Ibid.*

§§ 32, 34. Nature and Essentials of Right of Action: Evidence.

In an action by plaintiff against defendants, alleging that the affections of his wife had been alienated by them, the law imposes upon plaintiff the burden of showing by competent evidence—(1) That he and his wife were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; (3) that the wrongful and malicious acts of defendants produced and brought about the loss and alienation of such love and affection. Failure to so show makes the action vulnerable to nonsuit. *Ridenhour v. Miller*, 543.

While parents and near relatives must act in good faith in dealing with the marital rights of a member of the family, nevertheless they occupy a different position from a stranger in these matters. And the mere fact that defendants, sisters of plaintiff's wife, permitted his wife and children to live with them, after the separation, is not sufficient to show bad faith on their part, in view of the family relationship. *Ibid.*

INDICTMENT.

§ 7. Formal Requisites.

The caption is no part of a bill of indictment, and its omission or its recital of the wrong county does not constitute ground for arrest of judgment. G. S., 15-153. *S. v. Davis*, 117.

§ 15. Right to Amend.

The Superior Court, under G. S., 7-149, Rule 12, may allow, in its discretion, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. A warrant, defective in both form and substance, may be sufficient to inform the defendant of the accusation against him. *S. v. Brown*, 22.

INFANTS.

§ 1. Supervision and Protection by Courts of Equity.

The Superior Court, in a proper proceeding, having awarded the custody of a minor to an uncle and aunt and thereafter, because of the changed legal status of the parties, modified its former order and given the custody of the child to the mother, on application of the mother for a writ of assistance and show cause order against the uncle and aunt for failure to surrender the child, a judgment on *habeas corpus* by a court of another state, to which the child had been taken by the uncle and aunt, awarded custody to the father, is not entitled to full faith and credit here, the record disclosing that jurisdictional facts were misrepresented and suppressed in that proceeding. *In re Morris*, 48.

INFANTS—*Continued.*

A custodian's first duty is to the court of his appointment, and the Superior Court, having awarded exclusive custody of a minor to one of the parties litigant, thereby assumes the obligation to see that its confidence is not abused, and the court is justified in proceeding to that end with an inquiry *ex mero motu* or at the instance of an interested party. *Ibid.*

The duty shall be constant upon the court to give each child, subject to its jurisdiction, such oversight and control as will conduce to the welfare of the child and to the best interests of the State. G. S., 110-21. *Ibid.*

When the court having jurisdiction of the subject matter and the parties in a proper proceeding, after full investigation and upon sufficient evidence, undertakes supervision of infants' estates and thereupon adjudges the transaction to be for the best interests of the infants, the court's decree will be held to be conclusive. *Casualty Co. v. Lawing*, 103.

INJUNCTION.

§ 2. Inadequacy of Legal Remedy and Irreparable Injury.

Courts will not grant the equitable relief of injunction when there is an adequate remedy at law, and a demurrer *ore tenus* to the complaint in a suit asking such relief will be sustained and the action dismissed. *Newton v. Chason*, 204.

§ 9. Ordinances.

The constitutionality of an Act or ordinance will not be determined in a suit to enjoin its enforcement. Nor will we decide the question of its constitutionality prior to an attempt to enforce it. *Jarrell v. Snow*, 430.

§ 12. Hearings and Trial.

While in appeals from orders granting or denying injunctive relief, the findings of fact made by the court below are not conclusive, such findings are presumed, in the absence of exceptions, to be supported by evidence, and it does not behoove this Court to seek for cause to upset or reverse the same. *Mullen v. Louisburg*, 53.

INSURANCE.

§§ 30a, 37. In General: Actions on Policies.

In an action by plaintiff, the insured in a policy of life insurance with defendant, where there are allegations and evidence, *pro* and *con*, as to whether or not the plaintiff paid premiums sufficient to keep the policy in force, the jury answering the issue for defendant, there is no error. *Creech v. Assurance Co.*, 479.

§ 50. Actions on Policies.

The propriety of invoking the provisions of the Uniform Declaratory Judgment Act, G. S., 1-253, *et seq.*, on plaintiff's policy of liability insurance issued to one of defendants, being without challenge on the record and defendants demanding a jury trial on issues raised by the pleadings, G. S., 1-261, the question, as to whether the automobile covered by the policy was being "used as a public or livery conveyance," within the meaning of the policy at the time of the accident and injuries, is such an issue of fact as should be determined by a jury, under proper instructions, where the pleadings are not so clear in respect to the facts as to render it determinable without the aid of a definite finding. *Insurance Co. v. Wells*, 547.

INSURANCE—*Continued.*

When insured property is damaged or destroyed by the negligent act of another, the right of action accruing to the injured party is for an indivisible wrong and gives rise to a single indivisible cause of action, in which the whole claim must be adjudicated. *Insurance Co. v. Motor Lines, Inc.*, 588.

The cause of action for damages or destruction of insured property abides in the insured through whom the insurer, upon payment, must work out his rights. If, however, the insured no longer has an unsatisfied claim, over and above the amount of insurance received, then the claim of the insurer represents the entire unsettled claim and it, being subrogated to the rights of the insured, may maintain an action without the joinder of the owner. *Ibid.*

§ 51. Payment and Subrogation.

In an action by an insurer, who has paid the loss, against the alleged tortfeasor, without the joinder of the insured, the legal holder of the claim, demurrer being sustained for failure to state a cause of action and thereafter plaintiff's motion to make insured a party plaintiff being allowed, the allowance of the latter motion, in effect, reverses the ruling on the demurrer. *Insurance Co. v. Motor Lines, Inc.*, 588.

When insured property is damaged or destroyed by the negligent act of another, the right of action accruing to the injured party is for an indivisible wrong and gives rise to a single indivisible cause of action, in which the whole claim must be adjudicated. *Ibid.*

INTOXICATING LIQUORS.

§ 1. Validity of Control Statutes.

Where a board of county commissioners by resolution requested the surrender of a license to sell wine, which request was declined by the licensee, on the assumption that such action by the commissioners was invalid and unconstitutional, such licensee has an adequate remedy at law, should the commissioners undertake to enforce their resolution or to prevent the exercise of the privilege granted by the license. *Jarrell v. Snow*, 430.

§ 3. Violation and Enforcement.

By G. S., 18-45, authority is vested in the A.B.C. Boards of the respective counties to appoint one or more law enforcement officers with "the same powers and authorities in their respective counties as other peace officers." Subsection O. *Jordan v. Harris*, 763.

§§ 4d, 6a. Presumptions from Possession: Sale in General.

A person, charged with the possession of illicit, nontax-paid liquor for the purpose of sale, G. S., 18-50, cannot be convicted under G. S., 18-48. These two statutes define misdemeanors and are on an equal footing. Neither prescribes or includes a lesser offense or one of lesser degree. *S. v. McNeill*, 560.

§ 7. Transportation.

Where a truck-load (579 cases) of intoxicating liquor, in the possession of a common carrier, was lawfully passing through this State in interstate commerce and the agent in charge was arrested here, prosecuted and convicted for unlawful possession and transportation, without naming any amount, and the entire truck-load ordered confiscated, upon intervention by the common carrier, within the time prescribed by the court order, alleging that at no time was its possession changed or broken, or the character of the shipment altered

INTOXICATING LIQUORS—*Continued.*

and that, if its agent committed any illegal act, it was confined to seven cases of the liquor, such intervener is entitled to a full opportunity to be heard and to present evidence on its allegations, and there was error in the court's entering judgment on the pleadings and on the record in the criminal case. *In re S. v. Gordon*, 241.

The statute, G. S., 18-6, provides, not for the seizure of any and all intoxicating liquor found in the vehicle, but for the seizure of any and all intoxicating liquor found therein being transported contrary to law. *Ibid.*

The Supreme Court of the United States has decided that intoxicating liquor is a legitimate subject of commerce, within the protection of the Commerce Clause; and, in the absence of regulation by Congress, its movement therein is like that of all other merchantable goods, free from State control. *Ibid.*

§ 8. Forfeitures.

While G. S., 18-6, provides only for a hearing in respect of the seized vehicle used in transporting intoxicating liquor contrary to law, because thereunder the liquor itself is to be destroyed, G. S., 18-13, provides for the return of the seized liquor to the established owner, upon the acquittal of the person charged with unlawful possession of such liquor, otherwise it may be turned over to the county commissioners for disposition as therein provided; and this latter statute clearly contemplates a hearing in the criminal case to determine the "established owner" or rightful claimant. This remedy appears adequate and is approved. *In re S. v. Gordon*, 241.

An alleged invalidity of a search warrant is of no avail to appellant, the owner of intoxicating liquor, on his challenge to an order of forfeiture, since his codefendants, who had possession of the intoxicating liquor, did not appeal from their convictions, and appellant was acquitted of the criminal charge. *S. v. Jones*, 363.

§ 9d. Sufficiency of Evidence.

In criminal prosecution for unlawful possession of illicit liquor, where the evidence tended to show that defendant on his arrest said that the whiskey belonged to him, it having been found in his room, the door of which he unlocked for the arresting officers to enter, an issue of fact is presented, notwithstanding a radical shift of position by defendant on the trial and denial of any knowledge of the liquor, hence motion to dismiss under G. S., 15-173, was properly overruled. *S. v. Stutts*, 647.

JUDGES.

§ 2a. Regular Judges.

Under G. S., 7-74, a judge assigned to a district is the judge thereof for six months, and within the period of such assignment has jurisdiction of all "in Chambers" matters arising in the district. *Ridenhour v. Ridenhour*, 508.

JUDGMENTS.

I. Judgments by Consent.

1. Nature and Essentials. Eborn v. Ellis, 386; Lane v. Becton, 457; Trust Co. v. Parker, 480; King v. King, 639.
2. Jurisdiction to enter. Johnson v. Lumber Co., 595; King v. King, 639.
4. Attack and Setting Aside. King v. King, 639.

III. Judgments by Default.

8½. In General. Lane v. Becton, 457.
10. By Default and Inquiry. Wilson v. Thaggard, 348.

VI. Judgments on Trial of Issues of Hearing of Motions.

16. Parties. Whitehurst v. Abbott, 1.
17b. Conformity to Verdict, Proof and Pleadings. Ingram v. Smoky Mountain Stages, Inc., 444.

JUDGMENTS—*Continued.*

VII. Docketing and Lien.
21. Life of Lien. Sample v. Jackson, 380.

VIII. Validity, Modification and Attack.
22b. Procedure: Direct and Collateral Attack. Newton v. Chason, 204; Eborn v. Ellis, 386; Lane v. Becton, 457; Holden v. Totten, 558; Johnson v. Lumber Co., 595.
22c. Pleadings and Hearings. Crissman v. Palmer, 472.
22e. For Surprise, Inadvertence, and Excusable Neglect. Johnson v. Sidbury, 208; Crissman v. Palmer, 472.
22g. For Irregularity. Holden v. Totten, 558.

IX. Conclusiveness of Judgment.
29. Parties Concluded. Trust Co. v. Parker, 480; Johnson v. Lumber Co., 595.
30. Matters Concluded. Ridenhour v. Ridenhour, 508; Jenkins v. Jenkins, 681.

X. Operation of Judgments as Bar to Subsequent Actions.
32. In General. Taylor v. Schaub, 134.
33a. Judgments as of Nonsuit. Goodson v. Lehmon, 514.

IX. Assignment.
37b. Upon payment by One of Parties Jointly and Severally Liable. Stewart v. Parker, 551.
38. Rights and Liabilities of Judgment Debtor. Ibid.

§ 1. Nature and Essentials.

The rendering of a judgment is a judicial act, to be done by the court only. *Eborn v. Ellis*, 386.

In its ordinary acceptation, a judgment is the conclusion of the law upon facts admitted or in some way established, and, without this essential fact, the court is not in a position to make final decision on the rights of the parties. *Ibid.*

A judgment is not necessarily to be considered integrally. It may be good in one part and void in others—good for the part authorized by law, and bad for the residue; and the invalid divisible part may be treated as a nullity. There is no necessity of appealing from a void judgment. *Lane v. Becton*, 457.

The fiduciary character of a debt does not depend upon its form but the manner of its origin and the acts by which it is incurred, and reducing such debt to judgment does not affect it, for the court will look behind the judgment to discover the original character of the liability. *Trust Co. v. Parker*, 480.

It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and that such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and then in order to vacate such a judgment an independent action must be instituted. *King v. King*, 639.

§ 2. Jurisdiction to Enter.

The court has no power to change the terms of an original consent decree for the sale of lands in a special proceeding, without the consent of all parties. *Johnson v. Lumber Co.*, 595.

The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment. *King v. King*, 639.

§ 4. Attack and Setting Aside.

When a party to an action denies that he gave his consent to the judgment as entered; the proper procedure to vacate such judgment is by motion in the cause, upon which the court will determine whether or not such party did consent thereto, and a trial by jury will not be allowed as a matter of right. The fact that such party may have inadvertently overlooked the legal effect of the judgment does not entitle him to relief. *King v. King*, 639.

JUDGMENTS—*Continued.*

§ 8½. In General.

A judgment is not necessarily to be considered integrally. It may be good in one part and void in others—good for the part authorized by law, and bad for the residue; and the invalid divisible part may be treated as a nullity. There is no necessity of appealing from a void judgment. *Lane v. Becton*, 457.

In an action by a creditor against husband and wife to set aside a conveyance by the husband to his wife as fraudulent and void as to plaintiff, no answer being filed and no consent given by defendants, the judgment can give no greater relief than that demanded in the complaint, C. S., 606; G. S., 1-226; and the court acted in excess of its jurisdiction when it ordered the *feme* defendant to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title. Such provisions of the judgment are void. *Ibid.*

§ 10. By Default and Inquiry.

A defendant, having made a general appearance, by motion to set aside a default judgment, which was allowed and time granted defendant in which to plead, it is his duty to answer or demur, even though a copy of the complaint filed has not been delivered to defendant, G. S., 1-121, and, upon his failure to do either, the court has authority to enter judgment by default and inquiry, without notice. And the court is without discretion to vacate the same, except upon a finding of fatal irregularity or excusable neglect and meritorious defense. G. S., 1-220. *Wilson v. Thaggard* and *Stone v. Thaggard*, 348.

§ 16. Parties.

When a person acquires an interest in property, pending an action in which title thereto is at issue, from one of the parties to the action, with notice of the action, actual or constructive, he is bound by the judgment therein just as the party from whom he bought would have been. *Whitehurst v. Abbott*, 1.

§ 17b. Conformity to Verdict, Proof and Pleadings.

When there is no evidence to support an issue of last clear chance and the jury answers the issue on contributory negligence against plaintiff, the defendant is entitled to judgment on the verdict. *Ingram v. Smoky Mountain Stages, Inc.*, 444.

§ 21. Life of Lien.

A judgment is a lien on the land in which the homestead is allotted but collection by sale under execution or other process is prohibited during the life of the exemption. *Sample v. Jackson*, 380.

§ 22b. Procedure: Direct and Collateral Attack.

An action, which seeks to restrain acts and things directed to be done by *mandamus* in a suit involving the same subject matter, is a collateral attack by independent suit upon a valid, final and subsisting judgment, contrary to the consistent holding of this Court. *Newton v. Chason*, 204.

A purported judgment, signed with a facsimile rubber stamp signature and relied upon by defendants as muniment of title, is subject to collateral attack in an action to recover land. *Eborn v. Ellis*, 386.

In an action by a creditor against husband and wife to set aside a conveyance by the husband to his wife as fraudulent and void as to plaintiff, no answer being filed and no consent given by defendants, the judgment can give no greater relief than that demanded in the complaint, C. S., 606; G. S., 1-226;

and the court acted in excess of its jurisdiction when it ordered the *feme* defendant to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title. Such provisions of the judgment are void. *Lane v. Becton*, 457.

In an action to remove a cloud upon plaintiff's title, based on a transcript of judgment from Durham County docketed in Greene County, where restraining order was continued and appeal taken and thereafter on call of the case for trial, it appeared that motion had been lodged in Durham County to correct the record and that plaintiff had set up his rights in the Durham County proceeding, the defendant was entitled to have plaintiff pursue his legal remedies in Durham before asking for further aid from the equity case in Greene. The apparent irregularity may be corrected by motion in the cause in Durham County, or the execution may be recalled; and for the present the remedies in Durham County seem adequate. *Holden v. Totten*, 558.

A sale under execution may be restrained if the deed of the officer who sells will not pass title and will only throw a cloud upon the title of plaintiff; but the invalidity of the judgment upon which the execution was issued may not be collaterally attacked unless it be void or unenforceable. *Ibid.*

Where plaintiff's complaint alleges that defendants were wrongfully attempting to cut timber on her land beyond the time limited in a consent decree in the proceeding under which defendants purchased, and that defendants wrongfully had caused injury to plaintiff's cultivated lands, and asking for a restraining order and damages based thereon, plaintiff's action may not be regarded as a collateral attack on the judgment in the special proceeding for sale of timber, but rather it is an action maintainable in the Superior Court, founded on the allegations of the complaint; and a demurrer to the complaint was properly overruled. *Johnson v. Lumber Co.*, 595.

§ 22c. Pleadings and Hearings.

Where the judge below denies a motion to set aside a judgment, no findings of fact being stated, there is a presumption that he declined to set aside the judgment on the facts alleged. *Crissman v. Palmer*, 472.

§ 22e. For Surprise, Inadvertence, and Excusable Neglect.

Where, notwithstanding the summons and complaint in a civil action were duly served on defendant and copies left with him, defendant failed for a period of thirty days to acquaint himself with their contents and to file an answer or other defense, attributing his inattention and neglect to the similarity of the title of the case to a former action and to his preoccupation in the duties of his profession, there is no evidence in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his conduct as against diligent suitors proceeding in accordance with the statute. *Johnson v. Sidbury*, 208.

The judge is empowered by G. S., 1-220, to relieve a defendant from a judgment regularly taken against him only when he finds upon sufficient evidence that the judgment was taken through mistake, inadvertence, surprise, or excusable neglect, and that the defendant has a meritorious defense, so that, in the absence of excusable neglect, the question of meritorious defense becomes immaterial. *Ibid.*

In an action instituted in 1944 by plaintiffs against defendant to remove a cloud from their title by reason of claim of defendant to an interest therein, based on a conveyance dated 30 June, 1924, the acknowledgment, upon which defendant's deed was admitted to probate and registered, having been taken

by a notary public, who certified that his commission expired 27 January, 1924, where the cause was heard, by consent without a jury, and the court gave judgment for plaintiffs, no exception or appeal being taken, and at a subsequent term defendant having moved to vacate the judgment, apparently under G. S., 1-220, on the ground that the commission of the notary who took the acknowledgment did not actually expire until 1925, judgment below denying defendant's motion was proper. *Crissman v. Palmer*, 472.

Surprise at the action of the court does not constitute ground for setting aside a judgment under G. S., 1-220. This statute does not afford relief from a judgment on the ground of mistake of law. *Ibid.*

§ 22g. For Irregularity.

In an action to remove a cloud upon plaintiff's title, based on a transcript of judgment from Durham County docketed in Greene County, where restraining order was continued and appeal taken and thereafter on call of the case for trial, it appeared that motion had been lodged in Durham County to correct the record and that plaintiff had set up his rights in the Durham County proceeding, the defendant was entitled to have plaintiff pursue his legal remedies in Durham before asking for further aid from the equity case in Greene. The apparent irregularity may be corrected by motion in the cause in Durham County, or the execution may be recalled; and for the present the remedies in Durham County seem adequate. *Holden v. Totten*, 558.

§ 29. Parties Concluded.

The fiduciary character of a debt does not depend upon its form but the manner of its origin and the acts by which it is incurred, and reducing such debt to judgment does not affect it, for the court will look behind the judgment to discover the original character of the liability. *Trust Co. v. Parker*, 480.

Commissioners, appointed by decree in a special proceeding to sell lands, can convey only in accordance with the terms of the order; and purchasers are chargeable with notice of the proceeding under which they purchase and are bound by the limitations upon their rights appearing on the face of the record. *Johnson v. Lumber Co.*, 595.

§ 30. Matters Concluded.

In *habeas corpus* between husband and wife, who are living separate and apart without being divorced, for the custody of their minor children, an order of the Superior Court awarding custody of the children to one of the parties, or to both parties for specified periods, is not *res judicata*, when the court on a subsequent hearing finds as a fact that there has been a substantial change in the circumstances of the parties since the rendition of the last order in the cause. G. S., 17-39. *Ridenhour v. Ridenhour*, 508.

In an action by a husband against his wife, for divorce on the ground of two years separation, in which the wife set up in her answer a separation agreement by which her husband contracted to pay her a certain sum monthly for her support and asked for judgment that she recover according to the terms of such agreement, this plea of the wife being ignored by the court and no judgment rendered therein, though the court rendered a decree of absolute divorce for the husband, such decree is not *res judicata* in a subsequent action by the wife against the husband based on the agreement. *Jenkins v. Jenkins*, 681.

The general rule is that a judgment in a civil action constitutes an estoppel upon the parties, in a subsequent action for the same cause, as to all issuable

matters contained in the pleadings; but the judgment is conclusive only on the points raised by the pleadings or which might justly be predicated on them, and the rule does not embrace matters not properly introduced and not cognizable in the former action and as to which no judgment was rendered. *Ibid.*

§ 32. In General.

The relief sought by T. in a former action by S. against T., in another county, being for an accounting between defendant T. and plaintiff S., arising out of an alleged breach of contract for lease by S. to T. of certain truck operating rights, and the relief asked for by plaintiff T. in the instant case being for a restraining order against defendant S. and other defendants in favor of T. to preserve alleged rights of T. in the same truck operating franchise, any judgment rendered in the former case would not afford the relief sought in the latter case; nor would a judgment in the former be *res judicata* in the latter. *Taylor v. Schaub*, 134.

Where a judgment in a pending action would not support a plea of *res judicata* in a second action, and the two actions are not the same and the results sought are dissimilar, a plea in abatement in the second action, on the ground that another action between the parties was then pending, is properly overruled. *Ibid.*

§ 33a. Judgments as of Nonsuit.

G. S., 1-25, allowing a new action within one year after nonsuit, must be read into every final judgment of nonsuit entered by any court, and of this law all persons must take notice. *Goodson v. Lehmon*, 514.

Under G. S., 1-25, the new action is considered as a continuation of the former action and they must be substantially the same, involving the same parties, the same cause of action and the same right, and this must appear from the record in the case and cannot be shown by oral testimony. *Ibid.*

§§ 37b, 38. Upon Payment by One of Parties, Jointly and Severally Liable: Rights and Liabilities of Judgment Debtor.

A surety defendant in a judgment, in order to preserve the liens and to enforce the same for reimbursement, on payment of the judgment, must have the judgment assigned to some third person for his benefit: a surety, who pays the principal debt on which he himself is bound, without procuring an assignment to a trustee for his benefit, thereby satisfies the original obligation and can sue only as a creditor by simple contract. G. S., 1-240. *Stewart v. Parker*, 551.

JUDICIAL SALE.

§ 6. Validity and Attack.

A commissioner, appointed in a judicial proceeding to sell land, may not purchase at his own sale, even though he acts fairly. If he does, the sale is voidable, and may be set aside as of course upon proper and reasonable application of the parties interested. *Hinson v. Morgan* and *Hinson v. Baumrind*, 740.

JURY.

§ 1. Competency, Qualifications, and Challenges for Cause.

The competency of jurors is a question to be passed upon by the trial judge. *S. v. Hill*, 74.

JURY—*Continued.*

Upon a motion to set aside a verdict in a criminal case, on account of the presence of two newspaper reporters in the jury room during the jury's deliberation, where the court, after a full investigation, found that the reporters went into the jury room by mistake but said nothing to any member of the jury and that no member of the jury spoke to the reporters and that the deliberation and verdict of the jury were in no way influenced by the presence of the reporters, there is no error in the court's denial of the motion. *Ibid.*

Where there is nothing to show that members of the Negro race were excluded from the regular panel of jurors or from the special venire ordered by the court of its own motion in a capital case, the trial court having found as a fact that they were not excluded from the jury box and that the Negroes, called as prospective jurors, from the special venire, were challenged for cause by the solicitor as not being freeholders, and there being nothing to show whether the remaining Negroes of the special venire were freeholders or required to be such, no jury defect, bias or harmful error is shown. *S. v. Lord*, 354.

Upon challenge for cause, in a murder trial, of a juror who has formed and expressed an opinion of prisoner's guilt, where the juror states that he can give a fair and impartial verdict on the evidence in spite of his opinion, the court's finding of indifferency presents no reviewable question of law. *Ibid.*

LANDLORD AND TENANT.

§ 1. Creation and Effect of Relationship.

A landlord is not ordinarily deemed to be in the power of his tenant, and the mere fact of that relationship is insufficient to raise a presumption of fraud or undue influence against the latter in his dealings with the former. *In re Will of Atkinson*, 526.

§ 6. Tenancies at Will and at Sufferance.

One, who enters into possession of premises under a void lease or under an agreement which is for an indefinite and uncertain term, or for so long as the tenant may wish to occupy the premises, becomes a tenant at will. *Barbee v. Lamb*, 211.

Tenancy at will may be terminated at any time by either party to the agreement. And it is terminable *instanter* by demand for possession, or by a conveyance of the property by the landlord. *Ibid.*

§ 10. Duty to Repair.

Ordinarily at common law, in the absence of an agreement relating to repairs or warranty relating to the condition of the property when leased, the lessee takes it in its then existing condition, and the landlord is under no obligation to restore or make repairs to premises where defects have been caused by decay or use, or which have arisen after the date of lease or occupancy, or which existed at the time of the demise. *Harrell v. Refining Co.*, 421.

The burden is on the lessee to show that the lessor contracted to make repairs. *Ibid.*

§ 11. Liability for Injuries from Defective or Unsafe Condition.

Even when a lessor in his lease assumed the duty of making repairs, a breach of that duty would not ordinarily give rise to a cause of action in tort for personal injuries to the lessee. *Harrell v. Refining Co.*, 421.

LANDLORD AND TENANT—*Continued.*

In a tort action by lessee against lessor for injuries caused by defects in the leased premises, ordinarily the doctrine of *caveat emptor* applies. To avoid this doctrine, the lessee must show that there is a latent defect known to the lessor, or which he should have known, involving a menace or danger, and a defect of which the lessee was unaware or could not, by the exercise of ordinary diligence, discover, the concealment of which would be an act of bad faith on the part of the lessor. *Ibid.*

A *latent defect* in leased premises, for which the lessor may be liable in tort to the lessee, refers to a *physical* defect and not a latent potentiality of injury from a patent physical condition, or to mere consequences unknown, unexpected or unpredictable to the parties. Two rules are deducible from this distinction: First, to render the lessor liable for an injury on the theory of concealment, the latent defect which it is his duty to disclose must be of such a nature as to give warning to an ordinarily prudent person that injury might result as a natural and probable consequence in the use of the demised premises; and second, where the supposed defect or defective condition itself is patent, and the parties have an equal opportunity of inspection, no liability in tort can be imputed to the lessor with respect to it. *Ibid.*

In a civil action to recover damages by plaintiff, lessee, against defendant, lessor, for personal injuries allegedly caused by defects in the leased premises, where plaintiff's evidence tended to show that the injuries resulted from defects in an overhead slide type door, running on a track and operated by springs and cables over pulleys, that one cable was off the pulley, and there were insufficient brackets to hold the track causing the track to spread, that these defective conditions were in plain sight of plaintiff when the premises were let to him and he had been operating the door for some time prior thereto, there is insufficient evidence for the jury and judgment as of nonsuit was proper. *Ibid.*

LIBEL AND SLANDER.

§ 1. Nature and Essentials of Cause of Action: In General.

Slander, as distinguished from libel, may be actionable *per se* or only *per quod*. That is, the false remarks in themselves may form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed; or the false utterance may be such as to sustain an action only when causing some special damage, in which case both the malice and the special damage must be alleged and proved. *Penner v. Elliott*, 33.

§ 2. Words Actionable Per Se.

Ordinarily, we must look to the common law for defamations which are actionable *per se*, including accusations of crime or offenses involving moral turpitude, defamatory statements about a person with respect to his trade, occupation or business, imputation of having a loathesome disease, and the like. *Penner v. Elliott*, 33.

§§ 3, 11. Words Actionable Per Quod and Evidence of Defamation: Pleadings.

A public statement by defendant, that plaintiff "is a man who will not pay his honest debts, that he will not work and is a man that respectable people had best not have anything to do with," is not actionable *per se*, and, plaintiff having alleged no special damages, defendant's demurrer to the complaint for

LIBEL AND SLANDER—*Continued.*

failure to state a cause of action should have been allowed. *Penner v. Elliott*, 33.

§ 16. Damages.

Special damages are those which are the actual, but not the necessary result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. Humiliation and mental anguish are not special damages in an action for slander. *Penner v. Elliott*, 33.

LIMITATIONS OF ACTIONS.

§ 1a. Nature and Construction in General.

The plea of the statute of limitations is a plea in bar—a defense that may not be presented by demurrer. The lapse of time does not discharge a liability. It merely bars recovery. *Insurance Co. v. Motor Lines, Inc.*, 588.

The power of the Legislature of each State to enact statutes of limitations and rules of prescription is well recognized and is unquestioned. *Sayer v. Henderson*, 642.

A statute of limitations, strictly so called, operates generally on the remedy directly, and does not extinguish the right. *Ibid.*

It is a fundamental principle of law that remedies are to be governed by the laws of the jurisdiction where the suit is brought. The *lex fori* determines the time within which a cause of action shall be enforced. *Ibid.*

§ 1b. Applicability to Sovereign.

No statute of limitations runs against the sovereign unless it is expressly named therein. *Fertilizer Co. v. Gill, Comr. of Revenue*, 426.

§ 2e. Actions Barred in Three Years.

The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax (G. S., 105-174 [b], 227), a use or excise tax, which accrued in the year 1937, is barred by the three-year statute of limitations, when assessed in 1942. *Fertilizer Co. v. Gill, Comr. of Revenue*, 426.

G. S., 105-174, deals not only with deficiencies, but it is also intended to affect assessments made where no return has been filed. In the absence of fraud, the Commissioner of Revenue can make no assessment, for deficiency or otherwise under the provisions of the statute, which shall extend to sales made more than three years prior to the date of the assessment. *Ibid.*

§ 15. Pleadings.

The plea of the statute of limitations is a plea in bar—a defense that may not be presented by demurrer. The lapse of time does not discharge a liability. It merely bars recovery. *Insurance Co. v. Motor Lines, Inc.*, 588.

LIS PENDENS.

§ 1. Pendency of Suit.

The Legislature intended the term "action," as used in our *lis pendens* statute, G. S., 1-116, to embrace all judicial proceedings affecting the title to real property or in which title to land is at issue, including the caveat to a will. *Whitehurst v. Abbott*, 1.

LIS PENDENS—*Continued.*

While a caveat is not an adverse proceeding in the ordinary sense and the will is the *res* involved, any final decree therein will directly affect the title to land devised, hence the filing of *lis pendens* is essential to give constructive notice to those not directly interested. *Ibid.*

Lis pendens notice under our statute is not exclusive, nor is it designed to protect intermeddlers. G. S., 1-116. *Ibid.*

§ 2. Actions Affecting Realty.

At common law a pending suit was notice to all the world, but now the pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land lies. G. S., 1-116. *Whitehurst v. Abbott*, 1.

§§ 3a, 3b. Where Action Is in County of Land: Where Action Is in Other County.

At common law a pending suit was notice to all the world, but now the pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land lies. G. S., 1-116. *Whitehurst v. Abbott*, 1.

When a person acquires an interest in property, pending an action in which title thereto is at issue, from one of the parties to the action, with notice of the action, actual or constructive, he is bound by the judgment therein just as the party from whom he bought would have been. *Ibid.*

§ 4. Notice and Priority.

In a former suit, between the same plaintiffs and some of the same defendants, to set aside a deed to the original defendants for mental incompetency and undue influence, the original notice of *lis pendens* is effective to protect plaintiffs in renewed litigation, G. S., 1-25, within the statutory period, after dismissal, reversal or nonsuit on appeal, otherwise than on the merits, where there is identity between the causes of action and procedural continuity arising out of the legal right to renew the litigation, and the new defendants were *pendente lite* purchasers in the original proceeding. *Goodson v. Lehmon*, 514.

§ 5. Operation and Effect.

The effect of *lis pendens* and the effect of registration are one and the same, each being a record notice upon the absence of which a prospective innocent purchaser may rely. *Whitehurst v. Abbott*, 1.

In a former suit, between the same plaintiffs and some of the same defendants, to set aside a deed to the original defendants for mental incompetency and undue influence, the original notice of *lis pendens* is effective to protect plaintiffs in renewed litigation, G. S., 1-25, within the statutory period, after dismissal, reversal or nonsuit on appeal, otherwise than on the merits, where there is identity between the causes of action and procedural continuity arising out of the legal right to renew the litigation, and the new defendants were *pendente lite* purchasers in the original proceeding. *Goodson v. Lehmon*, 514.

MALICIOUS PROSECUTION.

§ 1. Nature and Essentials of Right of Action in General.

To sustain an action for malicious prosecution the plaintiff must show malice, want of probable cause, and the favorable termination of the former proceeding. *Melton v. Rickman*, 700.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

In an action for *mandamus*, in an attempt to test the constitutionality of a municipal ordinance based upon a statute, the relief demanded was properly denied. *Jarrell v. Snow*, 430.

§§ 2a, 2b. Ministerial or Legal Duty: Discretionary Duty.

It is not the function of a court to reverse or direct the reversal of decisions made by administrative officers in the exercise of discretionary powers; nor will review of their decisions, once made, be compelled by judicial mandate. *Jarrell v. Snow*, 430.

§ 2e. Remedy at Law.

Mandamus lies only for one who has a specific legal right and who is without any other legal remedy. *Jarrell v. Snow*, 430.

MARRIAGE.

§ 1. Nature.

Marriage is not a private affair between the parties. Society has an interest in the marital status, and a divorce will not be granted for separation, where the only evidence thereof must "be sought behind the closed doors of the matrimonial domicile." *Dudley v. Dudley*, 83.

There are three parties to a marriage contract—the husband, the wife and the State; and certain incidents immediately attach to the relation which cannot be abrogated without the consent of the State. It is the husband's duty to support his wife and children and there is no law or public policy which gives any countenance to an attempt by the husband to abdicate this duty which the law casts upon him, and impose it upon his wife through the medium of a contract. Such a contract is unenforceable. *Ritchie v. White*, 450.

§§ 5, 7. Parties Who May Sue for Annulment: Pleadings and Evidence.

A second or subsequent marriage is presumed legal until the contrary be proven, and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. The plaintiff cannot recover because of the failure of defendant to carry the burden. *Kearney v. Thomas*, 156.

MASTER AND SERVANT.

§ 21c. Nature and Extent of Master's Liability.

In an action to recover damages for alleged injuries resulting from an automobile collision, while there are other allegations of negligence in the complaint, the trial below was had on the alleged theory that, at the time of the collision, the bus of the corporate defendants was being driven by the individual defendant, an employee and agent of corporate defendants, at a reckless and high rate of speed and out of control, and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the bus to move from its right-hand side to its left-hand side of the public highway and immediately in front of plaintiff's automobile. Hence, the liability of the corporate defendants is grounded solely, and is wholly dependent upon the negligence, if any, of the individual defendant, under the doctrine of *respondeat superior*. *Hobbs v. Coach Co.*, 323.

MASTER AND SERVANT—*Continued.*

§ 25. To What Cases the Federal Act Applies.

In a civil action to recover damages for alleged wrongful death, under Federal Employers' Liability Act, plaintiff is not entitled to recover unless her intestate at the time of his death was an employee of the defendant, acting within the scope of his employment and engaged at the time in interstate commerce. *Bourne v. R. R.*, 43.

§ 26a. Construction: In General.

The Federal Employers' Liability Act does not define the word "employer" or the word "employee," hence they are to be considered as having been used in the Act in their natural and ordinary sense. *Bourne v. R. R.*, 43.

Being remedial, the Federal Employers' Liability Act is to be liberally construed to advance the remedy proposed, but it applies only when the relation of master and servant exists. *Ibid.*

Where an experienced locomotive engineer, employed by defendant for about eighteen years, is given a permit, under the company's rules, to ride an engine for the one and only purpose of learning that portion of the track, roadbed, sidings, curves and changes thereon, so that he may be eligible for assignment on that part of the road, he is not a student engineer and he is not an employee within the meaning of the Federal Employers' Liability Act, but at most a licensee. *Ibid.*

One has no claim upon an employer, predicated on an alleged breach of duty imposed by the Federal Employers' Liability Act, where it appears that the employee was in fact injured while acting outside the scope of his employment, as for example, when voluntarily assuming to do something that the employer did not employ him to do or when doing something which the known rules of the employer forbid his doing. *Ibid.*

§§ 40e, 40f. Whether Accident "Arises Out of Employment": Whether Accident "Arises in Course of Employment."

Where the testimony tended to show that deceased, following a custom of his employer of leaving the immediate place of his work to go on the ground floor on the outside of the building, for the purpose of smoking, was killed in attempting, on instruction of a superior, to stop a moving elevator at a designated point in order that such superior might use the elevator as a means of returning to the place of his duties, there is competent evidence to support the findings of fact by the Industrial Commission upon which it was determined that the death of deceased was by accident arising out of and in the course of his employment. *Fox v. Mills, Inc.*, 580.

§ 55b. Effect of Appeal.

An exception to a judgment, which approved and confirmed the findings of fact, conclusions of law and award of the N. C. Industrial Commission, presents the single question, whether the facts found and admitted are sufficient to support the judgment. It is insufficient to bring up for review the findings of fact or evidence upon which they are based. *Rader v. Coach Co.*, 537.

An appeal from the Industrial Commission is permitted only on matters of law. *Fox v. Mills, Inc.*, 580.

While the Workmen's Compensation Act does not set out with particularity the procedure on appeal, repeatedly it has been held by this Court that, by analogy, that prescribed for appeals from judgments of justices of the peace, when practical, should apply. But this refers only to the mechanics of appeal,

MASTER AND SERVANT—*Continued.*

as to notice and docketing; for the appeal from the Industrial Commission is only on matter of law and not *de novo*. *Ibid.*

An exception to the judgment affirming an award by the Industrial Commission is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of such commission. *Ibid.*

§ 55c. Notice of and Docketing Appeal.

By both statute and the uniform decisions of this Court the findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the Superior Court and in this Court, when supported by competent evidence. *Fox v. Mills, Inc.*, 580.

While the Workmen's Compensation Act does not set out with particularity the procedure on appeal, repeatedly it has been held by this Court that, by analogy, that prescribed for appeals from judgments of justices of the peace, when practical, should apply. But this refers only to the machanics of appeal, as to notice and docketing; for the appeal from the Industrial Commission is only on matter of law and not *de novo*. *Ibid.*

§ 55d. Review.

Findings of fact by the Industrial Commission, affirmed and approved by the judge, are binding on us when supported by evidence. It is presumed that they are correct and in accordance with the testimony and, when it is claimed that such findings are not supported by evidence, the exceptions and assignments of error entered into the court below must so specify. *Rader v. Coach Co.*, 537.

By both statute and the uniform decisions of this Court the findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the Superior Court and in this Court, when supported by competent evidence. *Fox v. Mills, Inc.*, 580.

§ 55g. Disposition of Appeal.

Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the Superior Court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated; but when such judgment on appeal merely decreed that the award be in all respects affirmed, the judge below presumably having considered each of the assignments of error and overruled them, we do not hold that a remand is required. *Fox v. Mills, Inc.*, 580.

MINERALS AND MINES.

§ 1. In General.

While the general rule, deduced from the decisions of States where subterranean mining has flourished, is that the owner of the surface has the right to subjacent support unless such right has been waived, the character of the mineral to be recovered, the manner of its occurrence, the known local custom of open or pit mining for the mineral involved render this doctrine inapplicable to the recovery of feldspar and kaolin, near the surface. *English v. Clay Co.*, 467.

MINERALS AND MINES—*Continued.*

§ 5. Evidence.

In an action to recover damages to surface soil and superstructures, where all the evidence tended to show that plaintiff acquired title, by conveyance excepting and reserving all the minerals and mining rights and also a right of way granted previously to defendant, that kaolin occurred on the property in a deposit under a soft top soil about six feet deep, that the custom of open or pit mining for the recovery of this and similar minerals was in vogue in that locality and this custom known to plaintiff, and that defendant took down the structures on the land, piece by piece, stacking and storing them on the premises and protecting them from the weather, and then proceeded to strip and remove the surface soil and recover the mineral, leaving the premises in that condition, judgment as of nonsuit was proper. *English v. Clay Co.*, 467.

MORTGAGES.

§§ 8, 9. General Rules of Construction: Parties and Debts Secured.

Whether any particular transaction amounts to a mortgage or an option to repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction is whether the debt existing prior to the conveyance is still subsisting or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a mortgage. *Ricks v. Batchelor*, 8.

The intention of the parties that a deed with option to repurchase shall constitute a mortgage must be established by evidence *dehors* the deed inconsistent with an absolute conveyance. *Ibid.*

§§ 24, 25. Transfer to, by Mortgagee: Acquisition of Title by Mortgagee.

When the equity of redemption is conveyed by the mortgagor to the mortgagee, there is a presumption of fraud upon a showing of the facts. *Atkinson v. Atkinson*, 120.

Where an agreement between the parties, requiring the defendant to acquire or discharge plaintiff's mortgage as part consideration for the conveyance of the mortgaged premises by plaintiff to defendant, was made and completed before the deed was executed or the mortgage assigned, with no fiduciary relation of any sort between them, no fraud or oppression could have existed, and the acquisition of the mortgage *eo instante* extinguished the debt, and the relation of mortgagor and mortgagee never actually existed between the parties. *Ibid.*

§ 27. Payment and Satisfaction.

Where defendant, at plaintiff's request, paid off a mortgage on plaintiff's property to prevent a foreclosure, and then took from plaintiff a deed for the property, absolute on its face, giving plaintiff contemporaneously an option to repurchase within a time certain, the transaction does not constitute a mortgage. *Ricks v. Batchelor*, 8.

Whether any particular transaction amounts to a mortgage or an option to repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction is whether the debt existing prior to the conveyance is still subsisting or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a mortgage. *Ibid.*

MORTGAGES—*Continued.*

§§ 28, 29. Form, Methods and Validity of Cancellation: Rights of Parties Upon Void Cancellation.

On the foreclosure of a deed of trust, the trustee therein having erroneously canceled the same of record, but after correcting such cancellation of the record, the trustee conveyed to the purchaser under the deed of trust, such correction is sufficient to give the purchaser a good title. *Burney v. Holloway*, 633.

§§ 30c, 31c. Default: Pleadings and Evidence.

Where plaintiff claimed title by deed of trustee in a deed of trust and defendant denied plaintiff's title, evidence for plaintiff, tending to show default in payment of the indebtedness secured by the deed of trust which was foreclosed, is competent. *Insurance Co. v. Boogher*, 493.

§ 32a. Execution of Power in General.

On the foreclosure of a deed of trust, the trustee therein having erroneously canceled the same of record, but after correcting such cancellation of the record, the trustee conveyed to the purchaser under the deed of trust, such correction is sufficient to give the purchaser a good title. *Burney v. Holloway*, 633.

§ 37. Disposition of Proceeds and Surplus.

In an action by a county to recover money received by defendant for its use, the complaint alleging that defendant, as mortgagee, foreclosed a mortgage and failed, out of the proceeds of sale, first to pay plaintiff's claim or lien for taxes as provided by G. S., 105-408, a cause of action is stated, and demurrer *ore tenus* for lack thereof, interposed in this Court, cannot be sustained. *New Hanover County v. Sidbury*, 679.

An alternative remedy is created by G. S., 105-408, in behalf of the taxing agency. On foreclosure of a deed of trust or mortgage it may look to the trustee or mortgagee for the payment of taxes required by the statute, or it may waive that remedy and resort to a foreclosure of the tax lien. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 2. Creation.

Municipal corporations are creatures of the Legislature and possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation. Ordinarily such powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the Legislature. *Clayton v. Tobacco Co.*, 563.

§ 5. In General: Legislative Control and Supervision.

Where a board of county commissioners by resolution requested the surrender of a license to sell wine, which request was declined by the licensee, on the assumption that such action by the commissioners was invalid and unconstitutional, such licensee has an adequate remedy at law, should the commissioners undertake to enforce their resolution or to prevent the exercise of the privilege granted by the license. *Jarrell v. Snow*, 430.

Municipal corporations are creatures of the Legislature and possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those

essential to the accomplishment of the declared objects and purposes of the corporation. Ordinarily such powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the Legislature. *Clayton v. Tobacco Co.*, 563.

There seems to be no constitutional limitation upon the power of the General Assembly to create a corporation for a public purpose. N. C. Const., Art. VIII, sec. 1. *Brumley v. Baxter*, 691.

The legislative power, both as to the State and to political and administrative subdivisions thereof, is restrained only by the limitations imposed by the State Constitution or that of the United States. *Ibid.*

The State cannot authorize a city to donate its property, or to grant privileges to one class of citizens not to be enjoyed by all, except in consideration of public services. N. C. Const., Art. I, secs. 2, 7. *Ibid.*

A city has no power, even with legislative sanction, to make an absolute grant of its valuable realty not presently required for other purposes, without a monetary consideration, for a public purpose which is not a necessary purpose, with a provision in the conveyance that, in the event the grantee determines that the public purpose has failed, or that the facilities are not sufficiently used, the grantee may dispose of the property in its discretion and apply the proceeds to such charity as it may elect. *Ibid.*

§ 12. Exercise of Governmental and Corporate Powers in General.

It is the general rule in this jurisdiction that municipal corporations when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs of their employees and agents, unless made so by statute. *Beach v. Tarboro*, 26.

The mission of the town's employee, out of which the alleged injury to the plaintiff arose, is the determining factor as to liability—not what such employee was called upon to do at other times and places, but what he was engaged in doing at the particular time and place alleged. *Ibid.*

In an action against a town to recover damages for alleged negligent injury to plaintiff by reason of a collision of a taxicab in which plaintiff was riding with a truck of the town, where all of the evidence tended to show that the collision occurred when the truck was being driven by the town's employee for the purpose of repairing five street lights in the town lighting system maintained for the public good and benefit, the court erred in refusing to grant defendant's motion for judgment as of nonsuit, made at the close of plaintiff's evidence and again at the close of all the evidence. *Ibid.*

§ 19a. Form and Requisites.

The provisions of G. S., 143-129, are not applicable to a contract between a municipal corporation and a public utility for the purchase wholesale of electric current for redistribution through the municipality's local plant. *Mullen v. Louisburg*, 53.

The purpose of G. S., 143-129, is to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts by giving notice to the prospective bidders and thus assuring competition, which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money. *Ibid.*

The statute (G. S., 143-129) applies only to contracts in relation to supplies and materials where the bidders have the right to name the price for which

MUNICIPAL CORPORATIONS—*Continued.*

they are willing to furnish the same. It has no application whatever to a contract between a municipality and a public utility, where there can be no competition between bidders because the municipality or the State has the power and authority to fix the price of the service to be rendered or the commodity to be furnished. *Ibid.*

§§ 19b, 20. Authority: Construction and Operation.

A municipality is authorized by the express terms of the statute, G. S., 160-2 (6), to grant franchises to public utilities. The terms and conditions upon which they are to be granted, unless clearly unreasonable or expressly prohibited by law, rest in the sound discretion of the local body. *Mullen v. Louisburg*, 53.

It is a general rule that officers of a municipal corporation, in the letting of municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or palpable abuse of discretion, have no power to control their actions. *Ibid.*

Where a municipality decides to abandon the generation of electricity by the use of Diesel engines and substitute therefor electricity purchased wholesale for distribution through its electric plant, and in pursuance of such change of policy, advertises a sale of its Diesel engines, under G. S., 160-59, there is no sale by such municipality of its electric plant requiring approval of a majority of the qualified voters under G. S., 160-2 (6). *Ibid.*

§ 26. Granting and Executing Municipal Franchises.

A municipality is authorized by the express terms of the statute, G. S., 160-2 (6), to grant franchises to public utilities. The terms and conditions upon which they are to be granted, unless clearly unreasonable or expressly prohibited by law, rest in the sound discretion of the local body. *Mullen v. Louisburg*, 53.

§ 29. Streets.

The control of streets is primarily a State duty, and the legislative control, in the absence of constitutional restriction, is paramount, subject to property rights and easements of abutting owners. *Clayton v. Tobacco Co.*, 563.

The Legislature may delegate the power of control over its streets to the municipal corporations of the State or to the governing body of a city, town, or to a particular municipal board, or other agency. *Ibid.*

Within constitutional limitations and provided public use is not unreasonably interfered with, the Legislature, or a municipal corporation by legislative authorization, may grant a private use of streets, and may permit structures in the streets for business convenience, which, in the absence of such authority, would be considered obstructions or nuisances. *Ibid.*

§ 44. Bonds and Notes.

The Legislature has prescribed the machinery by which a county may issue lawful and valid obligations for public purposes and necessary expenses, and pledge its faith, G. S., Art. 9, 153-1, *et seq.* And the Legislature has expressly provided that approval by the Local Government Commission of bonds or notes of a county, or other governmental unit, shall not extend to or be regarded as an approval of the legality of the bonds or notes in any respect. G. S., 159-12. *Insurance Co. v. Guilford County*, 293.

MUTUAL BURIAL ASSOCIATIONS.

§ 1. Creation and Supervision: In General.

Where the certificate of membership in a burial association, as well as the general statute relating to such associations, G. S., 58-226, contains the express provision that the rules and by-laws of such associations may be modified by Act of the General Assembly, members are bound by subsequent legislation, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. *Spearman v. Burial Assn.*, 185.

§§ 11, 12. Burial Service: Return of Assessments.

The spouse or next of kin of a member of a mutual burial association serving in the armed forces, who dies overseas, may elect to have return of the paid-in assessments in settlement, or to have the prescribed funeral benefits at any time the body of deceased is returned for burial to the territory served by the burial association; and the personal representative of the deceased may not recover $100 in lieu thereof. G. S., 58-241.1. *Spearman v. Burial Assn.*, 185.

NEGLIGENCE.

§ 1a. In General.

There are no degrees of care so far as fixing responsibility for negligence is concerned. The standard is always that care which a prudent man should use under like circumstances. But a prudent man increases his watchfulness as the possibility of danger mounts. Thus the degree—that is the quantity—of care necessary to measure up to the standard is as variable as the attendant circumstances. *Rea v. Simowitz*, 575.

§ 3. Dangerous Substances, Machinery, and Instrumentalities.

There is no duty resting on defendant to warn the plaintiff of a dangerous condition, provided the dangerous condition is obvious. *Perry v. Herrin*, 601.

§ 4b. Invitees and Licensees.

The proprietor of a store is not an insurer of the safety of customers while on the premises. But he does owe them 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. *Ross v. Drug Store*, 226.

In an action for damages for injuries to a customer, on the premises, by the alleged negligence of the proprietor of a store, a charge by the court, imposing the duty on the defendant "to give warning of any hidden peril," without more, is in excess of the legal requirement, and entitles defendant to a new trial. *Ibid.*

§ 5. Proximate Cause: In General.

The liability of a physician or surgeon cannot be predicated alone upon unfavorable results of his treatment. He may be held liable only when the injurious result flows proximately from his want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to exercise reasonable care and diligence in the application of his knowledge and skill in the treatment of his patient. *Buckner v. Wheeldon*, 62.

In an action by plaintiff, a minor 17 years of age, through his next friend, to recover damages for injuries, alleged to be the result of negligence by defendants, where all of plaintiff's evidence tended to show that the ice-scoring

NEGLIGENCE—*Continued.*

machine, involved as the cause of the injuries, was of standard make and kind used by ice companies at the time of the accident, was properly installed in the usual and customary way, and had all the guards and safety devices usual and customary and in general use on standard machines of the kind at that time, the machine being in good order and, while operated by a boy only 15 years old, there was no evidence that he was an incompetent operator or that the manner of operating the machine was the proximate cause of the injuries, and the only evidence as to the accident being that plaintiff fell, without knowing how or why, into the machine and injured his arm, there was no error in sustaining a judgment as of nonsuit, G. S., 1-183, at the close of all plaintiff's evidence. *Perry v. Herrin*, 601.

The decisions of this Court are to the effect that the violation of an ordinance or statute enacted for the safety of the public is negligence *per se*, but such violation must be the proximate cause or one of the proximate causes of the injury to warrant recovery. *Morgan v. Coach Co.*, 668.

In an action to recover damages for wrongful death allegedly resulting from actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff's testator under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury which produced the death—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Tysinger v. Dairy Products*, 717.

Where the violation of a statute relative to the operation of a motor vehicle upon the highway is negligence *per se*, such violation must be a proximate cause of injury to become actionable. *Ibid.*

§ 10. Last Clear Chance.

The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so. *Ingram v. Smoky Mountain Stages, Inc.*, 444.

Under the doctrine of last clear chance, plaintiff may not recover on the original negligence of defendant for such recovery is barred by his own contributory negligence. *Ibid.*

The application of the last clear chance doctrine is invoked only where there was an appreciable interval of time between plaintiffs' negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence. *Ibid.*

To sustain the plea of last clear chance it must be made to appear that (1) plaintiff by his own negligence placed himself in a dangerous situation; (2) the defendant saw, or by the exercise of reasonable care should have discovered, the perilous position of plaintiff, (3) in time to avoid injuring him; and (4) notwithstanding such notice of imminent peril negligently failed or refused to use every reasonable means at his command to avoid the impending injury, (5) as a result of which plaintiff was in fact injured. *Ibid.*

The doctrine of last clear chance does not apply when the plaintiff is guilty of contributory negligence as a matter of law. *Ibid.*

NEGLIGENCE—*Continued.*

Where plaintiffs' intestate, driving an automobile on a private road used as an outlet to the public road, on approaching the highway, stopped or hesitated as if intending to stop, or began to stop within a few feet of the highway, the driver of an oncoming bus had a right to assume that deceased would obey the law and not proceed suddenly onto and across the highway, when the bus was only ten or fifteen feet from the intersection; and there was error in submitting an issue on last clear chance. *Ibid.*

§ 11. Contributory Negligence of Persons Injured in General.

In an action to recover damages resulting from an automobile collision, plaintiff alleging that he was at the time of the collision a passenger in his own car which was being operated by a driver, where the defendants allege a cross action against the driver of plaintiff's car as a joint tort-feasor, alleging that the said driver was the agent of plaintiff and acting within the scope of his authority and apparently under plaintiff's control, and the said driver was made a party defendant and thereupon demurred to the cross action on the ground that it failed to state a cause of action, proof of negligence by the said driver, contributing to the injury, would constitute a complete bar to plaintiff's claim and would afford no ground for contribution, hence judgment overruling the demurrer reversed. *Evans v. Johnson*, 238.

The task of the reviewing court, on defendant's motion for judgment as of nonsuit on the ground of plaintiff's contributory negligence, is not merely to determine from the weight of the evidence, however convincing, whether plaintiff was negligent—that would be for the jury; but to say whether his contributory negligence is so clearly apparent that no person with a reasonable mind could draw any other inference. *Cummins v. Fruit Co.*, 625.

§ 17a. Burden of Proof.

In an action to recover damages for wrongful death, G. S., 28-172, 28-173, the plaintiff must allege and prove (1) that the defendant was negligent, (2) that such negligence, acting in continuous and unbroken sequence, and without which the injury would not have occurred, resulted in the injury producing death, and (3) that, under the circumstances, a man of ordinary prudence could and would have foreseen that such result was probable. *Morgan v. Coach Co.*, 668.

The decisions of this Court are to the effect that the violation of an ordinance or statute enacted for the safety of the public is negligence *per se*, but such violation must be the proximate cause or one of the proximate causes of the injury to warrant recovery. *Ibid.*

Negligence is not to be presumed from the mere fact of injury or that testator was killed. *Tysinger v. Dairy Products*, 717.

The operator of a motor vehicle on a public highway may assume and act upon the assumption that a pedestrian will use reasonable care and caution commensurate with visible conditions, and that he will observe and obey the rules of the road. *Ibid.*

§ 19a. On Issue of Negligence.

In an action to recover for injuries to plaintiffs as the result of an automobile wreck, where plaintiffs' evidence tended to show that defendant, the driver of the car in which both plaintiffs and defendant were riding, became drowsy, knew he was drowsy, lost consciousness, and failed to keep a proper lookout and to attend to what he was doing and thereby, or intentionally,

NEGLIGENCE—*Continued.*

disregarding the screams of one plaintiff, swerved the car to the left, ran off the road, causing the injuries, there is sufficient evidence for the jury and motion for judgment as of nonsuit was properly denied. *Harper v. Harper* and *Wickham v. Harper*, 260.

In an action to recover damages for alleged injuries to plaintiff resulting from an admitted automobile collision, where plaintiff's evidence tended to show that, at the time of the accident, the bus of the corporate defendants was being driven on the public highway, by the individual defendant, employee and agent of corporate defendants, at a reckless and high rate of speed (in excess of 45 miles per hour, no special hazard existing, G. S., 20-141) and out of control and without keeping a proper lookout for the safety of others traveling upon the highway, thereby permitting the bus to move over from its right-hand side to its left-hand side of the highway, in violation of G. S., 20-148, and immediately in front of plaintiff's automobile, a head-on collision resulting, and while plaintiff was offering his evidence, as an accommodation to the witness, a medical expert was allowed to testify for defendants, and then plaintiff completed his evidence and rested, defendant introducing no other evidence and also resting, upon motion by defendants for judgment as of nonsuit, G. S., 1-183, the motion was properly denied, there being ample evidence for the jury, and there being no sufficient evidence of contributory negligence; and it is not necessary to decide whether or not defendants' motion under G. S., 1-183, was aptly made. *Hobbs v. Coach Co.*, 323.

In a civil action to recover damages by plaintiff, lessee, against defendant, lessor, for personal injuries allegedly caused by defects in the leased premises, where plaintiff's evidence tended to show that the injuries resulted from defects in an overhead slide type door, running on a track and operated by springs and cables over pulleys, that one cable was off the pulley, and there were insufficient brackets to hold the track causing the track to spread, that these defective conditions were in plain sight of plaintiff when the premises were let to him and he had been operating the door for some time prior thereto, there is insufficient evidence for the jury and the judgment as of nonsuit was proper. *Harrell v. Refining Co.*, 421.

There are no degrees of care so far as fixing responsibility for negligence is concerned. The standard is always that care which a prudent man should use under like circumstances. But a prudent man increases his watchfulness as the possibility of danger mounts. Thus the degree—that is the quantity—of care necessary to measure up to the standard is as variable as the attendant circumstances. *Rea v. Simowitz*, 575.

The degree of care required, under the particular circumstances, to measure up to the standard is for the jury to decide. *Ibid.*

In a civil action to recover for the wrongful death of plaintiff's intestate, allegedly caused by negligence of defendant, where all of the evidence tended to show that plaintiff's intestate, who had previously been employed by defendant as a driver and at the time of the accident was employed by defendant to install certain electrical equipment on one of defendant's trucks, which was being driven by another on a round trip for a load of gasoline, asked to go on the trip and was allowed by the driver to do so, plaintiff's intestate driving part of the way and receiving injuries, from which he died three days thereafter, on the return trip by the negligence of the driver when the truck overturned, and that defendant called deceased's wife and told her of her husband's injury and said he was sure he could do something for her husband, there is sufficient evidence for the jury as to whether deceased was on the

NEGLIGENCE—*Continued.*

truck with defendant's prior authority or subsequent ratification, and judgment as of nonsuit was error. *Dark v. Johnson*, 651.

There must be legal evidence of every material fact necessary to support a verdict. If the evidence fails to establish any one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law. *Tysinger v. Dairy Products*, 717.

§ 21. Issues and Verdict.

When there is no evidence to support an issue of last clear chance and the jury answers the issue on contributory negligence against plaintiff, the defendant is entitled to judgment on the verdict. *Ingram v. Smoky Mountain Stages, Inc.*, 444.

NUISANCE.

§ 5. Action for Damages.

There must be an allegation of peculiar injury to person or property of plaintiff resulting from a public nuisance to entitle plaintiff to maintain a civil action therefor. *S. v. Alverson*, 29.

§ 6. Public Nuisance in General.

The maintenance of a public nuisance is an offense against the State, and upon proper allegation and proof would subject the person who maintained it to indictment. *S. v. Alverson*, 29.

There must be an allegation of peculiar injury to person or property of plaintiff resulting from a public nuisance to entitle plaintiff to maintain a civil action therefor. *Ibid.*

§§ 7, 10, 11. Matters Relating to Morals and Decency: Padlocking Premises: Sale of Property.

The proceeding prescribed by G. S., 19-2, for a civil action by a citizen in the name of the State for injunction, the closing of a place of business, and the seizure and sale of personal property used therewith, must be based upon allegations and proof of prostitution, gambling, or the illegal sale of whiskey as specified in G. S., 19-1. *S. v. Alverson*, 29.

PARENT AND CHILD.

§ 5. Support.

While it is the primary duty of a parent to support his child, whether the child has an estate or not, this obligation may be qualified by the parent's ability. And when a parent has not means sufficient to provide necessary maintenance, he should have reasonable allowance for lawful disbursements from the child's estate for that purpose. *Casualty Co. v. Lawing*, 103.

There are three parties to a marriage contract—the husband, the wife, and the State; and certain incidents immediately attach to the relation which cannot be abrogated without the consent of the State. It is the husband's duty to support his wife and children and there is no law or public policy which gives any countenance to an attempt by the husband to abdicate this duty which the law casts upon him, and impose it upon his wife through the medium of a contract. Such a contract is unenforceable. *Ritchie v. White*, 450.

PARTIES.

§§ 1, 2. Necessary Parties: Proper Parties.

A party may appear either in person or by counsel. G. S., 1-11. The statutory provision is in the alternative. It means that a litigant may not appeal both *in propria persona* and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later through counsel. *New Hanover County v. Sidbury*, 679.

§ 4. Proper Parties.

A third party, before he will be permitted to become a party defendant in a pending action, must show that he has some legal interest in the subject matter of the litigation. His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment, and it must be involved in the subject matter of the action. One whose interest in the matter is not a direct or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend. *Mullen v. Louisburg*, 53.

§ 7. Right to Intervene and Claim Property.

Where an action, to compel defendant corporation to transfer to the plaintiff upon its books certain shares of stock which had been issued to one M and others, was based upon the allegation that these shares had been endorsed and transferred to plaintiff, which was denied in the answer and by affidavit of M, in support of a motion by the defendant that M and others claiming ownership of the stock be made parties, there was error in the denial of such motion, M and his associates having a right to be heard. *Griffin & Vose, Inc., v. Minerals Corp.*, 434.

To entitle one to the benefits of G. S., 1-73, allowing new parties to be brought in, such additional parties must have a legal interest in the subject matter of the litigation; and the interest of a new party must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. *Ibid.*

§ 10. Joinder of Additional Parties.

Where an action, to compel defendant corporation to transfer to the plaintiff upon its books certain shares of stock which had been issued to one M and others, was based upon the allegation that these shares had been endorsed and transferred to plaintiff, which was denied in the answer and by affidavit of M, in support of a motion by the defendant that M and others claiming ownership of the stock be made parties, there was error in the denial of such motion, M and his associates having a right to be heard. *Griffin & Vose, Inc., v. Minerals Corp.*, 434.

As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. G. S., 1-73, 1-163. *Insurance Co. v. Motor Lines, Inc.*, 588.

Ordinarily orders by the trial court making, in its discretion, new parties necessary to a conclusion of the controversy, are not reviewable on appeal. *Ibid.*

In an action by an insurer, who has paid the loss, against the alleged tortfeasor, without the joinder of the insured, the legal holder of the claim, demurrer being sustained for failure to state a cause of action and thereafter plaintiff's motion to make insured a party plaintiff being allowed, the allowance of the latter motion, in effect, reverses the ruling on the demurrer. *Ibid.*

PARTITION.

§ 4c. Decree.

Commissioners, appointed by decree in a special proceeding to sell lands, can convey only in accordance with the terms of the order; and purchasers are chargeable with notice of the proceeding under which they purchase and are bound by the limitations upon their rights appearing on the face of the record. *Johnson v. Lumber Co.*, 595.

§ 4d. Sale and Confirmation.

A partition proceeding having been transferred to the civil issue docket of the Superior Court, confirmation of a sale therein is a matter for the judge. *Wood v. Fauth*, 398.

The report of sale in a partition proceeding, duly confirmed by the judge at term, confers upon the bidder certain rights of which the bidder cannot be summarily deprived. Upon failure to comply promptly with the bid, the proper procedure is by rule to show cause, and a reasonable time within which to comply should be allowed before vacating the sale and ordering a resale. Upon compliance the bidder is entitled to a deed as of the day of sale. *Ibid.*

Commissioners, appointed to sell land in a proceeding for partition, have the right to require the payment of the amount bid in cash; and a motion to allow the bidder to offset claims against some of the shares is properly denied. *Ibid.*

Commissioners, appointed by decree in a special proceeding to sell lands, can convey only in accordance with the terms of the order; and purchasers are chargeable with notice of the proceeding under which they purchase and are bound by the limitations upon their rights appearing on the face of the record. *Johnson v. Lumber Co.*, 595.

PARTNERSHIP.

§ 1. Creation and Existence.

A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for or on behalf of the firm with third parties. But, as between themselves, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, or if the agreement impairs or changes the body or capital of the personal estate of the wife, or accruing income thereof for a longer period than three years next ensuing the agreement, the contract is void unless executed in accordance with G. S., 52-12. *Carlisle v. Carlisle*, 462.

§ 13. Settlement Between Members and Their Representatives.

In a supplemental proceeding, G. A., 1-352, *et seq.*, all parties being before the court, where it appeared that the issue was the ascertainment of the interest, if any, of partner R, one of the defendants, in the assets of a partnership W & R, which remain after the partnership debts have been paid and the partnership affairs adjusted, the plaintiff, a just creditor of R and assignee of his interest in a judgment in favor of the partnership, is entitled to a full accounting of all of the partnership affairs, so as to determine what may be applicable to plaintiff's debt, and there was error in the refusal of the court below to allow the examination of R and to require the production of the partnership books and records for that purpose. *Cotton Co., Inc., v. Reaves*, 436.

PATENTS.

§ 1. Nature and Elements.

The very object of patent laws is monopoly and their strength is in the restraint imposed on others to exclude them from the use of the invention. The exercise of such restraint, within the field covered by the patent, is no violation of the anti-trust laws or of the rule against contracts in restraint of trade. *Coleman v. Whisnant*, 494.

§ 2. Jurisdiction.

In the exercise of the rights granted under Art. I, sec. 8, cl. 8, of the U. S. Constitution, Congress has given to the Federal Courts exclusive jurisdiction of all cases arising under the patent-right laws of the United States, where the suit involves the construction of the patent laws, the validity of a patent, questions of infringement, or at least where it is made to appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of the patent laws. *Coleman v. Whisnant*, 494.

But not every case involving rights conferred by the patent laws is beyond the jurisdiction of the State courts. When the action is brought on a contract, or in tort, with respect to the exercise of a patent right, the State court has jurisdiction; also in a suit to enforce the payment of royalties or license fees. And a suit to enforce or set aside a contract, though connected with a patent, is not a case arising under the patent laws of the United States. *Ibid.*

§ 3. Contracts as to Patents.

The owner of a patent may sell his patent, or an undivided share therein, to another and lawfully agree not to compete with his vendee to the exclusion of himself. Such a contract is not invalid under the anti-trust statutes. *Coleman v. Whisnant*, 494.

Joint owners of a patent are competent to contract with each other with respect to the exercise of the exclusive rights conferred by the patent, or to assign their interest absolutely or upon condition. Such contracts are subject to the same rules of law as other contracts. *Ibid.*

In a suit to avoid for want of consideration the sale of an interest in a patent and to recover damages for unlawful interference by defendants with plaintiff's efforts to realize on his invention, where plaintiff alleges that, while defendants own three-quarters of his patent and have paid the patent fees and some expenses and a small amount for another similar patent, plaintiff owns a one-quarter interest in the patent, and that defendants have appropriated his patent to their own use, and for two years have consistently and continuously prevented plaintiff from making contracts for the exercise of his rights in relation to his patent, preventing his using the patent himself or licensing its use by others or manufacturing the patented articles for sale, by threats of suits against those with whom plaintiff has attempted to deal, an actionable wrong is set out which is not vulnerable to demurrer. *Ibid.*

PENALTIES.

§ 2. Actions.

In a civil action by plaintiff to recover certain penalties, plus reasonable attorney's fees, under the Emergency Price Control Act of 1942, where there was a separate overcharge on each of five items, totaling eighty-five cents, all items left at one time to be cleaned by defendant, who filed but one schedule of maximum prices with the local O.P.A., as required by the said Act, the five acts complained of constitute but a single violation within the meaning of the

PENALTIES—*Continued.*

statute, and plaintiff is entitled to recover the sum of $50, plus reasonable attorney's fees and costs. *Hilgreen v. Cleaners & Tailors, Inc.*, 656.

The Superior Court has jurisdiction in actions to enforce the Emergency Price Control Act of 1942, regardless of the amount of the penalty or penalties demanded in good faith, if in addition thereto the plaintiff seeks to recover reasonable attorney's fees, since such fees are mandatory upon recovery by plaintiff. *Ibid.*

PHYSICIANS AND SURGEONS.

§ 15a. Malpractice: In General.

In an action for damages against a physician or surgeon for malpractice, the standard of the defendant's duty in the premises, as affecting his liability for negligence, must be determined by the law of the place where the tort was committed. *Buckner v. Wheeldon*, 62.

§§ 15b, 15c. Knowledge and Skill Required: Application and Use of Knowledge and Skill.

A physician or surgeon, who undertakes to treat a patient, implies that he possesses the degree of professional learning, skill and ability which others similarly situated ordinarily possess; that he will exercise reasonable care and diligence in the application of his knowledge and skill to the patient's care; and exercise his best judgment in the treatment of the case entrusted to him. *Buckner v. Wheeldon*, 62.

§ 15e. Sufficiency of Evidence of Malpractice.

The liability of a physician or surgeon cannot be predicated alone upon unfavorable results of his treatment. He may be held liable only when the injurious result flows proximately from his want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to exercise reasonable care and diligence in the application of his knowledge and skill in the treatment of his patient. *Buckner v. Wheeldon*, 62.

An inference of want of due care may be drawn from evidence tending to show that harmful foreign substances were introduced into a patient's body during a surgical operation and left there. *Ibid.*

A departure, by a physician or surgeon, from approved methods in general use, if injurious to the patient, suffices to carry the case to the jury on the issue of negligence. *Ibid.*

In an action for damages based upon the alleged negligent treatment of plaintiff's broken leg by defendant, an orthopedic surgeon, where plaintiff's evidence tended to show that he was struck by a motor vehicle and thrown into a sandy ditch, the right leg below the knee suffering a compound comminuted fracture, the broken bones protruding through an open wound, that he was given temporary treatment and placed within two days in a hospital under the care of defendant, who had specialized in such cases for many years, that defendant failed to sterilize or cleanse the open wound, immediately putting a closed cast on plaintiff's leg from toes to groin, that pus and sand came out of the top of the cast and out of the wound upon a hole being cut in the cast over same, such pus taking the "hide" off plaintiff's leg, and that upon consulting other physicians an operation resulted in the removal of pieces of bone from the leg, and that plaintiff suffered great pain from the first treatment and still suffers, there is sufficient evidence for the jury and allowance of motion for nonsuit was erroneous. *Ibid.*

PLEADINGS.

§ 2. Joinder of Causes.

Mental incompetency to make a deed and that weakness of mind, which often renders the subject especially amenable to undue influence, are not too far apart psychologically or too radically inconsistent as to require their assertion in separate actions. G. S., 1-123. *Goodson v. Lehmon*, 514.

§ 3a. Statement of Cause in General.

Recovery is to be had, if at all, on the theory of the complaint and not otherwise. *Coley v. Dalrymple*, 67.

Recovery must be had upon the theory of the complaint, and the court cannot, *ex mero motu*, assert for the plaintiff a different cause of action. *Atkinson v. Atkinson*, 120.

§ 3b. Anticipation of Defenses.

The plaintiff is not bound to anticipate and negative in advance all grounds of defense to the action he brings, and petitions for divorce do not constitute an exception to the general rule. *Taylor v. Taylor*, 80.

§ 10. Counterclaims, Set-offs, and Cross Complaints.

Where plaintiff sued her former husband to recover a monetary consideration under a written separation agreement, defendant's counterclaim for slander sounds in tort and is not a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of actions within the purview of the statute, G. S., 1-137. *Smith v. Smith*, 189.

In an action for absolute divorce a counterclaim or cross action for debt under a separation agreement between the parties is not cognizable by the court. *Jenkins v. Jenkins*, 681.

§ 13½. Demurrer: In General.

The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a defense or counterclaim. Such demurrer shall be heard and determined as provided for demurrers to the complaint. G. S., 1-141. *Smith v. Smith*, 189.

A demurrer admits the truth of factual averments well stated and relevant inferences of fact properly deducible therefrom, but it takes no account of legal inferences or conclusions of law asserted by the pleader. *Padgett v. Long*, 392.

The plea of the statute of limitations is a plea in bar—a defense that may not be presented by demurrer. The lapse of time does not discharge a liability. It merely bars recovery. *Insurance Co. v. Motor Lines, Inc.*, 588.

A purported special appearance, raising questions as to the merits involved in the action, does not challenge the jurisdiction of the court. Nor may it be treated as a demurrer. It is not a valid plea. *New Hanover County v. Sidbury*, 679.

Having overruled an invalid special appearance, without finding that it was irrelevant and frivolous and made in bad faith for the purpose of delay, G. S., 1-126, leave to answer should be granted, G. S., 1-125. *Ibid.*

§ 15. For Failure of Complaint to State Cause of Action.

Courts will not grant the equitable relief of injunction when there is an adequate remedy at law, and a demurrer *ore tenus* to the complaint in a suit asking such relief will be sustained and the action dismissed. *Newton v. Chason*, 204.

PLEADINGS—*Continued.*

In an action by an insurer, who has paid the loss, against the alleged tortfeasor, without the joinder of the insured, the legal holder of the claim, demurrer being sustained for failure to state a cause of action and thereafter plaintiff's motion to make insured a party plaintiff being allowed, the allowance of the latter motion, in effect, reverses the ruling on the demurrer. *Insurance Co. v. Motor Lines, Inc.*, 588.

§ 16c. Another Action for Same Cause Pending.

The relief sought by T. in a former action by S. against T., in another county, being for an accounting between defendant T. and plaintiff S., arising out of an alleged breach of contract for lease by S. to T. of certain truck operating rights, and the relief asked for by plaintiff T. in the instant case being for a restraining order against defendant S. and other defendants in favor of T. to preserve alleged rights of T. in the same truck operating franchise, any judgment rendered in the former case would not afford the relief sought in the latter case; nor would a judgment in the former be *res judicata* in the latter. *Taylor v. Schaub*, 134.

§ 20. Office and Effect of Demurrer.

The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted, but the principle does not extend to the admissions of conclusions or inferences of law. *Smith v. Smith*, 189.

A demurrer admits only relevant facts well pleaded and relevant inferences of fact readily deducible therefrom, but does not admit the conclusions of law or inferences of law contained in the complaint. *Newton v. Chason*, 204.

§ 21. Amendment Before Trial.

Permission to amend a pleading rests in the sound discretion of the trial court. G. S., 1-163. *Hatcher v. Williams*, 112.

In a suit by an administratrix against a business associate of her intestate and others for an accounting as to properties purchased, for the joint account of such intestate and such associate, with moneys furnished by plaintiff's intestate for their joint enterprise, an amendment to the complaint, alleging fraud in concealing property purchased for such joint account and failure to account therefor, is allowable as a cause of action arising out of the same transaction and connected with the same subject of action. G. S., 1-123. *Ibid.*

§ 22. Amendment by Trial Court.

In an action by a woman against her former husband to have them adjudged tenants in common of lands held by the entireties while husband and wife, where the wife alleged that she had secured an absolute divorce from defendant, which was admitted by answer, defendant is precluded from attacking such admission in his answer, which he does not seek to amend, by a motion for a new trial on the ground of newly discovered evidence as to his wife's divorce. *Pugh v. Pugh*, 555.

§ 27½. To Examine Adverse Party for Information.

After complaint is filed and before answer is filed, the provisions of the statutes, G. S., 1-569, and G. S., 1-570, are available to defendant for adverse examination of plaintiff to procure information to file answer. *Fox v. Yarborough*, 606; *McKnight v. Yarborough*, 606; *Reid v. Yarborough*, 606.

PLEADINGS—*Continued.*

The procedure, under G. S., 1-569, and G. S., 1-570, may be permitted to the plaintiff to procure information to frame complaint, or after answer is filed plaintiff may cause the defendant to be examined to procure evidence. And by parity the defendant may have the plaintiff examined to procure information to file answer, or after the answer is filed to procure evidence for the trial. *Ibid.*

§ 28. Judgment on the Pleadings.

The practice of allowing a motion for judgment on the pleadings is very restricted and is confined to cases where a plea confesses the cause of action and the matter relied upon in avoidance is insufficient in law. *Smith v. Smith*, 189.

PRINCIPAL AND AGENT.

§ 1. Distinction Between This and Other Relations.

Where a son leaves his automobile in the custody of his parents, with instructions that the parents use the car to keep the battery from running down, driving it enough for that purpose, the relationship of the parties is that of bailor and bailee, rather than principal and agent. *Sink v. Sechrest*, 232.

§ 4. Termination of the Relationship.

An agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party, provided the contract contains no time limit and the revocation is made in good faith. The only exception is an agency coupled with an interest, and that must be an interest in the subject of the agency, and not merely something collateral, as commissions or compensation for making the sale. *Insurance Co. v. Disher*, 345.

§ 5. Execution of Agency.

One who acts for another, or assumes the obligation of a fiduciary, is under the compulsion of fair play and good faith in respect of the interests of his principal or the confiding party. *Hatcher v. Williams*, 112.

§ 6. Compensation of Agent.

In an action by a broker against his principal for commissions, where all the evidence showed that the plaintiff had a right to lease the defendant's property for $385 per month, less 5% commissions, and that the best offer plaintiff was able to get, before the agency was revoked, was $350 per month, a motion for judgment as in case of nonsuit, made at the close of plaintiff's evidence, and renewed at the close of all the evidence, G. S., 1-183, should have been allowed. *Insurance Co. v. Disher*, 345.

§ 10a. Liability of Principal.

Generally a third party may not recover of the bailor for the negligent use by the bailee of the bailed chattel, in the absence of some control exercised by the bailor at the time, or of negligence on his part which proximately contributed to the injury. The doctrine of *respondeat superior* ordinarily is inapplicable to the relationship of bailor and bailee, unless made so by statute. *Sink v. Sechrest*, 232.

PRINCIPAL AND AGENT—*Continued.*

§ 10b. Liability of Agent.

In an action to recover damages resulting from an automobile collision, plaintiff alleging that he was at the time of the collision a passenger in his own car which was being operated by a driver, where the defendants allege a cross action against the driver of plaintiff's car as a joint tort-feasor, alleging that the said driver was the agent of plaintiff and acting within the scope of his authority and apparently under plaintiff's control, and the said driver was made a party defendant and thereupon demurred to the cross action on the ground that it failed to state a cause of action, proof of negligence by the said driver, contributing to the injury, would constitute a complete bar to plaintiff's claim and would afford no ground for contribution, hence judgment overruling the demurrer reversed. *Evans v. Johnson*, 238.

PRINCIPAL AND SURETY.

§ 5a. Bonds of Public Officers and Agents: In General.

Peace officers are required to give bond for the faithful discharge of their duties. G. S., 128-9. The law provides that such officers, and the sureties on their official bonds, shall be liable to the persons injured for torts committed *colore officii*. *Jordan v. Harris*, 763.

§ 14. As to Principal.

A surety defendant in a judgment, in order to preserve the liens and to enforce the same for reimbursement, on payment of the judgment, must have the judgment assigned to some third person for his benefit: a surety who pays the principal debt on which he himself is bound, without procuring an assignment to a trustee for his benefit, thereby satisfies the original obligation and can sue only as a creditor by simple contract. G. S., 1-240. *Stewart v. Parker*, 551.

PROCESS.

§ 1. Form and Requisites.

The sole purpose of a summons is to bring a party into court and to notify him that a complaint has been or will be filed against him. *Ryan v. Batdorf*, 228.

§ 2. Issuance and Time of Service.

An *alias* or *pluries* summons, improperly issued as such, may still be sufficient as an original summons. But when it is desired that the action shall date from the issuance of the original summons, or when it is necessary for it to do so, in order to toll the statute of limitations, the successive writs must show their relation to the original process. *Ryan v. Batdorf*, 228.

Issuance of summons is itself a ministerial act as to which the Clerk of the Superior Court is not disqualified by his personal interest. *English v. Brigman*, 402.

§§ 6b, 6d. Service on Foreign Corporations by Service on Secretary of State: Service on Local Agent of Foreign Corporation.

No satisfactory general definition can be made of the phrase "doing business" as found in our statutes. The question is one of fact, and must be determined largely according to the facts of each individual case. The objective of the law in which the phrase is found must also be considered. *Highway Com. v. Transportation Corp.*, 198.

PROCESS—*Continued.*

The purpose of G. S., 55-38, was, in recognition of reciprocal duties, to prevent a foreign corporation from accepting protection of our laws in the transaction of its ordinary business, create obligations and, by reason of its remoteness from any forum available to a local citizen, secure immunity from liability. Within reasonable limits the statute should be liberally construed to accomplish its remedial purpose. *Ibid.*

In an action by a resident of this State against a foreign corporation, commenced by the issuance of summons and service thereof upon the Secretary of State under G. S., 55-38, where, on objection to the jurisdiction by special appearance, the court, upon sufficient evidence, found that a vessel of defendant, a regular carrier of freight in the coastwise trade, entered the port of Wilmington and discharged a substantial part of its valuable cargo in the regular course of business, and was there damaged by striking a bridge and remained some months in said port, undergoing repairs and having considerable business dealings with local residents, the service of process upon the Secretary of State was valid and sufficient to bring defendant into court. *Ibid.*

The statute, G. S., 55-38, authorizes service of process on the Secretary of State, in an action by a resident of this State against a foreign corporation, after the business, once carried on by defendant, has been discontinued. *Ibid.*

In an action to recover damages for a tort occurring in New Jersey by a domestic corporation against a foreign corporation, formerly domesticated here with a local process agent, but which had withdrawn all personnel and property from this State, except an intrastate franchise for the transportation of freight, service of process on the lessee of defendant's franchise is invalid, as is also service on the Secretary of State under G. S., 55-38. *Motor Lines v. Transportation Co.*, 733.

An intrastate franchise for the transportation of freight in this State, owned by a foreign corporation, is "property" within the meaning of G. S., 55-38. *Ibid.*

Every state has the undoubted right to provide for the service of process upon any foreign corporation doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. But this power, to designate by statute the officer upon whom service in suits against foreign corporations may be made, relates to business and transactions within the jurisdiction of the state enacting the law. *Ibid.*

§ 12. Alias and Pluries.

An *alias* or *pluries* summons, improperly issued as such, may still be sufficient as an original summons. But when it is desired that the action shall date from the issuance of the original summons, or when it is necessary for it to do so, in order to toll the statute of limitations, the successive writs must show their relation to the original process. *Ryan v. Batdorf*, 228.

While an original summons cannot be changed into an *alias* summons by merely endorsing the word "*alias*" thereon, such process, however, can be converted into an *alias* by a memorandum or order, endorsed or subscribed thereon, specifying the date of the original writ. *Ibid.*

§ 15. Nature and Essentials of Right of Action.

One who uses legal process to compel a person to do some collateral act not within the scope of the process, or for the purpose of oppression or annoyance, is liable in damages in a common law action for abuse of process. It consists

PROCESS—*Continued.*

in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. Evil purpose alone is not sufficient. The bad intent must finally culminate in the abuse. *Melton v. Rickman*, 700.

§ 16. Actions.

In an action *ex delicto* for damages for malicious abuse of process, where the complaint alleges that defendant had a check of plaintiff, who had no funds in the bank and the check was dishonored, whereupon defendant caused a warrant to issue and plaintiff to be arrested, charged with a violation of the bad check law, the issuance of the warrant being in furtherance of defendant's plan to collect his debt by criminal process, and at the trial plaintiff pleaded guilty or was found guilty, and pending judgment plaintiff paid the check and costs, defendant surrendered the check and notified the magistrate that same was paid and the judgment was entered discharging plaintiff on payment of costs, no cause of action is stated and demurrer *ore tenus* here sustained. *Melton v. Rickman*, 700.

PUBLIC OFFICERS.

§§ 1, 2. Offices Which Are Public Offices: Power to Appoint or Elect.

By G. S., 18-45, authority is vested in the A.B.C. Boards of the respective counties to appoint one or more law enforcement officers with "the same powers and authorities in their respective counties as other peace officers." Subsection O. *Jordan v. Harris*, 763.

§ 4. Eligibility and Qualification.

Peace officers are required to give bond for the faithful discharge of their duties. G. S., 128-9. The law provides that such officers, and the sureties on their official bonds, shall be liable to the persons injured for torts committed *colore officii*. *Jordan v. Harris*, 763.

§ 5b. Rule That Person May Not Hold But One Public Office at Time.

Whatever may be the status as a *de jure* officer of one, appointed Clerk of the Superior Court by the County Commissioners under ch. 121, Public Laws 1941, in place of the duly elected clerk who had asked for and received leave, and was afterwards appointed and accepted as an officer in the U. S. Army, on the termination of an action to oust the new clerk by voluntary nonsuit leaving the incumbent in possession of the office, he is a *de facto* officer and his acts as such have a recognized validity, growing out of public necessity, and cannot be collaterally attacked. *English v. Brigman*, 402.

§ 8. Civil Liability to Individuals.

Peace officers are required to give bond for the faithful discharge of their duties. G. S., 128-9. The law provides that such officers, and the sureties on their official bonds, shall be liable to the persons injured for torts committed *colore officii*. *Jordan v. Harris*, 763.

The naming of the Durham A.B.C. Board as obligee in a bond of its law enforcement officers, rather than the State, works no limitation of its character as an official bond and affords no escape from its obligation as such. *Ibid.*

PUBLIC UTILITIES.

§ 2b. Regulation.

The statute (G. S., 143-129) applies only to contracts in relation to supplies and materials where the bidders have the right to name the price for which they are willing to furnish the same. It has no application whatever to a contract between a municipality and a public utility, where there can be no competition between bidders because the municipality or the State has the power and authority to fix the price of the service to be rendered or the commodity to be furnished. *Mullen v. Louisburg*, 53.

QUO WARRANTO.

§ 2. Proceedings.

An action for damages by plaintiff, who was appointed acting or substitute Clerk of the Superior Court under ch. 121, Public Laws 1941, against defendants, who, in a proceeding to oust plaintiff procured his arrest and imprisonment, in consequence of plaintiff's ignoring an order of the resident judge declaring the office vacant and enjoining plaintiff from exercising the duties thereof, cannot be converted into a *quo warranto* to try title to the office. *English v. Brigman*, 402.

RAPE.

§ 1c. Competency and Relevancy of Evidence.

Prosecutrix' evidence, on a trial for rape, as to what became of her pants and sanitary pad, was competent to show why these articles were not introduced in evidence. *S. v. Sutton*, 332.

The exclusion of testimony of prosecutrix, on cross-examination, relative to her testimony theretofore given as to whether she knew the penalty for the crime of rape, was not prejudicial to defendant. *Ibid.*

The testimony of a witness, as to her impressions and suggestions by her that the prosecuting witness, in a trial for rape, go to a doctor for examination, was competent when offered for the purpose of corroborating the prosecutrix, where the court fully instructed the jury that it should receive the testimony only for that purpose and not as substantive evidence, if they found it did in fact so corroborate the evidence of prosecutrix. *Ibid.*

§ 1d. Sufficiency of Evidence.

In a criminal prosecution for rape, where the State's evidence tends to show that prosecutrix was waiting for a bus to go to her work in a near-by town, when the defendant stopped his car and offered to give her a ride therein to her work, and on her acceptance took her instead off the main road to town and into a side road, there feloniously assaulting and ravishing her, threatening her with death should she tell anyone, and thereafter dropping her near her work to which she immediately went and told her fellow employees what had occurred and the next day identified the defendant on sight in the sheriff's office, there is ample evidence for a jury, and motion to nonsuit and to dismiss the action, G. S., 15-173, properly denied. *S. v. Sutton*, 332.

§ 2. Attempts.

In a criminal prosecution for an assault on a female, with intent to commit rape, the burden of showing that defendant was under 18 years of age is on the defendant. G. S., 14-33. *S. v. Morgan*, 549.

REFERENCE.

§§ 2b, 8. Compulsory Reference: Exceptions and Preservation of Grounds of Review.

Where it appears that an accounting between plaintiff and defendant is necessary, objection to a compulsory reference is without merit. *Troitino v. Goodman*, 406.

§ 12. Affirmance and Modification.

In a hearing on exceptions filed by appellant to the report of a referee, on a compulsory reference, no proper issues pointed out in exceptions and raised by the pleadings being tendered, where the court below denied a jury trial and considered the exceptions, reviewed the evidence before the referee, gave its opinion and conclusion, both upon the facts and the law, and entered judgment accordingly, which resulted in a modification and confirmation of the referee's report, the judgment of the court below will be upheld. *Cheshire v. First Presbyterian Church*, 165.

§ 13. Right of Jury Trial.

A party, who would preserve his right to a jury trial in a compulsory reference, must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Cheshire v. First Presbyterian Church*, 165.

In a compulsory reference, objected to and jury trial demanded, on the coming in of the referee's report, issues tendered by the objecting party, which have already been answered as matters of law by this Court on a former appeal in the same case, are not appropriate issues, the opinion on the former appeal being conclusive. *Ibid.*

Where pleadings allege conclusions of the pleader and present questions of law, but do not raise issues of fact for the jury, and the issues tendered are not pointed out in the exceptions and raised by the pleadings, they are not such issues as give the party tendering them the right to a trial by jury. *Ibid.*

REGISTRATION.

§ 2. Requisites and Sufficiency.

Registration, based on the certificate of a notary whose commission has expired, is invalid. And where the defect in the probate is apparent on the record, the registration does not affect subsequent purchasers and encumbrances. The rule is otherwise when the incapacity of the officer is latent and does not appear upon the record. *Crissman v. Palmer*, 472.

§ 4b. Purchasers for Value.

Where the executor of a will, who is also the propounder and one of the devisees, purchases the interest of other devisees and conveys to a third party, he is not an innocent purchaser and his deed, executed *pendente lite*, does not convey a good title. *Whitehurst v. Abbott*, 1.

The effect of *lis pendens* and the effect of registration are one and the same, each being a record notice upon the absence of which a prospective innocent purchaser may rely. *Ibid.*

REGISTRATION—*Continued.*

He who claims to be a *bona fide* purchaser for value without notice, so as to avoid the defective character of his deed, asserts an affirmative defense and has the burden of proving that fact. *Ibid.*

An innocent purchaser for value without notice from a devisee, prior to the filing of a caveat, unquestionably acquires an unassailable title. G. S., 31-19. *Ibid.*

Registration, based on the certificate of a notary whose commission has expired, is invalid. And where the defect in the probate is apparent on the record, the registration does not affect subsequent purchasers and encumbrances. The rule is otherwise when the incapacity of the officer is latent and does not appear upon the record. *Crissman v. Palmer*, 472.

STATUTES.

§ 4. Procedure to Test Validity.

The constitutionality of an Act or ordinance will not be determined in a suit to enjoin its enforcement. Nor will we decide the question of its constitutionality prior to an attempt to enforce it. *Jarrell v. Snow*, 430.

§ 5a. General Rules of Construction.

It is the duty of the Court, where the language of a statute is susceptible of more than one interpretation, to adopt the construction and practical interpretation which best expresses the intention of the Legislature, for "the heart of a statute is in the intention of the lawmaking body." *Mullen v. Louisburg*, 53.

All statutes must be construed in the light of their purpose. A literal reading of them, which would lead to absurd results, is to be avoided, when they can be given a reasonable application consistent with their words and with the legislative purpose. *Hilgreen v. Cleaners & Tailors, Inc.*, 656.

Unless the section of the Emergency Price Control Act of 1942, dealing with penalties, commands in unequivocal language, that each individual purchase shall carry a penalty of $50, the conscience of the Court forbids that most harsh interpretation. The section contains no such languge. *Ibid.*

§ 5d. Remedial.

One who predicates his cause of action on a statute, where no such right existed at common law, must bring himself within its provisions. *Padgett v. Long*, 392.

TAXATION.

§ 4. Necessary Expense.

The courts determine whether a given project is a necessary expense of a county, but the board of commissioners for the county determine, in their discretion, whether such project is necessary or needed in the designated locality. *Insurance Co. v. Guilford County*, 293.

The Legislature has prescribed the machinery by which a county may issue lawful and valid obligations for public purposes and necessary expenses, and pledge its faith, G. S., Art. 9, 153-69, *et seq.* And the Legislature has expressly provided that approval by the Local Government Commission of bonds or notes of a county, or other governmental unit, shall not extend to or be regarded as an approval of the legality of the bonds or notes in any respect. G. S., 159-12. *Ibid.*

TAXATION—*Continued.*

§ 15. Sales, Use and Transfer Taxes.

The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax (G. S., 105-174 [b], 227), a use or excise tax, which accrued in the year 1937, is barred by the three-year statute of limitations, when assessed in 1942. *Fertilizer Co. v. Gill, Comr. of Revenue,* 426.

G. S., 105-174, deals not only with deficiencies, but it is also intended to affect assessments made where no return has been filed. In the absence of fraud, the Commissioner of Revenue can make no assessment, for deficiency or otherwise under the provisions of the statute, which shall extend to sales made more than three years prior to the date of the assessment. *Ibid.*

§ 34. Duties and Authority of Collection Officials.

In an action by a county to recover money received by defendant for its use, the complaint alleging that defendant, as mortgagee, foreclosed a mortgage and failed, out of the proceeds of sale, first to pay plaintiff's claim or lien for taxes as provided by G. S., 105-408, a cause of action is stated, and demurrer *ore tenus* for lack thereof, interposed in this Court, cannot be sustained. *New Hanover County v. Sidbury,* 679.

An alternative remedy is created by G. S., 105-408, in behalf of the taxing agency. On foreclosure of a deed of trust or mortgage it may look to the trustee or mortgagee for the payment of taxes required by the statute, or it may waive that remedy and resort to a foreclosure of the tax lien. *Ibid.*

§§ 38b, 38c. Enjoining Levy or Collection of Taxes: Recovery of Tax Paid Under Protest.

Our tax law provides a method to be followed by the injured taxpayer in cases where a tax levy is deemed illegal, which is to pay the tax under protest and then bring suit to recover the same, G. S., 105-406. Drainage assessment shall be collected in the same manner as State and county taxes under the law existing at the time of the collection. G. S., 156-105. No sale of tax liens on realty shall be delayed or restrained by order of any court of this State. G. S., 105-387. *Newton v. Chason,* 204.

§ 40b. Foreclosure of Certificates, Notice and Parties.

An alternative remedy is created by G. S., 105-408, in behalf of the taxing agency. On foreclosure of a deed of trust or mortgage it may look to the trustee or mortgagee for the payment of taxes required by the statute, or it may waive that remedy and resort to a foreclosure of the tax lien. *New Hanover County v. Sidbury,* 679.

§§ 40c, 42. Foreclosure of Tax Lien, Tax Deeds and Titles.

A commissioner, appointed in a judicial proceeding to sell land, may not purchase at his own sale, even though he acts fairly. If he does, the sale is voidable, and may be set aside as of course upon proper and reasonable application of the parties interested. *Hinson v. Morgan* and *Hinson v. Baumrind,* 740.

In an action to recover lands of plaintiff, sold in tax foreclosure proceedings, from defendants, who acquired their title from the grantee of the commissioner appointed in such proceedings, where plaintiff's evidence tended to show that the husband of grantee in the commissioner's deed knew of no consideration paid by or to his wife for the deeds to and from her, and that he and his wife conveyed to said commissioner three of the five tracts conveyed to her by the

TAXATION—*Continued.*

commissioner in less than a month after the date of the deed to her, both of these deeds being put on record on the same day, fifteen minutes apart, and that the costs of the proceeding and the taxes on the property involved were not paid until several months thereafter, the tax scrolls failing to indicate that the taxes on the lands were paid in full, the judgment roll appearing regular and in compliance with the statute, G. S., 105-391, and the deed of the commissioner being in conformity with the judgment, there is insufficient evidence for the jury and judgment as in case of nonsuit was proper. *Ibid.*

TORTS.

§ 4. Determination of Whether Tort Is Joint or Separable.

Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury. *Evans v. Johnson*, 238.

§ 5. Liabilities of Tort-Feasors to Person Injured.

The purpose of the statute, G. S., 1-240, is to permit defendants in tort actions to litigate mutual contingent liabilities before they accrue, so that all matters in controversy, growing out of the same subject of action, may be settled in one action; though the plaintiff may be thus delayed in securing his remedy. *Evans v. Johnson*, 238.

§ 6. Right to Contribution Among Tort-Feasors.

The right of a defendant sued in tort to bring into the action another joint tort-feasor and, upon sufficient plea, to maintain his cross action against him, for the purpose of determining his contingent liability for contribution, is given by statute. G. S., 1-240. *Evans v. Johnson*, 238.

The purpose of the statute, G. S., 1-240, is to permit defendants in tort actions to litigate mutual contingent liabilities before they accrue, so that all matters in controversy, growing out of the same subject of action, may be settled in one action; though the plaintiff may be thus delayed in securing his remedy. *Ibid.*

In an action to recover damages resulting from an automobile collision, plaintiff alleging that he was at the time of the collision a passenger in his own car which was being operated by a driver, where the defendants allege a cross action against the driver of plaintiff's car as a joint tort-feasor, alleging that the said driver was the agent of plaintiff and acting within the scope of his authority and apparently under plaintiff's control, and the said driver was made a party defendant and thereupon demurred to the cross action on the ground that it failed to state a cause of action, proof of negligence by the said driver, contributing to the injury, would constitute a complete bar to plaintiff's claim and would afford no ground for contribution, hence judgment overruling the demurrer reversed. *Ibid.*

TRESPASS.

§§ 1c, 2. Trespass Where Original Entry Was Lawful: Pleadings.

Where plaintiff's complaint alleges that defendants were wrongfully attempting to cut timber on her land beyond the time limited in a consent decree in the proceeding under which defendants purchased, and that defendants wrongfully had caused injury to plaintiff's cultivated lands, and asking for a

TRESPASS—*Continued.*

restraining order and damages based thereon, plaintiff's action may not be regarded as a collateral attack on the judgment in the special proceeding for sale of timber, but rather it is an action maintainable in the Superior Court, founded on the allegations of the complaint; and a demurrer to the complaint was properly overruled. *Johnson v. Lumber Co.*, 595.

§ 12. Eviction of Trespasser.

The right of a person to defend his home from attack is a substantive right, as is the right to evict a trespasser from his home. *S. v. Spruill*, 356.

When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, G. S., 1-180, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. *Ibid.*

TRIAL.

II. Order, Conduct, and Course of Trial.

11. Consolidation of Actions for Trial. In re Will of Atkinson, 526.

III. Reception of Evidence.

17½. Production of Papers. Cotton Co. v. Reaves, 436.

V. Nonsuit.

22a. In General. Avent v. Millard, 40; Buckner v. Wheeldon, 62; Tysinger v. Dairy Products, 717.

25. Voluntary Nonsuit. Burney v. Holloway, 633.

25½. New Action After Nonsuit. Goodson v. Lehmon, 514.

VI. Directed Verdict and Peremptory Instructions.

27a. In General. Kearney v. Thomas, 156.

VII. Instructions.

29b. Statement of Evidence and Explanation of Law Arising Thereon. Steele v. Coxe, 726.

30. Conformity to Pleadings and Evidence. In re Will of Atkinson, 526.

32. Requests for Instructions. Kearney v. Thomas, 156; S. v. Morgan, 549; S. v. Spencer, 608.

33. Statement of Contentions and Objections Thereto. S. v. Smith, 78; S. v. Isaac, 310; Steele v. Coxe, 726.

VIII. Issues and Verdict.

37. Form and Sufficiency in General. S. v. Perry, 174; Griffin v. Ins. Co., 684; Steele v. Coxe, 726.

38. Conformity to Pleadings and Evidence. Cheshire v. Church, 165; Featherstone v. Glenn, 404; Ingram v. Smoky Mountain Stages, Inc., 444; Griffin v. Ins. Co., 684.

39. Tender of Issues. Cheshire v. Church, 165; Steele v. Coxe, 726.

X. Motions After Verdict.

47. Motions for New Trial for Newly discovered Evidence. Crissman v. Palmer, 472; Pugh v. Pugh, 555.

50. Motions for New Trial for Error of Law. Bell v. Niven, 395.

XI. Trial by Court by Agreement.

52. Agreements and Waiver of Jury Trial. McMillan v. Robeson, 754.

53. Hearings and Evidence. Ibid.

§ 11. Consolidation of Actions for Trial.

Where error is assigned on the ground of improper consolidation, injury or prejudice arising therefrom must be shown to sustain the exception. *In re Will of Atkinson*, 526.

A civil action to set aside a deed and issue of *devisavit vel non* may be consolidated for trial and heard together, both being predicated on the same alleged mental incapacity and undue influence, where the allegations of undue influence are broader in one case than in the other and some of the matters transpiring between the execution of the two instruments may not be competent to show undue influence in the procurement of the deed, the record showing no disadvantage to appellants by consolidation. *Ibid.*

TRIAL—*Continued.*

§ 17½. Production of Papers.

The court has power to order the production of the proper papers pertinent to the issue to be tried, and in the possession of the opposite party. *Cotton Co., Inc., v. Reaves*, 436.

§ 22a. In General.

The power of the Superior Court to grant an involuntary nonsuit is altogether statutory and did not exist prior to 1897, and therefore the requirement of the statute, now G. S., 1-183, must be strictly followed. *Avent v. Millard*, 40.

Where defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his motion therefor at the close of all the evidence cannot be granted, the right to demur to the evidence having been waived. *Ibid.*

On motion for judgment of nonsuit, the defendant's evidence, unless favorable to plaintiff, is not considered, except when not in conflict it may tend to make clear or explain that offered by plaintiff; and the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issue involved which may reasonably be deduced from the evidence. *Buckner v. Wheeldon*, 62.

There must be legal evidence of every material fact necessary to support a verdict. If the evidence fails to establish any one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law. *Tysinger v. Dairy Products*, 717.

§ 25. Voluntary Nonsuit.

Since a proceeding to probate a will in common form is *in rem*, it has been held—as far as we know without exception in this jurisdiction—that, when the issue of *devisavit vel non* has been raised, the proceeding is not subject to nonsuit at the instance of the propounders or other parties concerned. *Burney v. Holloway*, 633.

§ 25½. New Action After Nonsuit.

G. S., 1-25, allowing a new action within one year after nonsuit, must be read into every final judgment of nonsuit entered by any court, and of this law all persons must take notice. *Goodson v. Lehmon*, 514.

Under G. S., 1-25, the new action is considered as a continuation of the former action and they must be substantially the same, involving the same parties, the same cause of action and the same right, and this must appear from the record in the case and cannot be shown by oral testimony. *Ibid.*

§ 27a. In General.

There is no such thing as a directed verdict while the credibility of the evidence is still a matter for the jury; and it always is for the jury where the demand is for an affirmative finding in favor of the party having the burden, even though the evidence be uncontradicted. *Kearney v. Thomas*, 156.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

Objection to the charge, for not complying with G. S., 1-180, must state specifically how the charge failed to measure up to the requirements of the statute. *Steele v. Coxe*, 726.

TRIAL—*Continued.*

§ 30. Conformity to Pleadings and Evidence.

Where the court in its charge submits to the jury for their consideration facts material to the issue, which were no part of the evidence offered, there is prejudicial error. *In re Will of Atkinson*, 526.

§ 32. Requests for Instructions.

Where no prayer for instruction, as required by G. S., 1-181, appears in the record, this Court cannot indulge in speculation as to its form. *Kearney v. Thomas*, 156.

Requests for special instructions must be in before the beginning of the argument. *S. v. Morgan*, 549.

The statute, G. S., 1-181, requires counsel, praying for instructions to the jury, to "put their requests in writing entitled of the cause, and to sign them; otherwise the judge may disregard them." It is within the sound discretion of the trial judge to give or to refuse prayer for instruction that is not in writing and signed as required by the statute. *S. v. Spencer*, 608.

§ 33. Statement of Contentions, and Objections Thereto.

Errors in the court's statement of the contentions of the parties must be called to the court's attention in time for the court to have an opportunity to correct them, and a failure to so call them to the court's attention is a waiver of any objection thereto. *S. v. Smith*, 78.

In a criminal prosecution for murder, argument and contention of the State, given in the court's charge to the jury, that prisoner was armed with a shotgun when he inquired for deceased at her home shortly before the homicide, which was not only unsupported by the evidence, but was in direct conflict with the State's undisputed evidence on the very point, constitutes harmful error, even though not called to the attention of the court at the time. *S. v. Isaac*, 310.

The rule, that requires an objection at the time to an erroneous statement in the charge of the contention of the parties, does not apply on the trial of first degree murder, when such statement includes the assumption of sworn evidence against the prisoner, tending to show previous malice and vitally necessary upon the question of premeditation, where this evidence had been excluded or where no such evidence had been given. *Ibid.*

An assignment of error to a statement of the court, in its charge to the jury, as to the contentions of the parties about a controversy over evidence, will not be sustained where no objection was made in time to afford the court an opportunity to correct any error therein. *Steele v. Coxe*, 726.

§ 37. Form and Sufficiency in General.

While a verdict is a substantial right, it is not complete until accepted by the court for record. *S. v. Perry*, 174.

When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or one which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict. *Ibid.*

Ordinarily, the form and number of the issues, in the trial of a civil action, are left to the sound discretion of the trial judge and a party cannot complain because a particular issue was not submitted to the jury in the form tendered by him. *Griffin v. Ins. Co.*, 684.

Where the issues submitted to the jury arise upon the pleadings, present all essential or determinative facts in controversy, and afford the parties op-

portunity to introduce all pertinent evidence and apply it fairly, objections thereto are groundless. *Steele v. Coxe*, 726.

The court is not required to submit the tendered issues in the language of the party who tenders them. The issues submitted are largely in the discretion of the court, and, if not prejudicial or affecting substantial rights, will not ordinarily be held for error. *Ibid.*

§ 38. Conformity to Pleadings and Evidence.

In a compulsory reference, objected to and jury trial demanded, on the coming in of the referee's report, issues tendered by the objecting party, which have already been answered as matters of law by this Court on a former appeal in the same case, are not appropriate issues, the opinion on the former appeal being conclusive. *Cheshire v. First Presbyterian Church*, 165.

Where pleadings allege conclusions of the pleader and present questions of law, but do not raise issues of fact for the jury, and the issues tendered are not pointed out in the exceptions and raised by the pleadings, they are not such issues as give the party tendering them the right to a trial by jury. *Ibid.*

In a civil action to cancel a deed, remove cloud from plaintiff's title and to require defendant to reconvey house and lot to plaintiff, based on allegations of fraud, undue influence and coercion, where on the trial defendant in open court tendered the property in question to plaintiff, on the condition that plaintiff pay defendant the amount expended by her for improvements, which tender was accepted, there was error by the court below in submitting to the jury an issue, as to whether defendant made permanent improvements, under title believed by her to be good, the only matter left open by the agreement of the parties being the amount expended for improvements or their reasonable value. *Featherstone v. Glenn*, 404.

Where plaintiffs' intestate, driving an automobile on a private road used as an outlet to the public road, on approaching the highway, stopped or hesitated as if intending to stop, or began to stop within a few feet of the highway, the driver of an oncoming bus had a right to assume that deceased would obey the law and not proceed suddenly onto and across the highway, when the bus was only ten or fifteen feet from the intersection; and there was error in submitting an issue on last clear chance. *Ingram v. Smoky Mountain Stages, Inc.*, 444.

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. *Griffin v. Ins. Co.*, 684.

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. The rule applies to new matter alleged in the answer. *Ibid.*

In an action to recover on a policy of life insurance, where there were issues squarely raised by the pleadings, supported by evidence, as to the valid delivery of the policy and as to the payment of the first premium, and the court declined to submit the issues thereon tendered by defendant, or to submit others of similar import, which would be determinative of the questions presented, there was error. *Ibid.*

§ 39. Tender of Issues.

A party, who would preserve his right to a jury trial in a compulsory reference, must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably

file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Cheshire v. First Presbyterian Church*, 165.

Where pleadings allege conclusions of the pleader and present questions of law, but do not raise issues of fact for the jury, and the issues tendered are not pointed out in the exceptions and raised by the pleadings, they are not such issues as give the party tendering them the right to a trial by jury. *Ibid.*

The court is not required to submit the tendered issues in the language of the party who tenders them. The issues submitted are largely in the discretion of the court, and, if not prejudicial or affecting substantial rights, will not ordinarily be held for error. *Steele v. Coxe*, 726.

§ 47. Motions for New Trial for Newly Discovered Evidence.

Motion, for a new trial on the ground of newly discovered evidence, must be made at trial term, or upon appeal in this Court. *Crissman v. Palmer*, 472.

In an action by a woman against her former husband to have them adjudged tenants in common of lands held by the entireties while husband and wife, where the wife alleged that she had secured an absolute divorce from defendant which was admitted by answer, defendant is precluded from attacking such admission in his answer, which he does not seek to amend, by a motion for a new trial on the ground of newly discovered evidence as to his wife's divorce. *Pugh v. Pugh*, 555.

§ 50. Motions for New Trial for Error of Law.

Under the Soldiers' and Sailors' Civil Relief Act (U. S. C. A., sec. 520 [4]), in order to entitle defendant to set aside a judgment already rendered and to reopen the case, it must appear that he was prejudiced by reason of his military service in making defense to the action. *Bell v. Niven*, 395.

In an action by plaintiff to recover for professional services as an attorney at law rendered the defendants, where the trial court found that defendants were brothers and sisters, who had employed plaintiff about a matter in which all were equally interested and all of whom had fully empowered one of their number, T. J. N., to act for them as he might deem best, including W. B. N., one of the brothers in the U. S. Armed Forces, who had authorized T. J. N. to waive on his behalf the provisions of the Soldiers' and Sailors' Civil Relief Act, which was done, the court ordering the trial to proceed and finding that the interests of W. B. N. were fully protected, and thereupon plaintiff recovered and defendant W. B. N. moved to set aside the judgment, without contradicting or excepting to the findings of the trial court or the evidence, which motion was denied by the judge hearing same, after finding the facts as they had been found by the trial court, to which no exception was taken, on appeal the judgment below should be affirmed. *Ibid.*

§§ 52, 53. Agreements and Waiver of Jury Trial: Hearings and Evidence.

In an action by a husband to recover from his deceased wife's brother a large amount of miscellaneous personalty, consisting of household furniture, silver, jewelry, etc., mostly given to plaintiff and/or his wife upon their marriage, there being no children of the marriage and the defendant claiming the property as administrator of deceased and setting up the statute of limitations, where the court, acting by consent without a jury, gave judgment for the plaintiff, upon evidence partly inconclusive as to ownership, without find-

TRIAL—*Continued.*

ings on the various items, there is error and the cause is remanded for further hearing, as it is the function of the court, however tedious the process, to make findings in accordance with the evidence and to pass upon the applicability of the statute of limitations. *McMillan v. Roberson*, 754.

TRUSTS.

§ 1a. Creation and Validity: In General.

An agreement with the owner, that the tenant may occupy the premises without rent and free of taxes, so long as the tenant and his family would live thereon, is insufficient to create a trust estate or other equitable interest. *Barbee v. Lamb*, 211.

For the purpose of promoting loyalty and good will between itself and its employees, by providing financial assistance in emergencies to certain of its employees and their dependents, thereby relieving suffering and helping such employees when they are unable to help themselves, a corporation, employing about 500 operators in an isolated village, may transfer such funds, as may be reasonably necessary to carry out this purpose, to a trust foundation to be administered by a corporate trust company and a committee of employees, and the expenditure of such corporate funds is an ordinary and necessary expense of the corporation. *Trust Co. v. Steele's Mills*, 302.

While the beneficiaries in a trust, created by a corporation for its employees, are not ordinarily so limited as they are here, the instrument under consideration gives a committee of employees authority to make loans to employees, who are financially unable to cope with an emergency caused by illness or accident, and to invest a limited amount of the trust funds in such loans and, where the employee is unable, in the opinion of the committee, to repay the loan, the committee may remit the obligation and cancel the debt; and while the trustee is not liable for losses on loans to employees, it is the duty of the trustee to require the custodian, of the notes representing loans and of the trust funds, to make reports and give an accounting from time to time, in order that the limitations set forh in the trust agreement on all classes of loans, as well as on other benefits, may be observed. The instrument is not, therefore, too vague and indefinite and is valid and enforceable. *Ibid.*

§ 1b. Parol Trusts.

In appropriate cases a parol trust is imposed upon the legal title on an oral promise of grantee to hold in trust, made in contemplation of the conveyance or concurrently therewith, as a condition of the passing of the title and its acceptance by the grantee; and in some situations involving the violation of an established fiduciary relationship, equitable intervention may be referred to the fraud rather than to the enforcement of the parol promise *ex proprio vigore*, and may result in a constructive trust. *Atkinson v. Atkinson*, 120.

Parol trusts may be imposed upon the legal title on proof of an oral promise to hold in trust for the promisee; and parol evidence to prove such a trust is admitted not to contradict the deed but to bind the party to the trust which he undertook in accepting the deed. *McCorkle v. Beatty*, 178.

The establishment of parol trusts is required to be by evidence clear, strong and convincing. This rule arises out of the theory that the written instrument contains the final expression of the agreement between the parties, and one who seeks to show otherwise should be required to do so by higher degree of proof than a mere preponderance of the evidence. *Ibid.*

TRUSTS—*Continued.*

In a suit to fasten a parol trust upon a deed on its face in fee, where there is evidence of the trust for the plaintiff and *contra* for defendant, it is error for the court to charge that the preponderance of the evidence is defined to be evidence which is of greater or superior weight or that gives greater assurance and carries conviction to the minds of the jury, followed by the statement that the clear, strong and convincing evidence, required by plaintiff, means evidence that is clearer, stronger and more cogent and convincing in its character and weight than that required in ordinary civil cases where the burden of proof is satisfied by the greater weight or preponderance of the evidence. *Ibid.*

A parol trust in favor of a grantor cannot be engrafted upon a written deed conveying a fee simple title to land, where nothing appears in the instrument to indicate otherwise than that the absolute title was to pass to the grantee. *Carlisle v. Carlisle*, 462.

Since the seventh section of the Englist Statute of Frauds, which forbids the creation of a parol trust in land, has never been enacted in this jurisdiction, parol trusts may be enforced where the grantee takes title to the property under an express agreement to hold the property for the benefit of another, other than the grantor. *Ibid.*

A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. G. S., 52-2. And to rebut the presumption of a gift to the wife, and to establish a parol trust in his favor, no greater degree of proof is required than is required to establish a parol trust under any other circumstances. *Ibid.*

The evidence to establish a parol trust must be clear, strong, cogent and convincing. *Ibid.*

A parol agreement in favor of a grantor, entered into at the time of or prior to the execution of a deed, and at variance with the written conveyance, is unenforceable in the absence of fraud, mistake, or undue influence. Such an agreement would be tantamount to engrafting a parol trust in favor of a grantor upon his deed, which purports to convey a fee title. A parol trust in favor of grantor cannot be engrafted upon such a deed. *Loftin v. Kornegay*, 490.

§ 8a. Construction and Operation: In General.

For the purpose of promoting loyalty and good will between itself and its employees, by providing financial assistance in emergencies to certain of its employees and their dependents, thereby relieving suffering and helping such employees when they are unable to help themselves, a corporation, employing about 500 operators in an isolated village, may transfer such funds, as may be reasonably necessary to carry out this purpose, to a trust foundation to be administered by a corporate trust company and a committee of employees, and the expenditure of such corporate funds is an ordinary and necessary expense of the corporation. *Trust Co. v. Steele's Mills*, 302.

While the beneficiaries in a trust, created by a corporation for its employees, are not ordinarily so limited as they are here, the instrument under consideration gives a committee of employees authority to make loans to employees, who are financially unable to cope with an emergency caused by illness or accident, and to invest a limited amount of the trust funds in such loans and, where the employee is unable, in the opinion of the committee, to repay the loan, the committee may remit the obligation and cancel the debt; and while

TRUSTS—*Continued.*

the trustee is not liable for losses on loans to employees, it is the duty of the trustee to require the custodian, of the notes representing loans and of the trust funds, to make reports and give an accounting from time to time, in order that the limitations set forth in the trust agreement on all classes of loans, as well as on other benefits, may be observed. The instrument is not, therefore, too vague and indefinite and is valid and enforceable. *Ibid.*

The primary rule in the construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the creator, unless forbidden by law. *Ibid.*

Where a trust is created for a specific purpose and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, the trust may be dealt with only to carry out the appointed purpose. *Ibid.*

§ 8b. Title and Rights of Respective Parties.

The judgment entered below goes beyond the terms of the trust in so far as it instructs the trustee that the primary purpose of the trust is to improve the labor conditions of the grantor by providing for the general welfare of the employees of the corporation, and that the funds of the trust may be used for any emergency giving rise to financial need, even though the need is not caused by sickness or accident. *Trust Co. v. Steele's Mills*, 302.

A trust agreement has the status of a contract, and the right to amend this trust has been reserved to the grantor and has not been delegated to the court. *Ibid.*

§ 8h. Income and Profits.

Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will. *Cannon v. Cannon*, 611.

§ 12. Accounting, Settlement and Compensation of Trustee.

In administering a trust fund under a will, which directed that the estate be reduced to cash and the money be invested in interest bearing securities, there is no liability on the part of the trustee for loss on loans, in the absence of evidence tending to show that they were inadequately secured at the time they were made, and there being no evidence that the investments were not made in good faith or that the trustee failed to exercise due diligence in his efforts to collect same. *Cheshire v. First Presbyterian Church*, 165.

§ 14. Definition and Distinctions Between Resulting and Constructive Trusts.

A constructive trust, arising *ex maleficio*, is a remedial device, not referred to the intent of the parties, but imposed upon the wrongdoer *in invitum*, often contrary to the intent, to prevent the consummation of fraud or unconscionable practice. *Atkinson v. Atkinson*, 120.

When a constructive trust is predicated on fraud in the acquisition of property, or upon fraud, actual or constructive, which, if found, the law will refer to such acquisition, the basis of jurisdiction is the continuance of the equitable interest of the aggrieved person in and to the property of which he has been fraudulently deprived. The fraudulent conduct must be substantial, tangible, and of definite import, and must strike at the root of the transaction. *Ibid.*

TRUSTS—*Continued.*

§ 15. Acts and Transactions Creating Resulting or Constructive Trusts.

In appropriate cases a parol trust is imposed upon the legal title on an oral promise of grantee to hold in trust, made in contemplation of the conveyance or concurrently therewith, as a condition of the passing of the title and its acceptance by the grantee; and in some situations involving the violation of an established fiduciary relationship, equitable intervention may be referred to the fraud rather than to the enforcement of the parol promise *ex proprio vigore*, and may result in a constructive trust. *Atkinson v. Atkinson*, 120.

Speaking strictly of the theory of unperformed promises, and not of other conditions which might result in the creation of a constructive trust, it is manifest that a court of equity will not declare a constructive trust upon the nonperformance of an incidental promise made in connection with the purchase of land, which has no bearing upon the nature of the title or interest intended to be conveyed, although such a promise indeed may constitute a part of the consideration. *Ibid.*

Upon a conveyance by plaintiff to defendant in consequence of an offer made and accepted, promises by defendant in the offer that plaintiff should have one-half of the net profits of the property and one-half of the net proceeds of timber cut from the land, are contractual in character and setting. Their maturity gives rise to money demands, for which there is an adequate remedy at law and which cannot be converted into an equitable cause of action. *Ibid.*

An agreement with the owner, that the tenant may occupy the premises, without rent and free of taxes, so long as the tenant and his family would live thereon, is insufficient to create a trust estate or other equitable interest. *Barbee v. Lamb*, 211.

Where one purchases lands, paying the purchase price and taking title in the name of another, other than his wife, a resulting trust in favor of the purchaser is created, and the grantee holds the property as trustee for the purchaser. *Carlisle v. Carlisle*, 462.

The fact that plaintiff purchased land and caused title to be taken in his wife's name does not create a resulting trust in his favor; on the contrary, the law presumes that the husband intended the property to be a gift to his wife. This presumption is one of fact and is rebuttable. *Ibid.*

VENDOR AND PURCHASER.

§ 5a. Options.

Where an offer to sell necessitates or contemplates a further agreement of the parties in essential matters, the option is invalid. *Atkinson v. Atkinson*, 120.

While an offer to sell realty remains unilateral and unaccepted, the person to whom the offer was made has no equity in the premises and a conveyance by the owner involves no breach of legal duty, and where a complete change of ownership meanwhile takes place, for example, through survivorship in an estate by the entireties, the option terminates. *Ibid.*

A parol agreement of the conditional delivery of a deed conveying lands is valid, and it does not contradict the written instrument, but only postpones its effectiveness until after the condition has been performed or the event has happened. Such conditional delivery may be from grantor to grantee. *Lerner Shops v. Rosenthal*, 316.

An option or offer is just as much subject to the law of conditional delivery as any other instrument; and where the delivery imposes a condition prece-

VENDOR AND PURCHASER—*Continued.*

dent to the effectiveness of the option itself, it cannot be converted into a contract without performing the condition. It takes the act of both parties to consummate contract. *Ibid.*

§ 21. Action for Purchase Money.

There is no lien for purchase money in North Carolina. A vendor cannot reserve a lien unless he take his security in writing and have it registered—in the shape of a mortgage or deed of trust. *Rudasill v. Cabaniss*, 87.

VENUE.

§ 1b. Executors and Administrators and Other Fiduciaries.

In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks, G. S., 53-20, G. S., 53-22. *Indemnity Co. v. Hood, Comr.*, 361.

§ 4a. Motions for Change of Venue as Matter of Right.

In an action by plaintiff against a fiduciary, brought in the county of the personal residence of the defendant, seeking to have the legal effect of certain written agreements construed, defendant is no tentitled, as a matter of law, to removal; and, until the allegations of the complaint are traversed, the occasion for the exercise of discretion will not arise upon motion for removal for the convenience of witnesses and the promotion of justice. *Indemnity Co. v. Hood, Comr.*, 361.

§ 4b. For Convenience of Parties or Witnesses.

The exercise of the court's discretion, in granting or refusing to grant a motion for removal for the convenience of witnesses and the promotion of justice, after the issues are joined, is not reviewable on appeal in the absence of abuse of discretion. *Indemnity Co. v. Hood, Comr.*, 361.

WATERS AND WATERCOURSES.

§ 1. Riparian Rights in General.

While the general rule is that a description of land as bordering on a non-navigable stream carries to the thread of the stream, this is rebutted by words which clearly restrict the grant to the edge or shore of the stream; and where the call is to a point on the margin of a swamp and thence along the swamp, the common law rule which carries the riparian owner's title to the thread of the stream does not apply. *Kelly v. King*, 709.

The description "to a high water mark" of a non-navigable arm of the sea, a broad shallow sound, most of which is dry at low water and the deepest part of which (a ten-foot channel) does not exceed 3 feet at high water and is not over 10 inches at low water, restricts or limits the conveyance to the correctly located line of mean high water as indicated on the ground. Particularly is this so where the title to the marsh lands, lands covered by water, was at the time the lots in question were laid off held by the State, subject to disposition by the State Board of Education, since title to swamp lands is presumed to be in that Board or its assigns until a valid title to same is shown otherwise. G. S., 146-90. *Ibid.*

WATERS AND WATER COURSES—*Continued.*

There is no presumption that grantors, in a deed describing lands as running to the high water mark of a shallow sound most of which being dry at low water, intended to convey lands beneath the waters of the sound. *Ibid.*

WILLS.

I. Nature and Requisites of Testamentary Disposition of Property in General.
3. Testamentary Intent. Ferguson v. Ferguson, 375.

II. Contracts to Devise or Bequeath.
4. Requisites and Validity. Coley v. Dalrymple, 67.
5. Actions. Ibid.

VIII. Caveat Proceedings.
17. Nature of Caveat Proceedings. Whitehurst v. Abbott, 1.
22. Burden of Proof. In re Will of Atkinson, 526.
23b. Evidence on Issue of Mental Capacity. In re Will of Ball, 91; In re Will of Lomax, 592.
23c. Evidence of Fraud, Duress, or Undue Influence. In re Will of Ball, 91; In re Will of Atkinson, 526.
24. Sufficiency of Evidence and Nonsuit. Burney v. Holloway, 633.
25. Instructions. In re Will of Lomax, 31; In re Will of Lomax, 592.
30. Operation and Effect of Judgment Setting Aside Will. Whitehurst v. Abbott, 1.

IX. Construction and Operation of Wills.
31. General Rules of Construction. Bank v. Corl, 96; Ferguson v. Ferguson, 375; Jackson v. Powell, 599; Cannon v. Cannon, 611; Burney v. Holloway, 633.
32. Presumption Against Partial Intestacy. Ferguson v. Ferguson, 375.
33a. In General. Jackson v. Powell, 599.
33b. Under Rule in Shelley's Case. Ibid.
33c. Vested and Contingent Interests and Defeasible Fees. Beam v. Gilkey, 520.
33d. Estates in Trust. Bank v. Corl, 96; Cannon v. Cannon, 611.
33e. Annuities. Cannon v. Cannon, 611.
34. Designation of Devisees and Legatees and Their Respective Shares. Ferguson v. Ferguson, 375; Trust Co. v. Henderson, 567; Cannon v. Cannon, 611; Burney v. Holloway, 633.
35. Conditions and Restrictions. Bank v. Corl, 96; Beam v. Gilkey, 520.
38. Residuary Clauses. Ferguson v. Ferguson, 375.
39. Actions to Construe Wills. Burney v. Holloway, 633.

X. Rights and Liabilities of Devisees, Legatees, Surviving Wife, and After-Born Children.
44. Election. Lane v. Becton, 457.
46. Nature of Title and Rights of Devisees, Legatees and Heirs. Whitehurst v. Abbott, 1; Cannon v. Cannon, 611.

§ 3. Testamentary Intent.

The intention of the testator is the paramount consideration in the construction of his will. All rules of construction are in aid of discovering the testator's intent and effectuating it, unless it be contrary to some rule of law or at variance with public policy. *Ferguson v. Ferguson*, 375.

§§ 4, 5. Requisites and Validity: Actions.

An oral contract, to devise specific realty for services rendered deceased, is contrary to the statute of frauds and not enforceable, that issue being raised. *Coley v. Dalrymple*, 67.

§ 17. Nature of Caveat Proceedings.

The Legislature intended the term "action," as used in our *lis pendens* statute, G. S., 1-116, to embrace all judicial proceedings affecting the title to real property or in which title to land is at issue, including the caveat to a will. *Whitehurst v. Abbott*, 1.

While a caveat is not an adverse proceeding in the ordinary sense and the will is the *res* involved, any final decree therein will directly affect the title to land devised, hence the filing of *lis pendens* is essential to give constructive notice to those not directly interested. *Ibid.*

WILLS—*Continued.*

§ 22. Burden of Proof.

In a proceeding to caveat a will, the caveators are required to handle the laboring oar on the issue of undue influence, just as the plaintiffs, in an action to annul a deed on the ground of fraud or undue influence, are required to carry the same burden of proof. *In re Will of Atkinson*, 526.

§ 23b. Evidence on Issue of Mental Capacity.

Evidence of mental or physical condition, standing alone, is not evidence of undue influence. It is merely evidence of a circumstance to be considered by the jury in connection with, and as it may lend weight to other testimony. *In re Will of Ball*, 91.

Where there is proof, direct or circumstantial, of undue influence, then evidence of old age, mental and physical weakness is pertinent and material. *Ibid.*

Evidence of declarations of the testator, which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. Other declarations, when relevant, may be admitted as corroborative or supporting evidence, but alone they are not sufficient to establish the fact at issue. *Ibid.*

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. Hence the nonexpert witness must state the facts gained from personal observation as a predicate for the expression of his opinion on such capacity. Failure to observe this rule is prejudicial error. *In re Will of Lomax*, 592.

§ 23c. Evidence of Fraud, Duress, or Undue Influence.

On the trial of an issue of *devisavit vel non*, where the evidence of caveators, considered in the light most favorable to them, tends to show that, at the time of and prior to the execution of the will, the testator suffered from chronic ailments, used narcotics, was mentally weak, and possessed a poor memory, there is no evidence of undue influence. *In re Will of Ball*, 91.

Where there is proof, direct or circumstantial, of undue influence, then evidence of old age, mental and physical weakness is pertinent and material. *Ibid.*

Evidence of declarations of the testator, which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. Other declarations, when relevant, may be admitted as corroborative or supporting evidence, but alone they are not sufficient to establish the fact at issue. *Ibid.*

Testimony that a wife importuned her husband to make a will in her favor, after such a will had been executed by him, is not evidence of undue influence. *Ibid.*

The fact that testator gave his property to the childless wife of his bosom to the exclusion of his sister and his nephews and nieces is no evidence of undue influence. *Ibid.*

In certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation, of itself and without more, raises a presumption of fraud or undue influence as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted. *In re Will of Atkinson*, 526.

WILLS—*Continued.*

§ 24. Sufficiency of Evidence and Nonsuit.

Since a proceeding to probate a will in common form is *in rem*, it has been held—as far as we know without exception in this jurisdiction—that, when the issue of *devisavit vel non* has been raised, the proceeding is not subject to nonsuit at the instance of the propounders or other parties concerned. *Burney v. Holloway*, 633.

In suit by the seller to require specific performance of the buyer, title being claimed under a will in the probate of which the issue of *devisavit vel non* was raised and a motion of nonsuit made and allowed, the parties at whose instance the nonsuit was allowed being before the court, they will be bound by its judgment on the principle of estoppel. *Ibid.*

§ 25. Instructions.

In the trial of a civil action of *devisavit vel non*, where the court charged the jury, on the second issue, which was "did testatrix at the time in question have testamentary capacity," that, should the jury find from the greater weight of the evidence that the testatrix lacked such capacity, they should answer the issue "yes," and should the jury fail to so find they should answer the issue "no," there is reversible error, even though the error is a *lapsus linguæ*. *In re Will of Lomax*, 31.

In an action on the issue of *devisavit vel non*, where the court charged the jury that the rule, as to the greater weight of the evidence required of the propounders, means that they must offer more evidence, however slight it may be, than the caveators have offered, there is reversible error. *In re Will of Lomax*, 592.

§ 30. Operation and Effect of Judgment Setting Aside Will.

Where the executor of a will, who is also the propounder and one of the devisees, purchases the interest of other devisees and conveys to a third party, he is not an innocent purchaser and his deed, executed *pendente lite*, does not convey a good title. *Whitehurst v. Abbott*, 1.

An innocent purchaser for value without notice from a devisee, prior to the filing of a caveat, unquestionably acquires an unassailable title. G. S., 31-19. *Ibid.*

The Legislature intended the term "action," as used in our *lis pendens* statute, G. S., 1-116, to embrace all judicial proceedings affecting the title to real property or in which title to land is at issue, including the caveat to a will. *Ibid.*

While a caveat is not an adverse proceeding in the ordinary sense and the will is the *res* involved, any final decree therein will directly affect the title to land devised, hence the filing of *lis pendens* is essential to give constructive notice to those not directly interested. *Ibid.*

Whatever may be the effect of ch. 108, Public Laws 1921 (G. S., 31-20, 21), it does not control rights which accrued prior to its enactment. N. C. Const., Art. I, secs. 17, 19. Hence, when an original will probated in 1910 is invalidated by judicial decree, a certified copy thereof recorded in another county becomes void and one who purchases with notice of the caveat cannot convey any title thereunder, either before or after notice of its invalidity has been filed in the county where the certified copy has been recorded. The only purpose of such certified copy was to give notice of the source of title. *Ibid.*

WILLS—*Continued.*

§ 31. General Rules of Construction.

It is a cardinal principle in the interpretation of wills that inconsistencies are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose of the will. 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. *Bank v. Corl*, 96.

The intention of the testator is his will, unless at variance with some rule of law or contrary to public policy. This intention is to be gathered from the general purpose of the will and the significance of the expressions, enlarged or restricted according to their real intent. The courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention. *Ibid.*

To invoke the general rule, in construing a will, that a later provision, repugnant to a former one, will prevail, it is necessary that the repugnant clauses must be wholly inconsistent and incapable of reconciliation. *Ibid.*

The intention of the testator is the paramount consideration in the construction of his will. All rules of construction are in aid of discovering the testator's intent and effectuating it, unless it be contrary to some rule of law or at variance with public policy. *Ferguson v. Ferguson*, 375.

Where testator devised and bequeathed to his wife "all my personal property, horses, cattle, sheep, hogs, and all farming tools of all kinds, engines, automobiles, wagons and all money, notes, mortgages, in fact everything that I possess," there is nothing to restrict or to limit the property passing thereunder to personal property or to property of like nature with that designated, and these words dispose of all of testator's property, including realty. *Ibid.*

The word "devise," which usually signifies a gift of real property by will, may extend to embrace personal property where so intended by the testator; while "bequeath" aptly applies to a gift of personal property by will. *Ibid.*

The terms employed by a testator to dispose of his property are to be given their well known legal or technical meaning, unless it appears from the will itself that they were used in some other permissible sense. *Ibid.*

A will speaks as of the date of the death of the testator and any property acquired after its making, by reversion or otherwise, would be subject to its terms. G. S., 31-41. *Ibid.*

Where language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect. *Jackson v. Powell*, 599.

The intention of a testator is his will. This intention is to be gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent. In interpreting the different provisions of a will, the courts are not confined to the literal meaning of a single phrase. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention. *Cannon v. Cannon*, 611.

In ascertaining testator's intention, the will in its entirety must be brought into focus, and it is competent to consider the conditions surrounding the testator, how he was circumstanced, his relationship to the objects of his bounty, so as nearly as possible to get his viewpoint at the time the will was executed. *Ibid.*

Where the intention of the maker of a will is clearly and consistently expressed, there is no occasion for any interpretation. The will is to be given

effect according to its obvious intent. Construction belongs only to the domain of ambiguity, or where different impressions are reasonably made on different minds. *Ibid.*

It is a cardinal principle in the interpretation of wills that the predominant and controlling purpose of the testator must prevail, when ascertained from the general provisions of the will, over particular and apparently inconsistent expressions to which, unexplained, a technical force is given. *Ibid.*

The object of all construction is to arrive at the intent and purpose as expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose without excessive regard for minor inaccuracies and inconsistencies. These latter variations are to be reconciled, if reasonably accomplishable within the limits which the law prescribes, otherwise they must yield to the general purpose as expressed in the writing. *Ibid.*

The devise of all the income and profits from property, nothing else appearing, carries with it the *corpus*. *Burney v. Holloway*, 633.

The settled policy of the law, founded upon strong reason, does not favor a devise, or even a bequest, by implication, permitting it only when it cogently appears to be the intention of the will. Probability must be so strong that a contrary intention cannot reasonably be supposed to exist in testator's mind, and cannot be indulged merely to avoid intestacy. *Ibid.*

§ 32. Presumption Against Partial Intestacy.

There is always a presumption that one who makes a will is of disposing mind and memory, does not intend to die intestate as to any part of his property, and does intend to dispose of all of his property. *Ferguson v. Ferguson*, 375.

The presumption against intestacy does not mean that one must choose between a will or no will. A testator may elect to dispose of part of his property by will, and leave the remainder for disposition as in case of intestacy. *Ibid.*

§ 33a. In General.

When the words "bodily heirs" or "heirs of the body" are used in a deed or will, and are not so qualified as to indicate that they are used merely as a *descriptio personarum*, they are equivalent to the words "heirs general." *Jackson v. Powell*, 599.

§ 33b. Under Rules in Shelley's Case.

In a deed in form a fee simple, except that immediately after the description there appears the following—"The grantors hereof make this conveyance to the grantees named above during their natural lifetime then to their bodily heirs to the third generation," the phrase "to the third generation" is void, being within the rule against perpetuities, hence the grantees take a fee simple title to the property conveyed, under the rule in *Shelley's case*. *Jackson v. Powell*, 599.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

By a devise to a woman for her natural life, remainder in fee to the children of the devisee, with subsequent provision that, in case devisee should die leaving no child, or children, or child of any such children, the devise should go to another, a life estate passes under the will to such devisee and remainder

in fee vests immediately in the children of life tenant who are *in esse*, subject to open and make room for any after-born child or children, with ultimate limitation over in case the life tenant should die leaving no issue. Such remainder vests subject only to a contingency affecting the *quantum* of the children's interest, but not the quality of their estate. *Beam v. Gilkey*, 520.

The vested character of a remainder created by will is unaffected by a direction in the will that the property be equally divided among the remaindermen when they become of age, after the death of the life tenant. *Ibid.*

§ 33d. Estates in Trust.

Where a trust, created by a will for testator's son J. and his family, provided that the income therefrom should be expended by the trustee—(1) to pay all expenses for the preservation of the property, such as taxes, insurance, repairs, assessments, etc.; (2) to pay O., the divorced first wife of testator's son J., forty dollars a month as long as she lives and does not remarry; (3) and to pay the remainder to testator's son J. during his life, and upon his death to his second wife M. if living, so long as she shall remain his widow; (4) and, upon the death or remarriage of M., to pay all profits, incomes, and proceeds, with the *corpus*, to the legitimate children of J. as they come of age, the trustee holding same for such children as are minors until their majority—upon the deaths of J. and M., the divorced wife O. surviving and not having remarried, the apparent conflict between (2) and (4) is obviated by the intent of the testator that so much of the net income as is necessary to provide the payments to O. under (2), shall take precedence over disbursements to the ultimate beneficiaries. *Bank v. Corl*, 96.

In a suit to construe a will, which committed to trustees the duty to divide the principal of the residuary estate into five equal shares and to value each share, in the absence of an allegation of a refusal to act, abuse of discretion, or bad faith on the part of such trustees, the court is without power to make such division or to value the resulting shares. Equity will instruct the trustees to proceed. *Cannon v. Cannon*, 611.

§ 33e. Annuities.

Where a testatrix, owning at the time large properties in her own name and also a considerable estate held by a trust company under a revocable trust agreement, executed a codicil to her will leaving her residuary estate, largely of valuable securities, to trustees, who were required to divide the same into five shares of equal value and pay from each share an annuity of 4½ per cent, making up the 4½ per cent from the principal of each share when income should prove insufficient, to each of her five children who should survive her, and, should any child not survive testatrix, the share of such deceased child, and upon the death of any other child such child or children's shares, to be again divided, with similar annuities to the children of the deceased child or children, and providing also that the said percentage is to be 4½ per cent on the principal of each share, computed at the market value thereof on the date of the setting aside of such shares, the testatrix at the same time making a similar dispositive change in the trust agreement referred to above, she clearly intended that each of the first annuities should be paid from and after the date of her death and that the principal amount of each share of the first beneficiaries should be set aside and valued as of the same date. *Cannon v. Cannon*, 611.

WILLS—*Continued.*

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

Where testator devised and bequeathed to his wife "all my personal property, horses, cattle, sheep, hogs, and all farming tools of all kinds, engines, automobiles, wagons and all money, notes, mortgages, in fact everything that I possess," there is nothing to restrict or to limit the property passing thereunder to personal property or to property of like nature with that designated, and these words dispose of all of testator's property, including realty. *Ferguson v. Ferguson*, 375.

Where a will leaving property in the hands of an executor or trustee provides that, five years after the death of testator's wife, the entire estate should be equally divided between testator's four daughters, after the payment of a certain sum to one of the daughters, and that, if any one or more of testator's four daughters should die before the distribution provided for in the will, the legacy or bequest of such deceased daughter or daughters should be paid to their then living children, share and share alike, the intention of the testator is that the share of any one of his daughters, so dying before the date set for the final distribution, must be paid only to her children living at the date for distribution, and not to the issue of her children deceased before the date set for distribution by the will. *Trust Co. v. Henderson*, 567.

Where property is left by will to children or children living at the time fixed for payment or division, when there are persons that answer the description, grandchildren and great grandchildren will not be included in the distribution of such property. *Ibid.*

Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will. *Cannon v. Cannon*, 611.

Where a testatrix, owning at the time large properties in her own name and also a considerable estate held by a trust company under a revocable trust agreement, executed a codicil to her will leaving her residuary estate, largely of valuable securities, to trustees, who were required to divide the same into five shares of equal value and pay from each share an annuity of 4½ per cent, making up the 4½ per cent from the principal of each share when income should prove insufficient, to each of her five children who should survive her, and, should any child not survive testatrix, the share of such deceased child, and upon the death of any other child such child or children's shares, to be again divided, with similar annuities to the children of the deceased child or children, and providing also that the said percentage is to be 4½ per cent on the principal of each share, computed at the market value thereof on the date of the setting aside of such shares, the testatrix at the same time making a similar dispositive change in the trust agreement referred to above, she clearly intended that each of the first annuities should be paid from and after the date of her death and that the principal amount of each share of the first beneficiaries should be set aside and valued as of the same date. *Ibid.*

The devise of all the income and profits from property, nothing else appearing, carries with it the *corpus*. *Burney v. Holloway*, 633.

The settled policy of the law, founded upon strong reason, does not favor a devise, or even a bequest, by implication, permitting it only when it cogently appears to be the intention of the will. Probability must be so strong that a contrary intention cannot reasonably be supposed to exist in testator's mind, and cannot be indulged merely to avoid intestacy. *Ibid.*

WILLS—*Continued.*

Where testator's will confided the administration of his property, consisting of realty and capital stock in certain companies, to his son, making him collector of the income for the benefit of himself and his sister, after payment of upkeep, taxes and commissions, without any words limiting the devise to a life estate, and also provided that his stocks should not be sold without the consent of his associates and should be voted as such associates voted their stock, and then, if he should have no grandchildren at the death of his children, "my holding" to become the property of an orphanage—(1) The will is sufficient to convey to the son and daughter a fee in the realty; and (2) the words "my holding" are intended to apply only to the shares of capital stock. *Ibid.*

§ 35. Conditions and Restrictions.

Where a trust, created by a will for testator's son J. and his family, provided that the income therefrom should be expended by the trustee—(1) to pay all expenses for the preservation of the property, such as taxes, insurance, repairs, assessments, etc.; (2) to pay O., the divorced wife of testator's son J., forty dollars a month as long as she lives and does not remarry; (3) and to pay the remainder to testator's son J. during his life, and upon his death to his second wife M. if living, so long as she shall remain his widow; (4) and, upon the death or remarriage of M., to pay all profits, incomes, and proceeds, with the *corpus*, to the legitimate children of J. as they come of age, the trustee holding same for such children as are minors until their majority—upon the deaths of J. and M., the divorced wife O. surviving and not having remarried, the apparent conflict between (2) and (4) is obviated by the intent of the testator that so much of the net income as is necessary to provide the payments to O. under (2), shall take precedence over disbursements to the ultimate beneficiaries. *Bank v. Corl*, 96.

Restraint on alienation, in a devise by will, is void. *Beam v. Gilkey*, 520.

§ 38. Residuary Clauses.

The rule of *ejusdem generis* is not generally applied to the residuary clause in a will or to what amounts to a residuary clause. *Ferguson v. Ferguson*, 375.

§ 39. Actions to Construe Wills.

In suit by the seller to require specific performance of the buyer, title being claimed under a will in the probate of which the issue of *devisavit vel non* was raised and a motion of nonsuit made and allowed, the parties at whose instance the nonsuit was allowed being before the court, they will be bound by its judgment on the principle of estoppel. *Burney v. Holloway*, 633.

§ 44. Election.

Where a husband attempts to devise to his wife lands already belonging to her (1) the wife is not put to her election, especially when she does not offer the will for probate and fails to qualify as executrix thereunder; (2) and the wife's grantees are not estopped by her joinder, with some of the other devisees under her husband's will, in the execution of mortgages on the property, nor by evidence that she claimed only a life estate, against the assertion of a fee title by her said grantees, since their adversaries are not attempting to assert a title acquired after such declarations or in any way affected by them. *Lane v. Becton*, 457.

WILLS—*Continued.*

§ 46. Nature of Title and Rights of Devisees, Legatees and Heirs.

Where the executor of a will, who is also the propounder and one of the devisees, purchases the interest of other devisees and conveys to a third party, he is not an innocent purchaser and his deed, executed *pendente lite*, does not convey a good title. *Whitehurst v. Abbott*, 1.

An innocent purchaser for value without notice from a devisee, prior to the filing of a caveat, unquestionably acquires an unassailable title. G. S., 31-19. *Ibid.*

Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will. *Cannon v. Cannon*, 611.

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G. S.

1-11. Parties appearing either in person or by attorney, *New Hanover County v. Sidbury*, 679.

-25. Must be read into every final judgment of nonsuit, *Goodson v. Lehmon*, 514; new action continuation of old, where substantially the same, *ibid.;* original notice of *lis pendens* effect to protect plaintiff in renewed action, *ibid.*

-38. Adverse possession must be by some act of dominion, *Perry v. Alford*, 146.

-47. Plea of, governed by *lex fori*, *Sayer v. Henderson*, 642.

-73. New parties hereunder must have a legal interest in subject matter of litigation, interest defined, *Griffin & Vose, Inc., v. Minerals Corp.*, 434; new parties in discretion of court to effect final determination of controversy, *Ins. Co. v. Motor Lines, Inc.*, 558.

-82. Referred to in case of fiduciaries, *Indemnity Co. v. Hood, Comr.*, 361.

-95. When improperly issued, may be original, *Ryan v. Batdorf*, 228; how properly issued, *ibid.*

-103. Obtaining time to answer same as general appearance, *Wilson v. Thaggard*, 348.

-116. *Lis pendens* must be filed in county where land lies, *Whitehurst v. Abbott*, 1; "action" herein embraces all judicial proceedings affecting land, including caveat, *ibid.;* notice hereunder not exclusive and does not protect intermeddlers, *ibid.*

-121. Motion to set aside default judgment allowed and time to answer given, defendant must answer though no copy of complaint delivered, *Wilson v. Thaggard*, 348.

-123. Suit for accounting by administrator against business associate of intestate for property purchased for joint account and for fraud in concealing such property may be joined, *Hatcher v. Williams*, 112; mental incompetency to make deed and weakness of mind, subject to undue influence joined, *Goodson v. Lehmon*, 514.

-137. In suit by wife to recover money under separation agreement, counterclaim for slander cannot be set up hereunder, *Smith v. Smith*, 189.

-141. Demurrer to answer containing new matter, *Smith v. Smith*, 189.

-151. Complaint for breach of patent contract, *Coleman v. Whisnant*, 494.

-159. Pleadings, which do not amount to cross causes, deemed denied, *Taylor v. Taylor*, 80.

-163. Amendment of pleadings in discretion of trial court, *Hatcher v. Williams*, 112; new parties in court's discretion to effect final determination, *Ins. Co. v. Motor Lines, Inc.*, 588.

-180. Law not always self-explanatory and judicial interpretation necessary, *S. v. Davenport*, 13; referred to in connection with burden of proof, *Kearney v. Thomas*, 156; evidence that force in assault to protect home, law thereon must be explained in charge, *S. v. Spruill*, 356; Exception hereunder must point out and particularize the failure to charge as required, *S. v. Britt*, 364; conflicting evidence on violation of traffic light, charge error, *Stewart v. Cab Co.*, 651; objections here-

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

under must specify how the charge failed to comply herewith, *Steele v. Coxe*, 726.

-181. No prayer for instructions, court may not speculate as to its form. *Kearney v. Thomas*, 156; request for special instructions must be in before argument, *S. v. Morgan*, 549; counsel must put instruction asked for in writing and sign same, otherwise court may ignore, *S. v. Spencer*, 608.

-183. Granting involuntary nonsuit purely statutory, *Avent v. Miller*, 40; failure to move for nonsuit at close of plaintiff's evidence is waiver of right to so move after all evidence, *ibid.;* same purpose as G. S., 15-173, *S. v. Hill*, 74; for convenience of defendants their expert examined before close of plaintiff's evidence, and motion hereunder at close of plaintiff's evidence, where ample evidence of negligence, motion properly denied and not necessary to decide whether motion aptly made, *Hobbs v. Coach Co.*, 323.

Nonsuit proper: In action against town for injuries from acts conferred for public good, *Beach v. Tarboro*, 26; divorce action, *Moody v. Moody*, 89; on contract to pay off mortgage, take conveyance and allow plaintiff part of profits and proceeds of timber sold, *Atkinson v. Atkinson*, 120; adverse possession, *Perry v. Alford*, 146; suit by broker for commissions, *Ins. Co. v. Disher*, 345; for injuries to 17-year-old boy operating machine, *Perry v. Herrin*, 601.

Nonsuit error, or properly denied: Against individual and bus company for reckless driving, high speed, and on wrong side of road, *Hobbs v. Coach Co.*, 323; in renewed suit to set aside deed for incapacity and weakness of mind, *lis pendens* in first suit effective, *Goodson v. Lehmon*, 514.

-200. Mandatory and it is duty of judge to submit such issues as will settle controversy, *Griffin v. Ins. Co.*, 684.

-220. In absence of excusable neglect, the question of meritorious defense is immaterial, *Johnson v. Sidbury*, 208; no discretion to set aside default and inquiry judgment in absence of findings as here required, *Wilson v. Thaggard*, 348; surprise at action of court and mistake of law not relieved by, *Crissman v. Palmer*, 472.

-226. Limits relief to demand of complaint, when, *Lane v. Becton*, 457.

-240. Right of defendant to bring in joint tort-feasor, *Evans v. Johnson*, 238; surety paying judgment without assignment to trustee, has only rights of a simple creditor, *Stewart v. Parker*, 551.

-253 *et seq.* Propriety of invoking act without challenge, plaintiff entitled to proceed hereunder, *Ins. Co. v. Wells*, 547.

-261. Plaintiff entitled to trial by jury on issues raised by pleadings, *Ins. Co. v. Wells*, 547.

-255. Declaration asked for by trustee under will, *Bank v. Corl*, 96.

-277. Court will not hear moot question, *In re Morris*, 48.

-288. Requirements as to pauper appeals are mandatory and jurisdictional. *Clark v. Clark*, 687.

-302. Violation of court's order for custody of child, *In re Morris*, 48.

-352. Books of account and records produced as evidence hereunder, *Cotton Co. v. Reaves*, 436; partnership records, *ibid.*

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

-369. Judgment lien, homestead allotted, collection prohibited during life of exemption, *Sample v. Jackson*, 380.

-569, 570. After complaint filed, before answer, available to secure information to file answer, *Fox v. Yarborough*, 606; permitted to procure information for complaint, and for trial, *ibid.*

7-74. Jurisdiction of judge assigned, *Ridenhour v. Ridenhour*, 508.

-149. Court may allow warrant amended both as to form and substance, *S. v. Brown*, 22.

8-46. Enacted to permit use without proof, *Rea v. Simowitz*, 575; used as best evidence, *ibid.;* irrelevant as to children under ten, *ibid.;* precedent proof of age within table necessary, *ibid.;* evidence proper for consideration as to those not considered in, *ibid.*

-51. Dealings between mortgagor and defendant's intestate, who brought property under foreclosure, within statute, *McMichael v. Pegram*, 400.

9-29. Negroes challenged for cause and whether or not freeholders, *S. v. Lord*, 354.

10-70. Registration on certificate of notary whose commission expired invalid, *Crissman v. Palmer*, 472; when defect latent and when potent, *ibid.*

14-3. Verdict, guilty of assault with deadly weapon in secrecy, without intent to kill, valid, *S. v. Perry*, 174.

14-17. Homicide in perpetration of rape, etc., dispenses with premeditation and deliberation, *S. v. Mays*, 486.

-31. This and following section create distinct felonies both in one indictment cause uncertainty, *S. v. Perry*, 174.

-32. Evidence ample for conviction hereunder, *S. v. Cody*, 38; this section and preceding create distinct felonies and both in one indictment cause uncertainty, *S. v. Perry*, 174.

-45. Evidence sufficient for conviction, *S. v. Manning*, 41.

-106. False imprisonment, malicious prosecution, and abuse of process as related hereto, *Melton v. Rickman*, 700.

-290, -291, -291 (1). Evidence insufficient to show operation of lottery, or selling numbers or lottery tickets, *S. v. Heglar*, 220.

-302, -303. Evidence sufficient to revoke suspension of sentence, *S. v. Marsh*, 648.

15-144. Murder charge as herein, proof that committed in perpetration of felony, no variance, *S. v. Mays*, 486.

-155. Caption no part of indictment, *S. v. Davis*, 117.

-170. Evidence sufficient for jury, verdict of less degree of offense valid, *S. v. Morgan*, 549.

-173. Motion hereunder must be made at close of State's evidence and, if denied, renewed at close of all evidence, *S. v. Hill*, 74; same purpose as G. S., 1-183, *ibid.;* any evidence, for jury; suspicion merely, motion allowed, *S. v. Murphy*, 115; *S. v. Murdock*, 224.

Nonsuit proper: Assault and highway robbery, no evidence of robbery, *S. v. Murphy*, 115; no evidence of operation of lottery or sale of *tickets*, *S. v. Heglar*, 220.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

Nonsuit error, or properly denied: Assault with deadly weapon with intent to kill, etc., *S. v. Cody*, 38; abortion, *S. v. Manning*, 41; murder, *S. v. Matheson*, 109; murder, against two persons jointly, *S. v. Williams*, 182; felonious assault with intent to kill, *S. v. Murdock*, 224; rape, identification involved, *S. v. Sutton*, 332; murder, circumstantial, *S. v. Peterson*, 540; unlawful possession of liquor, *S. v. Stutts*, 647.

-177. Compared to statute on appeals from recorder's court, *S. v. Crandall*, 148.

-179. Judgment not guilty, after special verdict, on ground statute unconstitutional, no right of appeal by State, *S. v. Mitchell*, 42.

-197 *et seq.* Inherent power of court to suspend sentence and grant probation now statutory, *S. v. Miller*, 214; court may continue prayer for judgment from one term to another, when and how, *S. v. Graham*, 217.

17-39. Judgment awarding children not *res judicata*, when. *Ridenhour v. Ridenhour*, 508.

18-6. Provides only for seizure liquor being transported contrary to law, *S. v. Gordon*, 241; hereunder provision for hearing as to seized vehicle only, *ibid.*

-11. *Prima facie* effect of possession hereunder, not sufficient to convict one charged with possession for sale under 18-50, *S. v. McNeill*, 560.

-13. Clearly provides contemplated hearing as to ownership of seized liquor in criminal case, *S. v. Gordon*, 241; appellant owner of liquor, acquitted and his co-defendants, in possession of liquor, convicted and did not appeal, order forfeiture affirmed, *S. v. Jones*, 363.

-45. A.B.C. Boards may appoint enforcement officers, powers same as peace officer, *Jordan v. Harris*, 763; bonds, *ibid.*

-48. One charged with possession under 18-50, cannot be convicted hereunder, *S. v. McNeill*, 560.

-63 *et seq.* Beverage Control Act, 1939, a statute of general application, as to license to sell wine, rights of licensee, *Jarrell v. Snow*, 430.

-72. Rights of parties hereunder, *S. v. Alverson*, 29.

19-1, 2. Action hereunder for enjoining nuisance must be on allegations and proof of prostitution, gambling, or illegal sale of liquor, *S. v. Alverson*, 29.

20-124. Violation of, negligence *per se*, *Tysinger v. Dairy Products*, 717.

-141. Violation of, evidence of negligence, *Hobbs v. Coach Co.*, 323; *Tysinger v. Dairy Products*, 717.

-146. Last clear chance hereunder, *Ingram v. Smoky Mountain Stages*, 444.

-148. Violation of, negligence, *Hobbs v. Coach Co.*, 323; last clear chance hereunder, *Ingram v. Smoky Mountain Stages*, 444.

-161. Parking on highway without lights, flares or signal, *Cummins v. Fruit Co.*, 625; stopping for passenger no violation of, *Morgan v. Coach Co.*, 668.

-169. Conflicting evidence on violation of, for jury, *Stewart v. Cab Co.*, 654.

-174. Duty of drivers at crossings, *Tysinger v. Dairy Products*, 717.

-181. Dimming lights when passing, *Cummins v. Fruit Co.*, 625.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

-217. Stopping just ahead of school bus and obstructing view, negligence, *Morgan v. Coach Co.*, 668.

22-2. Contracts hereunder not enforceable by specific performance if oral, *Coley v. Dalrymple*, 67; parol lease for over three years, void, *Barbee v. Lamb*, 211.

28-81 *et seq.* Gives full power to administrator to sell land for assets, *In re Estate of Daniel*, 18.

-87. Heirs at law necessary parties, *ibid.*

-88. Adverse claimants may be brought in, *ibid.*

-89. Issue of fact tried as in special proceedings, *ibid.*

-147. Suit by surety to determine contingent liability on guardian bond, *Casualty Co. v. Lawing*, 103.

-149. Rights of husband, *McMillan v. Robeson*, 754.

-172. Allegations and proof necessary to recover, *Morgan v. Coach Co.*, 668.

-173. Evidence sufficient in death of child struck by motor vehicle, *Henson v. Wilson*, 417; allegations and proof necessary to recover, *Stewart v. Coach Co.*, 668.

31-18.2. Holograph will proven by only two witnesses and objection but no appeal, is objection waived? *McMillan v. Robeson*, 754.

-19. Innocent purchaser from devisee, before caveat, acquired good title, *Whitehurst v. Abbott*, 1; probate conclusive until vacated, *ibid.*

-20, -21. Do not control rights which occurred prior to statute enactment. *Whitehurst v. Abbott*, 1.

-32. A party in interest may enter a caveat, which is *in rem*, *ibid.*

-39. Probate necessary to pass title, only purpose of copy is notice, *ibid.*

-41. A will speaks as of death of maker, *Ferguson v. Ferguson*, 375.

33-23, 24. Embarking in business venture, except as herein, violation of trust, *Trust Co. v. Parker*, 480.

-42. Reasonable attorney's fee for proper expense in guardian account, *Casualty Co. v. Lawing*, 103.

34-13. Must keep ward's money separate and to account, *Trust Co. v. Parker*, 480.

38-1 *et seq. Bona fide* dispute as to line between adjoining owners not subject to nonsuit, *Cornelison v. Hammond*, 535; purpose of statute, *ibid.*; not applicable to dispute over title to swamp or non-navigable waters, *Kelly v. King*, 709.

-3. Either party may appeal, *Cornelison v. Hammond*, 535.

39-1. Conveyance in fee unless contrary appears in plain words, *Jackson v. Powell*, 599.

-15. Does not penalize conveyance, but is limited to aggrieved creditor, *Lane v. Becton*, 457.

-19. Purchaser, for value without notice, of record title is protected, *Ricks v. Batchelor*, 8.

41-11, -12. Suit by life tenant against remainderman to sell, in equity not hereunder, *Beam v. Gilkey*, 520.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

42-32. Double rent and damages by amendment hereto invalid when contrary to rental fixed by O.P.A., *McGuinn v. McLain*, 750.

43-18. Modifies the common law rule of *lis pendens*, *Whitehurst v. Abbott*, 1.

47-18. Purchaser, for value without notice, of record title is protected, *Ricks v. Batchelor*, 8; until contract hereunder recorded, third parties not bound, *Bruton v. Smith*, 584.

-26. Deed of gift void, not registered in two years, *Ferguson v. Ferguson*, 375; deed of gift on face, *ibid.*

49-2. Willfullness of neglect or refusal to support essential, *S. v. Vanderlip*, 610.

50-5 (4). Evidence of separation may not be predicated on evidence showing that parties held themselves out as husband and wife and so acted as to induce others to believe them such, *Young v. Young*, 340; separation must be voluntary from inception and not obtained by fraud, *Pearce v. Pearce*, 571; defense of wife, where she bargained for separation, no fraud or deceit, not sufficient, *ibid.*

50-6. Evidence for plaintiff complying herewith and that of defendant tending to show abandonment and recrimination, case is for jury, *Taylor v. Taylor*, 80; "separation" defined as cessation of cohabitation, *Dudley v. Dudley*, 83; cohabitation includes duties other than intercourse, *ibid.;* evidence of separation necessary, *Moody v. Moody*, 89; separation not sufficient, evidence showing that parties held themselves out as husband and wife and so acted as to induce others to believe them such, *Young v. Young*, 340.

-7 (4). Necessary hereunder to allege language and conduct relied upon and that same is without adequate provocation, *Pearce v. Pearce*, 571.

-8. Affidavit required with complaint and its truth jurisdictional and necessary, *Young v. Young*, 340; relief against judgment on false affidavit by motion, *ibid.*

-10. Approved, *Taylor v. Taylor*, 80; *Moody v. Moody*, 89.

-16. Amounts allowable in discretion of trial court, open to modification on motion, *Oldham v. Oldham*, 476; no defense except as stated, *ibid.*

52-2. Married woman may hold realty by oral agreement for benefit of husband, or for both, *Carlisle v. Carlisle*, 462; evidence to rebut, *ibid.*

-10. While earnings are separate property of married woman, she is not relieved from marital privileges, *Coley v. Dalrymple*, 67; married couples free to contract with each other but not to transfer marital obligations, *Ritchie v. White*, 450.

-12, -13. Separation agreements must comply with, when, *Smith v. Smith*, 189; *Pearce v. Pearce*, 571; contract fixing amount to be paid wife for support of herself and child within this statute, *Daughtry v. Daughtry*, 358; does not reduce marriage to commercial basis, *Ritchie v. White*, 450; partnership between husband and wife, how affected hereunder, *Carlisle v. Carlisle*, 462.

53-20, -22. Residence of fiduciary, such as receivers, trustees, executors and administrators, controls in absence of statute, *Indemnity Co. v. Hood, Comr.*, 361.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

55-38. Purpose to prevent foreign corporations from securing immunity as to contracts made here, *Highway Comm. v. Transportation Corp.*, 198; service hereunder on suit for contracts by foreign vessel in our ports, *ibid.;* service after business here by foreign corporation discontinued, *ibid.;* "doing business" hereunder, *ibid.;* service on lessee of franchise by foreign corporation and on surety of State void, corporation withdrawn from State, *Motor Lines v. Transportation Co.*, 733; intrastate franchise is "property" hereunder, *ibid.*

-118. Corporation domesticated hereunder and then withdraws from State, service process on, invalid, *Motor Lines v. Transportation Co.*, 733; construed in connection with G. S., 55-38, *ibid.*

58-226. Statute and certificate of membership both provide for change of rules by legislation, members bound by subsequent changes, *Spearman v. Burial Assn.*, 185.

-241.1. Modifies acts and rules of burial associations in respect to members who die while in armed forces, *ibid.*

60-136. Passenger's failure to move when called upon sufficient evidence of violation, when, *S. v. Brown*, 22.

62-1 *et seq.* Recognized that competition among public utilities is inadequate. *Mullen v. Louisburg*, 53.

-27, -30, -36. Commission given general control as to rates, etc., *Mullen v. Louisburg*, 53.

-70. Discrimination prohibited, *Mullen v. Louisburg*, 53.

-101. Territory allocated, *ibid.*

95-73. Allegation that forbidden purpose of 95-75 accomplished necessary, threat not sufficient, *Padgett v. Long*, 392; sending claim out of State for suit not forbidden unless effort to violate statute, *ibid.*

-75. Damages, how and when collected, *ibid.*

105-124, -130. When three-year limitation not applicable, no return filed, *Fertilizer Co. v. Gill, Comr. of Revenue*, 426.

-174. Deals with deficiencies and assessments where no return filed, *Fertilizer Co. v. Gill, Comr. of Revenue*, 426; in absence of fraud, no assessment can be made beyond three years, *ibid.;* use and excise tax subject to same three-year limitation as sales tax, *ibid.*

-387. No sale of tax lien on realty shall be delayed or restrained by court order, *Newton v. Chason*, 204.

-391. Judgment roll regular and in compliance herewith, sale of lands by purchaser to commissioner who made sale not fraudulent on facts, *Hinson v. Baumrind*, 740.

-394. Clerks of Superior Court may not delegate authority to render judgments, in tax foreclosures, *Ebron v. Ellis*, 386.

-406. Taxpayer must pay under protest and sue to recover illegal levy, *Newton v. Chason*, 204.

-408. Gives alternative remedy, look to trustee in mortgage for taxes, or foreclosure tax lien, *New Hanover County v. Sidbury*, 679.

109-1, -34. Liability of peace officer bonds for torts, *Jordan v. Harris*, 763; A.B.C. Board obligee in peace officer's bond and not State, affords no escape from liability thereunder, *Jordan v. Harris*, 763.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

110-21. Duty of courts to give oversight to children for their best interests and best interests of State, *In re Morris*, 48.

128-9. Bonds of peace officer and liability for torts, *Jordan v. Harris*, 763.

-40. Action for damages by one appointed to office vacated hereunder, not *quo warranto*, *English v. Brigman*, 402; *de facto* officer hereunder, *ibid.*

134-85. Parol revoked pending appeal in *habeas corpus*, *In re Burnett*, 646.

143-129. Not applicable to contracts with public utility for services subject to regulation, *Mullen v. Louisburg*, 53; certain terms therein defined, *ibid.;* purpose of statute, *ibid.;* applies to contracts where bidders may name the price, *ibid.*

146-90. Title to swamp lands presumed to be in Board or its assigns until valid title shown elsewhere, *Kelly v. King*, 709.

153-1. A county is a corporation with powers prescribed by statute and can act only by resolution of its board of commissioners, *Ins. Co. v. Guilford County*, 293.

-69 *et seq.* The Legislature has provided machinery by which counties may contract obligation, *ibid.*

156-105. Drainage assessments collected under existing laws at time for collecting taxes, *Newton v. Chason*, 204.

159-12. Approval of Local Government Commission is not an approval of the legality of obligations issued by municipalities, *Ins. Co. v. Guilford County*, 293.

160-2 (6). Municipality authorized to grant franchise to public utility, *Mullen v. Louisburg*, 53; change from production to purchase of electricity and sale of generation equipment does not require approval of qualified voters, *ibid.*

-59. Sale of equipment to generate electricity by municipality, *Mullen v. Louisburg*, 53.

-156. Cited with approval, *Brumley v. Baxter*, 691.

-229, -282. Discretionary powers hereunder may not be delegated, *ibid.*

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 2. State may not authorize city to donate its property except for public services, *Brumley v. Baxter*, 691; military services are "public services," *ibid.*

sec. 7. State may not authorize city to donate its property except for public services, *Brumley v. Baxter*, 691; military services are "public services," *ibid.;* Public Laws 1945, ch. 460, valid hereunder as to public service, *ibid.*

sec. 14. Two years for assault with deadly weapon no violation of, *S. v. Crandall*, 148.

sec. 17. A statute does not control rights which accrued prior to its enactment, *Whitehurst v. Abbott*, 1; absence of notice and hearing violates due process, *In re S. v. Gordon*, 241.

sec. 19. Statute does not control rights which accrued prior to its enactment, *Whitehurst v. Abbott*, 1.

IV, sec. 29. Whatever may be *de jure* status of one appointed clerk under G. S., 128-40, he was *de facto*, *English v. Brigman*, 402.

V, sec. 4; VII, sec. 7. An agreement by a county to buy property subject to a mortgage and assume the debt, in an effort to avoid the provisions of this section, is not enforceable as an express contract, but the mortgage may be foreclosed, *Ins. Co. v. Guilford County*, 293.

VIII, sec. 1. No limitation on legislative power to create corporation for public purpose, *Brumley v. Baxter*, 691.

X, sec. 2. Homestead subject to State law, *Sample v. Jackson*, 380; not an estate, a mere exemption, *ibid.*